IN THE DISTRICT COURT
AT QUEENSTOWN

I TE KŌTI-Ā-ROHE
KI TĀHUNA

CRI-2019-059-000316
[2020] NZDC 17784

WORKSAFE NEW ZEALAND
Informant

v

WILSON CONTRACTORS (2003) LIMITED
Defendant

Hearing:	18 and 19 February 2020 and 25 June 2020
Appearances:	Ms Longgill and Ms O'Brien for the informant Ms Lund for the defendant
Judgment:	3 September 2020

RESERVED JUDGMENT OF JUDGE K J PHILLIPS
Under the Health and Safety at Work Act (2015)

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[1] The defendant company, Wilson Contractors (2003) Limited ("Wilson Contractors") pleaded guilty to the charge before the Court. A two day disputed facts hearing was held in the District Court at Queenstown on 18 and 19 February 2020, following which the defendant company indicated the facts were accepted, no judgment was required and that a guilty plea would follow. On 25 June 2020, the plea was entered, and the Court heard sentencing submissions. At that time there was an amendment to paragraph [4] of the particulars contained within the charging document.

[2] The plea of guilty was entered to one charge laid against the defendant company under ss 36(1)(a), 48(1), and 48(2)(c) of the Health and Safety at Work Act 2015 ("the Act"). The maximum penalty for the offence is a fine not exceeding $1,500,000.00.

[3] The charge as laid reads:

> Being a PCBU having a duty to ensure, so far as reasonably practicable, the Health and Safety of workers who work for the PCBU, including Gawain Meredith Owen, while the workers were at work in the business or undertaking, namely operating a 2008 HAMM HD 75 Roller, registration number HME763, serial number H1730738; and that failure exposed the worker to a risk of serious injury or death.
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> **Particulars**
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> It was reasonably practicable for Wilson Contractors (2003) Limited to have:
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> 1) Conducted an effective hazard identification and risk assessment, and implemented appropriate controls;
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> 2) Complied with their own Health and Safety Plan which details that 3 tonne rollers and large plate compactors would be used for compaction work;
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> 3) Prior to operating machinery on a public road, ensured workers had the appropriate endorsements to operate that machinery;
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> 4) Ensured workers were appropriately trained and competent to operate machinery they were instructed to operate; and
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> 5) Completed a risk assessment when the 2008 HAMM HD 75 Roller was brought to site and ensured that information on its safe use was communicated to all staff working on site.

Facts

[4] Wilson Contractors is a company that specialises in a range of services including earthworks, siteworks, roading and drainage in the Otago and Southland areas. At the date of the offence, 4 May 2018, it employed 65 full time workers between Queenstown and Invercargill. The offence location in the charging document is described as Queenstown.

[5] The defendant company was given the contract to install safety barriers along State Highway 6, between Frankton and Kingston. Work commenced in early April 2018. At the time of the offence, the project was in its second stage namely, the

widening of the shoulder to create a flat area behind the safety barrier for future maintenance work.

[6] On 4 April 2018, Wilson Contractors hired a 4 tonne roller from the Porter Group, Cromwell ("PCG"). The width of the roller's drum is 1452mm. On 27 April 2018, the wiring of this roller caught fire and the roller was returned to PCG. On 1 May 2018, PCG replaced the 4 tonne roller with a 7.5 tonne roller, it did not have any 4 tonne rollers available as a replacement. The width of the drum of the 7.5 tonne roller is 1680mm.

[7] The victim Mr Gawain Meredith Owen observed the roller being delivered on a transporter and he discussed with his work colleagues that the roller was too big for the job being undertaken. He stated:[1]

> We were just like ahh that a pretty big roller…like compared to the last one… and I knew there was no other, that was our only option of a roller to get and like I said it was a rush, not a rushed job but there was a time like a time line for the seal.

[8] On 4 May 2018, the defendant company was completing phase two in the Drift Bay area at the northern end of State Highway 6. This involved digging down approximately 2700mm and out 300mm of the edge of the road to make a shallow trench. This trench was backfilled with arrogate and compacted down to create a shoulder that was flush with the existing road. Seal was then placed on top of that compacted arrogate. The width of the shoulder was approximately 1800mm.

