IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2022-009-000588
[2022] NZDC 23102

WORKSAFE NEW ZEALAND
Prosecutor

v

DANS RENOVATIONS LIMITED
Defendant

Appearances: V Veikune for the Prosecutor
C Shannon for the Defendant

Date: 24 November 2022

SENTENCING NOTES OF JUDGE G M LYNCH

Introduction

[1] John Moreton was a partner of J & J Decorators ("JJD"), a business which carried out painting and decorating work.

[2] Dans Renovations Limited ("DRL") is a small company owned and directed by Daniel Grobler. DRL focuses on residential renovations; however, prior to the accident, it would occasionally undertake maintenance work on commercial buildings. DRL has fluctuated between having one and three employees, along with its director.

[3] Mr Grobler previously worked for JJD with Mr Moreton. Following DRL's incorporation, DRL would contract JJD to do painting work as required.

[4] In December 2020, DRL was engaged by the owner of a single-storey commercial building on Orbell Street, Sydenham to undertake roof repairs and painting work. DRL engaged JJD to undertake some of the work at the site, which included water blasting and painting the roof.

[5] On 5 February 2021, while working on the roof, Mr Moreton fell 4.5 m to the ground, sustaining fatal injuries.

[6] As a consequence, DRL is for sentence having pleaded guilty to the following charge under s 36(1)(a) of the Health and Safety at Work Act 2015 ("HSWA"):

> Being a PCBU, having a duty to ensure, so far as reasonably practicable, the health and safety of workers who work for the PCBU, while the workers are at work in the business carrying out roof repairs and repainting, did fail to comply with that duty and that failure exposed individuals, including John James Moreton, to a risk of death or serious injury arising from a fall from height.

Background

[7] During the quoting process, Mr Grobler inspected the roof site on behalf of DRL, as did Mr Moreton for JJD. DRL obtained a written quote from JJD for the water blasting and painting work. Neither DRL, nor JJD obtained any quotes from any specialist scaffolding company for the provision of scaffolding and edge protection at the site.

[8] DRL did not have significant experience working at heights. It had, however, previously subcontracted JJD to undertake some exterior painting work as part of its work on a two-storey home in early 2020. On that occasion, scaffolding and edge protection was provided by a specialist scaffolding company. However, the scope of the work subsequently increased to include painting of a steeply pitched roof. An employee of JJD, who was a former scaffolder, borrowed a harness from a scaffolding company and also used a ridge ladder to carry out this work.

[9] When interviewed by WorkSafe, Mr Grobler advised that he had asked Mr Moreton to bring and use harnesses, and that Mr Moreton said he would. Mr Grobler did not discuss how the harnesses would be used, where the harnesses

would be sourced from, or Mr Moreton's competency to use a harness. Mr Grobler had of course seen a JJD worker use a harness on that previous job, but not Mr Moreton. There was no discussion of edge protection or scaffolding.

[10] The roofing repair work was carried out by Mr Grobler and John Haxell who was contracted through a contract hire company. The repair work they carried out involved the replacement of steel sheets running the length of the roof and from time to time being close to the edge of the roof. There was no Site-Specific Safety Plan ("SSSP") prepared for this work. The only instruction was when close to the edge to work on hands and knees.

[11] The water blasting and roof repainting was carried out over three days by Mr Moreton and his employee, Craig Hart. DRL did not attend the site while JJD were carrying out their contracted work but Mr Grobler and Mr Moreton did speak over the phone during this period.

[12] JJD did not bring harnesses to the site, however, this was not known by DRL at the time.

The fatal accident

[13] On 4 February 2021, Mr Moreton was painting the roof at the site with Mr Hart. Mr Moreton was working from the south-east corner of the building where the parapet running around the edge of the building was approximately 30cm high. At about 10.40 am, Mr Moreton fell from this corner of the building, falling about 4.5 m. Mr Moreton suffered critical head and chest injuries, resulting in his death.

[14] There were no witnesses to the fall and it has not been established how Mr Moreton came to fall from the roof.

