IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2018-004-009556
[2019] NZDC 7566

WORKSAFE NEW ZEALAND
Prosecutor

v

AFFORDABLE SCAFFOLDING (2010) LIMITED
Defendant

Hearing:	11 April 2019
Appearances:	I Brookie for the Prosecutor G Beresford for the Defendant
Judgment:	11 April 2019

NOTES OF JUDGE D J SHARP ON SENTENCING

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[1] These are the sentencing notes for WorkSafe New Zealand v Affordable Scaffolding (2010) Limited.

[2] Firstly, I acknowledge the representatives of the defendant company who are here.

[3] By way of introduction, this case involves the collapse of a scaffold constructed beneath the Panmure Bridge on 21 February 2017. Fortuitously, none of the six workers who fell into the water below the bridge were seriously harmed although it is clear two of the victims continue to be affected by what has happened to them.

[4] The collapse of the scaffolding and the resulting injuries were the result of a fundamentally flawed scaffold design which was devised and erected by the defendant, Affordable Scaffolding. This company specialises in scaffold design and erection.

[5] The defendant pleaded guilty at the second call on 10 April 2018 to the two charges under ss 36(1)(a) and (b), 48(1) and (2)(c) Health and Safety at Work Act 2015, called the Act. The maximum penalty for these offences is a fine not exceeding $1.5 million.

[6] There are two charges to reflect the fact that the defendant owed a duty to not only their own workers who used the scaffold but also to other workers who used the scaffold and who were influenced by the failures of the defendant in relation to scaffold design and erection. The particulars of both charges are the same. It was reasonably practical for the defendant to have ensured that the Panmure Bridge scaffold was designed so that it was safe for its intended purpose.

[7] The High Court decision of *Stumpmaster v WorkSafe New Zealand* provides a guideline for sentencing.[1]

[8] Two workers who were on the scaffold when it collapsed and fell into the water, Mr Platino and Mr Usman, have given victim impact statements. These men were not employees of the defendant company but of another company who was dealt with separately. There were four other workers who fell from the bridge. They have not participated in the sentencing process.

[9] The Panmure Bridge was involved here. The bridge crosses the Tamaki River and carries three lanes of traffic. It is heavily congested at peak times. There are boats moored nearby and some maritime traffic passes under the bridge. The bridge is essential to the Auckland traffic network as it connects East Auckland with the central suburbs including Panmure and Glen Innes.

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

[10] In 2015 an engineering consultancy assessed the condition of the bridge and concluded that remedial work was required, given that it was exhibiting signs of deterioration. The repair work needed to be carried out. The works were to be carried out in four stages and expected to take around five months to complete. The works also involved the use of specialised equipment including a vapour blaster to strip rust and clean the coating on the bridge beams that would produce a type of debris called garnet.

THE BRIDGE CONTRACT

[11] Opus was engaged by Auckland Transport under a parent contract to provide consultancy services for regional maintenance operations of the southern Auckland area. The contract, named Southern Area Road Corridor Maintenance, allowed Auckland Transport to raise and issue service orders instructing Opus in respect of specific projects.

[12] On 5 May 2016 Auckland Transport instructed Opus to undertake preparation of documents for restoration of the Panmure Bridge to go to tender.

[13] Topcoat was the successful tenderer for the restoration work. Its tender bid documents set out its plan for completion of the work including using the defendant as subcontractor to provide all scaffolding and protection so that Topcoat workers could access areas of the bridge required to complete painting works. Mr Willey was appointed as the engineer for the contract.

[14] The standard conditions of the bridge contract included the New Zealand standard conditions of contract for building, civil engineering and construction. In the standard terms the conditions set out duties and responsibilities for both the contractor, Topcoat, and the engineer, Opus. The contract includes temporary works within the scope of contract works. The scaffold to be built was within the scope of contract works required by the bridge contract.

[15] Topcoat was responsible for the acts, the faults and negligence of any subcontractor. Topcoat was therefore primarily responsible for the scaffold work under the bridge contract.

