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

IN THE DISTRICT COURT
AT NELSON

I TE KŌTI-Ā-ROHE
KI WHAKATŪ

CRI-2017-042-002560
[2018] NZDC 20796

WORKSAFE NZ
Prosecutor

v

THE SUNDAY HIVE COMPANY LIMITED
Defendant

Hearing: 3 October 2018

Appearances: N L-L K Szeto for the Prosecutor
N S P Laing for the Defendant

Judgment: 3 October 2018

NOTES OF JUDGE A A ZOHRAB ON SENTENCING

---

[1] On 27 November 2016, [the victim] and Sam McLeod were placing beehives in a remote location for Mr McLeod's company, The Sunday Hive Company Limited, it is the defendant company.

[2] The vehicle that Mr McLeod was driving lost traction on a steep hillside and rolled backwards down a hill. [The victim] attempted to jump clear of the vehicle, but tragically was killed. The subsequent WorkSafe investigation identified failures on the part of the defendant to comply with its statutory duties under the Health and Safety at Work Act 2015 ("the Act").

[3] The defendant company appears for sentence having pleaded guilty to a charge of contravening s 36(2) and s 48 of the Act. That offence carries with it a maximum

penalty of a fine not exceeding $1.5 million. The allegation against the company is that being a PCBU it failed to ensure so far as reasonably practicable that the health and safety of other persons, including [the victim], was not put at risk from work carried out as part of the conduct of the business or undertaking, namely the transportation of beehives by vehicle while bee-keeping and that failure exposed any individual including [the victim] to a risk of death or serious injury arising from exposure to the hazards associated with the transportation of beehives by vehicle.

[4] A summary of facts was read before I heard submissions and that is an accepted summary of facts and I am not going to repeat that.

[5] In terms of my approach today the full Court of the High Court has recently issued a guideline judgment for sentencing under s 48 of the Act, and that is the decision of *Stumpmaster v WorkSafe New Zealand.*[1] The Court has confirmed that I should engage in a four-step process.

[6] Firstly, I should assess the amount of reparation to be paid to the victim's family. Secondly, I should fix the amount of the fine by reference first to the guideline bands, and then having regard to aggravating and mitigating factors. Then I should determine whether further orders are made under the Act, and then I should make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[7] Before engaging in the process that I must, I firstly wish to acknowledge the attendance today of [the victim]'s family and friends. It is a pretty blunt process dealing with the death of a beloved family member in the course of one of these health and safety prosecutions, but regrettably I am required to go through a process which has been mandated by the higher Courts as to how to approach sentencing.

[8] In dealing with the issue of emotional harm reparation, of course I am in no way attempting to put a dollar value on the loss of a beloved family member and that is not my intention.

---

1 *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

[9] I also acknowledge the attendance of Mr McLeod as well and I note the close association of the two families and the exchange of views and love at the restorative justice conference, and I have been particularly impressed by the sentiments expressed by [the victim]'s daughter in terms of the forgiveness that she has offered to Mr McLeod and to his family.

[10] In terms of my approach, as I say it is mandated by the higher Courts, and I have to follow that process. So, firstly, I need to assess the quantum of reparation and reparation is given primacy in health and safety sentencings, so it is the first and most important thing that I need to address.

[11] The prosecution and both lawyers have filed very detailed written submissions addressing the issue of reparation. I also have read the victim impact statements that have been provided, and prior to coming into Court I had the opportunity to read [the victim's daughter]'s victim impact statement. The prosecutor has filed submissions with respect to emotional harm reparation and submitted that based on the facts of this particular case, based on comparative cases, and they have provided me with a table of reparation in cases of the fatalities, that $100,000 would be an appropriate reparation by way of emotional harm to [the victim]'s children, those being his immediate family, and the submission is that that would not be out of step with the sorts of orders made in other cases.

[12] Mr Laing, on behalf of the defendant company, acknowledges the submission made by the prosecutor for emotional harm suffered by [the victim]'s three children, and he acknowledges as do I, that no reparation figure can adequately put people back in the position they were beforehand. It is very difficult for a Judge to try and determine reparation for loss of life and so reparation is designed to give a measure of recognition to the loss in the best way that the Courts are capable of doing, but of course we can never make an order to the extent that the family members of the deceased would feel to be appropriate.

