IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2020-016-000338
CRI-2018-016-002401
[2021] NZDC 14158

WORKSAFE NEW ZEALAND

v

PAKIRI LOGGING LIMITED
ERNSLAW ONE LIMITED

Hearing:	24 March 2021
Appearances:	I Brookie for the Prosecutor S Mills for the Defendant Pakiri Logging J Lill for the Defendant Ernslaw One
Judgment:	16 July 2021

NOTES OF JUDGE W P CATHCART ON SENTENCING

Introduction

[1] On 13 February 2019, Nathan Thomas Lee Miller (Nathan) was working for a forest harvesting company, Pakiri Logging Limited (Pakiri), in the West Ho Forest near Tolaga Bay when he was struckwhilst logs were being hauled out of a steep valley via a skyline cable system. Nathan died at the scene as a result of his injuries.

[2] The nature of this work exposed Nathan to real risk of death, let alone serious injury, unless critical safety rules were adhered to. Pakiri's principal breach of its foundational duty to Nathan and other breaker-out workers was failing to take

reasonable steps to ensure they retreated to a safe distance of 45.4 metres before each drag. Nathan was estimated to have been standing with his back to the fatal haul at a distance of just under 20 metres.

[3] Nathan worked in Crew 26. Members of Crew 26 had a reputation for breaking critical safety rules and other health and safety work standards. And Pakiri knew about it in 2018 through external audits carried out by Ernslaw One Limited (Ernslaw) the corporation that contractually engaged Pakiri to assist with harvesting in West Ho Forest.

[4] Ernslaw, is a large forestry management company by New Zealand standards. Ernslaw even had contractual power to suspend or cancel Pakiri's harvesting work if relevant critical safety rules were not adhered to. In 2018, Ernslaw's external auditor twice reviewed Crew 26's health and safety practices and issued damning reports. Ernslaw passed on the full reports to Pakiri but did little else.

[5] Ernslaw and Pakiri failed to monitor the implementation of the corrective actions identified by the audits on the practices of Crew 26. The critical safety rules breached by Crew 26 on 13 February 2019 leading to Nathan's death bore material similarity to the core concerns expressed by the auditor in his 2018 reports.

[6] WorkSafe say the incident on 13 February was a "wholly unavoidable death".[1] For reasons below, I agreed.

[7] I found **Pakiri's culpability** was high under *Stumpmaster* principles and fixed a global starting point of $720,000.[2] From that I deducted a figure of 35 per cent for mitigating factors, including for early guilty plea; resulting in an end fine of **$ 468,000**.

[8] Pakiri is however now in liquidation. The liquidator testified Pakiri is "unlikely" to be able to pay any fine. Given the level of fine fixed, recovery of the fine is highly unlikely.

---

[1] Prosecutor's oral submissions at the sentencing hearing.
[2] *Stumpmaster v WorkSafe NZ Limited* [2018] 3 NZLR 881.

[9] Under s 14 of the Sentencing Act the court retains a discretion ("may") to impose a fine even where satisfied the offender does not or will not have the means to pay". Whilst generally speaking a fine against a liquidated company is unlikely to be recoverable, imposition of a fine remains a discretionary matter.

[10] For several reasons I considered it appropriate to impose the fine. Imposition publicly marks Pakiri's accountability for its offending. It protects the underlying integrity of orders made against Pakiri issued on a joint and several liability basis. And it ensures acceleration of Pakiri's corporate death. The liquidator can take the final step with knowledge this fine and other orders have been issued.

[11] I found **Ernslaw's culpability** fell at the higher end of the medium-culpability band in *Stumpmaster* and fixed a global starting point of $480,000. Individual culpability was thereby also attributed as between defendants on a 60:40 ratio. From that start fine, I deducted a figure of 40 per cent for mitigating factors including early guilty plea; resulting in an end fine of **$288,000**.

[12] Also, I held under the *Stumpmaster* approach there was no justification to reduce on a proportionality assessment the total package of sanctions ordered against each defendant.

The charges and particulars

[13] WorkSafe charged Pakiri and Ernslaw separately with a charge pursuant to ss 36(1)(a) and 48(1) of the Health and Safety at Work Act 2015 (HSWA). Each charge logically contained different particulars because of the different roles played by Pakiri and Ernslaw in the incident.

[14] The essence of the offending is captured by the admitted particulars. First the foundational duty breached. By their guilty pleas both defendants admitted in their respective capacity, they each failed to comply with the statutory duty to ensure, so far as reasonably practicable, the health and safety of workers at work in their business thereby exposing Pakiri's break-out workers, including Nathan, to risk of death or serious injury arising from those activities And the breach of duty covers the period between 20 May 2018 and 13 February 2019.

[15] Also, each defendant faced further and different particulars as cited in the separate charging documents and admitted them by pleading guilty. Understanding the nature and extent of the admitted particulars is therefore important in fixing individual culpability.

[16] Particularly here because both defendants argued Nathan contributed to his own death. Each defendant called in aid the principle in s 9(2)(c) of the Sentencing Act 2002 which requires a Court to take into account, to the extent applicable, the conduct of the victim as a mitigating factor. Both defendants say this is one of those rare cases where a worker's conduct is relevant to an assessment of corporate culpability under the HSWA.

[17] Contributory negligence arguments are especially fact-specific. Context is vital. And understanding the scope and breadth of the foundational duty each defendant breached is important. This ensures any claimed contributory conduct is not wrongly employed to subvert the statutory policy underlying the HSWA.

Further admitted particulars

Pakiri:

[18] Pakiri admitted it was reasonably practicable for it to have:

(a) consulted with Ernslaw and/or [the external auditors] to ensure that it obtained the full audit results for Crew 26 in a timely fashion;

(b) reviewed the audits and identified, in consultation with Ernslaw, the corrective actions necessary to remedy the concerns raised by the audits;

(c) monitored the performance of Crew 26 to ensure the implementation of the identified corrective actions.

[19] And ensure that, on 13 February 2019, Crew 26 complied with the applicable breaking-out rules and/or procedures. Significantly that it ensure members of Crew 26

retreat to an appropriate safe distance before each drag, being a distance of no less than the mean tree height of 45.4 metres for the drag that resulted in Nathan's death.

[20] Further critical safety rules were particularised, breaches of which were admitted. First, all breaker-out workers must be on the same side of the drag, and behind the head breaker-out, before the signal to haul any systems can be given. Second, the hauler operator must be advised of any head pull stems before the haul signal is given. Third, all workers must watch every stem drag, from the appropriate safe retreat distance, while it is in progress. Fourth, it must ensure that Crew 26's foreman was adequately supervised to confirm he was performing his allocated health and safety tasks.

Ernslaw:

[21] Ernslaw admitted it breached the duty imposed upon it when it was reasonably practicable for it to have:

(a) provided the full external audit results for Pakiri's break-out Crew 26 to Pakiri in a timely fashion;

(b) reviewed the audits and identified, in consultation with Pakiri, the corrective actions necessary to remedy the concerns raised by the audits.

[22] Significantly, Ernslaw admitted it was reasonably practicable for it to *monitor* the performance of Crew 26 to ensure implementation of the identified corrective actions and failed to do so.

The main issues

[23] Several *main* issues arose in this sentencing. I summarise them below:

(a) What is an appropriate award for an emotional harm reparation order?

(b) What is the starting point fine for each defendant under *Stumpmaster* principles?

(c) Is Nathan's conduct on 13 February 2019 materially relevant to the assessment of each defendant's culpability? If so, to what extent?

(d) What figure should be awarded for prosecutor's costs under s 152 of the HSWA?

(e) How is the consequential loss order to be calculated?

(f) What if any, totality adjustment is necessary?

The undisputed facts

Further background about the defendants

[24] Ernslaw is the fourth largest forest owner in New Zealand with approximately 110,000 hectares of forest. This includes management of the West Ho Forest including its harvesting.

[25] Pakiri is an East Coast company operating as a forestry harvesting business. It was incorporated in 2013. Mark Nyhoff is the sole director. He also owns 99 per cent of the shares. On 28 August 2020, a liquidator was appointed.[3]

Members of Crew 26

[26] Crew 26 was one of Pakiri's three harvesting crews. On 13 February 2019, Robert Ashford was the foreman. He is a qualified logger who commenced employment with Pakiri as a foreman for Crew 26 in March 2017. The hauler operator was Jeremiah Mataira. He is a qualified hauler operator with 16 years' experience in the forestry industry.

[27] The head breaker-out was Joseph Davoren. He was a qualified head breaker-out who was employed by Pakiri for approximately 18 months at the time of the incident. One of the breaker-out workers was Moana Kentworthy who has qualifications in that area.

---

[3] Affidavit of liquidator, Heath Gair dated 25 February 2021 at [6].

[28] Nathan was the other breaker-out worker. Nathan was qualified as a head breaker-out but was working as a breaker-out worker. He had returned to the forestry industry in June 2018 after a five-year break. The author of the 2018 audits described him in part as an "outstanding worker".

