IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2022-004-003128
[2023] NZDC 13894

WORKSAFE NEW ZEALAND
Prosecutor

v

KNCC LIMITED
Defendant Company

Hearing:	19 April 2023
Appearances:	K Opetaia for the Prosecutor V Engels and V Harris for the Defendant
Judgment:	19 April 2023

NOTES OF JUDGE S BONNAR KC ON SENTENCING

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[1] The defendant company KNCC Limited has pleaded guilty to, and is for sentence on, an offence under s 48(1) of the Health and Safety at Work Act 2015 of failing to discharge a duty to, as far as reasonably practicable, ensure the health and safety of workers, such failure exposing a person to a risk of death or serious injury. The offence is punishable, in the case of a corporation, by a maximum fine not exceeding $1.5 million.

[2] The facts upon which sentencing proceeds are as follows. The defendant company is a construction business which specialises in building high rise apartment buildings. The company was constructing a commercial building at a site in Kingdon Street in Newmarket. The director of the defendant company is

Mr Jin Woo Heo. Mr Heo's father, Mr Jae Ho Huh, works as a consultant for the defendant company. Mr Huh visited the site a couple of times a week and was also referred to, at times, as the chairman or a director of the company. The site at the relevant times was being supervised by the defendant's project manager, Taeyong Kim, who also goes by the English name of Kernel.

[3] The victim in relation to this offence was a person named Il Ha Ryu who was employed by the defendant as a truck driver and a purchasing assistant. Mr Ryu's duties included delivering materials to site with a truck fitted with a loading crane, and lifting and moving materials on the site by the operation of the loading crane. He would also sling loads which were being moved by the crane, effectively acting as a dogman as well as operating the crane.

[4] Finally, for present purposes, another worker on the site was Mr Rihari Thompson. He was 17-years-old and employed by a labour hire company for the purposes of work on the site. His main duties were to clean up materials around the site where work was not in progress.

[5] On the date of the offence, 25 May 2021, Mr Ryu had been instructed by Mr Huh to lift a stack of plastic construction sheets, measuring 1,200 millimetres by 600 millimetres, which were on the truck. The bundle of sheets comprised a stack of 120 sheets lying on top of each other, but which were not strapped together or secured. Mr Ryu was working unassisted as the crane operator. Due to the low number of workers on the site he had been told by Mr Huh to carry on with the work alone.

[6] Mr Ryu asked Mr Thompson to assist him. Mr Thompson initially declined. He considered that it was not part of his job description and he was not experienced in crane operations, rigging or dogman duties. Mr Ryu complained to Mr Huh and Mr Thompson's employer and, subsequently, Mr Thompson was instructed to assist Mr Ryu.

[7] Mr Ryu looped slings or straps around the unsecured load of construction sheets using what is referred to as a "basket" method of rigging a load. The straps were placed loosely around the load and not tightened before the load was lifted.

Mr Thompson was instructed by Mr Ryu to stand and hold a restraint line or tagline for the load. At the time, Mr Thompson was unaware as to where the load was to be placed. Mr Ryu was standing at the crane controls on the driver's side of the vehicle. He operated the crane and lifted the load.

[8] As it was being lifted, the load touched another stack of material which caused it to sway. At that point, the load was above head height and close to Mr Ryu. One of the slings slid out from underneath the unsecured load. The construction sheets fell and struck Mr Ryu on the left-hand side of his face, forcing his head into the crane. He suffered a concussion and significant injuries to the left-hand side of his face and ear. Those injuries subsequently required surgery.

[9] The charge to which the company has pleaded guilty particularises the failures of the company in terms of ensuring the health and safety of its workers. The charge specifies, first, that it was reasonably practicable for the company to have developed, implemented, and maintained an effective safe system of work, including an effective safe operating procedure, for the use of truck-mounted cranes, including the safe rigging and slinging of loads.