[13] He acknowledges the cases that have been referred to by the prosecutor. He notes the factors that seem to have influenced other Courts decisions in relation to the amount of emotional harm reparation sought, and also the purposes for which

emotional harm reparation have been ordered. He acknowledges the circumstances of this case on the loss suffered by [the victim]'s former wife and also his children, in particular the eldest child. Mr Laing has done the best that he can to make sure that the deceased's family, and friends, understand that this is a case which Mr McLeod has not fully recovered from, and will not fully recover from.

[14] So, in terms of doing the best that I can to try and achieve the aims and objectives of sentencing, and giving primacy to the need to provide for the deceased's children, and without in any way attempting to put a dollar figure on the loss that has been suffered by the [victim's] family, in my view an order of $100,000 emotional harm reparation to be held on trust for the children would seem to be appropriate, and also broadly consistent with the cases that the prosecutor has referred me to in the material that has been provided.

[15] The next step that I have to move to is then assessing the quantum of the fine. It may be to people unfamiliar with the Court process that it might be seen that there is not much point to this process, given the argument that has taken place between the lawyers as far as the resources that are available to the company. It is a modest company, and it would most certainly not be able to pay the fine that any end-point would reach based on the formula that I have been provided with by the higher Courts, and in the amount that the lawyers have spoken to, but there is still a purpose in this, because it is a learning exercise for everybody. We have to assess the company's degree of culpability, and what I mean by culpability is fault, or moral blameworthiness.

[16] I must then acknowledge any aggravating or mitigating factors, give credits for various things, and that at least will mark the degree of culpability of the company, even if there is a fine which cannot be paid. It is also a learning exercise for everybody involved in the defendant company, and any companies or business ventures that they might be involved in, in the future. It also gives guidance to other cases as well.

[17] So in terms of the legislation, what is clear is that by combining s 151(2), the decision of *Department of Labour v Hanham & Philp Contractors Ltd*, and s 22 of the Act, there are a number of factors which are relevant to the Court's assessment of the

company's culpability or degree of fault.[2] Those generally align with those set out in the *Hanham & Philp* decision, updated to reflect the health and safety legislative requirements. Firstly, I have got to assess the culpability of the defendant, looking at the identification of the operative Acts or omissions at issue and the practicable steps that was reasonable for the offender to have taken in terms of s 22 of the legislation.

[18] As set out in the summary of facts, the defendant company failed to take a number of reasonably practicable actions. It failed to conduct an effective risk assessment of the work to be carried out which included an assessment of the people, environment, conditions, vehicles and plants and emergency procedures. It failed to ensure that a safe system of work was developed, monitored and implemented, including that vehicles were operated safely on the terrain.

[19] It failed to ensure that the vehicle was safe for the use on the terrain and also that the driver was competent to operate the vehicle safely on the terrain. It failed to ensure that an emergency plan was prepared, maintained and implemented in relation to the work at the site.

[20] One of the issues that has come up in the course of counsel submissions is the characterisation of the business as being a "hobby business", or part-time business, and the fact that the very name of the business, "The Sunday Hive Company Limited," suggests a venture that would, as it seems, take place infrequently, often in weekends between two very good friends, enjoying their time together, and enjoying a business venture which they both saw as worthwhile out in the outdoors, as I say enjoying their company, enjoying this modest business.

[21] Of course, whilst it might have been seen as a "hobby business" and a "part-time business", a weekend venture with friendship being very much at the heart of it, the same rules apply to that sort of business, as they do to a multi-national business with its business in New Zealand operating on a seven-day 24-hour basis. So there is no lesser standard applicable to a business such as the defendant company.

---

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

[22] That does not mean that I cannot take into account the circumstances of the business, and its ability to be able to foresee matters, but it is still something that very much needs to be borne in mind. It was suggested in counsel's submissions that there had been a recognition of the hazard in the hazard register, but what is accepted now is that that hazard register was not put in place until after the incident.

[23] The next factor that I need to look at is the obviousness of the hazard, the availability cost and effectiveness of the means necessary to avoid the hazard, the current state of knowledge of the risk, and 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. The point made by the informant is that the hazards associated with a vehicle losing traction on a steep hill are obvious and well-known. The harm that can result includes death or serious injury, and the informant engaged an expert who assessed the site as medium to high risk and with a range of risk-increasing hazards including gradiability, service condition, escape route, hidden obstacles and driver ability.

