

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI**

**CRI-2018-009-5437
[2019] NZDC 25090**

WORKSAFE NEW ZEALAND
Prosecutor

v

**ALDERSON POULTRY TRANSPORT LIMITED
TEGEL FOODS LIMITED**
Defendants

Hearing: 12 December 2019

Appearances: D LaHood for Worksafe
M Wisker and J Lill for Defendant Alderson
S Shortall and M Ferrier for Defendant Tegel

Judgment: 16 December 2019

NOTES OF JUDGE P R KELLAR ON SENTENCING

[1] Alderson Poultry Transport Limited (“Alderson”) appears for sentence having entered pleas of guilty to two offences under the Health and Safety at Work Act 2015 (the “Act”) in that being a PCBU:

- (a) It breached ss 36(1)(a), 49(1) and (2)(c) (the “s 49 charge”) in that it failed to ensure the health and safety of workers while at work; and
- (b) It breached ss 36(1)(a), 48(1) and (2)(c) (the “s 48 charge”) in that it failed to ensure the safety of workers and that failure exposed workers to a risk of death.

[2] Tegel appears for sentence having entered a plea of guilty to a charge of failing to comply with a relevant duty and exposing an individual to a risk of death or serious injury (the s 48 charge).

[3] Tegel seeks a sentence indication in respect of a charge of failing to comply with a relevant duty (the s 49 charge).

[4] The maximum penalty for the s 48 charges is a fine not exceeding \$1,500,000. The maximum penalty for the s 49 charge is a fine not exceeding \$500,000.

[5] The Summary of Facts is long and involved. It also includes facts to which WorkSafe and Tegel have agreed for the purposes of the sentence indication on the s 49 charge.

Background

[6] Tegel is New Zealand's largest producer of poultry products. It contracts to farmers in Auckland, Christchurch and New Plymouth to grow chickens intended for meat production. They are known as "broilers". Tegel engaged Mr and Mrs Sullivan (who are defending charges against them) to grow broilers on their farm in Christchurch. Tegel also leased the relevant parts of the farm.

[7] Mr and Mrs Sullivan were required to comply with the terms of the Tegel Broiler Manual. They could expect a visit from a Tegel Broiler Adviser once a week or at least once a fortnight. Tegel could inspect the premises at any time. It also had input into the design of the poultry sheds.

[8] As part of its contract with Mr and Mrs Sullivan, Tegel was obliged to catch and remove the broilers once they had matured. Tegel entered into a contract with Alderson to meet that obligation.

[9] Between Auckland, New Plymouth and Christchurch Tegel catches around 240,000 broilers per day.

[10] Alderson was required to follow the procedures set out in the Tegel National Catching Manual and any safety documentation provided by Tegel.

[11] Tegel undertook to launder gloves and overalls daily and to ensure that safe working environments are available for Alderson's workers.

[12] Though the contract provided that it was Alderson's responsibility to provide personal protective equipment for its staff, in practice Tegel supplied the equipment. However, Alderson did make some changes to the personal protective equipment including the introduction of headlamps.

[13] Alderson had contracted a Health and Safety consultant and worked alongside them for more than nine years. The consultant provided advice to Alderson by drafting standard operating procedures and other health and safety documents.

[14] Alderson employed two catching teams in Christchurch. One such team was led by Mr Mun. On 12 June 2017 the team included three other catchers, one of whom was Mr Mun's wife, Mrs Kamila Mun. The final member of the team was the forklift driver.

[15] The five members of the team spoke four different primary languages. The only shared language was English but neither Mr Mun nor the forklift driver spoke English fluently.

The Poultry Shed

[16] The incident took place in the poultry shed located at Robinsons Road, Christchurch. The shed is approximately 18 metres wide by 135 metres long. It has doors at either end as well as one side door. Catchers were not allowed to use this side door during catching operations. When catching operations are taking place there can be up to 20,000 broilers in the shed.

[17] Temperature in the shed is controlled by heaters and fans. The fans also provide ventilation. Mr Sullivan's practice is to turn on the fans whenever catchers are working. Temperatures in the shed are often high while catching operations are taking place.

[18] Lights in the shed are deliberately kept dim during catching to ensure that the broilers remain docile. Blue or red lights are used during catching.

[19] The shed is noisy. A review in 2015 concluded that noise levels within poultry sheds ranged from 79 – 89 decibels.

[20] The shed is also filled with unhygienic dust. Workers are not allowed to take food or drink inside. Carbon dioxide from the broilers and heating units and ammonia from broiler excrement also builds up inside the shed. Tegel monitors ammonia levels during routine visits to ensure they do not exceed maximum levels for broiler welfare. Those levels are below those for human welfare. Monitoring was limited to whether the Tegel Broiler Adviser can smell an ammonia odour.

Recruitment and Induction of the Victim

[21] On Saturday 10 June 2017 a meeting of Alderson's staff was held with both the victim and Mr Mun present. Mr Kim, Alderson's Operations Manager for Christchurch noted there was a shortage of chicken catchers for the coming week. Because of family bereavements seven regular catchers were not available. The victim volunteered to take on a shift working in her husband's team.

[22] Mr Kim's normal hiring practice was for him to go through the paperwork with the new worker and send the new worker to Mr Mun for practical training. In this case Mr Kim assumed that Mrs Mun would be familiar with the work and that her husband would provide the necessary instruction. He did not consider it was necessary to fill out the paperwork immediately with Mrs Mun because she was pretty much in the Alderson family.

[23] Mrs Mun did not sign the Alderson's Safety Task Procedure for Chicken Catching. Mr Kim signed the document to indicate that Mrs Mun had been inducted. However, he did not actually provide her with any formal training or induction. Mrs Mun was not trained before she went to work but was expected to learn on the job from her husband and her fellow chicken catchers.

The Incident

[24] Mr Mun's team began their shift at 12.30am on 12 June 2017. The shift was expected to end 11 and a half hours later at 12pm that day. The shed was the last of nine sheds at five farms that the team was to attend. The team was expected to catch 42,640 broilers over the course of their shift. At the shed, they were expected to catch 9,410 broilers filling 37 modules. Depending on the weight of the birds, workers lift between five or eight broilers at a time, with birds ranging in weight from 1.5kg to a maximum of 3.3 kgs.

[25] The forklift driver had been working for Alderson for two weeks but had previously worked as both a forklift driver and a truck driver. He was trained as a forklift operator and had received a one-week training programme when he joined Alderson. He did not receive a safety briefing when he began working in the shed.

[26] The practice was for the forklift driver to operate the forklift in the centre of the shed while the chicken catchers operated at the sides. Canvas barriers were used to prevent broilers from entering the central lane where the forklift drove. These were low enough to be stepped over by chicken catchers. Modules were loaded onto the front forks of the forklift. They prevented the driver from being able to see clearly in front of him.

[27] The forklift, which was owned by Alderson, did not have any safety warning systems. It did not have warning lights or audible warning systems fitted to it. This was done to keep the broilers calm in accordance with the requirements of the Catching Manual.

[28] Several times during the shift Mrs Mun walked out of the shed to take a break from the heat, get some fresh air or use the toilet. She was wearing overalls with a single reflective strip. Alderson had expected that high vis overalls would be supplied by Tegel but the overall provided to Mrs Mun simply had a single reflective strip. She was also wearing headgear. Alderson had modified the headgear by adding a red light that could be changed to white to increase vision and visibility of chicken catchers.

[29] Mrs Mun told her husband that she needed a drink. She went to leave the shed. The forklift driver was carrying a fully loaded module out of the shed when the forklift he was operating struck and ran over Mrs Mun. She had been on the right side of the forklift where she was not visible to the forklift driver. She died at the scene from crush injuries.

