**IN THE DISTRICT COURT**
**AT NORTH SHORE**

**I TE KŌTI-Ā-ROHE**
**KI ŌKAHUKURA**

**CRI-2022-044-001295**
**[2023] NZDC 3760**

**WORKSAFE NEW ZEALAND**
Prosecutor

v

**MAPUA AVOCADOS LIMITED**
Defendant

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| Hearing: | 28 February 2023 |
| Appearances: | A Everett for the Prosecutor<br>E Harrison and I J Shore for the Defendant |
| Judgment: | 28 February 2023 |

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**NOTES OF JUDGE A SWARAN SINGH ON SENTENCING**

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## Charge

[1] Mapua Avocados Limited (MAL) entered an early guilty plea to one charge of breaching sections 36 (1) (a), 48 (1) and (2) (c) of the Health and Safety at Work Act 2015 (HSWA). The maximum penalty is a fine not exceeding $1.5 million.

> Being a PCBU having a duty to ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU, including Tipuarangi McDowell, while workers were at work in the business or undertaking, namely installing, maintaining, repairing and removing artificial shelters on farms, did fail to comply with that duty, and that failure exposed the workers to a risk of serious injury.

[2] I acknowledge the presence of the victim, Mr Tipuarangi Kohatu McDowell. His mother, Shana Tautimu, is also present as his support person. I also acknowledge

the presence of 2 officers from WorkSafe. On behalf of Mr McDowell, Officer Michelle Kendian has read the Victim Impact Statement, dated 11 January 2023. At my invitation, Mr McDowell has also addressed the court. I am very pleased to hear that Mr McDowell has obtained a position in the dairy industry in Kaitaia. He informed me that despite serious injury to his eye he is making progress in his life.

[3] In sentencing MAL, submissions from WorkSafe and Defence Counsel have been most helpful. The position taken by the two parties is a very responsible. Except for the starting point, there is consensus on: emotional harm reparation, consequential loss, contribution towards WorkSafe's legal fee and release of Summary of Facts with appropriate redactions, as well as Defence application for suppression of financial information contained in the affidavit of David Hounsell sworn on 22 December 2022.

**Documents Considered**

[4] In sentencing MAL, I have carefully considered the following:

(a) Agreed Summary of Facts;

(b) Prosecution: written and oral submissions;

(c) Defence: written and oral submissions;

(d) Affidavit of David Keith Hounsell;

(e) Mr McDowell's Victim Impact Statement (VIS).

**Safe System**

[5] Worksafe states that prior to the incident it was reasonably practicable for MAL to have:

(a) Developed and implemented effective training, and supervision of, workers to carry out the installation, maintenance, repair, and removal of artificial shelters;

(b) Developed and implemented a safe system of work, including developing and implementing a SOP, for safe installation, maintenance, repair, and removal of artificial shelters;

(c) Effectively monitored the safe use of PPE during the installation, maintenance, repair, and removal of artificial shelters.

[6] According to the agreed Summary of Facts, MAL did have in place safety systems. Since the incident, WorkSafe acknowledges that MAL's safety systems have been improved, including:

(a) Implementing Safe Operating Procedure for fencing;

(b) Implementing Verification of Competency for fencing;

(c) Documenting its "toolbox" meetings;

(d) Noting specific risks of high tensile wire in Hazard Register;

(e) Use of semi-permanent strainers, which do not require cutting of wire.

**Background**

[7] The facts are as set out in the agreed summary of facts.

[8] MAL is New Zealand's biggest avocado grower, employing up to 48 workers.

[9] Mr McDowell commenced work at MAL since 25 January 2021. His work description included installation and maintenance. At the time of the accident, Mr McDowell was a 20-year-old casual worker. He was working on a fencing structure when the incident occurred.

[10] Mr McDowell had been given general induction, which did not refer to the appropriate PPE for specific tasks.

[11] The defendant provided workers on-the-job training. Mr McDowell was under training and was being supervised. Whilst Mr McDowell was provided with safety glasses, MAL did not ensure workers wore it for fencing.

