IN THE DISTRICT COURT
AT AUCKLAND

CRI-2015-004-012008
[2016] NZDC 5535

WORKSAFE NEW ZEALAND
PROSECUTOR

v

GORDON DEVELOPMENTS LIMITED
DEFENDANT

ADAMS MACHINERY PLANT HIRE LIMITED
DEFENDANT

Hearing: 22 March 2016

Appearances: Ms E Jeffs for the Prosecutor
Ms E Harrison for the Defendant Companies

Judgment:

RESERVED JUDGMENT OF JUDGE C J FIELD

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[1] The defendant companies have pleaded guilty to two charges under the Health and Safety in Employment Act 1992 as follows.

[2] Gordon Developments Limited ("Gordon Developments") entered a guilty plea to a charge that being a principal it failed to take all practicable steps to ensure that no employee of a contractor was harmed while doing work that the contractor was engaged to do (ss.18(1)(a) and 50(1)(a) of the Health and Safety in Employment Act ("the Act").

[3] Adams Machinery Plant Hire Limited ("Adams Machinery") entered a guilty plea to a charge that being a person that hires to another person plant it failed to take all practicable steps to ensure that the plant had been maintained so that it was safe for any known intended use contrary to ss.18A(1)(b) and 50(1)(a) of the Act.

[4] The maximum penalty for all offence is a fine not exceeding $250,000. Both defendant companies have been placed into voluntary liquidation and the Court cannot therefore impose fines, although the Court has been asked to indicate the level of fine it would have considered appropriate in each case.

[5] The primary submissions therefore have been directed to an order of reparation for the victim. The defendants have insurance cover that covers reparation.

[6] The charges arise out of an incident on 26 May 2015 when Deshwa Nathan's leg was trapped between the frame and the lift arm of a Mustang Skid Steer Loader ("the Skid Steer"). Mr Nathan suffered severe injuries resulting in the amputation of his leg above the knee joint.

Background

[7] In brief, Adams Machinery hired, on a permanent basis, the Skid Steer to Gordon Developments. The Skid Steer was delivered to a work site where Gordon Developments was undertaking construction work on 22 May 2015. Adams

Machinery had not ensured that the safety devices on the Skid Steer were operational before delivering the Skid Steer to the site.

[8] Gordon Developments contracted Auckland Quarry Products Ltd ("Auckland Quarry Products") to provide labour at this site. Deswha Nathan, the victim, commenced work on 25 May 2015.

[9] On 26 May 2015 Mr Nathan was assisting backfilling a trench. He used the Skid Steer to collect crushed concrete. Mr Nathan initially operated the Skid Steer with the bucket down, however, this made it difficult for him to see the ground where he needed to drop the metal and he therefore moved the bucket up. The ground on which Mr Nathan was operation the Skid Steer was uneven and loose.

[10] Mr Nathan lost control of the Skid Steer and the machine became unstable. The bucket suddenly dropped and Mr Nathan's leg was trapped between the frame of the Skid Steer and the lift arm.

[11] Mr Nathan was taken to Auckland Hospital with right tibial fractures, crush injuries and an open wound. Despite several operations his right leg could not be reconstructed and it was amputated above the knee joint.

[12] The standard manufacturer's safety protections for the Skid Steer included sensors to detect weight on the seat and a seat belt which when fastened properly connected to an interlock that prevented the machine from operation if either an operator was not sitting properly on the seat or did not have their seat belt on. WorkSafe's investigation and an expert assessment of the Skid Steer revealed that the standard manufacturer's safety protections had been disabled through modified wiring to bypass the interlock.

[13] This serious deficiency was not detected. Neither defendant checked whether the circuit controlling the safety interlock control system functioned before the Skid Steer was hired or used. In addition, neither defendant put in place a system to ensure that regular safety checks were carried out as recommended by the manufacturer's handbook.

[14] The most relevant sentencing principles to this case in terms of the Sentencing Act 2002 are: the gravity of the offending including the degree of culpability, the seriousness of these types of offences in comparison to other offences, the need to take account of information on the effect of the offending on the victim, and the general desirability of considering consistency is reached in terms of sentencing levels. The Court must also impose the least restrictive sentence appropriate in the circumstances.

[15] I adopt the three step process to sentencing outlined in the judgment of the High Court in *Development of Labour v Hanham & Philp Contractors Ltd & Ors* (2008) 6 NZELR 79 (HC). First the Court must consider whether a reparation order is appropriate (in this case it is) and then move to consider the quantum of the fine if any and whether the totality of the final sentence is proportionate to the overall offending.

Assessing Quantum of Reparation

[16] Here the Court must assess the actual loss and also quantify the emotional harm to the victim.