[16] The bridge contract required that scaffolding must comply with relevant scaffolding standards, Australian and New Zealand standards 1576 and Australian and New Zealand standards 4576. This clause also detailed how wind loading was to be calculated:

> "All loads imposed by the scaffold works are to be provided to the engineer for approval two calendar weeks prior to work commencing. The contractor must submit two duplicate copies of scaffold drawings for acceptance by the engineer two calendar weeks prior to work commencing."

[17] Topcoat's tender submission document recorded that the scaffold was to be built for four to six workers on the bridge at one time.

[18] There was a risk register. The bridge contract included a document entitled, "Project Risk Management Plan," dated 21 July 2016. The plan included a risk register which addressed the risk of scaffold collapse. The risk owner was the contractor with control identified as follows:

(a) Scaffold design calculations by professional engineer to be submitted for review.

(b) Erection by a certified scaffolder.

[19] On 1 October 2016 Opus were instructed to provide contract management, surveillance and quality assurance to Auckland Transport in relation to bridge restoration works.

[20] Opus did not have any role in designing or checking the design of scaffold under the bridge contract terms or under the terms of the service order. Clause 6.7 of the New Zealand standard contract conditions for the bridge gave Opus the power to suspend work if it became necessary.

SCAFFOLD

[21] The construction of the scaffold was to commence in early January and end in April 2017. The scaffold was also to be erected in four stages to keep slightly ahead of the remedial works.

[22] The defendant engaged Mr Hendry as subcontractor to assist with the erection of the scaffold. Mr Hendry had subcontracted the defendant in the past.

[23] There was no documented contract in place between Mr Hendry and the defendant. Mr Hendry invoiced the defendant for work that he and his workers did in relation to the bridge contract.

[24] Mr Hendry was involved in discussions with the defendant's staff in relation to design of the scaffold. In addition to Mr Hendry, three advanced ticketed scaffolders employed by the defendant with many years of experience were involved in the defendant's internal discussions in respect to the design of the scaffold.

SCAFFOLD DESIGN

[25] Initially the scope of the works was to include the painting of the hand rails on top of the bridge. The initial scope involved installing a scaffold that wrapped around the edges of the bridge and was tied to the hand rails above. The hand rails were removed from the works. Following this in mid-November 2016 Opus emailed Topcoat photographs including a photograph showing a hanging scaffold and a drawing dated September 1973 which detailed a maintenance eye, also known as a u-ring (the photograph and drawing related to those u-rings were provided). U-rings are attached to the underside of the bridge. Topcoat forwarded the defendant photographs and the defendant discussed maintenance eyes/u-rings with Opus, with Opus suggesting to the defendant that it engage a third-party contractor to test the strength of the u-rings.

[26] The defendant then designed a hanging scaffolding, which is a type of scaffold that hangs from a supporting structure. The purpose of the hanging scaffold was to allow workers to access the piers and underside of the bridge to perform the

maintenance work. The design involved hanging the scaffold from u-rings that were already attached to the underside of the bridge. The scaffold platform surface was to be covered with a scrim mesh, a covering in order to provide noise protection and prevent the garnet from spraying onto boats and into the harbour below. It was also to prevent the surface from becoming slippery from the dust and water produced by the treatment.

[27] The defendant produced design drawings for the revised hanging scaffold design along with load calculations. The defendant did not engage any engineer to review the scaffold design at any point before the incident, however, on 17 November 2016 Opus suggested to Topcoat that an engineering test on the strength of the u-rings underneath the bridge was required. Topcoat passed this information on to the defendant. Neither the defendant nor Topcoat sent the scaffold design to Opus prior to commencing work on the scaffold, as required by the bridge contract.

[28] The defendant did not request, nor was it provided by Topcoat, a copy of the contract specifications prior to erecting the scaffold. The defendant was therefore not aware of the requirement for scaffold design to be sent to Opus prior to the erection of the scaffold, nor did it provide the scaffold design to either Topcoat or Opus prior to the incident.

