SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPH [64].
http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KOTI-A-ROHE
KI OTAUTAHI

CRI-2022-009-003785
[2022] NZDC 25215

WORKSAFE NEW ZEALAND
Prosecutor

v

LANYON & LE COMPTE CONSTRUCTION LIMITED
Defendant

Hearing:	16 December 2022
Appearances:	A Everett for the Prosecutor M Nicol for the Defendant
Judgment:	16 December 2022

NOTES OF JUDGE J J BRANDTS-GIESEN ON SENTENCING

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[1] Lanyon and Le Compte Limited appear today for sentence having pleaded guilty to a charge that on 16 June 2021, at its premises in Bromley, Christchurch, the company, being a PCBU in terms of the Health and Safety at Work Act 2015, having a duty to ensure, as far as is reasonably practicable, the health and safety of workers who work for the PCBU including Michael Ross Goode, while the workers were at work on business or undertaking namely work at its precast yard in Bromley, did fail to comply with that duty and that failure exposed the workers to the risk of serious

injury or death and, in particular, it was reasonably practicable for the company to have ensured a system with a higher level of control being used to store smaller precast concrete panels. It was reasonably practicable to ensure that its precast concrete panel storage system was validated or verified by a person with suitable technical competence and should have provided effective training, information and supervision to workers using its precast concrete panel storage system. The maximum fine for this under the 2015 Act is a fine of $1.5 million, although it should be said from the start that is for the most egregious type of offence under this Act by probably the largest company.

[2] The summary of facts has been provided to me and I have summarised it as follows in order to keep it within reasonable bounds.

[3] The defendant's company manufactures, transports and installs concrete panels and stairs. Precast panels are manufactured on a flatbed system at the company's yard at Bromley, Christchurch and that is the workplace in terms of s 20 of the Act.

[4] Once the concrete has set, the panels are lifted by crane to stand on one edge. There is a perimeter fence into which two holes are drilled. Metal pins are inserted and the panel placed between the pins and a wedge is inserted to take any slack between the panel and the pins. This pins and wedge system was not validated or verified by a person like a consulting engineer or a qualified engineer. For taller panels, a finger racking system was employed but that system was of no use for smaller panels.

[5] On this particular day, Mr Goode, the victim, was employed as what they call a dogman to move smaller six-tonne slabs which were not tall enough to engage with the finger racking system. He worked with a crane driver and a second dogman.

[6] A 5.8-tonne panel was lifted and craned into position between two larger panels which were already stored by a finger racking system. The victim inserted a metal pin in an existing hole and hammered a wooden wedge between the pin and the panel. The crane driver, at the victim's behest, then released the tension off the lifting points. Seconds later, the pin came loose leading to a loss of support and the panel toppled

and crushed the victim, Mr Goode, who I notice is present in court today and I commend his bravery for being here.

[7] He suffered major trauma - crush injuries including ribs, spine and multiple mandible fractures. The hazard was the heavy concrete panel or many of them. The risk was of serious injury or death.

[8] There are industry standards and guidelines. As a PCBU, the defendant was obliged to ensure, so far as is reasonably practicable, the health and safety of workers who worked for it. Here the defendant failed to ensure the health and safety of the workers. It could have been done by way of a finger racking system or a number of other proprietary systems in use in other places. Even with the present system with the proper induction of staff and training and provision of information, some of these were lacking or were not sufficient. The supervision and monitoring of staff are identified as having been inadequate.

[9] An improvement notice was issued and complied with. The company has been cooperative and there are no previous convictions.

[10] I should say, at this point, the purpose of sentencing is to hold a defendant to account, to denounce wrongdoing and to punish it, to deter further offending by this defendant and by others who may engage in similar practices that put employees at physical risk which of course can flow into financial danger as a risk as well.

[11] The victim impact statements, I have read very carefully. I realise how difficult it has been for Mr Goode and eventually, while he came back to work, he did not stay there and I will make some comments about that later as well.

[12] Having outlined the facts, I now turn to the submissions from the prosecution which identifies the defendant's shortcomings.

