EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

ORDER SUPPRESSING PUBLICATION OF ALL FINANCIAL DETAILS IN RELATION TO MMD ENGINEERING LIMITED AND DAVIES TREE SERVICES LIMITED

IN THE DISTRICT COURT AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE KI ŌTAUTAHI

CRI-2018-009-005053
[2019] NZDC 8584

WORKSAFE NEW ZEALAND
Prosecutor

v

DAVIES TREE SERVICE LIMITED
MMD ENGINEERING LIMITED
Defendants

Hearing: 8 May 2019

Appearances: D M Brabant for the Prosecutor
S G Graham for the Defendant Davies Tree Service Limited
J B Lill for the Defendant MMD Engineering Limited

Judgment: 8 May 2019

NOTES OF JUDGE T J GILBERT ON SENTENCING

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[1] MMD Engineering Limited is for sentence on one charge under ss 40(1)(a) and 40(2)(a) and 48(2)(c) Health and Safety at Work Act 2015. In June 2016 it failed to comply with its safety related obligations as the manufacturer of a log splitter that was to be used in a customer's work place and thereby exposed potential operators of the log splitter to a risk of serious injury. My understanding is that it is the first time this particular charge has been considered by the Courts.

[2] Davies Tree Service Limited (which will call "Davies") is for sentence on one charge under ss 36(1)(a) and 48(1)(c) of the same Act. That company purchased the log splitter which was central in an accident involving [the victim] in June 2017. Davies failed to ensure the safety of workers including [the victim] who were operating the log splitter and thereby exposed them to the risk of serious injury.

[3] Although at first blush the charges appear closely related, upon analysis there are factual gaps between them. The maximum penalty in relation to each defendant is a fine of $1,500,000.

Facts

[4] There are two summaries of fact – one in relation to each defendant. The summaries are extensive and I only intend to provide a high level overview.

[5] MMD is a small engineering company that manufactures plant and machinery. In July 2014 Davies contacted the predecessor of MMD to design and build a firewood processor/log splitter for use at its firewood yard. MMD had not previously manufactured this particular type of machine before. It engaged certain key suppliers in relation to some aspect of design and specification. Some guidance material was consulted although that did not include one particular safety standard that was relevant.

[6] The machine was tested prior to delivery to Davies. However, it was delivered with no instruction manual and without a full commissioning report or safety audit having been undertaken. It also did not have an interlocking device attached to stop the machine operating if the guard was open. This is something it was aware should have been present and was engaged to provide.

[7] There was an issue with logs falling awkwardly into the cradle as a result of which Davies identified what euphemistically is called a "work around" to prevent jamming. This involved manually repositioning the log using a stick prior to the splitter automatically activating. If that was not possible, the machine's automatic cycle was stopped whilst the problem was sorted by hand.

[8] Once on site, Davies modified the machine in that the guard door designed to protect the user of the machine from the circular saw and the hydraulic log splitting ram was removed. This was because of vibration but it was an inexcusable action on Davies' part.

[9] On the morning of 6 June 2017 the victim was operating the machine unsupervised. He had only been working with Davies for a couple of weeks. A log fell into the cradle and because he anticipated a jamb he pressed the button stopping the automatic cycle. He then put his hands through the unguarded opening where the guard door had been removed by Davies in an attempt to manually reposition the log.

[10] His hand got stuck between the hydraulic ram and the stationary blade. He tried to push the emergency stop button but did not do so in time, with the result that four fingers on his right hand were amputated just below the knuckle. Whilst the hydraulic ram came to a stop when the emergency stop button was pressed, the rotating circular saw continued to revolve for over a minute.

[11] Three of [the victim]'s fingers were re-attached by surgeons but his index finger was not. Whilst he has some use of the re-attached fingers they do not straighten fully and neither can he make a closed fist and he also has reduced power in that hand.

[12] A subsequent investigation found that the machine was not manufactured by MMD in accordance with industry standards. The practicable steps which MMD should have taken but failed to take and which are set out in the charge are:

- A failure to assess whether it was competent and capable of designing and manufacturing the machine according to industry standards;

- A failure to ensure it had acquired all relevant information about the safety requirements for such a machine;

- A failure to ensure all relevant safety requirements were met;

- A failure to ensure it followed the advice of other experts it had engaged when it manufactured the plant; and

- A failure to give adequate information including an Operator Manual and Maintenance Information to Davies.