The Investigation

[30] Police were originally called to the scene of the incident followed by WorkSafe. WorkSafe's investigation revealed that Alderson's Chicken Catching procedures did not involve physical separation between catchers and the forklift. That practice was consistent with industry wide practice.

[31] During the investigation WorkSafe issued a prohibition notice prohibiting the operation of forklifts within poultry sheds at the same time as chicken catchers. This was served on Alderson but Tegel voluntarily complied with the requirements of the prohibition notice until it was lifted in March 2018.

[32] Alderson and Tegel relied on general hazard identification procedures and inductions relating to chicken catching operations and sheds generally but none of Alderson, Tegel, or the Sullivans had carried out a specific hazard identification procedure in relation to the shed. Workers were not inducted into the risks of working in the shed and the ways of managing these risks before beginning to work.

[33] Workers were broadly unaware of the risks to human health arising from working in the shed. They often did not correctly wear the personal protective equipment that had been assigned to them to protect against poultry dust or noise. Often the equipment did not fit correctly. The eye protection fogged up and was unsuitable for workers with prescription glasses. No workers received initial health screens or ongoing health monitoring.

Exposure to risk of serious injury or death.

[34] The hazards associated with the use of forklifts in proximity to pedestrians are well known. The risks arising from using a forklift in proximity to pedestrians are obvious and are known to result in serious injuries due to the amount of force involved. Further, death is a known and easily predictable possibility when a forklift carrying a heavy load collides with a pedestrian.

Relevant Standards and Guidelines

[35] Regulation 10(1) of the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016 generally provides that a PCBU must make sure that a workplace is safe. In March 2016 WorkSafe published a Fact Sheet entitled “Workplace Traffic Management” that identified the risks associated with moving vehicles and equipment. In May 1995 the then Minister of Labour approved a Code of Practice for training operators and instructors of powered industrial lift trucks which stated that the correct procedure when vision is obscured by the load is to drive in reverse, or assistance must be obtained with guidance. The New Zealand Safety Standard for Low Lift and High Lift Trucks provides that unusual operating conditions may require additional safety precautions and special operating instructions. The need for specialist low light personal protective equipment is recognised by a New Zealand Standard.

Risks to health caused by conditions in poultry sheds.

[36] Regulation 11 of the Health and Safety in Employment Regulations 1995 states levels of noise exposure that should not be exceeded. WorkSafe has also published Workplace Exposure Standards relating to both carbon monoxide and ammonia. There are two workspace exposure standards for ammonia – one based on a time weighted average of exposure over a normal working week and one based on short term exposures of less than 15 minutes. The Workplace Exposure Standard on a time weighted basis for ammonia 25ppm and the standard for short term exposures is 35ppm. Ammonia is known to cause olfactory fatigue in which the sense of smell tires over time and fails to detect high concentrations if ammonia has built up over time. The ability to detect odour

is also highly variable among individuals. It may be affected by the presence of other odours or inflammatory conditions in the person's nose.

[37] Exposure to carbon monoxide should be controlled to maintain a carboxyhaemoglobin level below 3.5 per cent. Carbon monoxide is odourless, colourless and tasteless and so cannot be detected without proper equipment.

[38] As far as fatigue is concerned, WorkSafe has published guidelines entitled "Managing Shift Work to Minimise Workplace Fatigue". These observe that fatigue caused by over-exertion reduces a person's capabilities to an extent that impair their strength, speed, reaction time, co-ordination, decision making or balance.

[39] The approved Code of Practice entitled "Management of Substances Hazardous to Health" available from WorkSafe notes that the employer must be aware of any substance that is known or suspected to cause harm to health and have a responsibility to ensure that employees are provided with information on substances hazardous to health in a form they are likely to understand. It requires that induction training shall be provided before a person begins work with substances hazardous to health.

Alderson's failure to ensure health and safety of workers – WorkSafe's submissions

The risk of death or serious injury from being struck by a forklift

[40] In relation to the risk of workers being struck by a forklift in a poultry shed, Alderson failed to ensure the health and safety of those workers by failing to:

- (1) Implement a traffic management plan that separated the forklift's activities from that of pedestrians;
- (2) Implement a formal and reliable way for workers to communicate with the forklift driver;
- (3) Make sure there was an adequate Safe Task Procedure in relation to chicken catching and that it was effectively implemented;

- (4) Regularly review the personal protective equipment provided to workers to make sure it was fit for purpose and was being worn correctly;
- (5) Have available warning devices including headlights, a rotating beacon and warning sounds fitted to the forklift;
- (6) The forklift was designed so that when it was loaded the driver could not see out the front right-hand side. Alderson should have implemented options to mitigate the risk of impact;
- (7) To provide proper training to the victim or to induct her;
- (8) Discuss with the Sullivans or Tegel ways of managing safe ingress and egress of workers from the shed.

[41] These failures led directly to Mrs Mun's death.

[42] The risks involved with forklift operation in a low light environment are obvious and well documented. Alderson was aware of the specific risks from experience. In 2014 one of its forklifts collided with a pedestrian during a chicken catching operation. The victim was a grower who walked into the driver's blind spot and was not wearing correct protective equipment. He suffered a fracture to his leg. WorkSafe was notified of the incident but no action was taken against Alderson.

[43] Alderson was also aware there were communication limitations within Mr Mun's team due to language barriers.

[44] Alderson had taken steps to improve the personal protective equipment provided to its chicken catching teams which included introducing headlamps to improve the visibility of catchers which was not industry standard. However, these steps did not go far enough.

Risk to workers' health from working in poultry sheds

[45] In relation to the health risks arising from working in poultry sheds, Alderson failed to ensure the health and safety of workers in such sheds by failing to:

- (1) Ensure that its workers correctly wore suitable respiratory, eye and ear protection;
- (2) Ensure that personal protective equipment provided to workers was of an appropriate fit and properly maintained;
- (3) Put in place measures to manage worker fatigue given that workers were working 11 and a half hour shifts repeatedly lifting significant weight;
- (4) Assess and monitor the levels of carbon monoxide and ammonia;
- (5) Carry out health checks for its workers including lung tests, vision tests or hearing tests;
- (6) Give warnings about health risks of working in sheds.

[46] The health risks from doing long overnight work shifts involving heavy lifting in loud, hot and unhygienic conditions are obvious.

Tegel's Failures to ensure Health and Safety of Workers -WorkSafe's submissions

[47] As a PCBU Tegel had a duty under s 36(1)(a) of the Health and Safety at Work Act to ensure, as far as was reasonably practicable, the health and safety of its workers, including the victim, while at work in the shed.

The risk of death or serious injury from being struck by a forklift.

[48] In relation to the risk of workers being struck by a forklift in a poultry shed, Tegel failed to ensure the health and safety of those workers, most particularly the victim by failing to:

- (1) Develop or make sure that Alderson developed a safe system of work that adequately separated workers from moving plant. It should have provided guidance around how to ensure that workers were kept separated from moving plant. It should have used its powers of inspection to monitor Alderson and its workers and make sure those systems were properly implemented;
- (2) Provide adequate personal protection equipment to workers including providing reflective overalls that were suitable for low light work;
- (3) Discuss with Alderson and the Sullivans ways to manage safe ingress and egress of workers from the shed such as allowing workers to use the side door of the shed while the forklift was in operation.

