Admin
Disposed

IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CRI-2022-073-000011
[2024] NZDC 339

WORKSAFE NEW ZEALAND
Prosecutor

v

R & L DRAINAGE LIMITED
Defendant

Hearing:	11 January 2024
Appearances:	K Opetaia for the Prosecutor M King for the Defendant
Judgment:	11 January 2024

NOTES OF JUDGE K B F SAUNDERS ON SENTENCING

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[1] On 17 February 2021 Anthony Wanoa was seriously injured when a trench he was working in collapsed and engulfed him. He was working for R & L Drainage Limited alongside another employee, Henry Samuelson. As a result, that company is now for sentence on two charges.

[2] The most serious of the charges is one of failing to ensure so far as is reasonably practicable the health and safety of two workers, Mr Wanoa and Mr Samuelson while they were at work excavating a trench by exposing them to risk of death or injury arising from a collapse of that trench. That is a charge under ss 48 and 36 of the Health and Safety at Work Act 2015.

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HIGH/DISTRICT COURT
C Wilson
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HAMILTON

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[3] The second charge is one of failing to lodge notice of an intention to work in a trench in which any person is required to work in with a space that is more than 1.5 metres deep and with a depth greater than the horizontal width at the top. That is a charge under the Health and Safety in Employment Regulations 1995.

[4] I acknowledge present in court today Mr Wanoa and his partner Danielle. I also acknowledge representatives of the company who are here as well.

[5] Turning first to the facts. On 17 February 2021 Mr Wanoa and Mr Samuelson were working for R & L Drainage Limited. The defendant company is an earthmoving and civil construction business and it was engaged to extend a dairy effluent pond on a farm in Te Kuiti. The work included the excavation of a trench to install a leakage detection system.

[6] There are two directors of the company, Ross Pevreal who manages operations and his wife Leigh who is responsible for administrative matters.

[7] Mr Wanoa had recently started work for the company employed as a machinery operator and a labourer. Mr Samuelson had significantly more experience than Mr Wanoa and he was employed as a heavy machine operator.

[8] The work was to be carried out was as follows. Mr Samuelson was to excavate the trench using a digger and lay the pipe. Mr Wanoa's task was to operate a pole and laser to measure the depth of the trench and Mr Pevreal showed Mr Wanoa how to do this by standing on the floor of the trench.

[9] The trench was being cut through sloping ground and the technical measurements are that it was approximately 25 metres in length, it was shallow at the start approximately one metre in depth, increasing to three metres deep as the slope itself increased.

[10] The excavation was left to Mr Wanoa and Mr Samuelson to carry out mostly on their own and Mr Samuelson had, as I have already said, experience in the industry, 45 years' experience relevant to earthmoving services but had, it seems, never

excavated a trench that exceeded one metre. Mr Wanoa had no relevant experience or training and he relied on Mr Samuelson and the demonstration of the work method given to him by Mr Pevreal.

[11] Mr Wanoa had issues with getting the laser to read properly and it seems that Mr Pevreal returned to the site and helped him set up the laser on the trench floor and Mr Wanoa continued to work from inside the trench after Mr Pevreal left. At that point the height of the trench was about the same height as Mr Wanoa, approximately 1.8 metres tall.

[12] Mr Pevreal did not warn Mr Wanoa of the risks of working on the trench floor.

[13] When he was on site Mr Pevreal also noticed that Mr Samuelson was using a digger with a cleaning bucket and that observation, it seems, was not raised with Mr Samuelson. A cleaning bucket is flat to the ground and creates a flat trench with vertical walls.

[14] As Mr Wanoa and Mr Samuelson continued to excavate the trench part of the walls began to crumble when the trench was about three metres deep and as Mr Wanoa ran towards the shallow end of the trench the walls continued to collapse and completely engulfed him. He was buried for some period of time.

[15] The prosecution say it took Mr Samuelson approximately 45 minutes to free Mr Wanoa. Mr King on behalf of the defendant company accepts it took some time but does not accept it was 45 minutes. In any event, for Mr Wanoa I am sure one minute, even 30 seconds, must have felt like a lifetime.

[16] Ms Opetaia has read the victim impact statement provided by Mr Wanoa that details both significant physical and emotional consequences from being crushed in the trench that day. I do not repeat what was contained in the victim impact statement. I accept it in its entirety.

[17] Thankfully for Mr Wanoa, while the physical injuries from being crushed were moderately serious, they do not appear to have been permanent and he has physically

fully recovered. The emotional scars however remain and they will remain for however long they do so and I take some heart from the conclusion to Mr Wanoa's victim impact statement that today may provide closure for him.

[18] The particulars of the failures that were reasonably practicable for the company to have carried out are as follows.

