IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2017-004-009147
[2019] NZDC 17745

WORKSAFE NEW ZEALAND
Prosecutor

v

GOLD HAWK COOPERATION LIMITED
Defendant

Hearing:	28 June 2019
Appearances:	C O'Brien for the Prosecutor B Sellars QC for the Defendant
Date of Decision:	28 June 2019

REASONS FOR DECISION OF JUDGE B A GIBSON

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[1] On 8 May 2019 the defendant pleaded guilty to a charge laid under the Health and Safety at Work Act 2006 in that failed to ensure, so far as is reasonably practicable, the health and safety of workers including Mr D Q J Xu, while that worker was at work exposing him to serious injury or death.

[2] The defendant was sentenced by me on 28 June 2019 and fined $110,000 to be paid over five years at the rate of $2000 per month and ordered to make a reparation payment of $11,844 to Mr Xu as well as a contribution to the prosecutor's costs in the sum of $1562.80.

[3] Having imposed sentence on those terms I indicated my reasons would follow and, accordingly, they now do so.

Facts

[4] The defendant company designs and builds residential homes in Auckland. In late 2015 it began a project to build four three-level units at 32, Auckland Road, St Heliers. It engaged Premier Project Management Limited (PPM) to manage the project. The contractual requirement with that company was for it to attend the site for 10 hours each week. Among the other contractors it engaged were Marigold Decorators Limited (MDL), which was to paint the units, and Bob Duncan Scaffolding Limited (BDSL), which was to supply and erect scaffolding for the units.

[5] Mr Xu was the sole director, shareholder and employee of MDL. BDSL progressively erect scaffolding as the units were built so that workers could access the fascia and roofing. At the time of the accident on 6 September 2016, which involved Mr Xu, the scaffolding was approximately six metres in height.

[6] Mr Xu was working on the property at approximately 9.00 am that day and climbed the scaffolding intending to plug holes in the fascia with putty. The scaffold platform consisted of five unsecured timber planks running perpendicular to the building. The end of the platform was exposed as there was no mid-rail to provide a physical barrier blocking access to the overhanging portion of the platform. As Mr Xu picked up a tub of filler, three unsecured planks lifted, and Mr Xu slipped and fell six metres to the ground. The planks also fell to the ground but fortunately missed Mr Xu. He fell on a small landscaped area below the scaffolding narrowing missing a concreted part of the ground area.

[7] Mr Xu suffered a one centremetre laceration to the top of his head, an abrasion to his right cheek bone and bruises along the outside of his abdominal wall. The main bone in his forearm broke into pieces at the elbow joint and he dislocated the main joint of his left wrist. He spent six days on holiday and returned to work on 13 February 2017, having spent a total of five months off work.

[8] The scaffolding was erected by BDSL. Gold Hawk Cooperations Limited (Gold Hawk) liability under the Act, which it accepted, was its failure to ensure adequate scaffold inspections were carried out between checks by BDSL, failed to prohibit the use and prevent access to the scaffold from which Mr Xu fell until a competent person ensured it was safe, failed to implement an effective system to adequately manage and monitor its workers performance and ensure that its supervisory workers were competent and that they had received adequate health and safety training and clearly defined and communicated to its supervisory workers the scope of their obligations under the relevant legislation.

[9] The defendant informed Worksafe that basic scaffold inspections in the course of general monitoring of the site had been undertaken but the inspections were not recorded. Neither had Gold Hawk monitored whether any other scaffold inspection had been undertaken. It simply relied on BDSL to conduct thorough scaffold inspections and failed to monitor that company's performance in relation to the scaffolding and could not advise how often BDSL had conducted scaffold inspections or provide records of those.

[10] Further, Gold Hawk which was the main contractor, had little or no knowledge of how many other contractors were on the property at the time of the incident and did not know what scaffold and health and safety experience PPM or its employees and directors had. It did not ensure that supervisory workers were competent, including as to safe scaffolding fundamentals and that they had received adequate health and safety training.

