

**IN THE DISTRICT COURT
AT AUCKLAND**

CRN: 13070501970

**MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT
Informant**

v

**ABBAS LIMITED
Defendant**

Hearing: 4 June 2014

Appearances: S M Carr for the Informant
S Bonnar and B Sellars for the Defendant

Judgment: 18 June 2014

SENTENCING NOTES OF JUDGE P A CUNNINGHAM

[1] Abbas Limited faces one charge that on or about 30 May 2013 at Tauranga, being an employer failed to take all practicable steps to ensure the safety of its employee Paige Jordan Jacobson-Lang while at work and that it did fail to take all practicable steps to ensure that he was not exposed to the risk of harm while installing a steel gate.

[2] Abbas Limited entered a guilty plea on 3 March 2014.

[3] Abbas Limited sells, manufactures and installs ballustrading, handrails, gates and fences and aluminium glass steel and stainless steel. It does work for construction companies, builders and residential clients within the Bay of Plenty and Waikato region. It has been in business for 20 years. Mr and Mrs Hansen are a married couple who are involved in the day to day running of the company with

Mr Hansen allocating work and Mrs Hansen being responsible for administration, health and safety, financial and marketing.

[4] Mr Jacobson-Lang's family was known to the Hansens and he had only just commenced work for them at the beginning of the week that the accident occurred. He was assisting an experienced employee Mr Thom to install a steel gate that was 11.3 metres in length, 2 metres high, and weighed 700-900 kilograms at the new Police Station in Monmouth Street in Tauranga. Once the gate was lifted into position by a crane, it was welded together and the crane left the site. Mr Thom and Mr Jacobson-Lang stopped and tied the gate to secure it in position.

[5] On Thursday 30 May they returned to the site to complete the installation. The gate was positioned between two posts located approximately a metre from the building at the left hand end of the gate opening. These posts were in the line of travel of the gate. A G-clamp and a piece of timber was installed as a temporary stop to prevent the gate completely retracting beyond the posts at the left hand opening. Mr Thom started to attach the cog rack to the bottom of the gate. To do this the gate needed to be retracted within 200mm of the posts. The temporary clamp was removed. This allowed the gate to be fully retracted and as that occurred the gate fell onto Mr Jacobson-Lang who was crouched to the left near the base of the gate.

[6] The design plans for the gate which were not on site showed the installation of a support bracket to the wall of the Police Station. Mr Thom incorrectly thought the bracket was to be attached to the wall of the station halfway down the left hand extension of the gate but it would not fit at that location. He phoned Mr Hansen and told him about this. Mr Hansen advised Mr Thom to proceed and install the cog-rack to the bottom of the gate in the meantime. When this happened the gate fell on Mr Jacobson-Lang.

[7] The two issues identified as practicable steps that could have been taken but were not:

- (a) to ensure that the employees of Abbas were provided with and followed a written standard operating procedure or policy for the installation of heavy gates as included:
 - (i) a specific requirement to carry out a hazard identification exercise prior to work commencing to identify how the hazards were to be controlled including means of support for the gate until fully installed; and
 - (ii) a specific requirement that drawings plans of the gate is to be taken to the installation site.

[8] Abbas Limited by its guilty plea accepts that it did not do these two things.

[9] Mr Jacobson-Lang was crushed by the weight of the gate on him. Fortunately he had a safety helmet on but nonetheless described a feeling of his head being crushed. He was under the gate for a number of minutes before other people in the vicinity came to help lift the gate off him. At that point he tried to roll to one side and that is when he discovered that he could not move his legs.

[10] He was taken to Tauranga Hospital and was admitted. He was diagnosed with suffering from a compression fracture of the first lumbar spine and compression of the pelvis with right-sided pubic rami and buckle sacroiliac fracture. In the material provided by the prosecution there are a number of records from the Tauranga Hospital that detail follow up visits with Mr Jacobson-Lang. The last one is dated 20 September 2013. That was four months after the injury and it described that while the compression fracture appeared to have improved there was non-union of the public rami fractures. This note describes the disabling pain that Mr Jacobson-Lang was suffering from including that he had pain at rest and during the night and that it was very painful to touch the area of the right side of his pelvis. At that stage surgical fixation and stabilisation was being contemplated.

[11] As it turned out surgical intervention was not required. However in victim impact statement he wrote for the Court, Mr Jacobson-Lang identified that some

months after the accident a further scan this year showed that three discs in his lumbar region had been compromised in addition to the L1 fracture. There also appear to have been more than one further fracture of the pelvis. Mr Jacobson-Lang was discharged from Tauranga Hospital a few days after the accident. In hindsight there is every indication that discharge was premature.

[12] He struggled enormously once he left the hospital. He was 28 years of age at the time and was living with his partner. She bore the brunt of running the household alone and caring for Mr Jacobson-Lang once he was home. She was in fulltime employment herself. Mr Jacobson-Lang was confined to a wheelchair for a few weeks after the accident and there are references to him having falls in the toilet and the shower, on one occasion having to wait for a couple of hours until his partner arrived home from work to get him off the floor.