[19] There was not an effective assessment of the ground conditions and soil. The company should have developed, implemented and maintained a safe system of work for the trench excavation. A geotechnical report would have been invaluable but one was not obtained.

[20] As I understand it, the trench was expected to be two metres deep. It became three metres deep. Appropriate and effective controls were absent to manage the risk of a trench collapse.

[21] Secondly, accepted industry practices of using shoring, benching, battering techniques or sloping the walls of the excavated areas were not put in place and appropriate equipment was not provided, so the company failed to maintain a safe working environment in accordance with industry standards.

[22] Thirdly, Mr Wanoa and Mr Samuelson were not given effective training instruction or supervision for the excavation work, including hazards and risks. Mr Wanoa did not receive adequate training or supervision about how to use the pole and measure a trench and Mr Samuelson had no supervisory experience.

[23] The company failed to provide all information, supervision and instruction necessary to protect workers from the risk of engulfment.

[24] As for the failure to notify WorkSafe of notifiable work, the trench was notifiable work as defined in the regulations and Mr Wanoa was required to work in that space operating the pole and laser.

[25] R & L Drainage Limited did not notify WorkSafe of this work although I note it had previously notified WorkSafe of similar excavation work.

[26] The principles and purposes of sentencing and the criteria to be applied in cases such as this are well known. The Sentencing Act 2002, s 151(2)(b) of the Health and Safety at Work Act 2015 and the guideline judgment of *Stumpmaster v WorkSafe New Zealand.*[1] In that case the Court identified four steps that need to be assessed. The first is the amount of reparation to be paid to the victim. The second is fixing the amount of fine by reference first to the guideline bands referred to in *Stumpmaster* and then having regard to the aggravating and mitigating factors to determine whether further orders are necessary under ss 152 to 158 of the Act and finally an overall assessment of proportionality and appropriateness having regard to the sanctions required under those first three steps.

[27] The *Stumpmaster* case identifies four culpability bands. For the purposes of today's sentencing I am concerned with the medium culpability band with a starting point between $250,000 and $600,000.

[28] I want to address Mr Wanoa and the representatives of the company, people who I am sure are unfamiliar with the sentencing process and I appreciate that a lot of what I have just said means very little to both Mr Wanoa and to the defendant company, but essentially it is for me to set out the appropriate law and the principles that will determine for me where the reparation and appropriate fine sits.

[29] There is a starting point I must first determine and from there make adjustments depending on factors that may aggravate that starting point and factors that mitigate or reduce that starting point and that is an exercise that the Court does in all sentencing matters.

[30] I have received a substantial amount of information about the company, both financially and its standing in the community and safety record. There have been affidavits sworn by Mr Taylor who is a chartered accountant at Hudson Taylor Chartered Accountants Limited based in Wellington for the prosecution and for the defence affidavits sworn by Mr Waldron who is also a chartered accountant and who acts for the defendant company. I have also received extensive written submissions from both the prosecution and the defence and I acknowledge a confidential medical

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[1] *Stumpmaster v WorkSafe New Zealand* [2019] DCR 19.

report that does confirm the genuine remorse of Mr and Mrs Pevreal and I have today heard oral submissions from counsel. I thank counsel for their assistance both in writing and orally today.

[31] WorkSafe's position is that first of all in assessing the amount of reparation for an emotional harm an order now of $45,000 is appropriate and counsel has referred to a number of cases in support of that submission.

[32] In addition, consequential loss reparation of $1,496 is sought to cover ACC shortfall for a period of time from February 2021 until April 2022. In other words, the statutory shortfall between payments made to Mr Wanoa under the Accident Compensation Act and the income he would have received.

[33] In assessing the amount of fine, the prosecution refers to the guideline decision of *Moses v R* in 2020 and to the two-step methodology and then working through the various factors Ms Opetaia submits that this case falls at the top end of the medium band in *Stumpmaster* with a starting point, it is submitted, of between $550,000 to $600,000. Why she says culpability is at the high end of the middle band is because in essence the defendant company knew the trench was at least two metres in height.[2] It ended up being three metres at the deep end but it collapsed not only because of the height but also because of the condition of the soil and there was nothing put in place to protect Mr Wanoa who was working on the trench floor.

[34] Earthworks are the defendant company's main business. This was, as Ms Opetaia put it, an avoidable risk.

[35] She in her written material provided more detailed reasons why culpability was at that high end. I do not repeat those now other than to say this. It is a truism that the deeper a trench is the greater the risk to somebody working in it and there are industry standards together with regulations that make it very clear what a safe working environment should be when digging trenches of this nature.

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[2] *Moses v R* [2020] NZCA 296; [2020] 3 NZLR 583.