[10] In relation to that particular, the company did have a hazard and risk register for the site and a safe operating procedure for the truck crane. The company did not, however, carry out a risk assessment for the slinging of an unsecured load and the use of a tagline. The rigging and the slinging of loads had not been identified as a hazard. There were no records of any safe operating procedures, safe work methodology, task analysis or similar for the slinging and rigging of loads. The company told WorkSafe in the course of its investigation that it did not know of the existence of any such documents.

[11] Further, the weight of the load had not been calculated prior to the commencement of the lift. Neither Mr Ryu nor Mr Thompson had seen the safe operating procedure for the use of the truck crane and there was no lift plan for the task that Mr Ryu was undertaking on the day in question. Mr Ryu subsequently said that he was given instructions but no lift plan. Other risk management controls were not in place at the time, such as the existence of an exclusion zone or area, the

completion of a job safety analysis or the informing of all persons in the work area, including Mr Thompson, of the lift and drop zones for the load.

[12] Second, the charge particularises that the company could have minimised the risk of falling loads by ensuring the load was effectively secured and that safe methods were used for rigging and the use of the tagline, in accordance with relevant industry standards and approved codes of practice.

[13] The relevant approved code of practice required that taglines should be attached to the load being lifted. In this case the tag line was attached to one of the slings and not to the load itself. Further, the most secure method of rigging and slinging the load, which is referred to as the "choke hitch" method, was not applied to the load. The individual sheets of the load were not secured together with strapping.

[14] Third, it was reasonably practicable for the company to ensure that workers received effective information, instruction, training and supervision for the rigging and slinging activities and the operation of the truck crane.

[15] The defendant's project manager, Mr Kernel, had provided verbal training to Mr Ryu, but there was no evidence that Mr Kernel had himself received relevant training and qualifications or that he was a competent dogman or crane operator. Mr Kernel had apparently worked in construction as a military officer in Korea. He had not operated the truck crane as he did not hold an appropriate licence to do so. The company had not assessed Mr Ryu's competence as a rigger or a crane operator, nor had the company provided Mr Ryu with information, training, or supervision in relation to the operations of the crane or in slinging and rigging operations. Mr Ryu had not completed any unit standards for such operations as required by the approved code of practice.

[16] Fourth, it was reasonably practicable for the defendant company to ensure that all equipment used for lifting loads, including the truck loader crane and the slings, had a current certificate of inspection before being used. In this case the truck and the crane both required certificates of inspection in terms of the relevant approved code of practice. The truck's certificate of inspection had expired at the time of the incident

and the defendant had not obtained certificates of inspection for the crane from the time it had been purchased to the date of the accident. However, it is an agreed fact that the states of the truck and the crane were not contributing factors to the incident.

[17] The approved code of practice also provided that the slings, as lifting tackle, were required to be examined by a competent person on a regular basis not exceeding a 12-month period. The defendant had not had its lifting tackle examined as required.

[18] As I have already said, the harm caused to Mr Ryu involved the left-hand side of his face and his head being forced into the crane. He suffered a concussion and significant facial injuries.

[19] I have subsequently read a victim impact statement prepared by Mr Ryu dated 22 November of last year. In that statement Mr Ryu advised that he had to travel back to Korea for family reasons. He described the head injury and the wound to his face, being a 15-centimetre injury. He required surgery in both Auckland and in Korea. He says that he has suffered some nerve damage and that he was awaiting cosmetic surgery in relation to the facial scarring, which may not be able to take place for some time. He also described a lack of feeling in the left side of his face and acknowledged that he had been funded by the Accident Compensation Corporation until July 2022.

[20] Mr Ryu says that, as of that date, he had not received any support, apology, or financial assistance from the defendant company. He states that he had been informed by the company that because the injury happened in New Zealand, as opposed to Korea, he would not be subject to compensation.

[21] In terms of emotional harm, he expresses a sense of dissatisfaction at what he perceives to be the company's lack of action and he has suffered emotional harm as a result of the injury and the scarring to his face. He describes feeling embarrassed about having his photograph taken at his daughter's wedding. He says that he has become emotional, angry and sensitive following the accident.