[13] There is a rather more comprehensive list of failures set out in the summary of facts but in general terms they all fall under the broad categories I have just set out. The net result is that the machine was supplied to Davies when it was deficient in several areas. As already indicated, one important area was the failure to install a working interlock device.

[14] Having said that, WorkSafe have accepted, and properly in my view, that had it not been for Davies actions in removing the guard that was in place the accident in June 2017 would have been very unlikely to have occurred. Thus, it would be incorrect to attribute the accident to MMD's failings. It is on this basis that WorkSafe has not sought reparation from MMD.

[15] For its part Davies exposed its workers, including [the victim], to the risk of serious injury because of inadequate guarding on the machine. Related aspects of this as set out in the charge itself were as follows:

- Its failure to engage a manufacturer with the appropriate knowledge of machine guarding standards;

- Its failure to ensure a system of risk management relating to the log splitter; and

- Its failure to ensure that safe systems for clearing blockages were trained and implemented.

[16] Again, the summary of facts sets out more extensive failures but they broadly fall under the headings I have just outlined. The key failure, of course, was the intentional removal of the guard that had been fixed to the machine and the

requirement for its employees to operate a machine specifically designed to cut large pieces of wood in an unguarded state. The risk of operating that machine in that unguarded state was obvious.

[17] Neither defendant has been previously charged in relation to work place health and safety matters although both have a limited compliance history with WorkSafe.

Victim Impact

[18] I have had read to me today a victim impact statement from [the victim]. The victim has been significantly impacted which is unsurprising given the nature of his injuries. Briefly, I note that:

- He was unable to work for almost a year;
- During that period he underwent various surgeries and physiotherapies;
- He remains with a physical disability which means day-to-day activities can be difficult, including simple things. These include work related activities, leisure activities and family activities;
- He blames himself to some extent for the accident; and
- His mental health has suffered significantly.

[19] I have also received some medical information which suggests that while the re-attachment of his fingers has been reasonably successful as far as these things go, the issues he complains of will likely be with him in some shape or form permanently.

[20] Suffice to say, I accept that the victim impact has been significant.

Approach to Sentencing

[21] The leading case on sentencing under the Act is now *Stumpmaster v WorkSafe New Zealand* which sets out a four-stepped approach to be followed:[1]

- Step One – Assessing the amount of reparation;
- Step Two – Fixing the amount of the fine with reference to four culpability bands;
- Step Three – Considering any ancillary orders under ss 152 to 158 of the Act that might be appropriate;
- Step Four – Making an overall assessment of the proportionality and appropriateness of the total sentencing package.

[22] The culpability bands set out in *Stumpmaster* are as follows:

- Low culpability – starting point of up to $250,000;
- Medium culpability – starting point of $250,000 - $600,000;
- High culpability – starting point $600,000 to $1m;
- Very high culpability – starting point of $1m plus.

[23] I now turn to consider the four steps in the sentencing process.

Step One – Assessing the quantum of reparation

[24] Section 32(1)(b) Sentencing Act 2002 provides that the Court may impose a sentence of reparation if the offender has "through or by means of" its offending caused a person to suffer emotional harm or loss consequential on any physical harm.

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

[25] As I have already indicated, reparation is not sought in relation to MMD because the injury suffered by the victim was not consequent upon its failings. That is at least in the view of WorkSafe. Davies does not accept that. It submits that MMD bears some responsibility for the accident because of its failings, in particular its failings to install an interlocking device.

[26] I reject that submission, however, because it seems to me that the fundamental failing in this case was the very deliberate removal of the guard that had been placed on the machine to ensure the operator did not get his or her hands into the working parts. Whilst MMD's shortcomings have been highlighted, and in many regards are obvious, I do not accept that on a broad and common sense approach its failings have caused [the victim] to suffer loss through or by means of its offending. The commission of MMD's offence was effectively complete on the supply of the machine. It did have a working guard and but for its deliberate removal of that by Davies the accident would not have occurred.