[36] Cases have been referred to which provide some assistance in assessing that starting point.

[37] It is acknowledged that there are no aggravating factors that would uplift the starting point.

[38] As for mitigation or matters that reduce the starting point, today Ms Opetaia confirms 25 per cent for a guilty plea, five per cent for reparation, five per cent for remorse and 10 per cent for the previous safety record and no history of this type of offending and co-operation. So in terms of mitigation on behalf of the prosecution it is accepted of about 45 per cent. That would get to an end fine of between $302,000 and $330,000.

[39] Now the last step is what is called a proportionality assessment which involves assessing the defendant company's ability to pay. WorkSafe's position is that the independent financial review carried out by Mr Taylor of the financial information provided by the company does not support the defence position I will turn to shortly and that the company has limited means.

[40] Mr Taylor maintains his assessment the company has a strong balance sheet, cash holdings and a growing fixed asset register. It is performing well and growing and he maintains his opinion that the company is in a position to pay a lump sum payment of up to $625,000 by, in his view, accessing cash holdings, selling non-essential vehicles and shareholder advances or additional borrowings. He is of the view that the company can pay a maximum of $10,000 per month over three years. So the prosecution position is that no downwards adjustment is necessary to the end fine.

[41] The defence position urged by Mr King for the defendant company is while it acknowledges the summary of facts, he did want to add in the following facts. Mr and Mrs Pevreal arrived at the scene shortly after the accident occurred and did what they could to assist Mr Wanoa until the paramedics arrived. Mrs Pevreal kept in contact with Mr Wanoa until February 2022 when the relationship deteriorated and they have kept their distance since, and although it took some time for Mr Samuelson to get

Mr Wanoa out it was not 45 minutes. I have already addressed this point about how long he was engulfed for.

[42] Mr King details examples of some of the support Mr and Mrs Pevreal have since the accident and prior to today given and offered, not always accepted, to Mr Wanoa and his family after the accident, however Mr King accepts an amount of reparation for emotional harm to Mr Wanoa of $45,000 is proportionate and appropriate. There is no distance between the prosecution and defence in that regard.

[43] He says that the consequential loss has been paid.

[44] As to the quantum of fine there is disagreement. Mr King submits that the fine in this case is closer to the middle of the middle band of culpability in the *Stumpmaster* case and he distinguishes the cases relied on by the prosecution and he urges a starting point in the order of $475,000. The reasons why he argues culpability is lower include, this was a one-off incident and the company takes the health and safety of its workers extremely seriously. It has since 2015 utilised the services of an independent health and safety expert on an ongoing basis to ensure that systems are safe. COVID-19 interrupted plans.

[45] References have been provided that indeed show this point and Mr King has been at pains to ensure I referred to the Waikato Council reference and to the audits that it undertook. I wholeheartedly acknowledge that the company has a very good safety record and it does take the health and safety of its work sites and employees seriously. I do not take any issue with that but it failed on this occasion.

[46] Improvements to processes have been made, I acknowledge that, not by way of mitigation but to ensure that a repeat of Mr Wanoa's experience is not going to be felt by another employer.

[47] Mr King accepts there is always a risk in digging trenches of this nature but there are degrees of risk and he has distinguished the cases relied on by the Crown. Some involved deeper trenches, some involved greater consequences to a victim, one passed away and with other ongoing physical injuries. He is seeking a total discount

of 55 per cent for co-operation with the investigation, previous good record and community service, reparation and guilty plea equating to an end fine of $213,750.

[48] Turning to the company's financial capacity to pay a fine, Mr King submits it is limited and I ought to be persuaded by Mr Waldron's evidence of that. He particularly highlights Mr Waldron's evidence of a further downturn in the dairy industry, noting that the farming community in Otorohanga and Te Awamutu makes up 75 per cent of the client base of the defendant company's accounting firm.

[49] Turning now to sentence and to the analysis that I am required to undertake. The purpose of sentencing is to hold the defendant company to account, to denounce its conduct on this occasion and to deter others who endanger the lives of their employees through unsafe work practices.

[50] Insofar as reparation is concerned it is an intuitive exercise based on all I know of the harm suffered by Mr Wanoa. I repeat I accept it is, as he described in his victim impact statement read by Ms Opetaia. I have no hesitation in fixing the amount of reparation to Mr Wanoa at $45,000 to recognise the physical and emotional harm he has suffered.

[51] I turn now to assess the fine that is appropriate and while there is no dispute that culpability falls within the medium band of *Stumpmaster*, the issue for me as I have just outlined is where the starting point lies within that range of $250,000 to $600,000.

