IN THE DISTRICT COURT
AT NORTH SHORE

I TE KŌTI-Ā-ROHE
KI ŌKAHUKURA

CRI-2021-044-000056
[2022] NZDC 20075

WORKSAFE NEW ZEALAND
Prosecutor

v

TPL ACCESS LIMITED
Defendant

Hearing:	12 September 2022
Appearances:	S Cossey and A Simpson for Prosecutor G R Nicholson and L K Eastlake for the Defendant
Judgment:	26 October 2022

RESERVED JUDGMENT OF JUDGE A M FITZGIBBON

The accident

[1] Mr Melvyn Jarina, a 54 year old roofer, was working on the roof of Glenfield Intermediate School on 16 January 2020. He went to stand up and support himself by taking hold of the mid-guardrail of the roof edge protection. The mid-guard rail gave way and he fell about 3.6 metres onto the concrete floor below. He was badly injured and was in hospital for 10 days. He did not fully recover for over a year.

[2] TPL Access Limited (TPL) failed to ensure that the roof edge protection had been properly installed. TPL was charged under the Health and Safety at Work Act 2015 (HSWA) with being a person conducting a business or undertaking (PCBU), and

failing in its duty to ensure, as far as reasonably practicable, the safety of workers for the PCBU. The way in which the roof edge protection was installed exposed the victim to a risk of death or serious injury from a fall from height. The particulars of TPL's charge are that it was reasonably practicable for TPL to have ensured the roof edge protection had been installed in accordance with the manufacturer's guidelines and industry standards. This included by undertaking adequate assessments prior to and following installation to ensure it was safe and fit for purpose.

[3] TPL pleaded guilty to the charge, accepting it failed to ensure the roof edge protection was installed properly.

TPL

[4] TPL is a specialist equipment hire business, including roof edge protection equipment. Andrews Property Services Limited (APS) contracted TPL to provide and install roof edge protection at the school where roofing work was to be completed. Before installing the roof edge equipment, there was a site visit at the school by TPL. Following the site visit, TPL gave APS a quote to undertake the installation work which was accepted by APS.

[5] On 6 January 2020 the roof edge protection was installed at the school by three TPL employees. The employees were experienced in such work and had undertaken formal Site Safe training. On 7 January 2020, TPL's General Manager, Jeremy Wakelin, inspected photographs of the installation. The "viewing photographs" had been taken by one of the installers. From the photographs, Mr Wakelin determined the roof edge protection was installed to a "good condition". Accordingly, he informed APS's Project Manager that the installation of the roof edge protection had been completed. On 10 January 2020, APS workers, including the victim, were inducted onto the site at which the roofing work was going to be undertaken. The workers were taken through the APS Safe Work Method Statement/Site Specific Safety Plan, before commencing work on the roof. On 16 January 2020, as a result of the inadequate and noncompliant installation of the roof edge protection by TPL, the victim fell from height on to concrete and was badly injured.

[6] TPL is to be sentenced. I have received helpful submissions from both TPL and WorkSafe, together with affidavit evidence in relation to sentencing, all of which I have considered.

Sentencing

[7] When sentencing I must bear in mind the purposes and principles of sentencing in the HSWA[1]. The Court must follow a process of sentencing to arrive at an appropriate sentence. This process is not disputed and is in accordance with the guideline judgment of *Stumpmaster v WorkSafe NZ.*[2] It involves four stages;

- Assessing the amount of reparation and consequential loss payable to the victim;

- Fixing the amount of the fine by reference first to the guideline bands and then having regard to the aggravating and mitigating factors;

- Determining whether further orders under ss 152 to 158 of HSWA are required, for example, legal costs; and

- Making an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed in accordance with the first three stages. This includes consideration of ability to pay, and also whether an increase is needed to reflect the financial capacity of TPL.

[8] A number of factors for the sentencing process are agreed between the parties. The main issues, not agreed, are the level of the starting point, the level of any fine and the ability of TPL to pay a fine.

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[1] Section 151(2) together with ss 7 and 8 of the Sentencing Act 2002.
[2] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881 at [3].

