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

IN THE DISTRICT COURT
AT MORRINSVILLE

I TE KŌTI-Ā-ROHE
KI MORENAWHIRA

CRI-2018-039-000093
[2018] NZDC 22138

WORKSAFE NEW ZEALAND
Prosecutor

v

THE THREE H COMPANY LIMITED
T/A COROHAWK
Defendant

Hearing:	17 October 2018
Appearances:	V Sagaga for the Prosecutor E Boshier for the Defendant
Judgment:	17 October 2018

NOTES OF JUDGE M L S F BURNETT ON SENTENCING

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[1] The defendant is Three H Company Limited trading as Corohawk and has earlier pleaded guilty and been convicted on one charge pursuant to the Health and Safety In Employment Act 1992, s 18A(22) and 50(1)(a). It carries a maximum penalty of a $250,000 fine.

[2] The date of the offence was a continuing date between 7 January 2015 and 21 March 2015 when Three H Company Limited sold and supplied a piece of machinery or plant designed and made in a manner that it failed to ensure that the conveyor feed belt had adequate guarding. This piece of machinery was installed at [farm name deleted].

[3] On 27 July 2017 [the victim], who was a partner at the [farm] and a farm worker in that enterprise she shares with her husband was removing old feed from the conveyor belt using the reverse button function which is located at the end of the conveyor belt. This allowed the old feed to fall off the end of the belt and subsequently be swept away. Tragically during this process [the victim's] left arm was pulled into the in-running nip point at the upper surface of the tail drum between the drum and the conveyor belt and her arm was immediately amputated above her elbow. The kill switch as it is called was located out of reach but she was able to telephone her husband on her mobile phone and emergency services eventually freed her from the conveyor.

[4] During the course of the sentencing process, prosecution provided sentencing photos which show the exposure of this area of the machinery as quite unguarded. Subsequently the defendant has installed quite simple drum-type guarding over this area simply to prevent anyone reaching in to that danger area.

[5] The victim impact statements are from both [the victim's husband] and [the victim]. The victim impact statements cover the trauma of the event which makes harrowing reading. The complications to their lives and to their business as a consequence of [the victim] not having the use of one of her arms, the emotional stress, humiliation and trauma to [the victim] being without a limb, while she has the availability of a prosthetic limb, it is of course restrictive in its use and it does not disguise the absence of her own limb. The impact of this visual loss for her when in public and other social circumstances as well no doubt in her personal life will be an ongoing trauma for her.

[6] The amended agreed summary of facts provided can be annexed to my sentencing remarks along with the photographs provided just referred to. I have heard from both prosecution and defence counsel and both have provided written submissions, tabulated booklets containing various authorities and other material counsel wished the sentencing Court to have regard to. Between counsel there is an agreement as to the approach. Firstly, the machine was installed in March 2015. The

Health and Safety at Work Act was not then in force and the leading case as to the Court's approach is *Department of Labour v Hanham & Philp Contractors Ltd.*[1]

[7] As to the process and methodology that is also agreed between counsel. Assessment of reparation, then the fixing of the fine and then the overall assessment as to proportionality and appropriateness as to the level of fine, a three-step process.

[8] What is not wholeheartedly agreed upon is the level of reparation submitted by prosecution. Defence point to authorities at the lower end making various observations and seek a lower reparation figure. It is acknowledged by defence that insurance for reparation will cover the payment of reparation. As to the fixing of fine and level of culpability there is some disagreement on that as well. In essence, the prosecution seek a starting point of $100,000 in respect of fine whereas defence seek a lower starting point of $65,000. Defence make the points that the level of culpability is not at the level prosecution submit and accordingly a lower starting point is warranted. Once the starting point has been set prosecution and defence are agreed as to both the percentage and the factors warranting further recognition for the purposes of reduction.

[9] The final point of difference is whether the financial material before the Court shows or not the ability to pay a fine albeit on a contingent liability basis of a monthly payment.

Reparation

[10] Addressing first the factors as to quantum of reparation. Both defence and prosecution acknowledge that the purpose of reparation is compensatory whereas the purpose of the fine is punitive. It is acknowledged that reparation must be given primacy in health and safety sentencing. The defendant has wisely in place insurance for such contingencies as happened in this case.

[11] The extent of the emotional harm and the actual harm suffered by [the victim] cannot be underestimated. It is comparable to earlier cases. It is of course more than

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[1] *Dept of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095, (2008) 6 NZELR 79.

loss of use. It is an absence of the limb. It is also more than the loss of use or absence of part of a hand or fingers, it is the loss of the entire limb from above her elbow. Having regard to the cases provided to me, the emotional harm that [the victim] has suffered and will continue to suffer I do not have any great difficulty in reaching an emotional harm reparation award of $70,000. I do not agree with the defence view that a lower reparation level is appropriate. I appreciate that the award is under the previous Act. I do observe that society has moved forward considerably even under the old Act awarding figures then which would be regarded today as extremely modest. The level of recognition in our society and our community has moved forward appropriately even under the old law in acknowledging the different levels of harm that a person will sustain and continue to suffer resulting from a complete loss of limb in this manner.

[12] [The victim] still has flashbacks to the day of the incident and describes herself as being in mourning for the loss of her arm. The material that is before the Court in my view is entirely adequate to inform the Court as to the extent of her loss, limitations and emotional trauma and is quite adequate in satisfying that level of reparation I order.

Starting point

[13] Step two is fixing the starting point of the level of fine. There is required the assessment of culpability and placement of the starting point within the medium level range of culpability, attracting a fine of between $50,000 and $100,000. Prosecution as I have already said seeks a starting point of $100,000 reached on the basis of level of culpability which are set out in good detail under paragraph 59 onwards in the prosecution's written submissions. Defence also have covered well their point of view as to level of culpability.

