IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CRI-2020-085-000871
[2022] NZDC 22731

WORKSAFE NEW ZEALAND
MAHI HAUMARU AOTEAROA
Prosecutor

v

FULTON HOGAN LIMITED
Defendant

Hearing:	12 September 2022
Appearances:	B Finn and K Sagaga for Prosecutor P Chisnall, St John Howard-Brown and S Jack for Defendant
Judgment:	21 November 2022

RESERVED JUDGMENT OF JUDGE A I M TOMPKINS

A tragic death

[1] On 11 March 2019 Mr Joji Bilo was killed. He was employed by Fulton Hogan Limited ("FHL"). That night he was working on resealing work of a section of State Highway 1, in the Ngauranga Gorge in Wellington. He was hit by a driverless, runaway heavy truck. He died at the scene.

[2] I acknowledge his death. I also acknowledge his partner and whanau, who attended this sentencing hearing and who addressed the Court.

[3] I also record the attendance at, and similar participation in, the sentencing hearing of members of FHL's senior executive and management team.

The charge, the guilty plea and a broad chronology of events

[4] FHL, as head contractor on the Ngauranga Gorge worksite, has pleaded guilty to one charge under s 34 of the Health and Safety at Work Act 2015 ('the Act"). The maximum penalty is a fine of $100,000.00.

[5] That guilty plea recognises that FHL accepts that it relevantly failed adequately to consult, co-operate and co-ordinate activities on the site, specifically in relation to two other contractors who were also working on the site that night. It is accepted that FHL's relevant failures, as acknowledged by its guilty plea, contributed to but were not the sole cause of Mr Bilo's death.

[6] Between 10 March 2019 and 14 March 2019, FHL was relevantly contracted to remove the existing road surface and to lay new asphalt on a 350-metre section of State Highway one in the Ngauranga Gorge. A milling machine was used to remove the old asphalt, which was then trucked off-site, before the new surface was laid. On 11 March work had started at 9:00 pm and was scheduled to continue through until 5:00 am the following morning.

[7] FHL had subcontracted with Wellington Contracting Limited ("WCL") for WCL to provide trucking and cartage services. WCL had agreed not to subcontract its obligations further without FHL's prior approval. WCL in fact had subcontracted part of its trucking work to Shuttle Express Limited ("SEL"). SEL had, earlier than the events in question, begun but not completed FHL's Health and Safety Assessment Capability process. SEL did not have a written contracting agreement with FHL, but despite that omission, SEL provided trucking services for FHL via what amounted to an informal subcontracting arrangement. WCL would invoice FHL for both its and SEL's work, and then pass the appropriate amount on to SEL.

[8] FHL had extensive safety and work systems documentation, which included "high level pictorial guidance" for matters such as truck parking and vehicle

specifications and operations. Relevantly, these included guidance requiring trucks, when parked on a slope, to be placed in park or a low gear with their wheels turned towards the curb, and the handbrake applied. Not all of these documents were available to sub-contractors. At least in part, FHL relied on what were termed "tailgate" meetings, when relevant safety and other information would be passed on to workers. It was aware that not all workers could necessarily attend all tailgate meetings, and expected foremen to brief workers who had, for one reason or another, been unable to attend the tailgate meetings.

[9] The night of 11 March was clear, and cool. There was no rain or fog. The worksite was illuminated by the State Highway One road lighting. The right-hand southbound lane was still open to ordinary traffic, with a reduced speed limit of 30kmh. Resurfacing work was occurring in the left-hand southbound lane area, which was marked off from ordinary traffic by road cones. Many FHL employees and vehicles and related heavy and other equipment were on site. The only subcontractor employees on the site were truck drivers.

[10] Mr Bilo had been employed as a general labourer by FHL since August 2018. His job that night, within the left-hand southbound lane worksite, was to provide both labour and quality assurance

[11] Shortly before Mr Bilo's death, a Nissan heavy truck, belonging to SEL and driven by its employee Mr David Jenkins, had driven onto the worksite. Mr Jenkins had been employed by SEL from mid-February 2019 but had been driving trucks for about 13 years prior to that. The truck he was driving that night was a Nissan diesel CG400 truck. That truck was fitted with a park brake manufactured by Sanwa Seiki Limited.

