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

IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2022-009-001540
[2024] NZDC 10746

WORKSAFE NEW ZEALAND
Prosecutor

v

S T L LINEHAUL LIMITED
Defendant

Hearing: 14 May 2024

Appearances: A Everett for the Prosecutor
S McIntyre for the Defendant

Judgment: 14 May 2024

NOTES OF JUDGE R E NEAVE ON SENTENCING

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[1] The defendant company is to be sentenced for offending under the Health and Safety at Work Act 2015. Sentencing under this legislation is one of the most difficult judicial exercises, particularly where as here, there has been a death.

[2] The defendant company is charged with being a PCBU and having a duty to ensure, so far as reasonably practicable, the health and safety of its workers, including Nicholas Lee-Broun, while the workers are at work in the business or undertaking (namely long haul heavy driving), and that it did fail to comply with that duty and that failure exposed workers to the risk of death or serious injury.

[3] The risk here that needed to be managed and was not, was the dangers of fatigue, particularly in the transport industry and the particulars of the charge are that

it was reasonably practicable for the company to provide and implement an effective and safe system of work to manage the risks and hazards associated with fatigue, to monitor adequately its workers and their working conditions, including driver work time, and respond appropriately to minimise the risks and hazards associated with fatigue and finally, to provide adequate training or instructions to its workers on the risks and hazards associated with the fatigue.

[4] This is not a case where the company has failed to set up any systems at all because clearly it did, but what it failed to do was implement them in any way which meant that they had any real teeth and that the culture of the company was such that the risks were going to be dealt with appropriately and the workers protected.

[5] The summary of facts records that at the time of the incident in question, which was March 2021, the defendant company employed 15 class 5 heavy truck drivers and had eight depots across the country. The deceased, Mr Lee-Broun, was one of those employees. There was no suggestion of any problem with the truck that he was driving. It had a valid certificate of fitness and had been serviced, as far as I can tell, quite appropriately, only three days before his death. The vehicle seems to have been appropriately secured and although there were some issues about security of the loads in terms of deceleration, there is no suggestion that that contributed in any way to the accident.

[6] On the day in question Mr Lee-Broun began working at approximately 9.45 am, leaving from Lower Hutt to travel around the Lower North Island and he reached Masterton just before quarter past midnight. He then began work the following day at just before seven and travelled around the North Island before delivering goods in Auckland, reaching the Otahuhu depot at just after half past five in the evening.

[7] Two loads of steel pipes were scheduled to be picked up from that depot to be delivered to Pipitea Wharf in Wellington the following day. Those loads could be accepted at any time between 7 am and 5.30 pm on 5 March, which I think is Mr McIntyre's point that the journey could have been completed in a compliant fashion.

[8] At the Otahuhu depot the defendant's manager (and I think one of the shareholders) asked Mr Lee-Broun to take a rest break before leaving for Wellington as he was aware that he had arrived from Palmerston North and that a break was going to be required. It seems that requirement was not enforced. A rest break was not taken before leaving for Wellington.

[9] Mr Lee-Broun and another driver decided to travel in convoy with the other driver going in front because the deceased did not know the road to Taumarunui and had only driven it once before. Shortly after 11 pm on 4 March the fatal accident occurred on State Highway 4 near Ongarue. The deceased was descending a hill and approached a 55 km an hour bend, presumably that is the AA advisory speed, and the vehicle seems to have gone too fast and failed to take the corner. The vehicle tipped over. The driver was stuck inside the cab and the vehicle then caught fire with horrible, tragic results.

[10] I should make it absolutely plain that there is no suggestion that the driver was in any way, shape or form affected by anything such as drugs or alcohol and nor was he suffering from any medical conditions that meant he should not be driving. The only drug he had in his system was caffeine.

[11] It is clear that there was excessive driving and the company did not make sure that appropriate rest breaks were taken. Furthermore, the records leading up to this incident shows a persistent trend of breaches of the work and rest time requirements.

[12] The company did have a safe operating procedure for its drivers to use; a health and safety manual and a fatigue management policy which identifies fatigues as a significant workplace risk. That is all to the good but it seems to me that having identified that risk and then failing to make sure that those risk factors were monitored in practice and not just in theory, is a significant failure.

[13] Furthermore, whilst the company may have understood the effects of fatigue and whilst there is the obvious risk of falling asleep at the wheel, there are other lesser-known effects which I think both counsel acknowledged came as news to them and probably would be to most, and that seems to be exactly what has occurred here.

[14] It seems the driver may have been given a copy of the policy but there is no indication that he received any proper training or explanation of its purpose and the need for its enforcement. Nor were there any records of the management level being trained in, let alone receiving fresher training in that policy leading up to the incident.

[15] Essentially this is a situation where a system was created but there was just a singular failure to audit it to make sure there was compliance to deal with a very real, albeit silent, danger for its drivers.

[16] Furthermore the company did not take any steps to verify the records that were being provided to ensure they were accurate and to ensure human nature, being what it is, that drivers were in fact complying with the policies that the company had put in place.

