

**IN THE DISTRICT COURT  
AT WHANGAREI**

**I TE KŌTI-Ā-ROHE  
KI WHANGĀREI-TERENGA-PARĀOA**

**CRI-2020-029-000159  
[2023] NZDC 17562**

**WORKSAFE NEW ZEALAND**  
Prosecutor

v

**SAND SAFARIS 2014 LIMITED**  
Defendant

Hearing: 5 December 2022

Appearances: R Woods and S Cossey for the Prosecutor  
R Mark for the Defendant

Judgment: 21 August 2023

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**NOTES OF JUDGE P RZEPECKY ON SENTENCING**

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**Introduction**

[1] Sand Safaris 2014 Limited (Sand Safaris) faces sentence for one charge under s 48(1) of the Health and Safety at Work Act 2015 (the Act). This follows a defended hearing in December 2022. At that hearing, WorkSafe alleged that Sand Safaris, being a person conducting a business or undertaking (PCBU), failed in its duty to ensure as far as reasonably practicable that persons (other than its workers) were not exposed to the risks of serious injury or death for work undertaken in the course of Sand Safaris' business.

[2] Sand Safaris is a bus owner/operator. In 2019, its business included running daily bus tours of the Far North, which included a visit to Cape Reinga and then to the famous giant sand dunes at Te Pahi. The tour programme offered customers the

opportunity to ride down the massive sand dunes at the Te Paki stream on boogie boards.

[3] This prosecution follows the tragic death of Mr Jin Chang Oh, who was a Sand Safaris customer who took the opportunity to sand board down a dune, and on his first run, tragically sand boarded through the runout area at the bottom of the sand dune into the path of another bus operated by Sand Safaris, and suffered unsurvivable head injuries.

### **The Facts**

[4] The full facts and circumstances are set out in my reserved judgment, 19 May 2023, which should be read together with this sentencing decision. There is also a helpful summary in WorkSafe's sentencing submissions.

[5] The Sand Safaris bus tour would stop at the Te Paki stream. This was the route which the busses took to transition from the main inland road onto 90 Mile Beach for a trip along the beach, which was also a road. At the Te Paki stream, the Sand Safaris customers were offered sand boarding down the dunes. This involved Sand Safaris providing boogie boards and some basic instructions to the passengers by the bus driver, who would then supervise the activity.

[6] The Te Paki stream area is open to the public from both directions, and when passable, in reality is treated by the general public and tour operators as a road. There is open public access to this area through the stream. Sand Safaris busses would proceed along the margins of the Te Paki stream before parking to allow passengers to disembark and take part in the sand board riding activity if they wished. The traffic through the Te Paki stream always included other busses from tour operators who offered a similar experience to that of Sand Safaris. It was usual for the busses to park in the flat area at the base of the dunes where the sand was hard enough to take their weight.

[7] From time to time, depending on the conditions of the sand and the numbers of busses parking, the parking area was also where the sand boarders would complete their run, referred to as the runout area. Significantly, this meant that sometimes the

same area where the busses and other vehicles were moving also had the potential for sand boarders to enter, usually side on to the vehicles, as they came to the end of their run down the dune.

[8] On 4 February 2019, Mr Oh and his family, all from South Korea, were on a Sand Safaris' bus tour. Mr Oh was accompanied by his wife and his son and daughter-in-law. Mr Oh wanted to participate in the sand dune riding. He went to the top of the dune with the other passengers. A tour bus driver assisted passengers to position themselves on the boogie board before letting them go down the dune. While the bus driver was organising another passenger with their boogie board, Mr Oh put his board on the ground behind the driver in a position ready to go. The driver thought that he had indicated to Mr Oh to stop and told him to come around the other side of him. Mr Oh picked up his board and smiled at the driver. Whether or not he actually understood the driver's instructions is not clear, because Mr Oh did not come around the other side of the driver. Instead, he proceeded to sand board down the dune without any help or confirmation from the bus driver.

[9] At the same time, another bus operated by Sand Safaris had entered the area and was proceeding along the stream margin at the base of the dune. On reaching the bottom of the dune, Mr Oh could not stop in time and went through the runout area at speed. Tragically, he collided with the right-hand side of the Sand Safaris bus and was run over by the rear wheel. Mr Oh suffered unsurvivable head injuries.

