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 DUNEDIN

I TE KŌTI-Ā-ROHE
KI ŌTEPOTI

CRI-2018-012-001540

BETWEEN	WORKSAFE NEW ZEALAND Prosecutor
AND	ROBERT KIRK ASHTON Defendant

Hearing:	13 December 2018
Appearances:	Ms C O'Brien for the Prosecutor Mr S Wilson for the Defendant
Judgment:	11 April 2019
Reissued:	17 April 2019

RESERVED DECISION OF JUDGE M A CROSBIE

Introduction

[1] Mr Ashton pleaded guilty to charges under ss 38(1), 48(1) and 48(2)(b) of the Health and Safety at Work Act 2015 (the Act).

Facts

[2] Mr Ashton is a self-employed farmer in Palmerston. He has owned the farm for 16 years, and has been involved in farming for 40 years. Mr Ashton does not have any employees but engages contactors at times.

[3] The victim, and the driver of another truck, were at Mr Ashton's farm having both collected sheep from a farm in Ranfurly. The two men met with Mr Ashton and the three of them commenced unloading sheep from the other driver's truck, using a stock ramp weighing 250 – 300kgs.

[4] After unloading sheep from the upper levels of the truck, Mr Ashton began to move the loading ramp down to the first level. It appears that thought the ramp would catch on the sliding door of the truck, so he went under the ramp to push the door open further. There is no automatic brake system when the ramp is being lowered. Mr Ashton controlled the ramp by holding the ramp handle with both hands to keep it from lowering further.

[5] was under the ramp momentarily. Mr Ashton claims that as exited from under the ramp he used the ramp as a support to pull himself out. He says that this appears to have caused the ramp to move sideways. The handle became dislodged from the shaft causing the ramp to fall about half a metre in an uncontrolled manner and strike on the head.

[6] The charging document states that it was reasonably practicable for Mr Ashton to:

(a) Ensure that the winch handle could not disengage from the winch by fixing it to the handle with locking pins or similar;

(b) Ensure that the winch had an effective braking system for use when lowering the ramp;

(c) Instruct people not to go under the ramp at any time.

(d) Provide signage warning people not to go under the ramp at any time.

Injuries

[7] The prosecutor initially provided a letter from the victim's GP which was attached to the victim impact statement. I was concerned about the cogency and

objectivity of that assessment given the relationship of friendship that existed and some comments in the letter. I directed that additional medical evidence be provided. That is now to hand in the form of evidence from Dr Patrick Manning dated 4 March 2019 and Southern District Health Board Notes. This was received by the Court on 26 March 2019. It is regrettable that this report took so long to obtain.

[8] Dr Manning states that the victim has traumatic hypopituitarism due to the accident. This is decreased secretion of one or more hormones produced by the pituitary glands. Dr Manning states that recovery is rare, and the hormonal deficiency will be long term. In terms of the future, Dr Manning suspects that "he will be able to live a relatively normal life" as long as he takes his medication appropriately. There may be some issues regarding the victim's fertility in the future.

Victim Impact Statement

[9] The victim has struggled in his recovery and has felt depressed at times. The victim stated his hearings aids have caused annoyance and he will be taking medication for the rest of his life for his pituitary gland. It took around 10 months of recovery until he was able to get back to doing some of the outdoor activities that he loves.

Sentencing Process

[10] The approach to sentencing offending under the Act is to: assess the amount of reparation; fix the amount of the fine; determine whether further orders under ss 152 - 158 of the Act are required; and make an overall assessment of the proportionality and appropriateness of the penalty imposed on the offender. The agreed adjusted bands from *Stumpmaster*[1] are:

(a) Low culpability: up to $50,000;

(b) Medium culpability: $50,000 to $120,000;

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1 *Worksafe v Stumpmaster* [2018] NZHC 2020.

(c) High culpability: $120,000 to $200,000; and

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

Summary of Prosecution Submissions

[11] The prosecutor submits that it is open to the Court to order reparation of $80,000 for the emotional harm suffered, and $19,092.51 for the consequential loss.

[12] The prosecutor discusses the medical evidence and the effect that the injury has had on the victim's life including: time off work; inability to go hunting (initially); anxiety; and annoyance with hearing aids. It is accepted that emotional harm is difficult to quantify financially and that it is an intuitive exercise.[2]

[13] The prosecutor refers to *Worksafe v Carter Holt Harvey*[3] where the victim was maintaining machinery when part of it collided with his chest and trapped him. He suffered life-threatening injuries which required hospital treatment and ongoing complications for a considerable period of time. The long-term effects had a significant impact on the use of his shoulder and lungs. The reparation in that case was $55,000. This harm appears to be more severe than in the current case.

[14] For consequential loss, the prosecutor submits that the victim should be paid the shortfall between ACC and his wages ($11,371.56), the difference between the ACC and the IRD kilometre reimbursement rate ($4,096.05), and medical expenses including hearing aids ($3,614.90) which comes to a total of $19,092.51.

