IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI 2009-485-115

GOUGH GOUGH & HAMER LIMITED

v

NEW ZEALAND POLICE

Hearing: 11 December 2009

Counsel: G Wadsworth for Appellant
M Anderson and V Brewer for Respondent

Judgment: 14 December 2009

JUDGMENT OF RONALD YOUNG J

Introduction

[1] On 7 August 2007 a truck with two semi-trailers (known as a "B-train") was travelling in peak hour traffic down the Ngauranga Gorge into Wellington. When the truck driver braked the brakes did not work. The traffic was dense and the best the truck driver could do was to direct the truck across the lanes to an adjoining footpath, down a narrow gully and overturn the truck. In doing so the truck struck one vehicle which hit another. There was significant damage to the truck and the cars. Fortunately the only injury was the sprained wrist of the driver.

[2] Subsequent inspection of the brakes showed a number of faults. Nineteen days before the accident the appellant serviced the truck's brakes. The appellant company was prosecuted for what was essentially a failure to ensure the employee who carried out the task was adequately trained and supervised and that there was an adequate final check while undertaking the brake maintenance on the vehicle.

[3] The company was first charged on 19 March 2008 and pleaded guilty on 26 January 2009. It submits the fine of $68,000, together with reparation of $50,000, was manifestly excessive. It seeks a reduction in the fine, accepting the $50,000 reparation order was agreed to.

[4] In particular in support of the appeal it says:

a) the starting point for the fine which was at the top of the second sentencing range in *Department of Labour* v *Hanham & Philp Contractors Limited* (2009) 9 NZELC 093, 095 inflated the appellant's culpability;

b) the Judge failed to take into account the amount of reparation paid;

c) the Judge failed to sufficiently take into account the circumstances in which the appellant carried out the work on the vehicle;

d) the Judge failed to adequately take into account the distance travelled by the vehicle after the appellant's services; the responsibility of the driver for the defective brakes; and the financial circumstances of the appellant;

e) insufficient discount was given for its guilty plea and the appellant's subsequent steps to remedy the default.

[5] I note s 51A of the HSE Act specifically incorporates the principles of the Sentencing Act 2002 into sentencing under the Act.

[6] Section 51A provides:

> **51A Sentencing criteria**
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> (1) This section applies when the Court is determining how to sentence or otherwise deal with a person convicted of an offence under this Act.
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> (2) The Court must apply the Sentencing Act 2002 and must have particular regard to—
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> (a) sections 7 to 10 of that Act; and
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> (b) the requirements of sections 35 and 40 of that Act relating to the financial capacity of the person to pay any fine or sentence of reparation imposed; and
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> (c) the degree of harm, if any, that has occurred; and
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> (d) the safety record of the person (which includes but is not limited to warnings and notices referred to in section 56C) to the extent that it shows whether any aggravating factor is absent; and
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> (e) whether the person has—
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> (i) pleaded guilty:
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> (ii) shown remorse for the offence and any harm caused by the offence:
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> (iii) co-operated with the authorities in relation to the investigation and prosecution of the offence:
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> (iv) taken remedial action to prevent circumstances of the kind that led to the commission of the offence occurring in the future.
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> (3) This section does not limit the Sentencing Act 2002.

Background facts

[7] The sentencing Judge in the District Court set out in detail the circumstances of the failures of the braking system and the inadequate supervision of the maintenance undertaken nineteen days before the accident by the appellant. He said:

> [15] …
>
> …

(i) Subsequent detailed expert inspection of the brakes revealed faults on all of the 16 individual brake assemblies across all eight axles of the B-train combination. The faults are detailed in paragraph 21 of the summary of facts. Many different faults are identified some of which must have been obvious to anybody carrying out a maintenance inspection 19 days earlier. Those include, in particular, the excessive clearance between the drum brake linings and the drum, evident on 10 brake assemblies. The fact that some of the rods in the brake operation mechanism did not properly "return", possibly the rusty brake drums, usually indicative of brake linings failing to make contact with the brake drum and an air leak in part of the brake assembly mechanism. There are other defects, which may or may not have been observable at the time of inspection or, alternatively, may have developed between inspection and the date of the accident.

(j) The testing of the semi trailers in an unladen state showed that at 30 kilometres an hour, they took five times the distance to stop that they should have done under the Heavy Brake Rule 2006 which specifies minimum stopping distances. And, when using the park or emergency brake only, one trailer took twice the distance to stop that was required and, the other, nearly 10 times the distance to stop that was required. It seems that the braking performance would have been much worse than laden.