(a) The company should have had a system with a higher level of control to store small precast concrete panels.

(b) The company should have had its panel storage system validated or verified by a person with suitable technical experience and qualifications.

(c) The company should have provided more effective training, information and supervision in its precast panel storage system.

[13] Reparation is referred to at $45,000. That is not disputed. Consequential losses of $4,212 which relate to the shortfall between what would be the expected salary and what ACC covers. Again, that is not in dispute.

[14] What is in dispute, principally, is an appropriate starting point for an offence such as this and then the question of discounts.

[15] The prosecution, as has already been pointed out by Mr Everett, seeks a starting point of $500,000, conceding a 25 per cent discount for an early guilty plea and five per cent, but no more, for a good record which comes down to $350,000 by way of a fine, plus costs of half of $10,116.46 being for legal fees and external experts.

[16] I am reminded of the sentencing principles and purposes, some of which I have already referred to.

[17] I need to take into consideration the injuries suffered and their seriousness, the level of risk, the company safety record, warnings that may have been given and a departure from standards and then the financial capacity of the company.

[18] As I understand it, for the purposes of this sentencing today the company's financial capacity is not being disputed. Having said that, I appreciate it is a small company, in some respects, and that has to be taken into consideration because I gathered that the main shareholders are Mr Lanyon and Mr Le Compte and, accordingly, it is their pockets that are being hit. It is not some amorphous pocket of a publicly listed and large company or even multinational.

[19] The purposes of the Act which I have already referred to are also noted by the prosecution and it says that my approach should be reparation and $45,000 has been

put forward by both sides and a consequential loss of $5,212. The foundation for that is laid in the affidavit of Mr J Shaw, a chartered accountant whom I regard as an expert, as he himself explains that is what he is, namely an independent person who has done this calculation and is required to observe the independence set out in the appropriate High Court Rules.

[20] Medium culpability is claimed here by Mr Everett and it is suggested that, accordingly, on the *Stumpmaster v WorkSafe New Zealand* principles which is a case that I will refer to from time to time, the range is between $250 and $600,000.[1] The prosecution says an appropriate starting point would be $500,000 and it relies on some cases for that.

[21] I must say that when this legislation was changed, in I think 2015, the fines were ramped up heavily to reflect, no doubt, inflation and those early cases may have had a degree of kindness extended to them and, of course, also since 2015, we have experienced significant inflation.

[22] I note the matters set out in paragraphs 9, 4, 5 and 6 of counsel's submissions.

[23] The discount, at 25 per cent, has been referred to. Five per cent for its good record of having been in business in what is a potentially dangerous type of business. This company has been around since the 1990's and has not a single prosecution against it.

[24] There is reference also, a question mark I might say, around the loan which is criticised as not being true financial assistance. I will come back to that later and then to say that remedial steps were taken only after an improvement notice had been issued and the prosecution was commencing – that, I understand, is also somewhat in dispute. The ancillary order is for costs and I have already indicated that I consider that the $9,080, I should say, is probably an appropriate figure.

[25] The defendant company accepts responsibility through its guilty plea. It accepts it should have had a different storage system in place for the smaller precast

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.

panels, that it should have been certified by an engineer and that training, information and supervision should have been better.

[26] The defendant immediately set about improving its practices when this accident took place and before and it says "before the improvement notice was served". It submits $45,000 reparation is appropriate, so too the consequential losses. It says a starting point of $400,000 with adjustments and credits is an appropriate starting point and that should end with a fine of about $210,000 and then the just and reasonable prosecution costs are also referred to.

[27] The company, it says, has been involved in the manufacture of concrete panels since the 1990s. There were two systems of storing panels that had been manufactured and were lifted from the horizontal position to the racking system, a little bit like what happens with plates in a dishwater, I imagine these racks – the finger racking system for the larger panels and then a pin and wedge system for smaller precast panels – and that last one was the system which effectively broke down on this occasion with this accident. I should note, I was advised by counsel the finger rack system, while it has not caused any difficulty, was not, at the time of this accident, certified either by a certified engineer.

