

**IN THE DISTRICT COURT
AT WELLINGTON**

**CRI-2015-085-008814
[2016] NZDC 9737**

WORKSAFE NEW ZEALAND

v

GEORDIE ROBERT ADAM GRIEVE

Hearing: 25 May 2016
Appearances: D Brabant for the Prosecutor
O Grant for the Defendant
Judgment: 25 May 2016

NOTES OF JUDGE P A H HOBBS ON SENTENCING

[1] Mr Grieve you are a builder, you trade under the name of Geordie Grieve Builders; it is a relatively small scale business with four employees. You appear today for sentence having pleaded guilty to a charge of failing to take all practicable steps to ensure the safety of one of your employees; the victim in this matter Matthew Wright. It is a fineable only offence.

[2] Mr Wright was a third year apprentice carpenter who at the time of this incident had been working for you for two years. On 10 March 2015 Mr Wright was working with you and another man, Mr Powell, at a Newland's building site. You had instructed Mr Wright and Mr Powell to remove cladding from the ground level of the house in question. When that task was completed Mr Wright and Mr Powell went to remove a small first floor wooden balcony which was 2.8 metres above the ground. You were not aware of this as you were working on the other side of the house. Mr Powell used a low work platform to access the balcony from below.

Mr Wright used a ladder. Mr Wright was on the balcony for approximately 15 minutes. You heard banging and called out to both men to stop what they were doing and come and assist you at the back of the house. Mr Wright descended the ladder. Unfortunately he fell as the bottom of the ladder slipped from underneath him. He struck his head on the ground beside Mr Powell. He began convulsing and emergency services were called.

[3] As a result of this fall Mr Wright sustained multiple skull fractures and complex head injuries. He was admitted to the intensive care unit and underwent a bifrontal craniotomy. He remained in a coma for four to five days. Unfortunately Mr Wright had to be transferred back into the intensive care unit after developing meningitis. After 21 days in hospital he was transferred to the acute brain injury rehabilitation unit for six weeks. He underwent further surgery to reconstruct his skull and was discharged from hospital on 22 May 2015. His recovery continues to this day and understandably Mr Wright remembers little of what occurred.

[4] The events that unfolded on that day are a graphic illustration of how anybody's life can be changed in a moment forever.

[5] You have heard directly from Mr Wright. You have also heard Mr Wright's mother's statement read by a support person. What occurred has had a profound physical and emotional impact on Mr Wright and of course a profound emotional impact on his mother and no doubt others who are close to Mr Wright. I acknowledge here in Court today their presence and that pain and suffering.

[6] Unfortunately I cannot undo the harm that has been caused. My job is to apply the law as best I can and balance the principles and purposes of sentencing as best I can when handing down a sentence. Those principles and purposes conflict. People in sentencing have different interests and I must do my best to balance them as best I can. Denunciation, deterrence, and holding you accountable for the harm caused to Mr Wright are prominent features of sentencing, but they cannot be my sole focus to the exclusion of other relevant principles and purposes of sentencing. The approach to sentencing in cases such as this is now well settled:

- (a) I must assess the amount of reparation to be paid.
- (b) I must then fix the amount of the fine having assessed the gravity of the offending, your culpability for it, and any mitigating or aggravating features.
- (c) The final step is to make an overall assessment of the appropriateness of the total financial penalty to be imposed.

[7] You accept and acknowledge that Mr Wright has suffered emotional and financial harm. You accept that reparation is appropriate. There is no doubt that Mr Wright has suffered serious injury and as a result emotional harm. I have already referred to the injuries he sustained.

[8] The prosecutor in her written submissions has set out in some detail the health issues Mr Wright continues to face as a result of this incident and there will be, and are, ongoing challenges for Mr Wright. He has also suffered significant emotional harm. I am told that you did have regular contact with Mr Wright and his mother when Mr Wright was first injured and during the early stages of his rehabilitation.

[9] A restorative justice conference was held. A restorative justice conference is not a panacea for all ills. Mr Wright's mother has doubts about aspects of the conference and its usefulness, but your willingness to be part of that process and your participation in that process cannot be ignored by me.

[10] You have offered Mr Wright work when he is able to return, although there is some doubt about whether or not that will happen in the future.

[11] I have, as is customary in cases such as this, been referred to a number of cases on the issue of emotional harm reparation by both parties. While they are helpful to an extent in establishing an appropriate starting point each case must be considered on its own unique set of facts and circumstances.

[12] The prosecutor submits that an emotional harm reparation payment of somewhere between \$40,000 and \$50,000 is appropriate.

[13] Ms Grant on your behalf submits that a \$30,000 reparation payment is appropriate.

[14] There has been much debate between counsel and the bench about what should be paid on top of those figures to deal with the financial loss that you might have suffered.

[15] Ms Grant accepts that you would on top of that \$30,000 reparation payment also be entitled to a further \$8000 or so to take account of the shortfall in ACC payments between the accident and today's sentencing and for some clothing and medical expenses.

[16] Much debate has been had about whether I can and or should award any further money by way of consequential loss.

[17] Ms Grant has submitted to me that I am restricted by virtue of s 35(2) to only a top up for ACC payments if Mr Wright is unable to return to work. Ms Grant submits that I am not entitled to impose general consequential loss.