[49] The risks involved with a forklift operation in a low light environment are obvious and well documented. Tegel carries out chicken catching operations on its own elsewhere in New Zealand and is familiar with the process and the inherent risks. It uses forklifts in other areas of its business and in those areas does employ proper traffic management systems and warning devices. Tegel's Broiler Advisers inspected the shed on a regular basis. It provided personal protective equipment and was responsible for laundering overalls meaning it was aware of the state of the equipment. It was aware from an inspection carried out in 2014 that the personal protective equipment was not always worn correctly.

Risk to workers' health from working in poultry sheds.

[50] For the sentence indication it is alleged that Tegel failed to ensure the health and safety of workers by failing to:

- (1) Assess or monitor the levels of carbon monoxide in the shed to determine whether this posed a risk to worker. It relied on a sniff test to ascertain whether ammonia was present in dangerous levels. This was unscientific and inadequate;

- (2) Communicate the results of its occupational hygiene reports commissioned in 2015 and 2016 in relation to its own poultry sheds in Auckland and New Plymouth. It should have communicated the results and ensured that workers carrying in poultry sheds were aware of the consequent risks to their health and ways of managing this.

[51] The health risks associated from doing long overnight work shifts involving heavy lifting in noisy, hot and unhygienic conditions are obvious. Tegel had specific knowledge of the health risks in relation to workers from the hygiene reports; the regular inspections from its Broiler Advisers; the fact it provided personal protective equipment to Alderson's employees; and it was aware from an inspection in 2014 that the equipment was not always worn correctly.

Remedial Action

[52] The probation notice was issued on 29 June 2017. The Poultry Association of New Zealand of which Tegel is a member is developing chicken catching guidelines for companies to follow. These guidelines which would allow chicken catchers to safely operate in poultry sheds alongside forklifts are based on a trial chicken catching operation that was observed by WorkSafe. The prohibition notice was still in force at the time of the trial and was varied to allow it to take place. Feedback has been provided on the trial catching process and the guidelines continue to be developed.

[53] During the trial, Alderson provided WorkSafe with its revised Safe Task Procedure for chicken catching procedures. This Safe Task Procedure complied with the prohibition notice by ensuring that catchers were to be outside poultry sheds while the forklift was operating inside. Alderson assured WorkSafe that until the Poultry Association chicken catching guidelines are finalised it will continue to abide by the revised Safe Task Procedure and will not revert to its pre-incident practices.

[54] Considering these steps, WorkSafe was satisfied that the serious risks to the health and safety of chicken catchers that had prompted the issue of the prohibition notice had been remedied. Hence the notice was lifted on 21 March 2018.

Purposes and Principles of Sentencing

[55] The purposes of the Health and Safety at Work Act include:

- (a) Protecting workers against harm by minimising or eliminating risks arising from work;
- (b) Securing compliance through effective and appropriate enforcement measures;
- (c) Providing a framework for continuous improvement and progressive higher standards of work, health and safety.

[56] Section 151 of the Act provides specific guidance for sentencing for offences against ss 48 and 49. I incorporate s 151 into these sentencing remarks.

[57] In the guideline judgment for sentencing under s 48 – *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881 at [22] the High Court observed that s 151 “highlights features of the Sentencing Act to which particular attention must be given”.

[58] The relevant purposes of sentencing are:

- (a) To hold the offender accountable for harm done by the offending;
- (b) Promoting in the offender a sense of responsibility for that harm;
- (c) Providing for the interests of the victim including reparation;
- (d) Denouncing the conduct;
- (e) Deter both the offender and offenders generally.

[59] The relevant principles of sentencing are:

- (a) The gravity of the offending and the degree of culpability;
- (b) The seriousness of the type of offence as indicated by the maximum penalty;
- (c) The effects of the offending on the victim;
- (d) The outcome of any restorative justice process or any offer or agreement to make amendments;
- (e) The least restrictive outcome appropriate in the circumstances.

[60] The well-established sentencing methodology for sentencing under the Health and Safety at Work Act is as follows:

- (a) Assess the amount of reparation;
- (b) Fix the amount of fine by reference first to the guideline bands and then having regard to personal aggravating or mitigating factors;
- (c) Determine whether further orders under ss 152 – 158 of the Act are required;
- (d) Make an overall assessment of the proportionality and appropriateness of the “combined packet of sanctions” including by reference to the defendant’s financial capacity.

Reparation for emotional harm

[61] Section 12(1) of the Sentencing Act provides that a sentencing court must impose a sentence or order for reparation where this is available unless this would result in undue hardship for the offender or other special circumstances make it inappropriate.

[62] Section 32(1) of the Sentencing Act provides that reparation is payable where the offender has, through or by means of an offence, caused a person to suffer emotional harm or consequential loss.

[63] The task of quantifying emotional loss is difficult. The then Chief Judge Doogue in *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865 said:

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.

Consequential Financial Loss

[64] The issue of reparation for consequential loss was not before the Court in *Stumpmaster*. However, it has recently been the subject of discussion by Venning J in *Oceana Gold New Zealand Limited v WorkSafe New Zealand* [2019] NZHC 365.

[65] There were two alternative methodologies before the Court. Venning J summarised them as follows:

[41] On the first approach an order for reparation for financial loss, consequent on physical harm, would be constrained by the pecuniary benefit that the victim would have received (calculated by reference to net income in the period prior to the incapacitating incident), and limited to the shortfall between that amount and the victim's entitlement to compensation payments under the Accident Compensation Act 2001 for the period which they are entitled to such payments (the "statutory shortfall approach").

[42] On the second approach an order for reparation would entitle a victim to the prospective future value of the financial loss they have suffered (calculated by reference to anticipated life-time earnings on the basis of actuarial reports), for a period of time unconstrained by any time limit for which compensation may be payable under the Accident Compensation legislation (the "open-ended approach").

[66] His Honour concluded that the statutory shortfall approach should be adopted. His Honour considered that the need to generate actuarial reports predicting the deceased's full life-time earnings created unnecessary complexity that did not sit well within the sentencing process.¹ Further, the need to avoid over-compensation often resulted in arbitrary (more generously termed "pragmatic") steps such as halving the

¹ At [57] and [67].

calculated earnings when calculating the appropriate reparation amount. More importantly, Venning J held that it was necessary to preserve the “social contract” that underpins the Accident Compensation Act by ensuring that reparation orders were made consistently with the scheme of that statute.

[67] His Honour described the necessary calculation as follows:²

That shortfall is to be calculated as the difference between the pecuniary benefit the victim would have received and the compensation payable to them under the Accident Compensation Scheme, in accordance with the entitlements set out in Schedule 1 of the Accident Compensation Act limited to the period that the payments are made under that scheme.

[68] Section 32(5) of the Sentencing Act 2002 was amended in 2014 following the judgment of the majority of the Supreme Court in *Davies v Police*.³ Section 32(5) of the Sentencing Act 2002 now relevantly provides:

... the Court must not order the making of reparation in respect of any consequential loss or damage in subsection (1)(c) for which compensation has been, or is to be, paid under the Accident Compensation Act 2001.

[69] The 2014 amendment left uncertainty about the approach to calculating the quantum of reparation payable for loss of income. As noted above Venning J held that the statutory shortfall approach should be adopted and explained how the shortfall is to be calculated. His Honour adopted counsel for Alderson’s (Mr Gallaway who was counsel in *Oceana*) submissions as to how the statutory shortfall should be calculated.⁴

[70] Schedule 1 of the Accident Compensation Act sets out the entitlements for persons who suffer personal injuries. An earner who suffers an incapacitating personal injury is entitled to weekly compensation equivalent to 80 percent of their pre-injury earnings (the earner’s entitlement). The total compensation payable is capped at \$1134.31 per week and is subject to abatement if the injured person continues to earn during their period of incapacity. The Earner’s Entitlement continues until their incapacity ends or until they become eligible for superannuation.