[9] Mr Owen was initially involved in assisting the site supervisor in traffic management tasks and hand held plate compacting. The excavator operator for the defendant company was placing and levelling gravel and a truck was being used to bring in the arrogate which was then tipped into the trench.

[10] The site supervisor, Mr Whitley, asked Mr Owen if he had operated a 7.5 tonne roller, to which Mr Owen responded that he had not, but that he had previously operated a 3, 12, and a 20 tonne roller. The investigation disclosed that Mr Owen had done some 29.4 hours of work involving him using rollers, but on flat areas.

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[1] Summary of facts at [7].

[11] Mr Whitley directed Mr Owen to operate the 7.5 tonne roller and observed him on a flat area and then progressing up a hill. Mr Whitley stated that Mr Owen was not speeding and appeared cautious and he "couldn't pick up anything that he was doing wrong." At this stage Mr Owen was operating the roller on a flat, wide, open layby area which had no steep drop offs.

[12] After one and half hours Mr Whitley instructed Mr Owen to travel south down the shoulder of the road in the roller, this shoulder is narrower than the layby area. The shoulder contained an area of vegetation and a bank with a steep drop off leading down towards Lake Wakatipu.

[13] Mr Owen was operating the roller on the shoulder of the road when he felt the roller begin to slide towards the bank. He stopped and tried to drive forward and turn left towards the road, and away from the bank. However, due to the articulated turn mechanism of the roller, when Mr Owen turned the front towards the road, the back of the roller moved towards the bank. The roller began to slide backwards down the bank and rolled a number of times. It came to a brief stop some twenty metres down the bank and Mr Owen managed to escape. The roller then continued to roll for some further 10 metres before coming to rest on a large bolder.

[14] Mr Owen was removed from where he had positioned himself, by a specialist recovery team. He suffered significant injuries.

[15] The High Court in the decision of *Stumpmaster v WorkSafe New Zealand* set out a four step approach to be used by sentencing courts, in regard to offending under the Act:[2]

> (a) assess the amount of reparation;
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> (b) fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;
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> (c) determine whether further orders under ss 152—158 of HASWA are required; and
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> (d) make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three

[2] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [35].

> steps. This includes consideration of the defendant's ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.

[16] In the terms of *Stumpmaster* when fixing the fine, four guideline bands should be referred to:[3]

Low capability	:	Up to $250,000
Medium capability	:	$250,000 - $600,000
High capability	:	$600,000 - $1,000,000
Very high capability	:	$1,000,000 plus

[17] Section 151 of the Act provides that in sentencing an offender for an offence in terms of s 48 of the Act, the Court must apply the provisions of the Sentencing Act and have particular regard to:

a) ss 7 – 10 of the Sentencing Act;

b) the purpose of the HASWA;

c) the risk of and the potential for illness, injury or death, that could have occurred;

d) whether death, serious injury, or serious illness occurred or could have reasonably have been expected to have occurred;

e) the safety record of the offender to the extent it shows whether any aggravating feature is present;

f) the degree of departure from prevailing standards in the sector or industry; and

g) the offender's financial capacity to ability to pay any fine, to the extent that it has the effect of increasing the amount of the fine.

[18] The Court in the decision of *Department of Labour v Hanhan and Philp Contractors* set out factors which the Court should use (some of which mirror the s 151 matters) when assessing the culpability in the particular circumstances of the case:[4]

a) The identification of the operative act or omissions at issue. This will usually involve the clear identification of the "practicable steps"

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3 At [53].

4 *Department of Labour v Hanhan and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) at [54].

which the Court finds it was reasonable for the offender to have taken in terms of s 22 of the Act;

b) An assessment of the nature and seriousness of the risk 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 means available to avoid the hazard or mitigate the risk of its occurrence.

Summary of the Prosecution position

[19] In carefully drafted and thorough written submissions, amplified at the sentencing hearing, the prosecutor assessed the defendant's culpability to be at the high end of the medium band in *Stumpmaster*. The prosecutor submits that an emotional harm reparation order in the vicinity of $50,000.00 is appropriate, along with consequential losses of $19,092.00. The prosecutor submits that a starting point for the fine should be $550,000.00, and there should be discounts for: reparation at 10 percent; co-operation at five percent; prior good character at five percent; and 15 percent for the guilty plea. The prosecutor in the terms of s 152(1) of the Act, seeks an order for costs of $10,407.00.