[22] In terms of the company's safety history, the company had previously been issued with 14 prohibition notices and 14 improvement notices by WorkSafe in the

period since July 2018. On 29 May 2020, the company was sentenced for breaching ss 55 and 56 of the Act, following a crane collapse in which no one was injured. The company failed to preserve the site and notify WorkSafe.[1] On that occasion the company was fined $26,000, from a starting point of $40,000.

[23] I have received extensive submissions and affidavit material from both parties. There is a significant degree of agreement between the parties in terms of starting points and such like for sentence. The major issues in dispute include the extent to which the company should be entitled to credit for any remorse or assistance provided to Mr Ryu as the victim, as the company says that it had attempted to make an early payment of reparation, on a voluntary basis, to Mr Ryu. The parties also dispute the extent of any credit available for co-operation with the WorkSafe investigation and for remedial steps taken since the date of the accident. Finally, there is an issue as to the financial capacity of the company to pay a significant fine.

[24] The sentencing process for offences of this sort and the methodology of such sentencing is now relatively well known. In *Stumpmaster v Worksafe New Zealand* the Court confirmed that a four-step sentencing process is to be undertaken.[2] First, I must assess the amount of reparation to be paid to the victim. Second, I must fix the amount of the fine by reference to the guideline bands set out in that case and having regard to aggravating and mitigating factors. Third, I should determine whether any further orders are required. And finally, I should make an overall assessment of the proportionality and the appropriateness of the sanctions to be imposed, including consideration of the defendant's financial capacity.

[25] The Court in *Stumpmaster* also identified relevant bands for sentencing. In the case of a corporate defendant, the Court identified four culpability bands. The low culpability band will generally give rise to financial penalties of up to $250,000. The medium culpability band involves fines in a range from $250,000 to $600,000. The high culpability band results in fines in the region of $600,000 to $1 million and, in cases of very high culpability, fines can exceed $1 million and approach the maximum available penalty.

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[1] *WorkSafe New Zealand v KNCC Ltd* [2020] NZDC 9928.
[2] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020.

[26] *Stumpmaster* also confirmed previous authorities as to relevant considerations the Court should take into account in assessing the relative culpability of the defendant.

[27] I turn then, first, to the question of what orders for reparation should be made in favour of the victim, Mr Ryu. Both parties have referred me to a number of authorities and the parties are effectively in agreement as to the relevant award by way of emotional harm reparation. I do not propose to go through each of the cases which have been cited to me for the purposes of this sentence exercise. Once these remarks are transcribed, I will footnote the references to the various authorities.[3]

[28] I agree with the parties, however, that the precedent which is most analogous to the present case is that of *WorkSafe New Zealand v Lindsay Whyte Painters and Decorators Ltd*.[4] I agree with the parties that an appropriate award in terms of emotional harm reparation to be made in favour of Mr Ryu is an order in the sum of $20,000.

[29] The prosecution also seeks an order for reparation in relation to financial loss suffered by Mr Ryu in consequence of the physical harm suffered. They seek an order for reparation in the sum of $11,882 in terms of actual loss. That figure is calculated by reference to the shortfall on the amount paid to Mr Ryu under the Accident Compensation scheme between 1 June 2021 and 12 July 2022 and what he would have otherwise earned during that period. The defendant company takes no issue with that amount and does not seek to be heard in relation to it. In the circumstances, I am satisfied that a further order for reparation in respect of actual loss should be made in favour of Mr Ryu in the sum of $11,882.

[30] I then turn to an assessment of the fine which should be imposed. In terms of the culpability assessment, the various operative acts or omissions have already been addressed by me in my recitation of the facts. The defendant company acknowledges

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[3] *WorkSafe NZ v Corby Forestry Management Ltd* [2017] NZDC 26767; *WorkSafe NZ v Trade Depot Ltd* [2018] NZDC 372; *WorkSafe NZ v Tasman Tanning Company Ltd* [2017] NZDC 24398; *Big Tuff Pallets Ltd v Dept of Labour* (2009) 7 NZELR 322; *Ocean Fisheries Ltd v Maritime NZ* [2022] NZCA 164.