² At [68].

³ *Davies v Police* [2009] NZSC 47.

⁴ At [86] and [87].

[71] Whenever an earner is fatally injured, as here, his or her family is entitled to weekly compensation. A surviving spouse is entitled to compensation equivalent to 60 percent of the earner's entitlement as set out in Clause 66 to Schedule 1 to the Accident Compensation Act. This weekly compensation is payable until the latest of:

- (a) Five years from the date of the earner's death;
- (b) The spouse ceasing to have care of any of the earner's dependants; or
- (c) The earner's children in the care of the spouse turning 18.

[72] The surviving spouse can choose to convert the entitlement to one or more aggregated payments instead of weekly compensation. These payments are not merely the sum of the weekly payments for the entitlement period but are calculated actuarially.

[73] The child of a deceased earner is entitled to compensation equivalent to 20 percent of the earner's entitlement. This is payable until the later of:

- (a) End of the calendar year in which the child turns 18; or
- (b) If the child enrolls in full-time study, the earliest of the date they cease or complete that study or turn 21 years.

[74] The total compensation payable to family members of a deceased earner is capped by Clause 74 of Schedule 1 to the Accident Compensation Act. It must not exceed the earner's entitlement (that is, the lesser of 80 percent of their pre-death gross taxable income or \$1134.31 per week). Therefore, compensation paid to family members can be pro-rated.

[75] In *Oceana Gold Venning J* stated:⁵

[52] The 2014 amendments were clearly intended to overcome the decision in *Davies* and to allow for reparation payments consequential on physical harm to be ordered for the benefit of victims to address the statutory shortfall so that any shortfall between Accident Compensation entitlements and actual loss could be recovered for the period the compensation payments were made. The

⁵ At [52].

explanatory note to the Bill makes that much clear. While such reparation payments will top-up the entitlements under the Accident Compensation Legislation, the legislation provides a useful context against which the calculation of quantum for such reparation payments can be based, and can still be consistent with the purpose of the social contract underpinning the Accident Compensation Scheme, by providing compensation which is fair rather than full.

[76] I agree with submissions of counsel for WorkSafe that His Honour's comment that reparation should be "fair rather than full" is a reference to the fact that the rejected open-ended approach provides reparation based on the deceased earner's entire expected lifetime income. In contrast, the statutory shortfall approach only provides compensation for the entitlement period under the Accident Compensation Act.

[77] A person's earnings are calculated by reference to their gross taxable income prior to the accident.⁶ This is consistent with the fact that weekly compensation under the Accident Compensation Act is treated as "salary or wages" under the Income Tax Act 2007 and taxed accordingly. However, Venning J referred to net income in *Oceana Gold*.⁷ As is noted in 'McGregor on Damages' "As with personal injury, the decision in *British Transport Commission v Gourley* [1956] A.C. 185, requires calculation to be made on the earnings after deduction of the income tax which would have been payable on them..."⁸ I will use sums net of tax for the purposes of calculating the statutory shortfall.

[78] Counsel for Alderson submits that the High Court in *Oceana* sought to interpret the 2014 amendment to the Sentencing Act in a manner consistent with the social contract of the Accident Compensation Act, central to which is the use of 80 percent (as opposed to 100 percent) of the deceased's income when calculating compensation payable. The original order of reparation made in the District Court in *Oceana* was for the payment of the full "loss of future earnings" of the deceased. Though Venning J held that compensation should be limited by the Accident Compensation entitlement period, His Honour did not hold that the loss should be calculated based on a percentage of the lost earnings as Alderson now submits.

⁶ Sections 10-15 of the Accident Compensation Act.

⁷ At [41].

⁸ McGregor on Damages Twentieth Edition at 41-041

[79] Tegel purports to adopt Alderson's methodology on the calculation of the statutory shortfall although it has a different approach.

[80] The statutory shortfall is a methodology for quantifying the loss of a deceased earner's future earnings by reason of the defendants' offending. Under the Accident Compensation Scheme, future earnings are compensated through payment of weekly compensation. Accordingly, weekly compensation payments are subtracted from the calculation of loss. Funeral grants, childcare grants and survivor's grants do not address the specific loss. I agree with the submissions of counsel for WorkSafe that it would be incongruous and unjust for them to be considered when quantifying the loss. Funeral grants offset the cost of a funeral which is an additional cost, which victims have to pay by reason of the defendant's offending.

[81] Likewise, childcare grants compensate for loss arising from the inability of the deceased to provide childcare for their dependents. Furthermore, survivors' grants are not calculated by reference to lost earnings but, instead, are a fixed lump sum payment. It is not appropriate for those grants to be considered when calculating the statutory shortfall.

[82] Section 32(3) of the Sentencing Act refers to "a right available to the person who suffered **the loss or damage** to bring proceedings or to make any application **in relation to that loss or damage**" (emphasis added). Those phrases are a reference to "consequential loss or damage" to which the section refers. Indeed, s 32(3) refers to a description of "consequential loss or damage" in subs (1)(c) which refers to "loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

[83] In any event, a funeral grant cannot exceed the actual costs of the funeral. Similarly, a childcare grant requires a written application form and proof that an expense has been incurred. As noted earlier, survivors' grants are a fixed lump sum.

[84] I agree with WorkSafe's methodology for calculating the statutory shortfall totalling \$53,430.72 net, the calculation of which is as follows:

Earnings in 52 weeks prior to incident (14/06/2016-12/06/2017)

Net

	Southern Seafoods	
	Alderson Transport	
A	Total Gross Annual Salary	17,595.76
Weekly entitlements		
C	Maximum weekly entitlement (B/52)	274.47
D	Spouse's weekly entitlement (60% of C)	166.61
E	First child's weekly entitlement (20% of C)	55.54
F	Weekly entitlement for second and further Children under 18 (20% of C)	55.54
Entitlement Period		
G	Period when at least two children are under 18	365 weeks
H	When only one child is under 18	259 weeks
I	Total (G + H)	624 weeks
Total Shortfall		
J	Total salary earned during entitlement period (A x I)	211,149.12
K	Less: weekly compensation when at least two children are under 18 (G x (D + E + F))	-100,181.55
L	Less: weekly compensation when only one child is under 18 (H x (D + E))	-57,536.85
M	Less: life insurance	0.00
N	Shortfall:	53,430.72

WorkSafe's Submissions as to the appropriate amount of Reparation and apportionment between Alderson and Tegel

[85] In terms of emotional harm, WorkSafe submits that reparation in the order of \$150,000 should be awarded. WorkSafe submits that this figure is consistent with the

amount awarded in other cases which involve fatalities. In the present case, Mr Mun was present when his wife died. This has had an obvious and significant effect on him. WorkSafe submits that should be recognised in an increased emotional harm payment. During sentencing submission, counsel for WorkSafe referred me to *WorkSafe v Department of Corrections*⁹ in which the then Chief District Court Judge, Jan-Marie Doogue awarded reparation to one set of victims of \$95,000 and to another victim of \$45,000 in a subsequent sentencing.¹⁰ Whilst helpful, the decisions in those proceedings were in the context of the primary victims being very much in Corrections' care.

[86] WorkSafe's position is that Alderson should be responsible for sixty per cent of the reparation payment.

[87] Alderson submits that apportionment of liability for reparation between Alderson and Tegel is in respect of the s 48 charge only. This is because this is the charge that relates to factors that caused Mrs Mun's death. Both Tegel and Alderson were PCBUs with duties in relation to the incident and apportionment is appropriate according to their degree of culpability.