[17] I think one of the most telling factors is set out in paragraph [52] of the summary of facts. I am not going to read it aloud but it will be incorporated into the judgment at the risk of distress to the family but it is illustrative, it seems to me, of a culture basically and these are my vernacular words rather than the actual words of drivers basically needing to harden up and just get on with it. Of course such a culture was utterly unsafe.

> 52. Mr Lee-Broun text-messaged his manager Mr Page on 31 January 2021. That message was in relation to Mr Lee-Broun having raised concerns about his work. The message included a comment that he felt he was "going to run [himself into] the ground" and was considering returning to Christchurch. Mr Page replied to this message. As part of that reply he told Mr Lee-Broun that he was not in a school yard and to "grow up and carry on." STL claimed at interview it had been unaware of the text messages between Mr Lee-Broun and Mr Page.

[18] The summary of facts details the risks from fatigue and in particular, the risks of impaired judgment, effects on reaction time, able to negotiate curves of the road, as well as failing to appreciate risk factors. It seems to me that this must be regarded as a reasonably significant departure from industry standards and guidelines.

[19] The sentencing process in this class of case requires me to assess reparation before going on to assess culpability and the quantum of the fine. That approach is

mandated by cases such as *Stumpmaster v Worksafe New Zealand* and *Ocean Fisheries Ltd v Maritime New Zealand*.[1] It has always struck me as a slightly illogical way to deal with it but it is the accepted method. I have read the victim impact statements and obviously I have heard them read to me this morning in heart-rending fashion by the deceased's mother and his siblings. Those family members have lost a son or a brother. That loss cannot readily be reduced to some form of quantity, let alone a monetary value. Indeed I have always found it a somewhat distasteful exercise in having to do so. No amount of money will assuage the loss, ease the pain or bring back the loved one, let alone take away the horror of his death. The authorities too are not particularly strong in guidance as to how those figures should be assessed.

[20] The Court is essentially left to fix an award upon either a family basis or an individual basis. If it is a family basis, it is presumably left to the family members to apportion it as they see fit. Again this approach is approved by *Ocean Fisheries*, see paragraph [13] in particular.

[21] The prosecution in this case has suggested an award of $120,000 to be made to [the deceased's mother] and I assume this was at the family's request. The defence do not take issue with this proposal. This case might be distinguishable from cases such as *Ocean Fisheries* but no issue is taken, so I do not need to be troubled by that.

[22] The matter is currently in the hands of the liquidator and I infer that, as is often the case, the company is insured so that means that there is coverage for reparation or costs but obviously you cannot insure against fines. I am not aware of whether there is any cap on the amount that can be awarded. I am inclined to the view that given the number of family members affected, the circumstances of the tragic death of Nick, as well as the nature of the breach, a slightly elevated award of reparation is appropriate, particularly bearing in mind that that is something which is capable of being met. I will expand on this point later.

[23] I do not wish to set up false hopes for the family but I am assuming for the moment that will all be able to be awarded but obviously there is always the risk that

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[1] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2190; and *Ocean Fisheries Ltd v Maritime New Zealand* [2022] NZHC 3202.

the liability has been capped unknown to me. I am therefore proposing an award of $150,000 by way of reparation, which seems to me whilst at the upper end, not out of the way for awards of this nature, taking into account the factors I have already mentioned.

[24] The next exercise is to determine what is the appropriate level of fine because this is a matter that can only be the subject to a fine. I have received helpful submissions from prosecution and by counsel for the liquidator on behalf of the defence. Obviously in fixing the amount, I am required to consider the criteria and principles set out in the Sentencing Act 2002 in respect of which no one principle has priority.

[25] Furthermore, s 151(2) of the Health and Safety at Work Act obliges the Court to have particular regards to the purposes of that legislation set out in s 3. It may well be that the combined effect of those two provisions is to elevate the role of denunciation and deterrence as part of the role of encouraging safe practices in workplaces generally.

[26] The prosecution submits that this is a case that should fall at the lower end of the upper band as identified in *Stumpmaster*. It does not fall within the very high level of culpability but it does fall in the high culpability range it suggests which has a range of $600,000 to $1 million by way of fine and indeed in *Stumpmaster*, the Court noted that starting points of half a million to $600,000 will be common.

[27] The factors that are required to be considered is what were the practicable steps it was reasonable for the offender to have taken and I have discussed those to a large extent, an assessment as to the nature and seriousness of the risk of harm occurring as well as the realised risk. Obviously, the realised risk here was as bad as it can be and it is an obvious risk and clearly, given we have people driving very large motor vehicles on country roads in potentially dangerous situations, that suggests a very high level of risk of harm and serious risk.

[28] The degree of departure from the standards prevailing in the relevant industry it seems to me in this case are reasonably significant and the hazard is obvious and

well-known and there is no evidence that the availability and cost and effectiveness of the necessary means to avoid the hazard were onerous. Much of it is just involving a proper level of management. The current state of knowledge of the risks and nature and severity of the harm which could result, these factors are clearly identified and well known, as is what is necessary to avoid or mitigate the hazard.