[52] I have already referred to the particulars of the failures by the company and reasonably practicable steps it did not take which are accepted by the guilty pleas. In my view the risk of harm and the realised risk of harm was obvious. The risk of a collapsed trench was in my view likely and the potential for entrapment of anyone working in the trench was foreseeable.

[53] The defendant company's business is earthmoving and excavation works. It would have appreciated or should have appreciated the risks involved and there were simply no safeguards for Mr Wanoa put in place that day to protect him. There was

no effective assessment of the ground conditions. There was, for example, no shoring, no benching, no battering to prevent a collapse and there was very clearly inadequate training and supervision and while I acknowledge the material provided by the defence otherwise demonstrates compliance with health and safety standards to a high standard I agree with the prosecution's assessment that the degree of departure from the industry standards in the present case is stark and Mr Pevreal's demonstration or instructions to the inexperienced Mr Wanoa woefully inadequate.

[54] The availability and cost of effective means that would have avoided the risk is another factor I must consider and I have just referred to what are relatively straightforward measures of avoiding the risk of collapse which could have been implemented with, I think, a relatively modest cost.

[55] The cases that have been referred to in identifying an appropriate are very difficult to adjust in today's 2023-2024 world so all I can really take from those cases is that the nature of the risk of collapse was similar.

[56] Having regard to the material provided and to the submissions of both counsel I adopt a starting point of a fine in the sum of $500,000.

[57] The defendant company is entitled to mitigation as follows. Twenty-five per cent for a guilty plea. For its previous good record and I accept contributions to the community and otherwise high regard in which it is held in the community, five per cent. For remorse, I accept it is genuine and above that reflected by the guilty pleas and reparation, a further 10 per cent. As to co-operation with the investigation I have not received any particular details about that but assume it exists and a reduction of five per cent for that. The total reduction for mitigation as identified by me therefore is 45 per cent equating to $225,000. That comes to an end fine of $275,000.

[58] Finally, I turn to my assessment of the financial ability of the company to pay that fine. I have considered the expert opinions expressed in the affidavits provided by the two experts. Mr Taylor for the prosecution provides an independent assessment of means, Mr Waldron comes from the basis that he has worked for the defendant

company for some time since it was formed here in the Waikato so he has specific knowledge.

[59] When submissions were filed by counsel there was significant distance between the end fine and to some extent that has in my view affected my assessment of the stark difference between the two experts.

[60] I have now assessed the appropriate fine as $275,000 and that is a sum much closer to the figured urged by the defence and indeed on the defence submission of a lump sum payment of $120,000 and $5,000 a month over a period of three years, that is an ability to pay over and above a fine of $275,000. It is closer to $300,000. So the goal posts, if I can put it that way, shifted after the submissions were filed and it is really impossible for me, not a financial expert, to conclude that I should accept Mr Taylor's evidence over that of Mr Waldron or to accept Mr Waldron's evidence over Mr Taylor's. There is attraction in both arguments and I thank counsel for their assessment of it in their submissions.

[61] Ultimately, I find I simply cannot accept one opinion over the other in its entirety but given the fine is significantly lower than that upon which the opinions and counsel's submissions were based, I find now that I do not need to make a formal determination of whose evidence I do prefer.

[62] My assessment of the financial material provided is that the defendant company has the capacity to pay a fine of $275,000 and no downwards adjustment is necessary.

[63] Turning now to formally impose sentence.

[64] On CR ending 004 which is the failure under the Health and Safety at Work Act 2015 I make an emotional harm reparation order to Mr Wanoa of $45,000.

[65] There is a consequential loss reparation order of $1,496. That reflects ACC top up payments.

[66] I pause here to note that Mr King has advised that payment has already been made and if there is evidence provided to the Court then it does not need to be paid again.

[67] The defendant company is fined $275,000 to be paid as follows. An immediate lump sum payment of $120,000. The balance to be paid at a monthly rate of not less than $5,000 per month.

[68] In addition regulators' costs of $6,240.59 are ordered.

[69] On the remaining charge there is a conviction and discharge.

[70] Finally, I make the following orders restricting access without permission of a Judge to the following documents under r 5 (2) and 9 (3)(b) of the District Court (Access to Court Documents) Rules 2017

[71] [redacted]

[72] The summary of facts can be released.

[73] [redacted]

[74] Finally, let me again address Mr Wanoa, and Danielle I am sure that your support has been invaluable to him and I do appreciate that it is a funny world where the courts recognise harm by way of money but it is what it is. Money never recompenses physical and emotional harm but I do hope Mr Wanoa that today's

exercise has brought this matter to a conclusion for you, and Mr and Mrs Pevreal I hope it concludes matters for you also.

Judge KBF Saunders
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 12/01/2024

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