ORDER EXISTS PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF VICTIM, PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011. SEE PARAGRAPH [2] HEREIN, AND SEE - http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE DISTRICT COURT
AT INVERCARGILL

I TE KŌTI-Ā-ROHE
KI WAIHŌPAI

CRI-2017-025-002151
[2019] NZDC 18787

WORKSAFE NEW ZEALAND
Prosecutor

v

SOUTHLAND DISABILITY ENTERPRISES LIMITED
Defendant

Date of Ruling: 17 September 2019

Appearances: N M Self for the Prosecutor
E L Keeble for the Defendant

Judgment: 17 September 2019

RULING OF JUDGE B A FARNAN [ON S 106 APPLICATION]

Charge

[1] The defendant company, Southland Disability Enterprises Limited, faces sentencing in respect of a charge of failing to take all practicable steps as a PCBU to ensure the safety of its workers, including *[the victim]*, while at work.

[2] I acknowledge the presence of *[the victim]* today and appreciate that this whole incident has been very difficult for him and he will continue to suffer the consequences. I have made an order already for final name suppression for [*the victim*].

[3] The defendant company failed to ensure that *[the victim]* was not exposed to the risk of serious injury while operating a baler machine, contrary to s 36(1)(a) and s 48(1) and (2)(c) Health and Safety at Work Act 2015.

[4] The maximum penalty for this offence is a fine not exceeding $1.5 million, so it is clear that Parliament considers such offending to be serious.

[5] The defendant company pleaded guilty some time ago, but sentencing has been delayed as there were some disputed facts. However, the Court itself did not need to determine the dispute; rather, that was resolved after the hearing as between counsel, and I am grateful to them for their efforts.

[6] I have read counsel's helpful submissions and have heard from each of them orally today.

Current application – s 106

[7] The defendant seeks to be discharged without conviction.

[8] That is opposed by the prosecution who, however, accept that the defendant company, which is registered as a charity, has limited means.

Background

[9] The defendant company is a not-for-profit business. The company's operation is governed by a board of directors, who are unpaid, and each of whom are also directors of the company. I acknowledge representatives from the company who have attended Court today.

[10] The Southland Disability Enterprises Charitable Trust is a registered charitable trust and the sole shareholder of the company. The trustees of the trust are also unpaid.

[11] The company employs approximately 110 workers. It has a core workforce of around 82 staff members who are referred to as 'disabled workers', being intellectually or physically disabled from a moderate to a high degree. The other workers, who are referred to as 'mainstream workers', are either supervisors, process workers, and/or drivers, and perform functions that the disabled workers cannot undertake. *[The victim]* in this case was one of the mainstream workers.

[12] The purpose of the defendant company is to enrich the lives of people with disabilities, by providing meaningful full-time employment, and personal development opportunities through supporting a successful business. I understand the company has been undertaking such work for approximately eight years. It is the only organisation in the Southland region, based in Invercargill, which employs large numbers of disabled workers. There is almost no prospect of the company's disabled workers, I accept, working for anyone other than the defendant company on a fully utilised basis.

[13] The defendant company's core business is recycling, and the company relies on a contract with the Ministry of Social Development, and its contract with WasteNet.

[14] The contract with WasteNet is currently under review. There has been public interest and publicity around this review, as the local authorities in Southland had, in principle, recently granted the WasteNet contract to another mainstream entity, before granting this defendant company a 12-month reprieve.

Guideline approach

[15] The approach in sentencing in this case under the Health and Safety at Work legislation is summarised in the leading case of *Stumpmaster*, a decision of the full

Court of the High Court.[1] That case sets out that the approach to sentencing should include the following steps:[2]

> Step 1 - assess the amount of reparation;
>
> Step 2 - fix the fine by reference first to the guideline bands and then have regard to the aggravating and mitigating factors;
>
> Step 3 - determine whether further orders under s 15(2) and 15(8) of the Act are required.
>
> Step 4 – this requires the Court to make an overall assessment of the proportionality and appropriateness of the total sanctions imposed by Steps 1 to 3, including considering the defendant company's financial position which, it would be fair to say in this case, is dire or has no spare or limited funds.

[16] The *Stumpmaster* decision confirmed guideline sentencing bands for a fine, which would depend on a culpability assessment of a defendant.

