IN THE DISTRICT COURT
AT AUCKLAND

CRI-2015-004-007040
[2016] NZDC 17463

WORKSAFE NEW ZEALAND
Prosecutor

v

MAHONS AMUSEMENTS LIMITED
Defendant

Hearing: 10 November 2016

Appearances: I Brookie for the Prosecutor
N Beadle for the Defendant

Judgment: 10 November 2016

NOTES OF JUDGE R G RONAYNE ON SENTENCING

Introduction

[1] The defendant, Mahons Amusements Limited ("MAL"), after being charged on 11 August 2015, pleaded guilty on 6 June 2016 to a single charge of failing to take all practicable steps to ensure that no action or inaction of any MAL employee, while at work, harmed any person. That charge is laid under ss 15 and 50(1)(a) Health and Safety in Employment Act 1992 ("HSEA").

[2] The maximum penalty is a fine not exceeding $250,000.

[3] The charge arises out of an incident at the Alexandra Park Fun Fest on 10 January 2015.

Facts

[4] The facts are that on 10 January 2015, Mrs Nelson and her two young sons were attending the Fun Fest Carnival. This was a free event and featured rides on a number of amusement devices.

[5] Her son, Cruze, became entangled under a motor driven padded bag known as "the spinner" on the Crazy Circus amusement device. He sustained multiple leg fractures of the femur, the tibia and the fibula and a 10-centimetre wound to his left ankle.

[6] MAL owns approximately 95 percent of the larger mobile amusement devices in the North Island and about 75 percent of such devices across New Zealand. The majority shareholder and managing director of MAL has been running the company since 1987.

[7] MAL currently has certification to operate 15 powered amusement devices. It employs up to 60 staff, most of whom are seasonal workers. It has 10 permanent staff.

[8] The Crazy Circus is a two-storeyed walk through motorised obstacle course for children. It has been operated since October 1997. No height or age restrictions have ever been in place for the device.

[9] The spinner involved in the incident was one of two contra-rotating vertically mounted cylinders that provide a gentle squeeze to children as they run between them. The spinners are stuffed with foam and covered with canvas.

[10] On the day in question two MAL staff members were operating the Crazy Circus.

[11] When the victim came to negotiate the spinners he was holding his mother's hand. Instead of passing between the two spinners, he attempted to squeeze into the

gap between the handrail and the right side spinner. During that process his lower left leg became entangled in the base of the spinner. He was dragged backwards between the two spinners and completed approximately five rotations before the device was deactivated by use of the emergency stop button.

[12] One of the operators of the device came to the upstairs area of the Crazy Circus (where the spinners were located) to find the victim still entangled. He returned downstairs to obtain a tool to remove the spinner. In the meantime, members of the public entered the device and assisted the victim's mother to free the victim.

[13] In more particular terms the injuries sustained were:

(i) a comminuted mid-shaft left femur fracture – this means that the bone had broken into three or more pieces;

(ii) a grade three open fracture of the left tibia and fibula;

(iii) a large open wound on the lateral aspect of the lower leg.

[14] The victim's head had also struck the metal floor and curbing during the rotations a number of times, but no lasting injury was noted.

Investigation

[15] Investigations revealed that the spinner involved had previously been modified by MAL.

[16] MAL had previously become aware that, as well as running through the middle of spinners, children had shown a tendency to cling onto the right side spinner and ride around with it. This practice had been discouraged by device operators as it caused the stuffing in the spinner to slump down the rotating shaft. This practice was less of an issue for the left side spinner because it was belt-driven with the result that it would stop rotating when under such a load.

[17] MAL further advised WorkSafe that it commissioned a repair of the base of the spinner to counteract the slumping effect described. This work had been done in either late 1997 or early 1998.