[88] Alderson accepts that as Mrs Mun's employer it had the most control over her day to day activities but submits that Tegel also had significant influence over the catching process. Alderson submits Tegel had a significant level of control over Alderson and was able to carry out monitoring of the operation. Tegel also provided personal protective equipment including the overalls worn by catching staff.

[89] Alderson submits that liability for reparation should be apportioned 60:40 as the prosecutor submits.

[90] In addition to the authorities to which the prosecutor referred, counsel for Alderson has referred me to *Broadspectrum New Zealand Limited* [2016] NZDC 26458. Furthermore, in *Oceana Gold* Justice Venning observed that recent awards made in the District Court have been in the range of \$75,000 to \$110,000.

⁹ *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865

¹⁰ *WorkSafe v Department of Corrections* [2017] NZDC 819

[91] Alderson submits that reparation of \$120,000 should be awarded for which Alderson is responsible for 60 per cent. Shortly after the incident Alderson made the following contributions to the Mun family:

\$8,000 for funeral and associated expenses;

A website and domain name and photo gallery at a cost of just over \$2,000;

Mr Mun was paid \$4,112,82 for leave taken which was not deducted from his entitlements;

A voluntary payment of \$40,000 by way of amends was paid at the end of September 2018;

A payment of \$35,000 was made on or about 15 July 2019.

[92] Tegel submits that reparation of \$120,000 rather than \$150,000 for emotional harm would be consistent with awards in other cases involving fatalities and recognises the additional emotional harm suffered by Mr Mun because he was present when the death occurred.

[93] As to the apportionment between Alderson and Tegel, Tegel submits there is no question that Alderson had a much greater degree of control over the circumstances leading to Mrs Mun's death than Tegel did. Tegel was the principal under the contract and had no role in the day to day catching operation. The work was carried out by Alderson which developed the catching procedure used; it employed the victim and all other staff; and Alderson owned and operated the equipment.

[94] Tegel submits that reparation should be apportioned between Alderson and Tegel in the proportions of 70:30 on the basis that Alderson had significantly greater culpability. The amount of reparation must of course consider the fact that Tegel has paid \$37,500 to the Mun family.

Assessment of emotional harm reparation

[95] Mr Mun and the children have suffered very significant emotional harm because of Mrs Mun's death. For Mr Mun, the situation was made even worse because his wife died before his very eyes. The children have also understandably deeply affected by their mother's death. The eldest child has assumed responsibility for the family that her mother had fulfilled. The youngest child has also been deeply affected by the loss of her mother.

[96] No award of reparation can ease the suffering of the Mun family. Furthermore, there is no guiding principle as to how to assess the amount of emotional harm reparation. The best one can do is make a comparison with other, similar cases to the extent that these things can be measured.

[97] I make an award of emotional harm reparation of \$130,000. That sum pays regard to comparable cases and endeavours to compensate the Mun family for the harm insofar as money can do.

Assessment of relative contributions

[98] Both WorkSafe and Alderson submit that liability based on respective culpability be apportioned 60:40 to Alderson and Tegel respectively. Tegel submit for reasons, which are contained in Tegel's written submissions on which Ms Shortall expounded in oral submission, that the apportionment should be 70:30. Without wishing to be seen to be merely splitting the difference, I consider that the apportionment should be 65:35 to Alderson and Tegel respectively based on their respective responsibilities and control over the factors, which lead or contributed to Mrs Mun's death.

Quantum of the Fine

WorkSafe's Submissions

[99] The starting point should be determined by reference to the culpability of the offending. Adjustments are then made for relevant aggravating and mitigating factors

personal to the defendant. Finally, allowance should be made for the defendant's guilty plea.

[100] Once the assessment of culpability is complete, the Court in *Stumpmaster* held that offending could be characterised into several bands, with corresponding starting points. The bands for offending by a PCBU under s 48 are set out at paragraph [53] of the *Stumpmaster* judgment. The Court predicted that under the new bands, a starting point of \$500,000 to \$600,000 will be common. The Court noted that the starting point in the case of average culpability may well be higher depending on the degree of departure and the actual harm caused.

[101] There is no guideline judgment with respect to offences under s 49. WorkSafe referred to the only known sentencing decision on a s 49 charge in which the District Court Judge adopted a starting point of \$200,000 for the s 49 charge in which there is limited discussion about the assessment of the starting point.¹¹

[102] WorkSafe submits that the logical approach is to adjust the bands set out in *Stumpmaster* downwards to account for the lower maximum penalty. Counsel for WorkSafe submitted, and counsel for Alderson and Tegel agreed, that the adjusted bands for the s 49 charge are as follows:

Culpability	Range	Midpoint	% of maximum
Low	\$0 - \$85,000	\$42,500	0% - 17%
Medium	\$85,000 - \$200,000	\$142,500	17% - 40%
High	\$200,000 - \$335,000	\$267,500	40% - 67%
Very high	\$335,000 - \$500,000	\$417,500	67% - 100%

[103] The full Court in *Stumpmaster* expressed concern that routine standard discounts for reparation payments have distorted the sentencing process by so reducing the starting

¹¹ Maritime New Zealand v East by West [019] NZDC 21847

points that outcomes become very low. The Court pointed out that the high starting points for fines under the Act makes a percentage-based credit for reparations inappropriate in some cases. This is because such credits can have the effect of reducing the fine by an amount greater than the reparation. The Court strongly disapproved of that approach.

[104] WorkSafe referred me to several comparable cases including *Kuehne and Nagel Limited* [2018] NZDC 20761; *Toll Networks NZ Limited* [2018] NZDC 11132; *Cardinal Logistics Limited* [2018] NZDC 19686. WorkSafe submitted that an appropriate starting point is \$750,000 being in the lower half of the high *Stumpmaster* band for the s 48 charge.

[105] Alderson accepts that a substantial fine is warranted but that the starting point must reflect the fact that Alderson hired an external Health and Safety consultant; observed overseas poultry operations; imported specialised forklifts, used barriers in the loading zones outside the sheds, provided additional protective equipment to workers; and had fatigue management measures in place.

[106] Alderson submits that its overall culpability for both charges lies about \$650,000 being just within the high culpability band. It submits however that if a separate starting point for the s 49 charge is warranted, it must be at the high end of the low band suggested by the prosecutor on the basis that there is very little if any evidence of risk of harm and no evidence of a breach of workplace exposure standards that could justify a higher starting point.

Submissions as to the Starting Point – the s 48 charge.

[107] WorkSafe submits that Alderson's failures in relation to the s 48 charge were as follows based on which the starting point should be \$900,000 near to the top of the high culpability band in *Stumpmaster*:

- (a) Failure to develop, implement, monitor and review an adequate safe system of work that adequately separated workers from moving plant. WorkSafe submits that Alderson should have implemented a traffic

management plan that segregated the forklift's activities from that of pedestrians;

- (b) It failed to provide suitable protective equipment to workers;
- (c) It failed to provide and maintain safe plant, namely a forklift fitted with appropriate warning devices;
- (d) It failed to provide adequate information, training, instruction and supervision to its workers;
- (e) It failed to consult, co-operate with and co-ordinate activities with other PCBUs who had a duty in respect of the matter, namely Tegel and the Sullivans.

[108] WorkSafe submits that the risk in question was a risk of death arising from being struck by a forklift. Alas, this risk was realised. Furthermore, other workers were exposed to this risk on a regular basis. WorkSafe submits that the risk in question is within the most serious class conceivable.