The harvesting of West Ho Forest

[29] In early 2016, Ernslaw engaged Pakiri as a contractor to assist with harvesting the West Ho Forest. On 5 April 2018, a further services contract extending that relationship was signed between the defendants. Planning the West Ho harvest began in November 2018. A cable hauler operation was decided on because the area included steep terrain.

[30] Use of a cable hauler is a method of harvesting. It involves the extraction of felled trees to a landing, using a fixed hauler and an elevated steel cable (skyline). The cable is attached to a hauler machine at one end. It is fixed on the other side of the gully. A carriage unit attached to the cable is lowered down the skyline using a main line cable controlled by the hauler. Drop lines from the carriage unit are hooked onto logs, two at a time, by the breaking-out team. The head breaker-out controls the process and gives signals to the crew when to commence the haul. This process is called "breaking-out".

[31] Integral to the safety of that process is maintenance of a safe retreat distance. This is the distance that a breaker-out worker, like Nathan, must stand away from the cable before the inhaul signal is given by the head breaker-out. Relevant standards fix the measurement of that distance. The default measurement is the mean tree height for the block being harvested. However, it is accepted this distance can be reduced in certain circumstances.

[32] During the pre-harvest planning phase Pakiri liaising with Ernslaw identified danger areas in the West Ho Forest. The mean tree height for the relevant block was 45.4 metres. Pakiri's operations systems designated three zones. A red zone with a safe retreat distance of 67.6 metres, an orange zone with a distance of 45.4 metres (the mean tree height) and a green zone with a distance of 20 metres.

The incident

[33] On 13 February 2019, Crew 26 were breaking-out in an area coded as 'green'. Under that coding system the apparent safe retreat distance was 20 metres including during the inhaul process when the incident occurred. However, despite being coded as 'green' the area included blind spots, downhill hooks, harvest debris and fallen trees on the steep slope where the incident occurred. And as noted earlier, Pakiri admitted it breached its statutory duty by failing to ensure the breaker-out workers retreated to an appropriate safe distance before the drag of no less than 45.4 metres.

[34] At approximately 10.30 am Davoren and Kentworthy hooked up two felled logs for extraction. The first log was stropped 4.68 metres from the head pull. The second log was stropped 4.9 metres from the butt making it what is referred to as a long butt or long pull. Long butt hooks and head pulls often require a greater safe retreat distance.

[35] WorkSafe accepted it is not possible to accurately recreate the position of the break-out workers when the incident occurred. However, based on estimates given to WorkSafe by witnesses, Nathan was standing approximately 18 to 20 metres away from the haul line. Kentworthy was standing approximately 20 metres away from the haul line. Kentworthy suggested to Nathan he move further away from the line but he did not do so.

[36] Davoren did not advise the hauler operator that the haul included a long butt and head pull log. After hooking up the two felled logs to the haul, Davoren retreated east of the haul line so he could observe the drag. Nathan and Kentworthy retreated to the opposite side to a position where Davoren could not see them. Davoren attempted to call Nathan on his radio to confirm he and Kentworthy were at the distance of 20 metres before giving the inhaul signal. However, Nathan's radio was switched off. Kentworthy did not have a radio.

[37] Crew 26's foreman was loading logs up on the landing area behind the hauler. He was not able to see the breaker-out crew from where he was working. Also, he had his radio switched to a different channel to that being used by Crew 26.

[38] As the head breaker-out, Davoren used his tooter device to indicate to the foreman and the hauler operator it was safe to start the inhaul drag. And did that at a point when he could not see Nathan or Kentworthy. A few minutes passed. Davoren assumed that Nathan and Kentworthy had had enough time to move to the retreat distance of 20 metres. However, neither Kentworthy nor Nathan were facing or watching the drag after the signal to inhaul was given.

[39] As both felled logs were pulled up by the drag, the second long butt-hooked log dug into the ground and swung around towards Nathan. It either hit him directly or picked up and dislodged another felled log which struck him. Nathan was struck in the lower torso/upper leg. He tumbled downhill into a ditch landing approximately 14 metres from the haul line. He suffered fatal internal injuries and died at the scene.

[40] A post-mortem analysis by ESR recorded Nathan's blood contained 32 millilitres of alcohol per 100 millilitres of blood. And confirmed presence of amphetamine and methamphetamine in his system.

[41] WorkSafe inspectors and ESR attended the scene on the day. Davoren and Kentworthy indicated where they and Nathan were standing when the incident occurred. An image of the scene was taken using laser scanning technology and a drone. Also, from available data, ESR was able to take key measurements from the scene. That information led to an acceptance of Nathan's and Kentworthy's likely position when the incident occurred—as noted earlier.

Ernslaw's relevant health and safety documentation

[42] Ernslaw's health and safety management system contains four fundamental critical safety rules. These rules are designed to prevent serious harm or death occurring. Relevantly, one of the rules stipulates that no person shall work in a manner likely to cause harm to themselves or others—a given you might think. Also, no person shall position themselves where there is danger of materials being dislodged and rolling or falling into their work area.

[43] Ernslaw's health and safety plans include requirements for contractors, like Pakiri. Under these plans a contractor must comply with approved codes of practice

and Ernslaw's critical safety rules. Also, the contractor must comply with Ernslaw's safety audits; reporting of hazards and incidents; requirements for communication to relevant staff and training.

[44] Importantly, the plans set out disciplinary consequences for breaches of Ernslaw's critical safety rules. And these sanctions are imposed even at a contractual level. Relevantly, a breach of any critical safety rule will result in an immediate contractually imposed two-day suspension, and possible shutdown of operation. A second breach within two years may result in termination of the contract.[4]

[45] Ernslaw regularly conduct and internally audit the operations and systems of its contractors to ensure to ensure relevant safety practices are met. These include periodic on-site audits.[5] In addition to conducting these internal audits, Ernslaw also periodically engages an external forestry auditor, TopSpot, to audit performance of its contractors. TopSpot issued the two critical reports about Crew 26 in 2018. More about that later.

Relevant contractual relationship between Ernslaw and Pakiri

[46] As touched on earlier, the relevant health and safety requirements were part of the contractual relationship between Ernslaw and Pakiri. Under the contract, Pakiri was required to comply with all reasonable directions of Ernslaw relating to health and safety including observance of the critical safety rules. If requested, Pakiri was contractually obligated to take all reasonable steps to rectify any issues raised from an audit or review and to implement any matters in staff training.

[47] Should Pakiri fail to meet those requirements, the failure constituted a breach of contract. That breach entitled Ernslaw to immediately suspend any or all of Pakiri's operations for such period as was necessary until Pakiri remedied the failure. Ernslaw was entitled to even terminate the contract.

---

[4] Ernslaw's Health and Safety document 8.1 – Contractor management p 17 s 15; agreed summary of facts at [39].

[5] At p 18 s 17; agreed summary of facts at [40].

[48] However, as noted earlier, Ernslaw failed to monitor implementation of the external auditor's damning reports in 2018 about Crew 26. The contractual remedies available to Ernslaw here to sheet home to Pakiri the importance of ensuring the safety of break-out workers in Crew 26 like Nathan was not even entertained.

Pakiri's health and safety documentation

General obligations:

[49] Pakiri had several documented policies and procedures relating to health and safety including polices relating to breaking-out processes. They included adherence to Ernslaw's critical safety rules.

[50] Those rules applied to all employees, contractors and sub-contractors engaged to work on any Pakiri logging activities or controlled sites. Any observed breach would apparently result in immediate action upon offending individuals, the operation and/or a Pakiri employee. And Pakiri's logging manager was authorised to decide the extent and duration of any punitive measures taken.[6]

[51] Also, Pakiri's systems stipulated that safety audits would be conducted at least monthly, or more frequently if required, especially for high-risk activities such as tree felling and breaking-out processes.

[52] Pakiri's policy relating to breaking-out processes was reviewed in 2017. The new review contained a commitment to comply with the approved code of practice for health and safety in forestry operations as it related to breaking-out processes. Under that new policy, Pakiri's managing director or quality manager was obligated to assume responsibility for ensuring all corrective actions were carried out within the shortest timeframe practicable.

Specific obligations:

---

[6] Agreed summary of facts at [49]; Pakiri's occupational health and safety management system 1.0 at p 21.

[53] Pakiri's policy also descended to specific obligations. It relevantly stated that in breaking-out processes the *default* standard retreat distance will be the mean tree height.[7] But also recognised that in some circumstances, after approval with the foreman at the time of extraction, a safe retreat distance may be reduced to a distance of not less than 20 metres. Any such reduction must be recorded by the haul operator.

[54] The head breaker-out also had specific responsibilities. These included that for every drag of felled trees he or she will take into account factors such as the swinging or upending log or felled tree and mean tree height. And if there was any doubt about these factors and potential impact on safety, the minimum safe retreat distance was the default position—the relevant mean tree length.

