SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPHS [105 AND 106].
http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2021-009-007807
CRI-2021-009-007806
[2023] NZDC 23126

WORKSAFE NEW ZEALAND
Prosecutor

v

ABC ALUMINIUM LIMITED
ULTIMATE DESIGN & RENOVATION LIMITED
Defendants

Hearing:	17 October 2023
Appearances:	V Veikune for the Prosecutor G Gallaway and L Merrick for the Convicted Companies
Judgment:	17 October 2023

NOTES OF JUDGE G M LYNCH ON SENTENCING

---

[1] ABC Aluminium Ltd (ABC) and Ultimate Design & Renovation Ltd (UDR) are connected companies involved in the manufacture and installation of double-glazed aluminium windows, doors and conservatories. They share the same directors and shareholders but each employ their own staff. Illustrating the interconnectedness, the general manager of UDR also oversees the operations of ABC.

[2] UDR operates the public side of the operation dealing with clients and arranging jobs. The jobs are then sent to ABC for manufacturing in the factory owned by ABC and are installed by staff employed by ABC. However, UDR owns the work vehicle, trailer and tools used for the installation by ABC. ABC and UDR have each pleaded guilty to a charge under s 48 the Health and Safety at Work Act 2015 (HSWA) for failing to comply with their duties as PCBUs, to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.[1]

Facts

[3] On 23 October 2020 ABC and UDR staff were working on a residential installation job in Waikari. After the installation ABC's installation manager instructed [redacted], an ABC employee and [redacted], a UDR employee to return to the ABC factory with a trailer. The A-frame trailer had been brought to the Waikari job by another vehicle earlier that day and was loaded with the windows replaced from the Waikari property and some scaffolding.

[4] The trailer was attached to the work van [redacted] had driven to the site.[2]

[5] There are competing accounts as to who checked whether the trailer was properly attached and in fact, following discussion today, it is not entirely clear who in fact connected the trailer to the vehicle.

[6] Ultimately and tragically, the trailer was not correctly connected as the release/locking handle on the trailer tow hitch was not engaged. It was rotated therefore the latching mechanism which sits under the tow ball was not properly engaged. Additionally, the two safety chains on the trailer attached to a D-shackle were not attached to the hole on the tow bar of the van.

[7] Mr [redacted] sat in the passenger seat of the van while [redacted] drove.

---

[1] Person Conducting a Business or Undertaking.
[2] The vehicle was a Nissan Caravan, a light commercial vehicle.

[8] At approximately 12.10 pm the van travelling south entered onto Archers Bridge in the Weka Pass area. As a result of the poor trailer connection and the road surface, the trailer detached from the vehicle. It moved across the road into the northbound lane and struck the front of the oncoming Toyota Hiace van driven by Julian Yates.

[9] A Toyota Hilux travelling behind Mr Yates rear-ended him and a Mazda Demio travelling south struck the trailer, which had blocked both lanes during the collision.

[10] Tragically, Julian Yates, the sole occupant of the van, was fatally injured in the collision. The drivers of the Hilux and Demio suffered minor injuries. The photographs of the scene show the devastation. For Mr Yates, he would have had no opportunity to respond to what rapidly unfolded in front of him.

WorkSafe investigation

[11] The WorkSafe investigation identified a number of features contributing to this fatality, including:

(a) Mr [redacted] and [redacted] had no previous experience working with A-framed trailers or trailers of a similar size.

(b) ABC did not provide [redacted] with any training, or otherwise check his competency, on how to safely attach a trailer.

(c) UDR similarly did not provide [redacted] with any training on attaching a trailer. [redacted] was part of the sales team who, as I understand it, was not expected to drive the company vehicles.

(d) ABC and UDR did not have an effective system of work in place to ensure the safe connection of trailers to vehicles by their workers.

(e) If the safety chains were connected to the hole on the tow bar they would have held the trailer, albeit loosely.

[12] Overall, ABC and UDR failed to ensure the health and safety of other persons, in that it failed:

(a) to develop, implement and monitor compliance with an effective safe system of work to ensure the safe connection of trailers to vehicles; and

(b) ensure its workers had adequate information, training, instruction, supervision and experience necessary to safely use the vehicles and trailers.

