IN THE DISTRICT COURT
AT WELLINGTON

CRI-2014-085-007231

STEVIN IAIN CREEGGAN
Informant

v

NEW ZEALAND DEFENCE FORCE
Defendant

Hearing:	18 July 2014
Appearances:	T J MacKenzie for the Applicant N P Lucie-Smith for the Defendant
Judgment:	18 July 2014

NOTES OF JUDGE W K HASTINGS ON SENTENCING

---

[1] We have now come to the formal part of these proceedings. The New Zealand Defence Force appears for sentence having pleaded guilty to a charge that it being an employer failed to take all practicable steps to ensure the safety of its employees while at work in that it failed to take all practicable steps to ensure that its employees were not exposed to hazards arising from the operation of helicopters while at work contrary to ss 6 and 51(a) Health and Safety in Employment Act 1992.

[2] The maximum penalty for this offence is expressed as a fine not exceeding $250,000.

[3] I have entered a conviction.

[4] The facts have already been read in open Court by Mr MacKenzie. I will simply summarise them as follows.

[5] On the morning of Sunday, 25 April 2010, a formation of three Royal New Zealand Air Force Iroquois helicopters flying under the call sign of Iroquois Black departed Royal New Zealand Air Force Base Ohakea to conduct a series of ANZAC Day flypasts in the Wellington Region. The call signs for each aircraft were Black 1, Black 2 and Black 3. At 0549 hours en route to Wellington, Black 2 crashed into the head of a valley approximately half a nautical mile east of Pukerua Bay northwest of Wellington. There were four crew members onboard Black 2. The Captain, Flight Lieutenant Madson, the Co-Pilot, Flying Officer Gregory, and Helicopter Crewman, Corporal Carson were killed in the impact. The aircraft was destroyed.

[6] This prosecution is brought by the fourth crew member, Sergeant Stevin Creeggan. Sergeant Creeggan survived the crash, but was seriously injured. We have heard the details of those injuries.

[7] Subsequent inquiries revealed a number of steps that the New Zealand Defence Force failed to take prior to the accident to ensure that its employees were not exposed to the hazard of a helicopter accident. The practicable steps it failed to take were as follows.

[8] First, it failed to use or create an appropriate system to enable flight authorising officers during the flight crew selection process to identify and ensure that the flight crew had the relevant experience and currencies for the tasking.

[9] Second, it failed to ensure Defence Force Flying Order Rules in relation to flight planning were complied with, including undertaking a day survey for night vision goggle cross-country flights and not authorising a night vision goggle flight under 500 feet that had not been surveyed.

[10] Third, it failed to properly identify the movement of aircraft to Wellington as more than an administrative movement and afford the aircraft transit greater scrutiny than it received, including considering a direct instrument flight rule transit from Ohakea to Wellington.

[11] Fourth, it failed to identify and eliminate the can-do culture which was prevalent in Three Squadron which may have led to personnel believing it was appropriate to breach orders and flight plans to complete tasks.

[12] Fifth, it failed to acquire and utilise ground proximity systems for aircraft which operate in close proximity to terrain.

[13] Sixth, it failed to use or create an appropriate operational risk management system to identify and mitigate night vision goggle risks.

[14] The normal approach to sentencing under the Health and Safety in Employment Act 1992 is set out in *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,995; (2008) 6 NZELR 79 (HC). It requires me first to assess the level of reparation; second, to assess the level of fine; and third, to assess the total overall fine and reparation in proportion to the culpability of the offender.

[15] This approach is not, of course, available when the offender is a Government agency because s 84 Crown Organisations (Criminal Liability) Act 2002 prevents me imposing a fine on the New Zealand Defence Force. I am, however, able to undertake the other two steps. In doing so, I must impose a sentence that holds the New Zealand Defence Force accountable for the harm it has done to the victims and the community by its offending. I must impose a sentence to denounce the conduct that constituted the offending. The sentence must deter the New Zealand Defence Force and other employers from the same or similar offending. It must provide for the interests of the victims of the offending including reparation for harm. It must also promote a sense of responsibility and acknowledgement of that harm.

[16] I turn now to the issue of reparation. Sergeant Creeggan has emphasised that he did not ask for my permission to bring this private prosecution for financial gain. The first three purposes of sentencing I have identified above were always of paramount importance. He simply wanted to ensure that no other individuals or their

families had to endure what he and his family and the families of his deceased comrades endured.

[17] The New Zealand Defence Force has already made payments of $70,000 to each of the families of the deceased crew members and to Sergeant Creeggan's family. It has also paid funeral expenses that the ACC did not pay for, and a funeral grant of $4,300 to the spouses and partners of the deceased was paid from the Royal New Zealand Air Force welfare fund. Further, the New Zealand Defence Force has agreed to pay travel and tuition costs for Sergeant Creeggan to take an FAA-accredited course at an aviation school in the United States so that he is able to pursue a career in civil aviation once he leaves the Royal New Zealand Air Force.