[55] Also, in fixing the safe retreat positions on every drag of fallen trees, the head breaker-out was required to determine that distance through a combination of circumstances. His knowledge of the area, the relevant mean tree height, use a range finder to calculate the safe distance, and coding systems—that is, the green, orange or red zone designations. Also, all breaker-out workers were to be facing the drag before the inhaul signal can be given.

TopSpot's external audits in 2018

[56] The external auditors, TopSpot, engaged by Ernslaw identified the safety practices of Crew 26 as substandard in its audit on 21 May 2018. The auditors found the foreman of Crew 26, Davoren, was not adhering to breaking-out procedures, nor using a range finder for calculating safe retreat distances on the day of the audit. The record of negative results was signed by that foreman at the conclusion of the spot audit. Later in a more full audit report, the auditor identified that a key issue was Pakiri's breaker-out workers not following the rules regarding safe retreat working zones. Additionally, the auditor perceived a lack of leadership from both the head breaker-out and the foreman.

[57] A second TopSpot audit of Crew 26 occurred on 21 September 2018. The auditor found the breaking-out workers had no range finder. The head breaker-out

---

[7] Pakiri's break-out policy in 2017 p 7; agreed summary of facts at [54].

gave a haul away signal when the breaker-out workers were still walking out from the drag area prior to the inhaul of the logs. Breaker-out workers were not following the correct procedure. And the auditor opined the breaker-out workers needed to better understand the concepts of mean tree height and zoning areas.

[58] Again, Crew 26's foreman signed the audit on the day. A fuller audit of that occasion recorded Davoren—the head breaker-out—"needed to ensure that he waited for all breaker-outs to retreat to the safe area and be facing the drag before the signal to haul away is given."

[59] The auditor also commented on Nathan. He said:[8]

> Doing an excellent job but needs to remember break-out procedure policy and always follow it. Awesome attitude towards learning more about H and S. Stand out worker and someone the assessor thinks will make changes for a better, safe, productive and efficient worksite.

Pakiri's apathetic response to the 2018 external audits

[60] Crew 26 never discussed, as required, the findings of the audit on 20 September 2018 on any ensuing workdays. No record of any reference to the 2018 safety audit appears in any of Pakiri's monthly health and safety meetings for the period between September 2018 to February 2019. And despite having received the audit summary results on the day of each spot audit, Pakiri did not request the full audit results from Ernslaw or TopSpot.

[61] On behalf of Pakiri, Mr Nyhoff maintained he never received the full audit results. He said this was the reason he did not engage in any discussion or take any steps to remedy the issue with Crew 26. That was a poor excuse. He should have taken the initiative to immediately approach Ernslaw to discuss the results; but nothing was done.

[62] Also, Mr Nyhoff acknowledged there was no formal process in place to monitor Pakiri's crew foreman. Mr Nyhoff accepted the default standard retreat distance was the mean tree height but that can be reduced to 20 metres unless the circumstances demanded otherwise.

---

[8] Agreed summary of facts at [73](b).

[63] I drew inferences here. Largely, Pakiri adopted a nonchalant attitude to the critical findings of 2018 external audits. The risk of death or injury to Crew 26's breaker-out workers was not minimised by such an apathetic response. The likelihood of occurrence of such risks thereafter was high. The alarm bells were placed on silent mode.

Ernslaw's ineffective response to the 2018 external audits

[64] At no stage did Ernslaw activate its contractual powers for Pakiri's obvious breaches of critical health and safety orders upon receiving either or both full 2018 audits. And there is nothing to suggest Ernslaw contemplated that route of enforcement.

[65] Ernslaw did not receive the summary audit results. However, it received the full audit results from TopSpot. But Ernslaw did not provide the full audit results to Pakiri until 7 December 2018. And Ernslaw failed to take any other steps in response to the alarming safety audit results about Crew 26.

[66] On behalf of Ernslaw, its regional manager conceded the 2018 safety audit results identified breaches of Ernslaw's critical safety rules. And despite this, he conceded there was no documentary evidence showing any steps were taken by Ernslaw in response to the critical rule breaches.

[67] I drew inferences about these facts. Ernslaw knew about the substandard work practices of Crew 26. Yet it failed to pass on the full audit reports in a timely fashion. And during that lull, risk of death and injury to breaker-out workers in Crew 26 was unabated. Moreover, it failed to consult with Pakiri about the audits, the corrective steps needed, and to monitor implementation of those steps. And it had significant contractual power to ensure Pakiri compliance forthwith.

[68] In sum, Ernslaw's response to the 2018 audits was largely toothless.

WorkSafe's expert review

[69] WorkSafe engaged a forestry expert, Mr Lance Hare, to review the case. His findings are part of the agreed summary of facts.

[70] Mr Hare is an accredited and independent forestry trainer and assessor. He has over 38 years of forestry experience, 10 years of which was dedicated to health and safety in forestry work. He has co-authored significant industry guidance resources, including the 2012 approved code of practice for safety and health in forest operations.

[71] Mr Hare was not able to be definitive about whether a hooked-up log or dislodged log struck Nathan. However, he concluded the fatal drag was problematic because it involved a long-butt hook and a head pull resulting in two felled logs with different distribution. This alone was enough to warrant an increase of the safe retreat distance to at least the mean tree height. In other words, 45.4 metres.

[72] As noted earlier, one of the particulars of breach admitted by Pakiri was the failure to ensure on 13 February 2019 the breaker-out workers in Crew 26 retreated to an appropriate safe retreat distance of *no less than 45.4 metres*. Mr Hare therefore disagreed with Crew 26's onsite decision to designate a safe retreat distance of 20 metres—a green zone designation.

[73] Also, he concluded the other breaker-out workers should have been behind the head breaker-out and facing the drag before the haul signal was given. Further, he found that Ernslaw and Pakiri failed to adequately respond to the 2018 audits which included breaches of critical safety rules in relation to Crew 26.

[74] He concluded Ernslaw should have initiated a formal written corrective action recommendation, discussed with Pakiri and monitored by Ernslaw, to ensure that it had been remedied. Similarly, Pakiri should have obtained and consulted with Ernslaw to identify and implement the required corrective actions. Mr Hare found that proper oversight of Crew 26 and its foreman would have ensured that Pakiri was aware of the concerning audit results.

[75] Mr Hare also concluded the fatal incident featured breaches of protocol and best practice, some of which were present and causative in the 2018 external audits, including: failure to understand and properly measure or establish corrective safe zones and safe retreat distances; non-compliance by individuals with basic safety rules; and communication failures within the crew.

[76] All of these expert findings were properly inferred from core facts noted earlier.

Summary of defendants' admitted failings

Pakiri:

[77] Primarily Pakiri should have ensured on 13 February 2019 that Crew 26 imposed a safe retreat distance not less than the mean tree height of 45.4 metres. At great risk to breaker-out workers, including Nathan, the foreman designated an unsafe 20 metres green zone. And even failed to ensure all breaker-out workers were at the distance of at least 20 metres before giving the inhaul signal. And he did not ensure he could see the breaker-out workers before giving the signal to commence the inhaul. Also, he did not ensure he was on the same side of the cable and in front of the breaker-out workers with everyone at a safe retreat distance before he gave the signal. Those failings remained operative causes of Nathan's death.

[78] Also, members of Crew 26 did not maintain radio contact with each other. Nathan's radio was turned off at the time. But there is no suggestion that anyone tried to check on the location of the breaker-out workers by radio.

[79] Further, the breaker-out workers were not watching the drag when it started. And there was no record kept by the foreman or hauler operator about the decision to reduce the safe retreat distance to below the mean tree height for the haul. And Pakiri failed to provide adequate supervision of Crew 26's foreman to ensure he was doing his job properly.

[80] The similarities between the findings by the external auditor in 2018 and critical failings on 13 February 2019 are striking.

Ernslaw:

[81] Ernslaw had significant control over Pakiri's workers and activities as to work practices on site, including through the process of external auditors. This level of control was further galvanised as between them by force of contract.

[82] Ernslaw took, however, no steps to consult with Pakiri over the 2018 reports, nor review them with Pakiri to ensure appropriate corrective actions were identified and implemented. And even failed to provide a copy of the full reports to Pakiri in a timely manner. Moreover, it utterly failed to monitor Pakiri's implementation of compliance in the face of significant control to enforce the message of compliance.

Relevant principles and purposes of sentencing

[83] Section 151 of the HSWA sets out the criteria I must consider in the sentencing exercise:

> **151 Sentencing criteria**
>
> ...
>
> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
>
> (a) sections 7 to 10 of that Act; and
>
> (b) the purpose of this Act; and
>
> (c) the risk of, and the potential for, illness, injury, or death that could have occurred; and
>
> (d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and
>
> (e) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and
>
> (f) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and
>
> (g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[84] I must hold Ernslaw and Pakiri accountable for the harm done by the offending, promote in their corporate entities a sense of responsibility for that harm, deter both them and others generally. And deterrence at a general level must be a significant factor here because s 151(2)(b) obliges a sentencing Judge to have particular regard to the purposes of the HSWA.

