IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2018-092-001154
[2018] NZDC 26771

WORKSAFE NEW ZEALAND
Prosecutor

v

YSB GROUP LIMITED
Defendant

Hearing:	9 November 2018
Appearances:	A Simpson for the Prosecutor E Harrison for the Defendant
Judgment:	9 November 2018

NOTES OF JUDGE R J McILRAITH ON SENTENCING

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[1] (no audio from 09:47:49 to 10:20:24) bus driving over it the ground had become compacted and uneven, creating a lip between that ground and the next section of concrete footpath.

[2] As put by the defendant, the crux of this matter is that:

(a) YSB Group Limited did not formulate a plan with the contractor and subcontractors working on the site for pump and concrete trucks to access the three house plans on the site and,

(b) When the pump and concrete trucks entered the site by driving over the footpath, the company did not realise that a risk to safety had arisen from the ground, which had become compacted and uneven due to the heavy trucks driving over it.

[3] In any WorkSafe prosecution one must be mindful of the relevant purposes and principles of sentencing and I accept entirely the submissions of WorkSafe that in this case the most relevant purposes of sentencing are to provide accountability for the harm done to the victim, to promote a sense of responsibility for the harm, reparation and the interests of the victim, denunciation and deterrence.

[4] A full Court of the High Court has recently issued a guideline judgment for sentencing under this section of the Health and Safety at Work Act 2015, the *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 decision.[1] The Court in that case has confirmed a four-step process which I must go through. Those steps are:

(a) Assessing the amount of reparation to be paid to the victim.

(b) Fixing the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors.

(c) Determining whether further orders under ss 152-158 of the Act are required, and

(d) Making an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[5] The first step, therefore, is assessing the quantum of reparation.

Reparation

[6] WorkSafe has submitted that the appropriate amount of reparation for emotional harm in this case is in the vicinity of $120,000 payable to Mr Williams'

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

family. There are four surviving family members. They have suffered and continue to suffer significant emotional harm. In the course of this sentencing process I have been provided with extensive victim impact statements and had the privilege of having those statements read to me by members of Mr Williams' family who I note are in Court today.

[7] I have been provided by WorkSafe with a number of example cases involving fatalities where payments have been made to family members for emotional harm. It is WorkSafe's submission that an award in the amount of $120,000 would not be out of step with those cases.

[8] The defendant cites in its submissions the often quoted words of the Chief District Court Judge and I adopt her comments entirely. Those are:

> Determining reparation for loss is by no means an easy task. It involves placing a monetary value on that loss, which can only ever fall short of truly reflecting on the grief felt. Reparation gives a measure of recognition to the loss in the best way the Courts are capable of doing it. We are never capable of doing it to the extent that the family may feel is necessary.

[9] The company accepts that orders for emotional harm reparation in workplace death cases typically range between $80-120,000. In its submission an amount of $80,000 would be appropriate in this case.

[10] In terms of identifying why the defendant takes that view, one of its major submissions is that it has made clear from the moment a guilty plea was entered that it would be happy to make a significant contribution towards reparation in advance of sentencing. In other words, it has always been prepared to make such a payment.

[11] The company has noted that Shannon Thompson Concrete Pumps Limited has also been charged in relation to this incident. It has yet to proceed through the Court process fully. If it were to be convicted in relation to the charge it faces, it would of course be jointly and severally liable for any reparation order. However, I have been informed, and I understand this not to be in dispute, that that company may not be in a position to pay anything, if much, towards the reparation payment.

[12] Having considered the case law that counsel have referred to me, and reflecting upon the amount of reparation that is payable in this case, it is my view that the amount of emotional harm reparation that should be paid is $100,000. In terms of who that payment is to be made to, it is to be paid on the basis of submissions from WorkSafe to Patricia Williams, who is to then take responsibility for apportioning the payment to family members.

Level of fine

[13] I turn now to the second step, which is assessing the quantum of fine. In *Stumpmaster* the High Court set four guideline bands for culpability. Those are:

(a) Low culpability, a starting point of a fine up to $250,000.

(b) Medium culpability, a starting point of $250-600,000.

(c) High culpability, a starting point of $600,000 to $1 million, and

(d) Very high culpability, a starting point of $1 million plus.

[14] There a number of well established culpability assessment factors which I need to work through.

[15] The first of those is the identification of the operative acts or omissions at issue and the practicable steps that it was reasonable for the company to have taken in terms of s 22 of the Act.

[16] As has been set out in the summary of facts, WorkSafe submits that the company's conduct failed in three key areas. As a result of those failures it submits that Mr Williams was fatally injured. It submits that it was reasonable practicable for the company to have undertaken an assessment of the risk posed by the damaged footpath, adequately managed and controlled those risks by taking appropriate steps, such as blocking off the damaged footpath using cones and establishing alternative access pending remediation, and developing, implementing and communicating a site access plan.