**Incident**

[12] On 14 April 2021, Mr McDowell was carrying out maintenance of a top wire of an artificial shelter. The wire came loose and penetrated Mr McDowell's left eye.

[13] He received a significant eye injury, which required two surgical operations. The injury caused impaired vision in his left eye. Mr McDowell's Victim Impact Statement sets out in detail the harm and suffering caused by the injury.

**Sentencing Criteria**

[14] Section 151 (2) of the HSWA provides that Court must apply:

(i) Sections 7 to 10 of the Sentencing Act 2002. In particular, the relevant purposes of sentencing, including holding the offender accountable for the harm done, promoting in the offender a sense of responsibility, providing for the interests of the victim, denunciation, and deterrence. Further, applicable principles are the gravity of the offending, seriousness of the offence as indicated by the maximum penalty, the effects of the offending on the victim, and any offer to make amends.

(ii) Purposes of the HSWA.

(iii) Risk of, and potential for illness, injury, or death that could have occurred.

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

(v) Safety record of defendant to the extent that it shows whether any aggravating factor is present.

(vi) Degree of departure from prevailing standards as an aggravating factor, and

(vii) Defendant's financial capacity or ability to pay any fine.

[15] The main purpose of the HSWA is to provide for a balanced framework to secure the health and safety of workers and workplaces, including, amongst other purposes, protecting workers against harm to their health, safety, and welfare by eliminating or minimising risks from work or from prescribed high-risk plants.

**Approach to Sentencing**

[16] Full Bench of the High Court in *Stumpmaster v WorkSafe New Zealand*[1] stated that the factors set out in *Department of Labour v Hanham & Philip Contractors Ltd*[2] are still relevant under the HSWA.

[17] In *Stumpmaster*[3], the High Court set out four steps in the sentencing process:

(i) Assess the amount of reparation;

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

(iii) Determine whether further orders are required;

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

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC2020.
[2] *Department of Labour v Hanham & Philip Contractors Ltd* (2009) 9 NZLEC 93,095 at [42] and [45].
[3] *Stumpmaster* [3] and [35].

steps. This includes consideration of defendant's financial capacity, if pleaded.

**Reparation**

[18] In determining emotional harm reparation, the objective is to compensate the victim for the actual harm caused by the offence, including physical and emotional harm. The nature of the injury and the duration of the physical and/or emotional harm are relevant factors in determining the reparation figure.

[19] In *Big Tuff Pallets Ltd v Department of Labour*, the High Court stated that:[4]

> Fixing an award 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. 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.

[20] Mr McDowell's VIS, dated 11 January 2023, provides an insight into how the injury to his left eye impacted on his life, including the physical and emotional trauma that he suffered. The VIS was read in court by WorkSafe Officer, Ms Michelle Kendian. Whilst the full VIS is highly relevant, in brief Mr McDowell states that:

> I was just 18 entering the workforce .... I could not cope physically and emotionally with continuing to work where my accident had occurred .... Resulted in permanent loss of [left] eyesight .... My natural lens was damaged ... an artificial lens was replaced .... I fell into depression .... I struggled with my appearance ... I was overly self-conscious, awkward, and uncomfortable .... [it] impacted on my family .... I have suffered emotionally .... almost 2 years following my accident my vision is still affected .... My left eye is still sensitive ... I wear sunglasses a lot to minimise the sensitivity from sun, wind, dirt and sand .... Future problems may occur, and I have to accept that my eye injury has changed my life hugely.

[21] Mr McDowell has been always extremely well supported by his mother, Shana Tautimu, who was present in court during sentencing hearing.

[22] Mr McDowell also addressed the Court, outlining how the injury to his left eye has seriously impacted on his life. To his credit, he has moved on and secured a job.

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[4] *Big Tuff Pallets Ltd v Department of Labour* (2009) 7 NZELR 322 at [19].

[23] WS and MAL have agreed on a figure of $60,000 for emotional harm reparation. Emotional harm reparation of this amount is supported by *WorkSafe NZ v Daniel Nicholas Anderson*, Trading as DNA Fencing[5] and *Worksafe NZ v North Island Mussels Ltd*[6].