Stage one - Assessing the amount of reparation and consequential loss

[9] WorkSafe submits, taking into account the extent of the victim's injuries and related trauma, an award of $35,000 for emotional harm reparation together with consequential losses of $3,954 payable to the victim is appropriate. The latter figure of $3,954 is based on the expert affidavit evidence of Jay Shaw.[3] He calculated ACC payments made to the victim and grossed that amount up to 100%. Mr Shaw then deducted net payments made before arriving at a statutory shortfall payable to the victim as a 20% shortfall totalling $3,954.

[10] TPL accepts WorkSafe's submission and says an offer of $43,000 for reparation was made to the victim on 4 April 2021 when TPL Directors met with him to apologise for TPL's role in the accident. TPL wishes to make that payment to the victim in recognition of the financial, physical and emotional consequences the incident had on him. The fact that the offer was made, along with the apology on 4 April 2021, is a matter TPL seeks for the Court to take into account when considering mitigating factors as part of the sentencing process.

[11] The High Court in *Big Tuff Pallets Limited v Department of Labour* stated the fixing of an award of emotional harm is an intuitive exercise and the objective of the Judge is to strike a figure which is just in all the circumstances "and which, in this context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering."[4]

[12] TPL remains willing to honour its original offer of reparation to the victim. It is an appropriate amount. Accordingly, I make an order for emotional harm reparation of $39,000 together with consequential loss of $3,954 to be paid by TPL to the victim.

Stage 2 - Fixing the amount of the fine

[13] The High Court in *Stumpmaster* set out the following guideline bands for culpability in offending under s 48 of the HSWA:[5]

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[3] Financial Advisory Services Partner, Grant Thornton New Zealand Limited.
[4] *Big Tuff Pallets Ltd v Department of Labour* (2009) 7 NZELR 322 (HC) at [19].
[5] At [4].

- Low culpability — Up to $200,000
- Medium culpability — $250,000 to $600,000
- High culpability — $600,000 to $1 million
- Very high culpability — $1 million plus

[14] WorkSafe submits that the starting point is within the medium culpability band, but at the upper end. It submits a starting point of $580,000 should be adopted. TPL agrees that the medium culpability band applies to it but submits that a lower starting point of between $400,000 to $500,000 is appropriate.

[15] In assessing the amount of the fine, a number of factors are relevant. These are:[6]

- The identification of the operative or acts or omissions at issue.
- An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.
- The degree of departure from standards prevailing in the relevant industry.
- The obviousness of the hazard.
- The availability, cost and effectiveness of the means necessary to avoid the hazard.
- The current state of knowledge of the risks and of the nature and severity of the harm which could result.

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[6] *Stumpmaster v WorkSafe NZ* at [36] citing *The Department of Labour v Hanham and Philp Contractors Limited* (2008) 6 NZ ELR 79 (HC) at [54].

- The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

- Identification of the operative acts or omissions.

Identification of the operative acts or omissions at issue

[16] WorkSafe says failing to ensure the roof edge protection was installed correctly before work at height started is serious, considering the installation of access equipment was TPL's core business. In those circumstances, it was reasonably "practicable" for the defendant to adequately assess whether the roof edge protection was installed correctly.[7] By pleading guilty, WorkSafe says TPL has accepted its failure in this regard.

[17] TPL has pleaded guilty to the charge. Therefore, it has accepted that it failed to ensure the roof edge protection was installed properly and in accordance with the manufacturer's guidelines and industry standards. This included not undertaking adequate assessments prior to and following installing the roof edge protection to ensure it was safe and fit for purpose.

Assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk

[18] WorkSafe says that falls from height are a well known and significant hazard in the access equipment installation industry. It says TPL was aware of the specific risks of working at height. It's core business is providing and installing access equipment to protect from the risks of working at height. WorkSafe submits this is a significant aggravating feature of the offending.

[19] TPL accepts there was potential for serious harm by a fall from height and that the victim was harmed by his fall from height. However, it says it had reasonable processes in place to manage the risk. These processes included:

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[7] HSWA, s 22.

- Preparing a Safety, Health and Environment Work Method Statement (SHEWMS) for the work at the school and providing it to APS. The SHEWMS identified height and unsafe roof edge protection as a significant hazard.

- Providing training to its employees, including those who installed the roof edge protection at the school.

- Arranging for its Edge Protection manager to carry out a visual inspection to verify that the edge protection was installed correctly.