[85] One of the principles to be taken into account is that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.[9]

Approach to sentencing

[86] The relevant guideline judgment is *Stumpmaster v WorkSafe New Zealand* (*Stumpmaster*).[10] *Stumpmaster* set out four steps for the sentencing Judge, now well-established:[11]

(a) Assess the amount of reparation to be paid to the victim;

(b) fix the amount of the fine, by reference to guideline bands and then having regard to aggravating and mitigating factors;

(c) determine whether orders under ss 152-158 of the HSWA are required; and

(d) make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

Step 1: Reparation—s 32(1)(b)

[87] Quantifying an emotional loss reparation payment is an intuitive but difficult exercise. The judicial objective is to strike a figure which is just in all the circumstances. As applied here it means to compensate for actual harm arising from

---

[9] Section 3(2) of the Act.
[10] *Stumpmaster v WorkSafe*, above n 4.
[11] *Stumpmaster* at [3] and [35].

the offence in the form of anguish, distress and mental suffering by the victims. The nature of the injury is or may be relevant to the extent it causes physical or mental suffering or incapacity, whether short-term or long-term.[12]

[88] There is not, and cannot, be a tariff for the loss of life or grief. Case law only provides a broad indication of an appropriate figure. It is therefore generally accepted a close comparative analysis of the facts of other cases is unhelpful.[13] And in *Stumpmaster*, the High Court observed the increase in penalties under the HSWA "should not lower the size of reparation orders."[14]

Emotional impact on the victims

[89] Nathan's daughter, Rongokino Miller (Rongo), was seven years of age at the time her father died. Nathan was in a relationship with Ms Kiri Pohatu at the time. And the impact of Nathan's death has also naturally impacted upon his mother, Ms Karen Black. It is common ground these individuals fall with the definition of "victims" under the Sentencing Act.[15]

[90] Having read the various reports by the victims—designated as such under the Sentencing Act—their heightened grief and sense of loss is unsurprising. The grief suffered by Nathan's daughter, Rongo, is particularly palpable. The emotional impact on Rongo will be long-term as she faces life without her beloved father. Ms Pohatu has lost her young attentive partner; Ms Black a beloved son. And the exasperated expressions of the victims speak to the level of grief and loss felt.

The arguments

[91] Materially, both Pakiri and Ernslaw concede their respective failings were causative of the incident and thus consideration of reparation under s 32 of the Sentencing Act is available. In the language of s 32, each defendant has "through or by means of" the offence "*caused* [the identified victims] to suffer emotional loss."

---

[12] *Big Tuff Pallets Ltd v Department of Labour* HC Auckland, CRI-2008-404-322, 5/2/2009 at [19].
[13] *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865.
[14] *Stumpmaster v WorkSafe* at [56].
[15] I accepted the prosecutor's submission that the definition of "immediate family" under s 4 of the Sentencing Act 2002 does not include Nathan's ex-partner, Ms Poi. However, any award to Rongo will likely be managed by Ms Poi who will have access to the reparation award in trust for Rongo.

[92] The prosecutor contends for an overall reparation award in the range of $130,000 with apportionment between eligible victims to be assessed by me.

[93] Pakiri argue for a global sum payment of between $75,000 and $85,000 apportioned equally between defendants. Counsel for Pakiri argues the prosecutor's claim is outside the appropriate range. However, during the hearing Pakiri accepted Ernslaw's contentions were likely "closer to the mark".

[94] Ernslaw argues for a global sum of $100,000 said to be consistent with other similar cases. Acknowledging that each case must turn on its facts, Ernslaw argues the award should be guided by the range identified by Venning J in *Oceana Gold (NZ) Ltd v WorkSafe*.[16] And points to a recent decision by Judge Barkle in *WorkSafe v NE Parkes & Sons Ltd*.[17]

The contributory negligence argument

[95] Pakiri's approach requires further discussion here. One of the factors relied upon was a claim Nathan's negligent conduct contributed to the incident. And thus, the argument followed, Pakiri's omissions were not *solely* causative of the outcome. Both defendants employed the same argument on the issue of fixing culpability (see below). But Pakiri in particular directed this argument to the quantum-of-reparation issue also.

[96] Essentially, Pakiri argued Nathan came to work with prohibited drugs in his system, failed to follow instructions to retreat further away from the fatal haul and was not facing the drag at the time the haul started. In doing so, Pakiri say Nathan breached its health and safety protocols because he had an obligation to protect his own safety at work.

[97] For several reasons, I rejected this contributory conduct argument. Because my reasoning applies equally to reparation and culpability, I have set it out later in this judgment. It is sufficient to state here my conclusion on the point. I considered

---

[16] *Oceana Gold (NZ) Ltd v WorkSafe NZ* [2019] NZHC 365.
[17] *WorkSafe NZ v NE Parkes & Sons Ltd* [2020] NZDC 25449.

Nathan's contributory conduct carried no weight on either quantum-of-reparation or culpability.

Quantifying the reparation order

[98] In quantifying a reparation award, I was acutely aware nothing I said or did could possibly fill the empty void felt by the victims. I approached the task of determining what was just in all the circumstances on a principled basis.

[99] The scenario here calls for a large award. Where the deceased worker's child is one of the victims and the surviving parent does not have a valid claim a large sum is justified. Here, Rongo was only seven years of age when Nathan died. Her pain, grief and loss will continue to be felt long-term. The award to her must be substantial. Also, Nathan's widowed partner, Ms Pohatu, is entitled to an appreciable award.

[100] But Rongo and Ms Pohatu are from different family units with the expectation that one is unlikely to benefit from the other in any reparation award. And without diminishing in any way the level of grief and loss felt by Ms Black, the reasonable expectation is any payment for her will be comparatively significantly less.

[101] This general approach is mirrored in case law. In *WorkSafe v Ports of Auckland Limited* a reparation sum of $130,000 was ordered—$80,000 to the victim's young son; $20,000 and $30,000 to two other members of the deceased's family.[18] In *WorkSafe v Centreport Ltd*, $170,000 was awarded—$70,000 to the widow; a further $20,000 to each of the victim's five surviving children. In *WorkSafe v Stevens & Stevens*, $100,000 was awarded to the deceased's only surviving daughter.[19] And in *WorkSafe v Homegrown Juice Company* a sum of $90,000 was awarded to the widower with no dependants.[20]

[102] Pakiri, albeit now in liquidation, has insurance cover. Pakiri's liquidator can claim for an employee death by accident benefit. Nathan' estate will receive $50,000 for this.[21] But I have no information about the beneficiaries of that estate nor its

---

[18] *WorkSafe v Ports of Auckland Limited* [2020] NZDC 25308.
[19] *WorkSafe v Stevens & Stevens* [2018] NZDC 19098.
[20] *WorkSafe v Homegrown Juice Company* [2019] NZDC 16605 at [11].
[21] Affidavit of Adrienne Wikiriwhi dated 19 March 2021.

financial status. In those circumstances, I was not prepared to deduct the insurance payment from the reparation order.

[103] For reasons identified earlier, I considered a large award was just in all the circumstances. The victim scenario called for nothing less. And the prosecutor's argument for an order in the range of $130,000 was justified. It is generally consistent with the broad indication in similar cases cited to me.

[104] Deductions must be made however from that figure. Pakiri paid to Clarissa Poi (a) child support payments of $9,744.28; (b) the sum of $2,340 in addition to fortnightly wages paid to Nathan's nominated bank account.[22] I rejected Pakiri's submission the deduction of the gift of $2,000 paid towards the funeral should be deducted. It was koha and thus a gift.

[105] I thus ordered **reparation** in the sum of **$117,916** (rounded up).

Payment of reparation

[106] I order that Pakiri and Ernslaw are ***jointly and severally*** liable for the reparation order. As stated by Gendall, J in *Taua v Police* at [6], albeit in *dicta*, that co-offenders are jointly and severally liable for the full amount of loss as they would be in terms of tort duty.[23] On that basis, should one or more of the defendants be unable to pay reparation, the Court rightly can look to the other defendants to meet the total loss, damage or harm.

Apportionment

[107] Also, consistent with my assessment as to the attribution of culpability as between Pakiri and Ernslaw, I apportioned the reparation figure as between them on a 60:40 ratio, respectively—Pakiri $70,749.60; Ernslaw $47,166.40 This is consistent with the approach in *WorkSafe NZ v Hughes Partner Ltd.*[24]Apportionment as between defendants should reflect the individual culpability. Thus, my later findings in relation

---

[22] Affidavit of Adrienne Wikiwirihi at [10] and [14].
[23] *Taua v Police* HC New Plymouth, CRI-2009-043-22; 22 September 2009 at [6].
[24] *WorkSafe NZ v Hughes Partner Ltd* [2015] NZDC 20545.

to the respective culpability of Ernslaw and Pakiri for this incident applies with equal force here.

