EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2017-004-010881
[2019] NZDC 13056

WORKSAFE NEW ZEALAND
Prosecutor

v

DISCOVERIES EDUCARE LIMITED
HENG TONG INVESTMENTS LIMITED
Defendant(s)

Hearing:	30 May 2019
Appearances:	Ms McCarthy and Ms P Lepanoni for the Prosecutor N Beadle for the Defendants Discoveries Educare Limited
Judgment:	23 August 2019

RESERVED JUDGMENT OF JUDGE E P PAUL
[ON APPLICATION FOR ENFORCIBLE UNDERTAKING AND SENTENCING OF DISCOVERIES EDUCARE LIMITED]

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[1] Discoveries Educare Limited pled guilty to two charges laid under the Health and Safety at Work Act 2015 ("HSWA"):

1. Sections 36(1)(a), 48(1) and (2)(c) – A person conducting a business or undertaking ("PCBU") has a duty to ensure so far as reasonably practicable the health and safety of workers who work for the PCBU, while at work in the business or undertaking; and

2. Sections 36(2), 48(1) and (2)(c) – a PCBU has a duty to ensure so far as reasonably practicable the health and safety of other persons who they are not put at risk from work carried out as part of the conduct of the business or undertaking.

[2] The maximum penalty for each offence is a fine not exceeding $1.5 million.

[3] The charges in this case relate to offending that occurred on 8 November 2016.

[4] Before I proceed further with my decision I would like to acknowledge the presence of the parents of children's C, D and A. Also I wish to tell those parents that I have read the victim impact statements prepared for each of their children and I have also heard from Ms Cooper today with respect to child A.

[5] When this matter came before me in May, Discoveries Educare Limited made an application seeking that the proceedings be adjourned for up to two years and it be released on the basis that it gives an undertaking with specified conditions. The application was made in reliance on s.156 of the Act. The application was opposed by Worksafe.

[6] As I say I heard this application on 30 May 2019. Relevant to this hearing was the reserved decision of His Honour Judge McIlraith of 4 June 2019 in the matter of *Worksafe New Zealand v Niagara Sawmilling Co Ltd*[1] where the same issue of an undertaking or COEU was considered. That decision was provided to the Court on 7 June 2019. In light of that decision Discoveries Educare Limited filed further

[1] *Worksafe New Zealand v Niagara Sawmilling Co Ltd* [2018] NZDC 3667.

submissions on 20 June 2019 recording they were content for the Court to determine the application on the basis of the written and oral submissions already made, which included submissions on sentencing. Accordingly, I have proceeded on that basis.

[7] Today I have received an updating memorandum from Worksafe in terms of a schedule relating to not only reparation, but also culpability starting point, end point after aggravating/mitigating factors and prosecutor's costs, so I have taken that into account also.

[8] I first intend referring to the background facts of this offending. Out of necessity I will also include the facts relevant to Heng Tong Investments Limited. However, I have not heard from Heng Tong Investments Limited on sentencing. They did not seek a COEU. Accordingly, this decision I am delivering now is confined to the application and sentencing for Discoveries Educare Limited. As I indicated this morning, once I have delivered this decision I will the move to hear from Heng Tong Investments Limited in the orthodox way.

Background Facts

[9] There is no dispute as to the background facts pleaded to. I rely on the agreed summary of facts.

[10] Discoveries Educare Limited ("Discoveries") is a limited liability company which has a resource consent to operate a childcare centre from 29 Gillies Ave, Epsom, Auckland ("the property"). Heng Tong Investments Limited ("Heng Tong") is a limited liability company that owns the property. Heng Tong effectively lease the property to Discoveries.

[11] On 15 May 2013 Discoveries obtained a resource consent for the establishment of a childcare centre for 25 children and four staff, later amended to 50 children and seven staff on 16 December 2015.

[12] The resource consent required a "1.8 m canopy acoustic fence … constructed around the outdoor play area Zone 1 … with artificial turf and/or rubber-based paving".

[13] Discoveries carried out the renovations required under the Resource Consent to convert the property to a childcare centre.

[14] These renovations included installing the fence in approximately October 2013 around the rear playground area.

[15] Decks were built to level the garden ground for the children's outdoor play area with further renovations including laying paving, laying bark near the base of a large eucalyptus tree in the rear area ("the tree").

[16] Prior to the renovation in 2013 the tree had been flowering and producing leaves. However, there was a noticeable change in the tree's appearance from the time of the renovations. The leaves discoloured, turned black and fell off. The tree no longer flowered or regenerated leaves and appeared to die between the start of the renovations and approximately Christmas 2013. The centre opened in autumn 2013. Health and Safety New Zealand ("HSNZ") site hazard assessment reports undertaken in August 2014 and July 2015 respectively by Bayleys (when it was managing the property for Heng Tong) included photos of the evergreen tree appearing skeletal.

