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

**I TE KŌTI-Ā-ROHE**
**KI ŌKAHUKURA**

**CRI-2017-044-004833**
**[2018] NZDC 22096**

**WORKSAFE NEW ZEALAND LIMITED**
Prosecutor

v

**SCOTT ALEXANDER McRAE**
Defendant

Hearing: 17 October 2018

Appearances: I Brookie for the Prosecutor
N Beadle for the Defendant

Judgment: 17 October 2018

---

**NOTES OF JUDGE P J SINCLAIR ON SENTENCING**

---

[1] On 11 December 2016, Jason Smith was tragically killed when his tractor overturned and came to rest on him while he was feeding out on a dairy farm in Wellsford. As a result, WorkSafe New Zealand laid a charge under the Health and Safety at Work Act 2015 against Scott McRae being a PCBU who failed to ensure the health and safety of workers who worked for him while working as a dairy farm manager, that failure exposing Mr Smith to a risk of death or serious injury. Scott McRae entered a plea of guilty to the charge. It is my task to sentence Mr McRae today.

[2] By way of summary, Scott McRae is one of three trustees of SA & J McRae Family Trust which owns the dairy farm. Mr McRae was responsible for the running and oversight of the farm. Jason Smith was hired by Mr McRae as a

contract dairy milker/manager. On the morning of 11 December 2016, Jason Smith, a dairy farm worker, was feeding out using a tractor and two-axle trailer when the tractor jack-knifed, over turned and rolled over him, pinning him down and causing his death by positional asphyxiation. Investigation of the scene indicated that the paddock was of moderate incline and that the weather was fine, but due to a light shower of rain earlier that morning the ground was slightly wet. The cause of the tractor losing traction is not known. However, it has been ascertained the rollover protection system, commonly known as ROPS, installed on the tractor was severely corroded such that its structural integrity was compromised. The ROPS system collapsed completely as a result of the accident, leaving no survivable space for Mr Smith.

[3] The prosecutor submits a global emotional harm reparation award of at least $130,000 would be appropriate and a reparation order for consequential loss compromising the funeral cost and ACC top up of $48,194.67 would be warranted. The prosecutor submits the defendant's culpability for this offending falls at the lower end of the high culpability band and a starting point of $120,000 to $130,000 would be warranted.

[4] The prosecutor acknowledges a 15 percent discount could be afforded to Mr McRae for payment of reparation, immediate assistance to the victim in addition to co-operation and a good safety record. Finally, the prosecutor acknowledges Mr McRae is entitled to the maximum discount for his guilty plea, which would result in an end fine in the range of $76,500 to $82,875. The prosecutor seeks costs of $10,851 and when assessing the overall reparation orders and fine, no global totality adjustment is warranted.

[5] The defendant acknowledges the enormity of the incident and the tragic consequences of Mr Smith's death and the pain suffered by Mr Smith's widow and son. The defendant acknowledges payment of the shortfall of ACC entitlements, of loss of income and the shortfall in the cost Mrs Smith and her son incurred from Mr Smith's funeral which were not paid by ACC amounting to $43,974.24 and over $4000 respectively should be paid by him.

[6] The defendant submits an award of $110,000 for emotional harm is appropriate and further submits that culpability lies in the midpoint of the medium culpability range of $50,000 to $120,000 submitting specifically a starting point of $85,000 is warranted. The defendant submits he conducted an informal risk assessment of the farm site and tasks carried out on it, including the task of feeding out, but acknowledges he should have engaged an appropriately qualified person to monitor and maintain the ROPS. However, he does not accept the remaining factors identified by WorkSafe were causative of the accident.

[7] Finally, the defendant submits that a 25 percent discount is appropriate for mitigating factors in addition to a 25 percent discount for an early guilty plea. The defendant has advised that while the amount for the fine is not readily available to be paid, funds can be acquired for that purpose and ability to pay at the level proposed is not an issue.

[8] In response to the Pike River disaster, which resulted in 29 fatalities, as well as a growing concern about the high number of deaths and serious injuries in New Zealand's workplace, a major reassessment of health and safety legislation was conducted. This resulted in the Health and Safety at Work Act 2015 (which I will refer to as the Act from now on) coming into force in April 2016.