[18] The prosecutor submits otherwise and has provided for me an actuarial report about future potential earnings for Mr Wright. The prosecutor has also provided me with updates from those who are responsible for Mr Wright's care and ongoing rehabilitation. The prosecutor submits that Mr Wright is unlikely to return to work for at least another year, two years after the accident and that I should be making an award of consequential loss based on the figures contained in the actuary's report, but no more than the two years the prosecutor responsibly accepts.

[19] This is a developing and difficult area of law. I have done my best to listen carefully to the arguments and make my assessment of what I think is appropriate in this case.

[20] I am satisfied that a starting point emotional harm reparation payment of \$35,000 should be made.

[21] There should be a further payment of \$8592.43 which represents the small medical expense, clothing, and the top up to Mr Wright's ACC payment since the accident to today's date.

[22] That brings the figure to \$43,592.43.

[23] This leaves me with the argument I have referred to about consequential loss. Ms Grant submits there is no evidence that Mr Wright cannot return to work beyond April of this year.

[24] Clearly there is evidence, or material I should say, before me from AVI that suggests the usual time period for recovery from such an injury is two years. It has not been two years yet. There is at least a further 40-odd weeks I am told before that period will have expired.

[25] I am satisfied that I can at the very least acknowledge and compensate to some extent the shortfall that will occur as a result of Mr Wright not being able to return to work with his ACC payments. I acknowledge Ms Grant's submission that this is not yet certain, but I am satisfied that there is sufficient material before me to make such an award which I set at \$5000.

[26] That gives a total reparation figure of \$48,592.43.

[27] This now brings me to the fine. Your culpability must be assessed. The leading appellant judgment for sentencing in cases such as this identifies a low culpability bracket, a medium culpability bracket, and a high culpability bracket. Falling from a ladder on a building site is an obvious hazard with potentially serious consequences. Counsel have referred me to the relevant industry standard in relation to the safe use of ladders.

[28] Clearly your system of expecting the ladders to be used by your staff and relying on them to report any defects to you was inadequate. The ladder in question

was clearly defective and had been for some time. There was obvious damage to the feet of the ladder which contributed to Mr Wright's fall. It was not fit for purpose and it would appear that it had not been so for some time. The fact that this had not been identified and established by you in advance of this incident is a failure on your part.

[29] Ms Grant has suggested that the offending is mitigated by a number of factors. She submits that Mr Wright was working contrary to instructions, selected a ladder knowing it was not fit for purpose when other items were available, failed to report the state of the ladder to you and did not tie it off when placed against the structure in question. Ms Grant also submits that Mr Wright descended the ladder in an unsafe and inappropriate way. You had previously advised Mr Wright of the appropriate way to descend a ladder.

[30] Such submissions are to be approached with some caution for the reasons discussed with counsel. I acknowledge those submissions and they cannot be ignored, however the primary duty lay with you to ensure that appropriately maintained equipment was available for use and that defective equipment would not be used, and that proper training and procedures were in place to avoid this obvious hazard of falling from a ladder on a building site.

[31] The prosecutor submits that your offending falls within the medium band of culpability attracting a fine between \$50,000 to \$100,000.

[32] Ms Grant accepts that your offending falls within the medium band of culpability but at the lower end and she submits a starting point of \$50,000.

[33] I accept, as do counsel, that your offending falls within the medium band of culpability. The hazard was obvious; the state of the ladder and the manner of its use clearly indicates that your systems failed to identify that defect. So, in my view, the appropriate starting point fine is therefore \$50,000.

[34] In terms of mitigating factors, as I have already indicated, you have responsibly maintained insurance for the payment of reparation. That is no doubt a

significant cost to a small business such as yours, and it has meant that the reparation I have ordered will be paid to Mr Wright. You are entitled to credit for that responsible step to the tune of 10 percent.

[35] You have expressed remorse which I accept is genuine. You have attended a restorative justice conference notwithstanding its limitations. Those steps should be recognised, as should the fact that you have no previous convictions and an otherwise clear health and safety record. You have also taken remedial steps since this accident in the hope of it not occurring again. A work and safety enquiry did not identify any other failings on the part of your business. A 20 percent reduction is appropriate for those factors.

[36] You have pleaded guilty to this charge which has spared Mr Wright the difficulty and stress of a trial. Again, you are entitled to credit for that to the tune of 25 percent.

[37] By my calculation that reduces the end fine to one of \$27,000.

[38] I must take into account your ability to pay such a fine.

[39] Ms Grant has included in her submissions an affidavit sworn by you which deals with the financial position of your business and your personal circumstances. The financial statements you have provided demonstrate that yours is a business that is not generating vast sums of money or making you a rich man. It is perhaps a typical small business that is providing enough for you to pay yourself and meet your own obligations and to pay your employers and others you are responsible to pay. Your affidavit does, as I have said, include reference to your personal assets and the level of your indebtedness.

[40] I am satisfied that a fine of \$27,000 would indeed put significant strain on your financial position and would be difficult for you to pay. It seems to me to be counter-productive to put your business at risk which would see four people out of work and you without a job. Having said that there are assets available to help with the payment of a fine. A fine is different than reparation. A fine is directed towards

deterrence, reparation is directed towards compensation for the victim. You can, if necessary, make arrangements to pay the fine over time.

[41] I am satisfied that the fine can and should be reduced to take account of your financial capacity to pay, and I have decided that the appropriate fine is one of \$15,000 with a lump sum of \$5,000 to be paid within seven days and the remainder to be paid over time through arrangements with the registry.

PAH Hobbs
District Court Judge