EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT MANUKAU

CRI-2015-057-001515
[2017] NZDC 29617

WORKSAFE NEW ZEALAND
Prosecutor

v

EBERT CONSTRUCTION LIMITED
Defendant

Hearing:	15 December 2017
Appearances:	A Longdill and E Jeffs for the Prosecutor S BonnarQ C and M Ward for the Defendant
Judgment:	15 December 2017

NOTES OF JUDGE R J McILRAITH ON SENTENCING

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[1] Ebert Construction Limited is for sentence after being found guilty following trial of contravening s 18A(3) and s 51A Health and Safety in Employment Act 1992 between the dates of 1 February 2015 and 21 April 2015. The charge being that as a person who supplied to another person, namely Yashili New Zealand Dairy Co Limited, plant, namely a steel plate, to be used in a place of work and who agreed to install and arrange the plant, failed to take all practicable steps to install and arrange the plate so that it was safe for its intended use. The maximum penalty for the offence is a fine not exceeding $250,000.

[2] The facts and background to this matter are recorded in my reserved decision of 29 June 2017. I do not propose to take any great time going through those in this sentencing decision, but will simply note some of the key points.

[3] Ebert is a construction company providing design and construction services to a range of industries throughout New Zealand. Yashili is a producer of infant milk product. In 2014 Yashili was developing a dairy manufacturing factory in Pokeno. Yashili had contracted with Ebert to construct the blending tower and canning room facility. It had also contracted with Powder Projects Limited to commission and install food processing equipment in the blending and canning facility.

[4] In April 2015 PPL contracted another company, 24/7, to clean the blending and canning facility plant prior to its commissioning. 24/7 is a building cleaning company with specialist experience in the food industry. It was that company which employed [the victim] as a cleaner on a casual basis. He had commenced employment in December 2006.

[5] The events at issue related to a penetration in the concrete floor in the bag tipping room within the blending tower and canning room facility. The penetration or hole measured 500 mm by 730 mm. Ebert was required to construct the penetration in terms of a variation order to the construction contract with Yashili. The penetration was designed by engineers engaged by Ebert. The purpose of the penetration was to provide Yashili with the option of installing a further hopper in the future.

[6] In February 2015 an Ebert employee, [employee 1], put a steel plate in place over the casting frame covering the penetration. The steel plate had been specifically manufactured for that purpose. It measured 660 mm by 880 mm. It had 12 boltholes which were intended to correspond with the 12 boltholes in the cast-in-frame. The plate was not bolted down at that time. The boltholes in the cast-in-frame had been inadvertently filled with concrete earlier. There was no signage placed on the steel plate. Ebert then arranged for an epoxy resin floor covering to be poured in the bag tipping room in February. After that, MDF sheets covered the steel plate and the penetration. Ebert subsequently lifted the MDF sheets on or around 14 April exposing the steel plate.

[7] On 20 April [the victim] was in the bag tipping room for the purposes of completing a builder's clean. He lifted the steel plate and fell through the penetration, landing on the concrete floor of the floor below. WorkSafe attend at the scene.

[8] I have, for the purpose of sentencing, received victim impact statements from both [the victim], and, [his partner]. I had read those before coming into Court today and I have now had the benefit of also hearing [the victim's partner] read out significant portions of her statement, and [the victim] also reading part of his.

[9] Significant documentation is attached to [the victim's partner's] statement. In particular, there is a report from Dr Hosking a neuropsychologist, from the Cognitive Neuropsychology Services, and there is a further report from a psychologist prepared more recently. Those statements and those medical reports go through in some detail the effect medically on to [the victim] of this accident and of course, particularly in the context of [the victim's partner's] statement, some of the emotional and other related consequences. I have also had the benefit of reading a report from a restorative justice meeting that occurred relatively recently and that, it appears, was a positive process.

[10] The approach to sentencing has been addressed by both counsel in extensive written submissions and of course there is no disagreement on the approach that I am required to take. The approach is that provided for in the High Court decision of *Department of Labour v Hanham and Philp Contractors Limited & Ors*.[1] The approach is routinely followed in all health and safety sentencing.

[11] The sentencing process involves three steps. First, assessing the amount of reparation; second, fixing the amount of the fine; and third, making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and fine.

[12] At paragraph 80, the Court also noted that reparation and fine serve discreet statutory purposes. Both should ordinarily be imposed where there is no lack of financial capacity.