[9] The Act substantially increased penalties for significant breaches of workplace health and safety obligations. It aimed to incentivise compliance with those obligations. The charge Mr McRae is to be sentenced on carries a maximum penalty of $300,000. The aim of the review of the legislation was to increase deterrence and reduce New Zealand's poor workplace health and safety records.

[10] Sections 151 and 22 of the Act sets out the criteria I must apply when determining sentence on this charge. I must have particular regard to ss 7 to 10 of the Sentencing Act 2002. The purpose of the Act is to provide for a balanced framework to secure the health and safety of workers and workplaces, by protecting against harm and eliminating or minimising risk of and potential for illness, injury or death that could have occurred (whether death, serious injury or serious illness occurred or could reasonably have been expected to have occurred), [and addressing] the safety record

of the person, the degree of departure from prevailing standards in the sector of industry and the financial capacity of the company or person and ability to pay that fine. Workers and other persons should be given the highest level of protection against harm to their health and safety and welfare from hazards and risks arising from their work as is reasonably practicable.

[11] Under the former Act, the leading case on the approach to sentencing in health and safety prosecutions was *Department of Labour v Hanham & Philp Contractors* Limited. Recently in *Stumpmaster v WorkSafe New Zealand* a full High Court bench delivered a guideline judgment on sentencing offending under the Health and Safety at Work Act.[1] [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. The former three step approach has therefore been expanded to a four step approach as follows; first assessing the amount of reparation, second fixing the amount of fine, thirdly considering orders under ss 152 to 158 of the Act and, finally, making an overall assessment of the proportionality and appropriateness of the penalty.

[12] *Stumpmaster* also set out the sentencing bands to be applied to PCBW Entities under s 48(2)(c) of the Act as follows:

(a) Low culpability, 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.

[13] The *Stumpmaster* decision is not binding in terms of this sentencing because this sentencing involves an individual as the PCBU and the correlating fine is significantly less. However, I concur with WorkSafe that it is appropriate to use the

---

[1] *Department of Labour v Hanham v Philp Contractors Limited* (2009) 9 NZELC 93, 095; (2008) 6 NZELR 79.

[2] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2190.

*Stumpmaster* culpability bands and adjust them to take into account the different maximum penalty. As a result the adjusted bands could be viewed as follows:

(a) Low culpability, up to $50,000.

(b) Medium culpability, $50,000 to $120,000.

(c) High culpability, $120,000 to $200,000.

(d) Very high culpability, $200,000-plus.

[14] So I turn to the first matter, reparation. In *Stumpmaster* the Court observed that the increase in penalties under the Health and Safety Work Act regime should not lower the size of reparation orders. In *Big Tough Pallets Limited* the Court commented that fixing an award for emotional harm is an intuitive exercise. Its quantification defies finite calculation. My task and objective is to strike a figure which is just in all the circumstances and which in this particular context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering.

[15] Fixing reparation in relation to a loss of life is a very difficult task. It involves placing a monetary value on that loss and of course that can only ever fall short of truly reflecting the grief felt by Mr Smith's widow and son and his absence from their lives. So reparation can only be designed to give a measure of recognition to the loss in the best possible way that the Courts are capable of doing so. Quantifying emotional loss is difficult and I emphasise a comment made in *WorkSafe New Zealand v Department of Corrections*, "There is not and cannot be a tariff for the loss of life or grief."

[16] Reparation is designed to compensate a victim who has suffered as a result of the offending. Reference to other cases involving fatalities provides some assistance to the Court. WorkSafe has referred to cases decided under the former and new legislation including *WorkSafe New Zealand v Stevens and Stevens Limited*, *WorkSafe New Zealand v Toll Networks Limited, WorkSafe New Zealand v Eastern Agriculture*, *WorkSafe New Zealand v Salters*, *WorkSafe New Zealand v*

*Cathedral Cove Dive Limited*.[3] Emotional harm reparation awards ranging from 85,000 to 110,000 to the families of workers killed while at work or in one case involving a tourist have been imposed. In fact in *Stevens*, His Honour Judge Ingram commented that a perusal of the decisions indicate that in cases involving a fatality reparation orders between $80,000 to $120,000 are unexceptional.