MEETING

[29] On 5 December 2016 a meeting at Auckland Transport involving Topcoat and Opus took place. Opus took meeting minutes under the heading, "Amendments to Specifications of Drawings and Hand Rail Works Have Been Removed."

TESTING AND CONSTRUCTION OF THE SCAFFOLD

[30] On 4 December, the day before erection of the scaffold commenced, an engineer engaged by the defendant tested the hooks attached to the bridge. Two hooks were tested to a weight of four tonnes, which was the dead weight of the scaffold and was specified in the bridge contract at cl 1.10.16. Topcoat provided confirmation of these tests to Mr Willey via email on 13 January 2017. The testing did not involve any scrutiny of the defendant's produced design drawings or load calculations.

CONSTRUCTION OF THE SCAFFOLD

[31] Mr Hendry began constructing the first stage of the scaffolding on 5 January 2017.

[32] On 9 January 2017 Mr Willey emailed Topcoat and requested the engineer's sign-off of the scaffolding design for his records.

[33] On 10 January 2017 Mr Hendry decided to substitute check couplers on the scaffolding with splicing. Check couplers are a secondary measure in case of failure. Mr Hendry did not make the defendant aware of this substitution.

[34] The first section of the scaffolding was completed by approximately 14 January 2017. This section was from the bank on the east to pier 1. Mr Hendry signed off the scaffold as safe with a scaffold safe tag. Mr Hendry checked the scaffold on a daily basis. Mr Hendry also signed handover certificates every week indicating that the scaffold was safe for workers to access.

[35] On 16 January 2017 Topcoat began restoration work on the bridge using the scaffold for access. At the end of each working day or the following morning Topcoat workers would shovel the garnet sand that had collected on the work platforms into bags to be taken away.

[36] The second section of scaffold was completed around 28 January 2017. A week after the project started, Auckland Transport received complaints that the spray was being released through the scrim and covering nearby boats. Concern was relayed to Topcoat. Topcoat directed the defendant to enclose the scaffold with shrink wrap to contain debris from work. The defendant then arranged for a contractor to apply the shrink wrap on 1 February 2017. Neither the defendant nor Topcoat made any notification to the scaffold design despite the additional wind loading on the shrink wrap surface, which is required to be considered in the scaffold design.

[37] A week before the incident the defendant began dismantling the first section of the scaffold. A few weeks later, on 17 February, Mr Hendry decided not to dismantle the scaffold any further as there was too much garnet on the platforms. Mr Hendry

advised Mr Eric Whare, the Topcoat foreman, that garnet needed to be cleared off before the remainder of the scaffolding could be dismantled.

[38] On 20 February 2017 Mr Hendry returned to the site and continued to dismantle the first section of the scaffold. Mr Hendry estimated there was approximately 15 millimetres of sand remaining trapped under the scrim. Mr Hendry signed a handover certificate on that day. During the construction of the scaffold and while it was in use the defendant had no procedure in place to monitor or peer review the work of his contractor, Mr Hendry, and his staff.

OPUS

[39] Over this period Opus staff visited the site on multiple occasions to conduct site inspections. On 25 January 2017 an engineer from Opus made the site observation, "The scaffold is not latched on to anchor points." Mr Ambridge of Topcoat notified this to the defendant, stating that it had been pointed out by Opus.

[40] On 27 January 2017 an engineer from Opus made the site observation, "Affordable Scaffolding crew not wearing buoyancy aids." Eric, that is, Mr Whare, instructed them to put them on.

THE INCIDENT

[41] On the day of the collapse, the scaffolders were beginning to build the third section of the scaffold while also continuing to dismantle the first section. There were approximately 30 planks stacked up about two metres away from the east of pier 2 on the second section of scaffold. There was also an assortment of 20 tubes nearby which ranged in length from one to five metres and two or three sacks containing couplings and clips.