[24] Having considered counsels' submissions, including the *Anderson* and *Mussels* cases, and my own assessment based on VIS and having heard from Mr McDowell, I find that $60,000 for emotional harm reparation is appropriate.

**Consequential Loss**

[25] As both parties are agreed, I order consequential loss suffered by Mr McDowell in the sum of $2,185.

**Assessing Fine**

[26] In *Stumpmaster*, the High Court sets out four bands for culpability in offending under section 48 (2) (c) of the HSWA. The maximum fine is $1.5million.

**Starting Point**

(a) Low culpability: of up to $250,000;

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

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

(d) Very high culpability: $1,000,000 plus.

**Health & Safety Systems**

[27] MAL had inadequate health & safety systems relating to fencing:

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[5] *WorkSafe NZ v Daniel Nicholas Anderson* CRI-2021-006-000763 Kaikoura DC, 15 July 2022
[6] *Worksafe NZ v North Island Mussels Ltd* [2018] NZDC 20269.

(a) Prior to the incident, there was no Safe Operating Procedure (SOP) for fencing, including no SOP for the safe installation, maintenance, repair, and removal of artificial shelters.

(b) The risks arising from this work were not properly assessed or managed. Whilst safety glasses were provided, MAL did not ensure that workers wore it.

**Risk**

[28] In *Stumpmaster* at [39], the High Court stated that:

> Although necessarily the risk under s 48 prosecutions will always at least be of causing harm or illness, it is important to have regard to exactly what the risk was. How many people did it involve, for example, and might a worker have been killed?

*Whether death or serious injury occurred or could reasonably have been expected to have occurred*

[29] The risk that fencing wire may become loose and cause serious injury was not just a potential risk but a risk which in fact eventuated causing serious injury to Mr McDowell's left eye.

**Degree of departure from prevailing standards**

[30] WS submits that the departure from prevailing standards included not having in place procedures to ensure that the task was undertaken safely. WS accepts that MAL had provided safety-glasses. However, MAL could and should have ensured that its workers were using the available PPE gear. In this case, Mr McDowell should have been required to wear safety-glasses before undertaking his duties.

[31] Whilst accepting failures set out in [5] and [29], MAL submits that:

(a) This is not a case of failing to identify the risk or deliberately running the risk.

(b) Mr McDowell was provided with safety-glasses. However, MAL acknowledges that inadequate controls were put in place to monitor the usage of PPE.

**Obviousness of the hazard**

[32] The risk of eye injury within construction industry in well known. There was a near miss incident few weeks prior to this incident. MAL would have known the risks as it had identified the need for fencing crew to use PPE.

[33] Defence Counsel submits that MAL's culpability was lower, without intending to attribute blame on Mr McDowell's part, because the supervisor had signed out two pairs of safety-glasses (one for himself and the other for Mr McDowell) and had reprimanded Mr McDowell for not wearing it at the time of prior near-miss incident.

**Means to avoid hazard**

[34] WS submits that the cost to avoid hazard was minimal. MAL should have ensured that workers were using safety-glasses.

[35] In *WorkSafe v Stonehurst Timbers Ltd*[7], His Honour stated that:

> [23] The fact that there is a moderate cost of remedying these issues is not an excuse. To suggest otherwise would be to sacrifice employee on the altar of profitability which is something that is clearly unpalatable.

**Investigation**

[36] WS acknowledges that MAL fully cooperated with the investigation process and pleaded guilty at an early stage.

**System and Policy Changes**

[37] MAL did have in place safety systems. Since the incident, WorkSafe acknowledges that MAL's safety systems have been improved as set out at [6].

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[7] *WorkSafe v Stonehurst Timbers Ltd* [2016] NZDC 17200.

**Remorse**

[38] MAL has pleaded guilty at an early stage. It has expressed that it is sincerely sorry, particularly so for the injury suffered by Mr McDowell. MAL apologised to Mr McDowell for the short term and long-term effects of the injury, the sense of self-consciousness and the loss of confidence he has experienced. MAL has also advised that it's offer of re-employment for MR McDowell is open.