[27] Reparation is sought from Davies. I have been provided with a range of cases which have similarities to this in terms of the injury involved and the consequent impact. WorkSafe submits that a reparation order in the sum of $35,000 is appropriate having regard to the facts of this case relative to others. Davies submits that $30,000 is the appropriate amount.

[28] Each case has its differences and setting a figure is, at the end of the day, a judgement call. Having regard to the victim impact in this case I set emotional harm reparation at $35,000 which is to be payable to the victim by Davies. Fortunately, it has insurance to cover that amount.

[29] I note that no financial or economic reparation is sought because ACC payments were based on former employment which paid substantially more than what the victim was in fact earning at Davies, having only recently started there. Thus, there was no financial loss.

Step Two – Assessing the quantum of the fine

MMD

[30] WorkSafe submits that in relation to MMD its culpability sits towards the upper end of the middle band or the lower end of the high band, rendering a starting point of about $700,000. The defence, on the other hand, submits that the starting point should sit within the medium culpability band and in the range of $350,000-450,000.

[31] I have considered all of the submissions in relation to this but, to some extent, they are academic because everybody accepts that MMD's capacity to pay is limited to well below what the otherwise appropriate fine would be. For that reason I am going to keep my analysis brief.

[32] Some similarities can be drawn with other cases. One example which I do think is relevant at least to some extent is *WorkSafe New Zealand v Triple H Company Limited*.[2] This was decided under the old legislation. It involved a company which designed and manufactured a piece of machinery which was ultimately supplied to a farm. It failed to incorporate the appropriate safety features including guarding and did not meet industry standards.

[33] A starting point in that case of $100,000 was adopted which was 40 percent of the then maximum and it placed that case at the top end of the medium band or bottom end of the high band as they existed at that point. An equivalent starting point in relation to the current bands would be $600,000.

[34] In this case a guard was supplied, albeit it was removable and an interlocking device was not installed despite advice that it ought to have been. There were other failings. On the other hand, the failings were not causative of the accident as was the case in *Triple H.*

[35] In my assessment culpability sits somewhere towards the top end of the medium band and I adopt a starting point for MMD of $500,000.

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[2] *WorkSafe New Zealand v H H H Company Limited* [2018] NZDC 22138.

[36] There are no obvious aggravating features personal to MMD that would justify an uplift to this starting point. There are, however, several mitigating features.

[37] I accept that the company is remorseful and that it has co-operated fully with the investigation. I also accept that it has no previous criminal history although, to some extent, that is tempered by the fact of a compliance history for machine guarding breaches. I assess the appropriate overall discount at 15 percent, reducing the level of fine to $425,000.

[38] From that I would allow a further 25 percent for the guilty plea which was entered early and which reduces the nominal end point to $319,000 for MMD prior to consideration of financial capacity.

Davies

[39] WorkSafe submits that Davies' culpability sits in the high band and a starting point of around $800,000 should be applied. In submitting this it says that the intentional removal of a guard to expose workers to what was an obvious and significant hazard on an inherently very dangerous machine is important.

[40] The defence submits that culpability should be in the medium band with a starting point of about $450,000.

[41] Again, I have read all the submissions in relation to this but they are also academic in the sense that financial incapacity means that any end fine must be significantly less than what would ordinarily be appropriate. So, once more I will keep my comments reasonably brief.

[42] I accept that the removal of the guard with the consequent exposure of workers to a very obvious and very significant risk is an important aggravating feature in this case. The issue with logs becoming jammed was well-known and the actions of removing the guard to deal with that was completely inappropriate and unacceptable. Given the nature of the machine a nasty accident was completely foreseeable. Davies' actions have led directly to the victim's life being changed forever.

[43] I assess Davies' culpability as being in the high band and I adopt a starting point of $700,000.

[44] There are no obvious personal aggravating features justifying an uplift. There are, though, several mitigating features. These include remorse, full co-operation with the investigation and a lack of previous criminal history, albeit tempered by a compliance history. Davies also had to obtain a new machine and it has been left effectively with a dud which I understand it paid $120,000 for. It has overhauled its work place safety policies in the aftermath of the incident. It is also insured for reparation which means that the victim will be paid promptly and some credit is due for that.