[17] The bands set out in the *Stumpmaster* decision considered a culpability assessment and then correlate that to a relevant fine band. For example: for low culpability the Court has determined it should result in a fine up to $250,000; for medium culpability, the fine would range between $250,000 to $600,000; for high culpability, $600,000 to $1 million; and for very high culpability, $1 million plus.

[18] In this case, the prosecution, while acknowledging that a fine is not able to be paid by the defendant company, have nevertheless still sought from this Court my assessment as to the culpability of this defendant company, and I give my assessment during the course of my decision.

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1 *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.

2 At [35].

Allegations of fact

[19] The incident which injured *[the victim]* on 10 February 2017 happened at the defendant's recycling plant, at 28 Ettrick Street, Invercargill.

[20] The plant has a material recovery facility, referred to as an MRF, where household recycling waste products are sorted and baled. Four to five tonne of recycling is processed through the MRF every hour. The defendant company owns a recycling baler machine which is part of the MRF; it was installed in 2011. Once aluminium or plastic items are separated to be baled, a small conveyor carries the aluminium or plastic to a hopper. The hopper has a separate chute for plastic bottles which has a perforator at the base. Plastic bottles are dropped into the hopper to be perforated. The perforator pierces the plastic bottles so that air is released and they are compactible. The pierced bottles then drop into the baler to be formed into bales.

[21] In terms of the incident that led to the offending in 2017, *[the victim]* started work that day at about 8.10 am and was instructed to drive a forklift to move product bins and bales for distribution. At around 12.00 pm, a (non-mainstream) baler operator asked *[the victim]* for help as the baler was not working correctly.

[22] I have been assisted in terms of what happened on this particular day by various sets of photographs which have enabled me to have an understanding of this whole process.

[23] *[The victim]* realised that a piece of product was jammed in the hopper in which the perforator is located, and product was beginning to overflow. *[The victim]* followed the defendant's lockout procedure for the baler and filled out the lockout register form. He then climbed onto the baler, unable to reach some of the lower bottles which were causing the blockage. He entered the chute of the hopper, at the bottom of which is the perforator, so he could reach the trapped bottles. The top of the chute was 3,050 millimetres from the ground.

[24] While standing in the hopper, *[the victim]* felt something revolve and trap his foot. His foot became trapped in the perforator which was at the bottom of the hopper. *[The victim]* was injured, as a result of contact with the blades on the perforator, when he pulled his foot out and exited the hopper.

[25] At around 12.40 pm, first aid was administered and emergency services were called.

Victim impact

[26] *[The victim]* was taken to Southland Hospital for treatment. He suffered multiple injuries to his lower right leg, including a right compound fracture to his heel bone, talus and tibia fractures, ankle and leg fractures, and segmental nerve damage of his spine. *[The victim]*'s wound had to be cleaned, and damaged flesh removed, on multiple occasions. He had multiple screws and plates inserted in his lower leg.

[27] I have read his victim impact statement and it is clear that he is still suffering the consequences of this incident today. At one stage, there was a concern that he might lose part of his leg. He has had other challenges in terms of moving forward and I acknowledge that, as do the defendant company through their counsel, Ms Keeble.

[28] As a result of the failure to adequately guard the machine, the defendant company exposed *[the victim]* to a risk of serious injury, arising from exposure to the drawing in and entrapment hazard created by the nip point between the cutters of the perforator inside the hopper of the baler.

[29] Exposure to entrapment hazards on machinery can result in serious injury, including severe crushing injuries and amputation. I have already referred to that as being a possibility for *[the victim]* and that has certainly been an acknowledged consequence for him.

Industry standards and guidelines

[30] The risks arising from unguarded machinery are well known in the manufacturing industry and widely documented in guidance material.

[31] The introduction to WorkSafe's *Best Practice Guidelines for the Safe Use of Machinery* refers to common injuries caused by machinery, including crushing and amputation.[3]

[32] The defendant company's conduct departed from industry standards and guidelines. The Safety of Machinery Standard series *AS/NZS-4024* provides the current state of knowledge for the safeguarding of machinery. It includes how to conduct a risk assessment of a machine and the process for selection of fixed, moveable, and interlocked guards.

[33] WorkSafe's *Best Practice Guidelines for the Safe Use of Machinery* from May 2014 summarises and sets out guidance, including how to conduct a risk assessment, choosing the right type of guarding, and safe systems of work, and recommends choosing a physical interlocked guard when access to machinery is needed during normal operations. If there is no practical way to guard a hazard, a safe system of work must be put in place.