[42] At approximately 9.45 am the scaffolders were in the process of passing planks over pier 2 when the collapse occurred. Mr Hendry was passing from stage 3 to the walkway on stage 2 at the time. Three Topcoat workers, Mr Whare, Mr Usman and Mr Platino, and three scaffolders, Mr Hendry, Mr Kohonui and Mr Carswell fell into the water from the scaffold. The other worker on the site, Mr Clark from Topcoat, remained on pier 1.

[43] Mr Hendry injured his ankle however it was not fractured. Mr Kohonui injured his right shoulder. Mr Whare suffered lacerations to his arm, grazes to his legs, injured his back and fractured two ribs.

INDUSTRY KNOWLEDGE AND GUIDELINES

[44] The defendant's conduct departed from industry knowledge and applicable standards and guidelines. Relevant industry knowledge and applicable standards and guidelines have been detailed. The parties, Topcoat and Opus, also fell short of what was required of them under the bridge contracts. Good practice guidelines for scaffolding in New Zealand, issued in November 2016, were in place at the time of the collapse and was readily available to the defendants on the WorkSafe web site.

[45] The following particular guidelines applied to the scaffold:

[46] Section 7.4 of the guidelines states the scaffold should be designed for the worst combination of dead loads and live loads that can be reasonably expected during the period the scaffolding is required to be in service. Live loads include people, stacked material and environmental loads such as wind loads.

[47] Section 7.6 of the guidelines state environmental loadings are complex to calculate and secondly, scaffolders should understand the basic principles and seek professional advice from a chartered professional engineer.

[48] Section 7.11 covers special duty scaffolds. Scaffolds over five metres should be designed by an engineer unless there is enough information and structural values to calculate loads. Special duty hanging scaffolds should be considered for notification to WorkSafe. The scaffold structure in this case was a special duty hanging scaffold that was over five metres high. The guidelines state that loads on a hanging scaffold must be calculated by a chartered professional engineer if there is not enough information in the manufacturer's instructions or specifications to calculate loads.

[49] In this case, the expert evidence confirms there was insufficient information in the manufacturer's specifications and that this guideline required review of the design

by an engineer. The section also states that each vertical hanging tube should have check couplers at suspension points and underneath the platform or as per manufacturer specifications. No check couplers were in place in the scaffold.

[50] Section 13.8 of the guidelines states that scaffolds with screens, including shrink wraps, have increased environmental loads (such as wind) and must be designed by an engineer unless sufficient information is available, using the manufacturer's specifications and calculated or known loads. They must also be notified to WorkSafe as special duty scaffolds. The Australian and New Zealand standards are published and give guidance with regard to specific design and operational requirements for scaffolding equipment and scaffoldings.

[51] There was a detailed investigation by WorkSafe and expert assessments were carried out. The expert assessments concluded that the scaffold failed at the droppers and couplers attaching the scaffolding to the bridge. The scaffold failed due to overloading. The safe working load was exceeded by over 650 percent. The engineers also reviewed the scaffold drawing designs and load calculations provided by the defendant. They concluded that:

(a) The calculations did not calculate maximum working loads.

(b) The load calculations did not consider factors such as worker weight, tools, weight of sand, stockpiled scaffolding equipment and self weight.

(c) Hanging scaffolds are special duty scaffolds and, therefore, s 7.11 of the guidelines applied.

(d) Scaffold design should have been checked by an engineer.

FURTHER EXPERT

[52] John Benbow, an experienced scaffolder, was consulted by WorkSafe. He stated there were a number of issues with the scaffold design that suggested a lack of experience with this kind of work. He concluded that the scaffold design should have been checked by an engineer.

THE FAILURE TO ENSURE HEALTH AND SAFETY

[53] The defendant had a duty to ensure, so far as reasonably practical, the health and safety of workers who worked for it while the workers were at work and in the business and undertaking. There was also a duty to ensure, as far as reasonably practical, the health and safety of workers whose activities in carrying out work were influenced or directed by the defendant. The defendant failed to ensure the health and safety of workers and it did not take the following reasonably practical options:

(a) Ensuring the Panmure Bridge scaffold was designed so that it was safe for its intended purpose, including by making proper provision for safe working limits, dead weights and live weights (including workers, tools, materials, windage and traffic vibrations from the bridge).

