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

IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2018-070-000970
[2018] NZDC 20232

WORKSAFE NEW ZEALAND
Prosecutor

v

CROPP LOGGING LIMITED
Defendant Company

Hearing:	25 September 2018
Appearances:	L Moffit for the Prosecutor W Lawson for the Defendant Company
Judgment:	25 September 2018

NOTES OF JUDGE T R INGRAM ON SENTENCING

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[1] I start by thanking counsel for their efforts, and for the benefit of everyone in Court, I have received detailed bound volumes of submissions and cases which counsel have referred to me. I am only going to make reference to a fraction of the material which has been put before me. That is not to say that the remainder of material is irrelevant, it has informed my thinking but I simply do not have time to cover every single matter that has been raised for my consideration.

[2] The defendant company, Cropp Logging Limited, faced two charges. The defendant pleaded guilty to one charge laid under the provisions of s 36(1)(a) Health and Safety at Work Act 2015. The charge alleges that on or about 6 March last year at a location in the Bay of Plenty the company failed to ensure as far as reasonably

practicable the health and safety of its workers, including a [name deleted – the worker] whilst at work on the company's business, which was log harvesting. The failure exposed [the worker] to a risk of death and serious injuries.

[3] The particulars of that charge allege that it was reasonably practicable for Cropp Logging Limited to do three things:

(a) Complete an adequate safe behavioural observation of [the worker].

(b) Induct [the worker] into his role as head breaker-out.

(c) To ensure that no machinery was operating above the area where [the worker] was breaking-out.

[4] There is an additional charge of failing to take all reasonable steps to ensure that the site where an event occurred was not disturbed until authorised by an inspector. Application has been made for leave to withdraw that charge. I am satisfied it is appropriate that that charge be withdrawn. There are a number of reasons for that but, in particular, I am satisfied that whilst a digger was moved the actual location where the event occurred was where [the worker] was injured.

[5] I do not propose to go into detail in relation to the circumstances which led to this accident. [The worker] was a breaker-out working on a number of logs which had been felled. He was observed in his work earlier that morning by one of the principals of the company, who did not make a detailed record of that observation but who, nevertheless I am satisfied, observed [the worker] and was able to make the kind of judgement that I would confidently expect most employers to be able to make of a man engaged in this kind of operation. It was pretty obvious immediately as to whether or not the person is used to what he is doing, comfortable with operating in the way that he needs to operate and making good decisions about what he does and how he goes about it.

[6] I accept that Cropp Logging Limited could and should have marked [the worker] against a sheet or schedule of points and they did not do that on the day, which

was his very first day on the job. Had they done so, I am completely satisfied from the material before me that that would have made not the slightest difference to what actually occurred later in the day. Put another way, I am satisfied that [the worker] is a competent and capable man doing work that he had done before and was very capable at. I accept that a knowledgeable employer would have ascertained that from a relatively short observation of [the worker]'s work.

[7] However that may be, the events of the day are chilling. [The worker] was working away, in company with another man. The other man hooked a log up and [the worker] went to hook a log up and another log rolled down the hill and severely injured him. His injuries included a severely broken pelvis, that is, not one break but multiple fractures, a fractured hip, fractured femur and spine. I am informed that he has partially recovered but he will never recover fully from the very serious injuries that occurred, and he will suffer not only physical but psychological effects for the remainder of his life.

[8] He spoke to me this morning in relation to his victim impact statement. I am satisfied that he is a positive man who looks ahead. He has taken to re-training himself for other work within the industry, but the cold hard fact is that he has lost his good health and his ability to do work which he enjoyed and was experienced and competent at. He now has a different path in life, one which was thrust upon him by the injuries that he received and which can never be overcome fully.

[9] The law relating to sentencing under the Health and Safety at Work Act 2015 has recently been re-examined by a full bench of the High Court in the case of *Stumpmaster v WorkSafe New Zealand*.[1] The Court has confirmed that there are four steps for a sentencing Judge to undertake in assessing penalties:

(a) It is necessary to assess the amount of reparation to be paid to the victim.

(b) To fix the amount of the fine, by reference to the guideline bands and any aggravating or mitigating factors.

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

(c) Determine whether further or other orders are required under the provisions of ss 152 to 158. (I record that I have not been invited to consider the application of any such orders in this case and I see no need for them.)

(d) It is necessary to make an assessment of the proportionality and appropriateness of the sanctions produced by the first three steps.

[10] The circumstances, here, are pretty straightforward. There is a duty on all employers to identify hazards. In the case of the forestry recovery operations, the hazard of rolling logs is obvious. It is well identified. It is well-known throughout the industry and there are standard control measures taken right across the industry to minimise the risks to those involved in this particular type of work.