(k) Further investigation revealed the brakes had been recently serviced, by the defendant Company 19 days earlier. Overall responsibility for the maintenance and servicing had been with an 18 year old apprentice diesel mechanic, then employed for 18 months. He was yet to receive training in brake systems. This was scheduled for the third year of apprenticeship.

(l) Assistance was provided by a trade certified heavy automotive plant and equipment mechanic, whose speciality was engine systems. Clearly, he had very limited knowledge, if any, of heavy vehicle braking systems.

(m) The overall Truck Shop supervisor, for at least half of his time, was involved in client liaison and administration. He had confidence in the young apprentice and had no cause to doubt his competence or diligence. At one stage, the supervisor said he had not had the time to check the work but later changed his story and said he had checked and seen nothing. When shown the photographs of the faulty brake componentry after the accident, he said he felt sure that had the trailers brakes been in such a state when presented for the service check, then the apprentice mechanic would have said something. He said that anyone looking at that photograph would have seen something was not right. Over 8600 kilometres had been travelled since the servicing undertaken 19 days earlier. The number and magnitude of

the defects present, were completely and utterly incongruous to the relatively short distance covered in that intervening period. The supervisor agreed that the level of wear present, was inconsistent with the distance travelled since serviced.

(n) The essence of the prosecution is that the defendant Company could have taken a number of practicable steps relating to its employees, to ensure that no unsafe vehicle was returned to its operator. Proper training, adequate supervision, work review and the use of a decelerometer during a road test, were all measures the prosecution alleges, should have been taken. In this case, the inspection that had been undertaken had not adequately identified the numerous serious defects already mentioned. Critical maintenance work that had been urgently required, remained unattended to and, as a consequence, the B-train was returned to Knight Train Haulage supposedly in a compliant and roadworthy condition when, palpably, it was not.

[8] As to factual matters and the responsibility of the appellant, the Judge said:

> [24] There is some argument as to whether all the defects that existed at the time of the accident, would have been discoverable during the maintenance or, indeed, even existed at the time of the maintenance. Much technical evidence has been directed to this point. Not all the faults may have existed at the time; some may have been exacerbated over 19 days road use since the service. But, I am quite satisfied, that some fundamental defects, such as I have outlined in the summary of facts, were observable, should have been observed and should have been attended to at the time of the service. Even Mr Wadsworth, who has argued very carefully and powerfully on this point, concedes that the guilty plea has been entered on this basis.

[9] In assessing what the company did or failed to do, he said:

> [32] Assessing the situation as best I can, I accept here there was not a failure to take <u>any</u> practicable steps. Some steps were taken. There was a checklist in existence, there was a supervisor available. This appears to have been a one-off incident by a reputable company. It was not deliberate. However, Mr Wadsworth says it is not a gross oversight, simply a mistake. I disagree. The failure to inspect and properly service the brakes is, as the informant strongly suggests, a gross failure. There may be some small driver responsibility but I am satisfied he bought his concerns to the attention of his employer and, as I have said, his employer was entitled to rely on the work, the maintenance work of the defendant. In my view, the combination of leaving this job to an inexperienced partially trained apprentice with a lack of supervisory procedures and subsequent checking procedures, given the self evident risk and potential for serious harm, means that this offending is, at least, at the top of the second level set out by *Hanham*, if not, at the bottom of the third. Here, there is no actual serious harm, and although this is fortuitous, I cannot ignore that.

[10] As to the drivers responsibility, he said:

> [27] A difficult issue has arisen in the course of these lengthy submissions because the defendant has carefully, through its counsel, suggested that there are other reasons for the accident in addition to the defendant's failure to take all practicable steps. For instance, the defendant has suggested that the driver must have known of the defects and, indeed, his guilty plea acknowledges this and that additional servicing should have taken place, given his concerns. Also, he may have used the braking system in a sub-optimal way using the air and engine brake but not the service brake. This would have degraded the componentry significantly since the time of the service. Mr Wadsworth has also suggested that the brakes should have been checked every 5000 kilometres or so – this general best practice rule appearing in Mr Macalpine's affidavit, who himself, is an expert in this field. But it is only best practice, there was no legal requirement to do so, and the victim company was probably entitled to think every 20,000 kilometres or so, this substantial repair and maintenance work should have taken place.

[11] The Judge correctly approached the sentencing exercise identifying *Hanham & Philp Contractors Limited* as the appropriate authority.