[12] Mr Jenkins had earlier that night started work at the SEL yard in Grenada North. After completing his logbook and checking the truck, he then left the yard and congregated with other contracted drivers at a Johnsonville meeting point, to await their call onto the site.

[13] When called in, Mr Jenkins drove into the worksite and parked the truck to await loading. At the appropriate time, he was intending to back the truck up under the milling machine, have it filled with waste material, and then drive the loaded truck to FHL's plant in the Hutt Valley. He was parked in a line with two other trucks, all facing downhill.

[14] When Mr Jenkins parked the truck, he applied the truck's park brake (although Mr Kenkins could not later specifically recall doing so – but there is no reason to believe that he did not) and descended from the cab onto the roadway. He did not, however, turn its wheels towards the curb. Nor did he place the truck in reverse gear. He should have, to accord with best practice, done both of those things.

[15] As noted, the truck was fitted with a park brake manufactured by Sanwa Seiki Limited. This brand of park brake was known to be defective. It was known to fail even after initially being properly engaged by a truck's driver. Specifically, the risk was that even after being applied, and with the park brake level placed into a locked position, the park brake could release without anyone lifting and disengaging the park brake lever.

[16] In New Zealand concerns about the particular brand of park brake had been known since September 2004. At that time, the Truck's New Zealand distributor recommended what are termed "low-level administrative maintenance" measures to guard against failure. At various times over the succeeding years, similar measures were repeatedly recommended by a variety of relevant industry or regulatory entities.

[17] In August 2010 another tragedy, similar to Mr Bilo's death, occurred. In Dunedin, a person was killed after the park brake in a Nissan truck failed. The runaway truck crushed the person against another truck. A defective Sanwa Seiki park brake was directly implicated. Following that tragedy, a number of entities issued hazard management and service advisory warnings. Subsequently, in June 2012, a coroner's report highlighted the failure of the Sanwa Seiki park brake.

[18] Immediately after the coroner's 2012 report in relation to the Dunedin incident was issued, FHL removed all Sanwa Seiki park brakes from its own truck fleet. As counsel for FHL noted:

> This effectively eliminated the risk/hazard from Fulton Hogan's nationwide truck fleet.

[19] Waka Kotahi NZTA continued to issue safety alerts relating to Sanwa Seiki park brakes. The most recent such alert, prior to Mr Bilo's death, was in May 2017.

[20] Remarkably, on 8 March 2019 – just 3 days before Mr Bilo's death – VTNZ, a large nationwide vehicle inspector, issued SEL's Nissan truck, fitted with a Sanwa Seiki park brake, with a Certificate of Fitness. The Police's Fatal Crash Report subsequently concluded that VTNZ staff should have been aware of the many safety concerns and alerts previously issued relating to the Sanwa Seiki park brake, including the waka Kotahi NZTA's May 2017 alert, and furthermore that the known faults with the Sanwa Seiki brakes were present in the SEL Nissan truck at the time of the issue of the Certificate of fitness. The Fatal Crash Report noted:

> … had a more thorough inspection been carried out, this fault should have been identified, resulting in the truck being removed from the road for urgent maintenance.

[21] Returning to the sequence of events on the night of Mr Bilo's death. Having parked the truck, Mr Jenkins got out of the cab and stepped down onto the roadway. The park brake then failed.

[22] Because the truck was parked on a downhill incline without its wheels being turned to the curb and without reverse gear having been engaged, it began to move downhill. Mr Jenkins became aware of this. He immediately tried to re-enter the cab of the truck, intending to regain control of it. He ran about 20 or 30 metres alongside the moving truck. Sadly, he failed in that attempt. He fell and was himself injured. The driverless truck by then was moving downhill at a speed of about 45 – 50 kmh.

[23] At that time, approximately 9:20 pm, Mr Bilo was, with another FHL employee, walking down the closed left hand southbound lane of State Highway One, measuring and marking out the section of roadway about to be worked on.

