IN THE DISTRICT COURT
AT ASHBURTON

I TE KŌTI-Ā-ROHE
KI HAKATERE

CRI-2015-003-000522
[2020] NZDC 17848

WORKSAFE NEW ZEALAND LIMITED
Informant

v

TALLEY'S GROUP LIMITED
Defendant

Hearing:	13 July 2020
Appearances:	B H McCarthy and T Williams-McIlroy for the Informant J H M Eaton QC for the Defendant
Judgment:	3 September 2020

RESERVED JUDGMENT OF JUDGE K J PHILLIPS

---

[1] Talley's Group Ltd, the defendant company, pleaded guilty to a charge under sections 6 and 15(1)(a) of the Health and Safety in Employment Act 1992 ("the Act"). The charge description as detailed in the Charging document is that the defendant:

> Being an employer, failed to take all practicable steps to ensure the safety of its employee, namely Ms Te Atatū Hemi, while at work, in that it failed to take all practical steps to ensure that she was not exposed to hazards arising out of the operation of a Yale forklift.

Procedural history

[2] In the early stages of this prosecution the District Court held that the original charging document was defective as it did not contain sufficient particulars as is

required by s 17(4) of the Criminal Procedure Act 2011 (the "CPA"). The District Court found that the charge was not a nullity, but was unable to be remedied by s 379 of the CPA as there had been a miscarriage of justice; further, the Court held that in any event the prosecution should be stayed as it had become an abuse of process.[1] The prosecutor appealed to the High Court where Faire J agreed that the charging document did not comply with s 17 of the CPA and that the alleged failings, as contained in a prosecution under s 6 of the Act, must be recorded within the charging document.[2] However, in allowing the appeal Faire J held that the defects in the charging document could be cured pursuant to the provisions of s 379 of the CPA.

[3] Both the prosecutor and the defendant obtained leave to appeal to the Court of Appeal.[3] On 14 December 2018, the Court of Appeal upheld the High Court's decision and agreed that the charging documents had failed to meet the requirements of s 17(4) of the CPA, and that the charging document was saved by s 379 of the CPA. The Court of Appeal required the charging document to be amended to include the original summary of facts that had been served on the defendant on 1 December 2015; rather than the amended summary of facts served on the defendant on 26 August 2016, which is beyond the end date for the filing of such a charge.[4]

[4] Following the Supreme Court refusing the defendant's application for leave to appeal to that Court, the prosecutor and the defendant's counsel discussed and agreed upon the particulars of the charge. These are now contained in the agreed summary of facts. A guilty plea was then entered upon that basis.

Facts

[5] The defendant company operates a vegetable processing plant in Ashburton. It employs between 200 and 250 people at this plant. The victim, Ms Te Atatū Hemi, was employed at that plant as a forklift driver in the cool store. Mr Nicholas Baumber was employed as a supervisor in the cool store area. Within the site the defendant

---

1 *WorkSafe New Zealand v Talley's Group Ltd* [2016] NZDC 23299.
2 *WorkSafe New Zealand v Talley's Group Ltd* [2017] NZHC 1103.
3 *Talley*'s *Group Ltd v WorkSafe New Zealand* [2018] NZCA 587.
4 Health and Safety in Employment Act 1992, s 54B.

company operated some 18 forklifts. The particular forklift involved in the incident ("the forklift") had the following specifications:

(a) The backrest (the bars that the cargo leans against while on the forks of the forklift) measured 1.21 metres in height;

(b) The mast was 2.4 metres in height;

(c) The forks on the forklift could extend to 5.72 metres in height; and

(d) The forklift was the only "short-mast" forklift in operation at the particular site.

[6] Both Ms Hemi and Mr Baumber had received training and were certified operators, holding certificates allowing them to use forklifts on the worksite.

[7] On 22 May 2015, Ms Hemi was working in an area known as the paddle track, working as pack-out support. In the paddle track area product arrives on a conveyor and is then moved into bulk bins that have been positioned under the conveyor. Ms Hemi's task as pack-out support involved moving filled bins to another area, securing the lids on the bins and completing the necessary documentation.

[8] Mr Baumber's job as supervisor on this particular morning was using the forklift to stack empty bulk bins. He proceeded, after stopping and speaking with Ms Hemi, to create a stack of two empty bulk bins. He then placed a further two empty bins on top of the first stack to create a stack four high. He proceeded to raise the forks (which had the bins on them) with a view to placing the four bins on top of a fifth bin.