The WorkSafe investigation

[15] The WorkSafe investigation identified:

(a) no SSSP had been completed by DRL for the work on the roof;

(b) No edge protection had been installed on the roof of the site;

(c) While DRL had a health and safety policy which addressed appropriate planning, hazard identification, implementation of controls, SSSP, contractor management, "toolbox talks" and monitoring of health and safety matters, this policy was not adequately followed for the site;

(d) Four workers (Mr Grobler, Mr Haxell, Mr Moreton and Mr Hart) were exposed to the risk of death or serious injury as a result of DRL's failure to ensure edge protection was installed on the roof; and

(e) Regarding the management of its primary duty of care, the actions of JJD also fell below the levels expected.[1]

Sentencing approach

[16] *Stumpmaster v WorkSafe New Zealand* sets out a four-step approach for offences under the HSWA:[2]

i. assess the amount of reparation;

ii. fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;

iii. determine whether further orders under ss 152-158 of the HSWA are required; and

iv. make an overall assessment of the proportionality and appropriateness of the "combined packet of sanctions" imposed by the preceding three steps.[3]

[1] A pragmatic decision was made by WorkSafe not to prosecute the surviving partner of JJD.
[2] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [3].
[3] 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.

Relevant purposes and principles

[17] It is pertinent to highlight the following key purposes of the HSWA before engaging with the sentencing exercise:[4]

> (a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant;
>
> (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
>
> (g) providing a framework for continuous improvement and progressively higher standards of work health and safety.

[18] Further, and for completeness, ensuring the "the health and safety of workers" is a PCBUs "primary duty of care" under the HSWA.[5]

[19] Against that background, sentencing under the HSWA will generally require significant weight to be given to the ordinary sentencing purposes of denunciation, deterrence and accountability.[6] I also consider providing for the interests of the victim, and providing reparation to be relevant purposes in the circumstances of this case.[7]

[20] Not to be overlooked are the principles of sentencing.[8] The most relevant principles are the gravity of the offending and the culpability of the offender; the seriousness of the offence; the general desirability of consistency; the effect of the offending on the victim; and the need to take into account the particular circumstances of the offender.

---

[4] Health and Safety at Work Act 2015, s 3(1).
[5] Health and Safety at Work Act 2015, s 36.
[6] *Stumpmaster*, above n 2, at [43]. These are of course purposes of sentencing under s 7 of the Sentencing Act 2002. Section 151(2)(a) of the HSWA says that the court must apply the Sentencing Act and must have particular regard to ss 7-10 of that Act.
[7] Other mandatory purposes of sentencing: Sentencing Act 2002, s 7(1).
[8] Sentencing Act, s 8.

Step one: reparation

[21] Reparation may be imposed for the loss of or damage to property, emotional harm, and other consequential loss or damage.[9] Here, consideration needs to be given to the emotional harm and consequential loss suffered by the victim's family.

Victim impact statement

[22] Before I discuss reparation, the Court has had the benefit of a victim impact statement provided by Mrs Lisa Moreton, Mr Moreton's wife. Mrs Moreton read her statement at the hearing and I wish to acknowledge the incredible courage that requires. It is not easy reading something so intensely personal to a room full of strangers. I had, of course, read the statement before the hearing, but I consider it important that the Court hears from victims directly. When the Court reads so many victim impact statements, there a risk of becoming desensitised and overlooking the extent of the loss suffered and its ongoing impact. At the risk of leaving out something significant to Mrs Moreton, I summarise Mrs Moreton's statement as follows.

[23] Mr Moreton and Mrs Moreton were married for 12 years but had been in a relationship for 21 years. Together they have a family of five children.

[24] Mrs Moreton describes the financial difficulties she faced, having to go back to work, going bankrupt, and what it was like having to deal with all that while processing the loss of her husband. Mrs Moreton describes how she felt like a failure, but most of all, how she felt so alone without Mr Moreton there to support her.

[25] Mrs Moreton also discusses the immense impact Mr Moreton's death has had on her family. Their children have been struggling and divisions have begun to emerge between her and the children.

[26] It is clear Mr Moreton was a loving husband and father, and that it will be incredibly difficult for his family moving forward. For instance, Mrs Moreton reveals

[9] Sentencing Act, ss 32 and 38.

that their eldest daughter, Kayla, is now having a baby. She expresses how heart-breaking it is to know Kayla's son will never know his Grandad.

[27] There is no doubt that Mr Moreton's loss has been a devastating, emotionally draining and heart-breaking ordeal for Mrs Moreton, and those that were closest to him.

