

**IN THE DISTRICT COURT
AT HUNTLY**

**CRI-2017-024-000829
[2018] NZDC 6971**

WORKSAFE NEW ZEALAND
Prosecutor

v

MICHAEL VINING CONTRACTING LIMITED
Defendant

Hearing: 6 April 2018
Appearances: S Petricevic for the Prosecution
G Galloway for the Defendant
Judgment: 20 April 2018

NOTES OF JUDGE K B F SAUNDERS ON SENTENCING

Introduction

[1] In the early hours of 31 October 2016, [the deceased], an agricultural worker employed by Michael Vining Contracting Limited (MVCL) crashed the tractor he was driving home and died at the scene.

[2] [The deceased] was a UK national in New Zealand on a working holiday. He was 23 years old.

[3] MVCL is a limited liability company. It is an agricultural contracting provider and the services it provides includes bulk silage, hay bailing, spraying, spreading and cartage.

[4] MVCL is a person conducting a business or undertaking (PCBU) and accordingly it is obliged under the Health & Safety at Work Act 2015 (HSWA) to ensure as far as practicable the health and safety of its workers while they are at work pursuant to s 36(1)(a) of the Act.

[5] At any one time the company employed three workers including its director Michael Vining. [The deceased] began working for the company as a tractor operator on 17 October 2016.

[6] [The deceased]'s time sheet record for 30 October 2016 recorded he had worked 16.75 hours that day. In the fortnight leading up to the crash he had worked every day to a total of 197.25 hours.

[7] As a result of [the deceased]'s death, MVCL was charged with failing to ensure the safety of workers when they were at work, that failure exposing its workers to a risk of death or serious injury arising from fatigue. The penalty is a fine of up to \$1.5 million dollars.

[8] The identified risk to [the deceased] was operating a vehicle while fatigued. Fatigued because of extended work hours and driving home along poorly lit roads in the dark in the early hours of the morning exacerbated the risk caused by his fatigue. It is thought [the deceased] likely fell asleep at the wheel.

[9] MVCL pleaded guilty promptly and sentencing took place before me on 6 April 2018. I received written submissions from both counsel in addition to oral submissions.

[10] At the conclusion of counsels' submissions, it was agreed that I would provide full reasons for my sentence at a later date.

Victim impact statements

[11] The victim impact statements I have read from [the deceased]'s family, that is his mother, his father and his two brothers, sadly makes familiar reading. Lives have

been changed forever. The grief and guilt of not being able to protect their son and brother is overwhelming. Nothing I do will assuage their loss.

[12] A restorative justice conference has not proceeded to date, however I am told the family wish for the sentencing process to be completed first and Mr Vining has available \$20,00.00 to facilitate the family's travel to New Zealand to attend restorative justice at a later date.

Submissions

[13] There is as yet no High Court guideline judgment determining sentencing bands under the relatively new HSWA, but it is accepted that the sentencing exercise involves three main steps¹:

- (a) I must assess an amount of reparation. This is by considering statutory framework and any offer to make amends;
- (b) I must fix an amount of the fine and the relevant *Taueki*² approach of aggravating and mitigating factors applies.
- (c) I must make an overall assessment of proportionality and appropriateness of the total imposition of the fine and reparation. The payment of appropriate reparation receives priority.

[14] I accept there is also now a fourth step prior to the proportionality assessment, and that is whether any other order, such as costs is appropriate.

[15] There is no distance between counsel as to the amount of reparation for emotional harm. There is however dispute between them as to the approach I ought to take in determining the appropriate fine given the substantial increase in penalty. The prosecution urges a four-band approach which has been followed by some in this Court, adopting the three *Hanham and Philp* penalty bands and adjusting the bands

¹ *Dept of Labour v Hanham and Philp Contractors Limited* (2008) 6 NZELR 79 (HC)

² *R v Taueki & Ors* [2005] 3 NZLR 372 (CA).

accordingly. The defence prefer a six-band approach which has been adopted in the High Court.