[13] The driver, [redacted], was discharged without conviction in an earlier hearing. [redacted] did however make a $5,000 donation to Forest and Bird in Mr Yates' name following consultation with the family.

[14] Mr [redacted] charge, as a party to [redacted] offence, was dismissed, the Judge not being satisfied that the legal ingredients of being a party to [redacted] breach of the HSWA could be made out.

Relevant purposes and principles

[15] The key purposes of the HSWA for sentencing purposes are well understood. However, it is important to acknowledge the primary purpose here which is protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high risk plant.[3]

[16] Further, as in this case, ensuring the "the health and safety of workers" is a PCBU's "primary duty of care" under the HSWA.[4]

[17] Against that background, sentencing also requires weight to be given to the purposes of holding an offender accountable for the harm that they have done, denouncing and deterring their offending and providing for the interests of the victims.[5]

---

[3] Health and Safety at Work Act 2015, s 3(1).
[4] Health and Safety at Work Act, s 36.
[5] Sentencing Act 2000, s 7.

[18] I do not overlook the principles of sentencing, which include taking into account the gravity of the offending and the culpability of the offenders, the seriousness of the offence, the effect of the offending on the victims and imposing the least restrictive outcome.[6]

Sentencing approach

[19] *Stumpmaster v WorkSafe New Zealand* sets out a four step approach for sentencing under the HSWA[7]

(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 152-158 of the Act are required.

(d) Make an overall assessment of the proportionality and appropriateness of the "combined packet of sanctions" imposed by the preceding three steps.

Step one: reparation

[20] Reparation here is in the context of emotional harm reparation where consideration needs to be given to the emotional harm suffered by the victim's family.[8]

[21] In determining the appropriate quantum for emotional harm, I acknowledge the observation of Harrison J in *Big Tuff Pallets Ltd*:[9]

> The judicial objective 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 form of anguish, distress and mental suffering.

---

[6] Sentencing Act s 8.
[7] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [3].
[8] Sentencing Act, ss 32 and 38.
[9] *Big Tuff Pallets Ltd v Department of Labour* HC Auckland CRI-2008-404-322, 5 February 2009.

[22] Necessarily, as noted by then Chief District Court Judge Doogue in *WorkSafe New Zealand v Department of Corrections*, it is a fact-specific exercise:[10]

> The task of setting reparation for emotional harm in a case such as this, does not simply involve ordering the same amount given in other cases involving a fatality. Each case must be judged on its particular circumstances. While certain cases may give a broad indication of an appropriate figure, it is unhelpful to pick apart those decisions and try to pair particular features with a particular level of reparation. There is not and cannot be a tariff for the loss of life or grief.

[23] Nevertheless, as Nation J observed in *Ocean Fisheries Limited v Maritime New Zealand*:[11]

> In the absence of a statutory cap or statutory formula for the allocation of reparation for emotional harm for close family members, Judges have to rely heavily on awards that have been made in other cases to arrive at an appropriate reparation award for the particular case they have been concerned with. So, consistency with the range of awards commonly ordered has been an important consideration in fixing reparation, even when Judges have said that each case must be considered on its own facts.

[24] In *Ocean Fisheries* Nation J provided a comprehensive analysis of the reparation awards in other cases of workplace offences where there has been a death. His Honour noted the following conclusions:

> (a) On a per family basis, the range of total awards is $75,000 to $170,000 but, in recent years, there have been far more awards between $100,000 and $130,000. There has been a clear upwards drift.
>
> (b) The range of awards for a spouse has varied greatly, from $15,714 to $100,000. So too has the range of awards for a child, from $7,500 to $125,000.
>
> (c) The awards for a parent or sibling have, in general, been less than those for a spouse or child. The range of awards for a parent is $5,000 to $44,000, and for a sibling $4,000 to $125,000. The case where $125,000 was awarded to a sibling was however a notable outlier. If it is omitted, the range for a sibling is $4,000 to $39,000.