Emotional harm

[28] Determining the appropriate quantum for emotional harm is, for obvious reasons, a very difficult task. No sum of money can fill the void left by Mr Moreton's death. Nor can any sum directed to be paid ever reflect the life lost. As Harrison J said in *Big Tuff Pallets Ltd*:[10]

> The judicial objective is to strike a figure which is just in all the circumstances, and which in this context compensates for actual harm arising from the offence in form of anguish, distress and mental suffering.

[29] It is a fact-specific exercise and, while it is almost trite to observe, no case can ever be exactly the same as another. Accordingly, care is needed not to unconsciously seek or simply settle on a case in an attempt to find a default or universal amount for a death.

[30] In *WorkSafe v Department of Corrections* Chief District Court Judge Jan-Marie Doogue (as she then was) observed:[11]

> The task of setting reparation for emotional harm in a case such as this, does not simply involve ordering the same amount given in other cases involving a fatality. Each case must be judged on its particular circumstances. While certain cases may give a broad indication of an appropriate figure, it is unhelpful to pick apart those decisions and try to pair particular features with a particular level of reparation. There is not and cannot be a tariff for the loss of life or grief.

---

[10] *Big Tuff Pallets Ltd v Department of Labour* HC Auckland CRI-2008-404-322, 5 February 2009.
[11] *WorkSafe New Zealand v Dept of Corrections* [2016] NZDC 24865 at [25].

[31] Nevertheless, as Nation J said in *Ocean Fisheries*:[12]

> In the absence of a statutory cap or statutory formula for the allocation of reparation for emotional harm for close family members, Judges have to rely heavily on awards that have been made in other cases to arrive at an appropriate reparation award for the particular case they have been concerned with. So, consistency with the range of awards commonly ordered has been an important consideration in fixing reparation, even when Judges have said that each case must be considered on its own facts.

[32] WorkSafe have submitted, with reference to a number of cases, that emotional harm reparation of $130,000 should be paid to Mrs Moreton.

[33] The defence observe that $130,000 is at the very top of the ordinary range for cases involving workplace deaths, referring to Schedule A in *Ocean Fisheries*.[13] It is submitted that reparation of $110,000 would be more appropriate.

[34] Neither of the submissions account for the emotional harm suffered by the victim's five children. Although none of them have provided a victim impact statement, the effect this ordeal has had on them is obvious from the statement provided by Mrs Moreton.

[35] There is no prescribed way of calculating reparation where the recipient is a family. Often, the Court will simply award a global sum to the victim's family or the victim's spouse. However, in such cases, the children of the victim can usually be expected to receive the benefit of an emotional harm payment, being young children in the spouse's care.[14] It is also common for a Court to fix a total sum and then apportion it between various members of the family.[15]

[36] Importantly, Mr Moreton's children are all adults. They have their own lives to lead and their own grief to work through. Accordingly, I consider it appropriate that they receive some reparation independently of Mrs Moreton.

---

[12] *Ocean Fisheries* Ltd v *Maritime New Zealand* [2021] NZHC 2083 at [123].
[13] *Ocean Fisheries*, above n 12.
[14] See, for example, *WorkSafe v Shore Living Limited and Chang Yun Construction Limited* [2021] NZDC 13214 where the victim had "left behind a 9 year old son"; *WorkSafe v Vehicle Inspection New Zealand Limited* [2021] NZDC 3036 where the victim's widow had three young children: twins aged nine and another aged six.
[15] See, for example, *WorkSafe v Centreport Limited* [2019] NZDC 12020; *WorkSafe New Zealand v Guru NZ Ltd* [2020] NZDC 2955.

[37] It is clear from the schedule of cases in *Ocean Fisheries* that a global award of $130,000 is within range where the offending has resulted in a fatality. It is at the top of the range; nevertheless, such a sum is warranted in this case given the devastating and multidimensional impact Mr Moreton's death has had on his family. A loss like this is felt across generations. Emotional harm reparation has to be meaningful, both in providing for the survivors but also as part of the general deterrence that sentencing must have, particularly where the loss was preventable by low cost and simple means.

[38] I fix the emotional harm reparation at $130,000, to be apportioned as follows:

(a) $80,000 to Mr Moreton's wife, Mrs Moreton.