[24] What is also pointed out by the informant is that there was ample current knowledge as to the means available to mitigate the risk, including carrying out a risk assessment, developing and implementing a safe system of work, ensuring that the vehicles were safe, the driver was confident and that there was an emergency plan.

[25] It is clear to me that the risk was obvious, given we had some reasonably steep country. It was wet. There was a heavily laden vehicle going uphill in those circumstances. It is also reasonably obvious that one of the key things in terms of the vehicle was whether or not it was suitable for the job as it were, and what transpired is that as far as the tyres were concerned, is that the tread was not suitable, it was not up to standard, and also there were significant differences in the tyre pressure. All vitally important if one takes a moment and reflects upon the fact that this is steep country, with a heavily laden vehicle, when it is wet grass, when the ability to obtain traction and sustain traction were going to be critical, because if you could not achieve those things, then the hazards that would arise from that would be obvious, and also significant.

[26] The next factor I need to look at is the risk of and potential for illness, injury or death that could have occurred. Tragically [the victim] was killed, but there was also a very real potential for Mr McLeod to also have been fatally injured, and the risk, given the steep countryside and gradient, given the rain, should and would have been obvious to anybody who had given some thought to it.

[27] The next factor then is whether or not death, serious injury or serious illness occurred, or could reasonably have been expected to have occurred. Obviously [the victim] was fatally injured, and Mr McLeod was also injured and whilst he has made a full recovery physically, I am sure that one does not recover from an accident such as this, more especially when a good friend has been killed.

[28] In terms of the degree of departure from prevailing standards in the industry, the prosecution has submitted that the defendant departed significantly from industry standards, highlighting the failure to check the tyre pressure, tyre tread, considering and ascertaining basic vehicle loading information, failing to assess the risks of carrying out the work. There was no safe system of work information or training provided to undertake the work safely, despite the fact that there was ample industry guidance available to assist including a specific apiculture code of conduct and general guidance on safe driving practices.

[29] I accept the prosecutor's submission in that there was significant departure from industry standards. I am acutely conscious of the fact that these two were good friends, engaged in a business which they both thought to be worthwhile, and got a lot out of, not necessarily financially, but in terms of their company and their shared interests and their joint enterprise. But, as I say, there is no lesser standard applicable to such a business as The Sunday Hive Company Limited and there were some pretty fundamental departures because whilst there might have been a "recce", whilst the site might have been, as was discussed at the restorative justice conference, might have been to be "passable", because of the various dangers it presented, and the obviousness of the hazard in terms of taking a vehicle such as that up on a steep site, heavily laden with a significant load and all the difficulties that presents, let alone on a vehicle which had varying tyre pressure as between the tyres and lacking in tyre tread, as I say there were significant departure from prevailing standards in the industry.

[30] I am not saying that this was deliberate by any stretch of the imagination, and I appreciate that I have got the benefit, as did the expert who came in and looked at matters, I have got the benefit of knowing what actually happened, and looking back in time, and applying the benefit of 20/20 hindsight, but the whole purpose of the legislation is to make sure that people are forward thinking, they have got the systems in place to avoid someone such as myself having to look back in time at a terrible and tragic incident.

[31] Mr Laing on behalf of the defendant company, has acknowledged the risks and obviously what has happened. He acknowledges that the specific route to the crash was not specifically assessed on the day of the accident but, he pointed out that Mr McLeod had done a pretty good "recce" of the property, and on that very day, on other sites, there had been hives placed without any real issue, and whilst there had been showers, and there was a lot of wind, the weather was not considered to be "too nasty". Also he had two vehicles that day, and had given consideration to using the better four-wheel drive vehicle.

[32] Also, the hives were securely strapped down on the rear of the vehicle using some "seriously heavy" straps. He is also experienced in driving, and had a good safety record, and there were a number of reasonable steps taken by the company, including the choice of the vehicle and risk assessment.

[33] I accept that Mr McLeod's and the company's failures were not deliberate, but as I have previously observed, this legislation is supposed to be forward-thinking, encouraging people to take steps to identify the issues, and whilst in some *ad hoc* way there was consideration given to some of the matters, there was no real analysis of the risk that was being presented, and in saying that I am conscious of the fact that the roles could have so easily been reversed, with [the victim] having survived, and Mr McLeod having been killed in this circumstances, and I am sure that Mr McLeod thought that he was doing the right thing in terms of looking after his own personal safety. So I am acutely conscious of all of that.