[34] I note advice given to me that the defendant company, immediately after this incident, took steps to ensure that a guard was in place.

[35] WorkSafe's guide, *Introduction to Health and Safety at Work Act 2015*, which was published in March of 2016, provides an explanation of key requirements of the Health and Safety at Work Act 2015. It notes the requirements that PCBUs such as this defendant must, so far as reasonably practical, provide and maintain safety systems of work.

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[3] Worksafe New Zealand "Safe Use of Machinery" (May 2014) <https://worksafe.govt.nz/topic-and-industry/manufacturing/safe-use-of-machinery/> at 7.

[36] The manufacturer's *Operation and Maintenance Manual*, dated April 2011, gives further guidance, as does the Department of Labour publication, *New Zealand Guidelines for Refuse Collection, Processing and Disposal Equipment - Stationary Compactors: Safety Requirements (1999)*.

Defendant's procedures prior to the incident

[37] In terms of this incident, Worksafe was notified by the defendant company on the day and began an investigation.

[38] The defendant had a written Safe Operating Procedure ("SOP") entitled "Operation Procedures Balers and Conveyors" from March 2104. It included abnormal operation procedures which apply if materials were blocking the hopper. This procedure was to be conducted by trained and authorised personnel under supervision.

[39] Workers were instructed as follows:

> a) Please do not remove the jammed material from the baler door. As material could drop onto you.
>
> b) Stop the baler and conveyors immediately and apply lockout procedure to isolate power.
>
> c) Climb on to the conveyor and always ensure 3 point contacts.
>
> d) While removing the jammed material, please ensure you are standing on a secured position. Do not stand on jammed material as it could drop into the baler chamber uncontrolled.

[40] The Operation Safety Check section of the SOP stated, "do not climb on conveyor to remove jammed material without applying proper lockout procedure." The potential hazards the SOP identified included:

> (a) Serious harm accident like losing limb or death if exposing limb on baler chamber or loading area
>
> (b) Punctured or open wound cut from sharp objects.

[41] Despite the written SOP, all workers were also instructed not to climb on the baler as part of their induction. Mainstream workers such as *[the victim]* had access to the SOPs and so were possibly aware of the abnormal operation procedures.

[42] The defendant also had an SOP called "Work at Heights System" which stated:

> It is not envisaged that any employee of SdE will work at heights over 3 meters, but as with any potential hazard, we must ensure that we have systems in place before there is a requirement for them...

[43] The defendant has identified the risk of standing on jammed material generally. The defendant advised the following steps were implemented in respect of workplace hazards:

a) Prepared its Health and Safety and Environment Manual and SOPs including the Baler and Conveyancer's SOP and the Working at Height SOP;

b) Identified the Mechanical Recycling Facilities' machinery as a general hazard in its Health, Safety and Environment Manual;

c) Provided for reviews of the SOPs/manual/hazards;

d) Reviews of the SOPs/manual/hazards were conducted;

e) Held daily toolbox meetings with employees, covering hazards including those associated with the baler;

f) Held weekly meetings with employees to address hazards relating to the machinery, called "Take 5";

g) Held monthly health and safety meetings attended by mainstream and non-mainstream worker representatives from each department.

h) Trained all workers to use machinery, including the baler where relevant, and signed them off when competent. Further, the company reassessed their competence each year;

i) Workers were verbally instructed not to climb onto the baler and it formed part of their induction; this was a standing instruction and repeated often;

j) Workers were instructed in the baler SOP to escalate anything unusual, including blockages of the hopper, to their supervisor;

k) Engaged an outside engineer to carry out cleaning and maintenance parts of machinery that were dangerous e.g. rollers or machinery located at height, including the perforator;

l) Engaged an external auditor with competence in AS/NZS 4204 to audit machinery and SOPs on an annual basis.

m) Reviewed the auditor's reports by the Board with controls implemented;

n) The installation of the new baling machinery was supervised by the manufacturer and installed by an independent recycling plant expert.

[44] The defendant also engaged a health and safety auditor, Mr Rowly Brown. Mr Brown is a guarding expert and he undertook annual health and safety audits of the recycling plant for 13 consecutive years.