[10] In deciding that Sand Safaris has breached its duties, I concluded that there was a clearly identified hazard which Sand Safaris had a duty to eliminate or significantly minimise using reasonably practicable steps. Those steps would have included using a dune not adjacent to a roadway and/or a proper traffic management system, preferably using another driver or employee. Furthermore, I held that failure to take those steps significantly contributed to the cause of Mr Oh's death.

[11] It is in this context that I must now sentence Sand Safaris. The maximum sentence under s 48 of the Act is for a fine of \$1.5 million. While each case must be looked at on its particular facts and circumstances, including the degree of harm

caused by the breach, there are guidelines from previous cases which need to be considered.<sup>1</sup>

### **Sentencing principles**

[12] The approach to sentencing for offending under s 48 of the Act is set out in *Stumpmaster*, where the Court confirmed that the correct approach is to:

- (a) assess the amount of reparation;
- (b) fix the fine by referring to guiding bands, then having regard to aggravating and mitigating factors;
- (c) determine whether further orders under ss 152 – 158 of the Act are required;
- (d) make a note or assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This includes consideration of the defendant’s ability to pay and also whether an increase is needed to reflect the financial capacity of the defendant.

[13] Further guidance is found in s 151 of the Act, which provides:

#### **151 Sentencing criteria**

- (1) This section applies when a court is determining how to sentence or otherwise deal with an offender convicted of an offence under section 47, 48, or 49.
- (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
  - (a) sections 7 to 10 of that Act; and
  - (b) the purpose of this Act; and
  - (c) the risk of, and the potential for, illness, injury, or death that could have occurred; and

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<sup>1</sup> *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020.

- (d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and
- (e) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and
- (f) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and
- (g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[14] This brings into play ss 7 and 8 of the Sentencing Act 2002. In particular, the principles and factors requiring the Court to take into account are:

- (a) accountability;
- (b) denunciation;
- (c) the need to protect the community through deterrence.

[15] In making this assessment, I must take into account the gravity of the offending, the seriousness of this type of offending in relation to the maximum penalty, and the harm that has been caused by the offending, in particular, its impact on the victims.

### **Step one: reparation**

[16] The Court is able to require a defendant to pay reparation to victims in relation to loss or damage to property, emotional harm, and relevant consequential loss or damage.<sup>2</sup> In this case, reparations must be assessed in respect of the emotional harm suffered by the Oh family, and their claim for actual financial losses incurred by them due to the financial impact that Mr Oh's tragic death had on their holiday, and the fact that his death occurred in New Zealand, far away from home.

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<sup>2</sup> Sections 32 – 38 of the Sentencing Act 2002.

[17] In assessing the emotional harm suffered by Mr Oh's family, the prosecution relies heavily on Mr Sang Kyun Oh's victim impact statements. I have carefully read these statements, which have been translated into English.

[18] Mr Oh was 67 years old. He was a very loved father, grandfather and husband, and a very important person in his family and wider community. Mr Oh's son, Mr Sang Oh, admired his father, who was very successful in his career involving educational institutions. The family admired him for his achievements, generosity, and willingness to help others. Mr Sang Oh describes how many of the family's friends and his father's friends and people in their community were devastated by his death. Mr Sang Oh had to be strong for his family, as required by Korean culture. He, of course, is devastated. He finished one of the victim impact statements as follows:

It is impossible for me to fully convey the devastating emotional impact the loss of my father has caused me and my family.

[19] This grief is, of course, aggravated by the circumstances of Mr Oh's death. It is set out in a second victim impact statement by Mr Sang Oh. Mr Oh suffered shocking injuries which were witnessed by his son and other members of his family and passengers of Sand Safaris, which has caused ongoing post-event trauma for them.

[20] In considering emotional harm reparations, I acknowledge immediately that money cannot undo the harm which has been done and the loss which has been suffered by the Oh family. For this reason, the setting of reparation is not a mechanical exercise, rather it is intuitive. My duty is to strike a figure which is just in all the circumstances, taking into account the harm and grief which naturally follows from a death of a loved one and the particular circumstances.<sup>3</sup>

[21] WorkSafe submits to the Court that an appropriate order of reparation to Mr Oh's family is \$130,000. WorkSafe, in its submission, sets out previous cases in support of this. In particular, an award at this level is consistent with the awards to family of fatally injured victims in other cases.<sup>4</sup>

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<sup>3</sup> *Big Tough Pallets Limited v Department of Labour* HC Auckland CRI-2008-004-000322, 5 February 2009 at [19].

