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

IN THE DISTRICT COURT
AT WHANGAREI

I TE KŌTI-Ā-ROHE
KI WHANGĀREI-TERENGA-PARĀOA

CRI- 2017-088-002769
[2018] NZDC 22605

WORKSAFE NEW ZEALAND
Prosecutor

v

CARTER HOLT HARVEY LIMITED
Defendant

Hearing: 31 October 2018

Appearances: C O'Brien for the Prosecutor
G Nicholson for the Defendant

Judgment: 31 October 2018

NOTES OF JUDGE K B de RIDDER ON SENTENCING

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[1] The defendant, Carter Holt Harvey Limited, has pleaded guilty to one charge of failing to ensure so far as reasonably practicable that the health and safety of workers while at work in the business of the laminated veneer lumber press machine and that failure exposed [the victim] to risk of serious injury or death. That incident occurring on 13 October 2016.

[2] There has been a very detailed agreed summary of facts filed which explains fully the operation of the laminated veneer lumber process and in particular the conveyor and belt systems. Of course, in terms of sentencing I adopt that agreed summary of facts for the purposes of sentencing. However, I do not propose to analyse

it in depth. Essentially, what I propose to do is take an essential summary which is taken from the prosecution sentencing submissions.

[3] So the relevant facts are that [the victim] worked full-time as a shift fitter at Carter Holt Harvey's laminated lumber veneer plant in Ruakaka. His duties including basic repairs and maintenance of a laminated lumber veneer machine. This machine has a number of conveyor belts that move the veneer through the laminated lumber process and the particular belt involved in this incident was the belt known as the top shuttle nose belt which shuttles veneer to a layup station where it is laid in a particular sequence. The top shuttle nose belt has an automatic tracking system that keeps the belt in alignment.

[4] On 13 October 2016 at 6.45 [the victim] arrived at work. He was advised that the automatic tracking system was not operating and until it was fixed workers were instructed to manually track the shuttle nose belt. He was advised that at 11.00 pm that night the process line would be stopped for a product change, allowing [the victim] a chance to manually track the belt. At approximately 11 o'clock the process line was stopped and [the victim] started manually tracking the belt. He leaned into the machine with his torso resting on the frame of the machine and his feet off the floor so he could reach the bolts on the underside of a conveyor belt. The top shuttle nose belt suddenly moved forward and collided with [the victim]'s chest causing his chest and shoulder region to be crushed between the motor and the frame of the machine.

[5] At that stage [the victim] believed he triggered a limit switch with his foot resulting in a brake being applied to the shuttle nose belt. But as I now understand his victim impact statement it may have been his hand touching a button to stop the movement. Either way, there was impact which caused [the victim] to lose consciousness.

[6] He suffered serious and life-threatening crush injuries to his upper chest and shoulders and those injuries have been detailed in his victim impact statement today, requiring considerable hospital treatment and ongoing complications and further treatment for a considerable period of time. So those are the brief facts taken from the rather more detailed facts that I have referred to.

[7] As far as the failure to take reasonable steps or to ensure as far as reasonably practicable is concerned, the steps that Carter Holt failed to take were that firstly, it failed to ensure that press layup area was effectively guarded on both sides or to otherwise implement effective interim controls to ensure hazards and risks were appropriately managed until a permanent solution could be implemented. Secondly, there was a failure to ensure that the press machine was secured against inadvertent movement or to have in place effective systems and procedures for tracking belts when the machine was not secured against inadvertent movement. Finally, there was a failure to develop and implement appropriate procedures including undertaking task analyses for manually tracking belts and shuttle nose belts and ensure they were complied with.

[8] Approaching this sentencing exercise I have had the benefit of very lengthy and detailed written submissions from both counsel. Both counsel have updated those submissions in the light of the recent decision of a full bench of the High Court in the case known as *Stumpmaster v WorkSafe New Zealand*.[1]

[9] Also of course both counsel have addressed me this afternoon highlighting what they consider to be the essential points of their submissions, but of course I have read all of their submissions in detail. The case of *Stumpmaster* which I have just referred to essentially confirmed the sentencing approach mandated under the previous guideline authority known as the case of *Department of Labour v Hanham & Philp Contractors Ltd* but significantly noted that this sentencing exercise now requires a four-step approach and also the Court establishes new guideline bands for fixing the amount of the fine.[2]

