IN THE DISTRICT COURT
AT NEW PLYMOUTH

CRI-2014-021-000732
[2015] NZDC 482

WORKSAFE NEW ZEALAND
Informant

v

MANGOREI SAWMILL LIMITED
Defendant

Hearing:	16 January 2015
Appearances:	S Woodhead for the Informant A R Laurenson for the Convicted Company
Judgment:	16 January 2015

NOTES OF JUDGE S B EDWARDS ON SENTENCING

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[1] Mangorei Sawmill Limited has pleaded guilty to a charge under the Health and Safety in Employment Act 1992 of failing to take all practicable steps to ensure the safety of an employee while at work. The maximum penalty for this offence is a fine not exceeding $250,000.

[2] Mangorei Sawmill, which I will refer to in this decision as "MSL", is a contractor in the forestry sector. Its director is Mr Clive Allen, and he is in Court today.

[3] Mark Chapman was employed by MSL as a forestry logging manager in February 2013. He signed a declaration that he was competent to operate a digger, and he had 14 years' experience in operating a digger in logging and track work. The same declaration required Mr Chapman to informed Mr Allen if, for any reason,

he felt he was unable to operate any machinery or vehicle safely, within OSH guidelines.

[4] In early January 2014 Mr Allen, Mr Chapman and a farm owner met to discuss logging trees on his property near Stratford. MSL was using a Hitachi digger on this job. The digger was equipped with a rollover protection frame. It was being used by Mr Chapman to create a track to provide access to a flat area as a work site.

[5] On 13 April Mr Chapman started work on the site. He was the only person there that day. He planned to do track work and filled in a "toolbox meeting form". The aim of this is to identify hazards and set out a plan to deal with them. Mr Chapman identified the digger track and steep hill as hazards, and identified the controls, in his words, as being, "Use your brains and no cowboy shit."

[6] Mr Chapman started by excavating up the hill, making a track to access the flat area to be used as a work site. The track had a line of tree stumps on the left side, and he was digging out the right side. He continued with track-making beyond the left line of stumps, noticing he was getting close to a papa rock face. He got out of the digger, checked and reminded himself to be careful before continuing.

[7] He got back into the digger and continued, but the digger lost traction, slid and rolled down the embankment with Mr Chapman inside it. He lost consciousness in the fall, but then escaped from the digger, climbed back up the track and phoned for assistance. He was helicoptered to hospital for treatment. He sustained muscle damage to his thigh, bruising and mild concussion as a result of the accident.

[8] The victim impact statement tells me that he is still on ACC in relation to his leg injury and is still receiving physiotherapy twice a week for that injury. In addition to the physical injuries, he talks in his victim impact statement, about the consequential stress and effects on his personal life.

[9] The parties are agreed that the workplace hazard to which Mr Chapman was exposed was track work on a steep gradient and the digger access. The track work extended past the stumps on the inside of the track leading onto a papa rock face

which was wet due to a spring running down the gully. The area became unstable as a result and the digger slid down the rock face.

[10] It is also agreed that the following practicable steps were available to the defendant to ensure Mr Chapman's safety on this site. These were:

(a) Ensuring that an effective method of identifying hazards and determining controls was used.

(b) Ensuring that a specific hazard management plan for the track work was developed, implemented and monitored.

(c) Ensuring that Mr Chapman was appropriately qualified and competent for the work being carried out.

[11] There is disagreement as to the extent to which the defendant carried out these practicable steps, and I will return to this shortly. It is, of course, relevant to the assessment of the defendant's culpability and the quantum of the fine to be imposed.

[12] The leading case on the approach to sentencing in health and safety prosecutions is *Department of Labour v Hanham & Philp Contractors Ltd.*[1] This case outlines the sentencing process which involves three main steps:

(a) Assessing the amount of reparation;

(b) Fixing the amount of the fine;

(c) Making an overall assessment of the proportionality and appropriateness of the total reparation and fine proposed.

[13] The first step, assessing the amount of reparation, can be dealt with relatively easily in this case. This is because the parties agree the appropriate amount of reparation is $10,000. The defendant seeks to offset the sum of $4236.38 that

[1] *DoL v Hanham & Philp* (2008) 6 NZELR 79.

