IN THE DISTRICT COURT
AT NORTH SHORE

I TE KŌTI-Ā-ROHE
KI ŌKAHUKURA

CRI-2021-044-001702
[2022] NZDC 6148

WORKSAFE NEW ZEALAND
Prosecutor

v

ALTO PACKAGING LIMITED
Defendant Company

Hearing:	6 April 2022
Appearances:	T Braden for the Prosecutor D Erickson for the Defendant Company
Judgment:	6 April 2022

NOTES OF JUDGE S J MAUDE ON SENTENCING

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[1] Alto Packaging Limited is charged by WorkSafe New Zealand that being a company conducting a business or undertaking, having a duty to ensure, so far as reasonably practicable, the health and safety of workers working for it, and in particular Paul Pita, while the workers were at work in the business failed to comply with that duty, that failure exposing its workers to a risk of death or serious injury. The charge is laid pursuant to ss 36(1)(a), 48(1) and 46(2)(c) of the Health and Safety at Work Act 2015.

[2] The charge arose from the tragic death of Paul Pita on the company's worksite on or about 25 May 2020.

[3] The company, to its credit, has co-operated with WorkSafe investigations and has pleaded guilty to the charge.

[4] My task today is to sentence the company.

[5] An extremely detailed summary of facts, including reference to the company's worksite at Rosedale in Auckland, its process operating as an extrusion and thermo processing site manufacturing food product packaging, the machinery used and the incident itself, is made available to me and will be annexed to this decision for reference. For reasons of brevity and practicality I do not read the summary of facts into my decision.

[6] The essential relevant facts are that on the company's Rosedale site was a Sunwell plastic extruder line including what is described as an S-Wrap machine producing polystyrene foam sheets, later shaped into trays into which meat is packaged.

[7] The incident leading to Mr Pita's death occurred in the extrusion area where raw material is turned into large rolls of product later used for the shaping of the trays to contain meat in another area of the site.

[8] Mr Pita and his colleagues were, on 25 May, undertaking what is known as the string-up process, threading product through various parts of the Sunwell's S-Wrap line containing various rollers.

[9] Mr Pita moved to the outfeed side of the S-Wrap machine to collect product, then feeding it back through lower rollers on the machine. His body was drawn into the lower rollers and crushed. He was declared dead when ambulance staff arrived.

[10] The subsequent autopsy concluded that the direct cause of death was crushing.

[11] Mr Pita was 27 at the time and had worked for the company for approximately six years.

[12] I deal firstly with WorkSafe's assessment of site risk and the company's failure to protect Mr Pita from that risk.

[13] It was submitted, and not contested, that the counter-rotating rollers such as were in operation present as a risk of drawing persons into them, presenting a risk to life.

[14] The rollers on the S-Wrap machine operated by Mr Pita and his workmates were accessible at all times during the appliance's operation, there being nothing to prevent workers leaning in close to the rollers to examine product or to attempt to adjust components or rectify faults while operating at full speed.

[15] WorkSafe obtained advice from consulting engineer Scott Jackson.

[16] Mr Jackson advised that there had been no physical guarding preventing access to the moving rollers and no safety devices in place to stop them if a person's presence was detected. His view was that a competent person would consider the degree of possible harm arising as at the higher end of the scale. He was also not aware of any reason why product could not be threaded when the rollers were not moving or why interlocked guards could not have been fitted to address the risk.

[17] It was noted also that Mr Pita had worked five days Monday to Friday leading into the accident, then following into 12 hours on Saturday and eight hours on Sunday during the weekend, the weekend hours on night shift. The WorkSafe investigation concluded that fatigue could have played a role in the accident.

[18] Despite the company's 2015, 2018 and 2019 assessments identifying that the S-Wrap nip rollers could result in injury during the stringing-up process with risk rating given as extreme, no remedial actions had been taken. That observed, the assessments had referred to the appliance's upper rollers and been silent as to rollers 4 and 5 that had resulted in Mr Pita's death.