[9] Ms Hemi, at this particular time, was standing two to three metres behind the forklift, securing a lid onto a full bin. As Mr Baumber moved his forklift forward the top three unsupported bins toppled backwards over the forklift cab where he was seated and one of these bins knocked Ms Hemi to the ground. She lost consciousness and suffered a complete spinal cord injury. As a result she is a paraplegic.

[10] The summary of facts sets out the practicable step which was available to the defendant and should have been taken:[5]

> [33] As an employer, the defendant was obliged to take all practicable steps to ensure the safety of its employees while at work pursuant to s 6 of the Health and Safety in Employment Act 1992.
>
> [34] The following practical step was available to the defendant and should have been taken:
>
> (a) To have ensured that the bulk bins by being lifted by forklifts were always supported by the backrest of the forklift or the forklift mast. This could have been achieved by creating a Standard Operating Procedure that specified how bulk bins were to be stacked, training the employees in this methodology, and auditing employee behaviour to ensure compliance.

[11] The provisions of s 51A of the Act apply.

> **51A Sentencing criteria**
>
> (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.
>
> (2) The Court must apply the Sentencing Act 2002 and must have particular regard to -
>
> (a) sections 7 to 10 of that Act; and
>
> (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
>
> (c) the degree of harm, if any, that has occurred; and
>
> (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
>
> (e) whether a person has –
>
> (i) pleaded guilty:
>
> (ii) shown remorse for the offence and any harm caused by the offence:
>
> (iii) co-operated with the authorities in relation to the investigation and prosecution of the offence:

---

5 Summary of facts at [33]-[34].

(iv) taken remedial action to prevent circumstances of the kind that led to the commission of the offence occurring in the future.

(3) This Section does not limit the Sentencing Act 2002.

[12] The guideline judgment for sentencing for the current offending is *Department of Labour v Hanham & Philp Contractors Ltd* (*Hanham*) where the High Court set out the following approach:[6]

(a) assess the amount of reparation to be paid;

(b) fix the amount of the fine by reference first to the bands, and then having regard to aggravating and mitigating factors; and

(c) make an overall assessment of the proportionality and appropriateness of the combined payment required by the first two steps.

[13] The Court also set out culpability bands, against a maximum penalty of $250,000 to assist in setting the starting point for the fine:[7]

(a) Low culpability, a fine up to $50,000.

(b) Medium culpability, a fine of between $50,000 and $100,000.

(c) High culpability; a fine between $100,000 and $175,000.

[14] The Court also pointed out a number of relevant factors:[8]

(a) The identification of the operative acts or omissions at issue. This will require the clear identification of the practicable steps once the Court finds what was reasonable for the offender to have taken in terms of s 2A of the Act;

---

6 *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) at [80].
7 At [57].
8 At [54].

(b) An assessment of the nature and seriousness of the risk of harm occurring, as well as the realised risk;

(c) The degree of departure from standards prevailing in the relevant industry;

(d) The obviousness of the hazard;

(e) The availability, cost and effectiveness of the means necessary to avoid the hazard;

(f) The current state of knowledge of the risks and of the nature and severity of the harm which could result; and

(g) The current state of knowledge of the needs available to avoid the hazard or mitigate the risk of its occurrence.

[15] After having considered the agreed summary of facts and submissions of counsel I consider the most relevant purposes and principles of sentencing in this case are:

(a) Holding the defendant accountable for the accepted offending and the harm done;

(b) Promoting the interests of the victim;

(c) Promoting a sense of responsibility;

(d) General and specific denunciation and deterrence; and

(e) Recognising the gravity of the offending and impact on the victim.

[16] During the course of the sentencing hearing the Court received detailed written submissions from counsel for the prosecutor and the defendant which were augmented by oral submissions at the hearing on 13 July 2020. The Court recognises the detail

of such submissions and notes that the Court has been greatly aided by all submissions it received. I have read the various authorities that counsel referred to. This decision is not intended to discuss the submissions in major detail but that does not mean that the matters and issues raised have not been fully considered.

Summary of submissions by prosecutor

[17] The prosecutor submits a reparation order for Emotional Harm Reparation of $40,000.00 is appropriate, and that there should be an order for reparation for consequential loss on the statutory shortfall approach in the sum of $146,204.58.

[18] The prosecutor puts the offending into the middle of the medium culpability band and submits the appropriate starting point for a fine is $70,000. The prosecutor submits there should be an uplift of 10 percent to reflect the defendant's prior offending history; and the discounts that are available to the defendant are:

(a) reparation – five percent;

(b) remorse – up to five percent;

(c) co-operation – five percent; and

(d) a guilty plea credit of ten percent.