[25] Victim impact statements have been filed from the family of Julian Yates, some of which were read at the earlier hearing. Mr Yates was clearly a significant person in all of the victims lives and in his wider community. The effect of his death on the emotional wellbeing of all the victims is palpable. No amount of money can be a

---

[10] *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865 at [25].
[11] *Ocean Fisheries Ltd* v *Maritime New Zealand* [2021] NZHC 2083 at [123].

measure of Mr Yates's life and often a reparation award is seen as an insult. Nevertheless, the ordering of reparation is an important step that will hopefully go some way to serve the interests of the victims and to instil some sense of accountability and responsibility in the defendants.

[26] In summary, and it is only that, Ms Jeursen's victim impact statement spoke to the utter grief she has suffered with the loss of her partner, best friend, companion, supporter, co-parent, wise counsel and confidante as she put it. Since Mr Yates' death there has been extended periods of overwhelming sadness and anxiety and a fear of something happening to someone else close to her. Ms Jeursen has no extended family in New Zealand. Beyond her personally, the victim impact statement also highlighted the effects of this tragedy on their respective children.

[27] Mr Yates' son Rhodry speaks of how his father's death has torn his world apart. He could not sleep for months on end and could barely run his business. He described the aching loss of his father who was his greatest source of support, love and light.

[28] Mr Yates' daughter Saskia, spoke of how she was scared to form attachments with people because she has now learnt how swiftly and tragically those attachments can be severed. She is also terrified of driving or being on the road in general because she is constantly aware that something entirely out of her control could happen to her the way it did for her father. She is also scared to answer the phone because she is worried that on the other end of the line will be awful news like she received.

[29] Mr Yates' sister Bethan, says that since her brother's death, part of her has died. She records that she has been unable to work full-time as a result of Post Traumatic Stress Disorder and ongoing grief. She speaks of how her life is now completely different because of her brother's death: physically, emotionally and mentally.

[30] Mr Yates' brother Benjamin, spoke of how he would speak with Julian Yates almost every other day and that he was a big part of his life. Now he feels his absence every day. In his words, his brother's death has: "Made the world feel less. The days lack lustre and the future a sadder and lonelier place to walk".

[31] Mr Yates' other brother Rupert, acted as the family spokesperson for the police. Rupert Yates speaks of the harrowing experience he has been through since his brother's death. He, alongside a cousin who has not filed a victim impact statement, identified Julian Yates' body after the collision and spoke of having to live with that moment for the rest of his life. He notes that he is tormented by passing trailers and that his grief has stripped him of opportunities to make his home a better place for his own family. In his words he has been left as a: "Shell of a father".

[32] The family's grief has been compounded by the fact that Julian Yates' mother died a few months after his death.

[33] Kirsty Yates speaks of how her and Julian were more than cousins, more like close siblings. Kirsty Yates says that after her cousin died there were times she was suffocating with grief, anger and disbelief and was unable to breathe, eat or sleep. She does not live in New Zealand so her grief process has been hampered by access to her wider family brought about by the then COVID-19 restrictions.

[34] While those brief summaries can in no way capture the entire depth and breadth of the grief and emotional harm suffered by this family, it illustrates how a tragedy like this ripples out across a family and not to overlook it, Mr Yates' wider friend group.

[35] In assessing emotional harm I am not attempting to fix the price on Mr Yates' life or compensating for the inevitable loss and disadvantage it causes, particularly for his partner. As Judge Doogue said in the *Department of Corrections* case, there is not and cannot be a tariff for the loss of life or grief.[12]

[36] There is no statutory formula as Nation, J observed in *Ocean Fisheries*. Considering the cases that counsel have referred to me and bearing in mind that each case depends on its own facts, here I fix the emotional harm reparation at $130,000 to be apportioned as follows:

(a) $30,000 to Belinda Jeursen.

[12] Above at [22].

(b) $35,000 each to Rhodry Yates and Saskia Yates.

(c) $10,000 each to Benjamin Yates, Rupert Yates and Bethan Yates.

[37] Apportioning reparation is a difficult task and that is an understatement. It risks creating ill will or ill feeling among family members and it risks the family thinking that I have somehow put a price on Mr Yates' life and a price on the various relationships. I have not.

[38] In submissions, WorkSafe notes that the two defendant companies are jointly and severally liable for the payment of reparation which they have both contributed to. A number of the cases accept this proposition, however, in this case, there is agreement that the reparation may be split evenly between the two connected companies and that is what I will do.