[13] In terms of assessing fine levels, the Court noted that the starting point should generally be fixed according to the following scale:

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[1] *Department of Labour v Hanham and Philp Contractors Limited & Ors* (2006) 6 NZELR 79

(a) An offending level of low culpability, seeing a start point of up to $50,000;

(b) Medium culpability, seeing a start point of between $50,000 and $100,000; and

(c) High culpability, seeing a start point of between $100,000 and $175,000.

[14] The start point is of course then to be adjusted for any relevant aggravating and mitigating factors relating to the offender.

[15] The first step is to set the quantum of reparation. Section 32(1) Sentencing Act 2002 sets out the basis upon which reparation can be awarded.

[16] The Court may impose a sentence of reparation if an offender has, through or by means of an offence of which it is convicted, caused a person to suffer:

(a) Loss of or damage to property, or

(b) Emotional harm, or

(c) Loss or damage consequential on any emotional or physical harm or loss of or damage to property.

[17] As WorkSafe points out in its submissions, I have in front of me the following information regarding the harm and consequential loss suffered by [the victim]. There was the report of Dr Richard Seemann which was read at trial, the victim impact statements to which I have already referred, and the documentation attached to those victim impact statements. I have also been provided with information from [the victim's] employer, 24/7 Environmental Services, by way of a report and copies of payroll information. That information is particularly relevant to noting the reduction in take home pay that [the victim] has suffered since the accident.

[18] The first aspect of reparation I address is that of financial loss. WorkSafe has identified the following specific financial losses. First, a total of $4000 for petrol, accommodation, parking and incidentals required by [the partner of the victim] living in Auckland while [the victim] was in hospital in rehabilitation, that figure excluding a contribution from ACC. Second, $2400 of lost income for [the partner of the victim] when she was unable to work while [the victim] was in hospital for two weeks immediately after the accident. Third, $2068 in dental expenses that were not covered by ACC for fillings which [the victim] has required over the last two years.

[19] In relation to those losses, Mr Bonnar on behalf of Ebert, takes no issue with them other than in respect of the dental expenses. In relation to those he makes two points. First, if they were in fact caused by the accident one would expect them to be covered by ACC. Second, I have limited information in front of me on which to base a conclusion that the fillings were actually caused by the accident.

[20] The next aspect of financial loss relates to lost income. I have discussed the WorkSafe submission with both Ms Longdill and with Mr Bonnar. As I understand WorkSafe's position, [the victim] has suffered a loss of income up until January 2017 of just short of $8800. The anticipated loss for the calendar year through until now (December 2017), is an approximate sum of a further $9000. Based on that proposition, WorkSafe submits that an appropriate award of global financial loss is around $25,000.

[21] For its part, Ebert submits that an appropriate amount is $18,000. It has calculated that amount by reference to the specific financial losses (other than the dental costs) and lost earnings up until January 2017, the figure then being rounded up slightly, to get to a figure of $18,000.

[22] As has become clear in discussion, I consider that the actual loss that I have evidenced in front of me through to today, is the sum of $25,000 or just short of that figure.

[23] There has been discussion about an award of reparation for lost future earnings. I am not prepared to make an order for lost future earnings in this case. I am prepared to make an order for reparation of $25,000 globally for financial loss.

[24] The next head for me to consider is reparation for emotional harm. I have been provided with extensive written submissions by both parties that have referred to a considerable number of cases. I have read those cases, and I have also heard the oral submissions this afternoon.

[25] Fixing an amount for emotional harm is a far from straightforward process. It is simply not possible for a Court to assess in this process what emotional harm has actually occurred and to attribute a financial figure to that is an inherently difficult process. It is not a process that can in any way actually address the emotional harm which has been suffered. The key principle for me is a principle of ensuring consistency in sentencing. As I say I have referred to the cases to which counsel have taken me. I consider that the appropriate amount is somewhere between the submission of both counsel. WorkSafe submitted that an appropriate amount was $40,000, Ebert submitted that it was $25,000. For my own part I consider that an appropriate amount is $30,000. The case that I found of most assistance in that regard was *Police v Freightlines Limited.*[2] That was the amount awarded in that case and that is the amount that I consider to be appropriate in this one.