[29] It seems to me the risk was high to the drivers and to the general public. The risk was well known, it is easily managed and whilst there was a system in place, it just was not enforced and indeed there seems to be signs of a culture of tolerance for some of the more dangerous practices, as well as active encouragement, at least at a middle-management level. There are well known and indeed legislative rules put in place to ensure that these risks are mitigated and all of these steps should have been taken into account and followed up with much greater vigour than they were in this case.

[30] The prosecution submits this is not a case of a minor slip-up and should be above the $500 - $600,000 band referred to above.

[31] Two cases in particular have been referred to me. One is *NZ Police v Freightlines Ltd*.[2] Freightlines was a much larger company than this particular defendant. It had some, like 220 vehicles under its banner with over 200 staff. In that case the driver had been falsifying his logbook in a number of respects and by the time he crashed his truck he was badly fatigued. Fortunately he was the only victim and he was not killed, although he suffered severe and lasting injuries.

[32] Many of the relevant factors I have identified were also identified by the Judge in that case. This case preceded *Stumpmaster* so some caution needs to be applied. The previous regime of fines also was in operation, so again, it is not particularly useful to make a comparison. Furthermore there was clear evidence of a diminished capacity to pay on the part of at least some of the defendants. The Judge indicated culpability at the upper end of the moderate band, which equated to one-third of the maximum penalty.

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[2] *NZ Police v Freightlines Ltd* [2016] NZDC 16603.

[33] The maximum penalty here is $1.5 million. In my view this case is definitely on the cusp of the medium and high culpability bands. As I have noted the dangers are inherent in the industry, are well recognised and potentially catastrophic, particularly for the individuals involved, as well as the general public and other employees. The risk was clearly identified by the company. It is difficult to distinguish meaningfully between *Freightlines Ltd* other than the way I have already described, as well as *Michael Vining Limited*.[3]

[34] It seems to me that right on this band is appropriate and a $600,000 fine is entirely apt. The company is entitled to credit for its plea of guilty. This does not seem to have come at the first instance, however it may have been complicated by the fact that the company had gone into liquidation. The liquidator was not obliged to give consent, and his co-operation in this regard is a factor which I think needs to be considered.

[35] The prosecution have accepted that 25 per cent is appropriate and I take it that is on the basis that there needed to be significant discussions about the nature of the charges and perhaps some of the particulars before a plea could be entered. I will adopt that suggestion.

[36] The company had a good record. There was no suggestion of any previous convictions. That is militated against, to some extent, by the continuing nature of the failures but it is appropriate to make a modest allowance and I allow five per cent for that.

[37] The company is able to make reparation and that is something that I do and must take into account. The prosecution suggests five per cent. Defence does not take issue with it and whilst there could be an argument that a greater allowance should be made, I am prepared to adopt five per cent as well.

[38] That is a total of 35 per cent by way of credit. That brings me down to $390,000 if my mathematics is correct.

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[3] *WorkSafe New Zealand v Michael Vining Contracting Ltd* [2018] NZDC 6971.

[39] The company does not take issue with its contribution towards the costs of the prosecution and it is clear from the authorities that that is something I need also to take into account in fixing the final fine. That amount is just a shade under $24,000 and I will make that allowance, which brings me down to $366,000.

[40] Finally I am required to step back and consider whether or not the fine is nonetheless proportionate or otherwise inappropriate. Save for a matter I will mention in a moment, I do not think any further adjustment is required as a result of that stepping back. So, the total level of the fine is $366,000, in addition to the reparation I am going to order.

[41] The question then arises as to whether I should impose a fine at all. Given the company was in liquation the proceeding could only be continued with the consent of the liquidator. However, s 308 of the Companies Act 1993 notes that where a fine is imposed on a company in liquidation it can be collected. It does not seem that the same regime applies to companies as it does to insolvency for an individual. In that situation a fine is not part of the insolvency process and survives the insolvency.

[42] It seems to me that in this case any fine would simply join the list of creditors and in the event that there is any excess presumably would be apportioned between any unsecured creditors. The full list of the company's creditors does not seem to be before me but to the extent that I can determine, the creditors are other state agencies or professional advisors. If I thought there were innocent creditors outside those involved in the running of the business as it were, who would be detrimentally affected by having a fine added to it which ultimately only goes back into state coffers, I may have been less inclined to impose the fine.

[43] To a certain extent the imposition of the fine in this case is essentially symbolic and reflects the need to deter and denounce this conduct in the defendant but also in others, to drive home the message of the need for appropriate steps to be taken to manage these kinds of risks.

[44] However, in this case it seems to be unlikely there is any chance of anybody being detrimentally affected should I impose the fine, albeit for its symbolic value only.

[45] The net result of all of that is that the defendant company will be convicted and sentenced to pay reparation of $150,000, that is in a lump sum to [the deceased's mother] within 28 days. That is on behalf of the family and to be apportioned as they see fit and if no agreement can be reached, it can be referred back to the Court for further direction but I would hope that that is not required. In addition, the company is fined the sum of $366,000 together with court costs of $130.

R E Neave
District Court Judge

NB: I noted on the charging documents but neglected to mention in the remarks that I also awarded costs of $23,916.44 were to be paid by the defendant to Worksafe New Zealand.