[39] ABC and UDR are ordered to each pay reparation in the sum of $65,000 and apportioned between the victims as I have ordered.

Step two: fine

[40] When fixing the starting point for the fine, the following guideline bands are to be used:[13]

Low culpability:	$0 to $250,000
Medium culpability:	$250,000 to $600,000
High culpability:	$600,000 to $1,000,000
Very high culpability:	$1,000,000 to 1,500,000

[13] *Stumpmaster*, above n 7, at [4].

[41] In assessing culpability, s 151 of the Act offers specific guidance:

> **151 Sentencing criteria**
>
> (1) This section applies when a court is determining how to sentence or otherwise deal with an offender convicted of an offence under section 47, 48, or 49.
>
> (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.

[42] In *Stumpmaster*, it was held that the above sentencing criteria are covered by the well-established culpability assessment factors identified in the leading case *Hanham* under the old legislation:[14]

> (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 of the Act.
>
> (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.

[14] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) at [54] cited in *Stumpmaster*, above n 7.

(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.

Operative acts or omissions

[43] ABC and UDR should have developed, monitored and ensured compliance with an effective system of work to ensure the safe connection of trailers to vehicles. UDR should have ensured its workers had adequate information, training, instruction, supervision and experience necessary to safely use the vehicles and trailers. They did not.

Nature and seriousness of the risk of harm and the realised risk

[44] It is only in very limited circumstances where there would be no risk of harm where a trailer has not been securely connected. In relation to "realised risk", Mr Yates' death was as serious as it could be.

Degree of departure from prevailing standards

[45] Only the Waka Kotahi New Zealand Guide to safe loading and towing for light vehicles seems to apply. It notes that before and during a trip the trailer coupling and safety chain should be checked to ensure they are properly fastened. The defendants submit that there were no previous incidents which required them to refresh the expectation of the standard with their workers, essentially relying on the position that [redacted] and [redacted] should have known better. I do not accept that this is sufficient. It is apparent that reasonable measures were not adopted to ensure compliance with this standard.

[46] In my view, by authorising certain staff to drive company vehicles and attach trailers, the defendants should have ensured they would comply with the Waka Kotahi guidelines. They did not.

[47] ABC and UDR failed to ensure their workers were adequately trained, had adequate knowledge or were supervised. Any of these would have sufficed but they were all departed from. I consider the degree of departure to be moderate.

[48] I add in here Mr Gallaway's submissions this afternoon which emphasised the paucity of guidelines around the attachment of trailers. It was Mr Gallaway's submission that this was really something that had, in his words, slipped between the cracks. Indeed, the company, being responsible, had engaged a health and safety advisor and this was an aspect not identified by its advisor. Mr Gallaway was not advancing that by way of excuse, rather by way of explanation.

[49] Mr Gallaway observed that from an absolute tragedy, which of course this is, there will be some benefit to the wider industry by this issue now being squarely addressed.

[50] What Mr Gallaway emphasised was that this is not a case as in some of the other cases where there was some sort of systemic failure on behalf of UDR or ABC, sometimes illustrated by deterioration or neglect of gear.

Obviousness of the hazard

[51] It is an obvious hazard that if a trailer is not attached properly it could detach and cause harm.

[52] The defence submit that it was not obvious that the employees would not properly attach the trailer. In essence, the argument is the hazard was so obvious that it was not obvious that the defendants needed to do anything to avoid it.

[53] As I see it, this factor is not concerned with the obviousness of the need to avoid the hazard, but with the obviousness of the hazard itself. This is not directly discussed in *Stumpmaster* but in *Hanham* the Court discussed this factor in relation to

the obviousness of the hazard that it related to the actual thing that was hazardous, in that case, the scaffolding structure.[15] In that case, the defendants had an otherwise excellent health and safety record and were horrified by the actions of the employee who erected the structure expecting such action would never be taken.

[54] Here, just because the connection of the trailer was ultimately up to the individual employees, ABC and UDR cannot suggest that the failure to connect the trailer was not obvious. What really appears to matter here is the obviousness of the thing that can cause harm which is a detached trailer. It is expected that PCBUs take steps to mitigate or avoid obvious risks. Just because they thought they did not need to does not, in my view, justify a reduction in their culpability.