Summary of Defence submissions

[20] The defence submit the emotional harm reparation order should be $45,000.00; consequential loss should be in the sum of $14,242.08 for losses already incurred, plus $2,500.00 being a portion of the future predicted consequential loss and other expenses claimed by Mr Owen in his victim impact statement. The defence submit a starting point for the fine should be $475,000.00 based the culpability falling in the medium band. The defence ultimately submit that no fine should be imposed due to the defendant's financial position and taking into account the impact of the COVID-19

pandemic. The defendant submits a project order is appropriate. The defendant does not argue against the cost order.

Reparation

Emotional Harm

[21] The victim impact statement from Mr Owen is detailed and lengthy. It makes it clear that his injuries were severe and there is an ongoing impact upon his abilities and on his life generally. He has spent some 18 days in hospital, five of which were in the Intensive Care Unit. He suffered cuts and scratches to his face and body, and a head wound which required seven stitches. He had four broken ribs, a punctured lung, compound fractures to his left tibia and fibula and requires ongoing skin and muscle grafts. The artery in his left foot was damaged and he suffered a large wound on his right foot.

[22] His previous active lifestyle ended; he had to undergo eight operations; the injuries have had an "all-encompassing effect". He sees his injuries as having completely taken over his life. In the future he faces the prospect of further operations, financial burden (which is unknown), and the psychological burden of learning to live with his injuries.

[23] The mattes that I note from the victim impact statement are:

a) Mr Owen has lost mobility, he will never be able to regain his previous position;

b) his left foot now has a permanently limited range of movement;

c) he is, at this moment in time, in constant pain with one ankle rubbing on the inside of his boot;

d) he has to see a physiologist since the accident happened; and

e) he was on crutches for six months and during that period was very dependent on others.

[24] The victim impact statement contains detail as to how Mr Owen was positioned immediately following the roller rolling over and then the treatment in hospital and the various operations that he underwent. He went through a period of time where grafts had to be taken from sites on his upper thighs and used on both his lower legs. A skin flap from a large section of his thigh grafted onto the injured left lower leg was problematic, and if it had not "taken", the leg would have had to be amputated. The graft did prove to be healthy given time, but there was a constant fear that emergency amputation may have to take place.

[25] Mr Owen had by May 2019, received advice that the bone had not unified and would not heal without further major intervention, and he was offered the alternative of further operations or amputation. He had a further number of operations and as placed back on crutches and by the time of the sentencing hearing, two years after the incident through his perseverance, he was finally advised that the bone had begun to heal. He and his surgeons are optimistic of saving his leg.

[26] Mr Owen is a Scottish national with his visa expiring in November 2020 and the ACC structure he is currently under, and perhaps his removal from New Zealand when his visa expires, are further stressors.

[27] In the authority of *Big Tuff Pallets Ltd v Department of Labour* the Court commented:[5]

> Fixing an award for emotional harm is an intuitive exercise; its qualification defies finite calculation.

[28] One has to read and consider the victim impact statement to obtain the full impact upon Mr Owen of his injuries and on his life. In my view, the emotional harm reparation of $50,000.00 as promoted by the prosecutor is appropriate in all the circumstances.

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5 *Big Tuff Pallets Ltd v Department of Labour* HC Auckland CRI 2008-404-322, 5 February 2009 at [19].

Consequential Loss

[29] The issue of consequential loss is one where the prosecutor filed affidavits from a Mr Shaw, a chartered accountant. The consequential loss is calculated by him in the terms of the "statutory shortfall" to be estimated at $17,099.14. This is made up of the $14,242.08 loss incurred by Mr Owen, resulting from the accident up to 25 June 2020, and a predicted loss of $2,850.06 being until 1 November 2020, when his visa expires. It is predicted on the basis that the he is unable to work during this period.

[30] The defendant accepts the $14,242.08 for the 20 percent shortfall in earnings as an appropriate award. But queries whether it is appropriate for the Court to award consequential loss for forecasted loss of earnings with are speculative, other costs which are not supported by evidence, and whether the costs claimed were occurred as a consequence of the offending. The defendant takes a global position in saying a fair and reasonable sum of $2,500.00 should be awarded in addition to the loss incurred to 25 June 2020.

