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-2017-070-001930
[2018] NZDC 19098

WORKSAFE NEW ZEALAND
Prosecutor

v

STEVENS AND STEVENS LIMITED
Defendant

Hearing:	7 September 2018
Appearances:	I Brookie for the Prosecutor S Moore for the Defendant
Judgment:	12 September 2018

REASONS FOR SENTENCE OF JUDGE T R INGRAM

---

[1] The defendant company appeared for sentence in the afternoon of Friday, 7 September. The company had pleaded guilty to a single charge laid under the provisions of ss 48 and 36 of the Health and Safety At Work Act 2015. I imposed a fine of $306,000 and ordered reparation in the sum of $75,000, a portion of which had already been paid, and directed the defendant to pay costs in the sum of $10,372. —

[2] I now set out my reasons for imposing those sentences.

[3] The defendant was originally charged with a failure to ensure the health and safety of workers in circumstances where the failure exposed [the deceased] to the risk of death or serious injury. The particulars alleged initially were broader and more extensive than those in the final form of the charge to which the defendant entered a guilty plea on 15 March 2018.

[4] The essence of the particulars in their final form is that the defendant company failed to establish a safe work system which identified potential hazards to its workers whilst they worked on orchards, including ensuring that proper maps showing marked hazards were received, and that the workers received an induction as to potential site hazards at each orchard where they worked. A further particular alleged failure to design and implement a system for control and management of hazards and risks associated with workers who worked alone.

[5] 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 *Stumpmaster v WorkSafe New Zealand*.[1] The Court confirmed that there are four steps for the sentencing Judge to undertake in assessing penalties. They are:

(a) Assess the amount of reparation to be paid to any victim.

(b) Fix the amount of the fine by reference to guideline bands and any aggravating and mitigating factors.

(c) Determine whether further orders are required under ss 152 to 158.

---

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

(d) Finally make an assessment of proportionality and appropriateness of the sanctions produced by the first three steps.

Circumstances

[6] On 13 May 2016 [(the deceased)] went to work on a [kiwifruit orchard] near Katikati. She was employed by this defendant. Her job was to sample kiwifruit in an orchard. She used a quad bike supplied by her employer to get around the orchard, driving the quad bike under the kiwifruit canopy, where she selected samples of kiwifruit for maturity testing. She rode her quad bike up a hill into an area of hazardous terrain where the quad bike rolled on top of her and killed her.

[7] As a result of her death, WorkSafe New Zealand conducted an investigation, and a number of charges were brought under the Health and Safety at Work Act 2015 (the Act). Charges were initially brought against this defendant as the deceased's employer, the orchardist/landowner, Zespri, and a packhouse.

[8] At the time of these events, the Act had only been in force for a few weeks. Zespri had recognised the need for industry-wide compliance with the new legislation, and had taken steps to alert all those involved in the industry for the need to comply with new legislation. As a result of those efforts, and for additional reasons relating to the matrix of contractual relationships between the various defendants, WorkSafe entered into a binding undertaking with Zespri, and discontinued the prosecution against Zespri. After a trial, the other two defendants were acquitted of the charges against them.

[9] As explained in my earlier judgment dealing with the cases brought against the orchardist and packhouse, there is a web of industry wide agreements, contracts and arrangements relating to kiwifruit sampling that is organised and overseen by Zespri on behalf of the kiwifruit industry as a whole. This defendant employs the samplers to go onto orchards to scientifically sample the fruit prior to picking.

[10] Because of a need to ensure that the sampling process is not at all directed or influenced by individual orchardists, part of the training that the kiwifruit samplers

receive covers their relations with individual orchardists. Samplers employed by the defendant are trained to be assertively independent, to avoid or minimise contact with orchardists, to avoid any discussion which might hint at supervision or direction by orchardists, and to minimise their interaction with orchardists to the extent possible. Individual orchardists have no contract with this defendant for this and other reasons.

[11] Zespri has organised the industry on the basis that only packhouses can place an order for sampling of an individual kiwifruit block, and Zespri requires its orchardist suppliers to make all requests for kiwifruit sampling through a packhouse, which will then pass on the sampling request to this defendant.

[12] In order to place a sampling request with the packhouse, the orchardist is required by Zespri rules to provide the packhouse with an orchard map identifying the kiwifruit block or blocks to be sampled, and identifying known hazards. That map is usually provided to the packhouse in electronic form, and the blocks to be sampled are identified on that map. The packhouse then forward the sampling request and map to the defendant.

[13] On receipt of a request for sampling, this defendant needs to check that the block to be sampled meets the requirements detailed on an existing spray diary, and to that end it holds an extensive library of electronic maps with spray data included for every single block of kiwifruit. The sample request map showing the blocks for sampling is then checked against the spray diary maps.