[18] The work consisted of a round steel plate being fitted immediately below the spinner on the driveshaft to provide support for the bag. A bolt went through a hole in the shaft which supported the steel plate. The shaft diameter was approximately 45 millimetres whereas the bolt was approximately 100 millimetres long. A photograph forms part of the summary of facts. A photograph of the unmodified spinner is also before the Court. The modification to the spinner was not easily seen when in situ.

[19] The cause of the incident was determined to be entanglement of the victim's shoe and/or leg with the protruding bolt at the base of the modified spinner.

Industry knowledge

[20] The Amusement Devices Regulations 1998 ("ADR") govern certification and registration of amusement devices in New Zealand.

[21] Part of the regulated certification process requires inspection by an appropriately qualified engineer at least every two years.

[22] The examining engineer, upon being satisfied that a device meets all of the requirements of the regulations, issues a "Certificate of Examination of Amusement Device" which is valid for up to two years and may include a list of "conditions and requirements" of use. That Certificate of Examination is then submitted to the Registrar of Amusement Devices together with an application for registration.

[23] As part of the inspection ADR require the examining engineer to certify that they are satisfied that:

> ... all parts of the device with which a passenger may come into contact are smooth, free from sharp, rough, or splintered edges and corners, and with no protruding studs, bolts, screws, or other projections.

[24] The Registrar may also impose conditions of operation when issuing a Certificate of Registration.

[25] In the case of the Crazy Circus a condition had been included in every Certificate of Registration since a certificate issued on 24 October 1997:

> ... that all parts of the device with which a passenger may come into contact shall be smooth, free from sharp, rough, or splintered edges and corners, and with no protruding studs, bolts, screws or other projections. Should any of this equipment become damaged during operation, then use of the device shall be discontinued until such time as satisfactory repairs have been completed.

[26] In any event, a protruding bolt on a rotating shaft, as was the case here, poses additional risk of entanglement to device users independently of any regulatory compliance issues.

[27] ADR also require owners of amusement devices to keep a register for each device recording all alterations and repairs to it.

[28] MAL did not bring the modification of the spinner to the attention of either the examining engineers of the Crazy Circus or the Registrar of machinery and nor did it keep any record of the alteration to the spinner.

[29] During the investigation, both examining engineers confirmed that they would not have certified the device fit for operation had they been made aware of the protruding bolt.

The hazard

[30] The hazard in this case was entanglement and/or a puncture occasioned by the presence of the protruding bolt. It was foreseeable that users could become exposed to this hazard by placing their foot in the space between the base of the spinner and the floor. Younger users were at greater risk given their smaller size and unpredictable behaviour.

Failing to take all practicable steps

[31] The incident was caused because MAL continued to operate the Crazy Circus without taking steps to eliminate or isolate the hazard of entanglement.

[32] The practicable steps that MAL should have taken were:

(i) directing that the modification be done in a way that did not result in a protruding bolt on a rotating shaft;

(ii) making and keeping a record of the alteration on the device register;

(iii) not operating the device until the hazard was eliminated or isolated to the satisfaction of the relevant examining engineer;

(iv) imposing minimum age and/or height restrictions on the entry to the device such as six years of age and 1.2 metres.

The defendant's explanation

[33] The defendant, through its representative, stated at interview that:

(i) it knew about the modification but did not think that users of the device would be exposed to the protruding bolt;

(ii) the defendant further stated that the device had been in service for many years and that no incident such as this had previously occurred;

(iii) in 2012 a two-year old who was crawling across the moving floor feature of the Crazy Circus caught their knee in the "clearance" space between the moving floor and the frame.

[34] The defendant has not previously appeared before the Courts and was fully cooperative in the investigation.

Submissions

[35] The prosecutor submits that financial costs of $650, emotional harm reparation of $30,000 for the primary young victim and emotional harm reparation in the amount of $5000 for his mother ought to be ordered and possibly emotional harm reparation in respect of his father ought to be considered.

[36] It is further submitted that the Court should adopt a starting point of $75,000 to calculate the end fine.