[17] The HSNZ report of 27 July 2015, at page 13 under maintenance, notes there are several large trees on site, stating that a programmed tree maintenance schedule was required to limit falling branches and low headroom hazards. However, Heng Tong did not and had not had a programmed tree maintenance schedule put in place. No tree maintenance schedule was introduced by Heng Tong, nor did it assess "the tree" after it took over management of the property from Bayleys from 1 January 2016.

[18] On the afternoon of 8 November 2016, at least 13 children were outside in the rear play area supervised by Discoveries early childhood teachers [teacher 1] and [teacher 2]. The wind that day was fresh to strong at 30-40 kilometres per hour and gusty from the southwest.

[19] At 1.35 pm following a gust of wind, a large cracking noise was heard. The tree collapsed onto and around the children and adults below. As a result of the tree's collapse, four children aged under four years were hit by the tree and injured. A wooden playhouse was crushed.

[20] The four children were transferred to hospital, requiring medical assessment and care.

[21] The first child (Child A) aged two years eight months, was hit by branches. He sustained two fractures to his skull, fractures to the clavicle, distal radius and ulnar, facial lacerations, contusions and abrasions. His injuries were described as "moderate severe with the potential to be very severe, even life threatening". He was discharged from hospital on 14 November 2016, with ongoing post traumatic concussion community care.

[22] The second child (Child B) was three years of age. He sustained abrasions to the top of his head and back of neck, numerous contusions to back of lower chest and left upper chest with some abrasions, contusions to both arms and a minor head injury. He was discharged from hospital at 16:42 hours on 8 November 2016, the day of the incident.

[23] The third child (Child C) aged four years, sustained a head injury when he was hit by a branch. He had been standing next to the tree when it collapsed. The injury was described as a haematoma to the top of the scalp and an overlying superficial abrasion. He was discharged from hospital at 18:57 hours on 8 November 2016.

[24] The fourth child (Child D) sustained a fractured skull with a small subdural haemorrhage and a deep 5 cm long laceration on her left forehead from being hit by the tree. She was discharged from hospital on 14 November 2016 at 09:54 hours, requiring ongoing specialist care, including facial surgery for revision of scars in 2018.

[25] [Teacher 1] was under the tree when it fell, and it hit her back. [Teacher 2] was also under the tree when it fell but was not hit.

[26] The children and staff and visitors to the rear play area were exposed to the risk of a crushing injury by the tree collapsing. Discoveries have accepted responsibility by their guilty plea.

[27] Worksafe New Zealand ("Worksafe") was notified of the incident on 8 November 2016 and began their investigation.

[28] A qualified arborist, Jarod Collette, director of Geotree, examined the tree onsite and provided an expert opinion about its condition. He described the tree as an evergreen eucalyptus tree, most likely *corymbia calophylla* which had been located in the rear playground area. It was not deciduous and therefore should have carried leaves year-round. It had a standing height of approximately 12 metres, girth of 2.4 metres with a spread of approximately 10 metres.

[29] It was Mr Collette's opinion:

> "It would have been obvious to me the tree was dead, and that it had been dead for quite some time … were the tree to fall the likely target would be the play area to the north; this area is in frequent use, presumably with a high rate of occupancy by children and staff."

[30] Mr Collette obtained photographs of the tree between 2009 and 2015 for comparison. Those photographs showed a healthy tree in February 2012. However, by April 2014, the canopy was markedly sparse, and the foliage looked brown (dead). By October 2015 it appeared as a defoliated skeleton and was almost certainly dead. When the tree toppled it had been dead long enough that the finer twigs had been shed, bark was missing or detached in places from the trunk and branches. Mr Collette's opinion was the tree had been dead for at least a year before it toppled, it may have been dead for more than two-and-a-half years.

[31] Discoveries had a daily OSH checklist. However, trees were not included in that list. The dead tree had never been identified as a hazard.

[32] Worksafe interviewed Mr Singh on behalf of Discoveries. He stated that Discoveries first noticed the tree had stopped producing leaves when the centre opened

after their renovations "that was in autumn, then no leaves came out, what has happened? Such a big tree, such a heavy tree, why that hasn't?".

[33] The Worksafe investigation found Discoveries had failed to monitor and manage the condition of the tree in the rear playground area.

[34] David Huang was spoken to on behalf of Heng Tong. He confirmed Heng Tong had not done any inspections of the property since those completed by Bayleys. That there was no tree maintenance schedule and they relied on the tenant to raise issues. The Worksafe investigation found Heng Tong had no systems in place to adequately manage the health and safety of the centre.

[35] The summary of facts records there are a number of standards and guidance available regarding hazards associated with trees. Those include Worksafe Property Management Guidelines (19 May 2016), the Licensing Criteria for Early Childhood Education and Care Facilities 2009, the Health and Safety Executive, Management of the Risk from Falling Trees or Branches (reviewed 26/3/2014) which sets out a tree management system, Common Sense Risk Management of Trees National Trees Safety Group. This states at page 34:

> "In general terms, a landowner must identify those trees which might, if they fell, pose a risk to people or property. He should then inspect such trees and identify any obvious defects in the trees. If the landowner does not have sufficient knowledge of trees to enable him to identify such obvious defects, he should engage someone who has."

