IN THE DISTRICT COURT
AT WAITAKERE

I TE KŌTI-Ā-ROHE
KI WAITĀKERE

CRI-2021-090-003396
[2022] NZDC 20781

WORKSAFE NEW ZEALAND
Prosecutor

v

RS CONSTRUCTION LIMITED
Defendant

Hearing:	2 September 2022
Appearances:	A Everett for the Prosecutor J Cairney and P Brash for the Defendant`
Judgment:	25 October 2022

RESERVE NOTES OF JUDGE T SINGH ON SENTENCING

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[1] The defendant, RS Construction Ltd, has pleaded guilty to one charge of breaching their duty to ensure, so far as is reasonably practicable, the health and safety of a worker while they are at work in the business.[1] The maximum penalty is a fine of $1.5 million.[2]

Background

[2] The defendant engaged the services of Ace Pro-Build Ltd (APBL) to project manage the building of a residential property at 79 Matakohe Rd.

[1] Health and Safety at Work Act 2015, ss 36(1)(a) and 48(1).
[2] Section 48(2)(c).

[3] The victim was then a 40-year-old male Chinese national. He was working on a trial period and asked to work on 15 August 2020.

[4] That morning, the workers did not have a toolbox meeting. They commenced by manually putting in the prefabricated timber frames. The frame in question was approximately 5.3 metres by 2.8 metres and weighed approximately 360 kilograms. While they were erecting it, the stopper which was nailed into the concrete slab slipped, causing the frame to move forward, with the result being that the frame's weight fell on the victim. In that instant, the victim lost all feeling in his legs and fell.

[5] An ambulance was called. The victim was diagnosed with a traumatic spinal cord injury after sustaining Grade A T11 paraplegia, along with a secondary diagnosis of a traumatic spinal cord injury to T12/L1 fracture dislocation.

[6] The most aggravating features of the offending are the extent of the loss, damage and harm resulting.[3] The victim has filed a victim impact statement. It makes grim reading.

[7] The victim in a brave and candid way states he is now a paraplegic and will be confined to a wheelchair for the rest of his life. The spinal injury has caused other issues such as bladder issues, impotence, neuralgia (nerve pains in his legs) and severe leg muscle atrophy. His injuries prohibit him from working and supporting his parents, wife, and child. He has fears of being a burden on his family and has been undergoing counselling. He has insomnia and has been prescribed anti-depressants to treat depression. He describes he is: "no longer the optimistic person [he] was before the accident".

Sentencing Approach

[8] The sentencing approach to be followed is set out in the guideline judgment of *Stumpmaster v WorkSafe New Zealand*:[4]

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[3] Sentencing Act 2002, s 9(1).
[4] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881 at [3].

(a) assess the amount of reparation;

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

(c) determine whether further orders under ss 152 to 158 of the Health and Safety at Work Act 2015 are required; and

(d) make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This includes consideration of ability to pay, and whether an increase is needed to reflect the financial capacity of the defendant.

Step 1: Assessing the amount of reparation

[9] The parties agree emotional harm reparation should be assessed at $110,000. A payment of at least $30,000 has already been paid to the victim, which leaves a balance of $80,000 remaining less if any additional $10,000 payments have been made.

[10] There is disagreement on the quantum of consequential loss reparation which should be ordered. WorkSafe submits $165,734 is an appropriate award. The defence position is that $100,000 should be ordered.

[11] The High Court has expressed the view that calculation of the award for emotional harm reparation is an "intuitive exercise",[5] and one determined by the circumstances of each case. There should be no "tariff for the loss of life or grief".[6]

[12] WorkSafe relies upon the victim impact statement, the victim's current financial, emotional, and physical circumstances, and three other cases where reparation of $110,000 was awarded to establish that an award of $110,000 is appropriate in this case.[7]

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[5] *Big Tuff Pallets Ltd v Department of Labour* (2009) 7 NZELR 322 (HC) at [19].
[6] *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865, [2017] DCR 368 at [25].
[7] *WorkSafe New Zealand v Blackadder* [2022] NZDC 2048; *WorkSafe New Zealand v McKee* [2019] NZDC 16341; and *WorkSafe New Zealand v String's Attached Ltd* [2020] NZDC 13314.

[13] The defence acknowledge the seriousness and permanent nature of the victim's injuries as well as the impact the injuries have had on his life. The defendant has been voluntarily paying the victim $10,000 per month over the course of at least three months.