[11] The prosecutor alleged, and the defendant accepted, that there was a marked departure from industry standards and guidelines. The *Best Practice Guidelines for Scaffolding in New Zealand (SARNZ/DOL 2009)* provided relevant guidance at the time of the incident. The summary of facts, to which the defendant pleaded guilty, noted its cooperation with Worksafe New Zealand and also that it had not previously appeared before the Court.

[12] Gold Hawk, through submissions on its behalf by its counsel, Ms Sellars QC, accepted that reparation of $33,840 consisting of $30,000 for emotional harm and $3480 for financial loss compensation, is appropriate. The gross figure was apportioned between the various defendants with Gold Hawk's share being assessed at 35 percent so that a reparation of $11,840 is to be paid to Mr Xu as representing its share, and accordingly, as part of the sentence, the defendant was ordered to pay the same to him.

Culpability for the Offending

[13] In *Stumpmaster v Worksafe New Zealand*[1] a full Court of the High Court considered the approach to sentencing under s 48 of the Health and Safety at Work Act 2015 (HSWA) which Act replaced the earlier Health and Safety In Employment Act 1992 (HSEA). The Act significantly increased fines and the defendant is liable on conviction to a maximum fine of $1,500,000.

[14] Section 151(2) HSWA sets out the specific sentencing criteria to be applied when sentencing an offender convicted under ss 47, 48 and 49 of the HSWA. The relevant sections in so far as the defendant's prosecution is concerned are ss 36(1)(a) and 48(1) of the Act. Section 151(2) states:

> (2) The Court must apply the Sentencing Act 2002. It must have particular regard to:
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> (a) Section 7-10 of that act; and
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> (b) The purpose of this Act; and
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> (c) The risk of, and the potential for illness, injury or death that could have occurred; and
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> (d) Whether death, serious injury or serious illness occurred or could reasonably have been expected to have occurred; and
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> (e) The safety record of the person (including, without limitation, any warning, infringement notice or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factors present; and

[1] [2018] NZHC 2020

(f) The degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and

(g) The person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[15] *Stumpmaster* identified scales of culpability within the maximum sentence available of $1,500,000. The scales are as follows:

- Low culpability – up to $250,000.
- Medium culpability – $250,000 to $600,000.
- High culpability – $600,000 to $1,000,000.
- Very high culpability – $1,000,000 plus.

[16] At paragraph [37] of the decision the Court approved the list of relevant factors in the earlier guideline judgment of *Department of Labour v Hanham and Philp Contractors Limited (Hanham)*[2] for sentencing under the HSEA. The factors are similar to the s 151 factors but for the sake of completeness are set out as follows. They appear at paragraph [54] of the *Hanham* decision and at paragraph [36] of the *Stumpmaster* decision:

(a) The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practical steps" which the Court finds it was reasonable for the offender to have taken in terms of [s 22 HASWA].

(b) An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.

(c) The degree of departure from standards prevailing in the relevant industry.

(d) The obviousness of the hazard.

(e) The availability, cost and effectiveness of the means necessary to avoid the hazard.

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[2] *Department of Labour v Hanham and Philp Contractors Limited (Hanham)* (2006) 6 NZELR 79 (HC)

(f) The current state of knowledge of the risks and of the nature and severity of the harm which could result.