[18] Reparation is a terrible thing to have to quantify. As Judge Kiernan said in *Department of Labour v Sir Edmund Hillary Outdoor Pursuit Centre of New Zealand* [2010] DCR 26:

> "Obviously no price can be put on a life lost. It would be abhorrent to calculate in dollar terms the cost to each family of a loved one. Reparation orders in other fatality cases are really of little assistance."

[19] The range of reparation amounts in fatality cases varies enormously. $60,000 reparation was ordered for each family in the *Outdoor Pursuit* case. $110,000 reparation was ordered for each of the victims in *Department of Labour v Pike River Coal Ltd,* DC Greymouth CRI-2012-018-822, 18 December 2013. Other cases involve the same and higher amounts.

[20] In *Department of Labour v Fletcher Concrete and Infrastructure Ltd* DC Nelson CRI-2009-042-001043, 20 August 2009, reparation in the amount of $125,000 was ordered. In *Department of Labour v Transdiesel Ltd* DC Christchurch CRI-2012-009-001590, 14 June 2012, reparation in the amount of $60,000 for emotional harm was ordered. In *Department of Labour v Fulton Hogan Ltd* DC Greymouth CRN1018500058, 3 September 2010, reparation of $100,000 was ordered. In *Ministry of Business, Innovation and Employment* v *Mainfreight*, reparation of $140,000 to the widow and $60,000 in trust for the deceased's children was ordered.

[21] The victim impact statements which have been read aloud in open Court show the intense emotional and psychological suffering that the families have gone through and continue to experience. In Sergeant Creeggan's case, the psychological and emotional suffering was compounded by horrific physical injuries that he will carry with him as a reminder of ANZAC Day 2010 for the rest of his life.

[22] The faith of the victims in those in authority over their boys' lives has been shattered. They feel a sense of betrayal resulting from a breach of the trust they put in a venerable institution to look after their sons, their brothers and their partners. This harm would obviously have been the same for each of the families.

[23] The purpose of reparation in health and safety prosecutions is not to put a value on the loss of life. Its purpose is more symbolic. It is to demonstrate genuine awareness of, and an acknowledgement of, the grief and ongoing emotional and psychological harm experienced by the loved ones left behind and those who have been injured. Reparation is, in effect, a tangible demonstration of a willingness to make amends for harm done, rather than a crude valuation of a life lost.

[24] Justice Ron Young in *Clutha Chain Mesh Products Ltd v Department of Labour* (2005) 7 NZELC 97,673; (2004) 2 NZELR 261 (HC), said:

> "Where an offer of amends exceeds any reparation that could be properly payable, the Judge is likely to conclude that no reparation order should be made because of special circumstances of the offer of amends would make it inappropriate."

[25] While the New Zealand Defence Force's payments of $70,000 to each of the four families is generous, I do not consider that they exceed any reparation that could be properly payable, particularly given the high profile nature of the offending and its impact on Sergeant Creeggan and the families, as well as the ongoing injuries suffered by Sergeant Creeggan and the families as a result of the failures of the Crown. I order the defendant to make further reparation in the amount of $20,000 to each of the four families involved. This will bring the total reparation paid up to a level that is consistent with the amounts ordered in the cases I have mentioned.

[26] I turn now to assess the culpability of the New Zealand Defence Force. I am grateful to both counsel for their submissions on this point. Both Sergeant Creeggan and the New Zealand Defence Force agree that the New Zealand Defence Force's culpability is high in this case. I agree.

[27] Even though the New Zealand Defence Force cannot be fined, I nevertheless have the jurisdiction to make a culpability finding following Judge O'Driscoll's decision in *Ministry of Business, Innovation and Employment v New Zealand Defence Force* DC Auckland CRN13067500014, 2 August 2013. It is appropriate that I do so because the Sentencing Act 2002 requires me to, it is in the interests of the victims and, indeed, it is in the interests of the Crown that I assess the New Zealand Defence Force's culpability in this case.

[28] Assessment of culpability requires me to identify the operative acts or omissions at issue. This will involve identification of the practicable steps which I find were reasonable for the offender to have taken. This has been achieved through the agreement of both counsel. Assessment of culpability also requires me to assess the nature and the seriousness of the risk of harm occurring as well as the resulting risk that actually happened. It requires me to assess the degree of departure from standards prevailing in the relevant industry. I must also assess 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 risks and of the nature and severity of the harm which could result, as well as the current state of knowledge of the means available to avoid the hazard or mitigate the risk of it occurring. I will deal with each in turn.