[4] *WorkSafe New Zealand v Lindsay Whyte Painters and Decorators Ltd* [2017] NZDC 28091.

the operative acts or omissions which were identified and set out in the summary of facts. It says, however, that it did indeed have health and safety systems in place including an event-specific safety plan, a health and safety management plan, a hazard and risk register and a truck crane safe operating procedure. It also submits that on-the-job training had been provided to Mr Ryu.

[31] In relation to the nature and seriousness of the risk of harm which might occur and the realised risk which did occur, the obvious risk here was that of death or of severe personal injury being caused to any worker in the vicinity of truck crane operations. I assess that, in the circumstances, as being a significant risk. The realised harm here was serious, involving a concussion and serious facial injuries involving immediate surgery and the potential for further surgery in the future. There were some longstanding, if not permanent, effects.

[32] In terms of the degree of departure from standards in the relevant industry, I conclude that there were significant departures. The Health and Safety in Employment (Pressure Equipment, Cranes, and Passenger Ropeways) Regulations 1999 require persons operating plant to be competent and for operators to be able to provide evidence that crane operators have skills, knowledge and experience necessary to safely operate cranes. There are also approved codes of practice for the operation of cranes and rigging work which provide significant guidance for the slinging of loads, the directing of crane operations and the operation of truck loader cranes. Those codes of practice and guidance are freely available on the internet.

[33] The company submits that Mr Kim/Mr Kernel had provided training to Mr Ryu in relation to the operation of the truck crane and load management. However, there were no training records or other evidence available to establish that Mr Kim had himself received relevant training or qualifications or that he was a competent dogman or truck loader crane operator in New Zealand. As I have said, he had also not himself operated the truck crane as he did not hold a licence to do so.

[34] The company had not assessed Mr Ryu's competence as a rigger or crane operator and, as I have said, he had not completed any unit standards for those

operations as per approved codes of practice. Neither Mr Ryu or Mr Thompson had seen the standard operating procedure for the truck crane.

[35] In terms of the obviousness of the hazard, clearly the hazard here was obvious. In terms of the availability and the cost effectiveness of avoiding the hazard, the defendant company accepts that the cost of remedying the failures was not disproportionate to the risks of harm. Finally, in relation to the current state of knowledge of the risks, the risks were well known and obvious.

[36] In terms of general Sentencing Act 2002 considerations, I consider that relevant sentencing purposes here include holding the defendant accountable for the harm caused and promoting in the defendant a sentence of responsibility for that harm, providing if possible for the interests of the victim, and deterring, this company specific and others generally, from committing like-offences. I must bear in mind the comparative seriousness of the particular offence here and I must, if I can, approach the sentencing on a basis which gives due consideration to the desirability of consistency with sentencing levels in other similar cases.

[37] In terms of the starting point for the fine, again, a number of authorities have been referred to me by the parties and I have considered those cases. I will footnote the references to those cases when these remarks are transcribed.[5]

[38] Both parties agree that this offence falls at the top end of the medium culpability band as identified by the Court in *Stumpmaster*. WorkSafe submits that the appropriate starting point is a fine in the range of $550,000 to $600,000. The defendant submits that the appropriate starting point is a fine in the region of $500,000 to $550,000. Having considered the authorities and the facts here, I consider that the appropriate starting point is a fine of $550,000.

[39] There are aggravating features which require an uplift. That is primarily related to the defendant company's prior safety history. Both prosecution and defence

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[5] *WorkSafe NZ v CNC Profile Cutting Ltd* [2021] NZDC 9794; *WorkSafe NZ v Cropp Logging Ltd* [2018] NZDC 24165; *WorkSafe NZ v Phil Stirling Building Ltd & Duncan Engineering Ltd* [2019] NZDC 10608; *WorkSafe NZ v Agility Building Solutions Ltd* [2018] NZDC 24165; *WorkSafe NZ v YSB Group Ltd* [2018] NZDC 26771.

submit that an appropriate uplift from the starting point for the company's previous adverse safety history is one of 10 per cent, or $55,000. I agree and apply that uplift. That takes me to a nominal global starting point of a $605,000 fine.

