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

IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2022-092-009039
[2023] NZDC 26962

WORKSAFE NEW ZEALAND
Prosecutor

v

CREATE AND CONSTRUCT LTD
Defendant

Hearing:	20 November 2023
Appearances:	K Opetaia for the Prosecutor S Curlett and A Smith for the Defendant
Judgment:	6 December 2023

RESERVED JUDGMENT OF JUDGE S MOALA
[On Sentence]

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[1] Create and Construct Limited (CCL), a construction company, appears for sentencing today having pleaded guilty to one charge under s 36(1)(a), 48(1) and (2)(c) of the Health and Safety at Work Act 2015 (the HSW Act). The charge carries a maximum fine not exceeding $1.5 million.

[2] The charge is that on or about 17 November 2021, CCL, being a person conducting a business or undertaking (PCBU) and having a duty to ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU, including [name deleted - the victim] and [name deleted - employee 1], while the workers are at work in the business or undertaking, namely working on a roof terrace,

did fail to comply with that duty, and that failure exposed workers to a risk of death, serious injury or serious illness arising from a fall from height.

[3] The particulars of the charge is that it was reasonably practicable for CCL to have:

1. provided and implemented a safe system of work for working on the roof terrace, including a hazard and risk assessment of this work task;

2. minimised the risk of a fall from height by installing edge protection around the terrace;

3. ensured that workers had received effective information and instruction regarding working on the roof terrace, including the risk of a fall from height.

[4] CCL undertakes construction and renovation projects for residential properties.

[5] [The victim] is the victim. He was a self-employed worker who had been contracted to work solely for the defendant since 9 November 2020. Steve Moore was the site manager for the defendant. As the site manager on the day, he was authorised to manage the work on site. [Employee 1] was working alongside [the victim] when the incident occurred. He had been employed by the defendant as an apprentice builder since March 2021.

[6] CCL was engaged by the homeowners of [address deleted], Sunnyhills, to carry out extensive renovations and upgrades to the home. The work included the installation of membrane deck, post patchers for a glass handrail/balustrade which was to be erected around the edge of a large existing roof terrace. The roof terrace extended from the west side of the home around the corner to the north side. It was 3 metres high.

[7] On 10 November 2021, a risk assessment was carried out by the defendant in respect of "working at height" at the site generally (there was other "work at height"

at the site being done by the defendant). The risk of working at height was identified and "handrails and edge protection" were noted as being a relevant control measure.

[8] On 25 October 2021 the defendant ordered a steel scaffolding edge protection system, which was to be used as edge protection around the roof terrace. This edge protection system was not delivered to the site until 18 November 2021.

[9] On 17 November 2021 at 7:14 am, a pre-start meeting was conducted and attended by five workers including the site manager Mr Moore and [employee 1] who was working alongside [the victim] when the incident occurred. [The victim] was not present at the pre-start meeting as he was collecting materials for the project. No new safety risks were identified at this meeting, with the record of this meeting noting that nothing had changed since the last risk assessment was completed (this being on 10 November 2021). [The victim] had previously attended a pre-start meeting in which working at height was discussed on 22 October 2021.

[10] On 17 November 2021, Mr Moore directed [the victim] and [Employee 1] to mark out the membrane deck post locations using a string chalk-line. [Employee 1] was holding one end of the line while [the victim] held the other end, near the edge of the roof terrace. [The victim] stepped sideways towards his right and stepped off the edge of the roof terrace.

[11] [The victim] suffered a broken collarbone and a fractured left hand. The defendant accepts that the risk was a fall from a 3 m height when carrying out the task of working on the roof terrace. This created a risk of serious injury or death.

[12] The investigation revealed the following:

1. The defendant had health and safety documentation that was relevant to the work being done on site, including:

    a. "Create and Construct Health and Safety Management System 2021", which set out at a high level the need to carry out risk assessments and control risks.

b. "Main Contractor Site Specific Safety Management Plan for: Create and Construct Ltd", which stated high level principles including that PCBU must provide a safe working environment and ensure workers knew of all hazards and controls, and their supervisors were to ensure they did not knowingly expose workers to harm.

c. The risk assessment carried out on 10 November 2021, in which working at height was identified as a risk and "handrails and edge protection" was noted as being a control measure.