[19] Company Framework Design Limited was engaged to provide machine safety reports for all the company's sites around New Zealand. Neither reports referenced the Sunwell S-Wrap machine.

[20] WorkSafe claims that the company ought to have noted that the report had not dealt with the Sunwell S-Wrap machine.

[21] Section 4 of WorkSafe's best practice guidelines for machines issued in May of 2014 sets out that risk assessment should include a process to systematically identify all reasonably foreseeable hazards during a machine's life, inclusive of human factors. Section 8.11 observes the need for emergency stop devices.

[22] I now refer to the company's WorkSafe history.

[23] New Zealand-wide there had been issued one prohibition notice, 10 improvement notices and two written warnings prior to the accident.

[24] A 2010 incident occurred in Hawke's Bay where a worker's arm was caught up in moving rollers.

[25] The company was prosecuted in 2017 when a worker received crushing injuries to his right hand fingers while attempting to feed product through powered rollers.

[26] The company was described as being at all times co-operative in the investigation flowing from Mr Pita's death.

Sentencing Methodology

[27] The case of *Stumpmaster v Worksafe New Zealand* identified that sentencing involves four steps:[1]

(a) to assess reparation payable;

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

(b) to fix the amount of fine appropriate having regard to the guideline bands, having regard then to aggravating and mitigating factors;

(c) to determine whether further orders are required; and

(d) to look at the proportionality and appropriateness of the fines to be imposed having regard to reparation levels and the company's financial capacities.

[28] I turn to the issue of reparation and firstly the issue of emotional harm.

[29] Emotional harm reparation may cover loss or damage to property, emotional harm and consequential loss or damage.

[30] Then-Chief District Court Doogue in *WorkSafe New Zealand v Department of Corrections* observed:[2]

> [25] The task of setting reparation for emotional harm in a case such as this, does not simply involve ordering the same amount given in other cases involving a fatality. Each case must be judged on its particular circumstances. While certain cases may give a broad indication of an appropriate figure, it is unhelpful to pick apart those decisions and try to pair particular features with a particular level of reparation. There is not and cannot be a tariff for the loss of life or grief.

[31] Ms Braden for WorkSafe refers me to the High Court's observations as to reparation awards on a per family basis in *Ocean Fisheries Ltd v Maritime New Zealand* where ranges of $75,000–$130,000 were observed, the majority between $100,000 and $130,000.[3]

[32] Ms Braden observed that Mr Pita was part of a very close family living together, they all no doubt significantly impacted.

[33] I have read the heartfelt statements presented to the Court by Mr Pita's wife, mother, father and two siblings.

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[2] *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865.
[3] *Ocean Fisheries Ltd v Maritime New Zealand* [2021] 3 NZLR 443.

[34] I have read of the important cultural aspect that Mr Pita had in the family as the first born son, now lost to the family.

[35] Ms Braden urges reparation for emotional harm in the sum of $130,000. Reasonably analogous cases were referred to as *Worksafe New Zealand v Ports of Auckland*, *WorkSafe New Zealand v Vehicle Inspection New Zealand* and *WorkSafe New Zealand v Shore Living*.[4]

[36] Alto, the company, has already provided the family with $100,000 emotional harm reparation.

[37] The company fairly accepts the appropriate award lies in the range of $100,000–$130,000.

[38] I accept that what has already been paid is to be deducted from the sum that I conclude is appropriate.

[39] I accept Mr Erickson for the company's observation that the award is compensatory and not punitive by nature.

[40] Ms Braden stressed to me that this is a close-knit family who all live together.

[41] As I have said, I have heard of the emotional impact on the family in respect of this tragic loss.

[42] It is impossible to imagine the grief that they have suffered, that impacted significantly by the awful nature of the accident and its avoidability.

[43] I consider that the appropriate emotional harm reparation figure is $130,000 and I fix it at that, from which of course is to be deducted the reparation already paid.

[44] I turn next to the issue of consequential loss.