[11] However it might be assessed, in the end [the worker] found himself breaking-out a log and at that point there was machinery operating above him. That machinery may have contributed to the log being dislodged and rolling down on him. The mechanism is apparently vibration caused by the operation of the digger which was operating at a remove of something in the order of 80-100 metres. I accept unreservedly that there is no proof positive that the operation of the machinery specifically caused this log to roll. It did, however, increase the risk of that occurring and it should not have been operating whilst [the worker] was engaged in the course of hooking up a stem for removal.

[12] The injuries here were serious indeed and they are relevant to reparation. I have been referred to a number of authorities but I place particular reliance on what I consider to be a very thoughtful analysis of the principles. That is the case of *WorkSafe New Zealand v Department of Corrections*.[2] In summary, I accept that the cases establish that the assessment of reparation is highly dependent on the particular factors in individual circumstances and really there is no room for a tariff based approach.

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[2] *WorkSafe New Zealand v Department of Corrections*

[13] I consider that the decisions indicate that for loss of limbs or organ functions the usual range lies between $20,000 to $80,000. Death cases often involve payments between $80,000 and $120,000 but rarely above. In this case, the victim has lost his good health, he has a limp, he suffers from ongoing pain and discomfort. His victim impact statement establishes, unequivocally, that his loss of mobility means that he can no work in his chosen field of employment. That has been devastating to him financially and psychologically. He will indubitably suffer life-long physical and psychological consequences.

[14] The prosecution and defence have submitted that a reparation payment in the order of perhaps $50,000 or a little more might be warranted. Having regard to the overall circumstances, I do not accept that assessment.

[15] I consider that the cases that I have been referred to are, in many cases, somewhat elderly. There has been substantial inflation in New Zealand, particularly in matters of interest to working people and especially house prices. I consider that inflation has eroded the value of such awards very substantially in recent years.

[16] In my view, in this case the bare minimum award that I consider would be appropriate to cover the matters for which reparation is given in such cases, bearing steadily in mind the ongoing effect of the injuries that [the worker] has suffered, would be sum of $80,000. This is a matter that, in my view, the Higher Courts could well revisit, and re-examine the basis upon which reparation awards are made having particular regard to the effect of inflation on particular aspects of our economy.

[17] I turn now to assess the quantum of the fine. The logging industry knows all too well that breaking-out is very dangerous and that those who engage in that activity in the course of their work are necessarily exposed to substantial risks. There is a risk of death or serious injury almost every day, when a breaker-out goes to work. In this particular case, I think it is significant that [the worker] had been engaged by the defendant to start that very day. He was on his first day on the job.

[18] This was a case in which the risk attaching to the operation of machinery, whilst a breaking-out operation was being undertaken, was a very well-known and well

understood risk. This is not a case where the company has completely failed to deal with a known risk and, indeed, the defendant company had taken some practical steps to reduce the risk of injury to [the worker] and indeed for that matter his off-sider on the day.

[19] So rather than being a case where a known risk was ignored, it is a case where the steps taken to mitigate a known risk were not as comprehensive as they could and should have been. Additional practical steps could have been taken that were not taken.

[20] Firstly, whilst I accept that [the worker] was assessed visually, that assessment could and should have been done against a schedule of competencies and it should have been done in writing at the time. This is not a major factor in the assessment of culpability here, because I am satisfied that [the worker] was indeed a competent and capable man engaged in work which he knew very well. I accept that writing it down is not going to make the assessment any more accurate or reliable.

[21] Nevertheless, this business is so dangerous that I consider that there is some advantage to be gained by an assessment always being done against a written schedule or list of competencies, so that nothing slips the mind of the person undertaking the competency assessment.

[22] Secondly, there could have been a much better induction for [the worker] on his first day in work. The particular work site should have been the subject of detailed discussion and analysis by everybody involved. In particular [the worker] should have been told where everybody was working on the day. The location of the working machinery was critical to his safety. I am satisfied too that the communication protocols were insufficiently explained and organised between everybody present on the site.

[23] As counsel for the prosecution has submitted to me, the essence of safe-working in the bush is perfect communication. Where communication is perfect the chances of a serious accident are much reduced. Here, I am satisfied that the

communication was considerably less than perfect and I accept that, insufficiently clear communication is the leading and obvious cause of forestry accidents.

[24] The failure to induct [the worker] into the particulars of where everybody was working on the particular work site, where the machinery was to be working and the communication protocols which he would need to follow to safely undertake his work – all those factors – have combined to produce an unsafe work environment and resulted in a very serious set of injuries. Which, I must remind myself, were caused to a man on his very first day on the job.

[25] Finally, the defendant could have ensured that the digger was not working about the area where [the worker] was undertaking the breaking-out operation and reducing, at least, the risk of digger operations contributing to the log being dislodged.

