

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS,
OCCUPATION OR IDENTIFYING PARTICULARS OF CONNECTED
PERSON PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.
SEE PARAGRAPH [44](d)**

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html>

**IN THE DISTRICT COURT
AT GORE**

**I TE KŌTI-Ā-ROHE
KI MARUAWAI**

**CRI-2020-017-000040
[2023] NZDC 4161**

WORKSAFE NEW ZEALAND

v

GORE DISTRICT COUNCIL

Hearing: 6 March 2023
Appearances: R C Woods for the Prosecutor
G N Gallaway for the Defendant Council
Judgment: 6 March 2023

NOTES OF JUDGE R J WALKER ON SENTENCING

[1] I specifically welcome Lachie's father and his partner and any wider friends and family who are here, and I offer my sincere condolences for your loss.

[2] Decisions in relation to these proceedings are often seen as being long and technical. I hope this one will not be. As will be evident to all of you sitting in the back of the Court today, I have had the benefit of reading helpful and detailed written submissions on behalf of both WorkSafe and the Gore District Council outlining their

submissions as to what is the appropriate outcome in terms of a fine, reparation and other costs.

Charge

[3] Gore District Council (who I am going to refer to as “GDC”) have pleaded guilty to a charge laid by WorkSafe New Zealand that on or about 29 January 2019, at Grasslands Road, Gore, being a person conducting a business or undertaking who controls or manages a workplace, namely the Gore oxidation ponds at Grasslands Road, Gore, failed to ensure so far as was reasonably practicable that the workplace was without risks to the health and safety of any person, including Lachlan Paul Graham Jones.

[4] The charge is laid pursuant to ss 37(1), 49(1) and (2)(c) of the Health and Safety at Work 2015. The maximum penalty is a fine not exceeding \$500,000.

Summary of facts

[5] The summary of facts that has been presented to the Court by WorkSafe is lengthy and it will be attached to the comments that I am making today in sentencing GDC.

[6] In essence, however, on the evening of 29 January 2019, Lachie, who was then aged three years and eight months, left his home in Salford Street, Gore, on foot. He was subsequently seen by people in the neighbourhood between 9-9.30 pm running unaccompanied along Salford Street and turning into Grasslands Road.

[7] The entrance gate to the Gore oxidation ponds operated by GDC is situated at the end of Grasslands Road. At approximately 10.20 pm, following a large scale search involving numerous neighbours and members of the police, Lachie was found in the southern-most oxidation pond. Tragically, Lachie was found to have drowned.

[8] WorkSafe subsequently investigated and identified that the fencing around the ponds was inadequate to prevent children from accessing the ponds and deterring other

members of the public from doing so. GDC, having pleaded guilty to this charge, accept that failure.

[9] The oxidation ponds were fenced on three sides with stockproof five-wire fencing with either a live wire or a line of barbwire across the top. The exception to that type of fencing was at the Grasslands Road entrance gates. While it is not clear exactly how Lachie got into the pond area, immediately adjacent to the gate was a short section of wooden fencing approximately 85 centimetres high which had been constructed with horizontal wooden slats, creating in effect a rough ladder which was readily climbable.

Victim impact

[10] The Court has heard a victim impact statement read by Lachie's father and I want to thank him for coming to Court and doing that. It must have taken immense courage. While there are no words that can adequately describe the pain of Lachie's loss, I can put it no better than Lachlan's father when he says "there is no greater loss than the loss of a child". For him, the death of Lachie affects him every moment of every day and he has to live with that heartbreak, the grief, and the trauma, which has seriously impacted on his life in every way.

[11] It is clear from what he said today that he does not agree with the conclusion reached as to the cause of Lachie's death and does not attribute it to accidental drowning and does not hold GDC responsible. His belief has compounded the torment he feels and has added a further hurdle for him in being able to recover from his loss in terms of the normal grieving process.

[12] As I said in my preliminary comments this afternoon, today I am dealing solely with the charge before me and the acknowledgement of responsibility in relation to that charge by GDC. I am not in a position, and nor is it my function, to engage in any wider enquiry as, no doubt, Lachie's father would wish. I do, however, have the greatest sympathy with him and the terrible position in which he finds himself.