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[4] *WorkSafe New Zealand v Ports of Auckland* [2020] NZDC 25308; *WorkSafe New Zealand v Vehicle Inspection New Zealand Ltd* [2021] NZDC 3036; and *WorkSafe New Zealand v Shore Living Ltd* [2021] NZDC 13214.

[45] Both WorkSafe and the company accept that a top-up to Mr Pita's widow to bridge the gap between ACC compensation received for lost earnings and actual lost earnings is appropriate.

[46] At the time of sentence today, WorkSafe have only just received, for reference to their accountant, the necessary information from ACC and it is accepted that with relation to the issue of consequential loss I should reserve my decision and deal with that issue in chambers on the papers, giving of course to Mr Erickson for the company the opportunity to respond to Ms Braden.

[47] I turn then to the issue of a fine which I have identified as the second stage of the process.

[48] I accept that the sentencing principles set out in s 7 of the Sentencing Act 2002 are relevant and must be considered, they including the need to hold the company accountable, to attempt to instil in it a sense of responsibility, the need to provide for victim interests and the need to denounce and deter.

[49] I accept also the need to have as a backdrop to sentencing, acceptance and understanding of the purposes set out in s 3 of the Health and Safety at Work Act.

[50] I must first assess the appropriate fine start point. I must then allow for aggravating and mitigating features to achieve an end result.

[51] The High Court in *Stumpmaster v WorkSafe New Zealand* set out bands for guidance; in respect of low culpability offences $250,000, in respect of medium culpability offences $250,000–$600,000, in respect of high culpability offences $600,000–$1 million, in respect of very high $1 million and more.

[52] Ms Braden for WorkSafe urges a start point between $700,000 and $800,000, Mr Erickson $700,000.

[53] I am assisted by the WorkSafe commissioned reports that I have referred to. I am also assisted by the responsible and non-adversarial approach taken by counsel in their submissions.

[54] The company failed to:

(a) properly assess the risks associated with the Sunwell wrap machine;

(b) to provide plainly needed guards;

(c) to develop standardised operating procedures; and

(d) in my view, to consider the need for automatic roller stops.

[55] The obviousness of the need for guards was highlighted by prior accidents on the company's site, including workers injured by rollers and the company's 2015, 2018 and 2019 assessments, albeit not specifically referring to the rollers now in question.

[56] Ms Braden has referred to the risks to be associated with unguarded machines. They are well detailed in authorities and by now, I would have thought, would have been engrained in the reasonable employer's mind.

[57] Mr Erickson acknowledged the same but drew a distinction between the *Kiwi Lumber* start point of $700,000 and his client's.[5]

[58] In *Kiwi Lumber* the worker victim had to clear 15 faults in two hours, that not uncommon, whereas in this case the stringing-up procedure was required about 20 times a week. The difference exists but it is not greatly significant.

[59] Mr Erickson urges a fine in the range of $600,000–$700,000 and that Culpability in this case is not extreme but cannot be less than high.

[60] In *WorkSafe New Zealand v Eastern Agricultural Limited* the victim was, as was Mr Pita, drawn into a machine with unguarded counter-rotating rollers.[6] He died and a start point fine of $800,000 was imposed. It is difficult to discern a significant difference, though Mr Erickson pointed out that subsequently the guideline sentences

[5] *WorkSafe New Zealand v Kiwi Lumber (Masterton) Ltd* [2020] NZDC 19117.
[6] *WorkSafe New Zealand v Eastern Agricultural Limited* [2019] NZDC 2003.

have been annunciated and that, in his view, they might have led to a different outcome in *Eastern Agricultural Limited*.

[61] Notwithstanding that submission, I have concluded that in respect of this offending the culpability must be at the upper level of high. In reaching that conclusion I was tempted to consider it at extreme however, there must be room left for those employers who simply flagrantly disregard their obligations so that there is a category above that of high.

[62] I calculate at the end of the day that the start point of $800,000 submitted is appropriate.