[36] At page 46 it records high frequency use zones, including children's playgrounds, require prioritisation and that:

> "Normally, the best person to do an initial assessment is someone familiar with the land, how it is used and what trees are present. Typically, this could be the landowner, occupier or land manager. It does not require tree specialist to assess a site".

[37] Safety Around Trees (La Trobe, Australia), the Scouts UK Tree Safety Guidelines provide on risk assessment-based tree safety management.

[38] Discoveries as a PCBU must accept they had a duty to ensure so far as reasonably practicable the health and safety of other persons, including the children

A, B, C and D, were not put at risk from work carried out as part of the conduct of the business or undertaking.

[39] Discoveries failed to manage the condition of the tree in the rear playground area. That failure exposed the children to a risk of serious injury or death, namely crushing by a collapsing tree. As a result, four children and one of the teachers were injured when the tree fell on them. It was reasonably practicable for Discoveries to have:

(i) Identified the hazard of falling branches and collapse of the tree in the rear of the play area;

(ii) Assess the risk the tree posed, taking into account who was exposed, the harm that could result and the likelihood of harm being realised;

(iii) Adequately consulted and coordinated with Heng Tong about the management of risk to health and safety associated with the tree.

[40] As a PCBU Discoveries had a duty to ensure so far as reasonably practicable the health and safety of workers who worked for the PCBU, including [teacher 1] and [teacher 2], while they were at work, supervising children in the rear play area.

[41] Discoveries failed to manage the condition of the tree in the rear playground area. That failure exposed the workers (teachers) to risk of serious injury or death, namely crushing by a collapsing tree. As a result, one of the teachers was injured when the tree fell onto her. The other teacher avoided physical injury. Discoveries failed to ensure the health and safety of its workers. It was reasonably practicable for Discoveries to have:

(i) Identified the hazard of falling branches and collapse of the tree in the rear of the play area;

(ii) Assessed the risk the tree posed, taking into account who was exposed, the harm that could result and the likelihood of harm being realised;

(iii) Adequately consulted and coordinated with Heng Tong about the management of risk to health and safety associated with the tree.

[42] It is noted in the summary of facts Discoveries have not previously appeared before the Courts.

Application Under Section 156

[43] Subpart 8 of Part 4 of the Act deals with sentencing for offences. Section 150 provides that it applies if a Court convicts an offender or finds an offender guilty of an offence under the Act.

[44] Section 156 is within Subpart 8. It provides:

> **156 Release on giving of court-ordered enforceable undertaking**
>
> (1) The court may (with or without recording a conviction) adjourn a proceeding for up to 2 years and make an order for the release of the offender if the offender gives an undertaking with specified conditions (a **court-ordered enforceable undertaking – a COEU**).
>
> (2) A court-ordered enforceable undertaking must specify the following conditions:
>
> (a) that the offender appears before the court if called on to do so during the period of the adjournment and, if the court so specifies, at the time to which the further hearing is adjourned:
>
> (b) that the offender does not commit, during the period of the adjournment, any offence against this Act or regulations:
>
> (c) that the offender observes any special conditions imposed by the court.
>
> (3) An offender who has given a court-ordered enforceable undertaking under this section may be called on to appear before the court by order of the court.
>
> (4) An order under subsection (3) must be served on the offender not less than 4 days before the time specified in it for the appearance.

> (5) If the court is satisfied at the time to which a further hearing of a proceeding is adjourned that the offender has observed the conditions of the court-ordered enforceable undertaking, it must discharge the offender without any further hearing of the proceeding.
>
> (6) The regulator must publish, on an Internet site maintained by or on behalf of the regulator, notice of a court-ordered enforceable undertaking made in accordance with subsection (1), unless the court orders otherwise.

[45] Discoveries have made the application for orders under s 156. There is no provision within the Act for such an application to be made. Despite the decision in *Niagara*, Discoveries still pursue their application for a s 156 on the basis it can be a standalone outcome for this particular offending. It was Worksafe's submission that s 156 provides for orders which can be made as part of the sentencing process, not be the subject of a discrete application as sought by Discoveries.

[46] The High Court in *Worksafe New Zealand v Stumpmaster Ltd*,[2] is the guideline judgment with respect to sentencing under the Act, noted with respect the approach to sentencing:

> "We first addressed the correct approach to sentencing under HASWA. As noted, HASWA adds a number of potential orders available to the sentencing Court. The approach set out in *Hanham*[3] must be modified to reflect that. A fourth-step approach is now required:
>
> (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 HASWA are required;
>
> (d) Make an overall assessment of the proportionality and appropriateness of the combined sanctions imposed by the preceding three steps. This includes consideration of the defendant's ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant."

[47] It was stated in *Stumpmaster* that the third step in the sentencing approach must now be the determination of whether further orders under ss 152-158 are required. That includes any potential orders under s 156 – the subject of this application.