[28] In this case, a pin and wedge placed by Mr Goode came loose from the wall and then, when the crane released tension, the panel toppled on top of Mr Goode. Mr Goode had been put through NZQA standards courses when he qualified as a dogman under the approved code of practice for cranes. He had other NZQA qualifications relevant to the work as well and in-job training.

[29] Looking at his – well, was it a shortfall of his wages? Mr Goode, nevertheless, had a reasonably good but overall modest income and I think it behoves an employer who employs a person for their skill but not for their expertise, to take a greater role in supervision of that person than a person who is, one might say, more technically educated rather than just trained.

[30] The defendant accepts an emotional harm payment of $45,000, consequential losses of $5,212 being the ACC shortfall and I note a loan to the defendant

post-accident but not recovered, was described in the submissions from counsel as: "Able to be offset." I do not intend to do that because while it is a significant sum of money for the company, it was an even more significant amount for Mr Goode who had been very badly injured.

[31] The defendant says this was not a case of failing to see the obvious or turning a blind eye to danger, rather there may have been a certain slackness about the supervision but familiarity does breed contempt and then there is also the factor that there were far more panels on site than the company would have liked. It was not a case of trying to save money but I suspect the company was preoccupied with other things and because the system had worked so well without incident for so long, the perceived need for a technically trained person/expert to sign off was probably not realised adequately. Having said that, the company directors have a pretty full-on role in this company, as I understand it, and their experience, indeed expertise, cannot be ignored.

[32] Before the accident, I am told by the defendant, an upgrade had been planned and designed ready for assembly. Some of it was already there. It was delayed by COVID.

[33] As I see it, one of the real problems was there were delays in panels being taken away to new projects and that meant the company was overstocked as far as panels were concerned and, of course, they would also want to keep their business going and to keep staff employed. It is all very well to say you stop production if you have not got storage but even I see photos of 10 of acres of new cars in Japan or in America awaiting dispatch and they would run into the similar problems.

[34] Mr Le Compte did not believe the system was unsafe and he had taken special care to reduce the risk with training but there is a concession that more could have been done and I think that is an appropriate concession without attracting any further increase in penalty.

[35] There is the *Glaziers Choice* case is given as an example and there, there was a crane operator.[2] He was undergoing training but was not qualified and was killed. The victim there did things he should not be allowed to do and with proper training, including qualifications, would be less likely to have done as well.

[36] Then there is a *Department of Labour v Kerr Construction Ltd* case where items were being handled at a height and they fell onto a worker below and there were many significant fractures and serious brain injury.[3] The identified risks were not in any safety plan.

[37] I reference the case of *WorkSafe New Zealand v Neutze* with inadequate scaffolding, no or poor edge protection and unsafe access to the scaffolding system.[4]

[38] The defendant suggests a starting point of $400,000 against the prosecution figure of $500,000. It says in mitigation, there are no aggravating features but that mitigation can be recognised for remorse, for the forgiving of a debt, cooperation with the investigation, a good safety record to date, a willingness to pay reparation, post-accident modifications and an early guilty plea.

[39] The prosecution suggests that a discount of 25 per cent for the guilty plea be matched by a discount of 25 per cent for mitigation with an end point of $200,000 and costs – there was reference there to $12,348.50 in my notes but, in discussion today, I think, Ms Nicol was resigned to the fact that it may be we should not be haggling over costs.

[40] My view is that nothing – I should say, it is really directed, and to you particularly Mr Goode – nothing in my decision can totally restore you to the previous state of robust strength and health because, inevitably, even if physical damage can be repaired, there will, undoubtedly, be very significant psychological damage from which you may take a long time to recover. Nothing can truly compensate

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[2] *WorkSqfe New Zealandv Glaziers Choice Ltd* [2021] NZDC 13492.
[3] *Department of Labour v Kerr Construction Whangarei Ltd* [2021] NZDC 22782.
[4] *WorkSafe New Zealand v Neutze* [2020] NZDC 7872.

somebody in Mr Goode's position for his period of intense pain, anxiety, surgery, treatment and convalescence and residual damage.

