SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPH [4].
http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2023-009-000724
[2024] NZDC 10337

WORKSAFE NEW ZEALAND
Prosecutor

v

BUTTON LOGGING LIMITED
Defendant

Hearing:	9 May 2024
Appearances:	S Riley, K Opetaia (via VMR) and S Backhouse (via VMR) for the Prosecutor G Gallaway for the Defendant
Judgment:	9 May 2024

NOTES OF JUDGE Q C S HIX ON SENTENCING

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[1] I just wanted to start by acknowledging this case involves the death of someone. That someone is called Josh Masters. He is a very loved and cherished son, partner, grandson, and friend of a lot of people.

[2] I have taken the time this morning to re-read the victim impact statements again to try to bring to life the young man who had his life cut short unfortunately in the circumstances that have occurred here. That is why I want to record in the judgment

that this case is about Josh. It is not about the justice system or dollars and however unfortunate it comes down to in terms of making the final decisions I have to make.

[3] I have read about Josh being someone who from a very young age would go at a hundred miles an hour, was extremely loving and supportive of his parents, was nicknamed Buster, went fishing with his dad, fixed anything that broke for his sister and obviously had planned a future together with his partner [redacted]. So I just wanted to record into the formal judgment that we are talking about a real person today.

[4] I also wanted to formally record in the judgment acknowledgement to each of the victims. As I have said, I have re-read the victim impact statements before walking in. I have recorded in terms of the formal paperwork, formal suppressions of the names of Josh's mum [redacted] and his partner [redacted] and [redacted] workplace but I wanted to specifically acknowledge them, his dad Steve Masters, and his sister Rebecca also known as Beka Baker. I recall them attending the two previous hearings for this matter and three of the four victims are also attending today and I just wanted to acknowledge them.

[5] As part of that acknowledgement I would also like to record in the judgment a formal apology to each of them and that is for the delay that has occurred in the final resolution of this case. I am not suggesting that the delay is the particular responsibility of any individual, rather I am reflecting comments in at least two of the victim impact statements as to the time it has taken. That is a systemic delay and I, at least for my part, as far as I can as the person who is making a final decision in this matter, record an apology to them for that delay. I cannot think of anything more I can do on that particular issue other than to make sure it is recorded into the judgment.

[6] I have to say that in preparing my notes for today it made me feel very uncomfortable that this all comes down to money. In terms of setting amounts it is very trite, and I almost feel reluctant to say it, but no amount of money can make up for the significant loss and I am understating it obviously very much by just saying: "Significant loss," that has occurred with the passing of Josh in this case.

[7] I also just do want to acknowledge Mr Button. The information I have read again through the victim impact statements and the summary of facts indicate that he and his team have also suffered the consequences of what has occurred here. He and the company have put their hand up right from the start and have helped, and acknowledged responsibility, and I note that the apology for the delay in this case extends to him and his team as well. As I said, there is not much more I can think of other than to record it formally into the judgment on their behalf.

[8] The next point I wanted to make is there is a lot of material I am going to work through. Unfortunately for those who are not lawyers I expect I will be referring to court cases and so on. Because of that I will just reserve the right to edit the final written decision. That means to correct any spelling errors or punctuation or semantics. The overall result will not change.

[9] The next point I wanted to note in particular is thanks to the lawyers on both sides. There has been a significant amount of written material provided. It is a case where not only is it about as delicate as you can get in terms of its subject matter, there are also a number of challenging legal issues that arise and that in part has led to the, I will have to say, unintended delay in this case. So I just wanted to record in the judgment and here in open court my formal thanks to counsel for the efforts they have gone to to comply with the timetabling orders and provide the supporting information that is before me.

[10] Moving to conducting the formal part of the sentencing exercise, the reason we are here is a charging document and it records as follows that:

> Button Logging Limited is charged that on or about the 31st of January 2022 being a PCBU having a duty to ensure so far as is reasonably practicable the health and safety of workers who work for the PCBU including Josh Masters.
>
> While the workers were at work in the business or undertaking namely repairing a wheel loader, did fail to comply with that duty and that failure exposed a person to risk of death or serious injury from being struck or crushed by the wheel loader's boom. That it was reasonably practicable for Button Logging Ltd to have developed, implemented, maintained, and instructed workers, namely Josh Masters, on an effective safe system of work for working under the raised boom of the wheel loader by ensuring before work was done that the crowd ram linkage connecting pin was removed or the boom was otherwise effectively supported.