[17] The defendant takes a significantly different view in relation to this culpability factor. It has categorically rejected the submission by WorkSafe that Mr Williams died as a result of its omissions. In particular, it has pointed to the fact that it took no part in the decision to remove temporary fencing, and has submitted that its offending is only marginally more serious than that of a defendant committing an offence under s 34 of the Act, which is an offence of failing to co-ordinate activities. It points out that under s 34, the maximum penalty is a fine of $100,000. It says that this is informative in terms of its degree of culpability and is indicative of an appropriate starting point for a fine. It submits that the party which must bear primary responsibility for Mr Williams' accident is in fact Shannon Thompson Concrete Pumps Limited.

[18] It further submits that the other contractors on site who actually saw and drove over the footpath after the pump truck had gone in, but failed to raise it as a safety issue, must also bear some responsibility.

[19] As I raised with counsel during oral submissions, I have some difficulty with counsel's assessment that the company's conduct was only marginally more serious than that contemplated by the offence under s 34. In my view, that misunderstands the obligations of the defendant and its overarching responsibilities.

[20] Turning to the second culpability factor, that is the obviousness of the hazard, the availability of the means to avoid the hazard and current state of knowledge of the risk. Of particular relevance in my view in terms of the obviousness of the hazard, and this is a matter I raised expressly with counsel for the defendant, was the involvement of Auckland Council and earlier events concerning the footpath. I requested during the sentencing process to be provided with some information as to council involvement. That led to my receiving an affirmation from Catherine Reardon. In that affirmation, she sets out how on 28 December 2016, following a site visit, Auckland Transport issued a notice of non-conformance to the contractor COS Consultants Limited. Auckland Transport issued the notice as the worksite was found not to be in accordance with accepted traffic management practices. The site was deemed unsafe and the work was immediately ceased until the required action was taken. Details of the non-conforming temporary traffic management included, "an adequate provision for the pedestrian". Attached to that affirmation as an exhibit was

the notice of non-conformance. That notice was issued, as I say, to COS Consultants Limited. It noted specifically the details of non-conforming temporary traffic management and amongst those was indeed inadequate provision for pedestrians.

[21] In that regard, I also note the comments made by Mr Gundeep Singh in his affirmation provided to me. At paragraph 6(b) of that affirmation, he noted the following. "As Mr Coles pointed out, it does not matter whether the concrete trucks are driven over the temporarily reinstated footpath or the regular footpath, they would have damaged whatever type of footpath, so he would not have been advising me that vehicles cannot go over temporary footpath specifically when in fact no part of the footpath could support the weight of heavy vehicles."

[22] In my view, the fact that council had been to site, assessed matters earlier and drawn the contractor's (and, of course, through the contractor, the defendant's) attention to the need to pay specific attention to the footpath, combined with that stated knowledge of Mr Singh, confirms to me that there was a very obvious hazard and that that hazard was clearly notified to the company and, in fact, should have been front of mind. That conclusion sits very uneasily with the defendant's position that it had not looked at the state of the footpaths on the Friday or over the weekend after the concrete laying on the Thursday.

[23] WorkSafe submitted that the footpath was in an obviously dangerous state. Further, that there was ample current knowledge as to the means available to mitigate the risk, including carrying out a risk assessment, putting in place controls and communicating a site access plan. The cost would have been minimal to implement controls.

[24] For its part, the company does not accept that the footpath was in an obviously dangerous state. It has submitted that the footpath was in fact simply somewhat uneven. It quite correctly points to the fact that no complaints were received in respect of the footpath, either from passers by or from the council. It submits that there was, in fact, a control in place in the form of temporary fencing, which one might think is a clear sign that vehicles should not drive over the footpath at that point. That of

course, while accurate at a point in time, is not applicable to what occurred at the time Mr Williams went past.

[25] Turning to the third culpability factor, that is the risk of and potential for illness, injury or death that could have occurred, it is accepted in relation to this culpability factor that injury was the more likely outcome. Having said that, there is no doubt that of course death was possible.

[26] In terms of the fourth factor of when a death, serious injury or serious illness occurred or could reasonably be expected, as I note, while injury was the most likely consequence, death did result.

[27] In terms of the fifth factor, the degree of departure from prevailing industry standards, WorkSafe has pointed to a significant number of industry standards. As discussed with counsel during submissions, in my view, most if not all of those standards are quite generic. It is undoubtedly the case that there are codes of practice with respect to footpaths and pedestrian facilities and those could have been identified by the defendant. Perhaps of particular importance in this regard also are my earlier comments about the involvement of Auckland Council earlier in the year.