[13] Further down the track matters have become more complicated for this young man who has now been diagnosed suffering with post-traumatic stress disorder (PTSD) as a result of the accident and he has become dependent on opiate pain medication. Over a year after the accident he is still not able to work.

[14] It has affected his relationship tremendously which was reflected both in his victim statement and in a letter that his partner wrote. His injuries and the effects of those on him have placed a tremendous strain on their relationship. The partner left for a period of time and although they are now reconciled they are no longer living together.

[15] Mr Jacobson-Lang has two young children from a previous relationship. The accident and resulting injuries have had an adverse impact on his relationship with his children. Examples are that his former partner and mother of the children became concerned about the children being around them given that he was taking morphine. In addition Mr Jacobson-Lang was not really in a fit state to be caring for his children and he talked about not even being able to pick them up and cuddle them and do normal things with them.

[16] Although economic loss is not relevant to the sentencing exercise, I will mention the financial stress that has resulted because it is just another stress which has left this young man very different from the person he was before the accident . Because he was on the 90 employment trial at the time the accident occurred it appears that ACC viewed him as being in casual employment only and that resulted in payment of ACC compensation of \$116.00 a week. Because of this hugely reduced income Mr Jacobson-Lang and his partner were not able to sustain their rent and they fell into debt. He estimates that the effects of the accident have cost him close to \$20,000.00. He and his partner are still paying off debts from their past accommodation post his accident last May.

[17] This situation has now been redressed by Mr and Mrs Hansen advising ACC that they would have taken Mr Jacobson-Lang on as a fulltime employee. They described him as someone who had all the skills they were looking for, energy desire, practical approach to life and work – a breath of fresh air.

[18] It is accepted that since the accident occurred Abbas who up until that point had an unblemished safety record have taken considerable steps to ensure that this sort of accident never happens again. Mrs Hansen described the company as having gone to the next level in relation to safety. Written documentation is now in place in terms of making sure that workers take all plans to the site and that there is a safety operating procedure for gate installations.

[19] One of the matters mentioned by Mr Bonnar is that Mr Thom was an experienced employee (12 years). Although it was not recorded, it was company policy that plans should be taken to the site. If this had happened and the bracket had been properly installed the accident would not have occurred. It is accepted the particular hazard of the gate falling on someone had not been specifically identified.

[20] Counsel are agreed that I should apply the three step sentencing process set out in the *Department of Labour v Hanham & Philp Contractors* [2008] 6 NZLR at 79. This involves:

- (i) fixing of amount of reparation;

- (ii) fixing the amount of the fine; and
- (iii) standing back and taking an overall assessment of the proportionality and appropriateness of the reparation and fine.

Reparation

[21] Section 32(1) of the Sentencing Act provides:

- [1] A court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, cause a person to suffer-
 - (a) loss of or damage to property;
 - (b) emotional harm;
 - (c) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

[22] The reparation must be for emotional harm. Ms Carr submitted that this should be at the upper range of reparation orders outlined in similar cases that she submitted. She submitted that this victim has suffered significant emotional harm. In particular Ms Carr referred to the *Department of Labour v Genera Limited* a decision from the Tauranga District Court of Judge Harding 17 June 2009. The victim was injured when a machine used to remove large tarpaulins from stacks of timber after it had been fumigated fell off a forklift. He sustained a fractured lumbar vertebrae coccyx and dislocation of his shoulder requiring hospitalisation for eight days. Ten months later his injuries had not completely stabilised although his prognosis was good.

[23] There was a restorative justice conference in May 2014. At that conference Mr Jacobson-Lang had proposed the \$20,000.00 as being appropriate reparation to him and Mr and Mrs Hansen had agreed it was appropriate. Mr Bonnar submitted that that was an appropriate amount. The company has insurance to cover the amount of reparation. Although insurance is not a fact to be taken into account when assessing the amount of emotional hard reparation, it is a factor I can take into account when considering the ability to pay reparation.

[24] In my view Mr Jacobson-Lang has not only suffered emotional harm but he has suffered loss consequential on emotional harm. In the material in front of me it appears that Mr Jacobson-Lang's injuries may have been under diagnosed initially. Secondly, his discharge from Tauranga Hospital in hindsight appears to have been premature. This is evident from the fact that he was unable to look after himself even with the assistance of his partner when he got home. Not only was did he suffer falls, but his pain was poorly controlled.

[25] His interactions with ACC were less than satisfactory. While he was \$116.00 per week both he and his father were trying to talk to ACC and elicited help from other quarters such as the local member of Parliament to try and address his inadequate income. He was not even able to move from ACC to a benefit it would seem. Almost a year later when the Hansens got in touch with ACC and told them they would have taken Mr Jacobson-Lang on as a fulltime employee this situation was rectified. If this advice had been given to Mr Jacobson-Lang or his father earlier he would not have suffered the financial loss that he did. I am in no doubt whatever that the stress of his financial situation caused further emotional harm to Mr Jacobson-Lang.

[26] It is regrettable that no home care was provided to Mr Jacobson-Lang on his discharge from hospital. It is surprising that as between the Tauranga Hospital and Accident Compensation Corporation the necessary assistance was not provided. I am in no doubt that the lack of support once he was home further contributed to the emotional harm suffered by Mr Jacobson Lang.