[37] The prosecutor accepts that a small discount to recognise the guilty plea would be appropriate and that the Court should stand back and consider totality.

[38] The defendant, through counsel, submits that an emotional harm reparation award of $20,000 in total would be appropriate and that an appropriate fine should be imposed in the sum of $16,575 from a starting point of $30,000. Aside from what appears to be a small difference, no dispute exists with regard to financial cost reparation. A variety of cases have been brought to the Court's attention. It is submitted that this is a case of hindsight hazard recognition.

[39] The defendant submits that it is significant that seven inspections certified the device as safe. Furthermore, local authorities and health and safety inspectors inspect such devices.

[40] The reality, of course, is that the protruding bolt existed and was known to MAL, but was difficult to see and the modification had never been drawn to anyone's attention.

[41] It is further submitted that "it was not perceived to be a hazard".

[42] While endeavouring to indicate that MAL implies no criticism of the engineer, who enjoys a good reputation, it is submitted that the engineer did not think to check the mechanism on seven inspections. It is then suggested that it is properly to be inferred that there was no perceived risk of injury. The fallacy in this submission is that the modification was, on the one hand, known to and obvious to

MAL and its staff. During the process of regularly dismantling and reassembling the device, the hazard would have been plain to see. Yet despite this, the protruding bolt (which is obvious to this Court on an inspection of the photographs) was never brought to the attention of the engineers. Moreover, when assembled, the bolt is very difficult to see. It cannot be suggested that any fault whatsoever lies with the engineer or engineers. This merely illustrates the fundamentally sound reason why modifications of such devices have to be brought to the attention of those responsible for certifications. It is for this reason that I reject the submission that this was "hindsight recognition of a hazard". Both the modification and the resulting hazard should have been brought to the attention of the engineer. By not doing so, informed assessment was prevented.

[43] The defendant further submits that discounts should be applied to any starting point to recognise:

(i) cooperation in the investigation; and

(ii) a clean record with decades in the industry; and

(iii) acknowledgment of the injuries and demonstrated remorse, including restorative justice processes; and

(iv) disabling of equipment and imposition of height restrictions; and

(v) offer to make amends through reparation.

Assessment of penalties

[44] Both reparation generally, and the penalty of a fine need to be assessed within the statutory framework of the Sentencing Act 2002 ("the Act") and the HSEA.

[45] This Court is required to have particular regard to ss 7-10 of the Act. The Court also must properly address the objects of the HSEA, and the sentencing criteria set out therein and in particular in s 51A. Of course, s 51A is not to be regarded as dominating or as overriding the Act which remains the principal statutory guidance. This Court must also take into account these things:

(i) the requirements of ss 35-40 of the Act relating to the financial capacity of a defendant to pay any fine or reparation;

(ii) the degree of harm that has occurred;

(iii) the safety record of the defendant to the extent that it shows whether any aggravating factor is absent;

(iv) other factors such as:

(a) a guilty plea;

(b) genuine remorse;

(c) cooperation with the authorities in relation to the investigation and prosecution;

(d) remedial action taken to protect against future risk.

Step one – reparation

[46] I have carefully considered the victim impact statement provided for the victim Cruze. The effect on this young boy has been considerable. I do not propose to recite any of its contents in open Court. There are ongoing physical effects on Cruze and scarring. For example, he will need an orthotic insert in the shoe to even out his leg lengths. Mrs Nelson, Cruze's mother, had the horror of witnessing the incident and untangling her son from the machinery. She has been judged unfairly by the public, or at least some members of the public, who appear to be singularly ignorant. Nasty and cruel comments by uninformed individuals may be a feature of the internet these days, but although nasty, nameless internet trolls have greatly hurt Mrs Nelson, without any justification, that impact cannot affect my assessment of the overall penalty to be imposed upon MAL. Ignorant cowards should stay off the internet, but there is nothing I can do about that. Quite independent of the internet, Mrs Nelson has suffered considerably as a direct result of the incident. Cruze's father, Mr Davis, also suffered as a direct result of the injuries inflicted and all that came with that.

