IN THE DISTRICT COURT
AT NELSON

CRI-2014-042-001340
[2015] NZDC 729

WORKSAFE NEW ZEALAND
Informant

v

AB WOOD HOLDINGS LIMITED
Convicted Company

Hearing: 21 January 2015

Appearances: L J Moffitt for the Informant
R M Flinn for the Defendant

Judgment: 21 January 2015

NOTES OF JUDGE A A ZOHRAB ON SENTENCING

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[1] In this case the defendant company has pleaded guilty to a charge alleging offending under s 6 and 51A of the Health and Safety in Employment Act 1992 in that, being an employer, it failed to take all practicable steps to ensure the safety of its employee, namely Gary Wakefield, while at work and that it did fail to take all practicable steps to ensure that the said Gary Wakefield was not exposed to hazards arising from the operation of a Same tractor and mowing implement.

[2] I have detailed written submissions from the informant and also filed on behalf of the defendant. Those address the issues of reparation and also a fine. From the informant's perspective as well as reparation they seek a start point for a fine of somewhere in the region of $120,000 to $140,000. They base that on their submission that the offending is the high culpability range.

[3] In submissions filed on behalf of the defendant as well as addressing the appropriate reparation it is submitted that this is offending which falls within the medium culpability range and suggesting a fine start point in the range of $75,000 to $85,000.

[4] In terms of the facts, the defendant has pleaded guilty to a summary of facts which reads as follows.

[5] The defendant company is a family operated company running a 60 hectare apple and kiwifruit orchard in the Lower Moutere. It employs six to eight permanent workers and has 35 to 40 casual workers during peak periods. The deceased, Mr Wakefield, was employed to do tractor work and odd jobs on the orchard. He was a personal friend of the family that operated the company.

[6] In terms of the accident on 14 January of 2014, Mr Wakefield was mowing the grass between the rows of apple trees on the sea view block of the orchard. He was using a Same tractor and attached mowing implement. This particular block is on a slope and has terraced platforms between each row of the trees allowing the tractor and mowing implement to be operated on level ground. At the end of each row the topography returns to sloped terrain and so when mowing the lawns Mr Wakefield would manoeuvre the tractor and mowing implement along the terraced platforms and exit the tractor at the end of the platform on to the sloped terrain to perform a 180 degree turn to manoeuvre the tractor and mowing implement into the next terraced platform. At times the tractor could only turn into every second terraced platform, depending on the slope of the terrain and the turning circle of the tractor.

[7] The accident occurred when, on this particular morning, Mr Wakefield was manoeuvring the tractor along a narrow part of the row which tracked up sloping terrain. To exit the row he needed to position the tractor and the mowing attachment with great precision. There was not a lot of room. There were no witnesses to the accident and it seems that the tractor was too close to the edge of the embankment and it rolled over the embankment and was found upside down with Mr Wakefield tragically pinned underneath the tractor and suffering fatal injuries.

[8] In terms of the hazards, the sloping terrain of the orchard and the narrowness of area to manoeuvre the tractor and mowing implements were a hazard which Mr Wakefield and his employer had previously identified and indeed they discussed it on the very day of the accident. The risk of tractor rollover is a significant well-known hazard in the farming sector.

[9] The informant's investigation into the incident revealed a breach of the Health and Safety in Employment Act and, in particular, that it failed to take all practical steps to ensure the safety of its employees and the summary records that the defendant could have taken the following practicable steps to discharge its obligations. It could have reduced the number of apple trees in the row and re-shaped the terrain to ensure the tractor had greater space to move through the area. It could have erected suitable barriers along the edge of sloping and terraced terrain where tractors are required to operate in narrow areas. It could have undertaken a formal risk assessment and taken steps to ensure that the hazard was managed and the informant, in oral submissions, suggested that it could have used a stand-alone mower.

[10] So that was the summary. In terms of the written submissions I turn firstly to the approach to sentencing. The leading case is that of *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095 (HC) 6 NZELR 79 and that outlines the process which is to be adopted. There are three steps, firstly, assessing the amount of reparation, secondly, affixing the amount of the fine and, thirdly, then making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and also the fine.

