SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPH [34].
http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE DISTRICT COURT
AT TIMARU

I TE KŌTI-Ā-ROHE
KI TE TIHI-O-MARU

CRI-2020-045-000088
[2021] NZDC 23484

WORKSAFE NZ
Prosecutor

v

PRESTIGE ADVENTURE LTD
JOHN WILLIAM NEIL THOMSSEN
Defendants

Hearing:	29 November 2021
Appearances:	R Woods for the Prosecutor S Wilson for the Defendants
Judgment:	29 November 2021

NOTES OF JUDGE J E MAZE ON SENTENCING

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[1] Firstly, I would like to acknowledge the presence today, albeit remotely, of family members of Gary Murphy and Trevor Smith, and some friends. Both of those men died in a tragic accident which has given rise to these prosecutions. I sincerely hope your reception does not break down during the sentencing as I appreciate how important it is that you are able to follow the proceedings. Please accept my sincere condolences. Your various impact statements indicate how raw your distress remains.

[2] There has been no request for cross-examination on any of the affidavits I have received which in itself means that the facts are as set out in the available evidence and I cannot speculate beyond that. I will refer to Prestige Adventure Limited as Prestige throughout this exercise.

[3] Prestige must be sentenced following guilty pleas to the lead charge of failing to ensure, so far as is reasonably practicable, the health and safety of the two deceased men were not put at risk, when that failure exposed both men to risk of fatality (which is exactly what happened). The maximum penalty for the company is $1,500,000 for that offence. There is a second charge relating to a breach of the requirement to register as the provider of an adventure activity, an offence carrying a maximum of $50,000 as a fine.

[4] John William Neil Thomssen is to be sentenced for failing to take reasonable care that his acts and omissions did not adversely affect the health and safety of third parties which failure exposed both parties to risk of death (and again that is what happened). The maximum available fine is one of $150,000.

[5] The two deceased men were part of a group of eight family members and friends intending to complete a commercially-organised cross-country tour from east to west of South Island. They had flown into New Zealand from the United Kingdom, Asia and Australia between 19 and 21 March 2019. The first group activity was on 22 March in Ashburton where, aside from another activity, they had training and briefing on the vehicles to be used for the cross-country driving. Those vehicles were left-hand drive ATVs. While WorkSafe denies the briefing was sufficient, I must observe that, in the absence of clear evidence determining the matter, I can proceed only on the basis of what is admitted and evidentially presented. The training included each participant being separately both a passenger and then a driver of an ATV of the kind to be used. They were told about the operation and control of the vehicles and that seatbelts and helmets were required at all times. They were told about the terrain and risks arising from it, and were told careful driving was necessary at all times. However, the training appears to have been between 15 to 30 minutes per participant and exactly what occurred is not documented. I understand entirely that WorkSafe tends to advocate documentation for all health and safety at work duties.

[6] Prestige did not require them to produce their drivers licences. There were apparently no particular concerns and cautions raised about that. These being left-hand drive vehicles, none of the participants claimed he had prior experience driving in similar terrain or with similar vehicles and indeed three said they would not be prepared to drive, which does tend to indicate that there was some level of communication effective as to the dangers ahead.

[7] A further briefing occurred that evening, on 22 March, with repeated briefing about the terrain and the need for caution. Again, it was not documented. It was disclosed that, although parts of the trip had been used before, the entire trip, as a single trip, had not. So this was a first event, as I understood it.

[8] The start on 23 March was delayed by fog leaving some degree of pressure inevitably affecting the first leg which was particularly long. The lunch was a late stop at 4 pm because further delays had occurred with flat tyres. During this 20-minute break, Mr Thomssen told them that the owner of one portion of the land they would cross shortly had denied access but they intended to proceed to cross that land with a short crossing of about three kilometres, thereabouts. Soon after that lunch break, they came to the scene of the accident. The farm track being used was relatively narrow and, if I have understood correctly, ascending.

[9] The lead vehicle contained Mr Thomssen and another Prestige worker. Mr Murphy was driving the second vehicle and Mr Smith was his passenger. The wheels on the right-hand side of Mr Murphy's vehicle crossed the right edge of the track and, although Mr Murphy tried to correct it, the ATV over-balanced and fell over 80 metres killing both men instantly.