[45] When the MRF machine was bought by the defendant, the annual external audit was to cover this machine as well. The last external audit prior to the incident was in September 2015. The hopper of the baler was unguarded, that meant that the nip point between the cutters of the perforator tool inside the baler was accessible, and again I have been given the advantage of seeing the relevant photographs.

[46] A further appropriate control measure to manage the drawing in and entrapment risk to workers, was guarding the hopper to prevent access by workers to the danger area during operation, cleaning, and maintenance. The SOP provided instruction for workers for when materials were blocking the hopper under abnormal operations procedure, as has already been referred to. The SOP instructed workers to climb onto the conveyor. This is at a height adjacent to the unguarded hopper, and is not in accordance with the manufacturer's operation and maintenance manual.

[47] On the morning of the incident, a toolbox meeting was held, and the topic of the day was unblocking machines. The hazards identified at the meeting were: not locking out machines, and product falling down. The controls discussed were: using the lockout procedure, wearing PPE, and communicating with others.

Victim's training

[48] *[The victim]* in terms of training was inducted on 24 August 2015, shortly after beginning employment with the defendant company. He undertook basic training on the baler on 23 November 2015 and completed his training on 27 November 2015.

[49] On 9 December 2015 *[the victim]* was deemed competent to work alone on the baler. This was reviewed the following year, on 10 August 2016.

[50] *[The victim]* stated that he was fully trained in the operation of the conveyor and baler, however he was not able to say how a blockage would normally be cleared. He stated that he had not been instructed or taught how to clear a blockage. He also said that he thought the action he took was the quickest way for him to clear the blockage on this particular occasion.

[51] The type of blockage to the perforator encountered by *[the victim]* had never happened before. The hopper was known to become jammed from time to time. However *[the victim]* did not escalate the issue to his supervisor, as verbally instructed and referred to in the SOP. *[The victim]* had climbed onto the baler to maintain and clean it before, using an air hose, but this only required him to climb half way up the

machine. He had never gone inside the machine's hopper to clear a blockage before the incident.

[52] *[The victim]* had worked for a similar company, being a recycling plant in Ashburton, as a forklift operator before working for the defendant. He had not worked with balers before working for the defendant company.

Failure to ensure health and safety

[53] In terms of failure to ensure health and safety, as a PCBU the defendant has a duty to ensure, so far as reasonably practicable, the health and safety of workers who work for it while workers are 'at work' for that business or undertaking, pursuant to s 36(1)(a) Health and Safety at Work Act 2015.

[54] It was reasonably practicable for the defendant to have –

(a) ensured there was an effective system in place to implement and monitor appropriate controls for the risk the nip point presented; and

(b) ensured workers were isolated from the nip point by adequately guarding the hopper of the baler machine.

(i) The machine should have been guarded in accordance with the recommendations –

(ii) A fixed guard or, if access was required, an interlocking guard with trapped key interlock should have been in place.

(c) Also, there should have been effective processes and procedures in place for clearing blockages on the baler machine:

(i) The SOP should have set out a procedure for clearing blockages which was in accordance with the manufacturer's manual, and ensured workers were safe when clearing a blockage.

(ii) The SOP should not have instructed workers to climb onto the baler conveyor.

(d) Also, there should have been instructions ensuring workers are adequately trained in how to clear blockages on the baler machine.

Previous history

[55] The defendant has not previously appeared before the Court on health and safety matters.

Restorative justice

[56] While it was open to *[the victim]*, I understand he did not wish to engage in the restorative justice process. However, that is not intended as a criticism of him; that is entirely his right.

Prosecution submissions

[57] It is the prosecution case, in respect of the charge which the defendant company faces, that no fine should be ordered due to the defendant's financial position. However, as I have mentioned earlier, the prosecutor seeks a ruling on the defendant's culpability.

[58] The prosecution submits that a further amount of reparation is appropriate and a sum in the vicinity of $20,000 to $25,000 should be ordered, along with an amount of consequential loss of approximately $3000 which represents the ACC top-up and medical bills that have put *[the victim]* out of pocket.

[59] The prosecution further submits, when submitting that no fines should be imposed, that the Court could consider imposing training and project orders in lieu of a fine.

[60] The prosecution also submits that the defendant company should pay costs in the sum of slightly less than $11,000 and that the application to be discharged without conviction should be refused.