(b) $10,000 to each of Mr Moreton's five children.

Consequential loss

[39] WorkSafe seek consequential loss of:

(a) $122,899.40 for the loss of Mr Moreton's income;

(b) $1,536.50 to reflect the time Mrs Moreton took off work as unpaid leave; and

(c) $8,159.68 for the expenses incurred by Kayla Moreton.[16]

[40] There has been no real argument regarding (b) and (c). I observe that the defence have correctly pointed out the $900 spent on rent at Mrs Moreton's home should not factor into the reparation paid to Kayla. Rent is an obligation that would have arisen regardless of this incident. If anything, it is a private debt for Kayla and Mrs Moreton to resolve between themselves.

[41] The loss of Mr Moreton's income is the main point of contention in this case. WorkSafe have obtained this figure by calculating the "statutory shortfall" in the ACC

[16] How this sum is arrived at is explained at para 5.12-5.16 of the Prosecutor's submissions 20 June 2022.

payments made to Mrs Moreton by subtracting Mrs Moreton's ACC entitlements (60% of 80% of Mr Moreton's pre-accident net income) from Mr Moreton's pre-accident net income.

[42] The original submissions from WorkSafe suggested a loss of income sum of $158,163.72 was payable. At the sentencing hearing, WorkSafe acknowledged an oversight in their accountant's calculations, which were based on gross income, rather than net income. The new sum of $122,899.40 was submitted as appropriate – based on net income and net ACC payments to Mrs Moreton. On 17 November 2022 WorkSafe filed an updated affidavit from its accountant confirming the calculation.

[43] The defence criticised what it described as WorkSafe's "formulaic" approach to consequential loss, which it contended was undesirable from a policy perspective and out of line with other cases. The criticism is that the approach would lead to arbitrary and unfair outcomes. The argument is a younger worker, often with dependents, will receive less than an older worker, despite more years of earning ahead of them, given an older worker is more likely to have been paid more than the younger worker. Further, a worker may have received little income in the year before the death at work because of ill-health, creating unfair low loss of income reparation.[17]

[44] It is submitted that WorkSafe's approach does not take into account:[18]

(a) That Mr Moreton would have been spending some of his income on himself;

(b) Any insurance that the victim may have had;

(c) The time value of money and inflation; or

(d) Uncertainty as to Mr Moreton's future earnings.

[17] Defence submissions 15 July 2022 at [27.4].
[18] Counsel had also raised that WorkSafe had not taken tax into account, but this has since been resolved.

[45] Instead, it is submitted that a sum of $70,000 would be more appropriate, based on the total reparation ordered in other cases. The defence has however subsequently acknowledged that if the Court were to accept the prosecutor's methodology, it does not take issue with the sum provided by WorkSafe.

[46] The dispute between the parties arises largely from their respective interpretations of *Sarginson*.[19] In *Sarginson*, Mander J considered the District Court's decision to limit the victim's family's "top up" to the amount the deceased would have been eligible to receive had they survived but been incapacitated (80% of their previous earnings). His Honour expressed disagreement with this "arbitrary approach" but did not state what the "correct approach" would be.[20]

[47] WorkSafe say that *Sarginson* is authority for a clear methodology, that the deceased's family's entitlement is to be topped up to 100% of the victim's previous earnings. The defence, on the other hand, say *Sarginson* decided a formulaic approach is undesirable from a policy perspective.

[48] To be fair, Mander J declined to conclude on the issue:[21]

> In deference to the extensive arguments made by counsel and the potential influence the approach taken by the District Court may have on future sentencings, I am prepared to review whether that method should be affirmed. However, I am reluctant to lay down any definitive formula regarding the calculation of the balance of a family's consequential financial loss, if indeed that is possible, when in the circumstances of this case counsel are agreed it would have no application and no effect on its outcome. Similarly, I am reluctant to express a view regarding CAA's submission that the pecuniary benefit lost by the family should be calculated as the difference between the family's statutory compensation and the deceased's (net) pre-death income over the period the family remains entitled to ACC compensation.