[20] TPL does accept it could have done more to ensure the roof protection was installed in accordance with the manufacturer's guidelines and that an adequate assessment was not undertaken to ensure the edge protection was safe and fit for purpose before it was released to APS for use. When one takes all of those factors into account, it was quite foreseeable that there was a serious risk of injury.

The degree of departure from standards prevailing in the industry

[21] WorkSafe submits that TPL's conduct was a significant departure from industry guidelines. These guidelines are contained in the INTAKS Scaffolding and Edge Protection version 01.2018, Scaffolding in New Zealand Good Practice guidelines 2016, and the relevant AS/NZS Standards which set out general requirements for edge protection and roof edge protection.

[22] Expert opinion evidence was provided to the Court by Mr Terry Jenkins of Scaffolding Consultants Limited. He inspected the school and noted a number of issues with the roof edge protection. These included that the structures of the edge protection were not tied down, that the handrails were installed in the wrong location and that no lower guardrail was installed.

[23] TPL accepts its failures in that regard. TPL submits that it had processes in place to help comply with industry standards but that on this occasion, those processes failed. TPL accepts its performance was not up to industry standard.

Obviousness of the hazard

[24] Once those factors are taken into account, the obviousness of the hazard becomes clear. The way in which the accident could have been avoided if the roof edge protection had been adequately installed is apparent.

Availability, cost and effectiveness of the means necessary to avoid the hazard

[25] WorkSafe says the cost of ensuring the edge protection was installed properly and in accordance with industry standards was not prohibitive. TPL accepts this.

The current state of knowledge of the risks and of the nature and severity of the harm which could result and the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence

[26] The risks associated with work from height and falling from roofs is included in the material so far, including the means to control such hazards. This is not disputed. Neither is the fact that there are guidelines and processes in relation to the installation of edge protection.

Starting point

[27] WorkSafe and TPL have referred to a number of cases, each in support of their respective positions as to appropriate starting point.

WorkSafe NZ

[28] Reference is made to *WorkSafe NZ v Forrest Hill High School Board of Trustees*[8] in which a high school teacher and student were both injured following the toppling of a mobile scaffold used for performing arts. In that instance the Judge noted that he would have had "no hesitation" placing the defendant's culpability in the high band if the defendant was in the business of construction or contracting.[9] Reference

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[8] *WorkSafe New Zealand v Forest View High School Board of Trustees* [2019] NZDC 21558.
[9] At [56].

is also made to *WorkSafe NZ v Dong Xin Group Limited*[10] in which a starting point of $580,000 was proposed. In that case scaffolding had been supplied and installed in such a way that it created a significant risk of falling and electrocution, to the workers using it. The scaffold had been installed too close to a live powerline; there were no guardrails or edge protection in place to prevent a fall of approximately two metres; and the scaffold was at risk of collapsing. The Judge considered that it was luck that none of the workers were seriously injured in that case. The starting point was found to be at the top end of the medium band at $580,000. WorkSafe refers to that case in support of a starting point comparable in instances where the company specialises in installation of scaffolding and has workers relying on the safety of the structures.

TPL

[29] In *WorkSafe New Zealand v Kerr Construction Whangarei Ltd*,[11] Kerr Construction was undertaking refurbishment works at a commercial premises in Whangarei. This involved the removal of an air conditioning system using mobile scaffold units. The mobile scaffold units had not been set up correctly having either no or inadequate guard rails. The victim was removing one of the air conditioning unit, lost his balance and fell to the floor landing head first. He suffered serious injuries, including a brain injury requiring ongoing rehabilitation. The starting point of $375,000 for the fine was adopted by the Court.

[30] In *WorkSafe New Zealand v Car Haulaways Ltd*,[12] a contractor working for Car Haulaways Ltd as a car transporter driver was killed when he fell three metres from the top deck of a car transporter trailer he was loading. Car Haulaways failed to take four practicable steps, including ensuring there was effective edge protection in place on transport trailers, effectively maintaining the edge protection, having an effective maintenance plan and regular testing by a competent person, and providing and maintaining a safe system of work that included checking the condition of the edge protection in trailers. A starting point of $450,000 was adopted.