[27] One of the statements Mr Jacobson-Lang made in his victim impact statement was that at the beginning of 2014 he enrolled in a graphic design course. He did this because he had come to the view that it would be unlikely he could continue in his chosen occupation of working with steel. He has doubts about his ability to do work that requires physical labour and effort because of the long-lasting nature of his injuries. He has been told that he is likely to have ongoing difficulties throughout his life from the effects of the injuries from this accident. He says that when ACC found out that he had enrolled in a graphic design course that he was told he had to stop.

He was making an effort to re-train which was sensible and responsible and it is a great pity he was not able to continue.

[28] The restorative justice conference is to an extent relevant to emotional harm because of the following. Efforts were made both by Mr Jacobson-Lang and his father to get some assistance from Abbas Limited, particularly in relation to the low level of remuneration Mr Jacobson-Lang was receiving. When the parties met at the restorative justice conference in May this year Mr and Mrs Hansen fully realised for the first time the way in which the accident and resulting injuries had affected Mr Jacobson-Lang. At that stage they took what steps they could, particularly with ACC. Mr and Mrs Hansen to their credit recognised the detrimental impact of what occurred on Mr Jacobson-Lang in the context of the restorative justice conference and that is relevant because it is evidence that they accept the significant effects the accident has had on this young man.

[29] The information presented to me indicates that this accident represents a life changing event for this young man, particularly in terms of his chosen occupation. But the emotional effects on him affecting his relationship with his partner, his relationship with his children and the personal effects on him have been nothing less than devastating. For those reasons I agree that emotional harm reparation should be at the upper level and I fix it at the sum of \$40,000.00. Given that the defendant has insurance there is no issue about the company's ability to pay.

Fine

[30] Mr Bonnar contended for a fine in the lower range of the categories in *Hanham* (up to \$50,000.00) and Mrs Carr contended for a level in the mid-range (\$50,000.00 - \$100,000.00).

[31] Mrs Carr submitted that the following were aggravating features:

- (i) the failure to take all practicable steps, the detail of which has already been set out above;

- (ii) while the actual harm was significant the potential harm was even greater;
- (iii) the obviousness of the hazard, namely an unsupported 700kg – 900kg gate;
- (iv) the means available to mitigate the risk were simple and inexpensive.

[32] Mr Bonnar submitted that the operative act or omission was the identification of the risk of the gate falling over but submitted that Mr Thom as an experienced employee should have taken the site plans to the workplace and if this had happened the accident would not have occurred.

[33] He accepts that serious harm was suffered and that given the weight and size of the gate the hazard was obvious. In terms of mitigating risk he submitted that Abbas failed to anticipate that an experienced staff member would act in such a way as to allow this to occur.

[34] In my view the obviousness of the hazard is important. Anyone should identify the risk of the gate falling given its size and weight. While it is one thing to say that Mr Thom should have done better, it must be remembered that this legislation is designed to protect worker safety. The failure to have the written documentation including the requirement to take the plans to the site is what did not happen here. While it is one thing to have an oral company policy, once something is committed in writing it would in my view be more likely to ensure compliance on the part of employees. The very fact is that it is written down and that certain steps are required in writing means it is more likely to impress upon employees the need to follow safety procedures. Moreover it should not be forgotten that Mr Thom rang Mr Hansen who told him that he could not fit the bracket on the wall but was told to go ahead and fit the cog rack on the gate anyway.

[35] For the above reasons I agree with the informant's submission that a fine with a starting point of \$75,000.00 is appropriate.

[36] Factors in mitigation include:

- (i) previous good safety record;
- (ii) remorse;
- (iii) cooperation;
- (iv) remedial action;
- (v) guilty plea.

Discussion

[37] Abbas Limited has an unblemished safety record. I accept that Mr and Mrs Hansen are remorseful about what has occurred. They have cooperated with the authorities. And they have taken remedial action.

[38] Given those efforts I would reduce the fine with a 15% discount which reduces the figure to \$66,750.00. From there they are entitled to a 25% for the guilty plea leading to an end fine of \$50,062.50.

Overall assessment

[39] I now move to step three of the exercise which is to make an overall assessment of reparation and the fine.

[40] Material was presented on behalf of Abbas Limited that the company is technically insolvent. While that of itself is not the end of the matter, it is a factor that I intend to take into account. As a direct result of this accident Abbas Limited lost one of its important customers, the contractor for whom this gate was being installed. Abbas like many businesses have been hit by the economic recession since 2008. They employ 15 employees and appear to be running a good medium sized business. In my view it is important that a fine is not set at a level that will cripple that business.

[41] A further factor I take into account is to make a further assessment of the situation in the context of the amount of reparation already ordered which I accept is at a high level.

[42] Taking all of those factors into account I would reduce the fine to \$20,000.00.

Result

[43] Decision:

- (a) reparation \$40,000.00;
- (b) payment of a fine \$20,000.00.

Dated at Auckland this day of June 2014 at am/pm

P A Cunningham
District Court Judge