[47] This is not an exact science. Fixing reparation has to involve a broad evaluative exercise. Taking all aspects into account, I set, as step one in the sentencing process, reparation as follows:

(i) financial costs payable to Ms Jade Nelson $650;

(ii) emotional harm reparation for Cruze Davis in the sum of $30,000 payable to his mother, Ms Jade Nelson;

(iii) emotional harm reparation to Ms Jade Nelson in the sum of $5000;

(iv) emotional harm reparation to Mr Shane Davis in the sum of $1500. The only reason for the difference is that he was fortunate in not having to witness the incident itself.

Step two

[48] Moving to step two, I note that allowing infants of Cruze's age onto the machine was unwise and I have already rejected the argument that this was hazard identification only with the benefit of hindsight. This comment applies to the defendant with industry knowledge and specific knowledge of the equipment itself. It does not in any way apply to parents invited to pay for their children to experience the ride. Parents can be taken to expect safe equipment. They are entitled to do so. Nothing less than a scrupulous approach will be satisfactory. Small infants are vulnerable by their very size and nature.

[49] The extent of harm is an aggravating factor here.

[50] The operative acts and omissions amounted to a significant failure to apply well-known industry knowledge and to comply with regulations. These acts and omissions also breached commonsense.

[51] The nature and seriousness of the risk may not have been obvious when the machine was assembled and operating, but the hazard was obvious when the modification was carried out and every time the machine was dismantled and reassembled. I accept, however, that the degree of risk was not necessarily obvious,

given the location of the protruding bolt. The degree of departure from prevailing industry standards was nevertheless significant.

[52] As to the availability, cost and effectiveness of remedying the problem – this is self-evident even to an engineering layperson. The actual repair looks sloppy. No issue has been taken with the submission that effective remedy was not likely to cost much.

[53] I take as a starting point a fine of $70,000. This offending falls within a broadband of medium culpability.

[54] As to mitigating features, such as the offer of amends, restorative justice and the like, I give a global discount from the starting point of $70,000 of 15 percent. I note here that I give no significant discount for remedial action regarding the machinery. Such remedial action in this case reflects nothing more than compliance with the law.

[55] $70,000 less a 15 percent discount ($10,500) results in a notional fine of $59,500.

[56] As to a discount to reflect the guilty plea, this matter has had a considerable history. Chronology alone is not determinative of the discount to be afforded for the entry of a guilty plea. However, here the guilty plea was entered following the entry of any earlier not guilty plea. The guilty plea occurred 10 days prior to trial. I do not ignore the fact that some disclosure from the prosecution may have been more timely. The case appears to have been strong from the outset. The time and cost of trial and, importantly, the avoidance of stress for witnesses, was to some extent saved. However, in my view, in all the circumstances, a 10 percent discount for the entry of the guilty plea is appropriate.

[57] This results in a calculation of a reduction of $6000 from the notional fine of $59,500. The result is an end fine of $53,500.

[58] No issue is taken regarding the financial capacity of the defendant to meet penalties.

[59] I stand back and assess the overall result and, taking totality into account, I reduce the fine to $40,000.

[60] The end result is thus:

The defendant is ordered to pay:

(i) financial costs to Ms Jade Nelson in the sum of $650;

(ii) emotional harm reparation for Cruze Davis in the sum of $30,000 payable to his mother, Ms Jade Nelson;

(iii) emotional harm reparation to Ms Jade Nelson in the sum of $5000;

(iv) emotional harm reparation to Mr Shane Davis in the sum of $1500.

The defendant is fined $40,000 and ordered to pay Court costs of $130.

[61] Under s 31(1)(b) Sentencing Act, I order the defendant to pay all of those amounts within 14 days of today's date.

R G Ronayne
District Court Judge