[31] The victim impact statement details a further $2,000.00 that Mr Owen states he has spent as a result of the accident. This includes; new shoes and pants purchased because of the increased size of his foot; physio equipment; and increased heating bills due to him being at home and bed bound. No receipts or evidence of this has been provided.

[32] Further, in reading the information contained in the victim impact statement as to the medical position of Mr Owen, I accept the overall position promoted by the prosecutor, that is one of significant injury, lengthy rehabilitation and the general inability to work.

[33] I note that Mr Owen is going for medical consultations every six weeks. His ability to work is being assessed but there is no immediate position in relation to that within the short term. In reading the information put before me, I consider that it is unlikely he would be able to be involved in a labour intensive role for a significant period of time, and I consider overall, that one must approach the issue of

consequential loss using the policy of fair rather than full as is dictated by the case law.

[34] It appears on the evidence that in time Mr Owen will hopefully be able to work again and begin to do some of the outdoor activities which he enjoys. However, I am satisfied that the full consequential loss award is appropriate (the incurred and predicted). The Courts commonly award consequential loss on a predicted basis, and I find the evidence sufficient to do so in this case.

[35] I consider that Mr Shaw's evidence is what should be the base for the award. I award consequential losses of $17,092.14 as is detailed in Mr Shaw's evidence. In relation to the costs that Mr Owen has incurred and is detailed in the victim impact statement I consider a further $1,000.00 is a fair compensation for those matters. I note the defendant's concerns around causation and evidence, but I consider $1,000.00 is an appropriate award for the reasonable cost claimed.

[36] Accordingly, I award reparation of consequential loss of $18,092.14.

Fine

Identification of operative acts and omissions

[37] These are detailed in the charge itself, as outlined at paragraph [3] above. They are agreed upon by the defendant. The operative acts and omissions are wide-ranging and fundamental to the business operation of the defendant, which is in itself inherently risky and dangerous, involving the operation of heavy machinery around busy roads.

[38] The defence position is that the failings were in the implementation of risk controls, rather than identification and assessment. This submission implies that there is an acceptance that the defendant knew about the risk and failed to act. That does not reduce the culpability in any major way. I note that failure to appropriately train workers in such areas is a serious failing.

Nature and seriousness of the harm and realised risk

[39] There was a risk of death to the driver of this roller and potentially to anyone close by when the incident happened. Serious harm was caused to Mr Owen.

Departure from industry standards and obviousness

[40] The defence submit there was no major departure from industry standards; the prosecutor submits there was a major departure from such standards. When one has regard to the industry standards, one of which must be only using equipment suited for the job at hand, I consider that this case was a significant departure. I further note that Mr Owen himself, on the day of the incident, expressed concern about the large roller. The risk was therefore obvious. I do not accept the position of the defence that the degree of departure from prevailing industry standards is at a lesser position than the prosecution has argued.

[41] Here we have an obvious risk and the means to avoid the risk was onsite; the use of a plate compactor on the areas close to the steep drop off. Such a simple direction would have minimised or indeed eliminated the risk, it would have been simple and inexpensive.

Discussion

[42] In arriving at an appropriate starting point for the fine, I have read a number of authorities where fines have been imposed in the medium culpability band. I intend to refer only to three.

[43] *Worksafe New Zealand v The Sunday Hive Co Ltd.*[6] A vehicle lost traction on a steep hillside, rolled backwards and although the victim attempted to jump clear, he was killed. The defendant company had failed to conduct an effective risk assessment and implement a safe system of work. The starting point was $700,000.00. When I read that authority the failings there were wider and more fundamental than in this case.

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6 *WorkSafe New Zealand v The Sunday Hive Co Ltd* [2018] NZDC 20796.

[44] *Department of Labour v Taranaki Civil Construction Ltd.*[7] The victim was operating the defendant's roller near the top of a bank, when the roller rolled down. Some hazards had been identified by the defendant, but there was a failure to minimise or isolate them even through cones or barriers. It was a case dealt with under the previous legislation and attracted a starting point of $70,000.00. The failings of the defendant, *Taranaki Civil Construction Ltd* are similar to those in the current case, but the impact on Mr Owen is more severe.