[55] I consider the hazard was obvious.

Availability, costs and effectiveness of means to avoid hazard

[56] Establishing a safe system work for the safe connection of trailers to work vehicles would have been straightforward and achievable at low cost. However, I do not overlook the submission Mr Gallaway made earlier about the paucity of guidelines.

Current state of knowledge of risks and nature and severity of harm and of the means available to avoid hazard

[57] The danger of the trailer as not being attached properly is an obvious and well-known risk. After all, that is what safety chains are for.

[58] The fact that trailers are equipped with safety chains shows that there is widespread knowledge of the means available to avoid the hazard.

---

[15] *Hanham*, above n 13, at [148].

Submissions on starting point

[59] WorkSafe submits for the reasons explained, that a starting point of $500,000 for each defendant should be adopted on a global basis placing culpability at the higher end of the medium culpability band.

[60] The defence submits, for the reasons explained, that a starting point capturing the total culpability of the offending of $350,000 - $400,000 should be adopted. The defence support a single fine to be paid together by the defendants.

[61] Before considering the quantum of the fine it will be necessary to determine whether each defendant will receive a distinct fine, or whether a single fine will be imposed.

Approach to imposition of fine

[62] Where there is a close connection between the offenders to impose separate and distinct fines risks double punishment. In *Bay of Plenty Regional Council v TBE Two Limited* Judge Dickey considered a global starting point for the offending there was appropriate, which would then be apportioned between the defendants where the two defendant companies had the same "owner" and the same director.[16] Judge Dickey held that the roles and culpability of each defendant was closely linked through the common director who was also one of the two directors of the owner of the defendants.[17]

[63] That, in my assessment, is the position here. The two defendants have the same shareholders, the same directors and they are registered to the same address. No doubt there is a reason an accountant would understand for the business structure, but here by the nature of the linked operations, the actions of one can be seen as the action of the other.

---

[16] *Bay of Plenty Regional Council v TBE 2 Ltd* [2021] NZDC 7065.
[17] Ultimately the defendants were convicted and discharged but the principle discussed holds.

[64] Accordingly, I will adopt a single starting point to capture the entirety of the offending.

Starting point for the fine

[65] It can be an optimistic task trawling through the cases trying to find a case with sufficient similarity to provide some assistance. That is why the guideline bands in *Stumpmaster* should not be overlooked. That said, I have considered the cases counsel have referred to me. *WorkSafe New Zealand v Johnston's Direct Logistics Limited* is perhaps the most similar.[18] It also involved a trailer detaching from a light vehicle while it was being driven on a highway colliding with another vehicle and killing one of the passengers. The starting point of $600,000 was adopted. However, the defendant's failings were more serious than the present case. They included the tow ball and coupling having significant wear, the D-shackle on the safety chain not being up to code and the trailer's certificate of fitness having expired. These issues would have been identified if a pre-start check were undertaken.

[66] In *Worksafe New Zealand v NE Parkes & Sons Limited* a starting point of $500,000 was adopted.[19] The defendant hosted "Willing Workers On Organic Farms" who worked in exchange for food and accommodation. Two of these workers were driving a company utility task vehicle (UTV) up a hill with no seatbelts or helmets. It rolled backwards ejecting them both and landing fatally on one victim. The seatbelts were in fact, not operating properly so could not be used and there was no induction or training on the use of the UTV, other than a warning not to go up and down hills. Pre-start checks which were required but not completed would have detected the issues.

Analysis as to starting point

[67] I consider that the culpability of ABC and UDR to be less than in *Johnston's Stretch Logistics Limited* and approaching that in *NE Parkes & Sons Limited*. The defence emphasise those cases all include issues with mechanical defects or broader

[18] *WorkSafe New Zealand v Johnston's Direct Logistics Limited* [2022] NZDC 16086.
[19] *WorkSafe New Zealand v NE Parkes & Sons Ltd* [2020] NZDC 25449.

issues with health and safety management. The prosecution contends that the cases are nonetheless similar because systems of work involving training and compliance would have picked up the issues.

[68] This is offending towards the higher end of the medium culpability band in my assessment. I consider that a starting point fine of $450,000 is appropriate.