[41] Reparation can only be expressed in dollar terms and may assist in a victim's recovery or provide some creature comforts in our needs to make up for some of life's simple pleasures which have been lost or replaced by pain or disfigurement.

[42] The outcome today may be an accumulation of numbers and a just outcome also requires a generosity of spirit on the part of not just the defendant company but, to a certain extent or a great extent, the victim himself. No-one will leave the courtroom wholly satisfied. The shortcomings of the company, the risks involved and the potential victim – fortunately none other than Mr Goode was hurt – are identified in the summary of facts.

[43] The *Stumpmaster* and associated decisions and what is the now the classical case of the *Department of Labour* (as it was then) *v Hanham & Philp Contractors Ltd*, are decisions which have been followed by subsequent cases and they are, to a great extent, the touchstones not just for my decision but for others.[5]

[44] *Stumpmaster* sets up a four-step process:

(a) assess the amount of reparation and consequential loses;

(b) for the amount of the fine to be established by reference first to the guideline bands and then nuancing the amounts by having regard to aggravating and mitigating factors; and

(c) finally, to determine whether further orders are required under the Health and Safety Act. Here none are sought which is appropriate, especially in light of the company's good record over 30 years.

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

(d) Make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions, as it is sometimes called, just referred to by me.

[45] Here the defendant's ability to pay and also whether an increase is needed to reflect the defendant's higher than usual financial capacity to pay needs to be taken into consideration. Here the ability to pay is not disputed but higher than usual is not appropriate. As I said earlier, this is not a large public company for whom fines are, as it were, the cost of doing business. Here is a smaller company, the details of which I do not know but which I have drawn from the summary of facts. This is a smaller, but still significant, company for whom not only does it bring an element of personal shame and embarrassment on the directors, but there is also that extra hurt because these same directors work closely with their workers and they are part of a larger extended family or a commercial family, as I see it.

[46] *Hanham* also identified a list of other relevant factors for sentencing and I need not spell it out further.

[47] The s 151 of the Act covers, really, the various considerations that, in the *Hanham & Philp* case, pre-2015 conditions and legislation had to be taken into consideration.

[48] The risk of serious harm or death is a feature of a case before me and no-one can deny what happened to Mr Goode in that accident. It really just speaks for itself. In determining which band a case falls into, there needs to be made some regard to the Sentencing Act 2002 principles and purposes to which I have already made reference.

[49] I find the prosecution and defendant both agree that $45,000 is appropriate by way of reparation and so too the $5,102 for consequential loss as verified by J Shaw, a chartered accountant whom I have already referred to and who was engaged by WorkSafe to do this valuation and evaluation.

[50] I should not, of course, be a rubber stamp but as I have said earlier there is no dispute. Experienced counsel have worked on this matter and I am satisfied they are appropriate figures.

[51] The fine is disputed as to starting point and the discounts involved.

[52] I do not find any aggravating features other than what is contained in the charge itself. The company had a clean conviction record. There is no record of prior notifications. There is no evidence of any accident records not being maintained nor evidence of sloppiness. There is no doubt the victim suffered serious injuries even though he has recovered to the point of working again for the defendant company, albeit it not for long and not altogether happily, according to the victim impact statement.

[53] The obviousness of the hazard probably crept up on the company and it became overstocked with panels as building projects were delayed by COVID and the difficulty with procurements of material and labour shortages, which affect the projects downstream and which meant these panels, which were ready, could not be delivered. Plans to address the small panel storage apparently were initiated at an early stage.

[54] I reject, on balance, the WorkSafe claim that only once the improvement notice was served did the defendant start to rectify the situation. Significant changes take time to design, build and fully implement and that was particularly so during the whole COVID period when a lot of developments ground to a halt when people were just trying to survive. However, the system used the time. It should have been externally validated by a competent engineer. They were not. The number eight wire mentality has no place in workplaces like those of the defendant.