[11] In terms of assessing the quantum of reparation, I have of course been referred to the victim impact statements filed from Mr Wakefield's family. I am not going to go through those in detail. The Woods are present; they obviously have suffered as a result of this because Mr Wakefield was a personal friend, as was his wife. The impact is significant for them but they accept, as one would expect, that the impact upon them is nothing compared with that of the emotional impact on Mr Wakefield's family. They accept that the impact is significant and that there is extreme emotional harm which has been suffered and which also continues. I see

nothing from them which suggests that they take issue with the fact that Mr Wakefield's widow, in particular, has suffered financial hardship. And not surprisingly, Mrs Wakefield has been overwhelmed by the loss of her husband. She has lost the chance of enjoying a retirement with her life-long partner. As far as the daughter is concerned, she injured herself when she learnt of her father's death, falling on her right shoulder, sustaining injury that required ongoing treatment. She was struggling with grief and stress and suffered a miscarriage the following week. Mr Wakefield also has two other adult children, one of whom lives nearby and has had to provide increased support for his mother.

[12] Both lawyers responsibly acknowledge that quantifying loss is a difficult task. I have been referred to various cases by the informant. As far as reparation is concerned, the submission is that amounts generally vary between $60,000 and $125,000. Each of course, is different in its facts. I have been referred to the *Department of Labour v Sir Edmund Hillary Outdoor Pursuit Centre of New Zealand* [2010] DCR 26 (DC), the *Department Labour and Transdiesel Limited* DC Christchurch CRI-2009-009-001590, 14 June 2012, the *Department of Labour v Fonterra Co-Operative Group Ltd* DC Hawera CRI-2009-021-958, 20 January 2010, the *Department of Labour v Pike River Coal Ltd* DC Greymouth CRI-2010-018-000822, 5 July 2013, and the *Department of Labour v Fletcher Concrete and Infrastructure Ltd* DC Nelson CRI-2009-042-0001043, 20 August 2009.

[13] Counsel for the defendant, as I have indicated, takes no issue with the suffering of the Wakefield family. He simply notes that the latter three cases cited by the prosecutor involving reparation orders are amongst the highest orders made. He also notes that, in particular, two of them involve voluntary offers of reparation. He suggests that if one were to look wider that one might form the view that reparation orders of significantly less have been imposed in other cases and what he submits is that an order of between $50,000 and $60,000 would be in line with the range of authorities. Both counsel, however, have been careful to ensure that they acknowledge the loss to the Wakefield family and that in referring me to these various cases they are not in any way trying to put a dollar value on Mr Wakefield's life or the suffering of his family.

[14] It is incredibly difficult to fix a figure of reparation. That involves consideration of the statutory framework. I need to take into account the offer of amends and the financial capacity of the offender. I inquired of counsel as to whether or not this case was suitable for restorative justice and what I was told was that the restorative justice co-ordinator had been in contact with the victim's family and that they did not want to undertake the restorative justice process.

[15] I note that there had been offers of financial assistance made by members of the defendant company but that the funeral expenses were ultimately covered by ACC and Mrs Wakefield had declined the offer to provide financial assistance.

[16] In the circumstances it seems to me, given that this is a man who was about to really, effectively have full-time retirement, he and his wife had obviously had a long relationship and were looking forward, having worked for a considerable period of time, to a significant amount of time to themselves without children troubling them but it seems they still had a close relationship with their adult children. It seems to me, without putting a dollar figure on anyone's life and suffering, the sum of $85,000 by way of emotional harm reparation would not be out of order in a case such as this, given the circumstances of his death, given the impact upon his widow and also his children and given that they had a long and happy retirement to look forward to and given that Mrs Wakefield's circumstances now are quite different and her outlook is quite different for the future.

[17] So that then takes me to the next stage of the process which involves assessing the quantum of fine. The judgment in *Hanham & Philp* refers to an assessment of culpability by considering the degree of blameworthiness or fault for the offending and that culpability assessment includes a number of factors that are set out in para [54] of the judgement. The culpability factors involve my considering the identification of the operative acts or omissions, that is the practicable steps. Secondly, the nature and seriousness of the risk of harm occurring as well as the realised risk. Thirdly, the degree of departure from industry standards, the current state of knowledge about the nature and severity of harm and the means available to mitigate the risk of its occurrence, the obviousness of the hazard, then the availability and cost and effectiveness of the means to avoid the hazard.

[18] Dealing firstly with the identification of the operative acts or omissions, the practicable steps. Counsel for the informant submits that a number of practicable steps including those identified in the summary of facts could have been taken by the defendant to discharge its legal obligation. Counsel for the defendant accepts that it could have taken the practicable steps to discharge its legal obligations and in particular could have reduced the number of apple trees and it could have erected suitable barriers. Whilst it submitted there was a consideration of the risk present and that they had taken steps to ensure that the hazard was managed, however, what Mr Flinn emphasised on behalf of the defendant was that the hazard in this case is a sloping terrain which creates the risk of tractor rollover. He characterised it as an ubiquitous hazard on an orchard situated on hills and it is present on most of the orchard rows. So he submitted that it is a hazard which differs from other common workplace hazards such as blades or moving machinery which are discrete, clearly demarcated and can be isolated.