Relevant law

[13] I need to say a little bit about the law that I have to apply today. In cases of this nature judges are required to apply relevant provisions of the law, which have been referred to me by counsel for both GDC and the prosecution. I also need to look at other cases in order to try, as much as that is possible, to be consistent in relation to outcomes, which is often made more difficult given the fact that no two cases are exactly alike. However, in cases such as this where there is an overwhelming inherent injustice in the fact that a child has died and that nothing can compensate for that loss, the only justice I can do today is to make sure that the outcome I impose is in line with other cases that have been previously decided.

The Court's assessment

[14] The standard approach to sentencing in relation to charges under this Act has been well established following the decision of the full High Court in the 2018 decision of *Stumpmaster* which sets out a four-step approach where I must consider¹

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- (a) first, the issue of reparation;
- (b) second, the quantum of any fine to be imposed;
- (c) third, whether there are any secondary or other orders that the Court needs to make, for example in relation to the cost of prosecution; and
- (d) finally, when standing back from the matter, whether the combination of orders that the Court makes is proportionate and appropriate.

[15] As the High Court observed in the case of *Big Tuff Pallets Limited v Department of Labour* fixing an award for emotional harm is an intuitive exercise, its quantification defies finite calculation.² The judicial objective is to strike a figure

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

² *Big Tuff Pallets Limited v Department of Labour* HC Auckland CRI-2008-4-4-322, 5 February 2009, (2009) 7 NZELR 322.

which is just in all the circumstances and which in this context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering.

Reparation

[16] Lachie's life is, of course, priceless. The impact of his loss is beyond comprehension to anyone who has not suffered the loss of a child. No amount of money can compensate for that loss, it is unquantifiable. All I can do is award an amount which is line with other cases decided by the Court where a fatality has occurred.

[17] A helpful review of those cases was undertaken by Judge Lynch in *WorkSafe New Zealand v Point Lumber Limited* which identifies the appropriate range³. I consider that an award at the higher end of that range is appropriate.

[18] Accordingly, there will be an award of reparation in the sum of \$110,000, with \$55,000 going to each of Lachie's parents. My hope is that this will at least go in some way to enable the parents to get whatever support they need to cope with the almost unimaginable grief and loss, as well as assist them with some of the financial burden I know has been placed on them.

Quantum of fine

[19] In the *Stumpmaster* case different factors were identified that must be considered by the Court.

[20] When it comes to setting a fine, it is the role of the judge to weigh up the different factors relevant to the particular case in order to determine the appropriate fine. Ultimately, each case must be decided on its own facts.

[21] In this case, as I have previously outlined, the relevant act or omission is that the GDC failed to design, install, and maintain fencing at the ponds to prevent children from accessing them, and to deter other members of the public from doing so.

³ *WorkSafe New Zealand v Point Lumber Limited* [2020] NZDC 10327.

[22] I accept that the Grasslands Road entrance to the ponds was the most obvious point at which members of the public would approach the ponds site, and that it was in that area that it was particularly important that fencing was adequate and effective.

[23] The deficiency in the small section of fencing adjacent to the Grasslands Road gate, I consider, was readily identifiable. I accept the submission made by the prosecutor that the inadequacy of that particular piece of fencing can be contrasted with the installation of deer fencing around the newly installed treatment plant which is within this site.

[24] The risk of drowning in the ponds and other hazards associated with the ponds are self-evident and were reflected in the warning signage on the Grasslands Road gates. The risk, of course, is heightened for children who, in the words of the expert opinion obtained by WorkSafe, said that “children are not small adults, cognition takes time to develop fully. Children are often inquisitive and confident. However they lack experience and knowledge and the cognitive ability to make sound decisions including decisions about safety”.

[25] The prosecutor, however, accepts that although the potential harm was foreseeable, it was not foreseeable that a child of Lachie’s age would access the ponds unaccompanied. Nonetheless, the resulting harm was of a nature that was foreseeable and GDC was obliged to protect members of the public from that harm. That risk, however, is tempered by the fact that in 50 years of the operation of those ponds there has been no other incident of anyone falling into them.