Fine

[15] The prosecutor submits that the culpability falls in the middle of the medium band and a starting point of around $80,000 to $90,000 is appropriate. The prosecutor's written submissions break down the accepted omissions and highlight the difference between the circumstances on the farm and the "*Guidelines for Safe Sheep*

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2 *Big Tuff Pallets v Department of Labour* HC Auckland CRI-2008-404-00322.
3 *Worksafe New Zealand v Carter Holt Harvey Limited* [2018] NZDC 22605.

Handing 2014" and "Guidelines *for Safe Cattle Handling 2014"*. The guidelines state that ramps need ratchets to prevent unexpected unwinding and unwinding hazards and transport staff may not be as familiar with each farm and its hazards.

[16] The prosecutor submits that the risk of harm from being struck by a stock ramp is serious and could have resulted in a fatality. Further, that the defendant's departure from the industry standards, such as those mentioned above, is an aggravating factor to his culpability. The Prosecutor submits that further aggravating factors are that the hazard was obvious and could have easily been avoided. It is submitted guidance was readily available to manage the hazard. The prosecutor has referred to a number of cases which she submits are helpful in calculating the culpability. I have summarised what I believe to be the most analogous below.

(a) *Department of Labour v Sealed Air*[4] involved injury to a delivery driver where the company did not have a policy to keeping them safe. Culpability was considered to be in the middle of the medium band and a starting point of $70,000 was used.

(b) In *Harvest Pro*[5] *a tree* became out of control and caused serious injury. The failings were a lack of communication and warnings. The starting point was $80,000.

(c) In *De Geest Construction*[6] the victim slipped while on a ladder with worn feet. The Court noted that the hazard was obvious and the steps to remedy it were clear and cheap. The failure to monitor the suitability of equipment over time was significant. The court adopted a starting point of $70,000.

[17] In all three of these cases the defendants were companies charged under the former Health and Safety legislation which had a maximum penalty of $250,000.

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4 *Department of Labour v Sealed Air (New Zealand)* DC Waitakere CRI-2011-090-008896, 12 June 2012.

5 *Harvest Pro New Zealand v R* [2015] NZDC 364; and *MBIE v Harvest Pro New Zealand Ltd* DC Napier CRI-2013-016-00629, 13 June 2014.

6 *Worksafe New Zealand v De Geest Construction Ltd* [2016] NZDC 19886.

Aggravating and mitigating factors

[18] The prosecutor accepts that there are no aggravating factors. It is submitted that 5% discounts should be given for: remorse; co-operation; and remedial action; and 10% for reparation, totality 25%. Both parties accept that a guilty plea discount of 25% is appropriate.

[19] In conclusion, the prosecutor submits that reparation of $80,000 for emotional harm, $19,092.51 for consequential loss and a fine of between $45,000 to $50,625 is appropriate. The prosecution seeks orders for $1,447.49 for prosecution costs, which the defence accepts.

Summary of Defence Submissions

[20] The defence submits that reparation of $40,000 is appropriate. The defendant is happy to contribute towards the ACC income top-up payments and medical expenses. The defence disputes that there is any loss with respect to the kilometre reimbursement rate, submitting that $14,996.46 is appropriate for consequential loss.

[21] The defence submits that the case is analogous to *Worksafe v Grieve*.[7] There the victim suffered multiple skull fractures and complex head injuries, requiring 21 days in hospital. He was in a coma for as long as five days. The defendant was assessed as having medium culpability. Reparation of $48,592 was awarded, including $35,000 for emotional harm. Mr Wilson submits that the victim's injuries do not appear to be as serious as those of the victim in *Carter Holt Harvey*. I agree with that submission.

Fine – Starting Pont

[22] The defence submits that the culpability falls at the lower end of the medium band and that a fine of $60,000 is appropriate. The defence accepts that there were steps that could have been taken to prevent the accident. It is submitted that this is not a situation where the defendant disregarded his health and safety obligations or where

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7 *Worksafe New Zealand v Grieve* [2016] NZDC 9737.

he failed to address an obvious hazard. I accept that submission. It is submitted that the ramp was being used the way it was designed, and the defendant believed that it was compliant with industry standards. It is submitted that the ramp was regularly maintained with the defendant having reasonably robust systems and processes in place, along with a strong commitment to health and safety. I accept those submissions, particularly given that the defendant ensured that his farm had an annual independent audit.

[23] With reference to the guidelines discussed by the prosecutor, the defence submits that they are generic and do not address the specific need for the handle to be fixed with locking pins. The defence highlights the fact that the ramp did have a ratchet system for when the ramp was raised and a manual braking system for when it was lowered.

Defence Submissions on Case Law

[24] The defence refers to *E.S Plastics*[8] where a worker's hand was crushed and burnt when he inadvertently activated a hot stamping machine. The Court found that the defendant company failed to identify obvious and potential hazards but was not deliberately reckless. The Court held that the offending fell within the low to middle section of the middle culpability band. A starting point of $300,000 was used (using the original *Stumpmaster* bands).