[19] He took issue with the suggestion that all of the risk could have been isolated. He submitted that the matter needs to be looked at in the context of the nature of the orchard and the risks that are inherent in that. So what he submitted was that under the hierarchy of controls set out in ss 8 to 10 of the Act, that is elimination, isolation, minimisation, the hazard of sloping terrain cannot be eliminated or isolated on a site such as the Woods' but only minimised by landscaping and erecting barriers where appropriate and practicable to do so. And although the hazard itself is obvious, in the manner in which that hazard should best be minimised, is a matter of degree and judgment as is usually in the case for minimisation cases.

[20] He submitted that the two substantive omissions were the omission to build a barrier to keep the tractors from moving onto the sloped terrain from the terrace and omitting to remove trees to widen the access for tractors. He took issue with the submission from the prosecution that the defendant knew of the obvious and serious hazard of sloping terrain and could have addressed it in a reasonably straight forward fashion. Once again, he says the matter needs to be viewed in the context of the operation and the nature of the environment and it is simply not possible for the defendant to build barriers to protect against all sloped areas on the orchard because that would result in the orchard being completely unnavigable. Also he submitted

that it was not accurate to describe the defendant as having done nothing to address the hazard because this issue of sloping ground was consistently being addressed by the defendant in the way that it landscaped the ground and terraces to provide a safe, flat surface for tractors and the very high degree of awareness and caution endangered in all tractor operations.

[21] Further, he reminded the Court that there had been no prior incidents for many years but accepted that those steps, given what has happened on this occasion, have not turned out to be enough and he reminded me about the steps that the defendant had taken and that the defendant concedes that it could have taken these steps prior to the accident but emphasised that to characterise its breach as an obvious omission attracting high culpability is to hold it to a counsel of perfection and hindsight.

[22] I guess the impression that I get from reflecting on the context of the operation, and it was quite useful to see the photographs, is that it is clear that the risk had been identified and it is clear that we have got this sloping terrain, we have got these tight turning circles and I appreciate that is it easy to be wise after the event but I guess, at the end of the day, one has to question whether or not, if the risk is not able to be isolated to such a degree, as to whether or not it is prudent to carry on operating a particular business in the particular environment in which it operates - meaning that there must be some situations where the land is too sloping, and the area is too tight, for the particular operation to be continued in the particular circumstances.

[23] Moving on then to the next point which is the nature and seriousness of the risk of harm occurring, as well as the realised risk and obviously it is accepted that the realised harm is of the utmost serious nature, being the death of Mr Wakefield.

[24] In terms of the degree of departure from industry standards, the current state of knowledge about the nature and severity of harm and the means available to mitigate the risk, this was something that surprised me because before I saw the photographs I did not have a clear picture of what the tractor looked like or also the environment with which it was operating and I had a look at the photographs and

what the prosecutor highlighted in the prosecution submissions was that the risk of tractor rollover is a significant, well-known hazard in the farming sector and methods to control the risk need to be applied, and mention was made in the submissions of the approved code of practice for rollover protective structures on tractors in agricultural operations and which states at page 12 that, "Rollover of agricultural tractors can occur on any topography," and that would seem pretty straightforward, even to a layperson such as myself. And then there is the ACC publication as to tractor safety and what was submitted is that departure from industry guidelines was significant.

[25] What was submitted by the defendant though, was that the degree of departure from industry standards is relatively low, although it accepts that it had not gone far enough, the defendant had not done simply nothing to address the hazard of tractor rollover, it had taken steps to landscape the area and it was submitted that that reflected the standard industry approach to addressing the hazard of sloped terrain. It was also submitted that it was generally uncommon for orchard terraces to have barriers or for sloped surfaces to be guarded in the horticulture industry and in agriculture generally.

[26] What I learnt from the submissions is that there is an exemption available to orchards from requiring them to have rollover protective structures on tractors. And it seems that this is somewhat historic in nature, and also what is conceded by the prosecutor was that in the circumstances in which Mr Wakefield and the defendant company was operating the tractor on this day, it was not industry practice to have rollover protective structures on tractors in those circumstances, which surprised me, because I would have thought, as a layperson, just looking at the photographs, considering what had happened, that that would be an obvious protective measure to have in place, effectively almost like a guard.