[55] There is no evidence what the cost of the required improvements would be. I doubt it would have been excessively high although, for the number of panels being assembled, it could have still amounted to a large amount. No doubt orders kept on coming in but then the defendant was expected to store the product pending uplift. To have stopped production would, in my view, result in staff being laid off and

the company's finances being put at risk but particularly the staff would have been at risk and good teams are difficult to assemble and can be lost very easily.

[56] Applying the *Stumpmaster* principle and those of *Hanham & Philp* together with the submissions of the prosecution and defence, this is middle-band offending. I consider that only one person, the dogman, really, was at high risk at any one time so it was not a case where a large number of people, for example, as in *WorkSafe New Zealand v Cottonsoft Ltd* could have been at risk.[6] The *Kerr Construction* also involved more potential victims and probably greater actual injury.

[57] I consider that a starting point of $400,000 in this incident/case is firm but fair and counsel is realistic in advocating that. I reject the prosecution's submissions that the remorse is contrived and hollow (which were my words) especially with a prosecution being unresolved. A defendant company is really between a rock and a hard place as to how he deals with the victim who, after all, is really a potential witness for the prosecution. The money was, in my view, sympathetically lent and not pursued when the victim left the employment. I do not offset the amount against consequential costs but the intendant non-recovery is, in my view, consistent with overall remorse.

[58] I note the prosecution has not highlighted Mr Goode's claims of a deterioration in how he was treated post-accident when he returned to work but notes those situations, for the same reason, about making payments to potential witnesses is always a difficult one. There was cooperation with the department. I know that is expected of them by law. There is, however, the good safety record, the ability to pay reparation, the post-accident modifications and the guilty plea. I grant a 25 per cent discount for the guilty plea and 15 per cent for all the other collective mitigation. That comes to a fine of $240,000.

[59] I consider the defendant has pitched its discounts a little too high and the prosecution has probably also, in my view, pitched them too low and, accordingly, I have adjusted it as I have. A contribution to overall fees of $5,409.80 is appropriate, while a general enforcement agent like the police cannot expect to be paid for its work, it is appropriate for there to be some user pays or contribution to WorkSafe's costs on

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[6] *WorkSafe New Zealand v Cottonsoft Ltd* [2019] NZDC 1851.

its stated task which is to protect workers and people on worksites rather than the public at large. Expe1tise in every technical aspect of employment cannot be expected of an agency like WorkSafe. The 50/50 rule often adopted is a safeguard against WorkSafe taking for granted a defendant's ability to contribute to full costs.

[60] Before imposing the total amount, I am required to make an overall assessment, to stand back, to ask is the total amount payable by the defendant proportionate to the offending in this case? I am satisfied the amount I have calculated, much of it agreed between the prosecution and defendant, is well within the applicable range and I consider the prop01tionality test is passed. No adjustment for financial pressure on the part of the company has been sought, nor have I applied that because there is simply no evidence before me and I think the company has taken a realistic view in accepting its responsibilities and not contriving either excuses or pleading pove1ty.

[61] The total figure is confirmed and I now direct it to be paid within 28 days.

[62] So that is my decision today and, Mr Goode, I hope that you can make a full recovery and I hope that personal relationship you had with your previous employers can now settle down and either be restored, at least that you do not feel badly about it, because there are difficulties the employer too would have had in situations like this where there has to be a ce1tain distance kept and care taken before a matter like this is resolved. So thank you and thank you, counsel, for your assistance too. It has been most helpful.

[63] I would order half of the external of those expert costs and half of the legal costs so that really, in effect, all the costs are halved.

(a) [Counsel: external expert costs were in total and this is not a half-figure $4,706.66. Legal costs halve the figure and then the external legal costs. Half external costs $2,353.33.]

(b) [Judge: that is what I would order as far as costs are concerned.

(c) In the circumstances, I will leave it to the parties to sort out costs. If they cannot agree, submissions may be filed for me to resolve.

[64] The reference to Mr Lanyon's health is suppressed.

Judge J J Brandts-Giesen
District Court Judge | Kaiwhakawa o te Koti a-Rohe
Date of authentication | Ra motuhehenga: I0/01/2023