[45] Overall, I would be prepared to discount the starting point by $150,000 which is a little over 21 percent, leaving a nominal fine of $550,000. From that I would apply a further 25 percent discount for the early guilty plea, bringing the end point to $412,000 in relation to Davies prior to consideration of financial capacity.

Step Three – Ancillary orders

[46] Costs are sought in relation to both defendants. The Act allows me to order an offender to pay the regulator a sum that I consider just and reasonable towards the costs of prosecution.

[47] In relation to MMD, WorkSafe's internal legal department has nominally incurred costs of around $4,600. That is worked out based on 52.1 hours at approximately $90 per hour. In relation to Davies the amount is somewhat more, totalling $6,800 approximately based on 72.5 hours worked by internal lawyers and a modest payment of $150 for external counsel.

[48] WorkSafe seeks a contribution of approximately 50 percent of those amounts. That is, in round terms it seeks $2,300 in relation to MMD and $3,400 in relation to Davies.

[49] MMD essentially abides the Court's decision as to costs. Davies, however, opposes a costs award citing *WorkSafe v Lindsay White Painters and Decorators Limited*.[3] In that case Judge Maze refused costs largely because of a lack of evidential foundation as to what costs were incurred.

[50] I do not agree that a formal evidential basis in the form of sworn evidence needs to be laid in relation to costs applications. The costs jurisdiction is to enable the Court to defray the expenses that would otherwise accrue to the taxpayer as a result of offending. The guiding principle in the Act is that any costs must be just and reasonable.

[51] In this case WorkSafe has only sought a 50 percent contribution to its legal costs. It has not sought any contribution to investigatory costs which the Act in fact permits. Apparently that is a policy decision on WorkSafe's behalf. What can be said with absolute certainty is that the amount sought is but a small fraction of the total cost that will have been incurred by the taxpayer via WorkSafe investigating and prosecuting this matter.

[52] I can see a circumstance where costs claimed were, on their face, very high. That may justify the requirement for some evidential foundation. But circumstances such as this where the costs claimed are unquestionably modest relative to the total costs incurred do not require, in my view, an evidential foundation. All that would do is take up more time, and incur more expense.

[53] Accordingly, given the modest costs sought I am satisfied that they have been properly incurred and I am also satisfied that a contribution is entirely appropriate. In short the amount sought is just and reasonable in the circumstances. I am going to order costs of $2,300 to be paid by MMD and $3,400 to be paid by Davies.

Step Four – Overall assessment including financial capacity

[54] The final step in the sentencing process is an overall assessment, a part of which requires consideration of the financial capacity of the defendants.

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[3] *Lindsay White Painters and Decorators Limited* [2017] NZDC 28091.

MMD

[55] I consider that the fine that I have indicated in conjunction with costs would be appropriate in relation to MMD but for its financial incapacity.

WorkSafe accepts on the basis of the information provided, including its own analysis, that this represents a realistic assessment.

[56] As a general rule I am reluctant to impose fines that will take longer than three years to repay although I accept that in certain circumstances up to five years can be justified.

[57] I am going to impose a total fine on MMD of $60,000.

That will effectively mean that the fine is paid over the course of the next three years or so.

[58] I consider that a fine at that level will appropriately balance the various purposes and principles of sentencing by biting on the one hand but permitting MMD to continue to operate in an economically viable condition on the other.

[59] In respect of MMD the fine is set at $60,000 with costs payable to the prosecution of $2,300. There will be Court costs of $130 and I make a suppression order in relation to the company's financial details.

Davies

[60] In relation to Davies, the total sentencing package will include reparation, costs and a fine. However, Davies does have insurance and thus it can meet the reparation costs award independent of its own financial position.

[61] Financial information has been provided in relation to Davies. [Financial details deleted].

[62] With that in mind, I impose a total fine of $75,000.

That will take roughly three years to repay. In addition, there will be an order for emotional harm reparation in the sum of $35,000 which is to be paid in full within 28 days. There will be costs under the Act payable to WorkSafe in the sum of $3,400, and Court Costs of $130. Once more there will be suppression of the financial details of the company.

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Judge TJ Gilbert
District Court Judge

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