Culpability of appellant

[12] The appellant stressed several factors which it said bear upon the appellant's culpability which the Judge misconstrued. Firstly, the appellant says its inadequacy was significantly less than cases such as *Hanham* (and the three cases considered under that case name) as well as several District Court cases where serious injury or death was caused in industrial accidents. In some of these cases an inexpensive remedy of the hazards could have avoided serious accidents. In this case the appellant company did not deliberately fail to provide proper supervision. The appellant says, therefore, that in the interests of consistency the starting point should have been considerably lower here.

[13] Secondly, the appellant points to the driver of the truck as primarily at fault in this incident with the appellant having significantly less culpability. The appellant says the truck driver must have known that the brakes on the truck were faulty and should not have continued to drive the truck. They point to his prosecution for careless driving arising from this incident as supporting that proposition. They say that given the driver must have known the brakes were worn he should not have

continued to drive the truck. It was his neglect and that of his employer the appellant says, that was the major cause of the brake failure on Ngauranga Gorge that day.

[14] Further, the appellant says that it is good practice to check the brakes every 5,000 kms and if the truck company had done this then the defects in the brakes would have been then discovered.

[15] Finally the appellant says that the Judge's sentence failed to reflect the fact that the appellant company had an unblemished safety record over many years.

[16] The respondent says the Judge correctly identified as relevant, in assessing the appellant's culpability, the definition of "practical steps" set out in s 2A which identifies what steps could practically be taken in the circumstances.

[17] Section 2A provides:

> **2A All practicable steps**
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> (1) In this Act, **all practicable steps**, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to—
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> (a) the nature and severity of the harm that may be suffered if the result is not achieved; and
>
> (b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
>
> (c) the current state of knowledge about harm of that nature; and
>
> (d) the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and
>
> (e) the availability and cost of each of those means.
>
> (2) To avoid doubt, a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.

[18] The respondent submits the Judge was entitled to view the appellant's culpability as in the medium range given the obvious hazard of inadequate brakes

and the significant potential for harm from a brake failure. They say the truck driver's culpability, such as it was, did not affect the appellant's inadequacies.

[19] I turn firstly to the Judge's assessment of the culpability of the appellant company. In my view no valid criticism can be made of the Judge's assessment that the failures by the appellant company were significant.

[20] It is difficult to identify a more fundamentally important part of servicing a large truck and trailer unit such as this as the servicing of the brakes. The essential corollary to this work is the proper supervision and checking of the maintenance especially when, as here, the work was not performed by a fully qualified and experienced truck mechanic. Without adequate brakes such a large truck unit has the capacity to cause significant mayhem on the road. This illustrates the importance of ensuring that no mistake is made in the maintenance of the brakes. The company allocated an apprentice mechanic to the task. He had little experience in servicing brakes and no proper training. The company then failed to adequately supervise his work. This was a serious neglect of a vital public safety function. Also relevant is that faults were found on sixteen individual brake assemblies across all eight axles of the B-train combination. This emphasises the seriousness and extent of the failures and therefore the extent of the failure of the supervision.

[21] This truck and trailer unit fully loaded with goods weights almost 31 tonnes. It therefore takes little imagination to identify what damage could be done to property and persons by such a vehicle without an adequate braking system.

[22] The consequences, therefore, of a braking failure identifies the level of care required of those undertaking the checking and maintenance of such braking systems. This in turn identifies the level of responsibility of those who are to supervise that work. The level of care that is required is high and the level of supervision required also high.

[23] In this case the appellant chose to give the task of brake maintenance to an apprentice whom it knew had no proper training with such braking systems. In those circumstances the level of supervision required was especially high to compensate

for the inexperience of the apprentice actually undertaking the work. The failure of the company to properly supervise this work to that high standard or indeed to any proper standard illustrates the seriousness of its failure. However, what is properly acknowledged is that there was an appropriate check sheet for the apprentice to complete. As to the supervisor, he signed off the work indicating he had checked the apprentice's work. As it turned he had not in fact done so. While the appellant is ultimately responsible for the supervisor's action this was an unpredictable event which did not reveal any short coming in the companies processes.

[24] Without further relevant facts this analysis of the appellant's responsibility illustrates the Judge appropriately assessed the appellant's culpability. However, the appellant's point is that the conduct of the driver, and especially the company that employed the driver, played a major part in the events at Ngauranga Gorge.

[25] It seems that after the truck left the appellant's premises and before the accident the driver of the truck had contacted his employer to tell them that the truck had "spongy" brakes. The driver was reassured by his employer the brakes had been recently serviced and were fit for purpose. No check on the brakes was made. The appellant company had recommended to its customers, including the owner of the truck, that it check the brakes on the rear trailer unit every 5,000 kms. No such check was undertaken. The statutory obligation was that the brakes be serviced at regular intervals. The brake failure in this case was gradual until the catastrophic events on the Ngauranga Gorge. The brakes gradually wore out until they failed. Given those circumstances it cannot sensibly be suggested that those who drove that truck were not aware of some braking inadequacy before the Gorge events.