[17] Although I received some guidance from those decisions my task of setting reparation cannot involve simply ordering the same amount of reparation imposed in other cases. Emotional harm reparation orders vary significantly. There are differences in the emotional family circumstances. What is clear from higher authorities is that I must fix a reparation order based on the specific facts and circumstances relating to this case. I have received a victim impact statement from Jason Smith's widow written on behalf of herself and her 15 year old son. Unsurprisingly Mr Smith's death has had a profound and devastating effect on both of them. They have lost a loving husband and father. The loss is deeply felt. Although Mrs Smith was working part-time, Mr Smith was largely the financial provider for both her and their son. Mr Smith's death has meant that he is no longer able to support them. Mr Smith was in charge of the finances in the household and it was not until he died that Mrs Smith became aware Mr Smith had used the family vehicles as security against a new farm bike. Mrs Smith was unable to service those repayments and ended up losing both vehicles which were valued at around $30,000.

[18] In addition, because Mr Smith's contract involved accommodation, when he died Mrs Smith and her son had to leave the farm and find somewhere else to live which put a further financial strain on them. Mrs Smith advises she has been unable to work since given the impact Mr Smith's death has had on her.

[19] Tragically, Mr Smith's son witnessed his father's death and Mrs Smith saw him shortly afterwards when their son ran to seek assistance. Both Mrs Smith and her son continue to suffer from severe grief and psychological effects as a result of being present at the accident and being unable to help Mr Smith. These traumatic events

[3] *WorkSafe New Zealand v Stevens and Stevens Limited* [2018] NZDC 19098.

continue to have a serious effect on their ability to lead a normal life and recover from the experience.

[20] I concur with WorkSafe that an additional emotional harm reparation order is required as was imposed in *Cathedral Cove Dive Limited* given Mrs Smith's son witnessed his father's death which has undoubtedly added to his trauma. I impose an emotional harm payment of $130,000 of which $20,000 represents the additional emotional harm suffered by Mr Smith's son when he witnessed his father's death.

[21] WorkSafe seek an ACC top-up. Section 32(5) Sentencing Act addresses the question of reparation and allows the Court to make consequential loss reparation orders to top-up ACC entitlements for victims. As mentioned Mr Smith was the primary breadwinner for the family. Mr Smith earned $70,000 per annum, ACC covers 60 percent of that income for five years following the accident leaving a shortfall of 40 percent. WorkSafe have calculated the shortfall as being $43,974.24. I order that sum in addition to the shortfall for the funeral costs of over $4000.

[22] The next step is to fix the fine. A fine is required to address the separate statutory sentencing purposes of denunciation, deterrence and accountability. The usual approach to sentencing should be adopted in relation to fines under this legislation. A starting point should be fixed reflecting the aggravating and mitigating features of the offending and then that starting point should be adjusted to take into account any aggravating or mitigating factors relating to the offender and guilty plea.

[23] So I turn to address the *Hanham* factors. What were the operative acts or omissions at issue? Mr McRae submits that there was not a complete lack of required systematic approach to risk assessment and safe work processes on the farm. He submits he took steps in inducting Mr Smith who had worked on farms for 20 years. He drove Mr Smith around the farm and had an experienced part-time retired farmer induct him for two days and instructed him on the workings of the tractor, showing him what the various levers did and when the low ratio gears were to be used and how to use it with the silage wagon.

[24] Mr Smith was instructed that the protective equipment supplied was to be put on and used. Mr McRae advised that the tractor was purchased with a ROPS fitted but he was not aware the ROPS had a flawed design and therefore did not identify corrosion, but put his faith in Agridustrial Limited who serviced the tractor six months prior to the incident.

[25] Mr McRae advises it was not mentioned that there was any rust or corrosion on the tractor at the time. He was not aware he was under any obligation to have the ROPS specifically checked by a mechanic. Therefore Mr McRae submits that this is not a case where he knew of the defects but did not do anything.