Defence submissions

[61] The defence submits that a discharge without conviction should be granted, and that this is appropriate as the direct and indirect consequences of a conviction will be out of all proportion to the gravity of the offending.

[62] The defendant company accepts that a further sum of reparation is justified, but that such sum should be in the amount of $10,000.

[63] The defendant, Ms Keeble submits, was unaware of and had no knowledge of the defendant's time off work with his new job. This is a matter that has now been brought to the company's attention. The defendant accepts the consequential loss payment is appropriate and should be awarded.

[64] Defence counsel confirms that the defendant company has no ability to pay the prosecutor's costs, and that alternative sentencing options referred to by the prosecution, of training and project orders, are not appropriate or necessary.

[65] If a discharge without conviction is declined, the defence submits the proper sentence is a conviction and discharge.

My assessment

Step 1 – assess reparation

[66] In terms of reparation, which is the first step in the *Stumpmaster* process, I have formed a view that the defence have distinguished the prosecution cases in terms of reparation, and that an additional $10,000 plus consequential loss of $3,648.87 is appropriate, and that award will be made as part of this decision.

Step 2 – assess culpability

[67] In terms of Step 2, which is the culpability assessment, the prosecutor submits that the offending by this defendant company falls in a medium culpability band, which would attract a starting point in the vicinity of $400,000 to $425,000.

[68] The prosecution refers to various cases to support their assessment of culpability. This figure which the prosecution submits as being appropriate is based on a consideration of various cases, including *Worksafe New Zealand v Ron Frew Family Partnership Ltd* which is less serious than the case that we have here today as the risk itself was presented to more workers.[4]

[69] The prosecution accepts, however, that in this case the offending was less serious than the *WorkSafe New Zealand v Allflex Packaging Ltd* case.[5] While *Allflex Packaging* also involved a failure to adequately guard machinery, that defendant company had not undertaken a risk assessment and had no written SOPs for the machine operation, which is not the case here. In the present case, while the SOPs and risk assessment were not effective, they had at least, the prosecution concedes, been completed.

[70] Finally in terms of culpability, the prosecution submits that this case is analogous to both the *WorkSafe New Zealand v Eurocell Wood Products*[6] and *Locker Group New Zealand*[7] cases, in that both cases involved inadequate guarding, but also both companies took steps to assess the risks and hazards in their workplace by contracting health and safety auditors.

[71] The defence, however, submits the culpability for this defendant company falls within the low range of the low band. In support of this, it is submitted serious injury could not have been expected; the company complied with the WorkSafe guidance by engaging a competent auditor; the hazard was not obvious; direct instructions were disobeyed; and a guard was installed within an hour of the incident.

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[4] *Worksafe New Zealand v Ron Frew Family Partnership Ltd* [2018] NZDC 20330.
[5] *WorkSafe New Zealand v Allflex Packaging* DC Manukau CRI-2017-092-14520, 15 October 2018,
[6] *WorkSafe New Zealand v Eurocell Wood Products* [2018] NZDC 21568.
[7] *Worksafe New Zealand v Locker Group (NZ) Limited* [2018] NZDC 26802.

[72] As Ms Keeble has said to me today, the culpability, if it does exist in this case, was much more of a technical nature and was really a disconnect between the SOPs and what, in fact, was happening in a positive way for this defendant company.

[73] In my view, the following factors are helpful to summarise the defendant's culpability:

a) All workers were trained to use the machinery, including the baler where relevant; workers were signed off when competent; this competency test was reassessed each year.

b) The defendant trained employees not to work at heights over three metres.

c) Employees were trained to clear blockages in the baler with a stick while on the ground.

d) Employees were verbally instructed not to climb on the baler. This instruction formed part of their induction and was often repeated, although I accept that that may be somewhat of a two-edged sword because that would mean the company was aware that there was a hazard in existence, or might have been aware of such a potential hazard.

e) Employees were instructed to escalate anything unusual, including blockages.

f) An annual health and safety audit was undertaken by a professional with competence in the relevant guarding standard; and

g) In six years of operation there had not been a similar blockage as was encountered on the day of this incident.

[74] Additionally, I note that the prosecution submits that the second failing in the charging document that the defendant pleaded to, of ensuring workers were isolated

from the nip point by adequate guarding, imports that the baler should have been guarded in accordance with the recommendations that a fixed or removable guarding mechanism be installed.