[28] The defendant has drawn my attention to a significant number of cases in respect of identifying the culpability band. After traversing those cases, it submits the WorkSafe submission that this defendant's offending falls in the high culpability band is simply not sustainable. Further it says that WorkSafe's suggested starting point for a fine of $750,000 (and I will return to WorkSafe's submissions in a moment), is utterly unsustainable, given the following factors: the defendant's lack of involvement with driving over the footpath; its lack of awareness of risks from bumpy footpaths; the lack of foreseeability of death arising as a consequence of bumpy footpaths; the case law that it has referred to; and the $100,000 maximum penalty in cases of failing to consult under s 34. Given those factors, the defendant has submitted that an appropriate starting point of $150,000 to $200,000 is appropriate in this case.

[29] WorkSafe takes a very different view. It submits that the defendant's liability is in the high range identified by *Stumpmaster* and that a starting point of some

$750,000-$800,000 is appropriate. It draws my attention to a significant number of cases indicating that a start point in that area is not unreasonable. Its primary submission is that there was an obvious risk arising out of a dangerous hazard which was not controlled.

[30] I have read the cases that counsel have referred to and re-read their submissions a number of times in an attempt to identify why counsels are so far apart in terms of their assessment. I think the answer to that is found in a consideration of the points which I set out earlier that the defendant put forward as why WorkSafe's starting point was unsustainable.

[31] Firstly, the defendant's lack of involvement with driving over the footpath. In my view, that understates or fails to acknowledge the defendant's involvement in the worksite and its overarching responsibilities.

[32] Second, the defendant's lack of awareness of the risks from bumpy footpaths. In my view, while that may to an extent have some merit, it overlooks of course the points I have noted earlier in terms of this defendant's knowledge of the state of footpaths generally, the need to observe them and ensure that they were in good state given the earlier involvement of the council, and what Mr Singh himself observed in his affidavit, about the obvious damage that would be caused to footpaths by the concrete trucks.

[33] Third, the lack of foreseeability of death arising as a consequence of bumpy footpaths. While I have some sympathy with that submission, as injury was undoubtedly the most likely consequence, the reality is that a fatality occurred.

[34] Fourth, the cases that have been referred to. I have considered these.

[35] Fifth, the $100,000 maximum penalty in cases of failing to consult under s 34. As set out earlier, I consider that comparison with that section is misconceived.

[36] For me, one of the key points here is that Mr Singh was aware that the footpath would be damaged in this process. If he was not actually sure he undoubtedly should

have been sure. In my view, the fact that damage would be caused to the footpaths by such a number of large concrete trucks was so obvious it had to go without saying. The fact that there had earlier been council involvement with the footpath in drawing attention to the fact that it needed to be addressed on that occasion, aggravates that situation.

[37] In my view, the culpability is properly placed toward the top of the medium culpability band. The starting point should be $550,000.

[38] I turn now to the presence of aggravating or mitigating factors. There are no aggravating factors. In terms of mitigating factors, WorkSafe submits that up to 20 percent in discounts are available to the defendant and cites to me the comments from the High Court in *Stumpmaster* regarding care being required in this area.

[39] For its part, the defendant submits that up to 30 percent of discounts are available.

[40] It is undoubtedly the case that discounts are available for the following factors.

[41] Firstly, reparation. As I noted earlier, the company has always accepted that it must pay reparation to the Williams family. It has offered to make substantial payments shortly after its guilty plea was entered. That is to its credit and it is due, in my view, a discount of 10 percent with respect to reparation.

[42] Secondly, it is due a discount for remorse. I accept that the remorse that has been present on the company's part is genuine and I have acknowledged throughout the presence of its directors in Court. It is due a five percent discount for remorse.

[43] Third, it has co-operated with the investigation. That has not been in doubt and it is due five percent discount for that factor.

[44] Fourth, it has a previous good record and it is due a discount of five percent for that factor.

[45] Total discounts are therefore 25 percent.

[46] From a start point of $550,000, taking off 25 percent, a figure of $137,000, takes us to a fine of $412,500. From that the defendant is then entitled to a discount of 25 percent for its guilty plea. That takes off $103,125, leaving a fine of $309,375.

[47] That, in this case, however, is not the end of that issue. The question that has arisen is whether the level of fine should in fact be reduced, given the financial position of the defendant. This issue has been raised by the defendant in this sentencing. I have been provided with an affirmation from Mr Ali and additional submissions from the defendant and WorkSafe with respect to the company's financial position.