**Starting Point**

[39] Counsel for WS and MAL have filed comprehensive submissions on starting point, with supporting cases. On 28 February 2023, counsel for WS and MAL supplemented their respective written submissions with oral submissions on starting point. I am most grateful for their very helpful submissions.

**WS: Starting Point**

[40] Based on an analysis of cases[8] set out in Prosecuting Counsel's written submissions, WS submits that MAL's culpability should be categorised as being in the medium band. An appropriate starting point should be $400,000. Prosecution submits that this case is comparable to Daniel Anderson case Initially, WS had indicated a starting point of $450,000. *WorkSafe NZ v Affco NZ Ltd, WorkSafe NZ v Heinz Watties Ltd, WorkSafe NZ v Flick Anticimex Ltd, WorkSafe NZ v Assure Quality Ltd.*

**MAL's Starting Point**

[41] Based on an analysis of cases referred to by Prosecution, Defence Counsel accepts that MAL's culpability should be categorised as being in the medium band ($250,000 to $600,000). However, Defence Counsel submits that an appropriate starting point should be $350,000.

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[8] *WorkSafe NZ v Affco NZ Ltd* [2020] NZDC 12998, *WorkSafe NZ v Heinz Watties Ltd* [2019] NZDC 6388 at [27], *WorkSafe NZ v Flick Anticimex Ltd* [2022] NZDC 355, *WorkSafe NZ v Assure Quality Ltd* [2020] NZDC 23107

[42] Counsel submits that in *WorkSafe v Sorensen Transport*[9] the risks from failure to maintain breaks on its truck was obvious and very serious. The injured truck driver had not reported that her truck was experiencing brake failure.

[43] In *Sorensen* case, the Court adopted a starting point of $500,000 but reduced it to $400,000 on account of victim's failure to report. The Court allowed the reduction to reflect the victim's conduct as a mitigating factor. Counsel submits that in view of *Sorensen* case, Prosecution's initial starting point of $450,000 is difficult to sustain.

[44] It is to be noted that in this case Prosecution revised its starting point to $400,000.

**Starting Point**

[45] Having carefully considered counsels' submissions and, upon reviewing the relevant cases, I find MAL's culpability to be close to the middle of the medium band.

[46] Having regard to all circumstances of this case, I find that a starting point of $400,000 is appropriate.

**Credits for Mitigating Factors**

[47] By consensus, Prosecution and Defence Counsel submit that following credits are available to MAL, which I consider are appropriate:

(a) Early guilty plea: 25%

(b) Previous good record: 5%

(c) Remorse: 5%

(d) Reparation: 5%.

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[9] *WorkSafe v Sorensen Transport* [2019] NZDC 15469 at [59]-[78].

[48] Hence, for mitigating factors, total credit of 40% on a global fine of $400,000 is appropriate. This means an end fine of $240,000 would be appropriate as it would adequately reflect the purposes and principles of sentencing, including the objectives of the Health and Safety at Work Act.

[49] I have been assisted by an Affidavit from Mr Hounsell [redacted]

Hence, MAL is not in a financial position to pay any fine. WorkSafe accepts MAL's precarious financial position and is accepting of Defence Counsel's submission that MAL does not have the ability to pay a fine.

[50] Given MAL's inability to pay a fine, in the exercise of my discretion, I do not impose any fine on MAL.

**Final Orders**

[51] Having heard from Prosecuting and Defence Counsel and having considered their respective written and oral submissions, as well as having regard to the Victim Impact Statement, supplemented by oral presentation from Mr McDowell, I make the following orders:

(a) I order MAL to pay emotional harm reparation to Mr McDowell in the sum of $60,000;

(b) Consequential loss in the sum of $2,185 to be paid to Mr McDowell;

(c) Costs towards WorkSafe's legal fee in the sum of $5,332.15, which I consider is a just and reasonable contribution towards WorkSafe's legal fee;

(d) I also order that the Summary of Facts can be released, if requested, with appropriate redactions made for any suppression orders;

(e) Finally, on Defence request, which Prosecution does not oppose, I order suppression of the financial information in Mr David Keith Hounsell's Affidavit, sworn on 22 December 2022.

A Swaran Singh
District Court Judge