Mr Chapman owes to his employers. However, I am not prepared to do that. It is a separate debt arising from the employment relationship and particularly in circumstances where Mr Chapman has subsequently been made redundant because of the financial state of the company, it is my view that the reparation amount should not be affected or offset by that sum. However, I do accept Mr Laurenson's submission that the fact the defendant does not propose to pursue Mr Chapman for that debt in civil proceedings is a factor I can take into account at the third step of the process in assessing the overall appropriateness of the fine and reparation to be imposed.

[14] The next step is assessing the amount of the fine. The case of *Hanham & Philp* refers to assessing culpability by considering the employer's degree of blameworthiness for the offending. The assessment focuses on preventative steps leading up to and at the time of the incident. Starting points for fines should generally be fixed according to a scale set out in that case. The scale ranges from low culpability, which allows for a fine of up to $50,000; medium culpability, a fine of between $50,000 and $100,000, and high culpability – a starting point of between $100,000 and $175,000.

[15] The prosecution and the defence agree the culpability in this case falls somewhere in the medium culpability band. In fact the parties are not far apart on what they assess the appropriate starting point to be, with the prosecution suggesting $80,000 as a starting point, and the defendant proposing $60,000.

[16] Referring back to the practicable steps it says should have been taken by the defendant, the prosecution considers the risk of harm was significant as the work was carried out on steep gradient and a wet papa rock face surface. Added to that, Mr Chapman was working alone and had limited means of communication. In terms of the seriousness of the harm, the prosecution refers to the injury to Mr Chapman's leg and the concussion he suffered at the time.

[17] The prosecution considers there was a departure from industry standards because the approved code of practice for safety and health in forestry operations provides for specific hazard management plans to be developed, implemented and

monitored where the stability of machinery is compromised by a slope, weather or ground conditions.

[18] The prosecution suggests that the "toolbox meeting form" was not sufficient to meet the requirements of a specific hazard management plan. They also note that while Mr Chapman signed a declaration saying he was competent to operate a digger and he had 14 years' experience doing so, the defendant did not carry out any further competency or qualification checks. The prosecution asserts Mr Chapman did not in fact have any relevant qualifications.

[19] The prosecution says that the hazard was an obvious one within the industry particularly given the surface involved, the wet papa rock face. While acknowledging the hazard may not have been eliminated, the prosecution says it could have been minimised by more effective planning including more effective hazard identification and steps taken to ensure that Mr Chapman was a qualified and competent digger operator in the high risk environment in which he was working.

[20] The prosecution suggests that two other cases may be of assistance to me in determining the appropriate fine to impose in this case. The first is *Department of Labour v Taranaki Civil Construction Ltd.*[2] In this case a roller operator rolled off a bank and had his arm crushed by the roller. His employer was carrying out work on a clay stopbank using the roller. The employee had been instructed to keep a distance away from the edge of the stopbank, and the accident occurred when he went too close to the edge and rolled down the bank. The roller was not fitted with rollover protection and did not have a seat belt or reversing mirrors. The injuries suffered by the employee in that case were a compound fracture of his right arm and cuts to his face and head. He was in hospital for 12 days and required a number of surgical procedures on his arm. He suffered permanent disfigurement and ongoing loss of use of his arm.

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[2] *Department of Labour v Taranaki Civil Construction Ltd* DC New Plymouth CRI-2011-043-3018, 25 November 2011.

[21] In *Taranaki Civil Construction* the Court found the risk of harm was significant because of the high bank involved, and adopted a starting point of $70,000 for the employer. The employee was awarded $16,000 in reparation.

[22] The other case counsel refer to is *Department of Labour v Wellington City Council.*[3] In that case a council employee was killed when his dump truck lost traction and rolled downhill off a temporary road while hauling excavated material. The failures on the council's part were significant and the Court found their culpability was in the high-medium to low-high risk category and adopted a starting point of $100,000. In effect, Wellington City Council was held to be responsible for the construction of an unsafe road gradient for wheeled vehicles such as the deceased employee was using.

[23] In response, it is submitted for the defendant that while further practicable steps could have been taken in relation to the incident, steps were taken to identify hazards, to manage those hazards, and to ensure the digger operator, Mr Chapman, was appropriately experienced. The defendant regularly held meetings in relation to potential hazards and there were discussions on more than one occasion about an appropriate method for undertaking this track work. The defendant accepts that in hindsight it did not take sufficient steps to ensure Mr Chapman was appropriately qualified. However, the defendant maintains he was sufficiently competent to undertake the work given he had 14 years' experience operating a digger and 19 years' experience operating a skidder, loader, bulldozer and chainsaws.