[49] Despite his Honour's apparent reluctance, he confirmed "[t]here is no dispute that the statutory shortfall approach applies to the question of consequential loss". A

---

[19] *Sarginson v Civil Aviation Authority* [2020] NZHC 3199.
[20] At [194].
[21] At [144].

recurring theme of his decision is that the statutory shortfall methodology is an imperfect tool, and that it should be treated as such:[22]

> Subject to s 32(5) of the Sentencing Act, the quantum of reparation remains a matter of assessment for the sentencing court. As both this case and *Oceana Gold* illustrate, many factors may lead to a reparation order for consequential loss that is something different from the calculated shortfall between amounts received pursuant to the accident compensation scheme and the consequential loss of income to the deceased's family …

[50] The "statutory shortfall", as calculated by WorkSafe, remains a useful guide for the calculation of consequential loss, but the Court retains a discretion as to the amount of reparation payable. With that in mind, I turn to consider whether there are any factors that warrant adjusting the figure put forward by WorkSafe.

[51] With regard to the argument Mr Moreton would have spent some of his income on himself, that issue is addressed in *Sarginson*. It is pointed out that the non-financial contributions of the deceased's partner have also been lost, which is likely to have pecuniary implications.[23]

[52] The issue of insurance is also discussed in *Sarginson*. Justice Mander observes that ACC compensation is unaffected by payments received from an insurance policy, despite potentially placing the family of a deceased worker in a better financial position.[24]

[53] With regard to other factors raised by DRL, they are rather speculative. It is difficult to take such matters into account when no evidence is advanced in support.[25]

[54] The fact is, there are a myriad of potential factors which may mean Mrs Moreton ends up in a better *or worse* financial position upon receiving reparation for consequential loss. We do not know whether Mr Moreton's earnings would have increased significantly over the next five years; whether there are costly repairs or renovations looming that will now require a paid contractor (whereas Mr Moreton may

---

[22] At [192].
[23] at [190].
[24] at [189].
[25] See *Oceana Gold (New Zealand Ltd v WorkSafe New Zealand* [2019] NZHC 365 at [98] where the High Court agreed the District Court Judge fell into error by taking inflation into account without any data to support that view.

have previously done them himself); or whether Mrs Moreton and her children will require professional supports in the future as a consequence of this ordeal.

[55] The objective of the Court is to leave the victim's family in an equivalent financial situation than she was prior to the offending.[26] However, this will rarely be achieved, despite the Court's best efforts. The fact remains that Mr Moreton's earnings are no longer available for the benefit of Mrs Moreton or her family.

[56] I further note that the reparation payable is already limited to five years of Mr Moreton's lost income, when Mrs Moreton may have had the benefit of that income for much longer than that.

[57] Accordingly, I consider reparation for the loss of Mr Moreton's income equivalent to the statutory shortfall of $122,889.40 to be appropriate in these circumstances. I have not been presented with any evidence that shows the circumstances of this case warrant a departure from that figure, nor am I persuaded that it should be arbitrarily reduced to align with the total reparation awarded in other cases.

[58] The consequential loss reparation to be paid totals $131,685.58, being:

(a) $122,889.40 to Mrs Moreton for the loss of Mr Moreton's income;

(b) $1,536.50 to Mrs Moreton for time taken off work as unpaid leave;

(c) $7,259.68 to Kayla Moreton for the funeral expenses.

Step two: fine

[59] When fixing the fine at step two, the following guideline bands are to be used:[27]

Low culpability:	$0 to $250,000
Medium culpability:	$250,000 to $600,000

[26] *Sarginson*, above n 16, at [181].
[27] Stumpmaster, above n 2, at [4].

High culpability:	$600,000 to $1,000,000
Very high culpability:	$1,000,000 to 1,500,000

[60] In assessing culpability, s 151 of the HSWA offers specific guidance:

> **151 Sentencing criteria**
>
> (1) This section applies when a court is determining how to sentence or otherwise deal with an offender convicted of an offence under section 47, 48, or 49.
>
> (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 purpose of this Act; and
>
> (c) the risk of, and the potential for, illness, injury, or death that could have occurred; and
>
> (d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and
>
> (e) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and
>
> (f) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and
>
> (g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[61] In *Stumpmaster*, however, it was held that the above sentencing criteria are covered by the well-established culpability assessment factors identified in *Hanham*:[28]

> (a) The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practicable steps" which the Court finds it was reasonable for the offender to have taken in terms of s 22 of the HSWA.

[28] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) at [54] cited in *Stumpmaster*, above n 2.

(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.