[26] The second step that I must then undertake is to assess the quantum of fine. As I said earlier, the High Court in *Department of Labour v Hanham and Philp Construction Limited & Ors* identified the appropriate starting point bands once one has assessed culpability. To assess whether offending falls within low, medium or high culpability the Court observed that assessment requires consideration of a number of factors. Those are the identification of the operative acts or omissions at issue, that would usually involve the clear identification of the practicable steps which the Court has found was reasonable for the offender to have taken; an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk; the degree of departure from standards prevailing in the relevant industry; the obviousness of the

[2] *Police v Freightlines Limited* (2016) NZDC 16603

hazard; the availability, cost and effectiveness of the means necessary to avoid the hazard; the current state of knowledge of the risks and of the nature and severity of the harm which would result; and the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[27] Both counsel have taken me extensively in their written submissions through each of those factors. They have also referred to a significant number of cases most of which I was familiar with and those with which I was not I have read this morning. It is of interest to note that the case that I found of most assistance in determining culpability was in fact the case involving Ebert on a previous occasion. That was not simply because it was the same defendant, there were remarkable similarities in the offending. The band culpability assessment there was a starting point of $60,000. In this case WorkSafe submit an appropriate start point of $80,000 whereas Ebert submitted $60,000, largely based upon the former Ebert case.

[28] I agree with Mr Bonnar that that is indeed the appropriate case for me to focus on. What I do take issue with; however, is assessment of culpability. The offending here is of slightly greater culpability. We have had a discussion around ensuring that one does not double count the earlier offending. For my part, I consider the best way to reflect the earlier offending is to look at the culpability assessment in that earlier accident and then focus on what has happened in the current accident that ought not to have occurred. Quite simply, the experience of Ebert from that earlier accident and its own procedures implemented it after it, and its failure to follow those procedures, lifts that culpability beyond the $60,000 start point in that earlier case. The appropriate start point in my view is a fine of $65,000.

[29] I am not going to uplift from the start point for the earlier conviction. Reflecting on the discussion we had, I have two approaches available to me. One is to set a start point and then uplift for the earlier conviction. The other is to stand back and consider whether the totality principle is such that from the start point no uplift is appropriate.

[30] Having set the start point at $65,000, recognising the greater culpability on this occasion than on the earlier occasion, I do not consider that an uplift is appropriate when considering the totality of the offending.

[31] The next question is what discounts are available from that start point? We have had discussion around the appropriate discount to provide in relation to co-operation with WorkSafe. I am satisfied that if there was any misleading information provided to WorkSafe that this was inadvertent. Ebert is accordingly entitled to a discount of 10 percent in that regard.

[32] The second discount sought is in relation to remorse. Ebert has expressed its regret for what has occurred. Mr Bonnar, quite appropriately, acknowledged that at the start of the submissions today and [the partner of the victim and the victim] have had the benefit of hearing [name deleted] read her statement before the Court also. I have no doubt that remorse is genuine and a 5 percent discount is appropriate for that.

[33] The next discount sought is in relation to steps taken since the incident to ensure that such accidents do not occur again. Extensive steps have been taken by Ebert and those were set out in the written submissions filed. There is a considerable amount of detail but I will focus in particular on one aspect. Ebert took remedial steps to improve its systems for managing falls from heights and the risks posed by unsecured penetrations. It has reviewed and updated its penetration policy to include guidelines for temporary and permanent penetrations. That includes requiring signage on every penetration, whether temporary or permanent, and introducing the use of a residual risk register at project handover to ensure Ebert's clients and other contractors who remain on any given project site are aware of the remaining risks requiring ongoing management. Those in particular strike me as appropriate remedial steps and due credit is due for them. A discount of 5 percent is appropriate.

[34] The final discount sought was in relation to reparation. I have discussed with Mr Bonnar the quantum of that discount. I accept that the case law establishes that an entitlement exists of 10 percent for that discount.

[35] Totalling up those discounts comes to 30 percent. I have been provided with a case decided recently in the District Court where the view was taken that 30 percent was too great a discount and 20 percent was appropriate. I do consider that 30 percent as a total discount is appropriate here when one takes into account all the steps. 30 percent of $65,000 is $19,500. That reduces the fine to an amount of $45,500.

[36] The third step in the sentencing process is to stand back and consider whether the amount of reparations and fine are a just and appropriate outcome. I consider that they are.

[37] In summary, the outcome is:

(a) payment of reparation. First, by way of an amount of financial loss of $25,000. Second, by way of an amount for emotional harm of $30,000; and

(b) A fine of $45,500.

R J McIlraith
District Court Judge