[17] I have read the victim impact statement and the record of the restorative justice conference on 27 February 2016. The accident and resulting amputation of Mr Nathan's leg clearly have had a profound effect on him on a number of levels. Apart from the physical injury there have been ongoing psychological and emotional consequences to Mr Nathan and his family in the period following the accident and no doubt these consequences will continue to be felt indefinitely.

Quantum of Reparation

[18] Every case must be considered on its facts. Circumstances can differ widely and awards for emotional harm must be tailored to each case.

[19] The prosecutor submits that a reparation award of $50,000 for emotional harm would be appropriate to reflect the emotional harm Mr Nathan has suffered as a

result of the offending. The prosecutor points to awards of that sum in cases broadly comparable to this.

[20] For the defence Ms Harrison whilst acknowledging that significant emotional harm reparation is appropriate submits that a figure of somewhat less than this would be justified, those other cases including other components in the total.

[21] I am satisfied however that in this case having regard to the information before me as outlined in the reports a figure of $50,000 is entirely justified and emotional harm reparation is accordingly ordered in that amount.

[22] In addition I award $6515.20 for financial loss as calculated by the prosecutor and accepted by the defence.

[23] I consider that the victim is also entitled to compensation for consequential loss pursuant to s.32(5) of the Sentencing Act 2002.

[24] That section now provides (5 despite subs (1) and (3) the Court must not order the making of reparation in respect of any consequential loss or damage described in subs (1)(c) for which compensation has been or is to be paid under the Accident Compensation Act 2001.

[25] That subs replaced the previous subs (5) which provided that the Court must not order reparation for consequential loss for which the Court believes a person has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001.

[26] I consider that it is appropriate also to acknowledge and compensate to some extent for the shortfall in Mr Nathan's earnings on an ongoing basis but I accept the defence submission that this cannot be for an indefinite period and in my view the appropriate amount is an award of $10,000.

[27] The prosecutor also submits that the Court should consider an award of up to $25,000 on the basis that the victim and his wife have had to move in with his

daughter and son-in-law as a result of the injury and to cater for his needs they had to undertake major renovation on their house to the order of $25,000.

[28] I accept that this work was done but it must be remembered that the work would have increased the value of the property and I do not think it appropriate to order reparation for that.

[29] For reasons for which I will outline when considering the appropriate level of fine I consider that reparation should be apportioned 60% by Adams Machinery Plant Hire Ltd and 40% by Gordon Developments Limited.

Quantum of Fine

[30] I have been asked to indicate the level of fines which the Court would have imposed if the companies were not in liquidation.

[31] In doing so I adopt the scales referred to by the High Court in *Hanhan & Philp.*

[32] Factors relevant to the assessment of culpability are:

- Identification of the operative acts or omissions at issue.
- An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.
- The degree of departure from standard prevailing in the relevant industry.
- The obviousness of the hazard.
- The availability, cost and effectiveness of the means necessary to avoid the hazard.
- Current state of knowledge of the risks and nature and severity of the harm which could result.

- Current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

Gordon Developments

[33] WorkSafe's investigation identified that the following practicable steps were available to Gordon Developments and should have been taken:

(a) Ensuring that the Skid Steer was safe for operation; and

(b) Ensuring that Mr Nathan was adequately supervised commensurate with his experience or lack of experience in operating the Skid Steer.

Adams Machinery

[34] WorkSafe's investigation identified that the following practicable steps were available to Adams Machinery and should have been taken:

(a) Ensuring that the safety devices on the Skid Steer were fully operational before hire;

(b) Implementing adequate systems for inspection and maintenance of the safety devices on the Skid Steer; and

(c) Ensuring an effective system for conducting pre-hire service and safety checks and communicating the outcome.

[35] I consider that the risk of harm and the realised risk in this case was high, having regard to the size and stability of the Skid Steer and the realised harm to Mr Nathan.

[36] In terms of the degree of departure from industry standards the Skid Steer was manufactured with specific safety protections in place including sensors to detect the weight on the seat and a seat belt which when properly fastened connected

to an interlock which prevented the machine from operating if either an operator was not sitting properly on the seat or did not have their seat belt on.

[37] The manufacturer's handbook clearly set out that such safety devices should be checked every 10 hours.

[38] The defendant companies failure to ensure that the safety devices were operational either prior to hiring the machine out or before allowing a contractor to operate the machine were significant departures from industry standards. I consider also that there was obvious hazard in this case given the nature of the work and the conditions in which the work was carried out, resulting in an entrapment hazard. Further, the means available to avoid the hazard was clearly set out in the manufacturer's handbook recommending that the Skid Steer's safety devices were checked every 10 hours.