[14] There is broad support from relevant cases to suggest that $110,000 is the appropriate amount here.

[15] I consider the actions of the defendant were largely omissions and do not amount to intentional acts or recklessness. I consider APBL had some degree of control which, in some measure, reduces the culpability around RS Construction's actions.

[16] In addition to emotional harm reparation, pursuant to s 32(1)(c) of the Sentencing Act 2002, a victim is entitled to reparation for consequential loss.

[17] WorkSafe submits the calculation of reparation for consequential loss under s 32(1) of the Sentencing Act should be determined by the "statutory shortfall".[8] That is the shortfall between the pecuniary benefit the victim would have received (calculated by reference to net income in the period prior to the incapacitating incident) and the victim's entitlement to compensation payments under the Accident Compensation Act 2001 for the period to which they are entitled to such payments.

[18] In this case, ACC payments covered 80 per cent of the person's pre-injury salary. The consequential loss reparation would effectively top that up to 100 per cent. WorkSafe filed expert evidence from Jay Shaw, who concluded that the victim's loss of earnings total $165,734.

[19] Defence counsel have filed expert evidence from Peter Davies. The defence accepts Mr Shaw's calculations except for on two major points; the lack of mortality allowance and discount rate. The defence submits actual loss should be "recovered for the period the compensation payments [are] made".[9] Unfortunately, in serious

[8] *Oceana Gold (New Zealand) Ltd v WorkSafe New Zealand* [2019] NZHC 365, [2019] 3 NZLR 137.
[9] At [56].

harm cases like this, the injury is likely to affect life expectancy. Mr Davies also identifies Mr Shaw's calculations were made based on a risk-free discount rate, which is unwarranted otherwise the proceeds would not, for example, be likely to keep pace with inflation. In his view, these both warrant reductions. Mr Davies' final recommendation of the appropriate estimated shortfall is approximately $100,000.

[20] WorkSafe submitted a follow up affidavit from Mr Shaw, which considered the defence position. Mr Shaw maintained his original view to be correct. WorkSafe also notes similar arguments were raised in the case of *WorkSafe v String's Attached Ltd* where Mr Davies was the expert for the defence.[10] He submitted there should be a deduction based on the possibility of the victim returning to work, New Zealand male mortality rates and uncertainties around the assumption in the valuations as well as the benefit of a lump sum. A discount of 25 per cent was recommended. Judge McIlraith disagreed and found no deduction would be appropriate because the statutory short fall approach was likely to have been conservative and did not consider future earning potential had the accident not occurred.

[21] WorkSafe's submission through its expert Jay Shaw is persuasive as to the appropriate way in which to consider consequential loss reparation. The reasoning for this view is broadly the same as that accepted by Judge McIlraith in *WorkSafe v String's Attached Ltd*. The calculations of Mr Shaw are in fact conservative in terms of methodology and are appropriate as a measure to found consequential loss in the present circumstances.

Summary of reparation

[22] In summary, I find the reparation amount should be $110,000 (less the amount already paid, which is at least $30,000), leaving a sum remaining to be paid of $80,000.00 (or less if any other $10,000 payments have been made for emotional harm). The amount of $165,734.00 is awarded for consequential loss.

[10] *WorkSafe v String's Attached Limited* [2020] NZDC 13314.

Step 2: Assessing the Fine

[23] The start point for assessing the quantum of any fine is to be found in the decision of *Stumpmaster*. It provides the following guideline bands:[11]

Low culpability	Up to $250,000
Medium culpability	$250,000 to $600,000
High culpability	$600,000 to $1,000,000
Very high culpability	$1,000,000 plus

[24] The Court stated that low culpability cases tend to "involve a minor slip up from a business otherwise carrying out its duties in the correct manner".[12] In those cases, "[i]t is unlikely actual harm will have occurred, or if it has it will be comparatively minor."

[25] This offending sits within the medium band. WorkSafe submits a starting point of between $450,000 to $500,000 is appropriate. The defence submits a starting point should not be more than $425,000.

[26] In assessing the value of the fine, the Court in *Stumpmaster* identified the following factors as relevant:[13]

(a) The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practicable steps" which the Court finds it was reasonable for the offender to have taken in terms of [s 22 HASWA].

(b) An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.

(c) The degree of departure from standards prevailing in the relevant industry.