[109] WorkSafe further submits that the hazards arising from using moving plant around pedestrians in low light, loud, dusty and fatigue conditions were obvious. Similarly, the ways to eliminate or minimise those hazards are well known, simple and effective. WorkSafe submits that the ways of eliminating the hazards were not expensive or difficult to implement. Hence WorkSafe submits that Alderson's culpability is high in relation to the s 48 charge.

[110] Alderson is a contractor for Tegel and is required to carry its operations in accordance with Tegel's catching manual which sets out requirements for the conduct of a catch and for animal welfare during a catch.

[111] Alderson had engaged an external Health and Safety expert who managed its compliance and had developed safe task procedures.

[112] To manage safety around forklifts Alderson had a procedure whereby the forklift would operate in the centre of the shed while the workers worked around the outside. At the time of the incident this traffic management plan was not formally written down, however it was communicated to workers by supervisors and Branch Managers.

[113] Alderson does not accept that the risk of the forklifts could easily have been managed using a side door in the shed. Alderson submits that in any event the side door cannot be used until at least the front one third of the shed is cleared of poultry. It accepts however that it should have done more to ensure its workers were not at risk of serious harm or death from forklifts on site.

[114] Alderson required the use of personal protective equipment and took steps to provide additional equipment such as goggles, head lights and ear plugs. It provided its own headlamps which could be used on a red or white light setting to assist vision and visibility of the workers while minimising potential distress to the birds.

[115] Alderson accepts that while it took steps to provide its workers with appropriate protective equipment, those steps did not go far enough.

[116] As far as the forklifts are concerned, the forklifts are specifically designed for poultry catching. They are designed in a manner to make it easier for poultry modules to be moved and loaded. The cab is offset to the left from the forks to allow for the best possible range of vision when driving forward with a load. This does mean however that the driver's vision to the front right-hand side to the forklift is obscured. It submits that alarms and warning signs would not have been likely to have changed the outcome of the incident. It does accept that it did not take enough steps to ensure appropriate safety features were fitted on the forklift. It has now implemented the use of sonar to detect workers without the need for alarms or sirens.

[117] Alderson accepts that it should not have allowed Mrs Mun to join the catching team without satisfying itself she had the appropriate induction and training to conduct the safety role.

[118] As far as consultation and co-ordination is concerned, Alderson accepts that additional discussions about entry and exit of sheds could have taken place. It accepts that it should have communicated with Tegel and growers to confirm if there were other access points that could be used during the catching process.

[119] WorkSafe submits that the starting point for the s 48 charge against Tegel should be \$750,000 based on the factors referred to above.

[120] Tegel submits that in relation to the failure to ensure a safe system of work that separated workers from mobile plant was implemented and monitored, this is not a case where no such system existed and where Tegel took no steps to ensure that it was safe. Alderson had a Safe Task Procedure for chicken catching which had been developed with the input of a consultant. The procedure was developed following an incident in which a farmer was injured. The procedure stated that safety cones and barriers had to be placed to restrict people entering the forklift working area. Tegel reviewed the Safe Task Procedure and was satisfied as to it and then audited Alderson to make sure it was being adhered to.

[121] In relation to the failure to ensure the provision of suitable protective equipment Tegel submits that Alderson had the contractual responsibility to provide protective equipment. Tegel accepts that it assumed this role in practice. Tegel acknowledges that the overall Mrs Mun was wearing were daytime overalls but submits that low light overalls may well have made no difference.

[122] As far as the failure to consult or co-operate with other PCBUs to make sure that there was a safe entry to and exit from the poultry shed, Tegel submits there is no suggestion that access through the side exit was ever raised by Alderson's workers or by Alderson with Tegel. Furthermore, Tegel submits there were alternatives to entering and exiting through the side door including strict compliance with the Safe Task procedure designed to separate workers from the forklift.

[123] Tegel accepts there was a serious risk of harm or death from the moving forklift and of course that death is a grave risk. It is an element of the charge that there was a risk of death or serious injury and so this is already reflected in the maximum penalty.

[124] Tegel accepts that the proximity of workers and moving plant involved a departure from published guidance regarding risk management. The Safe Task Procedure that should have been in use had steps which were designed to address this.

[125] Tegel accepts that the hazards arising from using mobile plant around pedestrians are obvious. It is for that reason that the Safe Task Procedure was developed and audited. It had features designed to separate workers from the forklift. Older overalls were replaced with overalls designed for low light conditions. Tegel's laundry had been directed to remove the old overalls from circulation.

[126] Tegel also accepts that the practicable steps agreed between the parties were available and may have been effective in helping to prevent the incident.

[127] I have read and considered Tegel's submissions analysing comparative cases. Tegel submits that if a starting point for Alderson of \$600,000 to \$700,000 is adopted, the appropriate starting point for Tegel would be between \$360,000 and \$420,000 to reflect the seriousness of the incident, including the harm, but also the factors which distinguish Tegel's culpability from Alderson's.

Submissions as to the Starting Point – s 49 charge.

[128] WorkSafe submits that Alderson's failures in relation to the s 49 charge were as follows:

- (a) Failing to ensure that suitable personal protective equipment was worn;
- (b) Failing to develop, implement, monitor and review a safe system of work relating to the management of worker fatigue;
- (c) Failing to monitor the health of workers and conditions within poultry sheds for the purpose of preventing illness of workers;
- (d) Failing to provide adequate information, training, instruction and supervision to its workers.

[129] WorkSafe submits that the risk was the risk to workers' health from ongoing exposure to noise, dust, harmful gases and fatigue. PCBUs must make sure that no workers are exposed to noise above an average of 85 decibels across eight hours. Alderson's catching teams worked for 11 and a half hours at noise levels of between 79 and 89 decibels.

[130] Poultry dust is extremely unhygienic and can carry harmful pathogens and cause eye irritation.

[131] The workplace exposure standards require that workers are not exposed to concentrations of more than 25 parts per million of either ammonia or carbon monoxide over an eight-hour day.

[132] Fatigue is known to impair workers' capabilities over time including their strength, speed, reaction time, co-ordination, decision making and balance.

[133] WorkSafe accept that there is no evidence establishing whether any of Alderson's workers have actually suffered any negative health effects of a result of exposures to noise, poultry dust, ammonia or carbon dioxide. Hence WorkSafe concedes that it is not possible to prove that the risks referred to above were realised.

[134] WorkSafe submits that Alderson was aware that poultry dust contains pathogens and were potentially harmful to human health. It was also aware that the forklift generated carbon monoxide and should only be used outdoors with proper ventilation. Further, the presence of ammonia in the urine and faeces of chickens is well known in the poultry industry. Hence WorkSafe submits the general risks to worker health from fatigue are similarly obvious and well understood. WorkSafe submits that the reasonably practical actions that Alderson failed to take in relation to these hazards were not onerous.

[135] Overall WorkSafe submits that Alderson's culpability falls within the medium band with a starting point of \$150,000.

[136] WorkSafe submits that Tegel's failures in relation to the s 49 charge were:

- (a) Failing to monitor conditions within the poultry sheds for the purpose of preventing illness of workers. WorkSafe submits that Tegel's reliance on a "sniff" test to ascertain whether ammonia was present was unscientific and inadequate. It should have carried out a risk assessment to determine whether the level of ammonia generated in the shed posed a health risk to workers and if it did, to make sure adequate monitoring took place;
- (b) Failing to provide information, training, instruction and supervision to its workers. As mentioned earlier, Tegel commissioned Occupational Hygiene Reports in 2015 and 2016 in relation to its own poultry sheds in Auckland and New Plymouth. It should have communicated those results and made sure workers were aware of the risks to their health and ways of managing it.