Aggravating factors of the defendants

[69] There are no aggravating factors warranting an uplift to the starting point.

Mitigating factors of the defendants

[70] Under this hearing I am required to identify deductions to the starting point for the fine. The family might find this to be offensive where the actions of the defendants have caused the death of their loved one and harm to others. The law requires me to do so. However, as I discuss those factors, hopefully there can be some level of understanding of the need for them.

[71] In my assessment the appropriate deductions are as follows:

Co-operation, remorse and willingness to pay reparation

[72] I assess this as 7.5 per cent. Co-operation with the investigation is a matter you might think any responsible company would do. That is not necessarily the case. While the family will consider the process here to be glacial, which is not an unfair complaint, the companies did co-operate.

[73] Willingness to pay reparation is also a factor, but where insurers as in this case are present, that of course is largely out of their hands.

[74] Remorse is a more difficult factor and I want to briefly discuss that here. The family have been critical of the defendant's response, particularly compared to

[redacted] This is best illustrated by Rodney Yates who said in his victim impact statement:

> I have made peace with [redacted] and have given him my blessing to live in honour of Julian's values because as I have witnessed it, [redacted] has faced this all with courage, strength, integrity and honour. He has held himself accountable and has made it his mission to make things right... However, I see no evidence of this in regards to you, the companies responsible for creating this situation and allowing this to happen... To know that there were attempts to plead not guilty reeks of dishonour and trying to wriggle out of accountability.

[75] Mr Gallaway addressed the absence of contact from the companies at one of the earlier hearings. Five days after the tragedy the managing director of UDR wrote to the detective in charge of the police investigation asking him to pass on her message to the family. Mr Gallaway observed that this was the appropriate way of making contact where direct contact might not have been welcomed. Mr Gallaway spoke again to that this afternoon. So that the record is fair on this point, I repeat Ms Tyson's message. This was the communication:

> My name is Kelly Tyson and I'm the managing director of Ultimate Design And Renovation.
>
> It is my company's trailer and vehicle that was involved in the dreadful accident on Weka Pass Road on Friday.
>
> I cannot begin to understand what you are all going through having lost Julian in this way.
>
> I have read the articles about Julian and he was clearly a wonderful man with a great love of life.
>
> In writing to you I want to express how sorry I am for what has occurred. On behalf of us all at the company I am sending my love and prayers to all of you. I also want to assure you that we will cooperate with any investigation into the accident.
>
> Finally, if there is anything we can do please let us know. If you would like to meet with us at any time in the future we would welcome an opportunity to meet with you. Again, I am so very sorry for what has happened.

[76] The police failed to pass on that message. The companies wished to engage in restorative justice. That was late because of the late entry of guilty pleas. The family did not wish to engage as was their right, and perhaps a product of what they had seen as the defendant's not understanding the grief and pain they had caused. This is an unfortunate lost opportunity of communication between the company and the family.

Previous good record

[77] Neither company has prior health and safety convictions. I see 7.5 per cent being available.

Guilty pleas

[78] It was agreed between the defence and WorkSafe that 25 per cent was available. The guilty pleas were not prompt but there was some complexity in the prosecution. While a discount between 20 and 25 per cent might be justified, I will deduct the agreed 25 per cent.

[79] A further discount is sought to recognise that since the fatality, steps have been implemented to ensure something like this does not happen again. If anything was an affront to a grieving family, it would be a discount for doing what they should have done before the fatality. I struggle to see how on a principled basis a defendant can be given credit for doing what they should have done before, in this case, something as serious as a fatality.

[80] Applying a total discount of 40 per cent to the starting point fine of $450,000 results in a fine of $260,000.

[81] I am not invited to apportion the fine for the reasons discussed and that makes sense in these circumstances. Had I been required to I would have apportioned the fine 60:40 UDR:ABC. Accordingly, the fine for each before I turn to the ability to pay a fine is $135,000.

Step three: ancillary orders

[82] WorkSafe seeks costs pursuant to s 152(1) of the Act. This section allows the Court to order the defendants to pay a sum that it thinks just and reasonable towards the cost of the prosecution.