[10] The relevant provision of the Health and Safety at Work Act 2015 in terms of sentencing is s 151(2) which sets out the criteria to be applied. Firstly of course the Court must apply the provisions of the Sentencing Act 2000 and do so with particular regard to ss 7 to 10 of that Act which deals with the purposes and principles of sentencing and aggravating and mitigating features in particular. But also, sentencing

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2190

[2] *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095; (2008) 6 NZELR 79 (HC)

has to pay regard to the purposes of the Health and Safety at Work Act and also take into account the risk of injury or death occurring and take into account whether or not death or a serious injury has occurred and also the degree of departure from prevailing standards.

[11] Turning then to the four steps now mandated by *Stumpmaster*. The first is the issue of reparation. I had intended to summarise the effects on both [the victim]and his family and in that regard I grant the prosecution's application to admit the statements from [the victim's wife] and [the victim] pursuant to s 21(2) Victims' Rights Act 2002.

[12] I am not now going to detail the essence of those victim impact statements. They have been read in Court and there is no need for me to repeat them. It is sufficient to say perhaps that the long-term effects on [the victim] are significant and permanent and in particular very significant in terms of the use of his shoulders and lungs.

[13] As far as financial reparation is concerned there is no issue regarding that as the company, to its credit, has covered all of the [victim's] family direct costs arising out of this incident in terms of topping up his pay and also meeting extra costs incurred resulting from increased treatment and travel costs. But obviously, on the financial side [the victim] is rightly concerned for his future and his ability to earn and I note that he has some 10 years to go before he would be eligible for state-funded superannuation.

[14] As far as the emotional side of matters is concerned, again I do not propose to try and summarise those. They have been read in Court this afternoon, but perhaps the most telling comment is that made by [the victim] at the conclusion of his victim impact statement where he says that he felt like he died that night and a different person came back. "I'm always hopeful that next year will be a better year but so far next year hasn't come." That seems to me to be a very succinct and highly pertinent summation of the situation he finds himself in as a result of this incident.

[15] Reparation is a compensatory matter and it is simply incapable of mathematical formulation. I must look at the overall circumstances and in particular the degree of

injury and the long-term effect of that and the resultant trauma and distress. Those are present here to a very significant degree. However, I accept that there must be some consistency with other cases and I have read the cases referred to me by the prosecution in this regard. It is somewhat difficult to compare with the other cases as I have had no detailed information as to where those particular people might be with their lives now, but in looking at those two cases where the sum of $50,000 was awarded and noting the long-term effects on [the victim] which are going to be with him effectively for the rest of his life, I am satisfied that an appropriate reparation is the sum of $55,000.

[16] Turning then to the next step which is to fix a fine for the breach. The prosecution argued that this incident involves medium to high culpability on the part of the company and which places it on the cusp of bands 2 and 3 as set in the case of *Stumpmaster* which have an end point and a start point respectively of $600,000. Mitigating factors the prosecution accept are to be taken into account in the prosecution's submission amount to a total of 20 percent from that point.

[17] For the defence it is submitted that their breach falls within the higher end of the medium band which is band 2 where the Court in *Stumpmaster* set a range of $250,000 to $600,000. Therefore, being in the higher end of that medium band the defence submit that a start point of $500,000 is appropriate, and also would argue for mitigating factors to amount to 30 percent.

[18] In my view the culpability of the company has to be assessed having regard to the three reasonably practicable steps that the company failed to take. Firstly, to ensure that the press layup area was effectively guarded on both sides and the non-operational side in this case was not guarded but workers were required to access it.

[19] Secondly, to ensure the machine was secured against inadvertent movement or effective systems and procedures for tracking belts where the machine was not secured against inadvertent movement. In this case the company did not ensure that the machine was secured against inadvertent movement.

[20] The third failure was to develop and implement procedures for manually tracking the belts.

[21] In my view, of those three faults on part of the company the second and third are key, especially when considered alongside the risk of a person being caught between a fixed and a moving part of a machine. Also relevant of course is the nature of the machinery and the risk for very serious injury or death. In this case of course there was very serious injury to the point where there was some surprise expressed, as I understand it, by medical experts that [the victim] did indeed survive. It seems he came as close to death as was possible without actually dying.