<sup>4</sup> *Worksafe v Higgins Contractors Limited* [2020] NZDC 17036 at [16]; and *Worksafe v Vehicle Inspection New Zealand Limited* [2021] NZDC 3036 at [27].

[22] This amount is accepted by Sand Safaris as being appropriate under the circumstances. Accordingly, I make an order of \$130,000 for emotional harm reparation.

### **Consequential loss**

[23] The Oh family also claims consequential losses and seeks these as reparation on top of the emotional harm payment. As is set out from a memorandum from WorkSafe, dated 11 August 2023, and I have subsequently received a memorandum and affidavit from Ms Kim-Claydon which translates the invoices and amounts. The Oh family has set this out as the amount of \$53,209.33 (equivalent in New Zealand dollars) as a result of the accident and Mr Oh's death, and this amount is accepted by Sand Safaris.

[24] I also make an order for payment of consequential loss in reparations. This means that the total amount of reparations owed by Sand Safaris to the Oh family will be \$183,209.33.

### **The fine**

[25] The High Court in *Stumpmaster* sets out four guidelines for culpability and offending under s 48 as far as company defendants are concerned and in relation to setting fines where the maximum penalty is \$1.5 million:

- (a) Low culpability: up to \$250,000.
- (b) Medium culpability: \$250,000 to \$600,000.
- (c) High culpability: \$600,000 to \$1 million.
- (d) Very high culpability: \$1 million plus.

[26] In *Stumpmaster*, the Court set out the factors which are most likely to be relevant at sentencing as follows:<sup>5</sup>

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<sup>5</sup> At [36].

- (a) The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the “practical steps” which the Court finds it was reasonable for the offender to have taken in terms of s 22 of the Act.
- (b) The assessment of the nature and seriousness of the risk of harm occurring, as well as the realised risks.
- (c) The degree of departure from standards prevailing in the relevant industry.
- (d) The obviousness of the hazard.
- (e) The availability, costs and effectiveness of the means necessary to avoid the hazard.
- (f) The current state of knowledge of the risks and of the nature and severity of the harm which could result.
- (g) The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[27] The prosecution and defence have made submissions in relation to these factors.

*The WorkSafe case*

[28] WorkSafe submits that there was a serious risk of harm which was known to the operator because there would be tour busses operating in the area where the sand boarders would end their run, as well as undirected cars and four-wheel drives driven by members of the public. It must have been obvious that a collision between a sand boarder and a bus or car would result in serious injury or death. WorkSafe submits that the hazard was obvious. The factor is strengthened by the fact that there was an incident in 2016 where a young sand boarder had been struck and seriously injured by a passing vehicle in the Te Paki stream. Although this was a business which was part



of the wider tourist industry, its activity put it in a niche category which meant that there were no relevant industry standards.

[29] However, Mr Petricevich, Sand Safaris' director, had previously identified the need to manage traffic and had done that by talking after the 2016 incident to other operators and had, apart from making a few changes, decided that there needed to be a driver at the top of the dunes and a driver at the bottom. This required there to be scheduling of the operations so that the drivers would arrive there at the same time. However over time this system was not really observed, so that ultimately Sand Safaris relied on the driver at the top of the dune to regulate activity, with no one at the bottom.

[30] WorkSafe submits that there were several steps which could have reasonably been taken to significantly reduce or eliminate the risk associated with sand boarding at the Te Paki stream. This could have included:

- (a) Developing and implementing an effective system to control the hazards and risks arising from sand boarding at Te Paki stream.
- (b) To identify and use a safe area for sand boarding where there was no danger to participants from motor vehicles.
- (c) Implement with any other stakeholders an effective traffic management system.

[31] There was nothing to suggest that these steps were prohibitively expensive or could not have been otherwise implemented. In fact, significant remedial steps were implemented within a week of Mr Oh's death. WorkSafe says this indicates the hazards could have been addressed. WorkSafe's submissions in this regard generally follow my findings at trial.