[137] WorkSafe accepts there is no evidence establishing whether any of the catching team workers have suffered any negative health effects as a result of exposure to ammonia and/or carbon monoxide. WorkSafe submits that the cumulative risk to workers' health was meaningful and significant although it accepts the Court cannot sentence on the basis that the risk was realised.

[138] WorkSafe submits that Tegel's conduct departed from widespread published guidance on managing those risks. However, there is no evidence before the Court concerning the practices of other industry participants.

[139] WorkSafe submits however that Tegel was aware that ammonia was present in poultry sheds and that it could pose an animal welfare issue. It was also aware that forklifts with combustion engine would generate exhaust fumes that could be hazardous to health. WorkSafe therefore submits that Tegel could simply have provided the two industry hygiene reports to Alderson to make sure that Alderson was aware of the health risks to which its workers were exposed. Furthermore, WorkSafe submits Tegel should have carried out a risk assessment to determine whether workers were exposed to harmful levels of these substances.

[140] WorkSafe submits that Tegel's culpability falls at the cusp of the low and medium band for a s 49 charge sentencing with a starting point of \$85,000.

[141] Alderson submits that the noise levels do not exceed workplace exposure standards, and, in any event, personal protective equipment was provided. Furthermore, ammonia and carbon monoxide are present in poultry sheds but there is no evidence that this was at a level that exceeded workplace exposure standards. Alderson acknowledges that poultry dust is unhygienic and can cause eye irritations and illnesses but there was no evidence that this harm was caused to workers which, given the time for the charge, indicates the risk is only low. Hence Alderson submits that in respect of the s 49 charge there is very little evidence of a risk of harm and there is no evidence of any actual harm. Hence Alderson's culpability is at a low level.

[142] Alderson did plan shifts to limit the effect of fatigue on workers. The environment inside a chicken shed does contain ammonia and a forklift emits carbon monoxide. The sheds are fitted with large fans to ensure enough air is exchanged to prevent the build-up of gases which could harm both the chickens and workers. At the time of the incident, Alderson understood that Tegel conducted regular testing of the environment as part of its duty to ensure Alderson worked in a safe environment. Alderson did not, however, review the testing or satisfy itself of the adequacy of the process being used by Tegel. It accepts that this reliance on Tegel did not relieve it of its duty to ensure its staff worked in a safe environment. Alderson has since conducted tests of the environment inside the shed which indicate that the level of ammonia and carbon monoxide present do not pose a health risk or exceed the relevant workplace exposure standards. Lung function and other tests are now carried out for the workers. These tests build up a picture of worker health over time and so these will be a valuable part of ensuring that workers are safe and healthy.

[143] Tegel submits that the failure to monitor conditions within poultry sheds and the levels of carbon monoxide and ammonia must be seen in context. Tegel submits it is simply wrong for WorkSafe to submit that Tegel merely assumed the risks from ammonia and carbon monoxide were de minimis.

[144] In 2005 Tegel instructed an expert Occupational Hygienist to carry out industrial hygiene testing across Tegel's poultry sheds in Auckland and New Plymouth for several known hazards.

[145] The forklift was designed specifically for indoor use and in the shed only intermittently. The sheds themselves are very large, open spaces and ventilation fans and open doors during catching prove air movement and dilution.

[146] As noted above, people can detect ammonia at 5ppm. The Poultry Welfare Code requires ammonia levels to be maintained below 20ppm. The Workplace Exposure Standard is 25ppm. Ammonia levels were managed by farmers daily and by Tegel Broiler Advisers who visited the farms every two to three weeks.

[147] As far as the failure to communicate the results of occupational hygiene reports is concerned, Tegel notes that the reports were commissioned in a context where prior to the reports being commissioned Tegel met with Alderson to make sure it was aware of the risks from poultry and to reaffirm the consequent need for Alderson's workers to wear personal protective equipment. The reports subsequently confirmed the presence of poultry dust and that masks supplied were adequately rated to bring the dust levels down below the exposure level. Hence Tegel submits that although it could and should have provided the results of the reports, there is no question that Alderson already knew of the risk to health from poultry dust and the ways to manage it.

[148] It was known that there are significant airborne contaminants in the shed during catching including dust from litter, feathers, dander, faecal matter, bacteria and ammonia. It was known that those contaminants posed a significant risk to worker health through inhalation that could result in respiratory issues, illness or asthma. It was also known that although masks had been provided compliance with wearing them needed improvement. Several recommendations were made as to what Alderson could do to mitigate the risks.

[149] As Alderson has already submitted, Tegel submit (quite correctly) that there is no evidence to show that levels of carbon monoxide or ammonia were at unsafe levels or approaching them much less that anyone suffered a negative health effect as a

response. Nor is there any evidence as to what the risks of health would be if they were present.

[150] In its submissions WorkSafe submitted the Court should not over-emphasise this lack of evidence which WorkSafe attributes to Tegel's failure to carry out testing. WorkSafe is required to prove the elements of this charge beyond reasonable doubt. Tegel does not accept that there was exposure to risk from these factors of any serious harm.

[151] Tegel does accept that the failure to provide the reports was a departure from good practice but submits it is a highly technical departure. Tegel submits that it worked with expert industrial hygienists to guide it in the type of testing that should be undertaken. The industrial hygienists did not assess carbon monoxide or ammonia as a risk to workers. The forklift was used only intermittently. Ammonia is detectable by smell and the sheds were open and ventilated during catching.

[152] Given those factors, Tegel submits that a modest starting point of \$40,000 is appropriate to reflect low culpability and the absence of any evidence of harm or meaningful risk.

Personal Aggravating and Mitigating Factors

[153] WorkSafe submits that Alderson's previous safety record warrants an uplift to the starting point. The relevant safety record pursuant to s 151(2)(e) of the Act is a broader concept than prior convictions. I have already referred to the incident in 2014 when a grower's leg was broken when a forklift collided with him during a chicken catching process. Furthermore, in 2016 WorkSafe received a complaint about worker fatigue in Alderson's chicken catching operations. Hence WorkSafe submits that an uplift in the region of five per cent would be appropriate in relation to both charges. I do not consider that the previous incidents warrant an uplift despite the concept of "safety record" being broader under the Act than "previous convictions" in terms of the Sentencing Act. Neither of the previous matters had any of the systemic issues, which are present in this case. I intend to reflect the safety history in the allowance for prior good character that Alderson might otherwise have received. Tegel is also an entity of

otherwise good character. Sentencing is not a mathematical exercise. It is an evaluative one. In the end, there is nothing to distinguish Alderson and Tegel in this regard. There are both of previous good character.

[154] WorkSafe recognises that Alderson has made payments by way of reparation totalling \$89,112 including two payments totalling \$75,000 by way of emotional harm reparation. Tegel has paid \$37,500. WorkSafe also recognises that steps have been taken to improve practices although it submits that credit for this action should be modest.

[155] Alderson submits that the mitigating factors are that it co-operated fully with the investigation; it has demonstrated remorse through payments made to the family; it has no prior convictions; it has taken significant steps since the incident that go above and beyond mere compliance.

[156] Alderson submits that it is not appropriate to apply an uplift having regard to its prior interactions with WorkSafe. Alderson submits that it would be unprincipled to impose an uplift where there has not been any enforcement action against the company and there are no prior convictions.