[45] *WorkSafe New Zealand v Mangorei Sawmill Ltd*.[8] There a digger lost traction and rolled down a bank. The victim upon regaining consciousness was able to call for help. The failings by the defendant company included not having an effective risk identification method, no specific register and no management plan for the work being undertaken. It was found that the offending fell within the medium band and under the previous legislation attracted a starting point of $70,000.00. Quite simply the facts of that case fall within a similar aura of the present offending.

[46] I have been assisted in arriving at a decision in relation to the defendant's culpability, by having regard to the evidence called at the disputed facts hearing in February of this year. I accept the submission by the defence that failure was in regard to implementation rather than identification. But inherent in that approach is that the defendant knew of the serious risk posed and did not take appropriate action. The failing was limited to this specific piece of machinery but showed a clear deficiency in the defendant company's health and safety systems.

[47] Therefore, after having considered those matters, I arrive at an appropriate starting point for the fine of $500,000.00.

Discounts

[48] There following discounts are appropriate:

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7 *Department of Labour v Taranaki Civil Construction Ltd* DC New Plymouth CRI-2011-043-3018, 25 October 2011.

8 *Worksafe New Zealand v Mangorei Sawmill Ltd* [2015] NZDC 483.

(a) The defendant accepts that reparation is to be ordered and both parties submit 10 percent is appropriate. I consider this is appropriate and also accounts for the support provided to Mr Owen following the accident, which is indicative of remorse;

(b) The defendant company co-operated with the investigation, a discount of five percent is appropriate;

(c) The company had a prior good safety record, that is no prior convictions – I allow a discount of five percent;

(d) The remedial steps in relation to remedial steps are in my view significant and have increased the health and safety knowledge throughout the defendant company – I allow five percent;

(e) I accept that the defendant company gave Mr Owen support following the incident and is remorseful. I do not allocate a specific discount as this is adequately provided for in the discounts above; and

(f) The submission made by the defence that Mr Wilson, the owner of the defendant company, is a positive member of his community and is active within it. He, through the defendant company, makes donations and at times provides company services free of charge – I allow five percent discount.

[49] Therefore, the total discount is 30 percent.

[50] In *Stumpmaster* the Court commented:[9]

> …we consider a further discount of a size such as 30 percent is only to be expected in cases that exhibit all the mitigating factors to a moderate degree, or one or more of them to a high degree. That is not to place a ceiling on the amount of credit, but to observe a routine crediting of 30 percent without regard to the particular circumstances is not consistent with the Sentencing Act.

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9 *Stumpmaster v WorkSafe New Zealand*, above n 2, at [67].

[51] Having considered that and considering the findings as detail of what appropriate discounts are, I allow a 30 percent discount.

[52] In relation to guilty plea discount, I do not accept the defence submission that a 20 percent discount is appropriate where (as in this case) there has been a disputed facts hearing held where the victim was required to give evidence and be questioned. Further, I note that the prosecutor's case was in reality accepted by the defendant following that hearing.

[53] I consider overall that the 15 percent submitted by the prosecutor is merciful and I allow 15 percent.

Awards

[54] Accordingly, the following awards are made:

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

(b) Consequential loss – $18,092.14

(c) Fine – Starting point $500,000.00. Discounts applied and calculated in accordance with *Moses v R* - 45 percent.[10] Therefore, the end fine is $275,000.00; and

(d) Prosecution costs – $10,407.00.

Further considerations

[55] However, that does not complete the arguments put to me. The defence position at sentencing was that due to the financial position of the company, particularly in the light of the COVID-19 pandemic, that a fine should not be imposed and the defendant offered to undertake a project order at a cost of some $58,750.00.

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[10] *Moses v R* [2020] NZCA 296.

Project order

[56] The prosecutor does not accept that a project order should be made. The defendant proposes to:

(a) Establish and support a quarterly health and safety forum for health and safety practitioners in the civil construction industry in Southland;

(b) Design and facilitate a road safety workshop focusing on construction design, management regulations, issues and communications, offered free of charge to "key stakeholders";

(c) Facilitate six training days for any workers in the local construction industry;

(d) Arrange and pay for ten managers to complete the LeadSafe supervisor training program; and

(e) Produce an article detailing the incident and the learnings from it.