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[10] *WorkSafe NZ v Dong Xin Group Limited* [2018] NZDC 22114
[11] *WorkSafe New Zealand v Kerr Construction Whangarei Limited* [2021] NZDC 22782.
[12] *WorkSafe New Zealand v Car Haulaways Limited* [2021] NZDC 3119.

[31] A similar starting point was adopted in *WorkSafe New Zealand v String's Attached Ltd*,[13] where String's Attached had incorrectly installed a ladder and a hatch to allow internal access to the roof of a commercial building. The victim was climbing the ladder to access the roof, hit his head on the framing of the hatch, fell to the ground and suffered neck and spinal injuries resulting in him being a tetraplegic. There were a number of practicable steps which String's Attached had failed to take.

[32] In *WorkSafe New Zealand v Tower Scaffolding Group*,[14] Tower Scaffolding Group installed scaffolding for the construction of an apartment building, inspected it and confirmed its safety. Two days later the scaffold came away from the building. The scaffolding was found to be seriously deficient with inadequate bracing. No workers were using the scaffolding when it collapsed. A starting point was set at $400,000 for the fine.

[33] In reliance on these cases, TPL says that the appropriate starting point is within the range of $400,000 to $500,000.

[34] In the current case, there was a moderate to high level of culpability. Having considered the submissions and affidavits filed, a starting point of $500,000 is appropriate and in line with the above decisions, including *Forest Hill High School*.[15]

Mitigating factors

[35] The directors attended Court to express the seriousness with which they took their responsibilities in relation to the accident and the subsequent prosecution. One of the company's directors, Mr McMaster, in his affidavit set out the efforts taken after the accident to support the victim. The support included paying for the cost of the victim's family to fly to New Zealand from the Philippines, and a contribution to their accommodation costs while they supported him during his recovery. This amounted to $4,666.57.

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[13] *WorkSafe New Zealand v String's Attached Ltd* [2020] NZDC 13314.
[14] *WorkSafe New Zealand v Tower Scaffolding Group Limited* [2019] NZDC 26448.
[15] *Forest Hill High School*, above n 8, at [8].

[36] Mr McMasters also points to the offer to pay the victim $43,000 in reparations. Evidence was provided setting out remedial action taken by TPL following the accident to improve its safety and prevention systems. This remedial action has cost TPL approximately $16,000. TPL has acknowledged its responsibility by entering an early guilty plea and has co-operated with WorkSafe. TPL's efforts have been commendable.

[37] In terms of credit for actions undertaken by TPL I consider the following is appropriate:

- 25% credit for the guilty plea.
- 10% credit for the early steps taken to support the victim, genuine remorse and offer of reparation.
- 5 % credit for co-operation with WorkSafe.
- 10% credit for previous good character and a lengthy safety record.

[38] In summary, I calculate the fine as follows.

Starting point	$500,000
Reductions	less 50%
End fine	$ 250,000

Ancillary orders

[39] WorkSafe seeks a contribution of $1,776.80 towards its legal costs under the HSWA.[16] TPL agrees. I order TPL to contribute $1,776.80 to WorkSafe for legal costs incurred.

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[16] HSWA s 152(1).

Proportionality assessment

[40] [redacted]

[41] [redacted]

[42] [redacted]

[43] Factors that a Court must take into account in assessing ability to pay include that any penalty should not cripple the continued operation of TPL, TPL should be

[17] Affidavit of D J Henderson.
[18] Para 39.

encouraged to keep trading and to provide employment, particularly during times of recession which appear imminent.

[44] However, it would not be correct to order a fine totalling $55,000 given the level of culpability to which I have referred. It would fail, in my view, to provide the necessary deterrence to TPL and to other companies to ensure adequate safe workplace practices are engaged in at all times.

[45] Taking into account all the evidence and submissions received, I fix the fine at $100,000 payable over a period of five years. I make the following orders:

(a) A fine of $100,000 payable as follows:

(i) $5,000 within 28 days together with legal costs of $1,776.80 within 28 days.

(ii) $19,000 to be paid at the end of each financial year ending in 2023, 2024, 2025, 2026 and 2027.

(iii) Immediate payment of reparation together with statutory ACC shortfall totalling $43,000.

(iv) Court costs $130.

(b) I make a non-publication order of the financial details contained in the affidavits and submissions.

Judge AM Fitzgibbon
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 26/10/2022