(g) The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[17] Notwithstanding s 151(2)(g) of the HWSA, the defendant's inability to pay what would otherwise be an appropriate fine is a matter the Court can take into consideration because Parliament has made the legislation subject to the provisions of the Sentencing Act. At paragraph [23] of *Stumpmaster* the Court addressed the issue saying:

> [23] Two comments are required. Courts are instructed to apply the Sentencing Act. That is what the opening words of subs (2) say. The subsequent highlighting of some particular factors does not negate the core applicability of all of the Sentencing Act. Second, too much should not be read into s 151(2)(g). The requirement there to have particular regard to a defendant's capacity to pay only "to the extent that it has the effect of increasing the amount of the fine" is not to be read as a statement that an inability to pay cannot be considered. This is where the rule that all of the Sentencing Act applies is particularly relevant. On this issue of ability or inability to pay, all the following provisions in the Sentencing Act apply to a HASWA sentencing:
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> (a) section 8(h) which requires a Court to take into account the circumstances of an offender that might mean an otherwise appropriate sentence would be disproportionately severe;
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> (b) section 14(1) which says a Court may decide not to impose a fine, otherwise appropriate, that an offender cannot pay;
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> (c) section 40(1) which directs a Court when imposing a fine, to have regard to the financial capacity of the defendant; and
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> (d) section 41 which empowers a Court to require a declaration from the defendant as to financial capacity.
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> These provisions make it plain s 151(2)(g) is, like the other paragraphs, a legislature direction as to the particular importance of an already relevant factor. The final step of a sentencing will still involve assessing the ability of the company to pay the otherwise appropriate fine.

An Appropriate Fine

[18] The culpability factors identified determine which scale in terms of the *Stumpmaster* analysis is appropriate. I accept it was reasonably practicable for GHCL to have ensured that adequate scaffold inspections were carried out between checks by the scaffolders and in particular to have closely monitored whether BDSL was

undertaking the weekly scaffold inspections it was required to do. I also accept that GHCL did not have adequate systems in place to manage and monitor workers and contractors' performance in relation to the scaffold. It relied solely on PPM, the project manager as it had worked on projects with it previously and had confidence in it. In doing so it abdicated its own responsibilities to ensure the scaffolding was safe for workmen to use. It did not define the health and safety duties for supervisory workers or communicate those to them and plainly had little idea of the actual guidelines that applied and as to what was required. The result, I accept, as the prosecutor submitted, was that workers and contractors on the site were unclear as to who was responsible for what so that an obvious hazard, the scaffolding, was not closely monitored. There was a departure from well-known industry standards and guidelines for falls from height, which the defendant accepts.

[19] As far as the victim's own conduct is concerned, the prosecutor drew my attention to *Department of Labour v Eziform Roofing Products Ltd*[3] in which the Court noted the divergence of the case law in the High Court as to how a victim's carelessness should be taken into account in assessing the appropriate starting point. Section 9(2)(c) of the Sentencing Act states "the conduct of the victim" is a mitigating factor to be taken into account in sentencing an offender. Duffy J, in that decision stated, at paragraph [52], said that guarding against workplace accidents:

> "... that result from the foolish carelessness of employees is part of the role of the Health and Safety Employment Act. So, to allow such carelessness to minimise an employee's culpability would undercut one of the policy objectives of the legislation. That is why the full Court in *Hanham v Philp* refused to place any weight on the careless conduct of the victim in the *Cookie Time* appeal."

Nevertheless there are divergent High Court authorities as in *Transrail v Department of Labour*[4] carelessness of the victim was treated as a mitigating factor.

[20] Given there are divergent High Court authorities I am free to follow the approach taken by Ellis J in the *Transrail* case, which I shall. That seems to be supported by the overarching importance of the Sentencing Act 2002 as noted in the *Stumpmaster* decision. It would seem odd if the statutory directive contained in

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[3] [2013] NZHC 1526
[4] [1997] ERNZ 316 (HC)

s 151(2)(g) of the HSWA to have regard to a person's financial ability to pay a fine is to be brought into account only if it has the effect of increasing the amount of the fine is to be read down, because of the effect of the particular sections in the Sentencing Act identified at paragraph [23] of the *Stumpmaster* decision, yet the specific direction of the Sentencing Act at s 9(2)(c) to take the conduct of the victim into account as a mitigating factor is to be ignored. Section 3(a) of that Act sets out the purposes for which offenders may be sentenced or otherwise dealt with.