[57] Although the prosecutor remains opposed in principle to a project order, by way of suggestion the prosecutor proposes that the defendant:

(a) Designs and facilitates a road safety workshop focusing on common issues on construction projects offered free to stakeholders to be designed and delivered by a suitably qualified person approved by WorkSafe to be delivered within nine months;

(b) Arranges and pays for 10 managers to complete the LeadSafe supervisor training program; and

(c) Produces an article detailing the incident and the learnings from it.

[58] The question is whether a project order should be made? In *Maritime New Zealand v Fullers Group Ltd* the prosecutor referred to following factors suggesting project orders must at the very least:[11]

(1) go beyond compliance with HASWA;

(2) have a meaningful connection to the conduct for which the defendant is to be sentenced;

(3) do not propose things which already exist;

(4) require engagement from workers; and

(5) require something above and beyond existing health and safety obligations.

The Judge in *Fullers Group Ltd* put the factors as matters that *may* be considered, not as a mandatory list – but noted they make sense.

[59] When I read the provisions of the Act, a project order must also promote the purposes of the Act and I consider it must create utility for the wider community. A project order is not to take the role of providing training or services a PCUB is required in law to provide to its workers.

[60] Of moment in relation to the question as to whether a project order should be made is that there is already an established health and safety forum for civil contractors in Queenstown. Further there is an established general forum in Southland. I note that other PCBUs have legal obligations under the Act to train their own workers and to ensure competence.

[61] Considering the overall position, having regard to the forums that already exist, and the prosecutor's basis of opposition to a project order, I cannot be satisfied the creation of the suggested new forum, would create the intended benefit for the industry to the level required. However, I do accept there is utility for wider contracting community in an article being produced and distributed to the industry.

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[11] *Maritime New Zealand v Fullers Group Ltd* [2020] NZDC 10157 at [17].

[62] I have fully considered the submissions of each party, and the suggested project order as put by each party. I do not believe the order in either case, is appropriate.

[63] I consider a brief order can be made and following terms, ordinarily similar to those already agreed between the parties:

(a) The project order requires the defendant to produce, in collaboration with Civil Contracting New Zealand, an article dealing with the incident that formed the basis of the conviction and sentence. The article is to:

(i) Outline the lessons learnt form the incident;

(ii) Be published in an industry publication approved by WorkSafe, such as SafeGuard, and is to be made available to members of Civil Contracting New Zealand; and

(iii) Be no less than 500 words in length and must be published within six months of this decision's release date.

(b) I allow in the terms of the quotation received by the defendant for such an article, the sum of $4,000.00.

Ability to pay

[64] In the terms of the *Stumpmaster* decision, the fourth step in the process is to make an overall assessment of the proportionality and appropriateness of the combined package of sanctions imposed by the earlier three steps. That includes consideration of the defendant's ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.

[65] The financial position that has been put to me, by the defence in relation to the defendant company:[12]

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[12] Affidavit of David Russell Crossan, 18 June 2020, at [6].

(a) Current Account Balance – $149,554.29;

(b) Forecast for 2021 financial year – a loss of $295,359.00;

(c) Current finance available – $1,611,807.32.[13]

[66] The following sections of the Sentencing Act 2002 clearly apply to a sentencing under the Health and Safety at Work Act 2015:

(a) section 8(h) – requiring the court to take into account the circumstances of an offender that might mean an otherwise appropriate sentence might be disproportionally severe;

(b) section 14(1) – allowing the court to decide not to impose an otherwise appropriate fine that an offender cannot pay;

(c) section 40(1) – which directs a court when imposing a fine to have regard to the financial capacity of the defendant; and

(d) section 41 – impowering the court to require a declaration from a defendant as to financial capacity.