[75] However, *[the victim]*, it would appear, directly disobeyed verbal instructions and company policy and training by climbing into the baler.

[76] The submissions of the defendant company make it clear to me that many steps were taken in regard to overall health and safety at the defendant company. The failings, I consider, stem from the failure of perhaps what has been referred to in some cases as, 'imagination'. I refer in particular to the 2018 decision *WorkSafe New Zealand v North Island Mussels,*[8] in which the defendant did not see foresee any workers directly disobeying policy and training, and subsequently putting themselves in a position where this incident could occur.

[77] This position is contrasted with one of wilful negligence where a defendant may have foreseen the incident and done nothing, or where the defendant's general attitude to health and safety was so poor that they would have been unaware of risks.

[78] I do not find that the current case falls close to either. In saying that, the defendant must be sentenced on the basis of the charge and the failings to which they have pleaded. This is, after all, a strict liability offence.

[79] In my opinion, it appears in this case, as it is frequently beginning to happen in health and safety prosecutions, that some of the failings which have been pleaded to do not appear to directly correspond to the facts. That, however, is not a criticism of either counsel in this case. The facts are what the facts are, and I have formed a very clear view that it was appropriate for the defendant company to admit liability as they have.

[80] In this case, however, I do note that on one reading of the facts and the submissions of the defendant it appears that adequate training was carried out; but

[8] *WorkSafe New Zealand v North Island Mussels* [2018] NZDC 20269, at [21]-[22].

there was the issue of whether or not that was carried through by the individual workers.

[81] Inasmuch as that the defence submissions are perhaps irreconcilable with the pleaded failings, I find that the failings are at the lower end of the scale. This would invariably have a bearing on my assessment of culpability and, as I have said, I agree it was correct for the defendant to plead guilty.

[82] While the trainings which were undertaken by the defendant company were certainly extensive, at the end of the day they did not avoid this accident and incident occurring. That being said, I also acknowledge that the defendant's warnings not to stand on the baler could, on the one hand, be taken as an acceptance that the machine was dangerous and that there was potential for danger.

[83] However, when assessing the facts as a whole, it becomes apparent how unlikely this particular accident was, and how protocol needed to be deliberately breached in order for the accident to actually happen - a matter that has been addressed by Ms Keeble to me today.

[84] The baler itself was not a place to which a worker could have accidental intentional access. In fact, there were clear directions that the disabled workers were not to go anywhere near the baler in terms of attempting to fix any issue. Nor do I consider that the danger itself was obvious, which is shown by the absence of a guard being missed on the frequent audits that were undertaken by the defendant company's very experienced expert.

[85] The prosecution cases referred to regarding culpability, in my opinion can be distinguished from this case because of the hidden nature of the hazard, and the fact that deliberate action and breaching of training policy and procedures was required in order for the incident to occur.

[86] I consider the current case to analogous to a decision of the *Department of Labour v Professional Harvesting Systems New Zealand*, as submitted by the defendant, because of this deliberate action.[9]

[87] In terms of the relevant factors that I need to consider:

a) *Identification of the operative acts or omissions*, with installation of the guard as the main omission that occurred prior to and leading up to this incident.

b) In terms of the *risk of harm*, I consider that in this case the most serious risk of harm or injury possibly occurred, but I consider it was unlikely to be foreseen due to the detailed procedures put in place by the defendant company prior to the incident.

c) In terms of *departure from industry standards*, I consider that there was a low or minimal departure from industry standards, as the guidelines stated the defendant engage a professional to conduct audits and that occurred on an annual basis. Also, there were experts engaged when the machinery was installed in the first place.

[88] I consider, taking the required factors into account, that the defendant's culpability falls at a low to moderate range of the low culpability band of *Stumpmaster* which would provide for a fine in the $75,000 to $150,000 range.

[89] However, I do not impose a fine as it is clear that the defendant company has no ability to pay such or any fine.

Defence application – s 106

[90] In respect of the defence application for a discharge without conviction, I have not been able to locate a case where a discharge without conviction has been granted.

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[9] *Department of Labour v Professional Harvesting Systems* DC Tauranga CRI-2009-070-003786, 21 September 2009.