[14] Any discrepancy at all between the various maps will usually result in the sampling request map being rejected, and unless an updated map complying with the requirements is provided, sampling will not proceed. The rejection will be notified only to the packhouse, which will then communicate directly with the orchardist.

[15] Orchardists file their sampling requests with a packhouse the day before sampling is requested, together with their sampling map. Any map rejection will be prompt, allowing them to refile an amended sampling map through the packhouse, to allow sampling to proceed as requested the following day, and picking to proceed as

scheduled. In practise, maps were not rejected by this defendant for inadequate hazard identification, when they could and should have been rejected.

[16] As a condition of accepting a supplier's crop, Zespri requires its suppliers to comply with its Global Good Agricultural Practise (GAP) standards as set out in the Zespri Grower Manual. The manual is regularly updated, and it includes health and safety requirements covering all employees and contractors working on an orchard. Zespri's Grower Manual requires the packhouses to audit the orchardist's compliance with the Zespri specifications annually, by reference to a checklist, which includes health and safety requirements. Contractors operating within the industry can obtain a certificate of compliance to be produced at the audit, but no certificate is required from growers for this defendant, which has its own audit procedures and requirements in relation to its maturity sampler employees.

[17] The auditor's approach to auditing duties on this orchard was simply to ascertain the existence of health and safety documentation, materials and equipment, including signs, maps and manuals, and confirm that the manager was aware of and had addressed the GAP requirements identified in the checklist, and nothing more. The health and safety requirements covering this defendant's employees was not effectively considered or addressed in the audit for this orchard. I am satisfied that this defendant and the industry as a whole was lulled into a false sense of security as a result.

Hazard identification and the map

[18] The map actually provided for the sampler's use on the day of the accident provided a small amount of detail about some but not all access tracks, and no hazards were marked. It simply set out the farm layout and block identification information. Despite the defendant's requirement on the sample request form that orchard maps identify hazards, on this occasion, there was no hazard information noted on any sampling map.

[19] From the orchardist's point of view, there was simply no need to provide any hazard information for areas outside the kiwifruit blocks and access tracks, because it

was general knowledge within the industry that the health and safety requirements of both this defendant and Zespri meant that a sampler on a quad bike would invariably be somebody who had been appropriately trained in the use and operation of the quad bike. Samplers are trained to operate the quadbikes they use, specifically not to go on unmown grass inside the kiwifruit blocks, and to use formed tracks only as access points. At the time, it was general knowledge within the industry that samplers were specifically trained to stick to formed tracks and the mown areas within the kiwifruit blocks.

[20] Having seen and heard the trainer's evidence, and heard a number of witnesses assess the training programme as excellent, I am satisfied that the deceased had received the best training available to provide her with the necessary skills to ride a quad bike in the course of her employment, including training to recognise and assess hazards, including terrain hazards and long grass. The trainer's caution in requiring the deceased to re-sit the course would have served to enhance the confidence of the deceased in her quad bike handling skills when she passed his course at the second attempt. Further confidence may well have arisen from the fact that the deceased's sampling skills, including riding, were also audited, as part of an audit by her employer, using the quad bike. The evidence revealed that the deceased had been audited shortly before her death, and that she passed the audit. She had clocked up some 500 hours of quad bike use prior to her death.

[21] On the day of her death, from the point at which the deceased left the kiwifruit canopy, sitting on her quad bike at the commencement of her journey up the hill, an area of open earth may well have appeared to the deceased to be a vehicle track, indicating that the gap in the shelter belt led to a formed vehicle track. In fact, the area of bare earth had been made by a Hydraladder used in connection with nearby avocado trees, and there was in fact no vehicle access track at the top of the hill. The area at the top of the hill was simply a piece of waste ground, a portion of which may once have been part of an access track no longer used or maintained as such, and the whole area was covered in long unmown grass.

[22] On the evidence available to me, it was overwhelmingly clear that the proximate cause of death was the operation of the quad bike outside its stability

envelope. It is clear that despite her training the deceased either did not recognise the hazardous nature of that terrain, or more likely misjudged the extent of the risk posed by that particular hazard. She took her quad bike through a substantial area of long grass, which may have disguised the hazardous slope. Had she recognised the nature of the hazard and the extent of the risk of rollover, I am satisfied that such a careful and conscientious person as the deceased would not have proceeded in the way that she did.

[23] [An expert witness], identified the core problem in this case as a health and safety system failure. The component parts of the system included an overall industry wide system design, under Zespri's umbrella of over-arching authority and contractual requirements, which has emphasized sampler independence from orchardists, to the detriment of any expectation or practise of meaningful communication of hazard information from orchardists to samplers. In practical terms, this meant that orchardists had no option but to rely on this defendant to train its quad bike samplers to high safety standards, and to rely on the samplers to operate their quad bikes in accordance with such standards, including avoiding long unmown grass.