[157] As far as discount for reparation and remorse is concerned, counsel for Alderson has referred to *Department of Labour v Hanham and Philp Contractors Ltd* in which the Court referred to a discount of up to 10 – 15 per cent in the level of the fine has being reasonable to recognise the order for reparation in the case of an offender with adequate means.

[158] Tegel submits that its remorse, co-operation with the authorities, efforts made to address the underlying cause, reparation and previous good record are present to at least a moderate degree and that a discount of 30 per cent is appropriate.

[159] Tegel and Alderson initiated (with the support of the Poultry Association) an industry wide review of catching following the incident. This has resulted in the development of an improved and safer catching procedure that ensures catchers are able to operate safely in poultry sheds alongside forklifts. All Tegel's poultry sheds have implemented this procedure as has at least one other industry participant. Furthermore,

Tegel voluntarily directed that all operations should be carried out in accordance with the prohibition notice issued to Alderson that resulted in significant increased cost to Tegel of more than \$4,000,000. Tegel submits that a discount of 10 per cent is appropriate to reflect the steps taken following the incident.

[160] Tegel also submits that a discount of five per cent to account for steps taken to support Mr Mun and his family including the payment of voluntary reparation is appropriate.

[161] Alderson and Tegel should receive credit for all they have respectively done after this tragic incident to ensure, so far as is possible, there will never be a repetition of it. But there needs to be some balance. To some extent, the hazards were so obvious and the measures to deal with them were not onerous. And, to some extent the risks had been identified. So, while credit is due it must be tempered by those considerations.

[162] Overall, my assessment is that Alderson and Tegel should receive discounts totally 20% of the respective starting points. Anything much more than that both over-emphasises the significance of mitigating factors and starts to reduce the overall sentence below one that reflects the gravity of the offending.

Credit for Guilty Plea

[163] All parties accept that a credit of up to 25 per cent is available in the circumstances.

Financial Capacity

[164] Section 40(1) of the Sentencing Act sets out that the Court must consider the financial capacity of the offender. This is the last step in the sentencing process once the financial penalty can be determined. Alderson submits that if a fine of more than \$420,000 is considered appropriate, then the financial position of the company means that an adjustment is warranted.

[165] Alderson has provided an affidavit from its accountant and a financial report setting out its financial circumstances. Alderson has only recently begun making a profit

primarily due to an increase in demand from its major poultry transport clients. Despite this, there is a capital deficiency that recent profitability has decreased marginally. Alderson has high capital expenditure primarily on trucks, trailers and motor vehicles. It also has significant liabilities and therefore has limited resources to fund a large upfront fine payment. The cash flow of the company is largely dedicated to servicing ongoing bank loans and forecasts demonstrate that this will remain the case until March 2020.

[166] Its accountant now states that the company could manage payment of a fine in instalments of up to \$4,000 per month commencing April 2020 for up to five years. The financial report concludes that payment of a fine will place significant financial pressure on Alderson but that it could feasibly pay a fine of that magnitude. But for Alderson's current financial incapacity, the end sentence on the s 48 and 49 charges would be a fine of \$462,000.

Costs

[167] WorkSafe seeks a payment of costs against Alderson of \$7,000 and against Tegel of \$12,000. Neither Alderson nor Tegel take issue with an order for costs in those sums. There are orders accordingly.

Overall Assessment - summary

[168] The starting point for the s 48 charge against Alderson should be \$700,000, towards the lower end of the high culpability *Stumpmaster* bands. It was reasonably practicable for Alderson to have made sure that the chicken catchers were adequately separated from the forklift. Although, Alderson had engaged an expert and developed a Safe Task Procedures, those mechanisms serve little purpose unless they are properly implemented and monitored.

[169] Moreover, while I accept the practical difficulties of putting flashing lights or sirens on the forklifts because of animal welfare, the fact is that the forklift driver had a blind spot when the forklift was fully loaded with modules. The driver could effectively not see forwards to the right-hand side of the forklift.

[170] Since the incident, Alderson has installed sonar on the forklifts and detection equipment on the chicken catchers that should significantly reduce the risk of injury. I accept that this has come at not inconsiderable cost. Although, it was not explored in the hearing, one possibility was for the forklift driver to reverse out of the shed as the 1995 Code of Practice stipulates. More importantly, there were steps that Alderson could reasonably have taken to make sure that chicken catchers knew they could not leave the shed when the forklift was working. And, for the forklift driver to both be aware that people may be in his blind spot and to alert chicken catchers to operation of the forklift.

[171] Furthermore, the hazard was obvious. The forklift was operating in a dim light environment in which there is dust and noise. It is also to be expected that although they could take breaks the workers would be tired as the work is hard, and the chicken catchers worked long hours.

[172] I have determined that the starting point for the s 49 charge against Alderson should be \$70,000 towards the top end of the low culpability band as adjusted above. There is no proof beyond reasonable doubt of a risk to human health or of actual harm to any of the workers. The assessment of culpability is made on the basis that ammonia, carbon dioxide and carbon monoxide pose a risk to health above certain concentrations. Culpability for the s 49 charge rests on the facts that there was a failure properly to develop, implement, monitor and review safe and effective systems in relation to the obvious hazards in the shed: long exposure to noise, fatigue, unhygienic dust, ammonia and carbon monoxide.

[173] The starting point in relation to the s 48 charge against Tegel should be \$475,000 putting it in the middle of the medium culpability band. The relevant factors are essentially the same as for Alderson with one step removed. I have identified the obvious hazards in relation to the use of forklifts in the working environment. Like, Alderson, Tegel could have done more with respect to the personal protective equipment to ensure that it was fit for purpose and was suitable for the low-light environment. Again, there is little point in providing personal protective equipment if workers don't use it because, for example, eye protection fogs up. The working environment in the shed is unique in many ways. It is hot, noisy, dusty and dimly light. PPE that actually works and workers found suitable to protect workers' eyes, ears and noses should have been provided.

Furthermore, the need to use the PPE should have been the subject of ongoing training and monitoring.

[174] Alderson had developed a Safe Task Procedure for catching chickens. Tegel had reviewed it and was satisfied as to it. Tegel had also audited Alderson to make sure the safe task procedure was being adhered to.

Note: The following paragraphs [174] – [176] are a sentence indication of which there may be no publication.



P. R. Kellar
District Court Judge

Alderson

Tegel

**Emotional Harm Reparation
\$130,000**

65%
\$ 84,500.00

35%
\$ 45,500.00

Payments

\$ 75,000.00

\$ 37,500.00

\$9,500 to pay

\$ 8,000.00 to pay

**Consequential Loss
“the statutory shortfall”
\$ 53,430.72**

\$ 34,729.97

\$ 18,700.75

The Fine Starting Point

**Section 48 charge
\$ 700,000.00**

**Section 48 charge
\$ 475,000.00**

Section 49 charge

**Section 49 charge
Sentencing indication**

\$ 70,000.00

\$ 770,000.00

No uplift for safety history.

Discounts

5%
Co-operation and
improved practices

5%
Co-operation and
improved practices

10%
Amends and reparation

10%
Amends and reparation

5%
Prior good character
(moderated by safety history)

5%
Prior good character

Alderson

Tegel

Total Percentage/\$ value Discounts

20%

\$ 154,000.00

20% - on \$475,000

\$ 95,000.00

Provisional Starting Point

\$ 616,000.00

\$ 380,000.00

Guilty Plea

25%

\$ 154,000.00

\$ 95,000.00

\$ 462,000.00

\$ 285,000.00

Overall assessment and financial capacity

\$ 240,000

\$ 250,000.00

By 60 payments of \$4000
per month as from April 2020.

Costs

\$7,000

\$12,000