[25] The defence contrasts *De Geest Construction*, submitting that the defendant in this case performed regular maintenance on the ramp with no failure to monitor compliance with legal standards. The defence submits that the defendant's culpability is less than in *De Geest Construction.* It follows from my comments below that I accept that submission.

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8 *Worksafe New Zealand v E.S Plastics* [2018] NZDC 19341.

Aggravating and mitigating factors

[26] The defence cites *Stumpmaster* where the High Court held that discounts of up to 30% are only to be expected where all mitigating factors[9] are shown or one or more to a high degree.[10] The defence submits that a 30% discount is appropriate before full credit for guilty plea.

[27] The defence submits that an emotional harm payment of $40,000 is appropriate, together with a consequential loss payment of $14,996.46. a fine of $31,500 and costs.

Analysis

Reparation

[28] The updated medical information from Dr Manning provides an objective picture of the victim's situation. The injury is serious. However, it is stated that the victim should be able to live a "relatively normal life" notwithstanding the accident. My assessment is that the injury is less serious than that in *Carter Holt Harvey* where the long-term effects were significant and permanent. I determine that emotional harm reparation of $40,000 is appropriate.

[29] Regarding the prosecutor's submission that the victim is entitled to the difference between the ACC reimbursement rate and the IRD rate, I agree with the defence submission that the prosecutor has not shown that the victim suffered loss. If the victim showed actual operating expenses of his vehicle during the relevant trips to seek medical care, then top up payments could be made if there was a shortfall. However, this is not the case and I find that no loss has been established in terms of ss 32(1)(c) and (5) of the Sentencing Act 2002. I therefore order an amount for consequential losses of $14,996.46.

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9 Remorse, co-operation, efforts made to address the underlying cause, reparation and previous good record.

10 *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020 at [67].

Fine

[30] Mr Ashton accepts that on occasion drivers would go under the ramp, but not while it was being shifted. The prosecution included an excerpt from the "*Guidelines for Safe Sheep Handling 2014*" which states that transport staff may not be as familiar with the risks, so they need to be warned about safety procedure. The victim was not warned in this case. The guidelines also state that ramps need to be fitted with a ratchet mechanism, it was not until after this accident that Worksafe issued a bulletin detailing that ramps need an automatic brake system. It appears that there was a low to moderate departure from the prevailing standards. There was no fault in the winch or the ramp as such. The main departure was that the driver was not warned or given a safety briefing.

[31] The defendant's farm is accredited by AsureQuality which involves an annual audit of the farms operation, including the loading ramp. The fact that the farm is accredited and that the ramp was not picked up in the audit reduces the defendant's culpability. Further, the ramp had never previously disengaged and fallen. The defendant never envisaged the accident happening.

[32] In relation to the factors set out in s 151(d) and (e) of the Act, Mr Ashton has no record of pervious health and safety incidents. There was a risk for potential loss of life and serious injury did result. I refer to *Sealed Air*, where the victim, a delivery driver, was not prevented from being in an area where forklifts were operating. In *De Geest Construction* the hazard was obvious and showed a failure to monitor equipment. I assess the defendant's culpability as being less than those two cases. In *E.S Plastics,* the hazards were obvious, but not deliberately reckless. The defendant's culpability was at the low to medium range of the medium band. I assess the defendant as less culpable than in that case.

[33] On this analysis, I determine that a starting point of $60,000 is appropriate.

Aggravating and mitigating factors

[34] There are no aggravating factors.

[35] Mr Ashton has an unblemished safety record. He has no previous convictions and appears to be an outstanding individual and member of the community. Attached to his affidavit are references attesting to his high standard of workplace safety. Mr Ashton was willing to attend a restorative justice meeting, however the victim declined on the basis that it was not necessary. After the incident, Mr Ashton visited the victim in hospital and offered financial support to help with groceries and accommodation while the victim and his family was in Dunedin. He co-operated fully with the investigation.

[36] Following the accident, Mr Ashton scrapped the ramp and purchased a new one for around $6,000. He is now proactive about engaging with drivers when they arrive, discussing the hazards associated with the stock ramp, despite their often-incredulous attitudes. He has designed and made signs warning drivers of the suspended load hazard.

[37] It is difficult to imagine greater contrition and pro-active remedial work. The factors of remorse, co-operation, efforts to address the underlying cause, reparation and previous good record, are present to such a degree that the highest discount of 30% discount is warranted.[11]

[38] It is accepted that 25% guilty plea discount is appropriate. The combined discounts come to 55% which, from the starting point of $60,000, makes for a fine of $27,000.

Conclusion

[39] I make the following orders:

(a) a fine of $27,000;

(b) $40,000 for emotional harm; and

(c) $14,996.46 for consequential loss.

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11 *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020 at [67].

(d) The parties agree that the defendant should pay $1,447.49 for the prosecutor's costs. There will be an order accordingly.

M A Crosbie
District Court Judge