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[11] At [4].
[12] At [52].
[13] At [36] citing *Department of Labour v Hanham & Philp Contractors Ltd (*2008) 6 NZELR 79 (HC) at [54].

(d) The obviousness of the hazard.

(e) The availability, cost, and effectiveness of the means necessary to avoid the hazard.

(f) The current state of knowledge of the risks and of the nature and severity of the harm which could result.

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

[27] I will now consider each of these factors in turn.

Identification of the operative acts or omissions

[28] By pleading guilty and accepting the caption summary, the defendant has accepted that they failed to:

(a) conduct an adequate risk assessment for erecting prefabricated timber frames;

(b) develop an adequate lift plan and ensure lifting equipment was used; and

(c) communicate and monitor its workers on the safe processes to follow when erecting prefabricated timber frames.

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

[29] The risk of harm was the risk of injury after being crushed by the frames. The risks are well known. The realised risk was serious and permanent. Although the risk was not appreciated by the defendants on the relevant day, steps were overlooked which could have and should have identified the risk.

The degree of departure from standards prevailing in the industry

[30] WorkSafe identified that manually erecting those frames are contrary to the industry standards as set out in the Prefab-Timber Guide (the guide) from January 2020. The guide provides that lifting equipment should be used for frames of that size and weight. The engineer engaged by WorkSafe concluded a proper risk assessment would have identified that the frame required such equipment. The manual method placed incredible strain on an individual's shoulders, in excess of WorkSafe's general lifting guidance.

[31] The defence position is that the guide was only published a few months before the incident and there was no predecessor. Additionally, the guide is not well known in the industry and does not form part of the formal industry training. The defendant itself did not know it. The guide is also not readily accessible and has not been published on WorkSafe's website. The defence noted that it was not WorkSafe's role to promote all industry produced guidance. Though publication was not a requirement, the defence submits the guide being hard to find lowers the culpability and departure from the standards. The defence also submits that raising timber frames manually is still commonplace in the building industry and needs to change.

[32] Accepting each parties' submissions on this point is not necessarily incompatible. However, it should have been clear that pressing on without the use of a mechanical or lifting aid was going to expose workers to serious injury in the way which occurred.

The obviousness of the hazard

[33] The hazard was obvious to all.

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

[34] Practicable steps which could have been taken were not prohibitive. A risk assessment would have revealed a Hiab could have been used. WorkSafe note that it was raised by the site's project manager with the directors of RS Construction at an earlier time.

[35] The WorkSafe engineer also concluded the framing nails used for the stoppers could have been swapped out for a more secure anchorage which would have also improved the situation.

[36] RS Construction submits they did not know when a Hiab would be made available by APBL. They submit APBL, as the project manager, had control over the site and financial responsibility over the machinery. The defence submits the duty to ensure the victim's safety was also shared by APBL. It is unclear to them why APBL was not also prosecuted.

Comparable case law

[37] Both parties referred in their submissions to the same key cases. However, they differ in the application of those cases to these facts.

[38] Judge Sinclair noted in *WorkSafe New Zealand v Ikon Homes NZ Ltd* that it can be an unhelpful exercise to pluck out aspects of cases and compare them with others.[14] However, here there are some undeniable similarities between this case and *Ikon* itself.

[39] *Ikon* was a property developer which engaged JBL for the construction and to supply workers to complete development of its properties. As in the present case, a Hiab was not requested, and a manual lift involved an accident which resulted in serious back injuries to the victim.

[40] As with *Ikon*, the failures were largely omissions. WorkSafe accurately record them in the prosecution submissions, as mentioned above. The failure of RS Construction and APBL to use proper processes, and particularly the failure to use a mechanical lifting device, resulted in serious injury.

[41] In *Ikon,* the Court took a starting point for the building company of $450,000 and $300,000 for the project manager. WorkSafe submits this case contains further aggravating features such as more serious injuries, that *Ikon* and the guide had been

[14] *WorkSafe New Zealand v Ikon Homes NZ Ltd* [2019] NZDC 16134 at [51].

available to the defendants, and safety measures were largely ignored or not communicated properly to the workers.