[13] Neither of these documents specifically identified the risk of a fall from the roof terrace, how this was to be controlled, and how workers were to be informed of it.

[14] There was no form of control for the risk of the fall from height in place on the day of the incident.

[15] Mr Moore advised that edge protection had been ordered for the site, and that he was aware that it had not arrived when he directed [the victim] and [employee 1] to carry out work on the roof terrace. The edge protection arrived on site the day after the incident occurred.

[16] [The victim] attended an on-site induction on 22 September 2021, as well as a pre-start meeting on 22 October 2021 which both addressed the risk of working at height. There is no other documented evidence of training related to working from height for either [the victim] or Mr Moore during their time working for the defendant.

Approach to sentencing

[17] Section 151(2) of HSWA sets out specific sentencing criteria to be applied. The court must also apply the Sentencing Act 2002. I take into account the purpose of HSWA as well as the purposes and principles of sentencing under the Sentencing Act.

[18] The guideline judgement regarding HSWA sentencing is the High Court decision in *Stumpmaster v Worksafe New Zealand*.[1] In this decision the High Court confirmed a four-step process:

a. assess the amount of reparation;

b. fix the amount of the fine, by reference first to the guideline band and then having regard to aggravating and mitigating factors;

c. determine whether further orders under ss 152-158 of the HSWA are required; and

d. make an overall assessment of the proportionality and appropriateness of the sanctions imposed by the first three steps.

Step 1 - Assessing reparation

[19] Sections 32-38 of the Sentencing Act addresses reparation. Reparation may be imposed in relation to loss or damage to property, emotional harm and relevant consequential loss or damage.

[20] Compensation for emotional harm is difficult to quantify financially. In *Tuff Pallets Ltd v Department of Labour;*[2] the High Court said:

> "Fixing an award for emotional harm is an intuitive exercise; its quantification defies finite calculation. 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 the form of anguish, distress and mental suffering."

[21] [The victim] was given the opportunity to provide a victim impact statement but has elected not to. Once [the victim] recovered from his injuries he remained employed by the defendant.

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[1] [2018] NZHC 2020
[2] (2009) 7 NZELR 322

[22] In *Ocean Fisheries Ltd v Maritime New Zealand*[3] an issue on appeal was whether it was appropriate to award emotional harm reparation to siblings of the deceased where victim impact statements had not been provided. The High Court upheld awards of $5000 for those individuals, as ordered by the District Court. This was half the amount ordered for the siblings who had provided victim impact statements.

[23] I accept WorkSafe's submission that reparation in the absence of a victim impact statement is appropriate. I can infer that [the victim] has suffered emotional harm given the nature of the incident and his injuries. The prosecutor's estimate is between $2000 and $5000.

[24] CCL agrees with WorkSafe that an emotional harm reparation amount should be ordered and agrees with the proposed amount.

[25] Having regard to the nature of the incident and [the victim]'s injuries, I am satisfied that a reparation order of $5000 is appropriate.

Consequential Loss

[26] In addition to emotional harm reparation, pursuant to s 32(1)(c) of the Sentencing Act, a victim is entitled to reparation for consequential loss. Section 32(5) allows the court to impose a sentence of reparation in respect of consequential loss not covered by entitlements under the ACC scheme. Therefore, a court may top-up the 80% of a victims' weekly income paid under the ACC scheme to 100% of the victim's weekly income. The prosecutor was unable to obtain further information from [the victim] in relation to his ACC entitlements.

[27] CCL says that [the victim] recovered from his injuries and returned to work for CCL as a carpenter some eight weeks after the incident. CCL calculated that [the victim] would be entitled to around $2160 in consequential loss reparation based on [the victim]'s average weekly gross income at the time of the incident ($1800).

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[3] [2021] NZHC 20831

[28] WorkSafe were unable to provide evidence confirming consequential loss. Ms Curlett submitted that without this evidence, consequential loss should not be awarded. I agree.