[14] When identifying the level of culpability there is the need to assess the operative acts or omissions then 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 hazard, the current state of knowledge of the risks of the nature and severity of the harm which could

result and the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence. I look at each of these in turn.

[15] As to the identification of the operative acts or omissions or practicable steps, the defendant's culpability does lie at the top end of the medium band and accordingly a starting point is appropriately set in my view as prosecution has set it for the offending. Looking at the photograph of the exposed area of the machine, the unguarded nip points are indeed a well-known hazard and are identified in the safe use of machinery guidelines. The practical steps the defendant company failed to take was to adequately guard against this obvious hazard which safeguards could have been installed quite readily and have subsequently been installed without I imagine a great deal of cost.

[16] The next point is the nature and seriousness of the risk of harm occurring as well as the realised risk of harm. The clear risk was extensive crushing, amputation of digits and limbs and indeed it is exactly what happened at the very serious end of that.

[17] The next factor to consider is the degree of departure from standards prevailing in the relevant industry. I accept the defendant company's departure from industry standards was high. This is a failure to adequately guard or provide processes for the safe use of machinery which plainly disclosed a risk just by looking at the machinery. These hazards are well-known. They are well publicised. The need for cleaning and removing accumulated detritus from the use of the machine is plainly a standard part of operating the machine otherwise it simply builds up underneath the roller and the roller cannot function. Industry publications available at the time the conveyor belt was designed and installed in February 2015 provide extensive guidance on the hazards of inadequately guarded or unguarded machinery. There was much discussion then as there is now about such matters and machinery safety has long been a critical issue in industry when operating a machine as unforgiving in its actions when human flesh and bones come into contact with it.

[18] The risk associated with moving machine parts and in particular unguarded nip points quite plainly are well-known and at the time the conveyor belt was designed

and installed in February 2015 there was ample safety guidance available and prosecution have set out references to those at paragraph 66 of their written submissions. As to the obviousness of the hazard, I have already commented the hazard of this unguarded machinery is obvious to the naked eye and hence the obviousness of the hazard is high.

[19] The next factor is the availability, cost and effectiveness of means necessary to avoid the hazard. The defendant has demonstrated how easily remedied the guarding against the hazard is and the measures required and taken by the defendant were neither onerous nor costly and even if there was moderate cost of remedying that cannot be any excuse for failing to have taken the safety precautions in the first place. There was no negligent contribution by the victim. There was no wilful disregard for safety practices. There was no written risk assessment undertaken by the defendant company. Quite plainly in hindsight this would have been an obvious feature. It could have been provided to the purchaser which would have assisted the purchaser in assessing the risk and being informed and aware in assessing the risks. Without a written assessment the purchaser did not have that advantage. Both the vendor and purchaser would have been better informed as a result of any written risk assessment.

[20] The next feature is the current state of knowledge of risks and the nature and severity of the harm which it could cause. Unguarded machinery can cause injury or serious harm. It is a plain fact. The current state of knowledge is high and the consequence was entirely foreseeable.

[21] The next factor is the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence. Again the current state of knowledge at the time and now of the means available to avoid the hazard was clearly set out in the various guidance's referred to by prosecution.

[22] Both prosecution and defence have set out relevant case law as to starting point of fine which would be set by the level of culpability. For the defence, reference is made to the fact that the defendant company had sold and installed possibly identical but certainly similar machinery on another farm, the particular details of which are only made available in general terms. At what stage the purchasers of that other

machinery were asked whether there was anything that they would change I am uncertain as to the specific time. Apparently, the response by the owner of that machinery was they would change nothing and it seems on that basis the defendant installed the machinery at [the farm] in the same manner. On an enquiry from me today I am advised that the earlier referred to machinery has not had the safety modification placed on it that the current offending machine has now. I comment on this as something that quite frankly ought to be addressed immediately.

[23] As to the level of fine sought by defence that is based on the level of culpability submitted by defence as being lower than that by prosecution and defence point to the fact that this is not a case of known risk ignored or known risk recklessly disregarded or the deliberate removal of part of the machinery and the failure to replace for example after maintenance work and it is under this heading generally that the defendant had copied exactly existing equipment to which I have just referred and therefore subjectively there was a lack of knowledge on behalf of the defendant that the machinery was at risk of providing a hazard as it had been known to have operated without issue in the past and therefore this could be a distinguishing feature in respect of assessing level of culpability.

[24] Whilst I accept the information behind that submission I am satisfied for the reasons that I have identified that this defence submission does not lower the level of culpability and ergo does not lower the level of starting point.

[25] Having set the starting point in relation to the fine, defence agree with the percentage and methodology for recognition for further allowances. The final point that defence make is that the Court, having set the starting point for the fine, that imposition of a fine may be moot as [defendant's financial matters deleted].

[26] [Defendant's financial matters deleted].

[27] Prosecution have commented on that in response and my view is that even with the somewhat limited access to funding from the bank as I understand it and correct me if I am wrong Mr Boshier, there is no assessment of the directors or shareholders ability to make a contribution should they wish to do so. I have invited Mr Boshier to

comment on the personal financial position of the directors and shareholders that whilst they have drawn salaries and do draw salaries from the business they are modest, they are not excessive and should they wish to contribute to the financial viability of the company they would be able to do so in modest terms.

[28] Overall I am satisfied that there is sufficient funds available to the company to pay a fine ultimately reached of $63,750 which is the figure reached after allowing for deduction of the contributing factors agreed between the parties and accepted by me. I am satisfied that there is capability for the company to access further funds, albeit at a basis of some monthly payment imposed on a contingent liability basis to pay.

M L S F Burnett
District Court Judge