[42] *McKee* and *Blackadder* are both tragic incidents involving young women in the horse racing industry.[15] The defence submits these cases involve egregious breaches given the obviousness of the hazard, obvious risk of injury, and the availability of effective control measures. Therefore, the defendants in those cases were more culpable and a lower starting point would be appropriate here. WorkSafe submits that *McKee* and *Blackadder* are not as analogous as *Ikon* to the present facts. However, there are similarities in that the victim here was a migrant worker, therefore he was vulnerable with limited specific knowledge in undertaking the task he was being asked to complete. In *Blackadder*, the appropriate starting point for the fine was held to be $500,000.

[43] The defence refers to *WorkSafe New Zealand v Build Northland Ltd* where a worker received similar injuries after a fall from scaffolding.[16] The starting point was $300,000. The defence also refers to *WorkSafe New Zealand v Supermac Group Resources Ltd* where a worker was thrown from height after not wearing a harness.[17] The starting point was $450,000. The defence submits the defendant in *Supermac* was more culpable because they never trained their employees to use a harness and did not have them available. In contrast here, the defendant usually did follow industry practice.

[44] The many similarities with *Ikon* place the present case around the same mark. The fact that APBL was charged in *Ikon* is of limited weight. The victim outlook is worse in the present case, but there are factors which limit increasing the fine beyond *Ikon*. I do not consider it as serious as *McKee* or *Blackadder* as to warrant a start point of $500,000. The injuries here were more serious than in *Ikon*, so a start point of $475,000 is warranted.

Mitigating Factors

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[15] *WorkSafe New Zealand v McKee* [2019] NZDC 16341 and *WorkSafe New Zealand v Blackadder* [2022] NZDC 2048.
[16] *WorkSafe New Zealand v Build Northland Ltd* [2019] NZDC 23940.
[17] *WorkSafe New Zealand v Supermac Group Resources Ltd* [2019] NZDC 15023, [2020] DCR 14.

[45] The defendant is entitled to a 25 per cent reduction in relation to their early guilty plea.

[46] WorkSafe also notes up to 30 per cent discount should be given for remorse, payment of reparation prior to the Court making an award and remedial actions taken by defendant to better its health and safety procedures. WorkSafe states a total discount of 50 per cent would be appropriate.

[47] The defence states that a five per cent to ten per cent discount should be given for reparation. Counsel refers to *Stumpmaster* in which the Court gave extra credit for assisting the victim right from the outset.[18] Here, the defence submits the directors of the defendant visited the victim in hospital following the tragic incident, they assisted with translation and purchased clothes, food, and cigarettes for him. Since then, they have voluntarily paid at least $30,000. The defendant has also arranged for insurance to cover reparation and consequential loss to cover for the victim. Additionally, the defence submits a five per cent discount should be given for each of:

(a) previous good character;

(b) co-operation;

(c) changes implemented to their workplace health and safety; and

(d) remorse.

[48] In total, the defence have submitted a discount of between 50 to 55 per cent would be appropriate.

[49] I find that 55 per cent accurately reflects the higher level of mitigation which is warranted in this case. This is primarily based upon the actions and response shown by RS Construction in the submissions and affidavits filed in support.

[18] At [66].

Summary of fine

[50] In summary, I find the appropriate fine would be $475,000 with a discount of 55 per cent. The final amount at this stage is $213,750.00

Step 3 : Ancillary orders

[51] The defendant is ordered to contribute $2,935.24 towards costs under s 152(1) of the Health and Safety at Work Act 2015.

Step 4 : Proportionality assessment

[52] WorkSafe takes the view it is for the defence to provide evidence it cannot afford to pay a fine and any reduction will only be warranted if there is "clear evidence of financial incapacity, supported by appropriate disclosure of all material facts".[19]

[53] [redacted]

[54] [redacted]

[55] Sections 14 and 40(1) of the Sentencing Act provide that courts, when imposing a fine, may decide not to if satisfied the offender does not or will not have the means to pay it. The defence submits all material facts have been provided to WorkSafe in line with *Mobile Refrigeration Specialists Ltd v Department of Labour.*

[56] *YSB Group Ltd v WorkSafe New Zealand* supports the proposition that a "fine ought not to place a company at risk".[20] The Court also noted that "instalments should also not be ordered for any length of time and 12 months is normally an appropriate

[19] *Mobile Refrigeration Specialists Ltd v Department of Labour* HC Hamilton CRI-2009-419-94, 4 June 2010 at [17].
[20] *YSB Group Ltd v WorkSafe New Zealand* [2019] NZHC 2570, (2019) 16 NZELR 493 at [31].

lengthy maximum period". Additionally, the Court should only impose a sentence knowing it would force a business to cease operations in exceptional circumstances involving repeat offending of the most egregious breaches.[21]

[57] [redacted]

[58] The defence refers to the following cases:

(a) *Ikon:* There were severe spinal injuries. From a starting point of $450,000, a fine of $70,000 was ordered.