[40] In terms of mitigating factors, both parties accept that a guilty plea was entered at an early opportunity and that the appropriate guilty plea discount to be applied should be one of 25 per cent.

[41] In terms of a discount for the fact that I have ordered awards of reparation in favour of Mr Ryu, the prosecutor accepts that a discount of up to five per cent might be appropriate. The authorities suggest that the discount applied should not amount to a more significant credit than the amount actually ordered by way of reparation. I propose to apply a discount of approximately five per cent for the fact that I have made reparation orders in the sums previously described.

[42] I do not consider, however, that I should apply any additional credit for the company's stated efforts to make a voluntary reparation payment to Mr Ryu. The company says that attempts to make such a payment took place in December 2022, after the date on which Mr Ryu had prepared his victim impact statement. Any such efforts were, in my view, late in the piece and after a point in time at which Mr Ryu already felt aggrieved and had stated that he had not received any support, financial help, or an apology.

[43] I accept that the company is remorseful for the accident and expressed a willingness to engage in restorative justice processes with Mr Ryu, which could not take place. I am prepared to apply an additional discount of five per cent to take account of the company's expressed remorse and its willingness to engage.

[44] In terms of co-operation with the investigation, the prosecution submits that the defendant owed a duty under the Act to assist WorkSafe and its inspectors in its investigation and that such co-operation does not, in the usual cases, attract a discount. WorkSafe refers me to dicta of the Court in *Stumpmaster* to that effect and in *East by West Company Ltd v Maritime New Zealand*.[6]

[6] *East by West Company Ltd v Maritime New Zealand* [2020] NZHC 1912 at [118] to [119].

[45] On the other hand, the defendant submits that its co-operation went above and beyond usual expectations or requirements. In particular, it submits that the WorkSafe investigation took place during various COVID pandemic lockdowns when it was challenging to obtain access to documents and instructions but, despite that, the defendant submitted to a duty holder's interview at the earliest opportunity and also assisted with the translation of documents from Korean into English. I propose to apply a relatively nominal further credit of 2.5 per cent for co-operation.

[46] In terms of any discount for subsequent remedial steps, the prosecution submits that there should be no such discount. It submits that the steps taken simply brought the defendant company up to compliance standards.

[47] The defendant, on the contrary, submits that its remediation steps went beyond simply bringing the company up to standard. It submits that the steps taken involved an entire overhaul of the company's health and safety systems and procedures. The relevant steps or remedial steps were identified by the defendant company at paragraph [51] of its submissions. Those steps are said to have included the following:

(a) obtaining the correct certification for the truck;

(b) placing new tags on the truck loader crane;

(c) immediately after the incident, carrying out a toolbox talk with on site workers to ensure that they were aware of the risks arising out of the truck loader crane and what procedures they needed to implement to ensure those risks were eliminated or minimised;

(d) increasing the frequency of toolbox talks and induction processes;

(e) carrying out a risk assessment of the truck mounted crane operations to ensure the hazards and risks associated with it were adequately managed;

(f) developing and implementing a safe system of work for the training and supervising of truck mounted crane operators to ensure that they were and are competent in the safe use of the truck mounted crane;

(g) ensuring the training, information, supervision and instruction requirements of the approved code of practice for cranes were incorporated into the company's health and safety management system, including the minimum unit standard requirements; and

(h) updating the company's workplace policies.

[48] Notwithstanding the defendant's submissions, I do not consider that these matters, either individually or cumulatively, demonstrate significant improvement steps going above and beyond what was required to bring the company up to compliance and to a reasonable standard in terms of health and safety processes and procedures. I therefore do not propose to apply any further discount for remedial steps undertaken subsequent to this incident.