[48] Mr Ali is the director of an accounting firm which provides accounting services to the defendant. In his affirmation, he has set out the financial circumstances of the company. Most important to me is confirmation that there have been no payments to directors in the year ending March 2018 due to the company not earning any income during that year. That was because the property it owned was being developed, but had not yet been sold. The directors, therefore, took nothing from the company in that year. The payment of $40,000 which was made to directors that year, minus the proposed contribution towards reparation and the fine that he had anticipated, represented fees for two years' work. After paying off term loans, interest, GST, income tax and other incidentals, that will leave the company with a bank balance of just over $14,000 for that year. In his view, the company is therefore not in a position to pay more than the $75,000 combined personal contribution from the directors towards reparation and a fine that they had proposed. He says that he had considered whether the company could pay more money over a longer term, for example, a term of two years, but he noted that the company is selling the property it owns in order to free up cash so as to pay reparations and fine. It has no other source of income and no other contracts for future projects. Accordingly, he says it is not likely that a payment term of around two years would improve the company's ability to pay more towards a reparation and fine.

[49] I have received submissions from WorkSafe in relation to that affidavit, critical of some of the approaches that seem to have been taken by the company over the last two years. In particular, it has submitted that the amount of directors' fees paid or to be paid since the date of the incident could in fact have been applied to the fine and

observes that since the incident, the defendant has sold assets and received income from that sale in the amount of $215,000. That income, or a portion of it, could also have been put aside to be applied to the payment of a fine.

[50] Ms Harrison was requested by me to provide supplementary submissions in relation to this issue of financial impecuniosity. Those submissions have been very helpful. The starting point in her submissions, and I agree, is to consider the recent High Court decision in *Stumpmaster*. The Court noted at paragraph 23 the following:

> Section 1512(g) is not to be read as a statement that an inability to pay cannot be considered. This is where the rule that all of the Sentencing Act 2002 applies is particularly relevant. On this issue of ability or inability to pay, all the following provisions in the Sentencing Act apply to a Health and Safety at Work Act sentencing:
>
> (a) Section 8(h) which requires a Court to take into account the circumstances of an offender that might mean an otherwise appropriate sentence would be disproportionately severe.
>
> (b) Section 14(1) which says a Court may decide not to impose a fine, otherwise appropriate, that an offender cannot pay.
>
> (c) Section 40(1) which directs a Court when imposing a fine to have regard to the financial capacity of the defendant, and
>
> (d) Section 41 which empowers a Court to require a declaration from the defendant as to financial capacity.

[51] The final step of a sentencing will still involve assessing the ability of the company to pay the otherwise appropriate fine.

[52] Ms Harrison has drawn my attention to a decision by Judge Mabey QC in *Commerce Commission and Manufacturers-Marketing Ltd* [2018] NZDC 7913.[2] That decision helpfully set out by reference to a number of High Court authorities a number of principles that can be discerned in relation to this topic. The important ones in my view are as follows:

> (a) It is important to determine a provisional fine or starting point before adjustment to reflect a defendant's financial capacity.
>
> (b) Fines may be made in instalments but should not be ordered for any length of time and that 12 months is normally an appropriate lengthy maximum period.

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[2] *Commerce Commission and Manufacturers-Marketing Ltd* [2018] NZDC 7913.

(c) That a fine ought not to place a company at risk.

(d) That a fine needs to be large enough to bring home the message to directors and shareholders of corporates.

(e) That one must avoid a risk of overlap that in a small company the directors are likely to be the shareholders and therefore the main losers if a severe sanction is imposed on a company. The Court must be alert to make sure that it is not in effect imposing a double punishment.

[53] I have read carefully Mr Ali's affirmation and done my best to reach a view as to the treatment of finances over the last three years and take on board points made by WorkSafe in its submissions. I am left with the conclusion that this is not a case where the directors have unreasonably taken funds from the company as WorkSafe submitted.

[54] I am particularly mindful, with respect to the principles I have outlined a moment ago, that one ought to be careful not to put the company in a position where it would in fact go out of business by imposing an unrealistic fine.

[55] I am satisfied that the fine that I would otherwise have awarded, which is a fine of $309,375 should be reduced to reflect the financial situation of the company and its ability to pay. The final fine that will therefore be imposed is a fine of $100,000.

[56] Turning to the final step in the sentencing process, I have submissions from WorkSafe seeking costs in its favour of $2607.10. That has been opposed by the company. However, I consider it to be reasonable. So costs in favour of WorkSafe of that amount are ordered.

[57] The final step in this process is for me to stand back and undertake a proportionality assessment. I am satisfied that the final outcome, being a payment of reparations to Mr Williams' family of $100,000, payment of a fine of $100,000 and payment of WorkSafe's costs of $2607.10 is a proportionate response to the offending involved and takes into account the financial position of the defendant.

R J McIlraith
District Court Judge