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[2] *Worksafe New Zealand v Stumpmaster Ltd* [2018] NZDC 900 at para [35].
[3] *Department of Labour v Hanham and Philp Contractors Limited* (2008) 6 NZEKR 79 (HC).

[48] The orders contemplated by ss 152-158 are different in nature. However, they may all properly be termed ancillary orders. In other words, orders the Court may impose as part of the sentencing process in addition to the setting of a payment of reparation and imposition of a fine. Section 156 could be termed an alternative approach to the sentencing process and effectively that is the thrust of Discoveries submissions.

[49] With respect to the circumstances of this case Mr Beadle for Discoveries submitted that a COEU is a proportionate response to the gravity of the breach under the HSWA. The COEU was sought on the grounds that:

(a) It would satisfy the sentencing criteria and purposes of both the HSWA and the Sentencing Act 2002;

(b) The defendant's culpability is low;

(c) It is a proportionate response to the gravity of the breach. He says the defendant is remorseful, has no prior convictions and previously had a good safety record.

[50] In contrast Worksafe submitted that a COEU is not appropriate for the defendant and takes the view that a conviction should be entered. It opposes the application on the grounds:

(a) A COEU would not satisfy the sentencing principles and purposes under ss 7-10 Sentencing Act nor s 151 HSWA;

(b) The defendant was responsible for the renovations to the property, and the subsequent decline of the tree's health was evident. It was not an undetectable hazard situation;

(c) The health and safety audits and staff training in the proposed COEU is not exceptional nor additional. A fall under the defendant's duties to comply with HSWA (under s 36(3));

(d) The proposed COEU does not offer sufficient benefit to offset the seriousness of the offending, and the need to hold the defendant accountable for its actions.

[51] Worksafe say the gravity of the offending in this case is elevated by the fact that this was a detectable hazard, and that accountability for the harm done to the victims (as described in the victim impact statements) and as delivered to the Court today, and the community are important in this case, as well as reparation, denunciation and deterrence.

[52] Mr Beadle submitted Discoveries had been accountable for the harm. With its director Dr Singh speaking at two ECC seminars about the incident. Discoveries has accepted responsibility for injuring the children and that it must compensate the victims. It has volunteered to participate in a restorative justice process with the families. It has accepted Worksafe's reparation amounts and notes three of the four injured children returned to the childcare centre. Mr Beadle goes on to submit no specific or general deterrence is required since all trees have been removed from the site and Discoveries cooperated with Worksafe.

[53] In explaining the terms of the COEU Discoveries say it aims to promote work health and safety through the provision of advice, information, education and training to the childcare industry, to its own staff and the community, and to provide continuous improvement in higher standards of work health and safety through training of its workers. The advantage in accepting the COEU will be making the defendant and other owners of childcare centres a safer workplace. Mr Beadle submitted the COEU is extensive and will be a benefit not only to the defendant, its staff members and its 13 childcare centres, but also to other licensed childcare centres and to the community in general.

[54] Mr Beadle in his submissions set out in some detail the terms of the COEU which included:

(a) Discoveries to pay its share of the reparation to the victims;

(b) Discoveries presenting at Early Childhood Council conferences;

(c) Contributing $50,000 to a programme by the New Zealand Arborcultural Association for the education of the public on the benefits and risks associated with trees;

(d) Worksafe's reasonable costs of consulting with the New Zealand Arborcultural Association. Furthermore, Discoveries would fund a bespoke programme of health and safety training of its workers by the Early Childhood Council at a cost of $71,600 over the two-year period of the undertaking.

[55] Mr Beadle suggested a comparable case was the undertaking accepted by Worksafe in the case of *The St Kentigern Trust Board*.[4] There, Worksafe found the injuries to be life threatening following two students sustaining very serious lacerations to their throats while participating in a theatre production of Sweeney Todd. *St Kentigern's* proposal accepted by Worksafe to an extent mirrored the proposal now being offered by Discoveries. Ultimately, in Mr Beadle's submission a Court ordered enforceable undertaking in the terms set out in the application was a proportionate response to the gravity of the breach in this particular case, particularly when considering Worksafe's approach in the other case.

[56] Mr Beadle in his submissions has referred to s 3(1) HSWA in terms of the purposes of health and safety legislation. The relevant factors of s 3(1) are set out as follows:

> **3 Purpose**
>
> (1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—
>
> (a) 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; and
>
> (b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and

[4] Enforceable Undertaking Agreement between Worksafe New Zealand and St Kentigern Trust Board.

(c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and

(d) promoting the provision of advice, information, education, and training in relation to work health and safety; and

(e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and

(f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and

(g) providing a framework for continuous improvement and progressively higher standards of work health and safety.

[57] Discoveries say paragraphs (d), (e) and (g) are relevant to the exercise of the discretion under s 156.