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

Starting point

[62] WorkSafe submits that a starting point of $750,000 would adequately reflect the culpability of the offending in this case. That places DRL near the middle of the high culpability range. DRL submits that its culpability lies around the middle of the medium band and so a starting point of $475,000 - $550,000 is appropriate.

[63] This is all largely moot given DRL is far from capable of paying a fine in either range. I will return to the issue of financial incapacity at step four.

[64] Nonetheless, I need to consider DRL's culpability with reference to the *Hanham* factors identified above:

(a) *Operative acts or omissions.* DRL should have ensured that edge protection was installed around the perimeter of the roof and that a SSSP was developed, implemented, and communicated to all workers at the site.

(b) *Nature and seriousness of the risk of harm and the realised risk*. There was a risk of falling, and an associated risk of serious injury or death. The realised risk, being death, was as serious as it could be.

(c) *Degree of departure from prevailing standards*. DRL's conduct departed significantly from the prevailing standards in the construction industry. Some steps were taken in view of mitigating the risks involved, but these were wholly inadequate. The steps taken included asking Mr Moreton to bring harnesses (with no further discussion as to how they would be used or whether any of the employees were competent to use them), and having its workers move on their hands and knees when working close to the edge of the roof. In the end, harnesses were not used. I note that the guidelines indicate that travel restraint mechanisms (such as harnesses), should only be used where elimination controls (such as scaffolding or edge protection) and isolation controls are not reasonably practicable.[29] That was not the case here. Scaffolding or edge protection was the obvious control measure.

(d) *Obviousness of the hazard*. The risk of falling at the site would have been obvious to anyone. The fact that it was a flat roof and had a parapet does not detract from the obvious possibility that someone might fall off the edge. As I mentioned at the hearing, a 30 cm parapet is more of a trip hazard than a protection. Further, the fact DRL lacked experience, working at heights does not make the risk any less foreseeable. DRL were clearly aware of the risk, as demonstrated by the inadequate steps it took to mitigate it. They should have been prompted to make their own inquiries and research the guidelines for working at height. I acknowledge that DRL's failures are partly attributable to the reliance it placed on JJD, who share some responsibility for this incident. However, the safety of the people

[29] Ministry of Business Innovation & Employment *Best Practice Guidelines for Working at Height in New Zealand* (2019) at 10.

working for it was DRL's primary responsibility; as such, it was not entitled to defer to the presumed expertise of Mr Moreton.

(e) *Availability, cost and effectiveness of means to avoid hazard.* The cost of installing edge protection would not have been prohibitive, nor would it have been onerous for the defendant to put together an SSSP. This is not disputed.

(f) *Current state of knowledge of the risks and potential harm, and of the means to avoid the hazard.* This was a well-known hazard and there is no lack of guidance as to how it should be dealt with.

[65] For the purpose of setting a starting point, counsel have helpfully referred me to a number of cases which I have considered. However, I consider that the decisions in *Shore Living*, *Centreport,* and *Car Haulaways* provide the best indication of DRL's culpability.[30]

[66] In *Centreport*, the victim fell from a ladder while repairing containers and died as a result. The defendant had fallen short of meeting its responsibilities on multiple fronts, namely: by failing to develop and implement a system of safe work; by failing to implement processes to ensure ladders were well maintained and used correctly; by failing to provide any protection and fall prevention systems; and by not providing adequate training. The Court acknowledged that the defendant had identified the risk of working at height in a general sense and was "moving towards a safer system of work at the time of the incident".[31] However, the steps taken at the time of the incident were inadequate. A starting point of $700,000 was adopted.

[67] The failures in *Centreport* were extensive. It also appears that the failures were not limited to the single incident, rather, they represented unsafe practices of an ongoing nature. The use of ladders was part of the defendant's day-to-day business. It cannot be said that the present case is at that level.

---

[30] *WorkSafe New Zealand v Centreport Ltd (t/as Centreport Wellington)* [2019] NZDC 12020; *WorkSafe New Zealand v Shore Living Limited & Chang Yun Construction Limited* [2021] NZDC 13214; *WorkSafe New Zealand v Car Haulaways Limited* [2021] NZDC 3119.
[31] at [24].