[24] In adopting this system, the industry as a whole, and this defendant as an employer, have placed all their sampler health and safety eggs in one basket, relying entirely on the efficacy of sampler training and monitoring. An incompetent, careless or disobedient sampler could face hazards and risks that both the system and the orchardists did not contemplate. If a quad bike rider could not both recognise unmown grass as such, and as an unmistakeable sign of potential unidentified hazards, risks to sampler safety must ensue. The prosecutor in this case submitted, quite correctly in my view, that the necessary hazard identification feedback loop between orchardist and sampler was broken, resulting in a worker's death.

[25] In my view, responsibility for sampler accidents occurring outside the permitted areas of operation of quadbikes must lie with Zespri and this defendant both. Zespri's responsibility arises because it designed and implemented the system of rigorously independent samplers roaming orchards free from the orchardist's influence and direction. This defendant's responsibility arises because it accepted and implemented Zespri's system, including accepting maps from orchardists and

providing samplers with the maps they needed to do their task which did not exhaustively delineate possible hazards. Better hazard maps should have been required and provided, and this death may well have been avoided had such steps been taken.

[26] These conclusions are recited to demonstrate that this case has some very unusual features. The complexity of the industry-wide contractual matrix has in my view contributed in a substantial way to a failure to ensure the workplace safety of kiwifruit samplers. This defendant had responsibility for the safety of its workers, but in a context that diminishes its culpability.

Reparation

[27] Turning to reparation, counsel drew my attention to a number of cases, and I place particular reliance upon *WorkSafe New Zealand v Department of Corrections*. I accept that the cases establish that the assessment of reparation is so highly dependent on the particular factors in individual circumstances that a tariff based approach is impossible.[2]

[28] A perusal of the decisions indicates that in death cases reparation orders between $80,000 and $120,000 are unexceptionable. In this case, an only daughter has lost her mother, and her victim impact statement established unequivocally that the loss of her mother's support has been devastating.

[29] The prosecution has submitted, and the defence have not sought to persuade me otherwise, that in this case a reparation payment of at least $100,000 is warranted. Having regard to the overall circumstances, I accept that $100,000 is an appropriate reparation sum. In this case, the sum of $25,000 is to be paid by Zespri, who have entered into a binding undertaking with WorkSafe, and it is appropriate that that sum be deducted from the $100,000 initial figure.

[30] In addition, this defendant has paid funeral expenses in the sum of $3178, and will incur a further $1600 [details deleted], and the sum of $10,000 has already been

---

2 *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865.

paid [details deleted], a total of $14,778. I accept that this figure should be deducted from the $75,000, producing a net remaining sum due of $60,222.

[31] I assess reparation in the sum of $60,222, payable in one lump sum by 1 December 2018. [Details deleted].

Quantum of fine

[32] The next step is to assess the appropriate quantum of the fine. This is a very unusual case, without any close precedent. The defendant company employed kiwifruit samplers in order to meet the requirements of complex contractual arrangements overseen by Zespri, which operates with an oversight umbrella across the kiwifruit industry, having overall responsibility for the structure of the contractual arrangements across the industry. Those contractual arrangements had been at least partially responsible for the breaches of the Act by this defendant.

[33] This was a case in which the risk attaching to the operation of quad bikes had been recognised, and the defendant had taken all practical steps open to it to properly train its staff in the operation of vehicles. This was not a case where a known risk was ignored, rather it is a case where the steps taken to mitigate that risk were not as comprehensive as they could have been. Three additional practical steps could have been taken that were not taken. Firstly, the defendant could have required detailed hazard maps for each block on each orchard before sampling services were provided. Secondly, the defendant could have instituted a debriefing system by which samplers were required to notify the defendant of any observed hazards not otherwise properly identified on any orchard. Thirdly, the defendant could have required each orchardist to provide an induction as to potential hazards on each orchard for each sampler for each visit.

[34] The conduct of the deceased is a further factor. The evidence established unequivocally that the deceased had been trained not to go into areas of unknown grass, and her failure to observe the canons of her training in that regard has led her to stray into an area which presented hazards to her which she was either unable to recognise or to adequately deal with, leading to her death. However, as the authorities

have established, it is the duty of employers to foresee the possibility that an employee may fail to comply with their training and instructions in circumstances where they may be stressed, confused, or otherwise unable to recognise the need to comply with instructions.

[35] In my view, it is now beyond question that quad bikes are inherently dangerous, and those who use them in the course of their work are exposed to a substantial risk of death or serious injury to a greater extent than the operators of most other types of agricultural machinery or vehicles. However, I do not accept that there was in this case any departure from prevailing standards in the kiwifruit industry, and indeed I have concluded that the industry as a whole is to blame for having insufficiently high standards in relation to the health and safety of kiwifruit samplers.