[26] Mr McRae as PCBU had a duty to ensure as far as was reasonably practicable the health and safety of workers who worked for him. In my view the measures Mr McRae took to induct Mr Smith and safeguard Mr Smith fell short of his obligations and were insufficient. This is not a situation where the worker failed or refused to follow established procedures. There were systematic failures. First, failure to adhere to industry guidelines and standards and, secondly, failure to address the defective and corroded ROPS, so there was a failure to respond appropriately to a known risk.

[27] I consider there were four to five acts or omissions by Mr McRae which led to the incident. First, Mr McRae failed to conduct a risk assessment of the farm and tasks carried out on it. The failures exposed workers on the tractor to a risk of overloading and rollover because safe working parameters and systems regarding the use of the tractor with a trailer for feeding out had not been established. So the lack of a systematic risk assessment and development of safe working procedures increased the actual risk to Mr Smith, who was only 10 days into this work. Mr Smith was not properly trained to conduct his work task safely.

[28] Secondly, there was no risk register where the risk of tractor rollover should have been dealt with. Third, Mr McRae failed to identify the importance of maintaining the ROPS and the applicable code of practice. Fourth, the ROPS were inadequate and severely corroded and, fifth, there was a lack of any health and safety

programme and documentation for matters such as farm risk management, records of safe work procedures and induction processes and records.

[29] So while the direct cause of the tractor rollover is not known, the failure to conduct a risk assessment on the farm and identify the need to maintain the ROPS was causative of Mr Smith's death.

[30] The second question is: What was the nature and seriousness of the risk of harm as well as the realised risk? In *Stumpmaster* the Court commented whether actual harm occurred is a relevant and important feature in fixing placement within the culpability bands. It is well known within the industry that serious harm or death can result from a tractor rollover particularly when no ROPS or inadequate ROPS are installed. ROPS are known to be a method of providing survivable space to operate in the event of a rollover. Here the risk of a worker being seriously hurt or killed as a result of tractor rollover is high, and in this instance death occurred.

[31] Third: What was the degree of departure from prevailing standards in the sector and industry? Mr McRae's conduct departed from industry knowledge and applicable standards and guidelines. Health and safety at work and workplace management regulations sets out requirements relating to the training, instruction and supervision of works in relation to plant used by workers. There is an abundance of public information regarding safe use of tractors in agriculture settings including cautionary operations of dangers of tractor rollover. The good practice guidelines for safe use of tractors on farms was available prior to the incident. It covers the purposes of the guidelines and the direction of safe practice for towing, travelling downhill, rollover, driving training and induction.

[32] WorkSafe has recently published resources to assist farm operators in establishing an effective health and safety work system. The guidelines, including Safer Farm Talk, Farm Health and Safety Management, refer to the need for farms to create certain documents such as risk registers, farm rules, farm hazard maps and controls.

[33] The approved code of practice for ROPS requires ROPS to be installed [properly]. If they are damaged and suffering wear and tear it is the owner's responsibility to repair and maintain the ROPS to an acceptable standard. The ROPS fitted to the tractor did not meet the minimum New Zealand standards for ROPS because it used steel pipes that were too thin to provide adequate protection and, more importantly, the ROPS were severely corroded rendering them structurally unsound. In addition, there was no seatbelt. I accept Mr McRae did take the tractor to Agridustrial to be serviced. However, he did not direct the mechanic to check and address any issues involving the ROPS and it was his responsibility to do that.

[34] Finally, were the costs disproportionate to the risk? I have not gained the impression Mr McRae was avoiding paying costs in relation to his farm, particularly given that he had taken the tractor to be serviced. However, Mr McRae should have borne the costs associated with a proper risk assessment of the farm operation. They are part of expected costs of running a farm involving use of potentially dangerous plant. There would have been some costs involved in maintaining the ROPS and installing a seatbelt. However, in my view, those would not have been grossly disproportionate to mitigate the risk of serious harm.