[19] The net fine resulting it is submitted is $57,750.00. The prosecutor submits a costs award under s 4 of the Costs in Criminal Cases Act 1967 of $56.00.

Summary of defence submissions

[20] The defence, through Mr Eaton QC, considers that an Emotional Harm Reparation order of $40,000.00 is at an appropriate level. The calculation made by the prosecution as to consequential loss is accepted, but the defence submits that the amount should be reduced to take into account particular factors present in this case. These include:

(a) the work provided by the defendant to Ms Hemi following the accident, this involved retraining paid for by the defendant;

(b) accounts paid by the defendant for the pastoral care and support of Ms Hemi's family; and

(c) the cost involved in providing a modified vehicle and refurbishing her home to allow for wheelchair access.

The defence submit these credits total some $47,571.56.

[21] In relation to a fine the defendant submits that the culpability is the lower end of the medium band with a starting point of $55,000.00. The defence relies on cases to support its argument in this respect, such as *Department of Labour v Sealed Air (New Zealand)*[9] and *MBIE v Mount Pack and Cool Ltd*.[10]

[22] The defendant submits that an uplift of five percent is appropriate to reflect the previous historical convictions. Mr Eaton submits that the discounts that are appropriate are:

(a) five percent for co-operation;

(b) ten percent for remedial steps taken;

(c) ten percent for reparation;

(d) five percent for remorse; and

(e) twentyfive percent for the guilty plea.

[23] Mr Eaton argues that a full guilty plea discount is still available as the company's argument on the charging document and the resulting appeal decisions

---

9 *Department of Labour v Sealed Air (New Zealand)* DC Waitakere CRI-2011-090-008896, 13 June 2012.

10 *MBIE v Mount Pack and Cool Ltd* DC Tauranga CRI-2013-070-004424, 26 August 201.

raised important points of law of consequence to all regulatory prosecutions, and that once that appeal process ended there was prompt entry of the guilty plea.

[24] Mr Eaton submits that once the aggravating uplift and the mitigating discounts are taken into account the end point for a fine is $28,875.00.

Emotional Harm Reparation

[25] The payment of emotional harm reparation is pursuant to s 32(1)(b) of the Sentencing Act 2002. That is reparation where an offender has, as a result of the offending for which it is convicted, caused a person to suffer emotional harm.

[26] I have carefully considered the Victim Impact Statement filed by Ms Hemi. That statement, to put it bluntly, outlines the harsh realities of her life as a result of the accident. The accident had a profound effect which is ongoing on her physically and she is now paralysed from the breast down. In the statement it is noted that although she can use her arms, her shoulders are breaking down and that is expected to get worse. The statement discusses: the ongoing pain; the use of a catheter and bags attached to her; involuntary spasms; the inability to get into a regular routine and similar such matters. She describes the changes to her life as 'massive'. She has had to learn new limits, submit to the major life changes and is, overall, having mental health issues. She sees herself as a burden to everybody whereas before she was the provider for her whānau.

[27] The other Victim Impact Statements provided by her son, her carer, and her aunty and uncle, set out the picture clearly as to the impact on Ms Hemi and her wider family. An example that is poignant of this is that Ms Hemi's son now has to assist his mother in undertaking very personal bodily tasks.

[28] The High Court in the authority of *Big Tuff Pallets Ltd v Department of Labour*, commented that fixing an award for emotional harm is an intuitive exercise, the quantification of which defies finite calculation and that the objective of the Court is to arrive at a figure which is just in all the circumstances.[11]

---

[11] *Big Tuff Pallets Ltd v Department of Labour* HC Auckland CRI-2008-404-000322, 6 February 2009 at [19].

[29] The prosecutor refers the Court to *Department of Labour v Sealed Air (New Zealand)*.[12] There the victim had been struck by crates during an unloading exercise. The victim suffered fractures to his spine, pelvis and ankle amongst other injuries. The Judge described the injuries as very serious and life-changing and assessed emotional harm reparation at $40,000.00 to $50,000.00 as being generally appropriate in such the cases. The ongoing effect of the incident upon the victim in the *Sealed Air* case was not specifically outlined in the judgment.

[30] In the authority of *WorkSafe v Seventh-Day Adventist Church Property Trustee NZ*, the victim suffered serious spinal fractures, including a spinal cord injury and bowel dysfunction after falling from a height while undertaking a high ropes course.[13] Part of the judgment led to an inference, as I saw it, that the victim there was still able to walk. Reparation of $40,000.00 was ordered.