[91] However, there is one case in which a discharge without conviction was discussed and that is *Maritime New Zealand v Wackrow*.[10] That was a prosecution under s 45 of the Act in which the defendant - being a worker and failing to take reasonable care that his or her acts or omissions not adversely affect the health and safety of other persons - committed an offence.

[92] In that case, the defendant's failing was, in essence, to ensure people were clear from the area to which a large piece of machinery was being lowered from a crane when a boat was being unloaded. The loading strop snapped, and a digger fell into an area where people were nearby. No one was injured.

[93] The assessment of the gravity and consequences is of little importance to some extent, as each case will turn on its facts. However, I do note that in assessing the particular factors and the policy in general in terms of discharges, His Honour Judge Davis stated:[11]

> When one sits back and looks at these factors, I am of the view that the balancing exercise falls firmly in favour of a conviction being entered in this case. The purpose of the legislation, as I have reiterated, is to ensure all reasonable steps are taken to not adversely affect the health and safety of persons. That said, the deterrent factor, in my view, is one of the considerations the Court must keep in mind.

[94] That case, however, can be contrasted with this case, because it involved a worker being charged, whereas in this case it is the company itself that is charged. Also, in this case it was clear that all reasonable steps (to most extent) had been undertaken by this defendant company to ensure the health and safety of its workers. It is perhaps because of the nature of the workforce itself that such steps were taken leading up to this incident to ensure the safety of its workers, particularly its disabled workers. It is clear that this company had, in my view, an extra burden to be extra vigilant to ensure the health and safety of all of its workers, and that is not just the disabled workers. The company took that extremely seriously.

[95] The prosecution have addressed me today in respect of the discharge application. Ms Self submits that there is no evidential basis for a discharge to be

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[10] *Maritime New Zealand v Wackrow* [2019] NZDC 1943.
[11] At [46].

granted; that the gravity of the offending is serious, due to the purposes and principles of sentencing and (she submits) in terms of the possible foreseeability.

[96] As I have determined in this decision, with respect to Ms Self's position on behalf of the prosecution, I do not come to the same conclusion regarding the gravity of the offending.

[97] Ms Self goes on to submit that there is a heavy reliance upon the likelihood of losing the WasteNet contract, if convicted. She refers to the terminology used in the affidavit before me from the general manager, Mr McMurdo, and refers to the reference to a conviction might be a key factor in the loss of the contract, but that the wording "likely" is not referred to.

[98] Ms Self has also discussed with the Court whether a conviction would have an impact on grants and donations, as claimed by the defendant. She submits that there is no firm evidence to support that position. Further, Ms Self submits there is a lack of specificity in terms of the application, and that a conviction would not be disproportionate when one considers all of the factors in this case, and that would take into account the impact that there has been for *[the victim]* as a result of the defendant company's offending.

[99] Ms Self has referred to other types of applications where a discharge is sought, where issues of employment and travel are involved and where it would be normal to receive a copy of a defendant's employment contract and information regarding travel restrictions. She submits the equivalent is not before the Court in respect of this application on behalf of the defendant.

[100] Ms Keeble takes a different view and has submitted to the Court that if the discharge is not granted, then the consequences for the defendant company would be dire, not only for the company itself but more particularly for the employees, a large proportion of whom, it is acknowledged, are disabled.

[101] Ms Keeble refers specifically to the affidavits from the accountant and the general manager of the defendant company. She submits that there is grave concern regarding the WasteNet contract not being granted, if there is a conviction.

[102] Ms Keeble has also referred me today to a letter from the Invercargill City Council Chief Executive, in which there is a discussion regarding a peer review being undertaken in respect of WorkSafe matters for this defendant. She refers to a lot of rumour and innuendo that has been circulating since this incident, and submits that if one puts this incident to one side, there has never been any concern about the culture of health and safety for this company; there have been no prior incidents; and in fact, the company had always been extremely vigilant to meet all of their obligations under the Act.

[103] Ms Keeble submits that the defendant pleaded guilty relatively early, and that the guilty plea was necessary because there was the acknowledged disconnect between the baler SOP saying one thing, and the training and induction another, but that - until this incident - had not caused any problem. She describes that situation as being an irregularity in the SOP of a minor technical nature, which, if there had not been the accident and the issues and the injuries to *[the victim]*, might have resulted in the company being served an improvement notice, with no conviction.

