IN THE DISTRICT COURT
AT NEW PLYMOUTH

I TE KŌTI-Ā-ROHE
KI NGĀMOTU

CRI-2021-043-001236
[2022] NZDC 22256

WORKSAFE NEW ZEALAND
Prosecutor

v

WESTOWN AGRICULTURE LIMITED
WESTOWN HAULAGE LIMITED
Defendants

Hearing: 8 November 2022

Appearances: T Braden for the Prosecutor
M Booth for the Defendants

Judgment: 8 November 2022

NOTES OF JUDGE A S GREIG ON SENTENCING

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[1] The defendants have pleaded guilty to one charge each laid under the Health and Safety Act at Work Act 2015. In essence the charges are that they failed to ensure that a worker was protected from the risk of death or serious injury. The maximum penalty is a fine of one and a half million dollars for each of the two defendants.

[2] There is a third defendant [redacted]. They are best described as health and safety at work consultants. They have pleaded not guilty to the charges and they are not part of this sentencing.

[3] The summary of facts which has been agreed between the defendants and the prosecution is lengthy, but I am going to summarise it with reference to the WorkSafe's helpful submissions.

[4] In brief the two defendants Westown Agriculture Limited and Westown Haulage Limited are family operated companies with the same two directors and shareholders. WHL is a wholesale business providing transportation of horticultural and agricultural bulk products and livestock cartage. WAL offers farm operation services including hay baling, cultivating, harvesting, fertiliser spreading and livestock management. The two companies share work premises at 180 Cowling Road, New Plymouth which I shall refer to as the site. The site is owned by Westown Agriculture Limited.

[5] Mr Grant Bowling was a worker employed by Westown Haulage Limited, but he undertook some seasonal work for Westown Agriculture Limited. I will now refer to them collectively as the defendants.

[6] The defendants had been operating out of a site at 70 Cowling Road, New Plymouth but had outgrown these premises. They began to set up and move to a new site. The defendants were beginning to operate out of that site in July 2019. On a number of occasions through 2019 and early 2020 the need for traffic management was identified as being required for the site to ensure clear traffic flow and the separation of pedestrians and mobile plant.

[7] On a number of occasions the responsibility for forming a traffic management plan was assigned to the defendants' external health and safety consultants, [redacted]. It was decided by the defendants and [redacted] to wait until the offices at the end of the main workshop building were completed before putting in place a formal traffic management plan. A risk assessment was not carried out for this decision and an interim traffic management plan was not put in place. By July 2020 the site was operational but there was no formal traffic management plan in place.

[8] On 24 August 2020 at around 4.30 pm Mr Bowling was standing in the wash bay talking to a colleague who was washing a mobile telehandler. A telehandler I should explain is something like a tractor. It has got a front-end loader or a boom. It is lower to the ground and has poor visibility when the boom is carrying a load.

[9] Mr Bowling's colleague had finished washing the telehandler and began to drive it off the wash bay. The boom with the bucket attachment was restricting visibility to the front of the telehandler. The colleague was distracted and looked back over his shoulder while continuing to drive forward at a slow pace. Mr Bowling was standing at the edge of the wash bay. He had his back to the mobile plant, and he was using his mobile phone. He was using an app on the phone that allows him to clock off from work. He was struck from behind by the bucket of the telehandler. He was knocked into the bucket hitting his head and knocking himself unconscious.

[10] The colleague did not notice that Mr Bowling was in the bucket and he continued driving the telehandler towards the implement shed. Fortunately other workers noticed Mr Bowling in the bucket, and they told the colleague not to put the bucket down as it would crush Mr Bowling's legs. Mr Bowling came to and was helped out of the bucket by another worker.

[11] Mr Bowling suffered bifrontal intracerebral and subdural haemorrhages resulting in three days' hospitalisation, loss of sense of smell, altered sense of taste and sensitivity to light. He suffered concussion. He was not allowed to drive for around six months as a result of his injuries. He was unable to work for eight months and when he did return to work he was working reduced hours and driving smaller vehicles.

[12] Somewhat later in the piece with delay, possibly being as a result of the defendants receiving poor advice as to whether or not the incident was a notifiable one, an investigation was started by WorkSafe.