[67] I refer to the authority of Justice Heath in *Mobile Refrigeration Specialists Ltd v Department of Labour*:[14]

> [54] There are dangers in interpreting the Sentencing Act in a manner that allows corporate offenders to readily escape financial penalties on grounds of alleged impecuniosity. For example, a company may be incorporated with no working capital of its own, to undertake a particular venture. If that venture were to go wrong and harm was caused to its employees, the absence of liquid funds might tell against a fine. Yet, if that same company had been funded during its trading life through the provision of shareholder advances, it would not be unjust to put the shareholder to the choice of providing funds to pay the fine or leaving the company to go into liquidation. Similarly, if a parent company stood to gain significant taxation advantages from losses incurred by a subsidiary, it would seem wrong in principle for those benefits to be

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13 It is submitted this will reduce as when the COVID-19 available banking allowance is revoked and will be further reduced as machinery or vehicles are sold or decrease in value, as they are security.

14 *Mobile Refrigeration Specialists Ltd v Department of Labour* (2010) 7 NZELR 2437 at [54]–[55].

> retained by the parent to the exclusion of the company's obligation to pay the fine. Again, the parent company could make a decision whether to advance moneys to pay the fine or to place the company in liquidation.
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> [55] Those considerations suggest that, in the case of a company, the Court should require clear evidence of financial incapacity, supported by appropriate disclosure of all material facts (most of which will be in the exclusive possession of the offender), before imposing a sentence below that appropriate to mark the offending. Disclosure would need to address issues such as any benefits accruing to a parent company through the insolvency of a subsidiary. In contrast to a human offender, a fine imposed on a company, while not a provable debt in a liquidation, will rarely be recovered subsequently. A company is not usually revived from liquidation. An individual who is adjudged bankrupt remains liable to pay a fine, even after discharge from bankruptcy.

[68] And:[15]

> [57] …Where clear evidence to justify a reduction in an (otherwise) appropriate fine exists, the discretion must be exercised judicially and on a principled basis. Financial capacity to pay a fine falls for consideration in that context.

[69] *Mobile Refrigeration* was discussed in *WorkSafe New Zealand v Benchmark Homes Canterbury Ltd*, Judge O'Driscoll stated:[16]

> …the Court retains a discretion to impose a fine beyond the company's apparent means to pay if the conduct of the offender was serious and the company should not be in business. In *Mobile Refrigeration Specialists,* Heath J dismissed the appeal because there was no clear and unequivocal material before the Court to demonstrate that a fine of that level could not be paid.

[70] Further, in the High Court case of *YSB Group Ltd v WorkSafe New Zealand* Duffy J considered the issue of the ability to pay. At sentencing in the District Court the Judge had referred to various principles, including that: "a fine ought not to place a company at risk."[17] On appeal Duffy J referred to the cases that I have just discussed, which do not accord with such a principle, and looking at Duffy J's comments, the sentencing Judge appears to have erred. With respect to the Judge, what was espoused as a principle was not correct when one has regards to the authorities.

[71] Duffy J stated:[18]

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15 At [57].
16 *WorkSafe New Zealand v Benchmark Homes Canterbury Ltd* [2016] NZDC 7093 at [188].
17 *YSB Group Ltd v Worksafe New Zealand* [2019] NZHC 2570 at [31](c).
18 At [41]

> … I see no reason for the five shareholders/directors to take precedence over the company meeting its financial responsibilities to third parties, particularly in the form of a financial penalty. This is not a case where the company genuinely lacks funds to pay a fine; it is simply a case where there is money to pay the fine imposed, but this will mean shareholders and directors will receive less than they otherwise would have received had the company not offended in the way that it did. That is no reason to reduce the fine below its present level.

[72] The argument in this current case on the part of the defendant is that due to the ongoing impact of COVID-19 a company cannot reasonably be expected to provide precise evidence in such circumstances. And overall the position is such that a fine would have an adverse effect on the defendant company's ability to operate and maintain staff and capital. Emphasis being placed by the company's accountant on the impact of COVID-19.

[73] The prosecutor's position is that there are a number of authorities where orders have been made under s 81 of the Summary Proceedings Act 1957, where a fine is paid over a number of years. The submission of the prosecutor is that if the pre-COVID-19 levels of profitability were to continue, then it would be capable of absorbing a fine at the level sought by the prosecutor without adversely affecting its ability to operate and maintain staff and capital.