[11] That charge is under the Health and Safety at Work Act 2015, ss 48(1) and (2)(c) as well as 36(1)(a). The maximum penalty available is a fine not exceeding $1.5 million dollars.

[12] In terms of the background circumstances that bring us here today, that is set out in a comprehensive summary of facts. I am not intending to read that. It runs to 12 pages. The relevant points for consideration are by way of background Button Logging has been in the industry or at least the company has been incorporated since 2010. Mr David Button is the owner/director of the company.

[13] Josh started work there on 17 May 2019. He was a machine operator and was completing an apprenticeship as a diesel mechanic and I understand he was only two units off qualifying. The particular incident involves Button Logging being contracted to harvest some windthrown trees after a strong wind at Balmoral Forest. That involved a number of items of heavy machinery. The particular piece of machinery that is relevant for this case is what is referred to as a loader. The loader's role is to lift up and transport logs around the work site and place them elsewhere. There is a photograph or photographs in the summaries of facts. I will try to describe them as best I can.

[14] The loader is a machine that has four large wheels on it with rubber tyres. The lifting apparatus in terms of the mechanics involve what is referred to as forks, in other words, forks of what you might imagine to be on a forklift. Over the top of those comes what is called a beak and those are curved arms that open and close much in the way of a simplistic hand motion to pick up logs. The beak swings on a pivot back and forth to collect logs onto the forks. The forks and beak combine together to be known as what is known in the industry as a grapple. The grapple swings on a pivot so that the grapple as a whole can be lifted up and down. The part of the machinery to which the grapple is attached is called the boom and that is basically an arm. So the arm moves up and down lifting the grapple. The grapple itself can move up and down much like a wrist moving up and down on a hand.

[15] The boom projects out in the front of the loader beyond the front wheels and as I said, moves vertically up and down. In the process of moving up and down the

boom does travel between the two front wheels. The issue here is there is a very small gap between the front wheels and the side of the boom. That will become apparent as I continue to explain what has happened here.

[16] When Josh arrived at work on the morning of 31 January 2022 (it was between 6am and 6.30 am) he was tasked to operate what is called a harvester, so not the loader but a harvester, a different machine. He also had some tools that he carried to repair any breakages that occurred. The loader was operated by someone else.

[17] At about 8.37 am the loader was losing hydraulic pressure and the operator noticed that one of the hoses had burst and was leaking oil. He drove that to a different part or site so as not to hinder the further operation of the clearance of the logs. The loader operator got a hold of Josh who came over to inspect what was going on. Josh called Mr Button, the foreman, and another mechanic, so three other people basically, about the breakdown. There was discussion over the phone and the radio as to what should be done.

[18] The challenge was that the hydraulic hose that required repair was underneath a hatch which was located on the front of the loader directly under the boom. That is the large metal arm part of the grappling system. So what was needed was some way to lift the boom up so that Josh could get access underneath it to get at the hydraulic hose and replace it. There was a discussion amongst the team as to how that might occur.

[19] The discussion resulted in an agreed plan where the boom would be lifted up. That would result in the forks of the grapple tilting downwards and essentially standing vertically into the ground. The plan was then to lower the boom so that the forks would essentially dig into the ground supporting the boom up so that Josh could get in underneath and fix the hydraulic hose. That is the plan that was put in place. Josh was the only person at the scene when these discussions occurred. The boom was lifted using another piece of equipment.

[20] Unfortunately, when the grapple pivoted as the boom was raised, the forks could only ever swing down to an angle of around 65 to 70 degrees rather than 90

degrees or greater. This was because a connecting pin attaching the grapple to part of the boom prevented a wider pivot angle. That meant that as the boom was lowered, the forks of the grapple dug into the ground at an angle of around 65 to 70 degrees angled away from the loader. If the connecting pin had been removed, then the forks could have either stood vertically at 90 degrees – or could have been angled to point towards the loader. In the latter case, the grapple would have been resting on the back part of the beak. The prospects of any unexpected drop by the boom would therefore be all but eliminated.