[10] Both men were in the peak of their lives. They were much loved family members. I have victim impact statements from Mr Smith's partner, Sasha Finlayson on behalf of herself and her daughter and I have three victim impact statements from members of the Murphy family, being his partner, on behalf of herself and her daughter; his son Harley, who was a stepson but, to all intents and purposes, Mr Murphy's son, and Andrew, Mr Murphy's brother. Harley and Mr Murphy's

brother, Andrew, were both present as part of the party and both horrified and traumatised by seeing what happened.

[11] WorkSafe advances several criticisms. It refers to the extent of preparation for the particular terrain. Prestige had seen the area around the scene of the accident by helicopter but had not had its workers cross it before. That is accepted by Prestige and I accept it is a significant taking of risk especially when taken with the next point advanced by WorkSafe.

[12] Prestige had been declined permission to enter that land by the landowner. Prestige admits that was the case and indeed had told the participants. It is highly relevant because the landowner who gives permission knows when a trip is planned and can say whether the terrain has changed or whether there are new and specific concerns arising. The opportunity for that was entirely absent.

[13] WorkSafe says the assessment of the skills and experience of the participants was inadequate. Prestige has accepted it could have done more but denies what it did was wholly inadequate and emphasises that it impressed upon the party that safety equipment must be used on the ATVs and that care was particularly important. I accept that telling people to be careful and actually ensuring care to the necessary level is used are two different things, and I accept more could have been done based upon the facts as agreed. Prestige accepts it had no operations manual for the tour and indeed the lack of documentation is significant. As I say, WorkSafe impresses in all areas of its jurisdiction the need to document both mandatory steps and actual steps so as to ensure that necessary steps are not omitted.

[14] Mr Thomssen accepts he knew Prestige was not registered as required by the regulations. It is to some extent significant as registration would have disclosed the need to take further steps and probably have emphasised the need for documentation but I understand that it was intended that, after this event, steps would have been taken to address that shortfall. Regrettably, the catastrophic event intervened.

[15] The group had a specific lead and tail end vehicle as would be appropriate but at the time of the accident it seems the lead vehicle was ahead to the point where they

had to be called back. Mr Wilson explains that there was a bend or curve around which the lead vehicle had gone when Mr Murphy's vehicle left the track. I have no additional information as to the distance between them save that the lead vehicle had travelled about 120 metres when the call came through to come back.

[16] WorkSafe says the specific hazard to be identified here was loss of control on the terrain when driving an ATV and that is a very obvious hazard, particularly with inexperienced drivers using unfamiliar left-hand drive vehicles on high country, cross-country terrain.

[17] Some members of the group should have been expected to be fatigued, WorkSafe says, and I accept that. A long first day within 48 hours of the arrival of the last of the group would not allow for jet lag or fatigue, which appears to be undeniable, compounded by the delays which had occurred. There was no contingency plan for delay.

[18] WorkSafe's general approach in submissions follows the approach required under the *Stumpmaster* case.[1] WorkSafe submits broadly that, for reparation, the amounts for the Murphy family should be between $120,000 and $130,000, to be split between the various parties and for the Smith family between $100,000 and $110,000.

[19] When looking at fines, WorkSafe submits, for the company, it should be recognised this was upper range of high culpability with a starting point of $900,000 for the lead offence and a further $30,000 for the breach and for, Mr Thomssen, a starting point of $70,000, recognising his position within the enterprise.

[20] WorkSafe concedes discounts by way of guilty plea discount of 25 per cent which is intended to recognise the savings to witnesses and the state by saving a trial. There should be an allowance for co-operation with the investigation at 5 per cent and, if reparation is ordered, 10 per cent.

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

[21] Costs were being sought for expert opinions outsourced by WorkSafe but that is abandoned. The final stage of adjustment for circumstances as a whole and there are some areas of dispute there.

[22] The defence position overall is that the total amount actually available is Mr Thompson's personal contribution of $100,000 which should be prioritised for reparation and, in reality, whatever would be the fines, there is nothing for fines to be paid.

[23] I turn first to reparation. There is no claim for reparation for loss of earnings but I acknowledge entirely the financial impact of the loss of these two much loved family members in the prime of their lives. It is not open to me to award reparation for loss of earnings in this situation.

[24] Fixing reparation is said to be an intuitive exercise to find a figure which is just in all the circumstances for actual harm arising from the offence. It is obvious that this is at the highest level of loss and lifelong for those who loved these men. It is trite to say that no price can be put on a human life. WorkSafe seeks the amounts of $120,000 to $130,000 for the Murphy family and $100,000 to $110,000 for the Smiths but WorkSafe acknowledges that there is nothing obviously available at this point other than the $100,000 proffered by Mr Thomssen. There is a potential argument as to Mr Thomssen's ability to fund more but I will come back to that.