[68] In *Shore Living*, the victim fell through an open void on the second storey of a house and landed head-first on the concrete floor of the first storey. He died of his injuries the next day. The defendant had arranged for edge protection to be put in place, but it was not ready and available to be installed on the day of the incident. Work had been allowed to continue in the meantime, but the Court did not see this as a "callous commercially-focused preference".[32] The Court determined a starting point of $600,000.

[69] This is perhaps the most analogous case: the risk was appreciated; preliminary steps were taken to address it; but, ultimately, protections were not put in place. There is of course a key difference, in that Shore Living had properly ordered edge protection but commenced work before it could be installed. Here, the extent of DRL's preparation was limited to vague discussions with JJD about using harnesses. Had it followed through with this arrangement, DRL still would have fallen short of meeting its responsibilities. DRL's omissions are more serious.

[70] In *Car Haulaways*, the victim fatally fell three metres from the top deck of a car transporter trailer at the defendant's yard. The car transporter had two wire ropes that acted as edge protection on the top deck. One of these ropes broke, it being severely corroded in several places such that minimal force was needed to break it. Subsequent testing of the other rope revealed it too was severely corroded. The failures included not ensuring effective maintenance of the edge protection on trailers; not ensuring training and supervision of workers checking the condition of the wire ropes and not coordinating risk management with the victim's company. A starting point of $450,000 was considered appropriate.

[71] I mention this case for the purpose of making a key distinction. In *Car Haulaways*, there were protections in place (and systems for checking those protections); however, they were faulty. Although DRL discussed implementing protections, this was not done. This is a failure of a different nature, deserving of more serious consequences.

---

[32] at [58].

[72] Finally, I need to mention *Agricentre Southland Limited,* referred to by defence counsel, where the actions of another PCBU were taken into account in setting a starting point.[33] The responsibilities of JJD are relevant, as I have endeavoured to explain, but I am wary of putting much weight on that factor in these circumstances, given the HSWA's strong emphasis on deterrence and instilling responsibility.

[73] DRL's culpability is in the high culpability band but at the bottom of that band. Accordingly, having reviewed the relevant case law, I consider a starting point of $620,000 to be appropriate in these circumstances.

Mitigating features of the offender

[74] There are no aggravating features requiring an uplift from the starting point. I apply the following discounts:

(a) *Co-operation with authorities – 5%.*

(b) *Previous good character – 5%.*

(c) *Reparation – 5%.* In my view, a discount of 10% as sought by DRL would require steps to have been taken immediately after the accident to assist the victim's family.[34] I am not aware of DRL taking such steps. A 5% discount, assuming reparation will be paid, is sufficient.

(d) *Remorse – 5%.* Mr Grobler and DRL have acknowledged that they simply got it wrong. Mr Grobler speaks of his regret and the loss he has suffered, John being a friend and mentor to him. DRL has stopped working at heights and there is obviously an increased focus on health and safety. Mr Grobler himself has since engaged in a 'health and safety in construction course'. I agree that a discount for remorse is justified.

---

[33] *WorkSafe New Zealand v Agricentre Southland Limited* [2019] NZDC 2498 at [71].
[34] *Stumpmaster*, above n 2, at [66].

(e) *Guilty plea – 25%.* The parties agreed on a guilty plea discount of 25%, however in a strong case, as this was, *Hessell* makes it clear that 25% does not necessarily follow a guilty plea. Given it is going to be moot, as I have explained, I will apply 25%, but observe that as low as 20% given the strength of this case would have been sustainable.

Calculation

[75] These discounts total 45%. Against the starting point, that would leave an end fine of $341,000.

Step three: ancillary orders

[76] WorkSafe has sought payment under s 152 of the HSWA of $5,048.03, being half of the costs of the prosecution. That is not opposed.

Step four: overall assessment

[77] Section 40 of the Sentencing Act 2002 allows the Court to take into account the financial capacity of the offender in determining the amount of the fine. It is clear on the evidence that DRL is not in a financial position to pay a lump sum fine that would be anywhere near the appropriate quantum for this level of offending. There is nevertheless a dispute as to the extent of DRL's financial impecuniosity.

[78] DRL submits that the Court should err towards the expert evidence of DRL's own accountant, Mr Roberts. It is suggested that payments of $7,500 continue for three years, for a total of $22,500.

