

**IN THE DISTRICT COURT  
AT WHANGAREI**

**I TE KŌTI-Ā-ROHE  
KI WHANGĀREI-TERENGA-PARĀOA**

**CRI-2021-088-002875  
[2022] NZDC 25331**

**WORKSAFE NEW ZEALAND**  
Prosecutor

v

**TAURAROA AREA SCHOOL BOARD OF TRUSTEES**  
Defendant

Hearing: 13 December 2022

Appearances: T Braden for the Prosecutor  
M Wisker for the Defendant

Judgment: 13 December 2022

---

**NOTES OF JUDGE D J McDONALD ON SENTENCING**

---

[1] The Tauraroa Area School Board of Trustees, which has a responsibility of governing the school, pleaded guilty to one charge brought by WorkSafe New Zealand against it in that having a duty to ensure, so far as reasonably practical, the health and safety of persons, including [REDACTED], was not put at risk by an outside school excursion by boat to the Poor Knight Island Marine Reserve, failed in that duty by exposing individuals, including [REDACTED], to a risk of death and/or serious injury.

[2] The charge was laid under ss 36(2), 48(1) and 48(2)(c) of the Health and Safety at Work Act 2015.

[3] Those provisions carry a maximum penalty of a fine not exceeding \$1.5 million.

### **The School**

[4] The School is 22 kilometres south west of Whangārei and has approximately 500 students from year zero to year 13. It provides a wide range of education outside the classroom from museum visits to snorkelling trips. I accept that those activities enhance the learning experiences of the pupils at the school.

[5] Since 2016 the school has engaged the services of Dive Tutukaka Limited to take pupils to the Poor Knights every year, apart from those impacted by COVID-19. Dive Tutukaka Limited was incorporated on 17 May 1999, it operates all levels of marine activities from its base in Tutukaka.

[6] Dive Tutukaka claims to be the largest dive charter company in New Zealand. It has five ocean going vessels, which take approximately 12,000 people each year to the Poor Knights. I am of the view that Dive Tutukaka were intimately aware of the Poor Knights, including all the dangers to persons, including young persons, who went there with them.

### **The Incident**

[7] The school had contacted Dive Tutukaka to take a group from the school to the Poor Knights. On 7 December 2020, 22 year nine and 10 students, along with five teachers and parent helpers, travelled by bus from the school to the Dive Tutukaka base. Once there they got on the Dive Tutukaka boat, Perfect Day, and were taken out to the marine reserve. There were a number of Dive Tutukaka personal on the boat, including the skipper, Mr Steven Bowen.

[8] The skipper decided, when he got to the Poor Knights, that the original place he was going to moor to enable the students to snorkel, kayak and swim was not suitable because the wind was blowing in a direction which did not allow him to anchor in a way that would be safe. He therefore decided to go around to Cave Bay

on the eastern side of one of the islands. That was solely his decision; the school had no input into that whatsoever.

[9] The crew anchored the vessel. A briefing was given by a crew member to the students, parent helpers and teachers that included not to go onto the island, to stay away from the cliffs and the rocks. The students were also advised that they should, at all times, be in sight of the boat and be in a position so those on the boat could see them. For about 90 minutes most, if not all, the students snorkelled, kayaked and swam in the authorised area. The wind increased to 15 to 20 knots, the swell grew from one to 1.5 metres, which is described as moderate seas.

[10] Just outside the authorised area was a fissure in the cliff which eventually turned into a cave. The cave was 12 meters high, 15 meters long and three meters wide at its widest point but it narrowed at the back in both width and height. If a person has entered through the narrow entranceway and into the cave they could not be fully seen by persons on the boat and they could not fully see the boat.

[11] Six students entered the cave. It was in an area that they had been briefed not, generally, to enter. Two were on a double kayak; they did not get into difficulties and were able to paddle their way out. One was on a single kayak. He had some difficulties once he got into the cave with the current and the waves but again, he was able to exit the cave. A further student swam in, snorkelling, he had a snorkel and flippers. He, at first, was unable to swim out, even though he was a strong swimmer. He was able to get himself to a point where he could be seen by others; he signalled that he was in difficulties and a person came over and helped tow him out.

[12] The two victims in this case were not so fortunate. ██████████, aged 14 at the time and ██████████, aged 13, were paddling a double kayak. ██████████ was wearing a life jacket, ██████████ was not. Their kayak struck a partially submerged rock that they had been pushed onto by a wave and then once another wave came in they were pushed off the rock and further into the cave where their kayak capsized. ██████████, with some assistance from ██████████, was able to wedge himself between the walls at the back of the cave which enabled him to keep his head above water.

