IN THE DISTRICT COURT
AT WHANGANUI

I TE KŌTI-Ā-ROHE
KI WHANGANUI

CRI-2023-083-001494
[2024] NZDC 13412

WORKSAFE NEW ZEALAND
Prosecutor

v

KAI IWI LIFE LIMITED
TRADING AS KAI IWI BEACH HOLIDAY PARK
Defendant

Hearing:	10 June 2024
Appearances:	S Forrest for the Prosecutor S Brennan for the Defendant
Judgment:	10 June 2024

NOTES OF JUDGE J M MARINOVICH ON SENTENCING

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[1] Kai Iwi Life Limited appears for sentence today after pleading guilty to one charge pursuant to the Health and Safety at Work Act 2015, that being a charge pursuant to s 36(2), 48(1) and 2(c) of that Act. A maximum penalty for that offending is a fine not exceeding $1.5 million.

Summary of facts

[2] In terms of the offending itself, an agreed summary of facts has been provided. In short, the defendant purchased a Jump Pad which was an inflatable device which was anchored to the ground at four anchor points.

[3] In terms of the incident itself, the defendant has operated the holiday park since 23 March 2020. Mr and Mrs Taylor are both involved in the day-to-day running of the holiday park. During the peak season which runs approximately from Labour Day long weekend until Easter, the defendant contracts casual staff to assist. On the day of the incident casual staff were unexpectedly not available due to COVID-19 illness leaving just Mr and Mrs Taylor to oversee the holiday park operation.

[4] On 24 October 2022, the defendant reported that the holiday park was busy being the last day of the long weekend and when people tend to pack up and leave. Mr and Mrs Taylor were working in the holiday park office.

[5] Aletha Mariner aged three years and nine months at the time, had been staying with her parents at the holiday park. Archie Annison aged seven at the time had also been staying with his parents at the holiday park. Both Ms Mariner and Master Annison were victims in relation to this matter.

[6] Archie Annison asked Mr and Mrs Taylor if he could inflate the Jump Pad and he was told that he could flick on the switch to inflate it which he did. At around 9.30 am between five to eight children were playing on the Jump Pad when a sudden gust of wind caused the Jump Pad to lift. The wind data on the day indicates that it was at 22 kilometres per hour at 8 am and then at 31 kilometres per hour by lunchtime.

[7] The Beaufort Wind Scale used in meteorology describes this wind speed as moderate to fresh. The children's parents were a few metres away watching.

[8] Three-year-old Aletha Mariner and her sister as well as Archie Annison along with two other children were on the Jump Pad when it flipped upside down. Aletha Mariner was thrown approximately two metres to six metres from an elevation of approximately two to three metres into the air and landed on a gravel pathway suffering significant injuries. She suffered multiple broken teeth, a punctured lip, teeth entering the jaw, a chin laceration and bilateral mildly displaced femoral fractures requiring surgery.

[9] Aletha Mariner was taken to Whanganui Hospital for treatment by her mother the same day and discharged on 25 October 2022, in a wheelchair owing to full casts up to both hips.

[10] At least two children were trapped underneath the flipped Jump Pad on the grass immediately following the incident, Archie Annison and Aletha Mariner's sister, resulting in injury to Archie Annison's head and jaw requiring osteopathic treatment.

[11] Jessie Annison, Archie's mother attempted to hold on to the Jump Pad as it became airborne and as a result, she suffered a neck rib thoracic sprain for which she received osteopathic treatment. Jessie Annison is also a victim in respect of this matter though through or by means of the offence.

[12] Four to five adults at the campground assisted to lift the heavy Jump Pad off the trapped children.

[13] Mrs Taylor arrived at the site of the incident shortly after, followed by Tim Wallace, another patron who she had notified and who was an immediate life support paramedic with St John and has over 10 years' experience as a paramedic.

[14] At this point Ms Mariner was already bandaged on her chin so Mr Wallace assisted to check over Ms Mariner's reflexes and her nerves for any damage and did not remove her bandages. Mr Wallace advised Ms Mariner's parents that she should be taken to hospital. Mrs Taylor and Mr Wallace were not aware of any other injured victims.