[32] For its part, Sand Safaris says that:

- (a) Whilst Sand Safaris did have health and safety plans in place, it accepts that there was a failure to adequately identify and minimise the risk of a sand boarder colliding with a bus or other vehicle. Instead, the safety

focus was on the likelihood of injury from the actual sand boarding activity and not the risk of collision with a vehicle.

- (b) Sand Safaris says that its operation options were limited, as it did not have control over the area or of other users, including tour operators and members of the public.
- (c) Given that Sand Safaris did not have authority over the operators in the area, it would not have been possible to impose a traffic management system on other operators.
- (d) When Sand Safaris' busses entered the relevant area, they travel very slowly and were not operating recklessly or in a cavalier fashion. The primary concerns for drivers were avoiding accidents with people milling around in the parking area and avoiding sinking into the sand. Whilst they realised that the risk was serious, it was not in the effort that it would be realised.
- (e) Sand Safaris points to the fact that sand boarding had been occurring in the Te Paki stream area for over 30 years without a fatality, although acknowledges that there had been the incident in 2016. It accepts in hindsight that the hazard was obvious but inevitable, and Sand Safaris says that the knowledge and expectations of operators at the time in terms of hazard identification should not purely be based on a hindsight assessment.

[33] Generally, Sand Safaris says in mitigation:

- (a) That it has had an otherwise good safety record.
- (b) It complains that there had been no approach from WorkSafe following the 2016 accident.
- (c) Sand Safaris' health and safety plans were regularly audited.

- (d) There was no carelessness on behalf of the driver.
- (e) Sand Safaris relied on the driver to supervise customers from the top of the dune.
- (f) Sand Safaris complains that Mr Oh did not follow the driver's instructions before commencing his descent.
- (g) Sand Safaris had a health and safety plan which they considered appropriate at the time.

[34] In relation to any attempt to level any margin of blame on Mr Oh, I have already rejected that in my decision, and I must emphasise, as I did in that decision, that I do not accept that Mr Oh was to blame at all for what happened to him.

[35] WorkSafe take issue with a number of the points made by Sand Safaris. In particular, WorkSafe does not accept that Sand Safaris' health and safety plans were regularly audited and made submissions at trial that indeed there had been no audit since before the 2016 accident, and that seems to be the tenor of the evidence.

[36] Both the prosecution and defence refer to a number of cases which set out starting points between \$500,000 to \$700,000 for fines. WorkSafe submits that Sand Safaris' liability is at the lower end of the high band in *Stumpmaster*, however, Sand Safaris says that its contact is more properly at the upper quartile of the medium band.

[37] Having considered those cases produced by both parties and the particular circumstances of this case, I am satisfied that the offending falls on the cusp of the medium to high culpability band set out in *Stumpmaster*. I consider that a starting point of \$600,000 is appropriate for a fine at this stage.

[38] That leads me to discounts.

## **Discounts**

[39] WorkSafe acknowledges that Sand Safaris is entitled to some discounts on the fine for mitigating factors. These were:

- (a) Previous good record: five per cent.
- (b) Reparations: five per cent.

[40] Sand Safaris argues that there are more extensive discounts available, and I will deal with those now.

### *Co-operation with WorkSafe*

[41] Sand Safaris argues that it was fully co-operative throughout the investigation by WorkSafe. In particular, its director, Mr Petricevich, agreed to be interviewed at his lawyer's office and provided documents on request. Following that interview, Sand Safaris says that it responded to further requests for information. WorkSafe argues that Sand Safaris' subsequent conduct in denying that it was in fact the tour operator and making a disclosure for the first time at the end of trial of relevant documents which should have readily been provided earlier shows a lack of co-operation. At the end of the day, I am satisfied that despite these matters, there was a degree of co-operation which requires some discount. That will be set at a level of five per cent.

### *Reparation*

[42] It is usual for the Courts to recognise the willingness of a defendant to make a reparation payment and reflect this as a discount on a fine. In this case, it will be a five per cent discount, as Sand Safaris has agreed to make the reparation payments and has not disputed the amount sought.