[58] Worksafe have made submissions with respect to s 151 of the HSWA. Although the defendant has yet to be convicted. However, s 151(2) may be helpful in this case in the exercise of the Court's discretion as it emphasises the aggravating factors that a Court must have particular regard to at sentencing. For completeness s 151(2) provides:

151 Sentencing criteria

…

(2) The court must apply the Sentencing Act 2002 and must have particular regard to—

(a) sections 7 to 10 of that Act; and

(b) the purpose of this Act; and

(c) the risk of, and the potential for, illness, injury, or death that could have occurred; and

(d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and

(e) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and

(f) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and

(g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[59] Section 151(2)(b) specified the Court must have particular regard to "the purposes of this Act". This demonstrates the importance of the purpose of the Act described in s 3.

[60] Worksafe submitted that s 151(2)(c) and (d) are relevant – (c) and (d) concern respectively the risk and potential for injury or death that could have occurred, and where the death or injury had occurred or could reasonably have been expected to have occurred. Worksafe submitted that in the present case there was no unique risk or hard to detect hazard. When carrying out renovations Discoveries should have reacted to the visibly declining health of the tree. Clearly there was a likelihood of harm from crushing by a collapsing tree in such a confined space. It would not have been onerous to implement a system for monitoring and maintaining the tree. The fact that serious injury occurred in the present case, is a mandatory consideration for the Court pursuant to s 151(2)(d). One of the submissions made for Discoveries is that it should not be held liable for an undetectable hazard. This however overlooks the specific requirement of s 36(1) and (2) HSWA which places an obligation on a PCBU to ensure "so far as is reasonably practicable" the health and safety of workers and other persons.

[61] "Reasonably practicable" has been expressly defined in s 22 HSWA. It means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including those specified in paragraphs (a)-(e). Relevant to this is s 22(c) which states the person "knows, or ought reasonably to know, about the hazard or risk; and ways of eliminating or minimising the risk". When s 22 is applied to the circumstances, given Dr Singh stated in his affirmation that "DEL accepts it knew of the deterioration", the identification of the tree as a hazard in the circumstances would have been reasonably practicable in terms of s 22, to protect the workers and other persons against harm from hazards and risks arising from work, in accordance with the legislation at s 3 and the defendant's duties at s 36.

[62] Of relevance is s 48 HSWA when assessing the seriousness of the offence. Actual harm caused is a relevant factor. Also a mandatory consideration in sentencing under s 151(2)(d).

[63] Discoveries sought to rely on the *St Kentigern Trust Board* case where Worksafe accepted an enforceable undertaking from the Trust Board. The defendant's pointing to the similarities between the two cases, principally that they involve an education provider and that the students were injured on school premises. In addition, the defendant Discoveries submitted that a COEU is a proportionate response to the gravity of the breach, as Worksafe had similarly decided in the *St Kentigern* case. As already stated the defendant has structured its enforceable undertaking in a similar fashion to that case. They also submitted their COEU is far more extensive than the one accepted by Worksafe in the *St Kentigern* case.

Discussion

[64] I, like Judge McIlraith in the *Niagara* decision, have determined there is no basis in the Act for a discrete application pursuant to s 156 of the Act. Rather, consideration of whether an order under s 156 should be made is simply part of the sentencing process to be undertaken by the Court in relation to any health and safety offending. While the order contemplated by s 156 is different to the other ancillary orders, the approach mandated in *Stumpmaster* must apply to s 156. The order contemplated in the application is an alternative sentencing outcome rather than ancillary order.

[65] In this case, I do not accept that an appropriate outcome is an order pursuant to s 156. One factor that is likely to influence any sentencing process involving an order under s 156 is that the level of culpability is low. For the following reasons that is simply not so in this case.

[66] The apparent benefits associated with the proposal in Discoveries' COEU do not negate the importance of holding Discoveries accountable for breaching its duty of care under s 36. Nor does it satisfy the other sentencing purposes of deterrence and denunciation. The victims in this case were vulnerable, pre-school children who were

not alert to any potential hazards involving trees on their playground area. Those children and their parents were entitled to rely on the centre staff members to keep them safe during their time at the centre. Keeping the five victims (the four children and the staff member) free from harm while they were at the centre did not happen in this case. Therefore, it is more appropriate for Discoveries to be held accountable by way of a conviction and penalty in consideration of the purposes and principles of the Sentencing Act and the HSWA.

[67] In terms of s 9 of the Sentencing Act, aside from the extent of the harm resulting from the offending, there appear to be no other aggravating features of the offending or of the offender. Discoveries relevant mitigating factors are that it pleaded guilty to the charges, it is remorseful, it has no previous convictions, and is said to be unlikely to reoffend in this way again. That Discoveries intend to take remedial action in relation to improve staff health and safety training. The point was properly made by the prosecutor that such remedial action does not require a COEU. That Discoveries are free at any time to implement such remedial action and in fact, under the Act have an active responsibility to do so.