[13] As a result a number of failures were noted. There was no risk assessment attached to the use of mobile phones, vehicle movements in the yard were identified as being a risk but only administrative controls were considered necessary such as

reduced speed signage and the wearing of high-vis vests. A traffic management plan was absent despite it being noted some months earlier that there was a desperate need for one.

[14] Particularly lacking were the physical controls needed to direct traffic, or to separate vehicles from pedestrians. It is agreed that what systems there were in place were a completely inadequate method of controlling traffic.

[15] WorkSafe New Zealand have produced a fact sheet for workplace traffic management. This was produced in March 2016. This fact sheet identifies the relevant risks and iterates the type of measures that should be adopted as part of a traffic plan to make a site safe. It contains advice as to the type of systems that are relevant.

[16] The specific failings by Mr Bowling's employer, Westown Haulage, are a failure to ensure that there were effective controls in place to manage the risk of interaction between its workers and mobile plant. The failure to design and implement a safe system around the use of mobile phones at the site and also what is described as a failure to effectively consult, co-operate and co-ordinate with both Westown Agriculture and [redacted] for traffic management. All of these measures were reasonably practicable. A subsequent inspection in March 2021 showed that these systems had subsequently been put in place.

[17] The defendants do not have either convictions or a negative compliant history with WorkSafe and it is noted that they have co-operated with WorkSafe over the course of its investigations.

[18] I have had the benefit of three victim impact statements. The first from Mr Bowling himself, secondly from his wife and thirdly from one of his daughters. For Mr Bowling himself the physical injuries were significant. He has lost his sense of smell and taste permanently. The incident aggravated an already damaged left knee with the result that he required a knee replacement operation. He is very prone to headaches. He struggles with his speech at times. He lost his peripheral vision for six months and his short-term memory is poor. He has, what he described, as a short fuse and is easily overwhelmed.

[19] I think it is fair to say that he, his wife and his children say that this has affected him very deeply and he is a different person. There were shorter term consequences. The eight months off work, the overwhelming tiredness, he changed jobs. He can no longer do long haul driving and there has been a significant financial impact on him.

[20] His family life has suffered because he is less able to tolerate events, he is less able to play with his grandchildren, he suffers from post-traumatic stress disorder, he has nightmares and sleeping problems. He is sensitive to noise which has diminished his ability to enjoy concerts, something that had been a family tradition.

[21] His 25-year-old daughter moved home to help care for him, something that Mr Bowling describes as humbling but which I suspect he actually might find humiliating, although he should not. Naturally all of this has affected his wife as well as his daughter who has had to move. In summary this moment of carelessness has had very serious consequences for both Mr Bowling and his family.

[22] I have received submissions from both the prosecution and the defendants as to the appropriate sentence. The purposes and principles of sentencing under the Health and Safety at Work Act are as set out in the Sentencing Act 2002 and I have regard to those. In particular I have regard to the decision of the Court of Appeal in *WorkSafe New Zealand v Stumpmaster Limited* as well as all of the other cases that have been referred to me by both the defendants and the prosecution.[1]

[23] The decision of the Court of Appeal in *Stumpmaster* sets out a four-stage process to be followed. The first is to assess the amount of reparation that should be paid to Mr Bowling. Secondly, to fix the amount of the fine, thirdly to determine any ancillary orders including costs and finally, to have regard to the overall proportionality and appropriateness of the sentence. In particular with regard to a defendant's ability to pay.

[24] With regards reparation the prosecution submits that an award of $50,000 is justified given the extent of Mr Bowling's injuries, the related trauma and the ongoing complications. It is agreed that the consequential losses he has suffered stands at

[1] *WorkSafe New Zealand v Stumpmaster Ltd* [2018] NZDC 900, [2019] DCR 61.

$6,806. I suspect in fact they are much greater and Mr Bowling set out a list of those things that he has had to pay and will continue to have to pay but that sum represents the 20 per cent that he lost that was not topped up by ACC.