[24] Without warning, Mr Bilo was struck by the truck. He was dragged approximately 20 metres. Mr Bilo's colleague, who was further down the hill, received an urgent radio warning call, and was able both himself to jump out of the way of the truck, and to warn others.

[25] By that time the driverless truck had left the coned-off left hand southbound lane and entered the open right-hand southbound lane. It collided with the median barrier and then, scraping along that barrier, eventually came to a stop about 750 metres downhill from where Mr Jenkins had originally parked it.

[26] Mr Bilo was immediately given CPR by a FHL worker, under the direction of a nurse who had co-incidentally been driving past in her own car. Emergency services were called. When ambulance officers arrived, they took over administering CPR. Sadly, however, Mr Bilo had sustained fatal injuries. He died at the scene.

[27] Since Mr Bilo's death, FHL have been commendably pro-active regarding Sanwa Seiki park brakes, and workplace safety generally. For two years, beginning immediately after Mr Bilo's death, FHL actively lobbied a wide range of industry-wide participants for a recall of trucks fitted with the Sanwa Seiki park brakes. In addition, it has itself introduced significantly enhanced subcontracting plant minimum safety requirements to guard against a recurrence.

[28] A recall requiring that Sanwa Seiki park brakes be replaced by owners of Nissan trucks was finally issued by Waka Kotahi NZTA in March 2021.

[29] FHL has also stood alongside and supported Mr Bilo's family following his tragic death. In March/April 2019 the firm contributed $19,000 to funeral expenses, paid the family $40,755 pursuant to its employee insurance scheme, and made an immediate ex-gratia payment of $250,000. In August of this year an additional ex-gratia payment of $200,000 was made by Fulton Hogan to Mr Bilo's family.

The procedural history

[30] In March 2020 FHL, WEL, SEL and a director of SEL were charged by Worksafe with a variety of offences. FHL's charges were under ss 36 and 48 of the Act.

[31] Discussion between the parties occurred. About 18 months later, in November 2021, Worksafe received an earlier commissioned independent expert report. A month later, in December 2021, the charges against WEL, SEL and the SEL director were withdrawn.

[32] Subsequently, in August 2022 Worksafe amended the initial ss 36 and 48 charges against FHL to the current single s 34 charge. FHL immediately pleaded guilty that charge.

[33] Counsel for FHL stresses that the only offending for which Fulton Hogan is to be sentenced is that single charge under that section: this is not, counsel stresses, a s 48 sentencing for breaches of the Act's s 36 duties.

Summary of submissions

[34] I record that at the sentencing hearing comprehensive submissions were received, both in writing and orally, from counsel. In very broad summary, these can conveniently be encapsulated in each counsel's helpful written summaries, as now set out.

WorkSafe

[35] WorkSafe submits that the company should be sentenced as follows:

1. Emotional harm reparation in the order of $100,000 should be awarded to the victim Mr Bilo's whanau. FHL has already made voluntary reparation payments to the whanau, however, such that orders may not be necessary.

2. Emotional harm reparation in the order of $35,000 - $45,000 should be awarded to the victim Mr Jenkins.

3. WorkSafe is in the process of calculating whether or not consequential loss reparation ought to be paid to Mr Bilo's whanau and/or Mr Jenkins and if so, its quantum. A separate memorandum will be filed addressing this issue.

4. FHL's culpability justifies placement in the high culpability band for s 34 offending. A starting point in the range of $50,000 - $60,000 should be taken.

5. The fine should be reduced by 15% - 20% for FHL's gulty plea and 20% - 25% for further mitigating factors, leading to an end fine of around $27,500 - $39,000.

6. Costs of around $38,766 should be ordered in favour of WorkSafe.

Fulton Hogan

[36] Fulton Hogan submits:

1. Fulton Hogan takes health and safety seriously. It accepts its responsibility for its failings under s 34 of the HSWA. Fulton Hogan failed to consult, co-operate, and co-ordinate activities, as far as was reasonably practicable, with other PCBUs. However, it is important to remember that Fulton Hogan's failures were not the sole cause of the incident that resulted in Mr Bilo's death. Fulton Hogan is before this Court alone, but it is not a solely responsible defendant. Its failures contributed to the Ngauranga Gorge Incident along with various other parties, and this is not a s 48 sentencing. These two things must be reflected in the sentencing orders made against Fulton Hogan.