[68] Referring to s 36 HSWA the identification of the tree as a hazard in the circumstances here would have been reasonably practicable (in terms of the definition of s 22) to protect the workers and other persons against harm from hazards and risk arising from the work, in accordance with the purposes of the legislation in s 3 and the defendant's duties under s 36. Discoveries reliance on the *St Kentigern* case is misconceived. Some of the reasons for Worksafe accepting the enforceable undertaking were the circumstances giving rise to the incident which was specific and narrow. That the student victims were also supportive of the Trust Board's enforceable undertaking.

[69] By comparison, the circumstances of this case cannot be described as narrow and specific given that the tree in its obvious failing health was prominently in the centre's playground area for some years. Furthermore, there is no suggestion the victim's families are supportive of the defendants proposed enforceable undertaking.

[70] There is nothing exceptional about the circumstances of this case that dictates a departure from the normal sentence of a conviction, a fine and reparation to be paid by Discoveries. Health and safety offending must be taken seriously by employers and persons conducting a business or undertaking. This is reflected in the new monetary penalties as set out in the legislation. The maximum penalty being $1.5 million.

[71] I am satisfied a conviction is warranted in this case despite the defendant having no previous convictions and having cooperated during the course of the investigation. Worksafe continuously pointed out in its submissions to the Court that the deterioration of the tree was obvious. Therefore, the defendant should have identified the risk of the tree falling. The defendant's non-compliance with its primary duty of care, as set out in s.36, was therefore a clear contravention of the HSWA which resulted in serious injurie.

[72] Furthermore, when the defendant's inaction, in respect of the tree is scrutinised in the years prior to the incident it is evident that there was a serious breach of the defendant's obligations under the HSWA. It is disingenuous of the defendant to now reconstruct its actions prior to the incident as demonstrating a responsible monitoring of just such a risk. Its health and safety checklist referred to the trimming of shrubs and trees but did not extend further to examining the health of the trees on the property or identifying any hazards in relation to those trees.

[73] Under the HSWA identifying the toppling risk and the potential harm hazard was reasonably practicable given that it was a very large tree in the playground area and had apparently been dead for some time. In short it was there for all to see. When the tree did topple over on a windy day it collapsed over the children's playhouse injuring four children and a staff member. These victims suffered physical injuries, ranging from very serious to minor. The children also suffered from emotional trauma following the incident. One only has to have listened to the victim impact statement of child A today and read the victim impact statements for child D and B and C and the restorative justice report to realise the impact of the offending on the victims and their families.

[74] I am satisfied in assessing a COEU application all relevant statutory provisions should be considered by this Court. In the present case a serious breach of health and safety obligations under the HSWA occurred resulting in several young children being severely injured. That in of itself is a strong basis for not accepting the COEU from Discoveries.

[75] A conviction, fine and reparation will meet the HSWA's purpose in s 3(1)(e) of "securing compliance with this Act through effective and appropriate compliance and enforcement measures".

[76] Accordingly, sentencing must proceed in accordance with the procedures set out in the *Stumpmaster* decision. It follows there will be no Court ordered enforceable undertaking. I now turn to the sentencing process in relation to Discoveries offending.

Sentencing

[77] The High Court in *Stumpmaster* has provided guidance as to the approach to be taken in sentencing for health and safety offending.

[78] Section 151 of the Act provides that in sentencing an offender for an offence under s 48, the Court must apply the Sentencing Act and have particular regard to:

(a) Sections 7-10 of the Sentencing Act;

(b) The purpose of the HSWA;

(c) The risk of, and the potential for, illness, injury or death that could have occurred;

(d) Whether death, serious injury, or serious illness occurred or could reasonably be expected to have occurred;

(e) The safety record of the offender to the extent it shows any aggravating features present;

(f) The degree of departure from the prevailing standards in the industry;

(g) The offender's financial capacity or ability to pay any fine, to the extent that it has the effect of increasing the amount of the fine.

The High Court set out the four steps well known to counsel:

> (a) Assess the amount of reparation to be paid to the victims;
>
> (b) Fix the amount of the fine to 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 imposing the sanctions under the first three steps.

[79] I have the benefit of counsel submissions with respect to sentencing following this approach. To some extent those submissions have been ongoing and developing but we have reached a point today where I can deliver this decision.

Reparation

[80] In terms of reparation I am required to make an assessment of the emotional harm to the victims with reference to the victim impact statements.

[81] Victim A's injuries have been described in the facts of this offending. I repeat they were described as "moderately severe with the potential to be very severe, even life-threatening".

[82] Victim A suffered significant emotional harm. He was scared to return to the kindergarten. Restarting for short periods from August 2017, some nine months after the incident. He has experienced nightmares. He appears to be "a nervous boy all the time". He is fearful of trees, fearful of being in small rooms, and specifically being left alone. The victim impact describes his mood as constantly unstable. Ms Cooper spoke to this today.