(b) Ensuring that the load calculations of design drawings for the scaffold were reviewed by an engineer prior to the scaffolding being built.

(c) Ensuring that Mr Hendry (and staff) were adequately supervised while working on the scaffold including having a suitably qualified person conducting regular site inspections.

(d) Ensuring that check couplers (or an effective alternative contingency measure) were added to the scaffold.

EXPOSURE TO RISK OF DEATH OR SERIOUS INJURY

[54] Although none of the workers who fell into the water were seriously injured as a result of the incident, the hazards and risks of death and/or serious injury from scaffold collapse are well known, in particular, when the scaffold is at a height and/or positioned over a body of water. The failures of the defendant to ensure that the scaffold was designed in accordance with the relevant industry guidelines and standards and having that design checked by an engineer exposed each of the workers as well as workers from other companies who worked on the platform and members of the public who passed underneath to the bridge, to a risk of serious injury or death through scaffold collapse.

[55] The defendants have not had any previous convictions in respect of similar type of offending.

[56] *Stumpmaster v WorkSafe New Zealand*[2]. That case provides a four-stage approach to the sentencing. The first stage is to assess the reparation that may be due to be paid, then an assessment of appropriate fine, followed by an assessment of any other necessary orders, whether they be for reparation or otherwise, and then a consideration overall of the proportionality of the various aspects.

[57] The case here involves assessment of emotional harm for two of the workers who participated in the sentencing process. The fine estimate involves applicability of the categories which have been set from *Stumpmaster v WorkSafe New Zealand.* They are:

(a) Low culpability, up to $250,000.

(b) Medium culpability, $250,000 to $600,00.

(c) High culpability, $600,000 to $1,000,000 in fines.

(d) Very high culpability, in excess of $1,000,000 in fines.

[58] The competing submissions which are present are that the prosecution seek culpability and fines in the range of $600,000 to $650,000. The defendant submits that this is a case of low culpability and the fines up to $150,000 is the appropriate starting point.

[59] It is required that I apply the Act, in particular s 151 of the Act, in relation to assessment of culpability. The culpability assessment provides for taking into account ss 7 to 10 of the Act, taking into account the general purposes of the Act which have been set out, and then considering the following matters:

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

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[2] Ibid at page 2.

(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 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 capability or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[60] The situation in this case is that there is no argument from the defendant that it does not have the ability to meet financial penalties that may be imposed and so that aspect may be set aside. The principles and purposes of sentencing must be applied. They are that I am required to make the defendant company accountable, I am required to denounce offending conduct and I am required to provide both individual deterrence to the defendant company and general deterrence in relation to persons who are engaged in fields where this legislation is engaged. I am to take into account the interests of victims of the offending. In cases such as this there is a strong public interest. The Act also requires consideration of its purposes. I must also impose the least restrictive outcome consistent with the requisite principles and purposes.

[61] Moving to the aspect of reparation. I have read the victim impact statements that have been provided. Reparation is always a fraught issue, as Harrison J said in *Big Tuff Pallets Ltd v Department of Labour*:[3]

> "Fixing an award for emotional harm is an intuitive exercise; its quantification defies finite calculation. 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 the form of anguish, distress and mental suffering. The nature of the injury is or may be relevant to the extent it causes physical or mental suffering or incapacity, whether short-term or long-term."

[3] *Big Tuff Pallets Ltd v Department of Labour* HC Auckland CRI-2008-404-000322, 5 February 2009.

[62] In this case there were no long-term injuries. The experience is recorded by both of the victims of the offence as causing a great deal of trauma to them in terms of the fear that has resulted and the ongoing effects of that fear nevertheless there was no permanent physical injury caused. In addition, at restorative justice there were payments of $5000 made to each of the persons who have suffered harm and a Topcoat payment of $1000 in relation to each of the persons who were affected by the offence also occurred. These need to be taken into account.