[27] Mr Flinn very helpfully in his oral submissions provided some background as to why historically there has been an exemption in place, in particular for orchards, and the issues that rollover protective structures can cause in terms of potentially increasing the risk and also how with other loads carried by tractors, that they can further destabilise the tractor and lead to increased risk of rollover. So, as I say, as a

layperson it appeared to me to be the obvious protective measure to have in place, but it seems that it is not industry practice to operate rollover protective structures in these situations, though one would have thought, just looking at it from the outside, that the rollover protective structure, one that was able to be erected momentarily would have been able to be used when one was in the very high-risk situations and then it could be retracted later on in the low-risk situation so as not to impede the operation of the tractor but once again, that does not seem to be industry practice.

[28] Then there is the obviousness of the hazard. The defendant had identified the hazard and that is accepted by the defendant but, as was submitted, it had taken various steps to manage the hazard and the point made by the informant is that it is obvious there was a hazard because they had spoken about it on the day but the steps taken were not enough to manage what is submitted to be a very serious hazard.

[29] Then there is the availability, cost and effectiveness of the means to avoid the hazard. What was submitted was that any cost associated with managing the hazards would have been outweighed by the benefit received from having a safe work place and given the severity of the realised harm, that costs cannot be relied upon as a reason not to have taken the practicable steps, and the informant acknowledges that since the accident steps have been taken by the defendant to reduce the hazard.

[30] The defendant's response is, well, it was not possible to avoid the hazard of sloping terrain. Further minimisation was clearly possible but the cost was not inconsequential, and the defendant has incurred several thousands of dollars of costs erecting barriers following the accident, and has also lost significant productivity as a result of the removal of many trees and also limbs of trees.

[31] So as well as referring me to the culpability factors, both lawyers have then gone on to refer me to various cases. Both counsel acknowledge that these cases largely involve fatalities and in widely differing circumstances, and I have been referred to the *Department of Labour v Safe Air Limited* [2012] NZHC 2677, (2012) 10 NZELR 198, the *Department of Labour v Hanham & Philp Contractors Ltd, Mobile Refrigeration Specialists Limited v Department of Labour* [2010] 7 NZELR 243 (HC), the *Department of Labour v Fonterra Co-Operative*

Group Limited, and the *Department of Labour v Street Smart Limited* DC Thames CRI-2007-075-716, 18 February 2008, the *Department of Labour v Wellington City Council* DC Wellington CRI-2009-085-4889, 13 April 2010, *R v Riverland Adventures Limited* DC Manukau CRI-2013-057-000259, 24 September 2014, the *Department of Labour v P.A & S. C. Steens Limited* DC Masterton CRI-2009-035-000294, 17 March 2010.

[32] As well as acknowledging those cases, counsel for the defendant referred me to the *Department of Labour v Black Reef Mine* DC Greymouth CRI-2006-018-689, 29 January 2008 and he sought to distinguish the cases relied upon by the informant as involving cases which largely focussed on the need to eliminate or isolate a hazard as opposed to a minimisation which is how he classified or characterised this case, and also because those other cases involved what he submitted to be clear and obvious breaches of industry standards and/or manufacturing specifications.

[33] He also urged caution about too much reliance upon the *Department of Labour v Wellington City Council* case. That was a case where Wellington City Council were charged with breach of s 6 relating to an accident in which a dump truck lost traction and rolled on the downhill section of a temporary access road to the landfill, killing the driver of the truck. In that case a start point of $100,000 was reduced to $60,000. He urged caution in relying too much on that case because on a superficial level it might look similar to the circumstances of this case, his submission was that in that case the slope in question was artificial, being constructed by council rather than being a natural feature of the terrain so it was a hazard created by the defendant. It was also known to the defendant that the wheeled vehicles would travel up and down it and the gradient of the slope was at odds with industry standards, they should have prohibited the use of wheeled vehicles on the road in wet weather but failed to do so and the council was also penalised for the ambiguity about the actual gradient of the slope and also there were inadequate protocols for deciding the conditions in which the road could be used.

[34] So as well as acknowledging the various cases referred to by the informant, he then went on to submit that other authorities more closely analogous to this case were *Department of Labour v Fowlers Machinery Limited* DC Auckland

CRI-2012-004-4772, 26 July 2012 and also the *Department of Labour and Hawkins Construction Limited* DC Auckland CRN 10004502810, 14 December 2010.

[35] In particular, he relied upon the *Department of Labour v Fowlers Machinery Limited* case. There Mr George, the victim, was fatally injured while servicing a forklift after a failure of the plant used to raise the vehicle. A wooden block had split placing undue pressure on other components and causing the forklift to pin Mr George. The company had failed to establish safe operating procedures for lifting and supporting forklifts or training and had failed to ensure adequate equipment was available and used, namely good quality support blocks or routinely inspect them and there, there was an $85,000 start point adopted. What was submitted was that the facts of this case, in his submission, were similar in that involves an obvious hazard, that is the plant falling during a service, that was known and addressed by the defendant but inadequately and, in that case, with inappropriate plant being used for the work and with serious consequences.