[21] While the boom was up with the forks angled away from the loader, Josh went in to stop the leakage. While he was underneath the boom the forks have given way, or alternatively the loader has moved backwards or a combination of the two. The boom has dropped down and Josh was killed as a result of being caught between the boom and the left front wheel. That is the crux of why we are here. There is more detail set out in the summary of facts but in simplistic terms that is the incident that occurred somewhere around 9 am in the morning.

[22] In terms of the wider impacts that have resulted, there have been filed four victim impact statements. I have briefly started my comments today by acknowledging the victims and apologising to them for the delay. I just wanted to re-visit the victim impact statements again and do my best to note the particular parts of them that I have noted of issue, or of particular note from my perspective.

[23] I suppose in no particular order I have got Mum. It refers to Josh calling her Mama, that is the victim impact statement for [redacted]. She talks of, well, carrying Josh and to feeling him kicking and all those sorts of things and caring for him right from the time he first came into the world. She talks about the special relationship they developed as she helped him grow into a young man. She refers to specific memories that she holds in terms of him dressing up with his sister, for example, an incident regarding striking some bees with the weed eater, how affectionate he was in terms of his interaction with her as his Mama, her description of him going at a hundred miles an hour, his involvement with school, and so on and so on.

[24] She talks of the significant or very significant impact it has had on her in a number of ways. There has been, as I understand it, specific diagnoses in terms of serious medical impacts for her. It has had the effect of impacting on her ability to work. The overall sense I get from [redacted] victim impact statement is an overwhelming sense of loss of a pillar in her life. She refers to him as the bonus son in her family and so on, all the memories that she had and they no longer have the ability to recreate more for themselves. So I just wanted to acknowledge [redacted].

[25] The second I have is Dad. That is Steve Masters. He is more succinct but I very much relate to his words. He talks about, or says: "We were best mates," but the bit that I particularly underlined was: "He wasn't supposed to die first." And I fully appreciate the loss of a child for parents and knowing, as he has just said or as I have just repeated for him, that it just was not supposed to be how life progresses.

[26] There is a mention in Steve's and it comes through in others as well in that the timing of this could not have been worse. It was during the COVID situation and while there were significant attempts made by Steve to get to his son's funeral he just could not make it and just again, as an unfortunate consequence of timing, the ban on him being able to go was lifted just days after the funeral. That is something that has stuck with him. He has, in a very succinct way, acknowledged the very deep impact it has had on him. He records that sometimes he wonders if there is much of a reason to go on, however, I do acknowledge he also loves his daughter and there is a very powerful reason for him to continue there.

[27] In terms of [redacted], that is Josh's partner, she is someone that is obviously very eloquent. She, again, repeats the sentiments that I have had already expressed by the other two victim impact statements. It is that real sense of loss in terms of their future being ripped away. She talks of them having significant plans together: building a home, building a family, and all of those plans now being put on hold forever. It talks of Josh being a larger-than-life person. His pets, being a role model and so on and so on.

[28] Again the same sentiment from Beka Baker. She talks about, and I put a note or I have highlighted, how she is going to miss the sound of Josh's voice saying: "Hiya

blondie," in his unmistakable sound of another unannounced visit. How they had their challenges growing up together as siblings and they were always there to support each other as two close family members. She talks about phone calls in the middle of the night when he was upset about things, coming around to fix things for her and that special bond that they had as siblings.

[29] One of the other issues that I took from a combination of the victim impact statements was the extremely unfortunate consequence in terms of a breakdown in relationships among those who remain. I will not take that any further other than to note I am aware of that being a significant consequence for all involved.

[30] In terms of the next step I need to consider, I need to become legalistic with all of that background. I need to make a series of decisions culminating in, as I mentioned earlier, coming to a cold reality as to how much money is involved under what descriptions. I must say that it seems rather artificial to me but determining various heads of monetary amounts makes no real difference to the real people involved being the victims and Mr Button but that is how the law is and it is my job to apply it.

[31] There are a number of steps I need to follow. The first step is to determine the reparation payable. That falls into two categories. The first is what is called emotional harm reparation. The situation there is that the law is in one sense clear in that there is a broad consensus across the cases that there is a band of reparation that is generally ordered under this heading. It is to acknowledge the significant emotional harm that has occurred and I hope that I have done some justice to that particular aspect by the summaries of the victim impact statements I have just recorded.