[31] In considering the impact of this accident on Ms Hemi, her family and on Ms Hemi's future life, I consider that an emotional harm reparation order in the sum of $50,000.00 is appropriate.

Consequential Loss Reparation

[32] The prosecutor filed an affidavit of Ms Sandra Ann Lee. She is a chartered accountant employed by the prosecutor, her affidavit calculates the 'statutory shortfall'. This term is described by Venning J in *Oceania Gold (New Zealand) Ltd v WorkSafe New Zealand* as:[14]

> …the pecuniary benefit that the victim would have received (calculated by reference to net income in the period prior to the incapacitating incident) and limited to the shortfall between that amount and the victim's entitlement to compensation payments under the Accident Compensation Act for the period which they are entitled to such payments (the "statutory shortfall approach").

[33] I accept the evidence contained within the affidavit that that shortfall correctly calculated is $146,204.58. This is on the basis that Ms Hemi is not working or will not work again.

---

12 *Department of Labour v Sealed Air (New Zealand)*, above n 10.
13 *WorkSafe New Zealand v Seventh-Day Adventists Church Property Trustee NZ* [2015] NZDC 25135.
14 *Oceania Gold (New Zealand) Ltd v WorkSafe New Zealand* [2019] NZHC 365 at [41].

[34] I accept that compensation must be "fair rather than full" as was discussed in *Davies v Police*[15] by Elias CJ and as also by Venning J in *Oceania Gold*.[16]

[35] The defendant notes that Ms Hemi received some $74,374.44 as income paid by the defendant when employed in a data capture role from November 2015 to October 2016 and that she had been retrained at the cost of the defendant and is now "able to work." It is submitted that the defendant left that part-time employment for personal reasons and the evidence provided by the defendant supports this. It also appears to be somewhat supported by my reading of the Restorative Justice conference report. The defendant's counsel provided calculations as to Ms Hemi's potential future income, arguing it is between $150,074.00 to $353,116.00. The defence submits that it had spent $20,197.12 on pastoral care and support for Ms Hemi's family; provided her with a modified vehicle; and refurbished her home at an estimated cost of $20,000.00. The submission Mr Eaton makes is that these amounts should reduce any consequential loss payable.

[36] Overall, when I consider the evidence that is available to the Court it is my view that the Ms Hemi's ability to work in the future is extremely restricted. I do accept that there has been 'retraining and the creation of a role for her'. Whether she could carry out that role in the medium term remains in question. However, I do consider some credit should be allowed for those factors. I note that the Ms Hemi is receiving an Accident Compensation Corporation ("ACC") entitlement. That would indicate ACC has assessed her as being unable to work. I agree and accept that the defendant has made contributions outside any insurance policy it may have by way of providing a vehicle, carrying out modifications to her home and supporting her family. Aside from reducing the reparation payable, these expenses incurred, and steps taken are indicative of mitigating factors which are assessed later, and I have taken care not to double count.

[37] I reject the submission that the defendant is in a position to, or has the ability to, accurately assess Ms Hemi's potential in regard to future work and, therefore, her future earning ability. I note that when she was working for the defendant after the

---

15 *Davies v Police* [2009] NZSC 47 at [18]
16 *Oceania Gold*, above n 14, at [52].

accident she completed an average of 8.5 hours per week and that the calculations that have been provided by the defendant via the affidavit provided by Mr Nathan Gabriel Howes included calculations where the modelling was on the basis of her working up to 20 hours per week in the future. I do not have any evidence supporting the suggestion that she might in the future be able to work 20 hours. In reading Mr Howes' affidavit I also note that the submissions he makes in relation to the way in which the ACC system works is not supported by any authority.[17]

[38] In the end my considered decision is that I accept the statutory shortfall figure calculated by Ms Lee. I reduce that figure by $15,000.00 to account for the period of employment and part of the other expenditure by the defendant. In assessing it on a case specific and intuitive basis, as the case law suggests I should do, I find that a consequential loss reparation order of $131,204.58 is appropriate.

Level of fine

[39] The start of the discussion on this issue must be the accepted and agreed practicable step that was available to the defendant: there was a failing to ensure the bins, when lifted, were always supported by the backrest or the mast. The defendant did not have a safe operating procedure that governed how the bins were to be stacked.

[40] In considering the matter I take into account that the failing is specific to the incident and not a broad overall failing to have safe operating procedures in relation to the company in general.