[83] WorkSafe seeks the defendants each pay a half share of the legal costs amounting to $598.51 each. The defence originally took no issue with that, however,

the delay with filing a response to the financial information, notwithstanding the explanation given today which necessitated an adjournment and further delay, means that properly there should be no order and none is made.

Step four: overall assessment

[84] I have not applied any additional sanctions to the fines, however the Court may adjust the fines in this case to ensure that they are proportionate to the circumstances of the offending and the defendants. This can include the defendant's financial circumstances which is provided for by s 40 of the Sentencing Act 2002. Notably s 40 does not require the Courts to reduce the fine according to the defendant's financial circumstances. It is merely a matter the Court must have regard to.

[85] Here I can embark on a discussion of the cases.

[86] In *Mobile Refrigeration Specialists Ltd v Department of Labour* Heath, J conducted an analysis of the law applying to reductions due to a defendant's financial circumstances.[20] His Honour noted that: "a fine is punitive in nature, designed to serve the sentencing goals of denunciation, deterrence and accountability".[21] Accordingly, in order for there to be some reduction, there must be clear and unequivocal material as to what level of fine cannot be paid:[22]

> In the case of a company, the Court should require clear evidence of financial incapacity, supported by appropriate disclosure of all material facts (most of which will be in the exclusive possession of the offender), before imposing a sentence below that appropriate to mark the offending.

[87] In *Department of Labour v Street Smart Ltd*, Duffy, J observed the policy requiring fines to be punitive:[23]

> There are good policy reasons, which accord with the purpose and scheme of the Health and Safety in Employment Act, for ensuring that where employers infringe, penalties must bite, and not be at a "licence fee" level.

---

[20] *Mobile Refrigeration Specialists Ltd v Department of Labour* (2010) 7 NZELR 243.
[21] At [29].
[22] At [55].
[23] Department of Labour v Street Smart Ltd (2008) 5 NZELR 603 at [59].

[88] In *Worksafe New Zealand v Blackadder*, Judge Crosbie commented on the consideration relevant at this stage:[24]

> A fine ought not to place a company at risk but should be large enough to bring home the message to directors and shareholders of corporates.

[89] [redacted]

[90] [redacted]

[91] [redacted]

[92] [redacted]

(a) [redacted]

(b) [redacted]

[24] *WorkSafe New Zealand v Blackadder* [2022] NZDC 2048, at [58].

(c) [redacted]

[93] [redacted]

[94] [redacted]

[95] [redacted]

(a) [redacted]

(b) [redacted]

(c) [redacted]

(d) [redacted]

[96] [redacted]

[redacted]

[97] [redacted]

[98] [redacted]

[redacted]

[99] [redacted]

[100] I am also mindful of the sentencing purposes and the need to send a clear message of denunciation and deterrence to all PCBUs operating vehicles and trailers. This fatality serves to demonstrate that if these core elements of a business are not managed properly, what the consequences can be. Given the obviousness of this risk and the ease with which it can be managed, a heavy fine is warranted in accordance with the sentencing purposes.

[101] [redacted]

[102] [redacted] I do accept that it would be appropriate to allow the fine to be paid in monthly instalments. In *Stumpmaster* the Court cautioned against extending liability to much into the future. That concerned a four and a half year payments schedule but the Court chose not to overturn it. Monthly payments for a period of four years would be appropriate and I would endorse that if sought.

Summary of sentence

[103] Both ABC and UDR have each been ordered to pay reparation of $65,000 and a fine of $135,000.[25]

[25] If I overlooked formally entering a conviction for each defendant at sentencing, I have done so now.

Other matters

Release of summary of facts

[104] WorkSafe seeks an order that the summary of facts can be released if requested. With appropriate redactions it may be.

Name suppression of [redacted]

[105] On 16 May 2022 Judge Farish granted [redacted] the driver, permanent name suppression after he was discharged without conviction. Any publication of this sentencing decision will need to comply with that order. [redacted] charge was dismissed as no criminal liability could be sheeted home to him. For consistency with [redacted] position, I also suppress his name.

Suppression of financial information

[106] The defence seek an order suppressing any information relating to the defendant's financial capacity. [redacted] Accordingly, there will be suppression of the financial information [redacted]

[The hearing concluded with a minute's silence for Mr Julian Yates.]

_____
Judge GM Lynch
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 22/11/2023