[32] It is a case where the Court applies its judgment. I am not going to go through and exercise a particular detailed analysis of how emotional harm reparation should be calculated. I note in this regard that both sides seem to have come to a broad agreement as to how that should be made up. In a sense I suppose I am being asked whether I agree with that assessment.

[33] From my perspective the impacts here specifically for each of those involved are, in my view, significant and in particular the proposed resolution in front of me

invlolves a differentiation of emotional harm reparation payments across the four victims that I have referred to in terms of the victim impact statements. I question the rationale behind differentiating between them. I can understand the thinking that the suggestion is an amount for both parents then a lower amount for Beka as the sister and then a lower amount again for [redacted] as the partner. The total sum – I cannot just quite recall now but I think it was a pool of about $140,000 which I was being asked to allocate, as I said, in different amounts across each of the four.

[34] I have considered whether that is appropriate in terms of:

(a) the total amount to be allocated; and

(b) whether there should be any differentiation.

In terms of the total amounts of $140,000 I am aware of earlier cases that have been referred to and so on. I just did not, in my view, agree that that was sufficient in terms of the fact that we have got four different people here and I have seen other amounts similar to that amount of $140,000 where there has been just one victim involved. Having said that, it is the case where I have got to make a final judgment.

[35] In terms of differentiation amongst them, I know it is a case where no-one is going to be perhaps agreeable to the differentiation that has been proposed nor will they be necessarily agreeable to the differentiation that I have come to. For my part I have made one differentiation amongst the four. I have come to the view that losses in terms of emotional harm for those who knew him the longest are difficult to differentiate. I am acknowledging that [redacted] occupies a particular place in Josh's life of her own being his close partner and they were embarking on their future together. My understanding is they had been together for a bit longer than four years. I note that his sister and parents were with him for a considerably longer period. Perhaps for that reason that is why I have differentiated in that regard.

[36] The amounts suggested in my view, did not seem to have any justification in terms of they were, in my view, odd amounts. What I have done is rounded to come to emotional harm reparation payments as follows:

(a) For [redacted], Mr Steve Masters and Beka Baker I have got $50,000 emotional harm each.

(b) For [redacted] as I have mentioned I have done a differentiation and I have recorded her emotional harm reparation at $30,000.

[37] That brings the total emotional harm reparation to $180,000. Divided amongst the four in those amounts is higher than what was suggested but I am of the view that that is the appropriate amounts in this case.

[38] In terms of the second heading of reparation, this is referred to by the lawyers as what is called consequential loss; in other words, actual losses that flow from the incident. My analysis of it is that consequential losses may be categorised into two types. There are what I refer to as readily identifiable or perhaps retrospective or orthodox consequential losses; in other words, ones that can be quantified as they have already been incurred, such as, for example flight costs, treatment costs and so on. There is no real issue between the parties as to that.

[39] There has been reference to various receipts provided so I am not going to spend much time on that. Having said that, Steve Masters has (in his victim impact statement) outlined a number of steps that he has taken but he just, and I can fully appreciate, has not or was not in the mindset of keeping receipts for all the flights and accommodation costs and so on. He has made an estimate of what those expenses were, so for that reason and for similar reasons in terms of not being able to identify specific amounts, I have done some rounding on the consequential losses for those types of losses relating to expenses that have already been incurred.

[40] There is one slight difference in that [redacted] also has as part of her claim for consequential loss a reference to lost wages but again the calculation there seems to be relatively straightforward and again it is, from my perspective, a case of rounding to acknowledge all of that.

[41] There are, as I said, specific amounts mentioned in the documents before me which get right down to single dollars and cents. I have rounded those out as follows.

So for [redacted] the consequential loss amount is $13,000. For Beka it is $5,000 and for Steve it is $5,000 as well.

[42] That brings me to the other head of consequential loss and that is future or anticipated consequential losses and this is in relation to the claim on behalf of [redacted] for future lost earnings. That is where the real discussion comes into play in terms of the lawyers have significantly different views on that issue. In terms of some background to that, the starting point is that s 32 of the Sentencing Act 2002 records a Court may impose a sentence of reparation if someone has suffered loss or damage consequential on any emotional or physical harm or loss of or damage to property.

[43] The issue that arises in this case is that s 32 goes on to record at subs (5):

> Despite subsections (1) and (3) the Court must not order the making of reparation in respect of any consequential loss or damage described in subsection (1)(c) for which compensation has been, or is to be, paid under the Accident Compensation Act 2001.