Step Two - Assessing the Fine

[29] Fixing the amount of a fine under HSWA begins with the four guideline bands set out in *Stumpmaster*:

a. Low culpability: up to 250,000;

b. Medium culpability: 250,000 to 600,000;

c. High culpability: 600,000 to 1 million; and

d. Very high culpability: 1 million plus.

[30] In assessing culpability, *Stumpmaster* referred to the relevant factors listed in *Department of Labour v Hanham & Philp Contractors Ltd.* [4] which are:

a. the identification of the operative acts or omissions at issue and the 'practical steps' it was reasonable for the offender to have taken;

b. the assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk;

c. the degree of departure from industry standards;

d. the obviousness of the hazard;

e. the availability, costs and effectiveness of the means necessary to avoid the hazard;

[4] (2008) 6 NZELR 79

f. CCL's state of knowledge of the risks and of the nature and severity of the harm that could result; and

g. CCL's state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[31] CCL acknowledged through its guilty plea that there were a number of reasonably practicable steps that it should have taken to protect [the victim]. These are set out as the particulars of the charge.

[32] I agree with WorkSafe that CCL was aware of the risk of working at height and it failed to implement a safe system of work that identified the risk and how it was to be controlled. This included failing to ensure that the workers who were getting up on the roof were made aware of the risk and the rules put in place. It is all very well to identify the risk and to put in place a plan to mitigate that risk but if the workers are not given that information then the process is meaningless. There is no information as to what training was undertaken by Mr Moore the site manager. The only information I have is that he was an experienced site manager.

[33] CCL submitted that the risk of working at height was identified and a plan was put in place. Steel scaffolding had been ordered and was to be installed around the roof terrace as edge protection prior to any work being carried out. On the day of the incident, the pre-start meeting noted that there was no change to this risk assessment. CCL says that the site manager made a fundamental error in the moment and gave offhand instructions to [the victim] and a second worker to take some quick measurements of the roof terrace and mark outposts. According to CCL there was no reason for this to happen as these measurements could have been taken from the ground floor. CCL says that this was a one-off incident caused by a genuine error of judgement by the site manager. Accordingly, CCL submits that the only act at issue is the site manager's decision to commence the preliminary work before the installation of edge protection.

[34] While I agree with CCL that this was a decision made by the site manager, I agree with WorkSafe that the systems put in place after the assessment of risk failed.

[The victim] was not at the pre-start meeting on the date of the incident. Therefore, he was not privy to the information given at that meeting. The risk assessment on 10 November 2021 may have correctly identified the risk but there was no evidence that [the victim] was told about that risk assessment. There is no information that [the victim] was aware that there was to be edge protection around the roof terrace prior to the commencement of any work on the roof.

[35] CCL accepts that the risk was obvious given the 3-meter height of the roof. It ordered edge protection as part of its risk assessment. It is accepted that there was a serious risk of injury or death. As outlined already, [the victim] fell off the edge of the roof and sustained a broken collar, and a fractured left hand.

[36] CCL accepts that it departed from the published guidelines and best practice guides which are available to the public.

[37] The MBIE best practice guidelines for working at height in New Zealand (BPG) lists factors contributing to injuries sustained from working at height:

a. lack of or inadequate planning and hazard assessment;

b. inadequate supervision;

c. insufficient training for the tasks being carried out;

d. incorrect protection or equipment choices;

e. incorrect use or set up equipment including personal protective use or set of equipment including personal protective equipment;

f. unwillingness to change the way a task is carried out when a safer alternative is identified; and

g. suitable equipment being unavailable.

[38] CCL submits that it did follow industry standards to the extent that it carried out an adequate risk assessment and identified the need for each protection as a control measure. However, as I have already mentioned these assessments are pointless if the information is not passed to the workers who are getting up on the roof and to those who are supervising them.

[39] CCL accepts that the risk of working at height was obvious and that there was a plan in place to install edge protection before work commenced. Again, CCL submits that this accident was due to an error of judgment by the site manager.

[40] CCL accepts that the installation of edge protection was readily available and not cost prohibitive.

[41] Finally, CCL accepts that it could have taken further steps to ensure that its workers were not exposed to the risk of falling from height. The issue was immediately addressed after the prohibition notice was issued by WorkSafe. The steel scaffolding which had already been ordered was installed.