[29] I have identified at the beginning of these remarks the six practicable steps that the New Zealand Defence Force failed to take. Assessing the nature and seriousness of the risk of harm, there is a risk of harm occurring from hazards inherent in helicopter operations. Helicopter accidents often result in serious injury or death. With respect to the degree of departure from standards prevailing in the relevant industry, the agreed summary of facts sets this out. There was a high degree of departure from the New Zealand Defence Force written policies which themselves were allowed to become out of date.

[30] The New Zealand Defence Force did not adhere to the Defence Force Flying Order requirement to ensure that the flight crew of Black 2 were competent and qualified to undertake the task they were given. The New Zealand Defence Force did not use any formal operational risk management system to analyse the task. The Defence Force Flying Orders required a day survey to be undertaken which did not occur. Those orders required that any unsurveyed route must not be authorised below 500 feet, which it was.

[31] Helicopter crashes are an obvious hazard. They are inherently dangerous. The means necessary to avoid the accident were compliance with the Defence Force Flying Orders, an updating of those orders, the implementation of an operational risk management and a modern ground proximity warning system.

[32] The risks of hazards from helicopter operations are well known, as are the severity of the harm which could result from those operations. The defendant was very well placed to know of these hazards.

[33] With respect to the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence, once again, updating of the Defence Force Flying Orders and compliance with those orders was what was required.

[34] To quote the Fitzgerald Inquiry, latent conditions can lie dormant for years before they combine with active failures to create an accident. The defendant, however, allowed its employees to think and act in a way that allowed the accident to happen. I find, therefore, that the New Zealand Defence Force's culpability is high.

[35] Since the failures were identified, the New Zealand Defence Force has taken steps to remedy them. These steps include the introduction of a flight authorising officer checklist to ensure flight crew experience is reviewed and is appropriate for each task, and that all phases of flight are understood by flight crews.

[36] The Defence Force Flying Orders have been revised and updated.

[37] Aviation orders have been promulgated to ensure orders and responsibilities are clearly established.

[38] A mission risk profile process has been introduced so that flight authorising officers make consistent objective risk assessments.

[39] Night vision goggle flights are not authorised below 500 feet on unsurveyed routes.

[40] The risks of a can-do culture are said now to be an inherent part of training programmes and safety policy statements.

[41] Helicopters with better flight control and instrument systems are replacing the old Iroquois helicopters.

[42] An operational risk management assessment is now in place for all aircraft operations.

[43] A directorate of health and safety has been established that reports on New Zealand Defence Force-wide health and safety issues to the Vice Chief of Defence Force. The Health and Safety Governance Committee has been established to oversee and manage a coherent health and safety framework across the Defence Force.

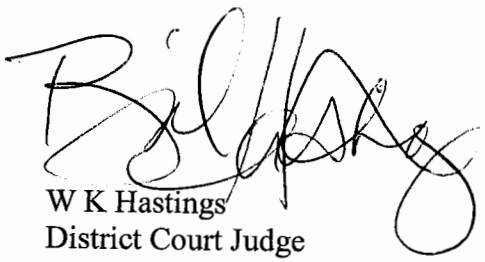
[44] I also acknowledge that the defendant notified the incident to the Ministry of Business, Innovation and Employment or the Department of Labour, as it was then called, the day it happened, that it convened its own Court of Inquiry, that it has undertaken to complete or that it has already completed the recommendations of the Court of Inquiry and the Fitzgerald report, and that it intimated a guilty plea once the summary of facts had been agreed.

[45] Importantly, we have heard an unreserved apology from the New Zealand Defence Force and the Royal New Zealand Air Force to the victims, the families and the people of New Zealand today. This shows remorse.

[46] Finally, I wish to make some personal observations. To the families of the deceased, to the family of Stevin Creeggan and to Stevin Creeggan himself, none of you should ever have had to go through what you have gone through. I cannot begin to imagine your grief, your anger, your sense of loss and, perhaps most significantly, your loss of what might have been, yet you have carried on and you have come through this with resolve, with grace and with dignity. You have my utmost respect.

[47] To the New Zealand Defence Force. It befits the dignity of the Crown that you have accepted responsibility for your failings that led to this tragedy. You have put or have begun to put your house in order to reduce the possibility that a tragedy such as this could ever happen again. All of New Zealand is grateful that you have done this.

[48] Finally, to Sergeant Stevin Creeggan. You are proof that one person can make a difference. By dint of your tenacity and resolve, you have managed to create a silver lining from an unimaginable tragedy that has seared itself into the nation's psyche. You have demonstrated what the amendment legislation permitting private prosecutions set out to achieve. The New Zealand Defence Force is a better employer and the honour of the Crown has gone some way to being restored as a result of your actions.



W K Hastings
District Court Judge