[44] The legal issue essentially arises in terms of the application of that subsection. There is no dispute as I understand it that a claim for potential lost future earnings is available. My reading of the material indicates that a Court case called *Davies v Police*, that is a Supreme Court case, had made a decision that there was no claim for lost earnings if someone had received or was eligible to receive payment under the ACC Rules.[1] This applies particularly to [redacted] because she has received payment under the ACC Rules and is eligible for future payments as well. However, the particular section, subs (5) was considered by a High Court case called *Oceania Gold (New Zealand) Ltd v WorkSafe New Zealand & Cropp Logging Ltd v WorkSafe New Zealand*.[2] It analyses this particular subsection and notes that the particular purpose of the recent change to the Act was specifically to account for the decision that the *Davies* decision had made. So there is the ability to consider a claim for future lost earnings.

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[1] *Davies v Police* [2009] NZSC 47.

[2] *Oceania Gold (New Zealand) Ltd v WorkSafe New Zealand & Cropp Logging Ltd v WorkSafe New Zealand* [2019] NZHC 365 [7 March 2019].

[45] In terms of the competing approaches, the position from WorkSafe is that *Oceania* essentially sets a rule, that is in the case of ACC payments specifically, the Court must award any statutory shortfall using the specific formula in the ACC legislation that allows a specific calculation to be made. The rationale behind that approach is to adopt the approach in *Oceania Gold* in that one of the benefits of taking that formulaic approach is that it provides certainty to the calculation process. By providing certainty it then follows that victims in particular will not be required to provide an evidentiary foundation beyond the ACC information leading to the calculations and, therefore, they are saved the trauma and anxiety associated with going through that process. That also reflects the otherwise uncertainty that can come into play if an actuarial approach is taken to the calculation of future lost earnings.

[46] The competing argument for Button Logging is that in simple terms if Parliament intended for that mandatory statutory shortfall approach to be taken then that would have been put in the change that was made at the time that subs (5) was implemented. It has not, rather the overall discretion of the Court under subs (1) that is: "A Court **may** impose a sentence of reparation," remains (emphasis added).

[47] The position for Button is that while *Oceania* has made findings in terms of the ACC matter the Court nevertheless should take into account all other relevant information before it in assessing the consequential loss under this heading. In other words, the Court still has to exercise its overall discretion.

[48] In terms of my analysis of it I first start with the comment of the High Court that encapsulates the issue around consequential loss in general terms. It is the *Agricentre South Limited v Worksafe*.[3] It says:

> Before reparation can be awarded for a consequential loss suffered by the victim, I consider the victim must: (a) demonstrate financial loss or expenditure that he or she would not have incurred if the offending had not occurred; and (b) demonstrate that the amount sought is required to put the victim in an equivalent but not better position to that they were in prior to the offending.

[3] *Agricentre South Ltd v WorkSafe New Zealand Ltd* [2018] NZHC [2070] at 29.

[49] I suppose looking at that and stepping back, the message I take from that is that there has to be some degree of not so much certainty but an ability to readily identify the loss and in that sense the court should take a relatively conservative approach.

[50] In terms of my reading of the *Oceania Gold* case, I found that exercise rather informative and interesting. The underlying facts of that case were that an actuarial approach was used by Worksafe. The evidence before the Court gave a range of consequential loss between, as I recall and I stand to be corrected, was somewhere between $700,000 and $2 million. The District Court in making its assessment used the lowest of that range being $700,000 and went on to halve it, so concluded that the consequential loss was $350,000.

[51] In analysing that decision the High Court on appeal essentially compared the two approaches being promoted to the High Court. One was what is referred to as the: "Open-ended approach." That is the actuarial approach and that was contrasted with what I am being asked to apply here and that is the: "Statutory shortfall approach." I have to say my reading of that case indicates that those were the competing positions adopted by the two parties, that is one was promoting open-ended, the other was promoting statutory shortfall.

[52] The High Court referred to aspects of *Davies*, that is the Supreme Court decision, to justify or to rationalise the decision to adopt the promoted statutory shortfall approach. It also commented on the certainty that that approach provided, as I have mentioned, from the WorkSafe position adopted in the case before me today. Having said that I had not read Oceania as saying that that was a hard and fast rule, rather it was the preferred approach in considering the two options put before the Court at the time.