[13] ████████ feet became trapped in a crevice, she was unable to free herself from that. The result was that every time a wave came into the cave she was totally submerged, meaning, as the wave came towards her she had to hold her breath as it passed over her and then had to wait until the wave went out before she could breathe.

[14] One of the students who got out of the cave signalled to those onboard the boat that there were difficulties with the two inside the cave. Nine minutes or so had passed at this point since the group got into trouble. Two members of the Perfect Day got into the Perfect Day's tender and went to the cave to see what the problem was. They were unable to assist. They immediately returned to the boat as more help was required. Two other crew members got into the tender and they headed back to the cave. One of those crew members got into the water wearing fins and swam into the cave. He managed to get ████████ free from the crevice and then help her from the cave. She was able to swim some of the way to the tender, who then took her back to the vessel for medical attention. It took 15 minutes to rescue her.

[15] Mr William Bowden, who is to be commended for his bravery, having rescued ████████, was then himself washed into the back of the cave. He was able to get out onto a ledge above ████████. He helped ████████ up to where he was. Because of the churning waters at the back of the cave the two could not swim out and remained on this rock ledge in the dark for over two hours before they were rescued. The Coastguard and the Rescue Helicopter were called and arrived. It was only with the extra assistance that ████████ and, indeed, Mr Bowden were able to be rescued.

[16] It goes without saying that both of these young students were extremely fearful that they were going to drown. Both students and, indeed, Mr Bowden suffered cuts, abrasions. The students, particularly ████████, suffered significant emotional distress.

### **Dive Tutukaka**

[17] Dive Tutukaka have also been charged under the same provisions as the school. They have requested that they be dealt with by giving enforceable undertakings under s 123 of the Act. That is an alternative procedure often used. I am told today by WorkSafe that that is still an ongoing discussion between Dive Tutukaka and

WorkSafe. If it is resolved and enforceable undertakings are made then WorkSafe would withdraw the charge against the company. As such, that charge is not before me. I can make no orders in respect of it in relation to Dive Tutukaka.

### **Approach to sentencing**

[18] Section 151(2) sets out the specific sentencing criteria to be applied. It includes ss 7, 8 and 9 of the Sentencing Act 2002. One of the important matters that I must consider is whether a defendant has the ability to pay a fine. The guideline judgment for sentencing in this area is *WorkSafe New Zealand v Stumpmaster Ltd*.<sup>1</sup> The Court there confirmed there are four steps in the sentencing process:

- (1) the amount of reparations to be paid to the victim or victims;
- (2) fix the amount of the fine by reference first to the guideline bands and then having regard to the aggravating and mitigating factors;
- (3) determine whether any further orders under s 152 to 159 are required; and
- (4) make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps. This includes consideration of the defendant's financial capacity if that is pleaded by the defendant, which it is in this case.

[19] I consider each of those steps in turn:

#### **Step 1 - Reparation**

[20] Reparation is sought for emotional harm to both the victims. Under s 32(1)(b) of the Sentencing Act I can impose a sentence of reparation for emotional harm caused to [REDACTED].

---

<sup>1</sup> *Worksafe New Zealand v Stumpmaster Ltd* [2019] DCR 61; [2018] NZDC 900; BC201861136.

[21] I am extremely grateful at this point to both counsel for their lengthy and detailed written submissions. They have spoken to those today. WorkSafe have referred me to *Big Tuff Pellets Ltd v Department of Labour* concerning reparation for emotional harm.<sup>2</sup> The High Court in that case observed:

Fixing an award for emotional harm is an intuitive exercise; its quantification defied finite calculation. The judicial objective is to strike a figure which was just in all the circumstances, and which in that context compensated for actual harm arising from the offence in the form of anguish, distress and mental suffering.

[22] The nature of the injury is, or may be, relevant to the extent that it causes physical or mental suffering or incapacity, whether short-term or long-term. Victim impact reports are the best way to assess the harm caused.

[23] I deal first with [REDACTED] victim impact statement. I have read that a number of times. It is abundantly clear from her victim impact statement, that [REDACTED], before this incident, had an extremely important cultural connection with the sea. Before this incident when she looked back, the present and forward, all of it, with reference to the sea. She tells me that while her physical injuries were bad, they have healed. Her emotional and spiritual injuries have not. She says that the sea is her everything; she gets anxiety now just seeing waves. She tells me that she cannot go to the sea to visit, she suffers from flashbacks. She recounts going through a carwash and that everyday event, caused a flashback. The flashbacks are that she is in the back of the cave trapped, drowning in darkness. She used to love Waka Ama, now she cannot even get in one. She feels weak, useless and depressed.