[79] WorkSafe relies on the evidence of Mr Taylor, suggesting that $20,000 could be paid for five years for a total fine of $100,000. The defendant has the burden of satisfying the Court that the appropriate level of fine should not be ordered on the grounds of financial impecuniosity. WorkSafe also acknowledges that the defendant has better access to the relevant information. Ultimately, WorkSafe leaves the matter for the discretion of the Court.

[80] The key difference between the evidence of Mr Roberts and Mr Taylor appears to lie in their forecasted tax payments. In subsequent affidavits, both experts have argued over amounts received by Mr Grobler from DRL and how DRL is currently performing in relation to Mr Robert's original forecast. Neither expert has changed their position.

[81] I am grateful for the assistance of both Mr Roberts and Mr Taylor, and I acknowledge the significant effort that they have put into their evidence. Each have advanced reasonable arguments in support of their position. Indeed, there are many uncertainties associated with this assessment, such that I fear that there is no "right" answer. Ultimately, I am inclined to prefer the evidence of Mr Roberts, given his intimate knowledge and superior expertise regarding DRL's financial situation. I accept that a fine of $7,500 per annum is the most that can be paid without something radically changing for the company.

[82] Whether this amount should be paid for three years or five years is a matter for my discretion. I accept that *Stumpmaster* expressed a preference for a higher rate of repayment for a shorter time, and I acknowledge the uncertainty that DRL faces.[35] However, in the circumstances of this case, I consider it necessary to extend liability out to a period of five years to reflect the discrepancy between the appropriate fine and the sum that will actually be paid. There is no barrier to this court making such an order.

[83] Therefore, DRL is to pay a fine of $37,500 to be paid in instalments of $7,500 over a period of 5 years.

[84] Stepping back, the combined packet of sanctions imposed is as follows:

(a) Emotional harm reparation: $130,000:

(i) $80,000 to be paid to Mrs Moreton.

[35] *Stumpmaster*, above n 2, at [24].

(ii) $10,000 to be paid to each of the victim's five children: Kayla, Jessaka, Shania, Robert, and Matthew.

(b) Consequential loss reparation: $131,685.58:

(i) $122,889.40 to Mrs Moreton for the loss of Mr Moreton's income.

(ii) $1,536.50 to Mrs Moreton for time taken off work as unpaid leave.

(iii) $7,259.68 to Kayla Moreton for the funeral expenses.

(c) Fine: $37,500.00 (to be paid in instalments of $7,500 over five years).

(d) Costs contribution: $5,048.03.

[85] I am satisfied that the overall sentence is appropriate and proportionate to the offending. That is the sentence I impose.

Other matters

[86] DRL seeks an order that the reasons for sum of the fine, including all the evidence and submissions filed concerning DRL's financial position, be suppressed.[36] No grounds have been advanced in support of that submission and in any case, I do not see how any of the available grounds under s 205(2) of the Criminal Procedure Act 2011 could be satisfied.

[87] There is a strong public interest in the reasons for this determination being released given the discrepancy between the otherwise appropriate fine, which the public may expect should be imposed, and the one actually made. I make no such order. That said, there is nothing in my discussion on this which provides any detail from the affidavits from the accountants which would embarrass or compromise DRL.

[36] Criminal Procedure Act 2011, s 205(1).

However, access to those affidavits, or the submissions discussing the affidavits is a different matter, and one to which I now turn.

[88] DRL invites the Court to exercise its discretion under r 5(2) of the District Court (Access to Court Documents) Rules 2017 to direct, for confidentiality reasons, that all DRL's financial information on the Court file may only be accessed with the permission of a Judge. I agree that is an appropriate step. This provides a balance. There will be no strict prohibition on the publication of the evidence and the submissions, however, access to the evidence and submissions which may be required for publication, will be regulated by a Judge. That Judge would then consider whether a party seeking access has a genuine reason to access those documents and may impose conditions – including relating to publication.

[89] Accordingly, the affidavits of Mr Roberts and Mr Taylor filed in this matter, including all annexures and the submissions dealing with that material, are to be sealed pursuant to r 5(2).[37]

_____

Judge GM Lynch
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 24/11/2022

[37] I appreciate that there has been some delay in releasing this decision and the distress that may have caused. However, the consequential loss issue has taken longer than foreseen to resolve, with the last set of material received 17 November 2022.