[63] The competing submissions that have been made are that, on the part of the defence, the payments already received should be sufficient to meet the emotional harm reparation payment that are acknowledged as required. The cases which are referred to point to relatively modest awards being made. The awards have been made usually accompany serious and ongoing physical effects of injury.

[64] The prosecution submission is that appropriate orders would be emotional harm reparation payments of between $12,000 and $15,000 per victim. This would be calculated taking into account payments that have been made already. The prosecution submission is that the cases in general indicate that losses to persons by way of emotional harm should be met with significant responses and, in this case, the clear risk of serious harm and the actual event itself were seriously traumatic to the extent that requires me to add to the payments already made. To calculate the effect of the collapse of the scaffold and the six meter fall into water is challenging but I have no doubt the victim impact statements fairly reflect the anguish caused.

[65] The principal disagreement with regard to this matter is in the assessing quantum of fine. The prosecution maintain that this is a case of high culpability and that a starting point of $600,000.00 is appropriate when one goes through the factors that have been enumerated in s 151 and in the *Department of Labour v Hanham & Philp Contractors Ltd* case.[4]

[66] The defence, on the other hand, point to this as being a case of low culpability and suggest that I should fix the fine in the region of $250,000.00 as a starting point.

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[4] *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095; (2008) 6 NZELR 79 (HC).

[67] The authorities which have been referred to by both prosecution and defence are called upon in relation to their calculation. I mentioned to counsel in discussions that the varying amounts that have been set as maximum penalties, together with variations in facts in relation to each case mean that although assistance can be obtained from the authorities there is no case that provides an answer as far as finding the correct level for the starting point for the fine to be assessed at.

[68] The suggestion is, from the prosecution perspective, that the acts and omissions in this case were matters which provided an obvious and serious opportunity for injury or death, that the height that the work was carried out at, the inherent risks in the work, the scale of the work, the number of workers involved and the circumstances all point towards a serious situation in which major consequences could be expected to have occurred.

[69] The prosecution say that the departure from standards in this case is manifest, that the failure to produce appropriate scaffolding was far from what could be expected, that the absence of engineering support and the actual degree of failure to meet standards are significant. These are factors should incline me towards this being high culpability. The prosecution speak to the vulnerability of persons who are engaged in scaffolding work. Also that this is a case in which the standards did not approach that which should be expected.

[70] The defence position is that the risks here were not obvious. This was a situation where experienced scaffolders were involved. The contract involved the input of other qualified persons including engineers. There were various occasions for site inspections. Although the documentation was not supplied in accordance with the contract there were circumstances which led the defendant company to be in a position of relying upon persons who had experience. The failures that are pointed out by the prosecution were failures that are not as obvious as is submitted and should not be taken to the point of high culpability.

[71] It is accepted by the defence that there are obvious risks in working at height in scaffold situations. It is accepted that the defendant failed to meet the standards that

were appropriate. That said, the defendant company still takes the point that it is not in a situation where a high culpability should be imposed.

[72] This case involves reflection upon what work was involved here. It is apparent that this was a large-scale contract. It is apparent that it involved a form of scaffolding that is inherently technically demanding. The hanging scaffolding placed workers in a position where there were continuing and ongoing stresses to the scaffolding. The shrink wrapping and the wind loading that accompanied it, the accumulation of debris to an extent that outside complaints were being made about it, all were factors which ought to have been recognised as increasing the particular demands on the type of scaffolding used. What was attempted by the defendant company took it to a point where its experience did not match the demands that were being made for appropriate design and design control. The absence of supervision on Mr Hendry, notwithstanding his experience, was a factor of significance.

[73] In my view, the risk factors take me to the point that although there were things that might have obscured the risk, the risk nonetheless was significant. The failure to engage with appropriate professional support in this situation brought about serious risks. I cannot see this as being low culpability but I do reflect on the other cases which have been provided where the culpability findings have been made in relation to such works.