The nature and seriousness of the risk of harm occurring as well as realised risk

[41] The forklift was the only short mast out of 18 forklifts at the site. There was a significant yet specific risk when the forklift was used to lift bins at height, thus the end result in this case. That risk has, in my view, a moderate likelihood of occurring and a very serious result when the risk is realised. Here we have unloaded bins weighing around 75 kilograms and the risk is of serious injury or potential death.

---

17 Mr Howes' affidavit, 10 July 2020, at [18].

Degree of departure from standards prevailing in the relevant industry

[42] The defendant acknowledges there was as departure from industry standards but mitigates this by referencing the procedures that it did have in place: the stacking of two bins only and physical distancing. After having given due consideration to the defence argument I find that the carrying and lifting of goods by forklifts which are not supported by either the mast or the backrest is a clear and unambiguous departure from recognised standards, despite the internal procedures.[18]

The obviousness of the hazard

[43] This particular issue or hazard which occurred was only able to occur in the one forklift out of the 18 but should have been obvious to a competent forklift operator, I note again that Mr Baumber had been certified in the operation of forklifts.

The availability, cost and effectiveness of the means necessary to avoid the hazard

[44] The specific hazard, if it had been recognised, would have been easily and cheaply prevented by creating a specific procedure in relation to the operating of this specific forklift and in relation to the lifting of things generally.

The current state of knowledge of the risks and of the nature and severity of the harm which could result

[45] The defendant company was aware of the risk generally in relation to forklifts. Because it had not particularly considered this forklift it was not aware of the particular risk that the short mast forklifts created.

Discussion

[46] Counsel for both the prosecution and the defence have discussed the *Sealed Air* case.[19] There a starting point of $70,000.00 was adopted where the failing was to provide a designated safe zone for delivery drivers when unloading was taking place.

---

[18] Department of Labour, Safety Code for Forklift Truck Operators: No. 1 Front Loading Forklift Trucks' (first published in 1979); ProDriver Training Ltd, Operate an Industrial Powered Lift Truck (Forklift) & F Endorsement Study Guide (first published 22 November 2014).

[19] *Department of Labour v Sealed Air (New Zealand)*, above n 10.

In my view that failing is more significant than the failing in this present case and posed a greater risk and appear to be more obvious than the risk in this case.

[47] In *MBIE v Mount Pack and Cool Ltd* where an employee was struck by a forklift where there was no traffic plan in place and there had been a previous near miss which should have triggered the re-audit of the safety plan, a starting point of $70,000.00 was used.[20] That failing was obvious and was fundamental more so than in this particular case.

[48] In *WorkSafe New Zealand v Freight Haulage Ltd* a truck's headboard was not securely fastened to a forklift.[21] When it was being removed it rotated and hit the victim causing facial injuries. There was a lack of documented procedure, no safety exclusion zone, a starting point of $70,000.00 was appropriate.

[49] When I consider those cases and the factors I have outlined I consider this case falls to the lower end of the medium band of culpability and that a starting point of $60,000.00 by way of fine is appropriate.

Aggravating factor

[50] The prior convictions that I have are for the defendant company but also for Talley's Fisheries Limited. I do not consider that I can attribute previous offending by Talley's Fisheries Limited to the current defendant. In making that decision I do not and have not overlooked the fact that there is a parent company relationship. I consider that it is appropriate only to take into account the previous convictions of Talley's Group Limited. I hold the view that it would be prejudicial to hold the subsidiary company liable for a parent company's prior convictions or vice versa when the actual failing which contributed to the offending may be limited to one, not the other.

[51] Here the defendant has the following convictions:

---

20 *MBIE v Mount Pack and Cool Ltd*, above n 10.

21 *WorkSafe New Zealand v Freight Haulage Ltd* DC Invercargill CRI-2015-025-002187, 12 April 2016.

(a) 2015 – breaching a duty under the Act where it was fined $48,000.00, reparation $35,000.00, Court Costs $130.00;

(b) 2014 – failing to ensure the safety of employees – fined $73,520.00, reparation $21,000.00.

[52] In assessing these convictions I take into account the quantum of each fine and the reparation orders made, and they indicate prima facie that the defendant was of a moderate gravity, as was the impact on the victims. In looking at the issue of uplift I consider these are relevant because they increase the overall culpability of the defendant, indicating a greater risk of re-offending and suggesting that a greater deterrence is required. I take note that an uplift needs to be proportionate in the circumstances. I note the dates of conviction and the dates of this offending. I consider a 10 percent uplift is justified.