[24] The defendant also points to the declaration signed by Mr Chapman in which he agreed to advise Mr Allen if at any time he felt he was unable to operate safely within OSH guidelines. In submitting Mr Chapman was competent to undertake this work, the defendant notes that during the incident, once he realised there was an issue, he got off the digger and took steps to reassess the situation. He decided it was safe and appropriate to continue.

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[3] *Department of Labour v Wellington City Council* DC Wellington CRI-2009-085-4889, 13 April 2010.

[25] The defendant acknowledges that as a small business operation its methods of identifying hazards may not be as robust as in a large operation but submits that its employees, as well as the defendant itself, take their obligations in respect of health and safety seriously.

[26] In terms of identifying the specific hazard, the wet papa rock face, the defendant notes this is not a situation where they knew about it in advance. The rock surface was buried beneath earth and could not be identified until Mr Chapman came across it that day.

[27] In response to the prosecution's submissions on the decisions in *Taranaki Civil Construction Ltd* and the *Wellington City Council* cases, the defendant submits that the injuries suffered by the employee in *Taranaki Civil Construction Ltd* were more serious and that, in this case, the defendant did take some steps to ensure Mr Chapman's safety.

[28] Both the prosecutor and the defendant agree that this defendant's culpability is not as high as in the *Wellington City Council* case where the starting point of $100,000 was adopted. I agree with the defendant that their culpability is on a par with that of the employer in *Taranaki Civil Construction Ltd* in that MSL took some steps to ensure Mr Chapman's safety.

[29] I consider the appropriate starting point in this case is $70,000.

[30] There is accord between the parties as to the appropriate deductions for mitigating features. While those deductions total a 50 percent reduction from the starting point, I proposed to adopt the methodology in *R v Taueki*[4] in applying them in this case.

[31] First, there is reduction of 15 percent to acknowledge the $10,000 reparation being paid to Mr Chapman. This reduces the starting point to $59,500. The defendant is entitled to a further 10 percent to reflect remorse and because MSL has

[4] *R v Taueki* [2005] 3NZLR 372 (CA).

no previous history of breaching its health and safety obligations. That takes the starting point to $53,550.

[32] Finally, as agreed, there is the full 25 percent discount available to the defendant for its early guilty plea. This reduces the appropriate fine to $40,162.50, which I will round off to $40,000.

[33] The third step is assessing the overall assessment of reparation and fine to determine whether it is proportionate and appropriate. The starting figure for this process is $40,000 for the fine and $10,000 for reparation, so a total of $50,000.

[34] The defendant has placed information before me about the financial position of the company since this incident occurred. The prosecution does not dispute this information. As a result of this incident the logging side of MSL's operation has now ceased, and that has clearly has an effect on the financial viability of MSL. There is an affidavit from the company's accountant which confirms turnover has reduced dramatically since the logging operation has been placed on hold. The financial position has also been affected by a downturn in the export market for logs which happened from August 2014 onwards.

[35] Mr Laurenson, for the defendant, has advised today that MSL is in a position to borrow to pay the reparation, (which must be given priority) and a fine in a reasonable amount which takes into account the defendant's financial position. He proposes a reduction of around 50 percent in the fine amount to reflect the defendant's financial situation.

[36] In prosecutions of this nature I take the view that it is incumbent on a defendant to show that a fine at the level proposed cannot be met within a reasonable timeframe. I consider that a reasonable timeframe in this case is the next five years, and in determining the appropriate amount of the fine I take into account the ability of the defendant to either borrow to pay it or pay it in instalments rather than in a lump sum. It is, of course, always preferable that reparation be paid in a lump sum wherever possible, but there is nothing to prevent the fine imposed being paid off by instalments.

[37] It is important to remember in these cases that a fine is a penalty. It is meant to bite to reflect the important purposes of sentencing which are denunciation and deterrence. However, I consider some reduction from the $40,000 fine is warranted, and overall I consider the appropriate amount payable, comprising reparation and a fine, and taking into account the defendant's financial position, is $30,000.

[38] Therefore, the reparation imposed remains at $10,000 but the fine is reduced from $40,000 to $20,000 to take into account the defendant's ability to pay.

[39] Mr Allen, Mangorei Sawmill Limited is convicted and fined the sum of $20,000. Court costs are also to apply, and the sum of $10,000 is payable in reparation to the employee. You will need to make arrangements with the registrar for payment, whether that is to be by way of a lump sum or instalments.

S B Edwards
District Court Judge