Starting Point

[42] WorkSafe submitted that the offending falls towards the higher end of the medium band in *Stumpmaster* with a starting point range between 500,000 and 550,000. WorkSafe relies on the following decisions:

a. *Worksafe New Zealand v Armitage Williams Construction Ltd & Ors*.[5]

b. *Worksafe New Zealand v Forrest View High School Board of Trustees*.[6]

c. *Worksafe New Zealand v CentrePort Ltd*.[7]

d. *Department of Labour v Hanham & Philp Contractors Ltd*

[5] [2021] NZDC 16630
[6] [2019] NZDC 21558
[7] [2019] NZDC 12020

[43] CCL has submitted that a starting point fine is $300,000. It relies on the following decisions:

a. *Worksafe New Zealand v 1962 Trees Ltd*.[8]

b. *Worksafe New Zealand v Kerr Construction Whangarei Ltd*.[9]

c. *Worksafe New Zealand v Build Northern Ltd*.[10]

d. *Worksafe New Zealand v Lindsay Whyte*.[11]

[44] I have found the decisions of *Lindsay Whyte*, *Build Northern* and *Kerr Construction*, particularly helpful. In light of the aggravating features of this case, I adopt a starting point fine of $300,000.

[45] There are no aggravating features requiring an uplift from that starting point. There are a number of mitigating factors warranting a discount in this case:

1. CCL will be paying reparation so therefore it is entitled to rely on this as a mitigating factor.

2. CCL has no previous convictions and has not previously been subject to any enforcement action.

3. CCL was willing to participate in the restorative justice process and met with the coordinator. [The victim] did not wish to participate therefore a conference was not scheduled. I have read the affidavit of the co-director Clinton Lockwood. It is clear from that affidavit, and the efforts made by the company after the incident, that they are deeply remorseful.

[8] [2022] NZDC 26088
[9] [2021] NZDC 22782
[10] [2019] NZDC 23940
[11] [2017] NZDC 28019

4. CCL fully cooperated with Worksafe throughout their investigation. Therefore, it is entitled to a discount for co-operation.

5. CCL is entitled to a further discount for the remedial work undertaken since this incident. They have employed a full-time office manager who has been hired to provide further assistance with health and safety. Further training has been provided to the relevant workers as well as first aid refresher courses. CCL has also upgraded health and safety software. In addition, it is engaged counselling services through EAP to support staff and workers' well-being. Its senior management have conducted thorough internal audits in relation to health and safety. They have also purchased further edge protection equipment to ensure such control measures are readily accessible to be used across CCL sites. CCL has invested a significant sum of money for health and safety following the incident.

[46] I accept that discreet discounts of 5% for each of those five factors is appropriate. Finally, CCL is entitled to a 25% discount for its guilty plea. That comes to a total discount of 50% which brings the fine down to $150,000.

Financial capacity

[47] The court needs to consider in terms of ss 14 and 40 of the Sentencing Act and s 151(2)G of the HSW Act, CCL's ability to meet a fine.

[48] CCL holds insurance to meet any award of reparation. CCL has the financial ability to meet the fine that is ordered so long as it is able to pay by instalments.

[49] I make an order that the fine be paid by instalments as arranged between CCL and the Ministry of Justice.

Step 3 – Other orders

[50] WorkSafe provided a prosecution costs report seeking $614.24 which is 50% of costs incurred. This is not opposed by CCL.

[51] I therefore award costs in the sum of $614.24.

Step 4 - Proportionality Assessment

[52] This final step requires the Court to make an overall assessment of the proportionality and appropriateness of the combined package of sanctions imposed by the preceding three steps.

[53] Standing back and looking at the offending, the order of reparation, the sum of the fine, and costs, I am satisfied that they are proportionate and appropriate given the particular circumstances of this case.

Orders

[54] In summary:

a. CCL is ordered to pay reparation of $5000 for emotional harm to [the victim].

b. CCL is sentenced to pay a fine of $150,000. This will be paid by instalments.

c. CCL is ordered to pay costs of $614.24.

Judge S Moala
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 06/12/2023