[36] The *Stumpmaster* case made it clear that cases classed as medium culpability would fall within a range of $250,000 to $600,000, and I consider this to be a case of medium culpability at the upper bound rather than the lower bound of the range.

[37] Taking those matters into account, if this defendant stood alone, without any culpability attaching to Zespri, I would assess the starting point of the fine at $600,000 on the basis that this is a death case involving inherently dangerous machinery in respect of which some, but not all, practicable steps had been taken to minimise a substantial risk of death or serious injury.

[38] I consider that some account should properly be taken of Zespri's overarching role in procuring and mandating the web of contractual relations upon which the kiwifruit industry operates, and I would reduce the starting point by $100,000, to $500,000 to reflect that fact. In particular, whilst recognising that the Act specifically provides that duties and obligations under the Act can be owed concurrently by more than one entity, I consider that the justice of the case requires concrete acknowledgement of the fact that Zespri has effective control of the industry as a whole and that this defendant operates in a subordinate role in a manner approved and mandated by Zespri.

[39] This is not a case where there are any aggravating factors personal to the defendant, and there are many mitigating factors which require to be recognised.

[40] Remorse is advanced routinely in cases of this kind, although I find the concept of corporate remorse to be conceptually difficult. I accept that the owners of this business are personally remorseful, and I accept too that they have acted with a sense of decency and responsibility in their dealings with WorkSafe, and done their best to provide the deceased's daughter with the support that she required. They attended a restorative justice conference, and unquestingly provided the sum of $10,000 as an initial lump sum to assist the deceased's daughter financially. They met the costs of the funeral, and have undertaken to meet the cost of setting up a trust fund. I accept that they were cooperative with the inspectors, and I accept that they have assisted in ensuring that remedial action was taken to minimise a risk of any reoccurrence. The defendant has no record of prior transgression.

[41] Having regard to the observations in the *Stumpmaster* decision that careful analysis is required for the assessment of sentencing credit for mitigating features, I have reached the conclusion that a total of 10 percent reduction is justified for a good prior record, restorative justice, cooperation with the investigation, and assistance with implementation of remedial steps to prevent recurrence. I acknowledge that some prior cases indicate an allowance of perhaps 15 percent for such matters, but I have concluded that the *Stumpmaster* decision signals a more restrictive approach to assessment of these factors.

[42] This is not a case in which any direct comparison can be drawn to any previous decision in most respects. The credit to be given for plea is, however, a matter of general principle. The defendant submitted that a full 25 percent credit in terms of the discounts approved by the Supreme Court in *R v Hessell* should be granted, while the prosecutor submitted that the plea arrived too late for anything more than a 15 percent discount.[3]

[43] In practical terms, the particulars of the charge were amended in a significant way which, in my view, accurately represents the defendant's culpability. The guilty

---

3 *R* v *Hessell* [2010] NZSC 135.

plea was not entered until briefs of evidence had been prepared, although I accept that the briefs were required to be prepared in respect of other defendants. It is my general view that in the broad swath of criminal cases it is not appropriate for a 25 percent discount to be given to reflect a plea entered at any stage after a case review hearing has been held and plea confirmed. I consider that later amendments to charges can justify a full 25 percent discount where the charge itself is reduce and an earlier plea offer has been made. In this case, the amendment simply narrowed the scope of the charge, without charging its essential nature.

[44] Accordingly, I have concluded that the 15 percent discount advanced by the prosecution is too low, and I do not consider that a full 25 percent discount is justified. In the circumstances, I consider a 20 percent discount to be a fair application of the principles guiding this area of the law.

Fine calculation

[45] The fine calculation has a starting point of $600,000, with a $100,000 reduction for Zespri's failure to meet its obligations to the defendant and the industry generally in its oversight role. That produces a figure of $500,000 from which reparation totalling $75,000 should be deducted, (with a balance currently due of $60,222). From the remaining figure of $425,000, a reduction of $42,500 to cover a good record, co-operation with the investigation, remedial action, restorative justice and remorse is appropriate, producing a figure of $382,500. A further 20 percent or $76,500 must be allowed as a credit to the defendant for the guilty plea.

[46] Those calculations produce a final figure of $306,000. I see no need for any further adjustment or rebalancing on an assessment of proportionality and appropriateness, given the clear legislative signal that very substantial penalties are to be expected for breaches of this Act.

Result

[47] The defendant is accordingly convicted and fined $306,000, and ordered to pay a further $60,222 in reparation. The reparation is to be paid in one lump sum by 1st December 2018, [details deleted].

[48] Costs in the sum of $10,372 had been agreed, and I direct the defendant to make payment of that sum to WorkSafe.

_____
Judge TR Ingram
District Court Judge

Date of authentication: 12/09/2018
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.