[26] Finally, it must be kept in mind that the driver was prosecuted for continuing to drive the truck when he knew (or should have known) the brakes were not working properly.

[27] These circumstances do reduce the responsibility of the appellant for the events in Ngauranga Gorge. If the driver and his employer had themselves acted "safely" then the truck's brakes would have been checked and repaired before the Gorge incident.

[28] These observations are relevant to the culpability of the appellant. They reduce the appellant's responsibility for the Gorge incident. They do not reduce the culpability of the failure at the appellant's premises. I also accept that the appellant's sentencing is primarily concerned with their actions rather than the failures of others.

[29] As to the company undertaking remedial action after the accident to ensure such an error did not happen again, this did not seem to me to be a significant mitigating factor, however, the company is to be commended for doing so. I accept, as I have observed, the supervisor's actions were unpredictable and the company did have a reasonably robust process.

[30] The combination of the unpredictable conduct by the supervisor and the failure by the driver and his employer to apply appropriate safety standards does in my view reduce the culpability of the appellant to the lower end of the middle band of cases in *Hanham*. I consider an appropriate starting fine is $60,000.

[31] The appellant submitted the Judge failed to take into account the distance travelled by the truck after the maintenance to the brakes and before the accident. It is clear (see 32(m) at [7]) the District Court Judge did take into account the mileage travelled since its brake maintenance. While there was obviously wear on the brakes from the 8,600 km's travelled since the maintenance was undertaken it was equally clear that this could not have accounted for "the number and magnitude of the defects present …" (as the Judge remarked).

[32] Even the supervisor accepted, when faced with photographs of the faulty brakes that the defects would have been self evidence to any experienced person. It can be seen, therefore, that the sentencing Judge did take into account the distance travelled and the overall conditions of the brakes.

[33] The appellant argues that the Judge should have substantially reduced the start fine given the $50,000 reparation agreed to. Reparation and fines are for quite different purposes. Reparation is to make up for the loss caused by the crime (s 32 Sentencing Act 2002). That is, to try and put the victim back in the same position

they would have been in had the crime not occurred. A fine is to punish an offender for their role in the offending. However, s 40(4) (Sentencing Act 2002) provides that in imposing a fine the Court must take into account the amount of reparation.

[34] The amount of the reparation and the fine proposed is especially relevant in my view when the Judge comes to assess whether the overall penalty (have reparation and all other monetary penalties) is fair and whether the offender can reasonably be expected to meet payment. The Judge considered the total financial cost to the company.

[35] In the circumstances of this case the Judge's 15% reduction in the fine for reparation did reflect an assessment of the total monetary penalty. Now that the starting point has been reduced however I cannot see any real basis for a direct reduction of the fine simply because the appellant has paid reparation.

Discounts

[36] The Judge discounted the starting sentence by 32% to cover the guilty plea, remorse, co-operation by the appellant company, a good record and remedial action taken, plus reparation paid. The Judge may have intended to give a 35% discount but applied one of the percentage deductions to a figure of less than $100,000. The better approach was to add together all the percentage discounts and deduct those from the appropriate starting time.

[37] The appellant's guilty plea was almost a year after it was originally charged. The guilty plea came on the morning of the defended hearing date. In those circumstances it would have been difficult for the company to get a significant reduction for its guilty plea or remorse given it had not accepted its responsibility for a considerable period. The deduction of 15% for the guilty plea and remorse was more than adequate. Although *R v Hessell* [2009] NZCA was not decided at that time applying *Hessell* principles would have resulted in a discount of no more than 10%.

Summary

[38] To take the start sentence of $60,000. From that I deduct 15% for the late guilty plea. This is generous. I also deduct a further 20% to reflect the appellant's good record, its co-operation and the action taken to remedy the default. The Judge included, within this figure a deduction for the imposition of both reparation and a fine. I see no need or any basis for doing so. However, I have kept the figure at 20% to reflect what is a remarkable record by the appellant company. It has, I understand, been in existence for 100 years and this is its first prosecution for a health and safety failure.

[39] From the $60,000 I therefore deduct 35% leaving a fine of $39,000. Considered overall, this fine plus the reparation of $50,000 is at appropriate level of penalty for the appellant's culpability and the mitigating feature.

[40] The appeal is allowed, the fine of $68,000 quashed and a fine of $39,000 substituted. The reparation was unchallenged.

Ronald Young J

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