IN THE DISTRICT COURT
AT HASTINGS

I TE KŌTI-Ā-ROHE
KI HERETAUNGA

CRI-2018-020-001871
[2019] NZDC 16662

WORKSAFE NEW ZEALAND
Prosecutor

v

NZCC LIMITED
Defendant

Hearing:	14 August 2019
Appearances:	C O'Brien for the Prosecutor J Krebs for the Defendant
Judgment:	14 August 2019

NOTES OF JUDGE B M MACKINTOSH ON SENTENCING

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[1] On 20 July 2017, Mrs Collier-Rapaea, an employee of NZCC, sustained a serious injury when her hand and fingers became trapped in the running nip-point between two rollers on a casing finishing/cleaning machine.

[2] The company's business is processing and supplying sausage casings internationally. The victim's role included operating the casing machine. The finishing/cleaning machine is used to revolve the animal intestines casings by feeding them through three rollers to squeeze the insides out. It is operated by two workers. One worker feeds casings into the first roller, and the other spreads them on the first roller by hand. The casings feed through two more rollers before being placed into a bin for further processing.

[3] On 20 July last year, the victim was spreading casings on the first roller, when her left hand and fingers became trapped between the in-running nip-point between the first and second rollers. Her hand was trapped there for about 20 minutes before the roller was cut from the machine to free her. She suffered a broken left wrist and degloving of the back of her hand requiring skin grafts. These wounds, unfortunately, became infected requiring further medical attention. She was diagnosed with post-traumatic stress disorder in the result.

[4] In sentencing, I have to bear in mind of course the purposes and principles of the Sentencing Act 2002, but also the provisions in the Health and Safety at Work Act 2015. The approach to sentencing is set out in *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020 and there are four steps that have been referred to.[1] So, the way it works, the first thing to do is:

(a) Assess the amount of reparation to be paid to the victim.

(b) Secondly, fix the fine by reference to the guideline bands and the aggravating and mitigating features.

(c) Determine if any further orders are necessary and then;

(d) Finally make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[5] As far as the reparation is concerned, the victim suffered a broken wrist and degloving of the back of her hand requiring skin grafts which became affected. There are long term effects:

(a) Suffering from forms of pain.

(b) Numbness.

(c) Pins and needles.

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

(d) Left shoulder would lock up.

(e) Difficulty with every day, what should be considered, relatively mundane tasks, doing simple things about the house.

(f) She suffers from flashbacks.

(g) She suffered significant emotional harm, problems sleeping.

[6] She did go back to work but was unable to remain doing that. She feels guilt and stress as if it is her fault that the family are now under some financial stress. In similar cases that I have been referred to by the prosecution, awards are made of in and around $20,000. The prosecution seeks, in this case, $30,000 due to the ongoing psychological trauma that has been suffered by her.

[7] To date, the company has made a $10,000 ex gratia payment. Unfortunately, and through no fault of it, it did not entirely work out completely as intended to the victim because ACC have factored that into their abatement process in terms of payments, but that certainly was not the intention with which that money was paid. Apart from that, also the company was compassionate towards her. They took steps when she was in hospital. They funded some counselling and enabled her to return to work on a reduced basis or in a different role, but as I say, she has not recently been at work as far as I am aware, which is as a result of her accident, but not because the company have been making it difficult for her. Simply, it is just one of the flow-on effects now and the consequences of what happened to her.

[8] It does seem to me that in around, ordinarily payments of $20,000 reparation would be within range. In my view, there have been some other stressors and strains for this victim over and above what appear to be in the general run of cases on these kinds of injuries, so I am prepared to make an additional order for $15,000. So, that means that $10,000 has been paid, plus another $15,000 effectively is a $25,000 order for reparation, although on the charging document it will reflect a further $15,000 to be paid. In addition, there is an ACC shortfall and there is no dispute that that is also to be paid by way of reparation, and that is an amount of $3721.23.

[9] In terms of assessment of the fine, basically what is required is a culpability assessment. The medium band referred to in *Stumpmaster* for this kind of offending results in starting points between $250,000 and up to $600,000, and basically what is required is identification of a number of aspects, firstly, in terms of identifying the operative acts or omissions, what was reasonably practicable in the circumstances.

[10] Well, the company here has pleaded guilty to breaching its duty to ensure as far as reasonably practicable, the safety of Mrs Collier-Rapaea while operating the finishing/cleaning machine. The charge maintains it was reasonably practicable for the company to:

(a) Engage a competent person to undertake a systematic risk assessment of this machine and recommend appropriate controls in accordance with the Australian and New Zealand standards.

(b) To develop and implement a system to ensure that the risks were identified and were addressed appropriately.

(c) To provide appropriate controls on the finishing/cleaning machines, such as increasing the distance between the nip-points on the rollers in accordance with the New Zealand standards.

[11] Looking at each of those in turn, as far as the engagement of a competent person to undertake a systematic risk assessment of the machine, and consequently identify the appropriate controls, in relation to that, there had been a similar incident in the company on 11 August 2015. The company engaged a person, Mr Bicknell, who was a safety specialist. He considered a number of remedial solutions, that the company was put on notice in relation to what was proposed. It seems that in hindsight, an engineer and somebody with the specific knowledge should have been engaged, but they were not. However, the company at that point was doing what it believed was the right thing to do. The company did not seem to be aware of the appropriate safety standards. I did ask counsel about that because it did seem to me that what was apparent was at that time in relation to the earlier incident, that WorkSafe, having been notified of the incident, did not draw the attention of the company to the appropriate Australian and New Zealand safety of machine standards. The company also was not aware of it and of course it is

not for WorkSafe to advise the companies necessarily of these issues and matters, but it does seem to me that when these kinds of investigations are being undertaken that it would be of assistance perhaps if there are some basic standards that are required and known about, it would be helpful if the companies could be given the benefit of that knowledge from the regulator.