[108] In reaching this conclusion I rejected Ernslaw's argument for general apportionment of culpability on a 65:35 ratio. Pakiri obviously had control over the day-to-day operations of Crew 26; Ernslaw less control. But, Ernslaw's argument failed to give sufficient weight to the significant level of control it had. In 2018, Ernslaw knew Crew 26 was breaching critical safety rules. Yet, Ernslaw failed to respond appropriately to ensure corrective steps were identified and corrected through monitoring compliance. And Ernslaw had the contractual power to enforce Pakiri's compliance. This constituted significant control the exercise of which may have averted the fatal incident. Ernslaw's attribution ratio placed it too far from that responsibility.

Step 2: Quantum of fines

[109] *Stumpmaster* sets out four guideline bands for culpability:[25]

Low culpability	:	starting-point of up to $250,000;
Medium culpability	:	starting-point of $250,000 to $600,000;
High culpability:	:	starting-point of $600,000 to $1 million;
Very high culpability	:	starting-point of $1 million plus.

[110] The *Hanham & Philp Contractors Ltd* culpability factors remain relevant under the *Stumpmaster* approach. I address the relevant factors below. And in fixing the respective starting point fines policy, the legislative scheme of the HSWA requires me to ensure the penalty bites and is not to be treated as a mere licence fee level.[26]

---

[25] *Stumpmaster, above n 4, at* [37].
[26] *Department of Labour v Street Smart Ltd* HC Hamilton, CRI-2008-419-26, 8 August 2008 at [59].

Operative acts or omissions

[111] Breaker-out workers are exposed to enormous risks. And Crew 26's poor compliance with critical safety rules and break-out policies and procedures was previously known by both defendants. Two prior audits in 2018 told them so. And the principal operative omission on 13 February 2019 was the failure to ensure Crew 26's breaker-out workers retreated to the appropriate safe retreat distance of 45.4 metres before each haul. Both defendants admitted the safe retreat distance should have been at least 45.4 metres. The setting of the distance at a mere 20 metres was the principal operative omission that lead to Nathan's death. That is partly why the contributory conduct argument failed on the facts here.

Risk of death to a breaker-out worker in Crew 26 very high

[112] The breach of that safe retreat distance requirement and other associated safety rules bore a striking similarity to content of the 2018 audits. Thus, both defendants had ample opportunity to prevent this fatal incident or at the very least minimise the risk of its occurrence but failed miserably. Crew 26 was left to run amok. It demonstrated systemic failures within both companies. It led to workers like Nathan being exposed to a very high but avoidable risk of injury or death—s 151(2)(c).

[113] Risk of death or serious injury also could reasonably have been expected to have occurred in these circumstances—s 151(2)(d). This is because breaker-out workers are in the frontline of a hazardous enterprise. The risk of being seriously hurt or killed as a result of being too close to the hauling operation must be considered as high.

[114] Moreover, death eventuated here. And in fixing culpability the degree of harm that occurred must be taken into account. As held by Dobson J in *Jones v WorkSafe NZ*, "the nature of the risk that [a] defendant ought to have been aware of, and the extent to which that risk was realised by actual harm being inflicted, are two components of the culpability analysis".[27] In simple terms the actual harm inflicted

[27] *Jones v WorkSafe NZ* [2015] NZHC 781 at [38].

is a relevant sentencing factor in determining how serious the offence was—s 151(2)(d).[28]

Degree of departure from industry standards

Pakiri:

[115] Logging is a high-risk industry. It is designated as such under Schedule 2 of the Health & Safety at Work (Worker Engagement, Participation, and Representation) Regulations 2016. By setting the safe retreat distance at 20 metres on 13 February 2019, Pakiri substantially departed from industry standards. And Crew 26's conduct demonstrated significant departures from industry standards. There was a lack of communication and supervision between the crew. All of this stemmed from systemic failures within Pakiri and Ernslaw.

[116] Whilst Pakiri had a document trail of health and safety policies and employed trained workers it did not adopt a proactive approach to Crew 26's health and safety. Pakiri failed to adopt even a re-active approach. Rather it turned a blind eye to health and safety of Crew 26's knowing months earlier that critical safety rules were being repeatedly breached.

Ernslaw:

[117] Ernslaw also failed to address industry standards by omitting to follow up the audits with Pakiri about Crew 26. In a sense, Ernslaw also turned a blind eye to the alarm bells raised by those audits. It was content to allow a mere paper trail to be sufficient knowing its subcontractor Pakiri had repeatedly worked in breach of industry standards via Crew 26.

[118] I accepted nevertheless that the existence of an external audit *process* reflects general good practice. Ernslaw rightly assumed Pakiri's workers were all qualified and trained. However, Ernslaw failed to review the audits about the concerns with Pakiri to ensure corrective actions were remedied. And moreover, failed to monitor implementation of the corrective actions on the behaviour of Crew 26.

---

[28] *Stumpmaster* at [40].

[119] Ernslaw's correct processes were in place. But eagerness to follow through to ensure implementation of corrective steps was wholly absent. Good health and safety practices for workers can only be realised in word *and* deed.

Conduct of victim

[120] The contention a victim's contributory conduct must be addressed in HSWA prosecutions is disfavoured. The argument was flatly rejected in *Ocean Gold (NZ) Ltd.* One of the corporations in that multi-defendant appeal was *Cropp Logging Ltd.* In the *Cropp* appeal, counsel argued the reparation for loss of earnings should be reduced to take into account the victim's contributory negligence because of his failure to observe relevant standards in the logging industry. In short, he contributed significantly to the accident which caused his injuries. Venning J rejected this argument on an amalgam of points.

[121] The learned Judge said a sentencing hearing is not an appropriate forum for determining not only what standard practices might apply to an industry or how the injury may have occurred, but also what contribution if any a victim may have made to the incident.[29]

[122] Also, he pointed out this argument had been rejected in the earlier tariff decision of *Department of Labour v Hanham & Philp Contractors Ltd*, where the Full Court declined to use the victim's careless conduct as a mitigating factor for offending.[30]

[123] Venning J approved of the reasoning of Duffy J in *Department of Labour v Eziform Roofing Products Ltd* at [52]:[31]

> The nature of a victim's conduct is relevant when it comes to considering such conduct as a mitigating factor in the offending, or the weight to be attached to it. Not all such conduct should be treated the same. A victim's intentional or wilful disregard for safety practices may well mitigate otherwise seriously culpable conduct on the part of an employer. But guarding against workplace accidents that result from the foolish carelessness of employees is part of the role of the Health and Safety in Employment Act. So, to allow such carelessness to minimise an employer's culpability would undercut one of the

---

[29] *Oceana Gold (NZ) Ltd v WorkSafe NZ* at [58].
[30] *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79 (HC).
[31] At [52].

> policy objectives of the legislation. This is why the Full Court in *Hanham & Philp* refused to place any weight on the careless conduct of the victim in the *Cookie Time* appeal. It is also why the carelessness of the young victim's father in *Street Smart* was not understood to diminish the employer's culpability. As was recognised in *Street Smart* (at [59]) and approved by the Full Court in *Hanham & Philp* (at [56]), workplace accidents are a cost to, and burden on the community. Yet the community has no means of monitoring workplace safety, other than through the Health and Safety in Employment Act. Particularly in light of the accident compensation scheme's no fault principle, the fines imposed under this Act must act as a real deterrent on employers to avoid workplace accidents, including those involving the foolishness and carelessness of employees. Unless employers are influenced by the means of this Act to change the culture of employees who display a cavalier attitude towards safety precautions, the community will continue to bear the cost of the harm that results. It would be wrong, therefore, to permit employers to rely on an injured employee's foolishness or carelessness to mitigate the employer's culpability. It follows that in matters of workplace health and safety, to attach little, if any, weight to a victim's carelessness will not be inconsistent with the requirements in s 9(2)(c) of the Sentencing Act. Indeed, to do otherwise would subvert the policy of the Health and Safety in Employment Act. Thus, the Judge was wrong to take into account the carelessness of Mr Paul and Mr McKay when she came to fix the starting point.

[124] Observance of these principles ensures the foundational duty under the statutory regime is not easily undercut. Employers must guard against workplace accidents that result even from foolish or careless employees.

[125] Contributory conduct factors logically arise more directly under culpability assessments. But, as Venning J held in *Oceana*, the relevant principles "apply equally in the case of reparation". Specifically, the Judge accepted that to seek to reduce reparation payable on the basis of contributory conduct would undermine the foundational duty on an employer under the legislation. In determining issues of reparation, he said, "refined causation arguments" are not to be encouraged.[32]

[126] With those principles in mind, the real question was whether the contributory conduct relied upon here should be accepted as mitigating the amount of reparation and culpability.