[22] When I stand back and look at all of those matters I am satisfied it points to a culpability in the medium to high range. I respectfully disagree with the suggestion that this case is equivalent to that of the *WorkSafe New Zealand v Niagara Sawmilling Company Ltd* case and when looking at those three areas where the company failed.[3] In particular I note two points, that in the *Niagara* case the operator was going about his ordinary duties whereas in this case this was something out of the ordinary. Secondly, I also note that in the *Niagara* case it involved the victim accessing the machinery involved with either his hand or lower part of his arm, whereas in this case of course the requirement to carry out the repair placed the whole [the victim]'s body at risk, as indeed proved to be the case.

[23] For those reasons I am satisfied that the submission made by the prosecution is the appropriate one. That this does sit at the top end of medium or the low end of band 3 and I would fix a start point of $600,000.

[24] I agree that there has to be an uplift to reflect the previous offending by the company. I understand that counsel for the company, Mr Nicholson, does not seriously argue against that and it has been suggested that the range is somewhere in the order of five to 10 percent. I note that the company regrettably has 26 previous convictions in this area and some of those I am told include instances of unguarded machinery. That again was not disputed by Mr Nicholson for the company.

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[3] *WorkSafe New Zealand v Niagara Sawmilling Company Ltd* [2018] NZDC 3667

[25] That being the case I am satisfied that it is appropriate there has to be a 10 percent uplift for that previous history, that is one of $60,000, taking the start point then to one of $660,000.

[26] In terms of mitigating factors there are several in my view. In accordance with now well-established sentencing procedures all of those factors other than a guilty plea are to be taken into account first, and then finally when that point is reached a further discount for guilty plea. I proposed to follow that procedure. In terms of mitigating factors other than the guilty plea, in my view there are three that are relevant.

[27] Firstly, there can be no argument that the company has demonstrated clear, continuing and ongoing remorse and demonstrated from the outset by ongoing assistance to [the victim] and his family, carrying through with topping up his pay and meeting extra costs through to restorative justice process. I have read the report from that meeting. Clearly it was a powerful process and in my view is yet just another demonstration of the power and purpose of that process.

[28] The second factor is co-operation. Again there is no argument that Carter Holt Harvey have co-operated fully with the investigating authorities who were investigating this incident.

[29] Of course there is the issue of reparation, but effectively that is already paid by way of topping up [the victim]'s pay and meeting his extra costs, but also the willingness of the company to pay a further sum of reparation which I have now fixed.

[30] The only other area for some dispute is the discount, if any, that I should allow for remedial action. I do not read *Stumpmaster* to direct me that I must make some allowance for this, if action has been taken. Obviously it is a factor to be taken into consideration but as to whether or not any discount is to be allowed is a matter for each individual case as I read it. With no disrespect whatsoever to Carter Holt Harvey and acknowledging that I have read in detail Mr Buckingham's affidavit, in my view the company was responsibly doing no more than it was obviously required to given the overall circumstances, the history of this machine, the length of time over which a potential problem had been identified.

[31] In in my view no particular discount should be applied for that. I intend however to simply apply a global figure for the three factors I have identified and that is one of 25 percent. That equates to a sum of $165,000. That would then take the fine down to a sum of $495,000.

[32] There is no question again that the company is entitled to have recognised its very early guilty plea and reinforced by its ongoing remorse and actions it has taken. That would be one of 25 percent which results in an end fine of $371,250.

[33] The Court is entitled to make extra orders. In this case the issue of costs arises. Again, both counsel have responsibly accepted that a sum of $2415.50 is appropriate.

[34] Turning then to the final step, I do not need to consider that. There is no issue about capacity of the company, Carter Holt Harvey, to pay these sums. Therefore, on this charge the company is convicted. It is ordered to pay reparation in the sum of $55,000. It is fined the sum of $371,250 and it is ordered to pay a contribution towards the prosecution costs of $2415.50.

[35] Finally, [the victim] at least this part of the process is over. Hopefully it can help in some way, at least in a small way, you put this part of it behind you. I simply express my best wishes for the future for you and your family. I hope things continue to improve as much as they can.

[36] Finally, counsel thank you very much for your very helpful, detailed and comprehensive submissions and for your assistance this afternoon.

K B de Ridder
District Court Judge