[24] She, like [REDACTED] is critical of the school's response to what occurred. She says the school were less than helpful. In fact, her words are more critical than that. It is not appropriate for me to make any comments on that. The Principal of the school has sworn an affidavit in that he tells me that counselling was offered to both [REDACTED] but each turned it down. He took it from that that they were doing okay, he now accepts that he got that wrong. It was not until he read the prosecutor's submissions in this case that he saw how it had impacted upon them both. He now says that ongoing support, where possible, will be given to both and he does

---

<sup>2</sup> *Big Tuff Pallets Ltd v Department of Labour* (2009) 7 NZELR 322.

not blame either of the victims for what occurred. He does not blame them that they went into the cave.

[25] I accept the submissions made by learned counsel for the defendant, that the school is deeply sorry for what occurred. One would expect that from a Principal and teachers in our education system. It is quite clear that both of these pupils could have drowned. The impact on [REDACTED] has been severe.

[26] [REDACTED], he is now 15; he is still at school, as is [REDACTED]. He did not know, he tells me, that he was required to wear a life jacket. A wetsuit was given to him but was too small but when he asked for another one the crew member just walked away. He got a lot of scratches, grazing and bruises, all of which have healed. The worst one was one on his back that got infected, he is now scarred in relation to that. He then tells me, in the victim impact report, that when all this first happened he used to have nightmares about it. He would wake up and he could not get back to sleep. He dreamed that he was right back in the cave.

[27] He blames himself for not being able to help [REDACTED]. That is a human response but I do not blame him for not going to [REDACTED] assistance. He may well if he did, have drowned. As I say, he is also highly critical of some of the teachers.

[28] He used to love going to the beach and swimming in the waves but now he hates it. [REDACTED] said, in her victim impact statement, [REDACTED] suffered more than her, although he does not open up about it, he tries to be staunch, tries to be a *man* and put it to one side.

[29] WorkSafe submit that both of the victims have suffered ongoing emotional injuries. It is submitted that reparation for emotional harm between [REDACTED] [REDACTED] for each of the victims is the appropriate response.

[30] On behalf of the school Ms Wisker submits that the reparation should be in the order of [REDACTED]

[31] WorkSafe have referred me to four cases, *WorkSafe New Zealand v Department of Corrections*, *Department of Labour v Sir Edmond Hillary Outdoor Pursuits Centre of New Zealand*, *Ministry of Business, Innovation and Employment v Taranaki Outdoor Pursuits and Educational Centre Trust* and *Nino Limited v Maritime New Zealand*.<sup>3</sup> The school was highly critical of the former three cases, submitted those cases involved victims who incurred severe emotional harm through being present while other people died. There is some force in that submission.

[32] Counsel for the school have referred me to *WorkSafe v Dillan* and *Worksafe v Silver Fern Farms Ltd*.<sup>4</sup> I myself have looked at *WorkSafe New Zealand v Portage Management Ltd*.<sup>5</sup> All of those cases just reinforce what was said in *Big Tuff*.

[33] In my view, despite submissions from both counsel that there should be a difference between [REDACTED], I do not consider that to be the case. There is a difference between the emotional harm that they have suffered but not, in my view, to an extent that calls for different amounts to be awarded. It may be if different amounts are awarded in a small community that they could cause further harm to both of the victims by unfounded gossip and rumours.

[34] I consider reparation for each of the victims [REDACTED] is appropriate.

[35] How should that be divided, how should that be apportioned? Whilst I cannot make any orders against Dive Tutukaka I consider they were the specialist organisation with years and years of experience of going out to the Poor Knights with experienced, partially experienced and inexperienced people; 12,000 a year. In my view, they should bear the primary responsibility of what went wrong. They would have or should have known about this cave and the dangers that it posed. The school could

---

<sup>3</sup> *Worksafe New Zealand v Department of Corrections* [2017] DCR 321; [2016] NZDC 18502; BC201662816; *Department of Labour v Sir Edmund Hillary Outdoor Pursuits Centre of New Zealand* BC200960837; *Ministry of Business, Innovation and Employment v Taranaki Outdoor Pursuits and Education Centre Trust* [2013] NZHSE 10; and *Nino's Ltd v Maritime New Zealand* (2020) 17 NZELR 483; [2020] NZHC 1467; BC202061462.

<sup>4</sup> *Worksafe v Dillon* [2017] NZDC 13426; and *Worksafe New Zealand v Silver Fern Farms Ltd* [2016] NZDC 11861; BC201664474.

<sup>5</sup> *Worksafe New Zealand v Portage Management Ltd* [2020] NZDC 1545.

have only done a small number of matters, in my view, they had only been on trips a handful of times to the Poor Knights.