[83] His condition has been confirmed by reports from Drs Gollop and Wu. A medical report from Chief Physician Huimin dated 27 July 2018, where the physician opines Victim A is now diagnosed with a "phobia" and advises weekly psychotherapy sessions. The family report considerable cost arranging additional care for their son and ongoing cost of treatment. Again that was referred to in detail by Ms Cooper

today. Worksafe have submitted reparation of $35,000 towards emotional harm suffered by Victim A. Discoveries do not dispute this. Consequential loss has been assessed at $5,817.30.

[84] Victim B suffered emotional harm on the following basis. For the first six months Victim B was scared of going outside, especially when windy. Scared of the sound of the wind and leaves of trees. He was traumatised by what had happened to him. His health did improve and is now described as "doing okay and is a normal, happy, healthy kid". Worksafe have submitted emotional harm reparation of $3000. Again, Discoveries do not dispute this.

[85] Victim C – his behaviour changed following the incident. He had trouble sleeping. He became agitated and scared when it was windy and was frightened that trees might fall down. He is fearful about being away from his mother. He cannot study alone. His mother comments "… his personality has changed, he is a completely different person". On that basis Worksafe have submitted emotional harm reparation of $4,000. Again, Discoveries takes no dispute with this.

[86] Finally, Victim D, who like Victim A suffered significant injuries, being described by her mother as "down to the bone" when she arrived at the childcare centre on the day. Victim D has required ongoing specialist care and in 2018 underwent facial surgery for revision of her scars. Despite that, she has been left with a scar on her face. This is obvious. Her behaviour has changed. She is less able to make eye contact. She becomes angry if her scar is mentioned. Victim D has lost confidence, is nervous and suffers from anxiety. She is fearful of loud noises. She refuses to sleep alone. She has unusual reactions to others being hurt and to seeing blood. Her social interaction has reduced. She is described as being "quite self-conscious about the scar she has on her forehead" and perhaps disturbingly now draws herself with a scar. The occupational report for ACC records changes in Victim D's behaviour being observed at drop-offs and pick-ups by family members. This has had a flow-on effect in terms of the anxiety experienced by her own mother. Worksafe submitted emotional harm reparation in the sum of $35,000 is appropriate. Again, no dispute was raised with this figure.

[87] For clarity I now set out the actual sums to be paid by Worksafe, firstly their 60 percent share of the assessed reparation and appropriate reductions for the two payments already made to Victim's B and C. Discoveries will pay Victim A emotional harm reparation of $21,000 plus a consequential loss of $3,490.38. Discoveries will pay Victim B $300. This figure takes account of the $1,500 already paid to Victim B. Discoveries will pay Victim C $400 emotional harm reparation. This takes account of the $2,000 already paid out to Victim C by Discoveries. Finally, Discoveries will pay Victim D $21,000 for emotional harm reparation.

[88] Accordingly, I order a total amount of reparation of $46,190.30 be paid to the victims by Discoveries. This amount includes Discoveries share of consequential loss to Child A in the sum of $3,490.

Fine

[89] I now turn to the fine. In *Stumpmaster* the High Court set out four sentencing bands:

(a) For low culpability, fines up to $250,000 will be appropriate;

(b) For medium culpability, a range of between $250,000 and $600,000;

(c) For high culpability, $600,000 to $1 million;

(d) For very high culpability, more than $1 million.

[90] The High Court has confirmed the orthodox approach to sentencing should be adopted in relation to fines imposed under the Act. Namely, a starting point should first be fixed, which reflects the aggravating and mitigating features of the offending, and that starting point should then be adjusted to take account of any aggravating or mitigating factors particular to the offender, and the guilty plea. There is a dispute between Discoveries and Worksafe as to the defendant's culpability. Discoveries submit their culpability is low while Worksafe submit it is in the moderate or middle of the medium culpability band. Accordingly, I address the factors relevant to any consideration as to culpability for Discoveries.

[91] Discoveries have submitted their culpability is low. That was on the basis of Discoveries attempt to comply with its duties. Relevant to that this was one omission in the context of they say, systematic and comprehensive processes that were in place which included a hazard assessment of trees. It may have been "one omission" by Discoveries but the consequences of that omission were severe. It left two of the victims with very serious injuries – in the case of one little girl, she has been left with a large permanent scar on her forehead.

[92] I have already referred to the disingenuous attempt by Discoveries to persuade the Court of their systematic and comprehensive processes for addressing health and safety. Discoveries appears to have levelled blame at other parties such as the Education Review Office which conducted an assessment and did not mention the tree hazards. Discoveries also claimed a number of persons working nearby the centre raised the trees deterioration with the Council, but no such concerns were raised directly with the defendant.

[93] Dr Singh in his evidence sought to rely on the centre's employees reporting day to day hazards. However, it seems inconceivable that not one staff member identified the dead tree as a hazard. Various health and safety checklists were relied on by Dr Singh in his evidence. However, on reading the defendants own daily OSH checklist (Exhibit C to Dr Singh's affirmation) it is notable there is no item for the checking of hazards relating to trees and shrubs, however there is an item to check for poisonous plants. There is also a Health and Safety New Zealand Site Hazard Assessment Report (Exhibit H) in 2015 referring to a large number of trees but failing to specify or refer to the dead tree and the potential risks associated with that.