[16] The four bands are as follows:

Low Culpability	A fine of up to \$400,000.00
Medium Culpability	A fine of between \$400,000.00 and \$800,000.00
High Culpability	A fine of between \$800,000.00 and \$1,200,000.00
Extremely High Culpability	A fine of between \$1,200,000.00 and \$1,500,000.00

[17] The six smaller sentencing bands are as follows:

Low:	\$0 to \$1,500,00.00
Low/Medium:	\$150,000.00 to \$350,000.00
Medium:	\$350,000.00 to \$600,000.00
Medium/High:	\$600,000.00 to \$850,000.00
High:	\$850,000.00 to \$1,100,000.00
Extremely High:	\$1,100,000.00 +

[18] I prefer and adopt the four band approach. The HSWA not only extended the duties of those who work in and control workplaces, but substantial increases were also made to the penalties for health and safety breaches. It seems the Pike River tragedy was the catalyst for change. I prefer the four band approach because it accords with the purposes and principles of the Sentencing Act and I adopt the prosecution's submission on this point. Fixing an appropriate fine is not however a simple mathematical exercise adapting the old approach to the new legislation.

Identified risks arising from fatigue

[19] The parties agree in so far as the risks arising from fatigue can be identified, that it was reasonably practicable for MVCL to have:

- (a) Ensured that an effective fatigue management system was implemented, including identifying specific factors that result in fatigue of workers;
- (b) Identified, assessed and monitored specific fatigue-related hazards, taking into account the risk that driving creates;

- (c) Ensured that guidelines for maximum work hours and minimum duration of breaks were developed and implemented;
- (d) Ensured that the effectiveness of these controls was monitored, including monitoring actual hours worked and having a system in place for reporting concerns with fatigue;
- (e) Ensured that workers took regular breaks from work;
- (f) Ensured there was a system of controls in place to recognise and address fatigue in periods of higher than normal workload;
- (g) Ensured that workers were trained in understanding and managing fatigue;
- (h) Ensured that all workers operating MVCL's vehicles/machinery wore their seatbelts.

[20] Accepting as it must that the key failing related to managing employee fatigue, it is submitted on behalf of MVCL that it did take steps to monitor employee fatigue. These steps included:

- (a) Mr Vining observed [the deceased] regularly stepping out of the tractor during the day to stretch his legs and walk around.
- (b) [The deceased] was observed drinking water regularly throughout the day.
- (c) The drivers had a minimum of an hour break at about 4.00pm.
- (d) The drivers ate dinner at about 9.00pm when they stopped for approximately 10 – 15 minutes.
- (e) Mr Vining and [the deceased] were the first to stop working at around 12.30am after [the deceased] had tipped his last load. [The deceased]

climbed into Mr Vining's tractor and had a conversation with him about the next day's work. Mr Vining observed [the deceased] to be alert. During the duty-holder interview he described [the deceased] as "bright eyed".

- (f) Before leaving the yards, [the deceased] was offered a ride home by the drivers who were leaving the yards together in one vehicle. [The deceased] declined the offer and said he wanted to drive MVCL's tractor back to his house. [The deceased] chose to drive the tractor home, he was not instructed to by MVCL.
- (g) MVCL is a small, three-man team and the effects of the accident on MVCL and Mr Vining personally have been significant. Mr Vining flew to England to attend [the deceased]'s funeral.

[21] For these reasons it is submitted that culpability is the medium of the six smaller bands of culpability.

[22] Other factors in support of the submission that MVCL's culpability is more appropriately assessed in the middle of the medium band or even lower are as follows:

- (a) The issue of fatigue in the workplace is not well understood (as opposed to say guarding cases) so it would be too simplistic to conclude that the number of hours worked equate to a particular degree of fatigue;
- (b) Tractor contracting is seasonal work and entirely dependent on weather conditions so that like all contractors MVCL must take advantage of good conditions when possible and there is pressure from farmers to complete work within certain timeframes. This means it is industry practice that tractor drivers work long hours in order to complete jobs as soon as possible. [The deceased] had been a professional tractor driver since at least 2012 and was relatively experienced within the industry.

- (c) It is acknowledged that the hours worked are high but not unusual or excessive when viewed in context of the short weather dependent season.

[23] Accordingly, and by reference to comparable cases, it is submitted that a starting point for a fine no higher than \$500,000.00 would be appropriate and in accordance with sentences imposed for conduct of similar culpability.

[24] The prosecution submits that culpability falls into the top end of the middle of the four bands of culpability. Assessing the conduct against the factors identified in sections 151 and 22 of HSWA as follows:

- (a) *The risk of, and the potential for, illness, injury, or death that could have occurred:*

The risk of an accident driving while fatigued is well known. It would have been clear to MVCL that driving along poorly lit roads, alone and after working long hours exacerbated this risk. The inevitable happened with the most serious outcome, [the deceased] was killed. Fatalities are not unusual in road accidents. (I accept however the decision to drive home was [the deceased]'s, in other words he was not forced to do so by MVCL).