[34] Both lawyers have referred me to a number of cases to enable me to try and work out where in the banding system I should fix the fine. The informant has

suggested that we are in the high culpability band and has suggested a start point of $700,000. Mr Laing, on behalf of the defendant company has suggested that we are in the medium range, and has suggested a fine for a start point of $500,000 to $550,000. Both lawyers have also referred me to cases seeking to draw some similarities or analogies as between the cases, but in my view given that the Act applies to modest companies such as this, as well as to multinationals with seven-day a week, 24-hour operations, applying the factors that I need to consider, and take into account in assessing the culpability, in my view the informant's submission as to the start point is preferable, because there was no health and safety assessment done, there was a significant departure from industry standards. For all of the aggravating factors identified by the informant in terms of assessment of culpability, I accept this had been towards the bottom end of the high culpability at the $700,000 mark. It may turn out to be academic obviously, but for all of those factors identified by the informant in terms of assessment of the culpability, this is a high culpability case.

[35] Then in terms of credits to be given, that is problematic. There are no aggravating factors of prior bad conduct. The *Stump Master* case seems to be indicating to the Courts that we should be more careful with the discounts that can be given in these cases, but as Mr Laing quite properly points out, they are not saying that the 30 percent cannot be given, what the High Court seems to be advising this Court is to take a more nuanced enquiry as to what is appropriate.

[36] I accept that the remorse of Mr McLeod is genuine, and I have already acknowledged that there is a good relationship as between the parties, the families, and I hope that that continues, notwithstanding what I have had to say in Court today, it is not my intention to cause any ructions amongst the families, I just have to make the call as I see it.

[37] There should be a discount for reparation and remorse. There should be a discount for co-operation with the investigation. There are, however, submissions made on behalf of the defendant that further credits are available. In particular the remedial steps which have been taken and the previous good record. I acknowledge the previous good record, but I do not see much scope for credit for that. In fact I see no scope for that. The rationale for that being that it is a short duration business, it is

also very much a part-time business. So the scope and opportunity for infractions or breaches of the legislation was very modest in nature.

[38] As far as remedial steps taken, I accept that remedial steps have been taken, but that has to be seen or contrasted with the total vacuum that was there beforehand, in terms of the health and safety plan or equivalent, because there was not really one, it was two friends working together on an *ad hoc* basis, identifying issues as they came up, and as I say the main driver for this business, as I see it, was not necessarily money, it was the shared time together, and a venture which they very much enjoyed, and if it earnt some money in the end, well all the better. So against that background, given the total vacuum, I cannot see that there can be scope for credit as far as remedial steps are concerned.

[39] In my view a 20 percent discount would be appropriate. That is slightly higher than the informant has suggested, less than had been suggested by Mr Laing on behalf of the company, but what strikes me in this case is the genuine remorse and co-operation with the investigation, and also the reparation as well. Whilst it is largely academic that takes me to a fine of $560,000.

[40] Then there is the full 25 percent discount for an early plea which takes me to $420,000.

[41] What it is clear from the information that I have got, is that this is a very modest business, very much a "weekend" part-time "hobby business", the capacity to sustain a fine. I am conscious of the fact that even with a fine of $10,000, it is suggested that it is possible that [business details deleted], because as well as the reparation that has been ordered today, I am conscious of the fact that the company has continued to care for 16 of [the victim]'s hives after his death, and there has been a concern expressed by me that if I were to impose a fine, that that might jeopardise that part of the business which has enabled just over $6000 to be paid to the deceased's family.

[42] The prosecutor reminds me that a fine could be paid over time. Mr Laing urges me not to impose a fine. The experts seem to be agreed in terms of the difficult financial situation, and I also note that costs are sought. I think the best way to deal

with the matter is that I am not going to impose a fine, because I am conscious of the genuine remorse which has been shown by Mr McLeod, the steps that he has taken attending to the hives and I do not want to jeopardise that ongoing potential stream of income as far as [the victim]'s children are concerned.

[43] I will also make an order for costs. It will be modest, it will be half of that sought by the informant in their submissions. Once again, you have sought $1613, there will be 50 percent of that. I appreciate it is a reduction of your reduced costs already, but I do not want to take money out of the company any more than is necessary, and which could otherwise go to provision for [the victim]'s children.

A A Zohrab
District Court Judge