[127] As noted earlier, both defendants called in aid s 9(2)(c) of the Sentencing Act which requires, where applicable, a judge at sentence to take into account the conduct

---

[32] *Oceana Gold (NZ) Ltd v WorkSafe NZ* [2019] NZHC 365 at [63].

of a victim. Ernslaw and Pakiri argued this is one of those rare cases where the worker's conduct is relevant to the assessment quantum of reparation and culpability.

[128] Nathan acted contrary to Pakiri's policy and instruction because he had alcohol and drugs in his system. And there is an available inference the incident occurred some three to four hours after he started work which raises a suggestion he ought not to have been working.

[129] Also, the weight of the evidence pointed to the conclusion Nathan was less than 20 metres away when the haul commenced. And the co-worker, Kentworthy, was just beyond that distance. Also, Kentworthy brought that fact to Nathan's attention but he did not retreat further. And Nathan's radio was off. But there is no suggestion any member of Crew 26 tried to contact him before the haul commenced.

[130] Both defendants say Nathan's actions in the lead-up to the incident went beyond mere carelessness. They say to completely ignore this lead-up and Nathan's contributory conduct is wrong in principle. I have not ignored it.

[131] I considered Nathan's contributory conduct carried no weight on quantum-of-reparation or culpability when measured against the *period* of offending and the *primary* operative failing.

[132] The contributory conduct argument largely ignored the *primary* operative omission which was the failure to set a safe retreat distance of not less than 45.4 metres. But for that breach—particularised and admitted by plea and fact—it was highly unlikely Nathan would have suffered injury let alone death. Nathan's own carelessness has therefore no direct bearing on the primary operative omission leading to his death. The conduct relied upon was *secondary* to that operative omission. In that context, arguments about Nathan's contributory conduct was little more than an invitation to tinker with causation. Boiled down it was a refined causation argument ill-suited to both the assessment of reparation and fixing of culpability here.

[133] Also, because the foundational duty here focuses on exposure of workers, including Nathan, to risk of death or serious injury the refined argument had a tendency to distort the law's focus. This is not a negligence lawsuit requiring

determination about whether the victim of the tort contributed to the cause of the accident. It is a criminal prosecution about exposing workers to *risk* of death or serious injury. The argument simply could not carry weight on the risk focus here.

[134] This reasoning applies downstream to Ernslaw. If Ernslaw had, as it should have, reviewed the audits in 2018 with Pakiri, identified corrective action and then monitored the implementation of those steps, the breach of the *primary* operative omission that led to Nathan's death was unlikely to have occurred.

[135] This is why this incident was a wholly avoidable death.

The cost to eliminate or minimise risks was negligible

[136] Here, costs associated with the available options of eliminating or minimising the operative risks was likely negligible. This is because the real costs had already been incurred in setting up and employing the external audit process. Likely costs associated with the extra steps of reviewing the 2018 audits, identifying corrective action and monitoring the implementation of those changes in Crew 26 was comparatively minimal. And the significant contractual power Ernslaw had over Pakiri to ensure compliance in this area appears to have been demoted from the cost-benefit analysis.

Comparative case law

[137] Apart from *Stumpmaster*, the prosecutor cited four cases, all of which I have considered: *WorkSafe v Cropp Logging; WorkSafe v Marrice Couper Logging Ltd; WorkSafe v Ports of Auckland Ltd;* and *WorkSafe v Central Siteworks Ltd.* [33] Both defendants engaged with an analysis on that case law and invited me to consider other cases which were also considered: *WorkSafe v Tree & Forest Ltd*; *R v Burr & Paul Burr Contractor Ltd; Harvestpro NZ Ltd v R;* and *WorkSafe v Avon Industries Ltd.*[34]

---

[33] *WorkSafe v Cropp Logging* [2018] NZDC 2232; *WorkSafe v Marrice Couper Logging Ltd* [2018] NZDC 16139; *WorkSafe v Ports of Auckland Ltd* [2029] NZDC 25308; and *WorkSafe v Central Siteworks Ltd* [2019] NZDC 24736.

[34] *WorkSafe v Tree & Forest Ltd* [2019] NZDC 25406; *R v Burr & Paul Burr Contractor Ltd* [2015] NZHC 2675; *Harvestpro NZ Ltd v R* [2015] NZHC 364; and *WorkSafe v Avon Industries Ltd* [2018] NZDC 4766.

Pakiri:

[138] In Pakiri's case, the prosecutor sought a starting-point at the bottom end of the high culpability band in *Stumpmaster* with a range between $620,000 and $700,000. Pakiri contended its offending fell within the medium culpability band and urged a starting-point somewhere $500,000 and $600,000.

[139] Drilled down, Pakiri's argument for a lower starting-point rested largely on the contributory conduct argument now rejected. When that is recognised, it is obvious Pakiri's offending falls within the high culpability band in *Stumpmaster.*

[140] Pakiri was acutely aware of the high risk of death and injury to breaker-out workers in Crew 26 but largely ignored the warning signals contained in the audit reports. Overall, the offending constituted a gross departure of appropriate standards. And was indicative of systemic failures within Pakiri.

[141] This audit dimension element elevates Pakiri's offending above that in *Marrice Couper.* In *Marrice Couper*, the offending company ran a cable logging operation in Marlborough on very steep terrain. The most probable chain of events was the victim was breaking-out when he requested the hauler driver to move the rope to hook up another log. The main line or tail rope snagged on a stump, flung back and pinned the victim to the hill. He suffered a fracture of his lateral tibia plateau of his left leg. Here, death actually resulted.

[142] And *Marrice Couper* was delivered before the new guideline judgment in *Stumpmaster*. Nevertheless, the *Marrice Couper* Court adopted a start point of $600,000 even where the duty holder had previously taken significant steps to address the problems. Here, Pakiri turned a blind eye to the dangerous work practices known to exist within Crew 26.

[143] *WorkSafe v Tree & Forest Ltd* is a comparable case. There the victim was engaged in tree-felling. Concerns had been raised about the practices of staff prior to the incident. The victim was struck on the head by a log, suffered a concussion and was hospitalised. The breaches by the corporate employer included failing to provide effective supervision, training and/or disciplinary action to workers known to be

working in an unsafe manner. And failing to have appropriate equipment or systems to measure accurately safe working distances.

[144] The facts in *Tree & Forest Ltd* thus justify comparison with this case. Here, however, the victim died. And the actual harm realised informs culpability. And, as found, Nathan's death was wholly avoidable.

[145] For all the relevant reasons given under step 2, I fixed a starting-point for Pakiri of $720,000.

Ernslaw:

[146] Ernslaw's offending falls within a different band in *Stumpmaster.* Ernslaw accepts the prosecutor's contention its offending falls within the medium culpability band. However, the difference lies where the starting-point should be fixed within that band. The prosecutor aims for the higher end; Ernslaw, the lower end. As with Pakiri, Ernslaw's contention rested also on the now rejected argument Nathan's contributory conduct lowered culpability.

[147] Ernslaw's culpability clearly fell within the higher end of the medium culpability band. Ernslaw knew months before the incident that Crew 26 was repeatedly breaking critical safety rules. Also, the second audit clearly revealed to Ernslaw the first audit had not been responded to. And Ernslaw had a positive duty to Crew 26 workers to take all practicable steps to *monitor implementation* of the much-needed changes to their dangerous work practices with significant compliance power at its disposal to achieve it. By turning a blind eye to *that* aspect of its duty, Ernslaw continuously exposed the breaker-out workers in Crew 26 to high risk of serious injury or death. With knowledge of the 2018 audits, Ernslaw had ample opportunity to avoid Nathan's death. It could not act simply as a conduit for audit reports; nor as a sleeping partner.

[148] Also, I gained the impression Ernslaw's submission failed to grasp the lesson. It argued the only real mistake or "gap" in its process was its failure to *review* the detailed reports picking up additional matters for workers to be informed about. That ignores entirely the ultimate obligation upon Ernslaw—to take all practicable steps to

monitor implementation of the change in work practices within Crew 26. Ernslaw's submissions on culpability largely ignored that crucial aspect of the case against it.

[149] I found *WorkSafe v Central Siteworks Ltd* a helpful comparison case. Central Siteworks Ltd was contracted to remove trees from a site for development. None of its crew, including the victim, had any experience undertaking forestry work. When the victim was in the process of felling a tree, he felt it start to fall. He turned his back to get out of the way but was hit from behind. He suffered a flail chest injury with multiple rib fractures and a punctured lung. Central Siteworks Ltd had failed to assess that workers were competent to undertake the work. Also, it failed to undertake an assessment of the site, identification of specific hazards with the site and associated with the work. A $600,000 starting point fine was adopted sitting between the medium and high bands.[35] Ernslaw's offending is less serious than *Central Siteworks Ltd.*

[150] For all the relevant reasons given under step 2, I fixed a starting-point fine for Ernslaw of $480,000. The difference in culpability attributed as between defendants was thereby reflected in a 60:40 ratio.

Aggravating and mitigating factors relating to Pakiri and Ernslaw

[151] There are no applicable aggravating features justifying an uplift from the starting-point for either defendant.