[21] The appropriate band for sentencing sought by the prosecutor was the middle band identified in *Stumpmaster* with a starting point in the vicinity of $400-$500,000. The prosecutor relied in particular on *Health and Safety Inspector v Iscaff*,[5] where the company was inexperienced in the provision of scaffolding and which led to a guard rail being inadequately secured. There was a fall from height and the level of culpability was assessed within the medium band as applied under the *Hanham* decision at mid-range providing for a fine under that band of $75,000.

[22] Ms Sellers QC submitted that the appropriate band was in the vicinity of $200,000, at the higher end of the lower band of culpability identified by *Stumpmaster*. I agree that is the appropriate band and also accept her submissions that *Iscaff* is of little use in fixing a starting point for Gold Hawk, as it did not erect the scaffolding but was instead a developer at the site. Most of the decisions cited relate to the liability of the scaffolding company or companies such as *Eziform Roofing Products Ltd* in the decision cited earlier, which was a roofing company rather than a site developer. Consequently the appropriate starting point for culpability is $220,000. That appropriately reflects what Gold Hawk actually did. It had overall responsibility but did not lay the scaffolding itself.

[23] Similarly, I accept Ms Sellers submission that the victims conduct is a relevant mitigating factor. Mr Xu, in his witness statement, said:

> "When we started I noticed there was some loose planks on the scaffold on the lowest platform on the scaffold, about a metre off the ground. When I noticed that, I told the boys to be careful with their step and so they don't lose balance."

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[5] District Court, Porirua, CRN-120-915-0073

[24] Accordingly, I reduce the fine by 19 percent to take account of s 9(2)(c) of the Sentencing Act 2002 in that Mr Xu, knowing the boards had been loosely and improperly laid, had not drawn the matter to the attention of the scaffolder BDSL or taken steps to secure his own safety.

[25] From that figure $180,000 I allow a discount of 10 percent for cooperation and remorse reducing the fine to $162,000. After allowing a discount for the absence of previous convictions, reasonably significant as the company has been operating for 14 years, and which discount amounts to 15 percent and with a further discount of 20 percent for pleading guilty the end fine is $110,160 which I round down to $110,000.

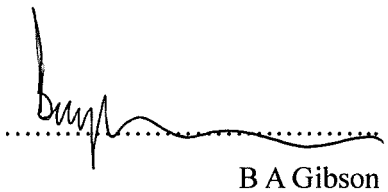
[26] Ms Sellers raised the financial capacity of the defendant to pay as a discounting factor. The company, Gold Hawk, undertakes one project at a time and by affidavit sworn 4 April 2009, its manager, Ms He, said that it had not undertaken any projects since the Auckland Road development. Consequently, the number of staff employed by the company has been reduced. Ms He attributed a number of reasons for the failure to undertake further developments including the property downturn in Auckland, health issues affecting the owner of the company, tax miscalculations, a legal claim and the prosecution itself.

[27] I accept the company cannot, in its present state, pay a lump sum fine of $110,000, but nevertheless to allow it a significant discount does not seem to me to be appropriate given the nature of the company's operations. It is a property development company and could, within the near future, undertake property developments again. I accept that is speculative but to allow the company a substantial discount at present which would then leave it free to undertake further significant property developments when conditions improve would deliver it a windfall in the form of a lower fine over that which would otherwise be appropriate. The better way to deal with the matter is by allowing the defendant, Gold Hawk, time to pay and accordingly, the sum of $110,000, which is imposed as a fine, is to be paid over the next five years at the rate of $2000 per month beginning one month from the date of sentencing.

Costs

[28] Ms Sellers for the defendant accepted that a costs order in the sum of $1562.80 was appropriate and accordingly an order in that sum, being the amount sought by the prosecutor, was made at sentencing.

Signed at Auckland this 12th day of September 2019



B A Gibson
District Court Judge