[36] WorkSafe submit that there should be a 50/50 split between the school and Dive Tutukaka. The school submit 70/30, that is 70 for Dive Tutukaka, 30 for the School.

[37] I accept the submission of WorkSafe that the school had the primary responsibility of keeping the students safe. Outdoor education can *never* be totally safe unless, of course, the only outside education this school would offer would be for the students to sit on a school field reading something of relevance.

[38] It is important that pupils at schools get some outdoor education. Of course, that does not absolve the school of the emotional trauma that was caused to two of its pupils and the school readily accepts that. In my view, the apportionment I would make is that it is 60 per cent to Dive Tutukaka and 40 per cent to the school.

### **Fine**

[39] In sentencing under s 48 there are guideline bands to be followed as set out in *WorkSafe New Zealand v Stumpmaster Ltd*.

[40] Low culpability up to \$250,000, medium culpability, \$250,000 to \$600,000, high culpability \$600,000 to \$1,000,000, very high culpability, \$1,000,000 plus. WorkSafe submit that the school's culpability is in the middle to upper end of the medium culpability band with a starting point of \$500,000 to \$600,000.

[41] They highlight that there was a risk to both of the pupils, that they could have drowned and that the school did not sufficiently consult and coordinate with Dive Tutukaka to ensure an effective supervision plan was in place. The school did not have a safety management plan for education outside the classroom. The hazards were obvious.

[42] Ms Wisker, for the school, submitted the culpability lies in the middle of the medium culpability range from the start point or \$350,000 to \$400,000. She

recognises the starting point must reflect the steps taken by the school, particularly in engaging an expert provider for outdoor education and requesting a risk analysis and management plan. The lack of control in selecting the education for the excursion. The lack of experience in making it difficult to assess a supervision plan and the potentially serious outcome of the incident.

[43] In my view, this offending falls in the medium culpability range. The start point for a fine of \$450,000. From this there would be various deductions such as guilty plea, co-operation and the like.

[44] However, before I can impose a fine I must have regard to the ability of the school to pay it and the impact any fine would have on the viability of the school to continue in its current form.

[45] I have read and considered Ms Shaw's affidavit; she is the accountant for the school. She is of the view that the school cannot pay a fine, even a modest fine, except in instalments of about \$1,000 a month. She tells me that the school has been greatly impacted by the inability to attract international students during the COVID-19 period. She says the school is funded primarily by government grants and any significant fine would reduce the amount available for the education of the students. That any fine, even if it is paid off at \$1,000 a month, would have the impact of reducing programmes available to students and would delay the school's financial recovery.

[46] The Principal, Mr Burns, as I have said, has also sworn an affidavit. He speaks about the ability to pay a fine. He tells me that any fine would impose significant pressure on the school to the point that it would not be able to operate effectively, will need likely to be put into statutory management by the Ministry.

[47] WorkSafe has looked at the school accounts. I have looked at the school accounts. I am grateful to WorkSafe that they have come to the position that there should be no fine imposed upon the school because of the impact such a fine would have and the viability of the school to operate in its current fashion. It would take away from the pupils. I will not impose a fine primarily because the school could not

pay it, it would be a backward step for the school and the community who rely upon it; any fine would cripple it.

### **Other Orders**

[48] I now go to step 3, whether any other orders should be made. WorkSafe seek some payment for some of its costs to the prosecution. That is not opposed by the school. I award 50 per cent, \$2,526.20.

### **Last Step**

[49] I then go to step 4. I have really covered that in my earlier comments.

### **Suppression**

[50] WorkSafe seek suppression of the victim's names and the amount of reparation order. Section 204 of the Criminal Procedure Act 2011 automatically suppresses the victim's names when they are under the age of 18. The amount of reparation could also be suppressed under the provisions of that Act. I make such an order. The names of the victims will be suppressed and the amount of reparation ordered also suppressed. I also make, without opposition, a suppression order in relation to the other four pupils who went into the cave but were able to get out. Nothing is to be gained by publishing their names. It is not in the public interest; they are still children. That is not opposed by the school. It is sought by WorkSafe.

### **Conclusion**

#### *Reparation*

[51] I make an order of reparation which is 40 per cent of the ██████████, which is ██████████ on my maths, which is ██████████ to each victim.

#### *The Fine*

[52] There will be no fine.

*Legal cost*

[53] I will make an order that the school pay prosecution costs of \$2,526.

*Suppression*

[54] The victim's names will be suppressed along with reparation that they are to be paid. Any details that may lead to their identification is also suppressed. I also suppress the name of the other four pupils.

*Four*

[55] A copy of the summary of facts may be provided to interested parties with the necessary redactions to comply with the suppression orders that I have made.

---

Judge DJ McDonald

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 24/02/2023