[152] As to mitigating factors, there is greater agreement between the parties.

Discount for guilty pleas

[153] It is common ground Pakiri and Ernslaw entered a guilty plea at the first reasonable opportunity. Both defendants are therefore entitled to a 25 per cent discount under the methodology in *Moses v R.*[36]

---

[35] *WorkSafe v Central Siteworks Ltd* [2019] NZDC 24736 at [27]–[28].
[36] *Moses v R* [2020] NZCA 296.

Deduction for reparation ordered

[154] Here the prosecutor contends a five per cent deduction for both defendants. I agreed.

[155] As noted earlier, I rejected Pakiri's contention that because its insurer must pay a death benefit of $50,000 to Nathan's estate a corresponding deduction should be made from the total reparation figure apportioned to it. I was provided with no details about this estate and the beneficiaries. Any deduction therefore may have been counter-productive.

Other mitigating factors

[156] I accepted both defendants were fully cooperative with the investigation and provided all information requested to WorkSafe. Also, I accepted in a general sense that Ernslaw and Pakiri otherwise had a good formal safety record reflected in lack of convictions.

[157] And overall, there has been a genuine expression of remorse by the leading representatives in Ernslaw and Pakiri. In relation to Pakiri, the remorse was partly demonstrated by the voluntary payments to assist Nathan's whānau and emotional support given to his whānau following his death. Ernslaw has continued providing financial assistance to Rongo.[37]

Global deduction for mitigating factors

[158] Measured against the gravity of offending, I considered Pakiri was entitled to a **35 per cent** deduction for the relevant mitigating factors, including early guilty plea.

[159] In the case of Ernslaw, I considered a greater discount was appropriate because it has taken significant remedial steps since the incident.[38]

---

[37] Memorandum from Ernslaw dated 28 June 2021.
[38] Affidavit of Paul Nichols dated 10 March 2021.

[160] Ernslaw now implements a daily circulation of any incidents, including near misses, to act as reminders. Ernslaw's new systems encourage preventative action. It has centralised the health and safety administration ensuring all reports are circulated and reviewed by the relevant person. It has increased the number of meetings with contractors as a group. Also introducing one-on-one meetings with contractors every four months to discuss and review operations such as crew performance, training, health and safety performance, production and quantity and environmental compliance. And a central health and safety manager has been appointed. Part of his duties include working on the quality of internal investigations. The quality of remedial action taken is recognised.

[161] Overall, I considered Ernslaw was entitled to a **40 per cent** deduction for mitigating factors, including early guilty plea.

[162] **End fines**: for **Pakiri, $468,000**; for **Ernslaw, $288,000**.

Step 3: Whether orders under ss 152-158 of the HSWA are required?

Prosecutor's costs

[163] The prosecutor seeks a contribution from both defendants to WorkSafe's costs in the sum of $20,000 pursuant to s 152(1) of the HSWA. The costs relate solely to legal fees incurred by WorkSafe in engaging an external prosecutor, Mr Brookie. The sum represents about half of the actual costs incurred there. Also, WorkSafe seeks costs from both defendants to cover the forestry expert, Mr Lance Hare's invoice which totals $4,200. WorkSafe contended these costs are just and reasonable in the circumstances and should be apportioned as between the defendants, as the Court deems fit.

[164] As per *Stumpmaster*, costs in this area are now commonplace. The issue before me was whether the external prosecutor's fee was "just and reasonable" under s 152(1). Both defendants contend the amount sought was not warranted. Pakiri even suggested there was no evidence to justify the legal costs claimed. That thin submission faded quickly in the face of Mr Brookie's invoices.

[165] Ernslaw argued the sum sought "far exceeds" cost orders "typically awarded" in other cases.[39] I rejected that argument. As the prosecutor demonstrated there are cases where generally similar awards of costs have been made. In *WorkSafe v Dibble*, the sum of $21,476 was awarded.[40] In *WorkSafe v W Gartshore Ltd*, the sum of $15,900 was awarded for external legal counsel's costs (single defendant case).[41] And in *WorkSafe v Waste Management NZ Ltd,* costs of $26,629 ordered (albeit post trial).[42]

[166] WorkSafe prosecutions like this one are inherently more complex than many criminal cases. Here, the prosecutor would have been required to carefully assess several legal and factual elements against separate defendants, even at sentencing. The length of this judgment attests to the level of complexity even at this sentencing stage.

[167] Also, guilty pleas were not entered by Ernslaw until 8 December 2020 and by Pakiri until 22 February 2021. While deemed pleas at the first *reasonable* opportunity, the first appearance was on 30 March 2020. That presupposes several things. The defendants knew they were facing a relatively complex prosecution otherwise their pleas would have been deemed late. And the external prosecutor faced the prospect of a trial—leading to increased work—up until the dates those pleas were entered.

[168] In all the circumstances, I considered $20,000 was appropriate, apportioned as between the defendants on a 60:40 ratio—Pakiri $12,000; Ernslaw $8,000.

[169] Also, I considered each defendant should be jointly and severally liable. The jurisdiction under s 152 extends to what a judge in his or her discretion thinks is not only reasonable in the circumstances, but also "just". A wider discretion under the HSWA regime is hard to imagine. In principle, imposing joint and several liability must be a viable option to ensure justice in the case. And in the circumstances here, where Pakiri is likely one step short of ceasing to exist, it seems to me it is just that Ernslaw bear responsibility for the total sum if Pakiri cannot pay.

[170] Also, I considered WorkSafe's application for costs for the expert's fee in the sum of $4,200 was well justified. The circumstances surrounding Nathan's death

---

[39] Ernslaw's sentencing submissions dated 17 March 2021 at [88].
[40] *WorkSafe v Dibble* [2019] NZDC 29728 at [67].
[41] *WorkSafe NZ v W Gartshore Ltd* [2020] NZDC 26656 at [17].
[42] *WorkSafe NZ v Waste Management NZ Ltd* [2020] NZDC 23854 at [8].

required expert assessment. And the contribution figure sought was both reasonable and just.

[171] The total sum ordered under s 152 is **$24,200**. Each defendant is *jointly and severally liable* for that total sum. If Pakiri has the capacity to pay its share, it is apportioned as per the 60:40 ratio.

Step 4: Proportionality assessment

[172] This final step requires me to make an assessment of the proportionality and appropriateness of the imposition on each defendant of reparation, fine and other orders.[43] This final step reflects the totality principle. The total must be proportionate to the circumstances of the offending and the offender.

[173] My assessment of quantum of reparation and fine necessarily involved me taking into account the relevant purposes and principles of sentencing at each stage. The application of the totality principle was therefore of lesser importance because it was to a degree already factored into my reasoning. And the risk was that a further material deduction will provide each defendant with double discounts which would be inappropriate.

Ernslaw:

[174] On the likely premise the liquidator determines Pakiri lacks financial capacity to pay the orders against it, Ernslaw will be liable to meet them to the extent its liability is joint and several. On a worst-case scenario, the total package of sanctions against Ernslaw is likely to be $430,116, excluding any award for consequential loss.

[175] Having stood back and reviewed the likely total package, I did not consider any further deduction for totality purposes was required. In my view, it struck an appropriate balance under the HSWA against a leading forestry company for a worker's avoidable death.

---

[43] I revisited this factor later under the consequential loss order issue.

Pakiri:

[176] Pakiri is in a different position. It is clearly more culpable than Ernslaw. But, as noted earlier, Pakiri's liquidator holds the view it is "unlikely any fine could be paid". I give that opinion due weight here despite the lack of detailed evidence to support his somewhat conclusory opinion. And I accept Pakiri's capacity to pay the total penalty package against it is now highly unlikely.

[177] If Pakiri was still trading and there was a risk it may cease to exist because of the total package of sanctions it would likely lead to reduction here or an instalment plan. But that is not the picture presented to me. Any adjustment in totality will make no difference to likely outcome. Pakiri will soon cease to exist. And for reasons given earlier, imposition of the package of sanctions is appropriate. For those special reasons, no adjustment for totality purposes was made.

Application for consequential loss orders for victims—s 32(1)(c)

Background

[178] At the hearing on 24 March 2021, the parties could not agree on the quantum of any consequential loss order under s 32(1)(c). Sentencing was therefore adjourned to today's date to allow the parties the opportunity to file evidence and submissions and to release my judgment.

[179] In the interim, I received an affidavit from a chartered accountant, Mr Jay Shaw. Mr Shaw was instructed to assess an ACC consequential loss calculation from the date of Nathan's death on 13 February 2019 to the date to which his youngest child is no longer eligible for ACC weekly compensation – 31 December 2029.

[180] In summary, WorkSafe seeks a consequential loss order for the benefit of Nathan's daughter, Rongo Miller, Nathan's partner, Ms Pohatu, and Nathan's stepdaughter, Ms Audrina Poi. The defendants agree but dispute quantum. They challenge the methodology used by WorkSafe to reach its figure.