[15] There was no organised emergency response in accordance with an emergency plan and an ambulance was not called and no details of injured persons were recorded by the defendant beyond what Mrs Taylor documented on a serious harm form dated 25 October 2022.

[16] An investigation following this was commenced into the matter. WorkSafe established the following:

(a) The defendant's point of reference for the operation of the Jump Pad was the old Jump Pad owner's manual.

(b) The defendant did not ensure the Jump Pad and its intended operation complied with AS3433.4.1.2005 prior to making it available for use.

(c) A daily check of the Jump Pad was not completed on the day of the incident.

(d) The incident was caused by the o-rings coming off the round-headed stakes. O-ring stakes were not suitable. Suitable stakes as depicted in the user manual for the old Jump Pad would be hooked to avoid slipping off the o-ring anchor point. The defendant did not have an effective anchorage system using suitable pegs to ensure that anchor points did not become unsecured and that any strong winds or sudden gusts did not lift, raise or carry the Jump Pad while in use.

(e) Weather monitoring undertaken by the defendant was ineffective, only consisting of checking the daily morning weather forecast. There was no ongoing monitoring of the weather while the Jump Pad was in use.

(f) While placed on grass, there was no impact absorbing material placed around the Jump Pad to protect against a fall from height.

(g) There was a sign displayed at the campground with playground rules. There were also rules for the use of the Jump Pad displayed on a sign on the side of a wooden blower box. Neither were obvious to patrons using the Jump Pad nor in a prominent place.

(h) Patrons of the holiday park were not provided information as to hazards and risks at the time of check-in, but the defendant's terms and conditions specified that children under the age of 14 years must be supervised by an adult at all times. Children must be supervised in the play areas and must follow appropriate playground rules as specified

which was displayed on their website and provided to guests via a hyperlink on the confirmation of their booking email.

[17] In terms of the investigation once that was complete, the defendant advised WorkSafe of the following remedial steps that they had taken since the incident. It is of note within the agreed summary of facts that the defendant cooperated with the WorkSafe investigation. The following steps have been taken:

(a) A decommissioning of the Jump Pad.

(b) Review of campground hazards and updated risk register.

(c) Both directors and a new employee have completed first aid courses.

(d) Check-in procedures involve provision of information about risks and hazards.

(e) Signs with rules are displayed at the campground office, the main shed area of the amenities block, and are attached to the map given to guests at check-in.

(f) Working toward improving emergency procedures and staff training.

[18] So in short that sets out factually the background that has resulted in the offence.

Victim impact statements

[19] For sentencing today, the victim impact statements provided by two of the victims have been read out. I take those into account. It is clear from this offending that both the young victims Aletha and also Archie suffered relatively significant injuries as a result of this incident.

[20] It is also clear from the victim impact statement that the impact has flown on into other family members.

[21] I acknowledge the family members who are present today and no doubt the long road to recovery that these young children have had to experience.

[22] I also acknowledge as a parent the trauma and terror not only of the incident itself but having to deal with your young children and the obvious injuries that they suffered for periods of time after the event.

[23] So in terms of those victim impact statements as I said, it is clear that this offending has had a significant impact on the victims.

Submissions

[24] In terms of submissions, I have had a significant amount of information placed before me. Helpfully I have had written submissions from both the prosecutor and the defendant's lawyer. Those written submissions and their oral submissions have been of significant help to me in deciding the appropriate sentence.

Sentencing approach

[25] Ultimately the sentencing criteria is relatively structured. I take into account s 7 to 10 of the Act, the purposes of the Act s 151(2)(b) of the Act and also the sentencing approach as set out in *Stumpmaster v WorkSafe New Zealand*.[1] *Stumpmaster v WorkSafe New Zealand* determined that the approach to sentencing requires four steps:

(a) Firstly, to assess the amount of reparation. I note here that the amount of reparation nominated by the prosecution is not disputed by the defendants.

(b) The second step is to fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors. In many respects there is not too much of a difference between

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

both the prosecution and the defendants in terms of banding this offending.