[12] Subsequent to this incident, the company was made aware of that standard by WorkSafe. They did engage a competent person with knowledge and a suitable solution has now been reached, but unfortunately, it seemed, in the meantime of course, the accident happened in relation to this victim. The company, to be fair, does accept that it is ultimately responsible for what happens, but as I say, in many respects, the more information that is given to people, the better decisions that can be made in the round for everybody.

[13] The company does accept that despite identifying the risk, it did not actually have a system in place to ensure that that risk originally was addressed, and it did not have appropriate controls in place at the relevant times, such as increasing the distance between the nip-points on the rollers in accordance with the New Zealand standards.

[14] As far as the nature and seriousness of the risk of harm occurring as well as the realised risk is concerned, the risk of harm is from drawing in or trapping hazards between the two nip-points, could of course result in a more serious injury. The realised harm was significant. The degree of the departure from the prevailing standards in the relevant industry was significant. It seems that the knowledge was not necessarily readily available after the first incident, but of course everybody is well aware of it now.

[15] As far as the obviousness of the hazard is concerned, the hazard was obvious at the time due to the fact that they were aware of it, but simply had not addressed it. Really, when considering the issue of cost in fixing the problem, ultimately it was done and the relevant steps were taken, and cost does not seem to have been a problem in the round.

[16] The prosecution, essentially is saying that there are a number of really aggravating aspects to this. The risk arose because of the design. The second incident, the prosecutor seems to be saying, could well have been prevented if the appropriate steps had been taken. It submits that the defendant company was not familiar with the

relevant machinery standards, and I have already made some comment in relation to that. She says that clear industry guidance is available and should be sought. It seems to me, that in some respects it has been a learning curve for the company, so they need to know where to go and what to get in respect of the correct information in relation to their machinery. This, and they failed to comply with the best practice guidelines at the time, and certainly failing to engage a competent person to fix the machine and failed to have the relevant systems in place. None of that really is disputed because of course they have pleaded guilty to the charge.

[17] What the prosecutor is submitting in this case, and she has given me a number of cases helpfully, she submits that the culpability sits in the medium band but at the high end, and essentially gives a starting point of a fine in the vicinity of around about $560,000.

[18] The defence of course, do not agree with that, and whilst originally Mr Krebs alluded to perhaps this sitting in the low band of culpability, after some discussion, I think realistically, that could not be said to be the case. In terms of *Stumpmaster*, low culpability cases do involve a minor slip or in cases where it is unlikely that actually harm will have occurred, and I do not really think we can put this situation in that category.

[19] We are talking about a starting point somewhere in the medium band of culpability. Now, in terms of the cases that have been referred to by the prosecutor, there have been some written submissions filed, and for the prosecution, it has been suggested that cases such as *Department of Labour v Hanham & Philip Contractors Ltd* or it is known as "the Cookie Time case", *Stumpmaster* appealed by Niagara Sawmilling Company, *WorkSafe New Zealand v Carter Holt Harvey Ltd*, *Worksafe New Zealand v Alliance Group Limited*, and *Worksafe New Zealand v Furntech Plastics Ltd*, all point to a range in the middle range of culpability.[2] The prosecution, as I say, suggesting a starting point of somewhere in the round of $560,000.

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[2] *Department of Labour v Hanham & Philip Contractors Ltd (2008) 9 NZELC 93,085); Stumpmaster* [2018] NZHC 2020; *WorkSafe New Zealand v Carter Holt Harvey Ltd* [2018] NZDC 22605; *Worksafe New Zealand v Alliance Group Limited* [2018] NZDC 20916; and *Worksafe New Zealand v Furntech Plastics Ltd* [2018] NZDC 18150.

[20] As far as those cases are concerned, it seems to me that the *Carter Holt Harvey* situation is more serious than this case. In that case, an employer directed a departure from the standard operation to an operation which was inherently unsafe. In the *Alliance Group Limited* case, injury was considerably more significant than in this case and the employer had little training and had only been present for five days. In *Furntech Plastics*, similarly I agree with Mr Krebs' submission that that was more serious than the present case. In that case the risks had not even been identified or assessed, and the injured worker was required to complete the task despite inexperience.

[21] I accept that the focus in this case must be on the culpability of defendant when assessed against the steps that took first to identify the risk and then do whatever was reasonably possible to minimise it. It did have health and safety processes in place and it did have some training in place. It has sought advice from an independent advisor, Safe on Site, and it had commissioned an engineer to consider and identify any possible alternatives which would make the machine safe.

[22] In the circumstances, bearing in mind that the culpability is in the mid-range, I take the view that it sits slowly lower, to the lower than the higher, so I am taking a starting point of $350,000. There are discounts available, and it is agreed 20 percent for remorse, cooperation, safety record and reparation. That gets us back to $280,000. In addition, there is a further discount of 25 percent for plea. That gets us back to $210,000, so that is the fine imposed. There will be ancillary costs as agreed of $1601.49.

[23] In summary:

(a) There is a fine of $210,000.

(b) $15,000 to be paid for reparation.

(c) $3721.30 for the ACC shortfall.

(d) $1601.49 for legal costs.

[24] When I consider those matters overall, I am satisfied that they are overall proportionate and appropriate to the level of the offending. I understand that there is no issues in relation to hardship or inability to pay being raised.

B M Mackintosh
District Court Judge