(b) *WorkSafe New Zealand v String's Attached Ltd:* The incident resulted in the victim being tetraplegic. The starting point was $450,000 and no fine was ordered.

(c) *WorkSafe New Zealand v Build Northland Ltd:* The incident resulted in the victim being paraplegic. The starting point was $300,000 with a fine of $12,500 being ordered.

(d) *WorkSafe v Shore Living Ltd:*[22] There was a fatality. The starting point was $600,000. This was a high culpability band. There were two defendant companies. A fine of $21,000 was ordered for Shore Living Ltd with no fine ordered for Chang Yun Construction Ltd.

[59] In *Stumpmaster*, repayment of the fine was extended over four and a half years. The Court accepted orders can be made for the payment of fines by instalment but

[21] *WorkSafe New Zealand v Rangiora Carpets Ltd* [2017] NZDC 22587 at [52].
[22] *WorkSafe New Zealand v Shore Living Ltd* [2021] NZDC 13214.

cautioned against extending liability too far into the future. The Court observed "[a] higher rate of repayment for a shorter time is generally preferable".[23]

[60] Section 86(2) of the Summary Proceedings Act 1957 provides a fine may be paid, with the consent of a registrar, over a five-year period, but the duration of the fine should not exceed that.

[61] There are several decisions which have instalment plans between two and five years:

(a) In *WorkSafe New Zealand v Dong Xing Group Ltd,* Judge Sinclair ordered a fine of $180,000 to be paid over a period of two and a half years.[24] Her Honour accepted that a fine of $388,237 may have left the defendant unable to trade.[25]

(b) In *Ikon,* Judge Sinclair ordered total fine of $65,000 be paid at a rate of $1,800 per month for three years.

(c) In *WorkSafe v Mike Harris Earthmoving Ltd,* Judge Hollister-Jones reached an end fine of $180,000 and reduced it to $100,000 to be paid in monthly instalments over three years in consideration of the defendant's financial capacity.[26] His Honour deferred the first instalment to be due in a year's time.

(d) In *WorkSafe v Tui Glen Farm Ltd,* Judge Cooper reduced the fine from $270,000 to $240,000 and directed it be paid by instalments over a four-year period.[27]

[62] Based upon the financial information filed, I am persuaded that ordering a fine of significance may put the company at risk. Accordingly, $75,000 represents an end

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[23] At [105].
[24] *WorkSafe New Zealand v Dong Xing Group Ltd* [2018] NZDC 22114.
[25] At [40].
[26] *WorkSafe v Mike Harris Earthmoving Ltd* [2020] NZDC 14722 at [59]-[61].
[27] *WorkSafe v Tui Glen Farm Ltd* [2021] NZDC 12766 at [40].

point which balances financial viability, taking into account the relevant factors raised in the proportionality assessment.

[63] I make a further adjustment here to accurately reflect the goodwill which I indicated the Court would recognise, over and above the value of the $30,000 or more paid after the teleconferences between the parties and me which occurred sometime ago. I reduce the fine to $65,000 and order it to be paid within a period of three years. The first payment of $15,000 is to be made in the 2023 calendar year, with a further $25,000 to be paid in 2024 and 2025.

Summary

[64] In summary, I find the reparation amount should be $110,000 (less the amount already paid, which is at least $30,000), leaving a sum remaining to be paid of $80,000.00 (or less if any other $10,000 payments have been made for emotional harm). The amount of $165,734.00 is awarded for consequential loss.

[65] I find the $2,935.24 should be the ancillary contribution towards costs under s 152(1) of the Health and Safety at Work Act

[66] The starting point appropriate for the fine is one of $475,000 with a discount of 55 per cent.

[67] The fine after the proportionality adjustment is fixed at $65,000, to be paid over the course of three years. The first payment of $15,000 is to be made in the 2023 calendar year, with a further $25,000 to be paid in 2024 and 2025.

[68] Finally, the defence apply for a suppression order of their commercially sensitive financial information as was done in *Rangiora Carpets* and *Ikon.* I order that information suppressed.

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Judge T Singh
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 25/10/2022