(c) The next step is to determine whether further orders under ss 152 to 158 of the Act are required.

(d) The last step is to make an overall assessment of the proportionality and appropriateness of the sanctions imposed by the first three steps. In relation to that step, that is where the information contained in affidavits from accountants becomes relevant.

Step one

[26] In terms of the first step, that being assessing the amount of reparation, I take into account the emotional harm as set out in the victim impact statements. Both those victim impact statements by Ms Hubbard and Ms Annison clearly set out as I have already said, the significant impact this offending has had on the victims. Quite appropriately the defendant has accepted that reparation should be ordered.

[27] Taking into account the circumstances of this matter and the information before me, it is appropriate to order reparation as set out in the prosecutor's submissions at 6.6(a), (b), (c) and (d). That being:

(a) Aletha Mariner a sum of $35,000.

(b) Aletha Mariner's mother, Brooke Hubbard the sum of $6,000.

(c) Archie Annison, the sum of $6,000.

(d) Archie Annison's mother, Jessie Annison the sum of $5,000.

Step two

[28] That takes me onto the second step which is looking at the appropriate fine in relation to this matter. Fixing the amount of fine begins with reference as I said to the

case of *Stumpmaste v WorkSafe New Zealand*. There *Stumpmaster v WorkSafe New Zealand* set out culpability bandings as follows:

(a) Low culpability up to $250,000.

(b) Medium culpability $250,000 to $600,000.

(c) High culpability $600,000 to $1 million.

(d) Very high culpability $1 million plus.

[29] In terms of *Stumpmaster v WorkSafe New Zealand,* in order to assess culpability, the Court referred to what have been called *Hanham* factors.[2] *Hanham* factors enable the Court to assess certain matters factually in order to determine overall culpability and banding within the case of *Stumpmaster v WorkSafe New Zealand*.

[30] In terms of those *Hanham* factors, I address the following:

(a) The identification of the operative acts or omissions at issue and the practical steps it was reasonable for the defendant to have taken. Here the defendant failed to have developed implemented and monitored an effective safe system of work for the activity surrounding the Jump Pad. In particular I note the following:

(i) That the Jump Pad had an ineffective anchorage system in place before it was made available for use. That system meant that the Jump Pad was not adequately secure. In terms of that I note that the anchorage system involved o-rings which by their very nature made it easy for the anchorage system to slip and for the Jump Pad to become loose. I note that there were no real checks to ensure that the anchorages were secure or effective. I do note the defendant's submission that there were checks but clearly on

[2] *Department of Labour v Hanham & Philp Contractors Ltd And Ors* HC CHCH CRI 2008-409-000002 [18 December 2008].

this morning, there were no checks made and it was not a rigid practice.

(ii) The next there was no effective weather monitoring undertaken to ensure that the Jump Pad was and remained safe for use when it was in use. I accept that there may have been checking of weather in the morning but as we are all aware, weather patterns certainly on the west coast change quickly. There needed to be an ongoing check of weather which no doubt would have incorporated onsite weather checking.

(iii) The next factor is in relation to the ineffective impact absorbing material positioned around the Jump Pad. I take into account what the defendant has said in relation to kikuyu grass being present but that is really by luck and positional play as opposed to an intent that that be some form of impact-reducing material. That being said, it would have been difficult to provide impact material on an extensive basis given that once the Jump Pad was caught by the wind, it could have effectively ended up anywhere.

(iv) The next factor I take into account, is the lack of real information provided to those who checked in. I balance that off by again saying that any information that was provided over and above necessary risks identified would not have made much of a difference to the lack of oversight with respect to the Jump Pad. By that I mean what was required was clear and determined oversight of the Jump Pad identifying particular risks.

(v) The other factor I take into account is a lack of any effective emergency plan in place. Here it would seem by luck someone with some medical knowledge and skill was available.

(b) The next Hanham factor I take into account is an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk. Here the risk of harm clearly was significant and the likely hazard I determine, probable. It does not take anyone with much nouse to know that if you inflate a large device and it is not anchored properly, then with any gust of wind under it, it will become airborne. If children or anyone are on that device then the risk of serious injury or death is high.