[53] I have to say that I am no expert in civil litigation but my limited recollection of consequential loss, perhaps in relationship property matters and elsewhere suggests that an overall conservative approach needs to be taken and that seems to be what the Court had adopted because the final outcome was a significant further reduction in the consequential loss awarded in that case. That was followed by a further case called

Sarginson v Civil Aviation Authority.[4] That I found interesting because the argument there was about how the consequential loss was calculated when applying the statutory shortfall approach. The Court found that the Judge had made errors, that the appropriate figures to be used would have increased the consequential award. However, the Court concluded that in applying the Court's overall discretion, the High Court was satisfied that there was no significant error made.

[54] I suppose stepping back and analysing the issues here first in terms of the concern around putting WorkSafe to the expense of providing significant evidence to justify any claim for consequential loss under the ACC statutory shortfall approach, I am of the view that that overstates the case. The information in this case seems to have been relatively straightforward in terms of the length of the relationship, the intermingling of assets and so on. The information seems to have been readily available in that it is information already provided to ACC and no new information was required. In my view, that is an appropriate level of information to allow a determination to be made in this case. I would see no need in most cases, for lengthy affidavits, any cross-examination and so on.

[55] Rather it is getting to the relevant nub of things. By that I mean what we are doing in terms of looking at consequential loss is assessing the degree of certainty or alternatively uncertainty as to what might happen in the future. The more uncertain the loss is then the argument is it should be, that is the loss to be awarded, should be lower. There is some reflection in that in some of the District Court decisions since *Oceania* but I will not go into those in any great detail.

[56] I note the position I am taking is different to either of the approaches taken by Button or WorkSafe here. In my view in terms of analysing and calculating the appropriate level of consequential loss for [redacted] in this case, I am of the view that it is appropriate to look at the readily available background circumstances and make an assessment as to the degree of uncertainty or certainty, whichever way you want to look at it, of the lost future income. That necessarily comes down to looking at those

[4] *Sarginson v Civil Aviation Authority* [2020] NZHC 3199.

issues as to length of relationship, the stage of their life and whether there has been any significant moves towards an intermingling of assets moving forward.

[57] I also acknowledge that there is an argument on [redacted] behalf that because the length of time over which the loss of income is potentially occurring, in other words, because they are young they could have earned more together; that counterbalances the issues I have just raised. Having said that, in my view that is the whole point of the Judge analysing all of the competing factors and exercising the Court's discretion under s 32 as a whole.

[58] In this case, balancing all of those factors together, I note the respective positions taken. WorkSafe goes through a formulaic approach and comes to a figure of something in the order of $166,000. Button says on the one hand zero or on a different calculation $140,000. I suppose the approach I have taken is to, as I have said, acknowledge those competing factors, the extent to which their assets have been combined or at least their future income streams, the length of the relationship, and the amounts already received for loss of income through the ACC system.

[59] My understanding is that something in the order of $50,000 has already been received and future entitlements are calculated as $75,000 making a potential total compensation for that heading at $125,000 from ACC. I understand the rationale behind the calculation of the $166,000. There are a number of cases that have been put in front of me that indicate that that is the appropriate approach to take. However, I am also aware of other cases where the intermingling of assets and future income streams are more comprehensive; the relationship is significantly longer and so on. Taking a step back and balancing all those factors together, in my assessment the appropriate amount under this heading is $75,000.

[60] In terms of coming to that conclusion I turned my mind to whether there should be any balancing of the emotional harm reparation payments that I have previously made against the consequential loss issues that were discussed in some detail. In my view that is not appropriate as a separate issue, however, it may come into the final step to be considered and that is the totality assessment at the last step of the sentencing exercise in this case. The lawyers will know what I am talking about there.

[61] The next significant issue is the assessment of the amount of the fine to be imposed. The key issue that informs that decision is the maximum available. That is $1.5 million. There is the standard guideline decision of *Stumpmaster v WorkSafe New Zealand* which sets out the four bands.[5] There are respective positions taken by both sides, both taking a different approach. Again I thank the lawyers for the various cases they have put in front of me. My assessment really is to look at this particular case. I have looked at it through the lens of the relevant criteria under, I think it is *Department of Labour v Hanham & Philp* is the case and I am using my own wording really.[6] I understand the respective positions taken by the competing parties to the case. From my perspective the key issues are as follows.