- (b) *Whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred:*

The hours [the deceased] had worked were known to MVCL, and also that he was to start work again in the morning. That day he had worked 16.75 hours. In the fortnight leading up to his death he had worked close to 200 hours 7 days a week. He left for home between 1.30 and 2am, to drive approximately 30 kilometres in a tractor. He crashed at 2.45am. He was not wearing a seatbelt and was ejected from the vehicle.

The consequences of the fatigue-related impairment experienced by [the deceased] because of the excessive working hours prior to and at the time of the accident are identified by the prosecution experts Dr Karyn O’Keefe and Professor T Leigh Signal of Massey University as likely to be:

- Decreased reaction time, including decreased braking reaction time.
- Increased lane weaving and deviation, and speed variability.
- Impaired ability to negotiate curves of the road.
- Decreased vigilance, including decreased attention and information processing.
- Increased sleepiness, including increased likelihood of microsleeps.
- Unstable performance (wake-state instability) leading to moments of relative alertness, followed by moments of lapses in attention and response.
- Increased risk-taking behaviour, which could include failure to wear a seat-belt.
- Overestimation of performance ability and underestimation of fatigue-related impairment, particularly sleepiness.

(c) *The degree of departure from prevailing standards in the sector/industry as an aggravating factor:*

MVCL’s conduct departs from industry standards and guidelines; a number of standards and guidance material are available setting out the effects of fatigue.

(d) *The cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk;*

Monitoring and reducing work hours would have had some cost for MVCL, however this would certainly not be disproportionate compared to the risk of harm to workers.

[25] Accordingly, and also by reference to comparable cases, it is submitted an appropriate starting point for a fine is in the region of \$600,000.00 to \$800,000.00.

Sentence

[26] The purposes of sentence are accountability, responsibility, deterrence and to provide for the interests of the victims and the harm done by the offending.

Reparation

[27] Quantifying emotional loss is a difficult and delicate exercise. No price can be put on a person's life, but it is a relevant factor in this sentencing process. In this case I make an order for reparation by way of an emotional harm payment in the sum of \$80,000.00. That sum is to be apportioned equally between the four members of [the deceased]'s family.

[28] In addition, I am satisfied the family has suffered financial loss as set out in paragraph 7.15 of the prosecution's submission of (NZ equivalent) \$9,361.00. There is also a further order for payment of that sum as financial reparation.

Fine

[29] I have given consideration to the cases referred to by counsel decided under both the old and new legislation as to start point and culpability. There are, it is accepted, very few fatigue cases.

[30] Taking into account all that I must, I am satisfied that the culpability of MVCL falls into the band of medium culpability for the reasons identified by the prosecution, attracting a fine of between \$400,000.00 and \$800,000.00. I assess culpability as being within the middle of that band, so as to warrant a starting point of \$650,000.00 as the least restrictive outcome. Accepting as I do that this type of work can only be

done when the sun shines so being weather dependant adds to the demands and pressure from farmers to complete the job as soon as possible, MVCL ought to have done more to protect [the deceased] from the dangers of excessive working hours fatigue. It did not implement a formal fatigue plan to manage that day. It simply did not do enough.

[31] There are no aggravating features of the offending or of MVCL so that further uplifts are not appropriate.

[32] As to mitigating factors; MVCL pleaded guilty at the earliest opportunity, it has co-operated with the prosecution throughout the investigation, is remorseful and does not present with a significant record of safety failures. Those factors would warrant a discount of 25%.

[33] In addition, the guilty plea would also attract a discount of 25%.

[34] This leaves an end fine of \$325,000.00.

Other costs

[35] I am satisfied an order for contribution of the prosecution's legal costs is warranted in the sum sought of \$2,656.50. There is an order accordingly

Proportionality and fine

[36] [Details deleted].

[37] [Details deleted].

[38] [Details deleted].

[39] There ought to be a punitive element to sentence. Reparation will be met by the defendant's insurer. A fine will act as a deterrent, not only in a specific sense, but general deterrence is also something I must have regard to.

[40] Having regard to all of the material before me, I am satisfied that an adjustment on a proportionality basis is warranted. An appropriate fine is in the sum of \$10,000.00 and that is the order I make accordingly.

K B F Saunders
District Court Judge