### *Remorse*

[43] It is clear from the circumstances that there was never any intention by Sand Safaris and/or its owners and staff to cause harm to anyone. However, there has

been no gesture from them to the Oh family which suggests any outward form of remorse in the traditional sense. There was, however, an offer by Sand Safaris to participate in a restorative justice process, but that does not seem to have taken place. That, of course, is not Sand Safaris' fault. Despite this, Sand Safaris continues to blame Mr Oh at sentencing, even though this was rejected at trial as a causative factor. On that basis, there will be no discount for remorse, and it is regrettable that there is no one from Sand Safaris here today.

### *Remedial steps*

[44] In the short period of time after the accident, Sand Safaris worked with other tour operators and local iwi and the Department of Conservation to put in place effective measures to limit the risk posed to sand boarders. This is to be commended and there will be a discount of five per cent for remedial action.

[45] There is nothing to suggest that Sand Safaris had a poor safety record. It has no previous relevant convictions. Accordingly, it is entitled to a further discount of five per cent.

[46] That totals discounts of 20 per cent. Applied to the fine, that reduces the starting point to a fine of \$480,000.

### **Proportionality**

[47] Standing back and looking at proportionality, I find that a fine at \$480,000 is appropriate under the circumstances, taking into account the maximum fine available to the Court. This is sufficient to denounce Sand Safaris' behaviour and firmly acknowledges the seriousness of its breach.

[48] However, I must also take into account the financial ability of Sand Safaris to pay reparations and a fine.<sup>6</sup> In its submissions, Sand Safaris attached its draft financial records for the years 31 March 2022, together with draft financial statements for 31 March 2023 (final accounts have not yet been completed). Sand Safaris submits that its financial position has deteriorated substantially since the accident occurred in

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<sup>6</sup> Section 40(1) of the Sentencing Act.

February 2019. It puts this down largely to the result of the financial impact of the COVID-19 pandemic on the tourist industry, which was particularly hard hit. It acknowledges, however, that a fine and reparation can be paid over time.

[49] WorkSafe has filed an affidavit of Mr Simon Taylor setting out an analysis of Sand Safaris' financial position. In summary, Mr Taylor concludes that Sand Safaris has an ability to pay as follows:

- (a) A lump sum payment between \$30,000 and \$70,000 using current and future cash facilities or the sale of assets.
- (b) A monthly instalment fine of \$5,000 per month for a maximum of five years.

[50] Looking at those financial possibilities for payment posed by that analysis, it appears that funds in the range of \$370,000 are available over five years. It also appears that Sand Safaris may have other issues in relation to its liability to the IRD which perhaps rules out a lump sum payment at the moment.

[51] Mr Taylor's affidavit is a reasonable reflection of Sand Safaris' ability to pay a fine and the best information available to the Court. It is a local Northland business of reasonable longevity which employs a number of local people. While convicted of breaching s 48 of the Act, any fine must still reflect its financial situation so as not to put it out of business altogether.

[52] The payment of reparation should be made as a priority. Accordingly, I reduce the fine to \$200,000 to reflect Sand Safaris' financial position. In making that assessment, I am mindful that a fine still needs to be able to achieve the sentencing aims of accountability, denunciation, the protection of the community from tourism operators who do not offer safe activities.

### **Prosecution costs**

[53] WorkSafe seeks to recover 50 per cent of its external costs for the prosecution, amounting to \$23,136.63. Sand Safaris accepts that this is a reasonable amount and

does not oppose an order, provided that payment will only occur after payment of reparations and the fine.

### **Sentence**

[54] Accordingly, I impose the following sentence on Sand Safaris:

- (a) Reparation is ordered for emotional harm to Mr Oh's family of \$130,000.
- (b) Consequential loss reparations to Mr Oh's family to be paid of \$53,209.33.
- (c) There will be a fine of \$200,000.
- (d) Prosecution costs at 50 per cent of external costs of the prosecution amounting to \$23,136.63 are ordered.

[55] In relation to payment, I make no specific directions, other than to direct Sand Safaris to make an arrangement with the registrar for payment of all amounts over time, with a direction that the first amounts paid should go immediately to the reparation payments for emotional harm and consequential loss.

[56] Just leaves me to wish Mr Sang Oh and his family all the best from the Court, and you have, of course, our deepest sympathies going forward.

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Judge P Rzepecky  
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe  
Date of authentication | Rā motuhēhēnga: 25/08/2023