[25] The prosecution submit that the level of culpability, having regard to the culpability bands set out in the *Stumpmaster* case is at the upper end of the medium culpability band or in the lower end of the high culpability band which in the prosecution's assessment indicates a starting point of between $600,000 to $700,000.

[26] The prosecution have provided analogous cases in support of this figure, most of them concerned with vehicles striking other people in similar circumstances to Mr Bowling's accident. The prosecution submits that discounts totalling 10 per cent should be made available for the companies' previous good character and co-operation with the investigation and a further 25 per cent to acknowledge the guilty plea.

[27] The prosecution acknowledges that only one fine should be levied encompassing both defendants since any fine and reparation will come from the same directors and shareholders.

[28] With regards to ancillary orders the prosecution seeks what is described as a just and reasonable contribution towards its legal costs as being $4,627.60, that is half of the prosecution's recorded costs and the prosecution also seeks reimbursement of $7,500 costs in obtaining an opinion as to the reasonable costs that should have been in place at the site to manage the risks of vehicles and pedestrian interaction.

[29] In response the defendants submit that the emotional harm reparation of $50,000 is an appropriate amount and that an order for consequential financial loss of $6,806 representing the 20 per cent top up of the ACC payment is appropriate.

[30] The defendants submit that the fine should be considerably less than that suggested by the prosecution. They suggest a figure of between $300,000 and $400,000. Counsel for the defence submits that discounts for previous good character, a willingness to pay for reparation indicative of remorse, its financial commitment to health and safety initiatives since the event and the extensive degree of co-operation

the defendants have offered should allow for a further 25 per cent discount to be added onto the 25 per cent discount for an early guilty plea resulting in a fine of between $150,000 to $250,000.

[31] The defendants acknowledge that a contribution towards the prosecution's legal costs of $4,627.60 is appropriate but resists the suggested $7,500 sought for the external expert's opinion.

[32] As regards the reparation figure both prosecution and defence agree that an award of $50,000 is appropriate and I agree that the authorities support this figure. Given that the figure for consequential loss of $6,806 is agreed I also agree that that figure is appropriate.

[33] Setting the level of fine and assessing the defendants' level of culpability is complicated due to the involvement of the third defendant [redacted] [redacted] have denied the charge they face but the summary of facts advanced by the prosecution makes it quite clear that the two defendants in court today took their obligations under the Health and Safety at Work Act seriously, that they took their employees' safety seriously.

[34] The fact that there have never been any compliance issues or convictions could in itself be taken as testament to this but over and above these factors is, as the summary makes clear, the defendants' reliance on [redacted] to a significant extent when it came to putting into place systems that should have kept Mr Bowling and all other employees safe.

[35] The defendants had engaged [redacted] as their health and safety consultants, they had engaged them on their premium package and in particular they had engaged [redacted] to advise them as to what they needed to do at their new premises to keep their employees safe. It is clear from their submissions that the defendants feel that they have been let down by [redacted] and on the basis of the agreed summary of facts I accept that as being the position.

[36] Whilst I appreciate that the advice from [redacted] was to wait until the office buildings had been constructed at the new premises before devising a traffic management plan I cannot myself see why at least a provisional plan around the wash bay area, which is where Mr Bowling suffered his serious injury, could not have been devised off the plans that would have been drawn up for the office buildings.

[37] What has subsequently emerged is that [redacted] have no expertise in devising traffic management plans and the consultant that they assigned to work with the defendants was not in fact qualified to draw one, or certainly did not have the necessary expertise. It may well be that that led to their advice that the definitive plan should wait until all the buildings were in place and that is the advice that the defendants relied on. The defendants, of course, were unaware of the lack of expertise of the people on whom they relied to a significant extent to help keep their employees safe.

[38] Therefore, whilst I agree with the prosecution that overall the level of culpability on the face of this appears to be at the upper end of the medium culpability band, or even at the bottom of the high culpability band, it is in my judgement, highly relevant that the present defendants were not in themselves, by any means, entirely culpable for what happened. They took their obligations seriously, but they were reliant on someone else to prevent from happening exactly what did happen.

[39] They are not, of course, entirely absolved of blame because I agree with the prosecution that this was a particularly obvious hazard and it was a particularly obvious hazard that had been drawn to the defendants' attention.