[62] The key factors that stand out here are the risk here in my view was relatively foreseeable. This was a very heavy piece of machinery being raised and walking underneath it is a relatively foreseeable risk. The other side of it is that there was a relatively rudimentary fix, that is the pin attached between the arm and the grapple, if that was removed, that would allow the grapple to pivot more freely and sit at an angle that meant that the risk of movement was eliminated. There are alternatives available such as using another piece of machinery to apply force combined with chocks.

[63] Another issue is it does seem to me that the high risk here being relatively foreseeable was dealt with in a way that gave rise to the risk of a breakdown in communication. That was because Mr Button and the others involved in the discussion were not there. Josh was the only one that was there. Either Mr Button and Co did not appreciate that the connector pin needed to be removed. Had they been there, then they would have seen the issue and hopefully would have intervened to correct it. Or they did know the connector should have been removed but overlooked telling Josh. Either way, Josh was following suggestions from more experienced people and was under the mistaken impression that he was doing the right thing.

[64] Against that background there is the nature of the incident. It does seem to be, in one sense, relatively unique. There is reference to Button operating 40 pieces of heavy machinery and not once has this ever faced them before. Having said that, the

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[5] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [3].
[6] *Dept of Labour v Hanham & Philp Contractors Limited* (2008) 6 NZELR 79.

generic risk around having extremely heavy machinery suspended in the air and someone walking underneath it is of itself, relatively, as I have commented on, foreseeable.

[65] I also note it is more a case of omission rather than active offending.

[66] I suppose balancing all those factors together I need to assess where this offending sits in the bands set out in *Stumpmaster*. In going through with that calculation the competing bands in this case are the medium one which is from $250,000 to $600,000 and there is the higher range of $600,000 to a million. Both sides place this offending in different bands and at different levels of those bands. My overall assessment of it is that it sits in the medium band but towards the top end of the band. Not at the top but towards the top.

[67] The assessment I have made is the starting point for the fine is $550,000. In terms of the assessment of adjustments to be made there is no increase for personal aggravating factors. This is a first offence for Button Logging.

[68] For mitigating factors there is the guilty plea discount. It is 25 per cent. There is no issue with that. They have pleaded guilty as soon as the charge was finalised. For other factors, there is various references to five per cent for this factor and five per cent for that.

[69] My assessment of it is that a lot of those other factors, that is, for example, remorse - and I have no doubt that Mr Button and his team are remorseful; taking steps to mitigate risk for the future and that is adopting strategies into their manuals and so on to reduce the risk of this happening again; making the reparation payment which I have referred to, all of those factors are not the same but interrelated. My approach is rather than divide them all up into specific percentages, I have allocated an overall additional discount for all of those mitigating factors which both sides recognise in their submissions l. I have allocated another 20 per cent for those various matters. That brings me to a 45 per cent reduction for mitigating factors.

[70] The calculation is a $550,000 starting point minus $247,500. It brings me to an end point of $302,500 for the fine.

[71] There is no dispute over the costs' award which is $1,189.23.

[72] The final step is to take a step back and decide whether the overall sentencing package, that is the combination of the reparation payments, the costs, the fine, is appropriate in the circumstances. By my maths the total figure here at $581,689.23 is well within the range of what is appropriate. In particular I have turned my mind to whether there should be a reduction in the fine to reflect the amounts of reparation ordered. In my view, I have taken into account that reparation has been ordered in the 20 per cent additional mitigating factors. I am not of a mind to make any further specific adjustment for that factor. That is to acknowledge the purpose of the fine is to essentially acknowledge the culpability and to act in a deterrent way. The reparation has a different purpose in terms of it is to substitute for what otherwise could have been seen as civil proceedings and to compensate for actual losses incurred. For those reasons I have not made any adjustment to the level of the fine.

[73] So to summarise the fine is $302,500. The emotional harm amounts are $50,000 each for [redacted], Steve and Beka, and $30,000 for [redacted]. Consequential losses $75,000 for [redacted], for [redacted] $13,000 and for Beka and Steve $5,000 each and costs of $1,189.23.

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Judge Q C S Hix
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 15/05/2024