[49] The total discounts to be applied, therefore, approximate 37.5 per cent. I say "approximate" because I am rounding the discounts and will apply a total discount from the starting point of $225,000, leaving a fine in the sum of $380,000.

[50] I then turn to the question of other orders. The prosecution seek an order that the defendant pay $1,390.78 towards its costs, being 50 per cent of the prosecutor's legal costs. The defendant abides the decision of the Court in that respect. I consider the request of costs are reasonable and appropriate. I make an order for payment in the sum of $1,390.78 towards the costs of the prosecution.

[51] Finally, I turn to a totality assessment and the potential for adjustment on the grounds of the financial circumstances of the company. I am satisfied that a total fine in the sum of $380,000 together with the reparation orders made and the order for costs would, ordinarily, be appropriate on a totality basis. However, the defendant here claims that it does not have the financial capacity to pay a fine in that amount. It relies

on the affidavits of Joon Seo, who is the chartered accountant for the defendant company, and Eugene McLaren, the chief operating officer of the company.

[52] Mr McLaren deposes that the company suffered a net loss after tax of $985,331 in 2021. He says that 2022 results are expected to also show a significant loss. The company's only major project and income stream has been halted and there has been no work at the Kingdon Street site since July 2021. He deposes that the company does not have major upcoming projects. He also states that the company is unable to obtain further finance or loans. A supplementary affidavit has been filed indicating an inability to seek any further shareholder advances. Mr McLaren also states that attempts have been made to sell some company assets but have been unsuccessful.

[53] Notwithstanding that, the company accepts that it could pay a fine in instalments of $5,000 per month for the next two years. That is a total amount of $120,000. The defendant submits, however, that its ability to continue to pay instalments beyond a two-year period is speculative at this stage.

[54] WorkSafe relies on affidavits of Mr Jay Shaw, a partner at Grant Thornton. Mr Shaw, after having reviewed the materials supplied by the company, concludes that the defendant has no liquid assets which could be applied to pay a lump sum fine. He also concludes that it does not have sufficient resources to pay a lump sum fine without further funds injection and ongoing shareholder support.

[55] While agreeing that forecasting beyond a two-year period is uncertain, Mr Shaw concludes that it is not unreasonable to assume, at this time, that the defendant may well continue to trade beyond the next two years. He points out that WorkSafe has not had access to the projections upon which the defendant bases its future forecasts.

[56] The prosecution sought a further adjournment of sentencing to obtain further information from the company. That adjournment application was opposed by the defendant. I declined the prosecution request for a further adjournment. I considered that it was in the interests of all parties, including Mr Ryu, the victim, that this matter be finalised today.

[57] WorkSafe submits, however, that the Court should order that the defendant continue to pay instalments on a monthly basis up to a maximum period of five years, that being the term specified in the Summary Proceedings Act 1957 in respect of the recovery of fines and reparations.

[58] The defendant submits that the Court should not make an order for payments beyond two years because, beyond that, the company's financial position is speculative.

[59] While that may be the case, I consider that it is presently reasonable to expect the company to be able to continue to trade beyond the next two years. Given that the company accepts that it can presently pay a fine in instalments of $5,000 per month for the next two years, I see no reason in principle why it should not be ordered to pay the fine in such instalments for a longer period. If the company's circumstances should change and it is no longer able to meet such payments, then it has other options available to address a future inability to pay.

[60] I am not, however, going to require payments to continue for a period of five years. I consider that to be too long a period into the future. I propose, therefore, to make an adjustment to the total fine to be imposed on account of the company's present financial circumstances. The fine will be reduced to a total fine of $240,000 to be paid in monthly instalments of $5,000 per month over the next four years.

[61] The sentence, therefore, includes reparation orders in favour of Mr Ryu in the total sum of $31,882, being $20,000 by way of emotional harm reparation and $11,882 by way of reparation for financial loss. I make an order for payment of the prosecution costs in the sum of $1,390.78. The company is fined the sum of $240,000, to be paid in instalments of $5,000 per month over the next four years.

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Judge SJ Bonnar KC
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 09/07/2023