[40] There has been quite a lot of discussion about this point this afternoon. WorkSafe pushed back at the suggestion that the involvement of the third party [redacted] reduces the defendants' culpability but accepts that even if I agree with WorkSafe as to the level of culpability that it should be a mitigating factor. I am not entirely sure that in the context of these sorts of prosecutions and in assessing the culpability band there is a significant difference. What is agreed, it would appear now by WorkSafe, is that the involvement of [redacted] should reduce the level of fine.

[41] I also note that the incident occurred within a very few weeks of the new premises being fully operational at a time when they were still waiting for the traffic management plan to be provided. Following the incident the defendants engaged a Mr Holme from Absolute Safety to develop a traffic management system. It took four weeks from when that particular expert was first engaged until he was able to provide a comprehensive plan.

[42] I also note that the affidavit supplied by Mr Holme in which he refers to the defendants' determination to provide a safe and healthy working environment. It is clear that this determination predated the injury to Mr Bowling, although that injury undoubtedly highlighted the need for a comprehensive traffic management system.

[43] Counsel (inaudible 15:38:31) therefore would have been for all of defendants to wait some weeks or even months whilst [redacted] produced the traffic management system and for that system, which included construction work, to be put into place.

[44] The courts have had due regard in the past to cases where defendants have particularly relied upon health and safety experts in order to ensure compliance with their obligations under the Act. In such cases the courts have found that such a reliance reduces the employer's culpability.

[45] Today counsel for WorkSafe distinguishes those cases on the basis that the injuries that were risked were less than the injuries likely to be incurred, such as was incurred by Mr Bowling. On a point of principle however, I find that the proper reliance on consultants to advise is a factor that reduces culpability.

[46] So in setting all of this against the criteria set out in *Stumpmaster* and with regard in particular to comparable cases such as *WorkSafe New Zealand v Vehicle Inspection New Zealand Ltd* or the prosecution against *WorkSafe New Zealand Ltd v Kuehne Nagel Ltd* I agree that the culpability sits in the medium level but not at the highest end.[2] I assess an appropriate starting point to be a fine of $450,000. Even if I was to agree with WorkSafe and set the starting point at their sort of level $600,000 to

[2] *WorkSafe New Zealand v Vehicle Inspection New Zealand Ltd* [2021] NZDC 3036; *WorkSafe New Zealand Ltd v Kuehne Nagel Ltd* [2018] NZDC 20761.

$700,000 the end result would be to reduce the fine to about that level taking the involvement of [redacted] as a mitigating factor.

[47] The early guilty plea, the defendants' impeccable record when it comes to health and safety, its genuine remorse, the steps it has taken to ensure its employees' health and safety since the event and the degree of its full co-operation in the prosecutor's investigation, justify a discount of 40 per cent or $180,000. Indicating a final fine of $270,000.

[48] As regards ancillary orders the prosecution are entitled to reimbursement of the legal costs of $4,627.60. I have pondered as to whether or not to order the defendants to pay the further costs of $7,500 for an expert opinion. I am satisfied that that was a legitimate expense incurred by WorkSafe. Counsel for WorkSafe has explained today that traffic management system is in its own right a particular expertise and that WorkSafe does not routinely employ people with that degree of expertise. In order to ensure that the prosecution was properly founded it was necessary for WorkSafe to incur this cost, so I do direct that the defendants are to pay a further $7,500 towards the costs.

[49] In summary therefore, the sentence is as follows, the defendants shall pay $50,000 by way of reparation and a further $6,806 for consequential financial loss. These sums are to be paid to Mr Bowling within 28 days. The defendants shall be fined $270,000. The defendants shall pay legal costs of $4,627.60 and further costs of $7,500. I do make an order suppressing any details identifying [redacted]

[50] Mr Bowling I fervently hope that you do return to full health. I know brain injuries do take a long time to recover. You will have had expert advice. I hope it is that things will continue to improve for you. I certainly hope that is the case, you deserve that, so does your family. Thank you for being here today.

Judge AS Greig
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 22/11/2022