[25] The defence submissions do no take issue with WorkSafe's approach to reparation but Mr Wilson reminds me that the law requires the awards to be realistic given the circumstances of the offender in each case and the requirements of the Sentencing Act 2002 and I am referred to *R v Bailey*.[2]

[26] The impact of the global pandemic, especially on tourism which was the lifeblood of the defendant company's enterprise, has indeed been crippling in New Zealand as it has elsewhere. Prestige is alive but not operating. Mr Thomssen has assumed full responsibility for Prestige and acquired the shares but at no financial advantage or disadvantage to anyone or himself.

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[2] *R v Bailey* CA 306/03, 10 May 2004.

[27] Mr Thomssen has lost his employment. He is working elsewhere on a lower income and, on the information available, struggling to some extent to meet his obligations. That makes it all the more significant that he has reserved $100,000 for reparation in cash. Prestige has few assets remaining and I have the financial records.

[28] Mr Wilson's position must be correct. The personal capacity to pay reparation is the final determinant. Fixing impossible reparation figures is not only prevented by law but it further impacts adversely on victims and their distress. I would have ordered reparation to the Murphy family of $130,000 were it available. I would have ordered $100,000 to Mr Smith's partner and child but I cannot.

[29] Therefore, the orders are in relation to the known available funds, being reparation of $30,000 to Mr Smith's former partner and child, $30,000 to Mr Murphy's partner and the younger dependent child, $30,000 to Harley on the basis that he was a witness to what occurred as well as the other aspects of his dependency, and $10,000 to Mr Murphy's brother, Andrew. That is specifically to address what is available for an award for trauma.

[30] The question then arises as to what should be ordered against Prestige. Mr Thomssen has taken overall responsibilities at no advantage to himself or anyone else. The company is, in effect, waiting for de-registration. Mr Thomssen's acceptance of his role as the face of the company has at least given the victims a person to contemplate rather than a corporate. As to whether there is anything further available from Mr Thomssen, I am satisfied that there is realistically not. He is a discretionary beneficiary, along with several others, under a trust. He is already financially vulnerable and realistically I accept that there is nothing further available. The company appears to have been operating at a loss awaiting de-registration. In the circumstances, I cannot make a reparation order against Prestige but, for the reasons that I will come to, there will be orders made against Prestige in relation to the fines.

[31] I now turn to the question of the fines. Section 151 of the Health and Safety at Work Act 2015 requires me to apply the Sentencing Act principles and purposes along with recognition of the purposes behind the Health and Safety at Work Act which particularly requires me to recognise that workers and third parties affected by the

operation of any enterprise should be afforded the highest level of protection from harm. The approach is well established under *Stumpmaster v WorkSafe* and that is that I should assess the reparation, fix fines based on guideline bands and aggravating and mitigating factors, consider any other orders and then assess for proportionality and adjustment.

[32] I turn now to the question of the fine in relation to Prestige. I note the different positions adopted by counsel. It is accepted that this is in the high band. The range is therefore $600,000 to $1 million as a fine. Where to fix the starting point within the band is what is in dispute. I accept this is not at the highest end of that band but neither at the lowest. There are justified concerns about adequacy of briefing, provision for such problems as the impact of delay, assessment of the capabilities of the participants and documentation to record all of these. There is also the refusal of consent for entry upon private land which is itself a significant factor but I must accept that this was not an enterprise carried out in a wholly inadequate way or in a cavalier fashion. I could indicate a single starting point on the lead charge and an additional sum for the breach of the regulations but I intend to reflect totality and treat the breach of the regulations as the exaggeration of aggravating factors, particularly that registration might have revealed risks sooner. So I adopt a starting point of $850,000. I do not accept that the starting point proffered at $750,000 gives sufficient recognition to those factors in particular but I have already referred to and listed the broad approach by WorkSafe and acknowledged that it is correct.

[33] The aggravating features are the inadequate skill assessment of the participants, the inadequate training, the failure to drive and inspect the route shortly before embarking, the failure to document all of these, the failure to obtain permission for the three-kilometre stretch, the unrealistic expectation of time and distance, the absence of scope for adjustment to accommodate these and the failure to consider extra risks with left-hand drive ATVs. The failure to obtain registration would have flushed out what needed to be done. But this exercise was not wholly without effort to meet health and safety needs and I note the requirements for helmets and belts, the use of vehicles best suited to the terrain, the use of experienced guides, the care taken in leading and tail vehicles using well-defined farm tracks.