[104] Further, Ms Keeble submits that the affidavit sets out the consequences and that is confirmed by the company's solicitor. She says that it is difficult to get evidence for such applications which will categorically state what the consequences will be. (That terminology is mine, not Ms Keeble's, but that is the essence of what she is saying to me today.)

[105] Ms Keeble also expressed some concerns regarding the grants and donations and that it would be problematic if they were lost. She submits that if you weigh up a choice that a donor had to make - between a company that had an unblemished work and safety history, compared with the defendant company who now has one blemish on their record - the donor may well opt for donating to the company with the unblemished record.

[106] I note that submission is perhaps somewhat analogous with a similar submission that is often made to the court on behalf of individuals seeking a discharge without conviction, when the Court is told that if an employer looks at two potential apprentice plumbers - for example, where one has a conviction and the other does not - that it is fairly clear who would get the job, particularly if one was facing the prospect of having something like a burglary conviction where that might have relevance in terms of properties that a prospective employee was being sent to. That is certainly something I can, in my view, take into account.

[107] The defence also rely on the often-cited case of *Iosefa*, where the Court concluded that there does not have to be absolute evidence of a real consequence or an absolute consequence occurring, but that the Court can consider if there was a real and appreciable risk that a consequence can flow, then that can be the basis for a discharge.[12]

[108] I have had, it would be fair to say, some angst over what decision I would make in relation to this. I have dealt with a number of health and safety prosecutions, and one of my cases was, in fact, one of the cases that was the subject of the *Stumpmaster* appeal, so I am very aware of the consequences for workers, and in particular I am aware of the consequences for employees who are injured as a result of deliberate, reckless, or other actions by their employers, sometimes to such an extent that the employer deliberately chooses not to follow their own expert advice regarding guarding, which happened in my case which was one of the *Stumpmaster* cases considered on appeal.

[109] However, in this case, I see the situation as being significantly different. This defendant company has worked for many years with a mixed workforce. It is very clear that they have taken their health and safety responsibilities extremely seriously. They have gone out of their way to ensure that their disabled workers have been safe at all times when they went to work. Perhaps where there has been a failing, is a presumption that their more able workforce would not take certain actions.

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[12] *Iosefa v Police* HC Christchurch CIV-2005-409-64, 21 April 2005.

Conclusion

[110] By a very fine margin, I have reached the conclusion that the consequences of a conviction, having assessed the culpability at the lower level, would be disproportionate to the gravity of the offending.

[111] In the circumstances, I am prepared to discharge the defendant company.

[112] However, I wish to make it very clear that this should not be seen as a precedent for future WorkSafe prosecutions. Ms Self has made a number of valid submissions to me in terms of the need for employers to be vigilant in terms of their health and safety requirements and obligations, and, as many of the cases I have read state clearly, cases need to be looked at on their individual merits.

[113] Therefore, the defendant company will be discharged without conviction. But that is on the basis that, within seven days of today's date, the additional reparation of $10,000, which I assess as being appropriate, is paid.

[114] Therefore, my conclusion now follows. Based on my analysis and my assessment of the defendant's culpability as being in the low to moderate range of the low culpability band in *Stumpmaster*, the defendant company is discharged without conviction. I find that the consequences which the defendant company had outlined would be out of all proportion to the gravity of the offending.

Penalty imposed

[115] As noted, the discharge is conditional on the defendant company paying a further $10,000 in reparation within seven days to *[the victim]*; and there is to be the additional consequential loss amount of $3,648.87 payable by the defendant to the victim, also within seven days.

[116] I have considered whether or not I would direct the company to be the subject of further orders. Even if I had not discharged the defendant without conviction, I had formed a view that those further orders were not necessary, due to my culpability assessment.

[117] I would also again wish to commend counsel for the way in which they have conducted this prosecution. Their submissions have been of great assistance to the Court.

[118] I also direct, pending release of my decision, that the summary of facts may, on request, be released to the media. I have referred to the summary of facts in detail today.

Costs

[119] The prosecution was seeking an amount of costs. In the circumstances, considering the financial position of the defendant company, while a contribution to costs are generally appropriate, in this case I do not make an order for costs due to the defendant's financial position.

ADDENDUM:

[120] I note for the record that during the oral delivery of this sentencing, the name of the victim was used in court. However, in view of the final suppression order made in relation to the name of the victim, I have instructed that the name be removed from this text.

B A Farnan
District Court Judge