[35] I have reviewed the decisions of *WorkSafe New Zealand v Eastham* and also the decisions referred to the in the *Stumpmaster* appeal including *WorkSafe New Zealand v Tasman Tanning Company Limited* and also additional decisions such as *WorkSafe New Zealand v Oceana Gold (New Zealand) and WorkSafe New Zealand v Dimac Contractors Limited*.[4] [5] [6]

[36] In *WorkSafe New Zealand v AB Wood Holdings*, a case decided under the former legislation, a starting point of $110,000 was fixed at the higher level of culpability involving a fatal tractor roll. That starting point was deemed appropriate. Of course no decision falls on all fours with this matter. Those decisions have some similarities to Mr McRae's case. However, ultimately I must assess the specific findings and aggravating features to fix an appropriate starting point.

---

[4] *WorkSafe New Zealand v Oceana Gold (New Zealand)* [2018] NZDC 5274.
[5] *WorkSafe New Zealand v Dimac Contractors Limited* [2017] NZDC 26648, [2018] DCR 447.
[6] *WorkSafe New Zealand v Tasman Tanning Company Limited* [2017] NZDC 24398.

[37] The sole case where an individual officer, PCBU, has been sentenced since the enactment of the new Act is *WorkSafe New Zealand v Robertson*. There the District Court took a starting point of $100,000 for offending relating to unsafe asbestos removal.

[38] Taking all matters I have discussed into account, I consider the offending sits at the upper end of the medium band and a starting point of $115,000 is appropriate. Mr McRae has not previously appeared before the Court, therefore there is no requirement for any uplift.

[39] So I turn to the mitigating factors. In *Stumpmaster* the Court cautioned against the use of standard bulk discounts for remorse, co-operation, 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 all the mitigation factors to a moderate degree or one or more of them to a higher degree.

[40] Mr McRae seeks discounts for four matters; reparation, remorse, co-operation and prior good record. Mr McRae has offered to pay reparation; however, no reparation payment has been made thus far. It has not escaped my attention, however, that Mrs Smith was allowed to stay on the farm for four to five weeks after the incident and assistance was given to her. Mr McRae has also indicated he wishes to attend a restorative justice conference, although that has been deferred on Mrs Smith's request until after the sentencing.

[41] Mr McRae co-operated with WorkSafe investigation. As mentioned earlier, Mr McRae has an unblemished record. Mr McRae has not taken the usual orthodox remedial steps frequently seen in cases such as these. However, without minimising the pain or placing it on the same level as Mrs Smith and her son's suffering, Mr McRae has suffered significantly and the impact of this incident has been significant. He has decided that he is unable to continue with the ownership of a farm and, as a result, sold the dairy farm with the associated loss of income. So, as I

mentioned, the incident has had a significant impact on both Mr McRae and his family. That in my view is a significant matter that I should take into account. In my view, taking into account all of these factors, a discount of 20 percent is appropriate.

[42] Finally, I turn to Mr McRae's guilty plea. I concur with both Mr McRae and the prosecutor that Mr McRae is entitled to the maximum discount for the guilty plea. The charge was laid on 8 December 2017 and a guilty plea was entered in March 2018. On these calculations I reach an end fine of $70,000.

[43] I turn to the third step. WorkSafe seeks a costs order of $10,851 for half of the external legal costs in relation to this prosecution. In *Stumpmaster* the Court noted that previous costs awards under HSWA had been modest. Mr McRae submits a cost order of that amount is not warranted and proposes a cost order of just over $6000.

[44] A similar cost order was awarded in *WorkSafe New Zealand v Stevens v Stevens Limited* which was decided after the enactment of new legislation.[7] This case has had some particular complexities given a fatality was involved and experts have been engaged. I award costs of $10,851.

[45] I move to the final step. I am satisfied the totality of the reparation order of $130,000, the ACC top-up of $43,974.24, the funeral costs of $4090.43, the fine of $70,000 and costs of $10,851 is proportionate to the circumstances of the offending and the offender.

P J Sinclair
District Court Judge

[7] *WorkSafe New Zealand v Stevens and Stevens Limited* [2018] NZDC 19098.