[26] In terms of the degree of departure from prevailing standards, the gold standard of perimeter fencing was deer fencing. However the guidelines for the design, construction, and operation of oxidation ponds provided, and I quote:

Fences are essential to keep livestock out of pond areas and to deter public access. The large areas of land usually involved tend to make climb-proof fencing expensive although from a health and safety perspective its use is desirable. In many cases the front entrance to ponds is securely fenced in this manner with the back door being left at stock-proof fencing, normal seven or eight wire stock-proof fences are usually all that is provided.

[27] Later guidance provided that:

Deer fencing can provide additional security with limited additional expense.

[28] In other words, the guidelines suggest stock-proof fencing as being standard but deer fencing being desirable.

[29] While I accept that the fencing around the ponds at the time was not generally a significant departure from the relevant industry standards, the small portion of wooden fencing at the Grasslands Road entrance not only failed to prevent entry, but effectively provided a ladder to enable entry to occur. In an area close to where the nearest residential housing was only 200 metres away, the risks were entirely apparent.

[30] The area around the ponds has since been fenced with deer fencing, as have two other sites managed by the GDC, along with new gates to the Grasslands Road entrance. While those costs were not insubstantial, they were not at a level that was prohibitive, particularly in the context of this case where there was nearby residential housing.

[31] I consider that the means to avoid the hazard presented in this case was readily available.

[32] Both parties have provided me with useful comparative cases, albeit none which involve facts which are directly comparable to the case before me.

[33] I consider, having regard to all the circumstances of this case - and in particular the *Point Lumber* and *Hastings District Council* cases, which I acknowledge were decided under the previous legislation, as well as other cases cited to me by both counsel - that this matter falls into the middle of the medium culpability band and therefore I adopt a starting point of a fine in the sum of \$150,000⁴.

[34] In terms of aggravating or mitigating factors relating to the defendant, there are no aggravating factors requiring an uplift to that starting point.

⁴ *WorkSafe New Zealand v Hastings District Council* [2015] NZDC 7574.

[35] In terms of mitigating factors, the prosecutor acknowledges that there should be a 25 per cent discount for the GDC's guilty plea which was entered immediately after the amendments of the charge currently before me, and five per cent reductions for the GDC's previously good record which is unblemished, co-operation with the investigation, and willingness to pay reparation. I want to particularly acknowledge the affidavit from GDC's Waters Assets Manager and the apology that was filed by the Chief Executive. I direct a copy of both of those documents be provided to Lachie's parents, if that has not already occurred.

[36] I also would add to the discounts I have mentioned, a further discount of five per cent for remorse, which is also accepted as being appropriate by the prosecutor.

[37] I consider that discounts totalling 45 per cent for all of those matters are appropriate in this case, which brings the end fine to \$82,500.

Secondary or other orders

[38] The prosecutor seeks a contribution to its costs in the sum of \$18,874.85 which represents 50 per cent of the prosecutor's expenses. In my view those costs are just and reasonable.

Totality

[39] There is no indication that the GDC do not have the means to pay the fine and other orders I have made.

[40] Standing back from the matter and looking at the case in its totality, I do not consider the fine, reparation, and other orders I have made to be disproportionate with the offending.

[41] The prosecutor acknowledges, however, that any fine imposed will be met by local ratepayers and will inevitably divert Council funds which would otherwise be applied to community facilities and services. WorkSafe therefore adopt a neutral

position in the event the Court considers it appropriate to reduce or dispense with the fine in this case.

[42] The financial position of the GDC has been widely publicised in terms of the significant debt owed by a relatively small number of ratepayers.

[43] Given that the fencing around the ponds operated by the GDC has been rectified, I consider the purposes and principles of the Sentencing Act 2002 of accountability and deterrence are met by the payment of reparation and costs, and I see no point in further burdening the ratepayers of this area with a fine which effectively would be paid by ratepayers into the Consolidated Fund.

Sentence

[44] The final sentence imposed is as follows:

- (a) Reparation of \$110,000 is ordered against GDC, which is to be divided equally into \$55,000 payments made to each of Lachie's parents.
- (b) For the reasons I have outlined there will be no fine.
- (c) GDC will pay the costs of the prosecutor in the sum of \$18,874.85.
- (d) There will be an order for suppression of the name of Lachie's mother.

Judge R J Walker

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 15/03/2023