[94] Discoveries is under an express duty (s 36) to ensure so far as reasonably practicable that the health and safety of workers and other persons are not put at risk from work carried out as part of the conduct of the business or undertaking. This obligation to protect the health and safety of the staff and the young children attending the childcare centre each day rests squarely on Discoveries regardless of whether or not outsiders, such as parents, members of the public or Auckland Council, have identified a hazard at the childcare centre. The onus is on the defendant, and on one view is in fact higher due to the high number of vulnerable children in Discoveries

charge on a daily basis. The seriousness of Discoveries responsibilities is informed by the fact the defendant held an Early Childhood Education and Care Centre Licence enabling them to have at the centre each day a maximum of 50 children, including up to 15 children under two years, during its hours of operation. I form the view that the responsibility for the health and safety for such a large group of children should be set at the highest level.

[95] The defendants were operating a childcare business from premises where a huge, but quite dead, tree was prominently in the centre's playground area. There was never an assessment of the risk of trees falling over by Discoveries or for that matter Heng Tong. It was reasonably practicable to do such an assessment given the children played under the tree in question and the defendant knew of its deterioration. Discoveries failed to meet its statutory duty under s 36.

[96] The defendants submitted that its culpability under s 8(a) of the Sentencing Act was low because among other matters, its management staff turned their minds to tree hazards independently of the Ministry of Education checklist. As already indicated those checklists and reports did not go far enough in identifying the potential hazards concerning the conditions of the tree in the playground. They failed to identify the fall risk. The defendant's assertion of low culpability flies in the face of the defendant's own admissions where it states at:

> 78. DEL accepts the deterioration. It did not appreciate the risk of it toppling. It accepts it missed the point, but it did so while diligently managing the hazard at the childcare centre, including other tree-related hazards. …

[97] I am satisfied considering the breach of the primary duty of care under s 36 and the serious injuries suffered by some of the children, the defendant's culpability extends beyond the low range. Not only did injury and serious injury occur, but the fact that serious injury or death could reasonably have been expected to have occurred is all too obvious.

[98] I do not accept Discoveries submission there are no available guidelines in this area. I have already referred in this decision under the s 156 application.

[99] For completeness in terms of the costs associated with the available ways of eliminating or minimising the risk, one only needs to look at the relatively minimal effort required from Heng Tong who removed a further tree from the property and another outside the property. In short, the costs of removing those trees were and cannot be arguably suggested as being disproportionate to the risk of serious injury or even death, which has been identified.

[100] Worksafe submitted Discoveries culpability was at the moderate culpability or middle of the medium band and that a starting point for a fine of $420,000 to $430,000 is appropriate.

[101] For Discoveries Mr Beadle submitted on the basis of the defendant's culpability being low, on a worst case they should be seen on the cusp of the low to medium band at $250,000.

[102] After assessing the various factors informing culpability I am satisfied Discoveries culpability is in the medium band. The appropriate starting point for a fine is therefore $430,000. I am particularly persuaded by the fact that the victims were vulnerable children and the serious injuries sustained by at least two of those children as a result of the failures by Discoveries.

Aggravating Factors

[103] There are no aggravating factors with respect to Discoveries. They have no previous convictions under the legislation. Accordingly, there is no uplift required.

Mitigating Factors

[104] It is accepted there are a number of mitigating factors that must be taken into account. This is acknowledged by the prosecution. In particular, reparation to be paid. Cooperation by Discoveries with Worksafe and Discoveries expressed remorse. Finally, their safety record. In my view that would reduce the fine by 35 percent. Discoveries are then entitled to the maximum discount for their guilty plea of 25 percent.

Financial Capacity in Relation to Fine

[105] I have not been presented with any submissions by Discoveries that would suggest that they are not in a position to meet a fine.

Other Orders Under HSWA

[106] For the reasons already stated I do not consider it appropriate that either a Court ordered enforceable undertaking be imposed or any other orders under the Act.

Final Calculation of Fines

[107] Accordingly, from a starting point of a fine of $430,000 there should be a discount of 35 percent for mitigating factors. There should then be a further discount of 25 percent for guilty pleas. That would take the fine to $209,625.00.

[108] I direct a contribution to costs of Worksafe under s 152 of the Act. Discoveries do not challenge the contribution sought by Worksafe. Accordingly, I order the amount of $2,109.00 for payment of Discoveries share of the costs.

[109] Finally, I am obliged to make an overall assessment as to the imposition on Discoveries of reparation, fine and any other orders. The total must be proportionate to the circumstances of the offending and the offender. I am satisfied that a total payment of reparation in the sum of $46,190.30, a fine in the amount of $209,625.00, and payment of their share of the costs to Worksafe is a proportionate and appropriate penalty with conviction being entered today.

Signed at Auckland this 23rd day of August 2019 at am / pm

E P Paul
District Court Judge