[26] Counsel for Cropp Logging Limited has endeavoured to persuade me that I should assess this case by reference to a case called *Harvest Pro New Zealand Limited v R*.[3] I have carefully read and thought about the issues raised in that case. I take a different view of this particular case in the setting of a forestry work injury. The risks of death and injury to someone who is engaged in breaking-out are so obvious and so well-known that I consider where very serious injury arises, we need to go beyond what was considered in the *Harvest Pro* case. In this case, I accept that there was a departure from prevailing standards in the logging industry.

[27] I am then invited by the defence to take the view that an absence of vigilance in ensuring that employees comply with their training and obligations, is a different matter to running a risk.

[28] Having thought about that matter, I have come to the view that I simply cannot agree with that proposition. A policy which is designed to ensure the safety of workers but which is not vigilantly enforced is fundamentally of no practical help to the worker who is put at risk. It seems to me, that on any view of it, having a policy which is inadequately enforced is almost the same thing as not having a policy.

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[3] *Harvest Pro New Zealand Limited v R* [2015] NZHC 364

[29] I do not wish to be overly critical of the defendant company in this particular case, but I wish to draw a clear and sharp distinction between cases where an employee has unexpectedly and for absolutely no logical reason 'crossed a line' which is precluded by a clear policy which has been vigilantly enforced, as opposed to a company having a policy which is only sometimes enforced. In this particular case, the reality of the situation is that Mr Cropp's inadequate induction and the failure of Cropp Logging Limited to ensure that its digger operator posed no risks to someone working below the digger, has meant that a man received a very serious injury.

[30] This is not a case where there are any aggravating factors personal to the defendant and there are some mitigating factors which require to be assessed. I, however, take the view that this is a very high-risk industry and the risks involved are almost always of very serious injury or death. In this case, there was a very serious injury.

[31] Counsel have submitted to me that this case falls somewhere within the moderate culpability band. I disagree. I consider that given the potential for death and very serious injury, a case of this kind would warrant a starting point in the region of half the maximum fine, simply on the basis that this is a case where there is a very serious injury, death could very easily have resulted and it involved a recognised inherently dangerous operation with a clear failure to meet the statutory standard of ensuring safety, through adequate communications and proper induction into the work site.

[32] I would accordingly take a starting point of $750,000.

[33] Remorse is routinely advanced in cases such as these. Whilst I have some difficulty with the concept of corporate remorse, I nevertheless accept that this has been an awful shock to the owners of the business and that they are personally remorseful. I am prepared to allow a small factor of five percent for this factor.

[34] Some criticism can be made of the company because they did not attend a restorative justice conference. Whilst I accept that that is so I must make allowance for the fact that the principal of the company himself has a very serious health

challenge. I have no doubt at all that that would have affected his ability to deal with the issues arising as a result of this accident.

[35] I accept that this company is a small family company with a long and very good record of operation in the industry. I allow 10 percent for that factor.

[36] In terms of payment of reparation, I am prepared to allow 10 percent reduction in penalty to cover that factor.

[37] Having regard to the observations in *Stumpmaster* that care is required in assessing the credits to be given in these cases, I have reached the conclusion that a total of 25 percent credit reduction for mitigating factors is justified. Here, there can be no question but that a full 25 percent credit for a prompt guilty plea is justified, in terms of the decision of *Hessell v R.*[4]

[38] When I add the two lots of credits together it produces 50 percent. I started at a fine of $750,000 as I have, that is going to produce a fine which is well in excess of the ability of this defendant company to pay. It simply cannot afford to pay a fine of $375,000 which is the fine that in my view should have been imposed, were they able to pay it.

[39] Counsel have conferred and they have informed me, and I accept their assessment, that a fine of $100,000 would lie at the limit of this defendant company's ability to pay, and that any more is highly likely to produce the outcome that the company will no longer operate. That would not be an appropriate outcome here. The people involved have a long and good record in the industry. In my view, the damage to them and their employees is simply not justified were I to take the view that a fine which would result in the company's liquidation should be imposed.

[40] Accordingly, despite reaching the view that a fine of $375,000 would otherwise be justified, I accept that the evidence before me leads inevitably to the conclusion that a fine of $100,000 should be imposed. When I stand back and make an overall assessment of the matter, I see no reason to reduce that or increase it in any way.

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[4] *Hessell v R* [2010] NZSC 135

[41] Accordingly, the company will be convicted and fined $100,000.

[42] It will be ordered to pay reparation in the sum of $80,000. That is to be paid in a lump sum by 1 December.

[43] Counsel addressed me on the question of costs. I accept that the prosecution have incurred costs of almost $30,000 and have sought a 50 percent contribution. I think that in all the circumstances, particularly having regard to the financial position of the company, that is a little high. I am, however, of the view that a contribution to costs should be made.

[44] Accordingly, I order the defendant company pay the prosecution's costs in the sum of $10,000.

[45] The nett result for the company today therefore, is a fine of $100,000, reparation of $80,00 and a contribution towards the prosecutor's costs in the sum of $10,000.

Judge TR Ingram
District Court Judge

Date of authentication: 28/09/2018
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