[39] The costs of avoiding the hazard would not have been prohibitive when weighed against the risk of serious harm or injury.

[40] I have considered the authority submitted to me by the prosecutor and defence.

[41] For the defendant companies Ms Harrison submits that a total fine of approximately $100,000 would be appropriate being $30,000 for Gordon Developments Limited and $70,000 for Adams Machinery Plant Hire Ltd. The prosecutor suggests a much higher level of fine, namely $70,000 for Gordon Developments Limited and $85,000 for Adams Machinery Plant Hire Ltd. Both are agreed that the level of culpability for Adams Machinery is significantly higher than that for Gordon Developments.

[42] Adopting the least restrictive approach provided in the Sentencing Act, whilst I am satisfied that Adams Machinery's culpability falls at the higher end of the medium culpability band identified by the Court in *Hanham & Philp*, a starting point of $80,000 is appropriate for this offending. Hiring machinery to be used in construction is Adams Machinery's core business and that company was responsible

for ensuring that the machinery was maintained so that it was safe for use prior to hire.

[43] In relation to Gordon Developments I consider that the appropriate starting point is a fine of $60,000, well into the medium range but not warranting a starting point of $70,000.

[44] In fixing that sum I acknowledge the submissions that the offending on behalf of the company was not a case of total failure but rather a case of failing to discharge the duties to the required degree.

[45] I accept that Mr Adams a qualified diesel mechanic and the director of Gordon Developments Limited did actually check the machine onsite the day before the accident including a general spanner and oil check. He got in the vehicle, fastened the seat belt (making sure it functioned) and operated the machine to ensure it was functioning smoothly.

[46] What Mr Adams did not do was check under the seat where he may have noticed the circuit controlling the safety interlock system had been disabled.

[47] I accept that it is not reasonable to expect Gordon Developments to conduct a full service of the machines its hires, the very purpose of hire companies is so that the vehicles come to site maintained.

[48] I accept also that the company in general adopted a responsible attitude to Mr Nathan's training and supervision. The accident occurred when Mr Nathan had been operating the machine to break out concrete without incident shortly before 5.00 pm. At that point he had decided to stop work for the day like everyone else on site. However, at the request of another, Mr Nathan switched over to using the bucket attachment to transfer broken concrete to fill a trench.

[49] One issue has been raised as to whether Mr Nathan had fastened the seatbelt at the time of operating the Skid Steer.

[50] There is some evidence that he may not have had the seatbelt fastened at the time and Mr Nathan is unable to recall whether that was the case. It may well be that the seatbelt was not fastened as Mr Nathan was ejected from the vehicle at the time of the accident but I record even if that had been the case it would not have amounted to a contribution by the victim to the accident which would justify a reduction in culpability of the defendant companies.

[51] He had used the bucket attachment on numerous occasions and this is not a case of an entirely untrained person being left in charge of potentially hazardous machinery. For these reasons I set the starting point for Adams Machinery at $80,000 and for Gordon Developments at $60,000.

[52] There are however significant mitigating features which in each case would justify a reduction in that starting point of 25%.

[53] Mr Adams on behalf of the companies has voluntarily and promptly accepted full responsibility and in my view has done everything that could be reasonably expected of him following the accident. He attended the restorative justice conference; he has expressed continuing support for Mr Nathan. In relation to Adams Machinery the company completed the necessary work to ensure that the safety devices were fully operational by repairing the safety circuit so that the seat weight and seatbelt sensors were on separate sensors. This modification means that the machine is even safer than the factory standard.

[54] In relation to Gordon Developments the daily vehicle checklist was improved to prompt better checks of safety features. It was also printed on the reverse of the timesheets so that it could not be ignored. Audits were undertaken regarding the completion of the daily vehicle checklist. Independent training was arranged for employees in the operation of the machinery although the company was liquidated before the course was scheduled to take place.

[55] I place considerable weight on the responsible attitude adopted particularly by Mr Adams in terms of remorse and offer to make amends.

[56] I consider that the same deduction of 25% from the starting point should be made in respect of both defendant companies.

[57] From that there should be a deduction in each case of 25% for prompt acceptance of responsibility and an early plea of guilty to the charges. That would result in a net fine of $40,000 for Adams Machinery and $30,000 for Gordon Developments.

[58] As I have indicated these fines represent what would have been imposed if the companies were in a position to pay them.

[59] There will be no order for Court costs or offender levies in the circumstances of this case.

Signed at Auckland this 5th day of April 2016 at 3.15 ~~am~~ / pm

C J Field
District Court Judge