Mitigating factors

Reparation

[53] In relation to reparation a five percent discount is appropriate to reflect the emotional harm and consequential loss reparation paid to Ms Hemi.

Remorse

[54] I carefully considered the Restorative Justice report. I note that the Ms Hemi at the conference and in her Victim Impact Statement expresses some concerns about Mr Andrew Talley not having visited her (as it was indicated he would), and that the position created was not of a suitable kind and nature for her taking into account her background and disabilities.

[55] Overall, the steps taken by Mr Wallace (the then Talley's Group manager) on behalf of the defendant were significant. They are clear indicators of remorse. The support provided to Ms Hemi and her family is supported by the fact that Mr Wallace travelled from Motueka to Christchurch Hospital immediately upon hearing of the accident. I note that Ms Hemi found the role provided following the accident to be unsuitable but that is more a reflection of the effects of the accident rather than any

lack of remorse on the part of the defendant. I consider that a 10 percent discount is appropriate for remorse. In coming to this discount I have considered the $15,000.00 reduction to the reparation that was for expenses indicated remorse. Those factors have not been double counted.

Steps taken

[56] The steps taken by the defendant appear to be significant, including a comprehensive review of forklifts in its business; traffic separation schemes; a reconfiguration of the area where the incident occurred; and standard operating procedures being drafted. I note the discussion at the Restorative Justice conference Mr Wallace's views in relation to the defendant's health and safety attitudes and the change as a result of this incident. I allow a five percent discount.

Co-operation

[57] It is accepted between the parties that the defendant co-operated with the investigation. A five percent discount is appropriate.

Guilty plea

[58] In relation to guilty plea credits the defence seeks a full 25 percent. In support it highlights the procedural history of the matter which I have discussed at the start of this decision. No case law was put to me by the defence in that regard. The Supreme Court in *Hessell v R*[22] outlined the rationale for guilty plea discounts and the policy reasons of: saving costs to State and judiciary; the benefits to the administration of justice; reducing the backlog of trials; and commented "all circumstances in which the plea was entered must be addressed, not merely the timing".[23]

[59] It is of some moment to note that following the Supreme Court refusing leave to appeal, that decision being notated 5 April 2019, the prosecutor made an application to amend the charge and that application was declined on 8 July 2019. The case was then set down for trial.

---

22 *Hessell v R* [2010] NZSC 135 at [45].
23 At [51].

[60] It appears to me there was some four months between the release of the District Court decision declining the application to amend the charges and the indicated guilty plea. The prosecutor and the defence then engaged in making amendments to the Charging document and summary of facts.

[61] The further point that has to be noted is that the appeals raised important points of law that have consequence for regulatory prosecutions. The entry of the not guilty plea was not an indication of denying all responsibility of the offending but was a legal challenge to the way in which the prosecution was conducted.

[62] The impact of the not guilty plea on the victim, therefore, is less.

[63] One has only to note the frequency in which the Court of Appeal's decision in this case is cited in courts since it was released. The Supreme Court comments in *Hessell* were aimed in reality at purely criminal prosecutions rather than quasi criminal charges. In considering these matters, I accept the defence submission that there has been considerable benefit in regard to the position it took in terms of legal precedent for all regulatory prosecutions. I also know there were incentives and benefits to the particular defendant in this case and appeals were being made for tactical reasons which cannot be ignored.

[64] I consider overall that a 20 percent guilty plea discount is appropriate.

[65] I find that the following penalties and payments are appropriate:

(a) Emotional harm reparation - $50,000.00;

(b) Consequential loss reparation - $131,204.58;

(c) Fine - $36,000.00, calculated:

(i) starting point $60,000.00; and

(ii) total discount of 40 percent.

(d) I award $56.00 in prosecutor's costs.

(e) $130.00 in Court costs.

[66] I then, as I am required to in the terms of the *Hanham* process, make an overall assessment of the proportionality and appropriateness of the total imposition of reparation and fines. I, again, make reference to the Summary of Facts and that the agreed practicable steps that the defendant should have taken. I refer to the assessment I made in relation to the various sentencing factors and re- read the Victim Impact statement of the victim, Ms Hemi.

[67] In looking at the emotional harm reparation, consequential loss reparation, and fines I consider, overall, that the end result is both proportional and appropriate.

[68] I hold accordingly.

_____
Judge K J Phillips
District Court Judge

Date of authentication: 03/09/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.