(c) The next is the degree of departure from standards prevailing in the relevant industry. Here there were standards. It would seem that the defendants have in effect relied on an old manual and what predecessors had put in place when they were overseeing an old Jump Pad. Here really, the obligation is on the defendants to ascertain whether there are any industry standards, what those standards are and what needs to be put in place.

(d) The next factor again is the obviousness of the hazard and to an extent I have taken that into account above. As I said, wind and anything inflatable is a risk and that is obvious.

(e) The next factor is the availability, cost and effectiveness of the means necessary to avoid the hazard. Here the ability to reduce the hazard is relatively straightforward. It required assessing the weather. It required anchoring the device appropriately. Had those things easily been done, then clearly the hazard and risk would have been reduced.

[31] In terms of assessing culpability and start point, I also take into account the cases that counsel have provided. Those cases being *WorkSafe v JTK Trustee Limited*, *WorkSafe v Discoveries Educare Ltd* and *WorkSafe v Forest View High School Board of Trustees*. Those are cases which I have read and take into account.[3]

[3] *WorkSafe v JTK Trustee Limited* [2022] NZDC 660; *WorkSafe v Discoveries Educare Ltd* [2019] NZDC 13056; and *WorkSafe v Forest View High School Board of Trustees* [2019] NZDC 21558.

[32] Ultimately though in terms of those cases, the case which I find most on point is the case of *WorkSafe v JTK Trustee Limited*. There it was dealing with a similar set of circumstances. We are dealing with a land-borne inflatable device, there the device was some 14 odd metres tall and involved an inflatable slide. In that case, I do note that the people involved with the company had knowledge of prior concerns around the slide and the risk of harm was elevated. I also note that was the company's core business. There, in terms of start point, a fine of $400,000 was taken as appropriate.

[33] In terms of the other *WorkSafe v Discoveries Educare Ltd*, there it can be distinguished more so on the fact the sole responsibility of that defendant was to care for a large group of young children. Parents no doubt placed their young children in the care of that defendant on the knowledge that they would be safe. That case involved a large dying tree with the defendant having knowledge of risk and the fact that that tree was dying for some time.

Banding and fine start point

[34] Ultimately when I assess banding, I agree with both the prosecutor and defence counsel that this case sits in that middle band identified in *Stumpmaster*. There in terms of assessing culpability I determine that a start point fine of $350,000 is appropriate.

Adjustments for aggravating and mitigating factors

[35] That brings me into looking at what adjustments in terms of aggravating and mitigating factors should be made. Here again, I agree with counsel that there are no aggravating factors that would warrant an uplift.

Personal mitigating factors

[36] In terms of personal mitigating factors, I do take into account the following:

(a) There is the issue of remorse. I have before me a letter written by Bruce and Diane Taylor. There, that letter goes on to talk about their horror and sorrow as to what occurred. I accept what the defendants have said

in terms of not reaching out to the victims earlier. Sometimes those decisions are made, not because the defendant does not care, but because there is conflicting advice whether that be legal advice or because an investigation is undertaken. Here I note in relation to that, that the defendants say:

> looking back it was a foolish idea that it would be disingenuous to reach out while WorkSafe investigated. Like this would seem fake and simply acting in our own best interests, rather than completing the proceedings and reaching out after to be completely genuine. It seems ridiculous to me now trying to explain it. Effectively the outcome is simply more harm to everyone. Also we did not start this process ourselves, to our shame an omission on our part never to be repeated.

That letter as I said goes on to talk about how sorry they are in terms of the offending and the harm that this offending has caused. I am also aware that there was an offer to attend restorative justice. I have before a memorandum dated 8 May 2024, there it tells me that the restorative justice conference was something that was not able to be undertaken. I do take into account the offer though made to attend. When I assess remorse, I determine that seven per cent should be made available.

(b) The next factor I take into account is cooperation. Here I understand from the very beginning of the investigation that the defendants have cooperated with it. They have made themselves available and provided what information has been sought. There I would afford five per cent discount.