[34] So on that basis my starting point is $850,000. The company appears to have no previous convictions. As WorkSafe says, the hazard was very obvious, falling off the track, but I accept the points made by Mr Wilson in para [63]. However, I cannot accept this was the safest route when the landowner with the full knowledge had refused permission and they had not driven it shortly before. I accept Prestige's approach was not cavalier but I have listed what are the aggravating features as a whole.

[35] So I turn now to consider the starting point for Mr Thomssen. I accept that, on an assessment of his position as a worker for the company, a minor shareholder at the time but also a director, a starting point at $60,000 is appropriate.

[36] I turn now to reductions and credits. For Prestige, it is argued by WorkSafe that the discounts are either 30 per cent or, if there is to be an allowance for the order for reparation, and there is none against Prestige, then 40 per cent. So the fine would be reduced by $255,000 for Prestige and the fine would be $595,000.

[37] Mr Thomssen is in a different position. The 40 per cent discount is agreed and that reflects the guilty plea discount, the co-operation and the reparation orders. As to expressions of personal remorse, it is noted that he failed to attend a restorative justice conference. He had a family member with a medical emergency. It is unfortunate that was not communicated to Mrs Shore and unfortunate as I am sure she was attempting to communicate with him. It is also unfortunate that it was not communicated as soon as possible after the event to enable a replacement conference to be organised, but Mr Thomssen has taken steps to reserve funds for reparation and to become the face of the party responsible for the tragedy. So I accept that there are expressions of personal remorse and I also acknowledge that he has no previous convictions of relevance. So on that basis, the credits for him will be at 50 per cent.

[38] That then means that the fines to be imposed on the company would be $595,000 and for Mr Thomssen, $30,000. As I have said, WorkSafe is not seeking other orders.

[39] I turn to adjustments for the practical realities of the defendant's position in each case. Financial incapacity is the issue. The Sentencing Act requires evidence of capacity to pay but, in the area of law here, the test seems to be, to some extent reversed. If a party cannot pay both reparation and fine, priority must be given to reparation but evidence of incapacity is required and I refer to s 14 of the Sentencing Act.

[40] In the case of Mr Thomssen, the affidavits disclose a long personal history in adventure and outdoor guiding which, largely due to the pandemic and its impacts, has meant that he has lost previous employment. He was on an income of $[redacted] per annum which would equate roughly to £[redacted] per annum. He is now apparently raised his income to I think it was $[redacted] which would be approximately half that figure in British pounds. He has dependent children to support and has lost his marriage which means that his payments of child support will be enforced. In his case, he made a very real effort to hold and reserve $[redacted] and that is a significant issue. So, in his circumstances, I accept the defence submissions that I should decline to order a fine but indicate that the fine would have been $[redacted] had he the capacity to pay. He does have a KiwiSaver account but I know from previous inquiries in respect of other people that sum is not available for reparation or fines.

[41] As to the company, it appears to have been operating at a loss, certainly since the pandemic and presumably is therefore, insolvent. The only assets seem to be depreciating. The accounts reflect liabilities and some equipment but it is not described. I am told the company has ceased trading and, in effect, is waiting to be de-registered. I can no longer look into whether or not I could have expected some degree of acceptance of responsibility by other shareholders because they have surrendered their involvement at no advantage to themselves but with the advantage already noted that Mr Thomssen has become, in effect, the face of the company for the victims.

[42] I acknowledge the obligation to adjust to reflect inability to pay but in this case, I bear in mind that there is a need for general deterrence, that the company will be de-registered as insolvent and that the existence of the fine may, in fact, put that beyond dispute.

[43] There is a public interest in not reducing the fine in this case because it is a mark on the record of this company and represents general deterrence purposes. So on that basis, I decline to reduce the fine which would be and is to be paid by the company. It is expressed as $595,000 as a whole on the lead charge with a convict and discharge on the other, recognising totality.

[44] There are no further orders made, save that I suppress publication of the financial information for both defendants as sought by the defence.

[45] I thank again the victims and those who were present through this ordeal. I hope that this brings this aspect to a close but, of course, nothing will compensate you. I understand that the reparation will be payable immediately which may provide some practical assistance to you.

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Judge JE Maze
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 02/12/2021