[74] The defendant company says that it has already had to make employees redundant due to COVID-19 and that further redundancy are likely. I note that was prior to the Government announcing a particular package with some emphasis placed on the Queenstown Lakes District Council area, in the industry which the defendant is involved in. The defendant submits it is speculative that it will receive benefit from this package.

[75] In updated submissions made by the defendant, it is submitted that the company acknowledges that penalties are intended to "bite" however a fine should not put the defendant company at risk of going out of business or lead to employees losing their jobs.[19] The authority cited by the defendant is the *Department of Labour v Street Smart Ltd*:[20]

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19 Dated 17 July 2020.

20 *Department of Labour v Street Smart Ltd* (2008) 5 NZELR 603 at [59]

> The clear purpose of the Act, as was recognised in *Areva* at [39], is "to promote and enforce workplace safety". There are good policy reasons, which accord with the purpose and scheme of the Health and Safety in Employment Act, for ensuring that where employers infringe, penalties must bite, and not be at a "licence fee" level. It is important, therefore, that any reduction to the amount of a fine to reflect a reparation payment is viewed in the context of the offender's financial capacity to pay the fine and not treated as simply a mitigating factor justifying a reduction.

[76] These comments in my view represent and support an alternative view to the defendant's submission. When one reads the comments, there are directed at ensuring fines are not set at such a level, where it is more economical to pay the fines (plural, envisioning more than one incident) following accidents, rather than properly ensuring the health and safety of those at risk.

[77] When one has regard to Judge O'Driscoll's comments in *Benchmark Homes Canterbury Ltd*, the Court retains a discretion to fine a company beyond its ability to pay in appropriate cases.

[78] I do not accept the submission, that a fine would make redundancies likely, as being determinative of the issue. I have regard to the volume of financial evidence available on the ability to pay, but I note also that the defendant ultimately has the choice of how it operates in the future. It could lay off staff to pay the fine or alternatively it could decrease expenditure in any number of different areas. It is not for the Court to tell a defendant how to do this. I do not accept the submission the redundancies are a direct and immediate results of the fine. To make staff redundant is ultimately the defendant company's decision. There is not the position of the Court to enquire into the flow on effects of the fine at a micro level. In my view, I must consider the financial position in a broad way with reference to the evidence available.

[79] In this case the submission relies on the current economic environment caused by the COVID-19 pandemic. The submission was written prior to Government action being made available within the Queenstown Lakes district area, and of course is based on predictions. If the predictions are incorrect and the defendant's turnover and profitability is maintained or indeed increases, it could be arguable that he defendant should be resentenced. In my view, that level of uncertainty is not describable in sentencing, and breaches the principle of finality.

[80] When I come to consider whether there should be an adjustment in the quantum of the fine, for the defendant's positions in the current economic climate, I need to use common sense and take a robust approach to the evidence.

[81] The defendant's own accountant in his affidavit notes that there is approximately $150,000.00 in the defendant company's current account, with a draw down facility of $1.6 million.[21] More importantly overall, when I consider the various authorities I have discussed int his decision, I note that in the 2020 financial year a total of approximately $400,000.00 was paid to shareholders. Further, at all times there is an uncertain future. Covid-19 will undoubtedly have an impact. The extent of the impact is unknown. In my view, a quantum of fine needs to be based on current financial information.

[82] I see the defendant as a profitable and growing company, paying a return to shareholders of some $400,000.00 in the last financial year.

[83] The significant infrastructure package to boost the Queenstown economy announced by the Government is relevant as against what the defendant submits. Both are in effect predictions of what may happen in the future.

[84] I find on the information I have available to me there should be no reduction made for the defendant's ability to pay.

[85] Therefore, I consider the fine of $275,000.00 is to be reduced by $4,000.00 for the project order in relation to the article.

Result

[86] The defendant is to pay Mr Owen emotional harm reparation of $50,000.00 and consequential loss reparation of $18,092.14.

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[21] Affidavit of David Russell Crossan dated 18 June 2020

[87] The fine of $271,000.00 is ordered with $100,000.00 payable within thirty days of this decision and the balance of $4,750.00 payable on a monthly basis for three years.

[88] The defendant is to pay the prosecutor costs of $10,407.00.

[89] A project order is made as outlined at paragraph [63].

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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.