[36] As far as the *Department of Labour v Hawkins Construction Limited* case is concerned, he referred me there to the start point that was taken of $60,000 where an employee died after falling through a penetration in a plant room floor and the hole had not properly been covered up. There was no guard rail and it was found that the builder failed to install a specially designed walkway as the plans had prescribed and the defendant in case was considered to be less culpable by virtue of its role as a subcontractor.

[37] So, in essence, seeking to distinguish this case from the more serious ones relied upon by the informant, he sets a start point of around about $80,000 before the discounts are concerned.

[38] As far as any discounts are concerned, there is no issue taken by the informant with the defendant company being entitled to the full 55 percent discount with such discount being calculated on the basis that it has not previously appeared before the Courts, it would have paid reparation in terms of the order, it has pleaded guilty at an early stage, it has taken appropriate steps since this incident. It is

obviously a responsible employer and there is recognition or an acceptance that the Woods have suffered as well on a personal level as a result of this incident.

[39] So then turning to an assessment of the culpability or fault, the degree of blameworthiness. It is always difficult in cases under the Health and Safety in Employment Act because we know what has happened and so we are now looking back in time and we have the benefit of hindsight. But it seems to me that the environment, and the operation of this tractor in those circumstances on a sloping terrain, it is an incredibly dangerous one and the fact was that the danger had been discussed on this particular day. And it seems to me that there are a number of operative acts or omissions that could have been taken and those are relied upon by the informant in its summary of facts as practicable steps. And I do not think that one can lose sight of the fact that if the risk is not able to be dealt with, whether it be by way of isolation or minimisation, it seems to me that there are some situations when it is too dangerous to operate a particular piece of land. And the point I guess I am trying to make is, it is all very well saying that this is an orchard, it is on a slope, there are always going to be risks in some situations. If the risk cannot be appropriately managed, then one has to consider whether or not one should be operating in those circumstances.

[40] And I guess the other thing to think about in a case such as this is whilst I appreciate that it does not seem to be industry practice to operate rollover protective structures on tractors in orchards in these situations, one would have thought that an easy step to take would be when one gets to the dangerous situation at the end of the row, to have a retractable protective rollover structure that can be taken or erected at that particular point, once the turn is completed, and then it can be brought down. If there are impediments in that particular area such as extending branches or whatever then those can be cut down and the landscape can be shaped to further minimise or deal with the risk and, at the end of the day, if it is not possible to do those things, then one would have to give some particular thought as to whether it is possible to continue with the operation in those circumstances.

[41] Obviously this is a case where the realised harm is significant. I cannot say that there has been a significant degree of departure from industry standards because

it seems, based on what I am told by the prosecutor, that in orchards people as routine are not operating tractors with protective structures more particularly of the retractive type. It is clear that the hazard was obvious and seems to me there are means to avoid the hazard.

[42] So when I consider all of those factors in combination, in particular the significant nature and seriousness of the risk of harm, when I consider that further practicable steps were easily available and the hazard was obvious, I would have thought that the start point for a fine is $110,000. How I fixed that figure is that this is just in the bottom range of the high culpability factor. There is a significant degree of fault or blameworthiness given the fact that this was sloping terrain, the risk was obvious and there were, in my view, a number of practicable steps that could have been taken and it would have been quite practicable, albeit it does not seem to be the industry standard, given the risk presented on the facts of this particular case, for there to be a requirement that there be some sort of rollover protective structure, whether it be of a permanent type or whether it be of a retractable type.

[43] Then in terms of discounts that are available. As I have indicated, the full 55 percent is available given the co-operation subsequent, given that there is to be reparation to be paid, given the plea of guilty at an early stage, that then means a deduction of $60,500 which would then take me to a fine of $49,500.

[44] These fines are supposed to bite. Obviously the Woods are responsible people and the defendant is a responsible company. I accept that the penalty will be significant for the operators of the company but fines in this area are supposed to bite in terms of achieving the aims and objectives of sentencing which have to be accountability, responsibility and deterrence both specific and general. It seems to me that that fine is appropriate. When I stand back and consider the fine and also the reparation together, it seems to me to be proportionate and appropriate.

[45] So the issues then, Mr Flinn, is in terms of the reparation, when can that be paid in terms of the timeframe? [14 days] That is to be paid within 14 days and there are Court costs of $130.

A A Zohrab
District Court Judge