The relevant law

[181] Under s 32(1)(c) of the Sentencing Act 2002 a Court may order reparation for "loss or damage consequential on any emotional or physical harm…"[44] Under s 32(5) a Court is prohibited from awarding reparation for such consequential loss for which compensation has been, or is to be, paid under the Accident Compensation Act 2001. This is designed to prevent double dipping.

[182] However, the prohibition in s 32(5) "does not prevent the Court from making an order for the balance of the consequential loss that the ACC compensation falls short of providing in order to restore the victim to their free-offence position. The current wording of s 32(5) is an endorsement by Parliament of the '*top-up*' approach…"[45] As such the calculation for consequential loss must take into account any relevant lump sum payments already paid under the accident compensation scheme.

[183] The 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. That will enable the shortfall to be made on the basis that ensures a degree of consistency with that scheme. And it provides a more straightforward basis for the calculation of reparation.[46]

[184] No specific formula is mandated to calculate the shortfall. However, reparation must be "approached in a broad common-sense way and resort to refine causation arguments is not to be encouraged."[47] The assessment as always must be "case specific".[48]

[185] However, determination of the appropriate way in which reparation should be calculated in a case must be informed by the primary purpose of a sentence of reparation. Reparation is designed to provide for the interests of victims and to calculate a simple, speedy and inexpensive means of doing so. And the overarching

---

[44] Sentencing Act 2002, s 32(1)(c).
[45] *Sarginson v Civil Aviation Authority* [2020] NZHC 3199 at [177].
[46] *Oceana Gold (New Zealand) Ltd v WorkSafe* [2019] NZHC 365 at [68].
[47] *R v Donaldson* CA227/06, 20 October 2006 at [36].
[48] *Sarginson v Civil Aviation Authority* at [180].

principle is reparation should not put a victim in a better position than he or she otherwise would have been.[49]

Pakiri's COVID-19 subsidiary argument

[186] Pakiri sought to factor into the assessment the impact of the COVID-19 pandemic on its financial position. Pakiri relied on the affidavit of Adrienne Wikiriwhi. Ms Wikiriwhi said that payments to Nathan's family members ended when the country went into lockdown due to COVID-19. And then added "that this was when cashflow issues for Pakiri became significant." No more detail was given. Pakiri went into liquidation in August 2020.

[187] Pakiri says the consequential loss assessment undertaken by WorkSafe on the basis of Nathan's continued earnings was unreasonable because in less than two years after the incident Pakiri was placed into liquidation. And that financial difficulties were being faced by Pakiri earlier than that. Therefore, the argument follows, because the impact of the pandemic on Pakiri's financial position was likely certain, Nathan would have been made redundant in any event.

[188] To support this argument, Pakiri said Nathan did not have significant work experience and had been out of the industry for a significant period making his redundancy under the pandemic likely. But Nathan was qualified. He had simply been away from the forestry industry for five years before he joined Pakiri.

[189] On the little material before me these arguments were wafer-thin on facts and speculative on inferences. There was little background evidence about Pakiri's cashflow problems at the time of the pandemic lockdown.

[190] Moreover, reliance on the consequences of the pandemic is a factor too remote from the point at which Pakiri's obligation to provide consequential loss crystallised. The pandemic hit in March 2020 over a year *after* Nathan's death. And Pakiri could cite no case law to support the proposition that an assessment for reparation and consequential loss might be affected because of the impact of COVID-19.

---

[49] *Agricentre South Ltd v WorkSafe* [2018] NZHC 2070 at [29].

[191] For all these reasons, I rejected it.

Common ground on consequential loss issue

[192] First, there was consensus that the shortfall should be distributed between Ms Pohatu, Audrina Poi and Ronga Miller in accordance with their current 60:20:20 entitlements. WorkSafe also accepted the apportionment to be awarded to the children should be paid to their respective immediate caregivers being Ms Pohatu for Ms Audrina Poi and Ms Poi for Ms Rongo Miller.

The dispute

[193] While the submissions were wide-ranging in commentary about the law, the essential issue was quite narrow—how should the total shortfall be calculated in *this* case?

[194] Mr Shaw's analysis produced a shortfall of $138,492. Nathan's total earnings over the period is $567,242; 80 per cent of earnings forming the basis of ACC payments of $428,751 leaving a shortfall of $138,492.[50] The defendants maintained the shortfall was $66,963. The difference was reflected in the methodology adopted by each party.

[195] This arose because Nathan's partner, Ms Pohatu, elected to receive her accident compensation entitlements as a lump sum on 23 December 2019 when she was paid just under $195,000 (excluding GST).[51] Ms Pohatu preferred the lump sum option because as a result of Nathan's death she stopped working. That meant her household was reduced from two incomes to no income. Her decision was understandable.

[196] But if Ms Pohatu had elected weekly compensation option payments she would have been entitled to a higher sum of just under $289,000 over the period of entitlement.[52] In simple terms, Ms Pohatu's choice to take a lump sum payment rather than receive weekly compensation payments over the period of entitlement produced a higher shortfall figure.

---

[50] Affidavit of Jay Shaw dated 23 March 2021 at [20].
[51] Affidavit of Jay Shaw dated 23 March 2021 at page 46.
[52] J Shaw's affidavit at p 3.

[197] The defendants say therefore that WorkSafe's methodology is not a top-up but a windfall for victims who elect lump sum payments; equally it penalises they say victims who choose weekly payments or victims who choose lump sum payment only after sentencing.[53] And here it is a windfall to Ms Pohatu because of the choice she made to receive the lump sum payment. This is made worse here they say because WorkSafe is advocating an approach where this windfall is shared between all three victims. And two of the victims therefore would receive a share of that windfall unrelated to any consequential loss they suffered.

[198] There is real force in some of these contentions. As Dunningham J observed in *Agricentre South Ltd v WorkSafe,* a victim is to be put in an equivalent but not better position to that they were in prior to the offending.[54]

[199] I am not bound to follow either methodology here. In the end, I adopted a hybrid approach between the competing methodologies. First, I fixed the shortfall at the figure of $138,492, as advocated by WorkSafe. That reflected the lump sum actually paid to Ms Pohatu. And it is consistent with the plain words of s 32(5) which was specifically amended to endorse the top-up of ACC payments approach ("has been or will be paid"). It is not an arbitrary approach here because it reflects what in fact occurred in *this* case. Nor is it unfair to these defendants as to the total shortfall they are liable to pay because they must take their victim, Ms Pohatu, as they find her.

[200] Second, the calculation as between the three victims should be different. Ms Pohatu to receive a payment based on the lump sum calculation. But for each of the two daughters—who are not entitled to lump sums—a calculation based on separate weekly entitlements. This approach ensures the two daughters do not inappropriately share in the windfall linked entirely to Ms Pohatu.

[201] Adopting that approach, I issued a **consequential loss order** in the sum of **$138,492**, attributed as between the defendants on the same 60:40 ratio. And for the same reasons supporting the reparation order I held both defendants *jointly and severally liable* for the total sum.

---

[53] Ernslaw's 2nd Supplementary Submissions on Consequential Loss dated 9 April 2021.
[54] *Agricentre South Ltd v WorkSafe* [2018] NZHC 2070 at [29].

[202] I direct the sum of $138,492 is to be distributed as between the three victims as follows:

(a) To Ms Pohatu $111,706.80;

(b) To Audrina Poi $13,392.60—to be paid to Ms Pohatu for Audrina;

(c) To Rongo Miller $13,392.60—to be paid to Ms Clarissa Poi for Rongo.

Revisiting Step 4

[203] Given the delay by the parties in presenting their positions on the consequential loss issue, I was required to revisit the step 4 analysis. This is because the additional consequential loss order has been added to the total package of sanctions.

[204] I thus went through the process under step 4 again. For similar reasons, I reached the same conclusion that no reduction in totality was required for either defendant. Whilst the consequential loss order likely increased the package of sanctions against Ernslaw to **$568,608** it remained a proportionate outcome. It reflected an appropriately strong message to a leading forestry company about the consequences that follow under the HSWA for a worker's avoidable death.

Conclusion

[205] By way of summary:

(a) Pakiri fined $468,000 with court costs of $130.

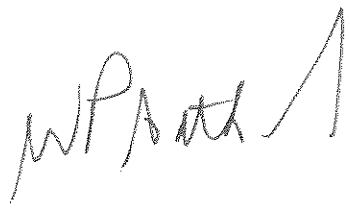
(b) Ernslaw fined $288,000 with court costs of $130.

(c) Reparation order in the sum of $117,916.

(d) Prosecutor's costs order in the sum of $24,200.

(e) Consequential loss order in the sum of $138,492.

[206] The orders on reparation, prosecutor's costs and consequential loss are as noted, attributed as between Pakiri:Ernslaw on the 60:40 ratio. Also, both defendants are jointly and severally liable for the entire sum stated in those orders.



W P Cathcart
District Court Judge