[63] In terms of aggravating features, both counsel accept that there should be a five per cent uplift in respect of the previous offending of the company in 2019, that being $40,000.

[64] In respect of mitigating factors, it is agreed, and I accept, that it is appropriate for there to be a discount of five per cent in respect of the company's co-operation with WorkSafe and, I note also in that regard, the family.

[65] In respect of remorse there is no doubt in my mind that the company is remorseful. Counsel agree that a five per cent discount is appropriate and I do not disagree with that. That amounts to a further discount of $40,000.

[66] In respect of the provision of voluntary reparation a further discount of five per cent is agreed, which I also accept, being a further discount of $40,000.

[67] There is also accepted as appropriate a discount of 25 per cent in respect of guilty plea, that amounting to $200,000.

[68] The remaining discount at issue is in respect of remedial steps taken by the company.

[69] Mr Erickson urged that in respect of subsequent installation of guarding together with other Albany site changes, a discount of five per cent was appropriate.

[70] Ms Braden urged, in short, that the remedial steps taken, as set out in Mr Thompson's affidavit filed, were not of substance or, as she put it, going the extra mile but rather simply putting in place circumstances that would have been expected in the first place.

[71] The *Oxford Dictionary* indicates that the definition of "remedy" is to put right, the *Cambridge Dictionary*, to correct or improve. Those language definitions, however, are refined in the decision of *Stumpmaster* at para [62]:

> …were the reformative steps going an extra mile, or at the other extreme merely correcting what were woeful deficits that should never have existed in the first place?...

[72] That is to be the question to be asked.

[73] *Stumpmaster*, in essence, places a gloss on the dictionary definitions which of course is binding on this Court.

[74] Mr Thompson's evidence as to remedying of deficiencies was of:

(a) the selling of the Sunwell machine;

(b) the installation of guarding on the Suncorp machine in accordance with recommendations of engaged engineer;

(c) some $150,000 spent on upgrading the OMV extruder plant, engaging experts to advise in that regard;

(d) the spending of $80,000 on rewriting operating procedural documentation;

(e) installation of guarding and railing in other areas including silos;

(f) the development of new training processes and evaluation methods in respect of competency;

(g) there were other improvements referred to in Mr Thompson's affidavit that I do not detail;

(h) the appointment of work, health and safety manager by the company; and

(i) creation of a safety advisory committee.

[75] As I have indicated, Ms Braden's submission was that these actions were simply putting the company back in the position it should have been in from a safety perspective.

[76] It is difficult for me to accurately measure the extent to which the company has gone the extra mile, but I do reach the conclusion that it has gone beyond the reinstate to proper standard level and I allow a further discount of five per cent or $40,000.

[77] The end result is a fine, after allowing for aggravating and mitigating features, of $480,000.

[78] In terms of analysis of proportionality, both counsel accept that the reparation and fine outcomes reached are appropriate as submitted by them.

[79] In terms of additional orders sought, Ms Braden seeks costs in the sum of $1,216.04 for legal costs and 66 per cent contribution towards expert costs, being $4,947.92, making a total cost of $6,163.96, that claim accepted by the company and it is accordingly ordered.

[80] Referencing the result again, I cannot leave this case without observing that no outcome can return to Mr Pita's family the life that they loved and knew. Their loss cannot in reality be satisfactorily compensated.

[81] As I have earlier indicated, I am grateful for the responsible attitude taken by the company and by all participants in the courtroom today.

[82] By way of summary , the following is ordered:

(a) reparation in the sum of $130,000 less the $100,000 already paid;

(b) the company is fined $480,000;

(c) the company is to pay costs to WorkSafe of $6,163.96; and

(d) the issue of consequential loss that I have referred to with relation to the differential between income that would have been received by Mr Pita and ACC payments is reserved, to be considered by me in chambers and I direct that that information and submissions relating to it be filed within 21 days.

[83] Finally, I order release of the summary of facts though of course I have already referred to the summary being an addendum to my decision.

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Judge SJ Maude
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 14/04/2022