[74] The defence submission is particularly referred to in circumstances in *Department of Labour v Matthews*, a case in which there was an absence of serious harm.[5] The defence also point to *WorkSafe v Trade Depot Limited.*[6] This was a further case in which supervision may have assisted. The *WorkSafe New Zealand v Alliance Group Ltd*[7] case is also referred to in relation to starting points for fines.

[75] The position from the prosecution perspective, with *WorkSafe New Zealand v DMAC Contractors Limited*[8] was a case in which the absence of serious injury was regarded as not as a critical factor in terms of levels of culpability. This case was said

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[5] *Department of Labour v Matthews* DC Greymouth CRI-2009-018-000373, 12 May 2009.
[6] *WorkSafe New Zealand v Trade Depot Ltd* [2018] NZDC 372.
[7] *WorkSafe New Zealand v Alliance Group Ltd* [2015] NZDC 21538.
[8] *WorkSafe New Zealand v DMAC Contractors Limited* [2017] NZDC 26668, [2018] DCR 447.

to be distinguished on the basis that it preceded *Stumpmaster v WorkSafe New Zealand.*

[76] The risk of potential injury or death here was significant. Such a result (despite not occurring here) could reasonably be expected in these circumstances. This situation derived directly from the failure of the defendant company to observe the standards required. The defendant company does not have a history of failing to meet the required standards and repeat failure cannot be suggested as an aggravating aspect. The departures from the required standards were significant and only good fortune saved the workers involved from serious injury or death.

[77] These factors take me to the point where I consider that there is, like *WorkSafe v DMAC Contractors Limited*, medium culpability. The level of fine which has to accompany a medium culpability situation is the starting point between the range of $250,000 and $600,000. That to me seems, given the fact that this was not a case in which death or serious harm resulted, to take into account not only the serious failures that are present but the other circumstances in respect of the offending.

[78] I move firstly to take into account reparation. In my view, this requires an uplift to the payments which have already been made. I accept the prosecution submissions and the victims impact statement shows a need for emotional harm reparation. The incident must have been terrifying.

[79] I consider each of the victims of the offending, Mr Usman should receive the sum of $6000, Mr Platino should receive the sum of $6000, as an increase to the amounts already received. Mr Usman also needs to receive the sum of $171.11 to top up the ACC payment which he received.

[80] As regards the starting point for the fine I come to the conclusion this should be $300,000.00.

[81] From there, and the facts related to the offending, I move to the defendant company. The defendant company is entitled to certain discounts with regard to mitigating factors.

[82] Firstly, for prior good record, I will allow a 5 percent reduction.

[83] In relation to remorse, and the apology which was given a restorative justice meeting took place, the steps to pay interim reparation and in relation to making amends there will be a further reduction.

[84] As relates to co-operation with the prosecution and other factors that are related there will be a further reduction of 5 percent, for remedial acts, including the matters which are detailed in the affidavit which has been filed by Mr Overend. There will be a figure of 10 percent. The total reparation being 25 percent, to which is added the Hessell discount of 25 percent for the guilty plea.

[85] Accordingly, the reductions which are made reduce the sum of the fine from the $300,000 starting point.

[86] I do not reduce the fine for the reparation allocated I consider that, all in all those figures provide a proportionate response and for that reason I do not adjust the fines or reparation.

[87] There also will be an order in relation to the issue of costs. In this case, the costs sought are in the sum of some $24,044.56. I will award the costs sum in the sum of $15,000. Accordingly, there is the fine which has been imposed and there is the reparation figures which I have enumerated, together with the costs award.

D J Sharp
District Court Judge

Schedule of fines discounts and reparation

(a)	Starting point for fine	300,000.00
(b)	Total discounts for mitigating factors and Discount for plea	150,000.00
		150,000.00
Add	Reparation	12,000.00

Add	ACC top up	162,000.00
		171.00
		$162,171.00
Add	Costs	15,000.00
		$177,171.00