(c) In terms of reparation, that is a significant part of any sentencing process. Here the amount of reparation that I will order is not insignificant. Reparation has been offered and it is accepted should be paid. I note that it will be paid through insurance, but even still the fact that reparation is made, is something that should properly be taken into account. There I would afford five per cent.

(d) In terms of previous good character, there I do take into account the fact that the defendant is active within the small community of Kai Iwi, that

the defendant does involve itself with the community and make itself available for the assistance of the community. That it not only makes its premises available but also provides for the community through its interactions with it. I balance that though with the fact that the operation of the Jump Pad was in play for an extended period of time. I take that into account because it was a hazard waiting to occur. Ultimately, there I would afford five per cent.

(e) In terms of guilty plea, I acknowledge through cooperation with the investigation the charge being laid that guilty plea was forthcoming at a very early stage, therefore I would afford the full 25 per cent.

[37] With all those deductions in place from a start point of $350,000 that would get me down to $185,500. There, in terms of that figure, it is not the end.

Step three: Further orders

[38] This step requires me to look at whether there are any further orders that should be made. Here again the defendants do not dispute that a contribution to the cost of prosecution should be made. I have information before me that tallies the amount at $8,566.61. I accept what the prosecutor has said that 50 per cent of that total is sought. The defendant does not dispute that. I therefore make an order of $4,283.30 to be made as a contribution to the costs of prosecution.

Step four: proportionality assessment

[39] Step four is really one of the more important steps. It means that I have to step back and make a proportionality assessment. This last step takes into account information of the financial capacity of the defendant. Here I have had affidavits provided by Mr Spooner and Mr Shaw. Mr Shaw was engaged by WorkSafe. Mr Spooner was engaged by the defendants.

[40] The defendants suggest really that there are three key factors that the Court needs to look at. Firstly, the current cash position of the defendants, that is how much

is available to pay such a fine. Secondly, the future financial outlook of the defendant and, thirdly, looking at the scale and size of the defendant's operation.

[41] In terms of cash position, as I said there is a significant amount of information provided to me from accountants. In terms of the latest affidavit from the accountant Mr Spooner, it suggests that there is around $81,000 which would be at the upper sealing available to pay a fine.

[42] Accountants for WorkSafe suggest that there is more. A part of that suggestion is in relation to the payments made to the shareholders. For the defendant, it says that the shareholder payments are something that have been in place and have been made for some time, that it is not a case of trying to circumvent the defendant's obligation to pay a fine. There it says that in terms of the prosecution's accountant that they are really looking at potential income and looking at it through a lens of potentially profits available when they make a market comparison. There the defendant says that they routinely work 80 hours a week and if calculations were taken as set out by the prosecutor that they would effectively be working for below the minimum wage. The defendant asks me to take into account the cash available rather than the shareholder payments.

[43] Ultimately this is a difficult decision. We have on the one hand the need for emotional harm reparation which is important. I accept that the insurance company is to pay for that. We also have to balance off a fine which sets the punitive aspect of any prosecution with the financial capacity of the defendants to pay such a fine. That really means that the Court needs to look at whether a fine at the level sought by the prosecutor is realistic or whether imposing such a fine will simply push the defendant to a point of liquidation where the company is shut. Here part of the consideration is the value and worth of the defendant to the local community in Kai Iwi.

[44] I also take into account the number of steps that the defendant has taken in order to rectify the situation. There, clearly since the offending and the harm done, the defendant has done all it can to make sure that this type of offending or harm is not caused again.

[45] Ultimately taking all matters into account, I assess the appropriate fine given the financial capacity as set out at $70,000. That is still a significant amount for a small two-person family business to pay. Ultimately therefore, the fine of $70,000 is imposed.

[46] The reparation as I ordered, namely Aletha Mariner $35,000, Brooke Hubbard $6,000, Jessie Annison $5,000 and Archie Annison $6,000, is ordered.

[47] In terms of the contribution to the prosecution, that will be set at the figure that I nominated, namely $4,283.30.

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Judge J M Marinovich
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 14/06/2024