2. WorkSafe is correct when it points out that other parties such as Shuttle Express, Waka Kotahi NZTA, and VTNZ have not been prosecuted and

are not before this Court. But Fulton Hogan should not be held to bear greater responsibility for the Ngauranga Gorge Incident as a result of WorkSafe's prosecutorial decision-making. As Fulton Hogan is only one piece of the puzzle, understanding the roles that other parties played in the Ngauranga Gorge incident is integral to sentencing Fulton Hogan appropriately.

3. For the reasons set out in these submissions Fulton Hogan submits that the following sentence is appropriate –

(a) No additional reparation order in respect of the Bilo family as $509,755 has already been paid.

(b) No reparation order to Mr Jenkins in light of his contribution to the Ngauranga Gorge incident and Fulton Hogan's limited control over him (or in the alternative a third of what the Court would deem appropriate if Wellington Contracting and Shuttle Express were also before the Court).

(c) A fine of $12,000 for Fulton Hogan's breach of s 34 based on –

(i) a starting point of $30,000 (at the top of the medium culpability band);

(ii) less 25% for a guilty plea (less $7,500); and

(iii) less 35% for mitigating factors (less $10,500).

(d) Costs of approximately $3,000 to WorkSafe.

[37] In all the circumstances, I record that in my view the voluntary ex-gratia payments, together with the other payments, already made by FHL (and as set out above) to Mr Bilo's family mean that, as responsibly and entirely appropriately conceded by counsel for Worksafe, no emotional harm reparation order is now appropriate.

Issues

[38] Three substantive issues fall require determination:

(a) Was Mr Jenkins a victim, as defined, and therefore entitled to reparation from FHL (and if so, how much); and

(b) What an appropriate fine would be for FHL in relation to its admitted offending under s 34 of the Act; and

(c) What quantum of costs, if any, should be awarded against FHL.

Mr Jenkins

[39] There is disagreement between Worksafe and FHL as to whether Mr Jenkins is properly a victim of FHL's offending and therefore entitled to reparation.

Submissions of Worksafe

[40] Worksafe considers Mr Jenkins to be a victim of FHL's offending. He is therefore, in their view, entitled to reparation. Worksafe submits that while a charge under s 34 does not explicitly require exposure to risk of harm as an element, the concept of exposure to risks posed by the offending is still relevant when assessing who is a victim.

[41] Worksafe submits that Mr Jenkins was exposed to the risk of injury/death and suffered injury through or by means of the offending by FHL. It submits that FHL's offending was one of the substantial operative causes of the accident that resulted in Mr Jenkins' injuries, even if those injuries did not arise directly from the elements of the s 34 offence.

[42] Worksafe submits that the major difference between Mr Bilo and Mr Jenkins is that the former tragically died as a result of the accident, whereas the latter did not. It submits that the fact that Mr Jenkins worked for SEL whilst Mr Bilo worked for FHL is "beside the point".

[43] In response to the argument that Mr Jenkins is precluded from being considered a victim because he bears some responsibility for the accident himself, Worksafe submits:

(a) There is nothing in the agreed summary of facts to indicate Mr Jenkins is primarily to blame for what occurred; and

(b) There is no legal basis for the submission that a victim is precluded from being so classified, simply because of some measure of contribution to the accident that caused the injuries.

Submissions of FHL

[44] FHL submits that Mr Jenkins is not a victim. He is therefore, in FHL's view, not entitled to reparation of any kind.

[45] FHL submits that in light of Mr Jenkins' contribution to the incident, and the limited control FHL had over him, FHL should not be ordered to pay Mr Jenkins reparation.

[46] FHL submits that Mr Jenkins contributed to the incident in the following ways:

(a) Mr Jenkins did not put or keep the Nissan Truck's transmission in reverse gear;

(b) Mr Jenkins did not turn the Nissan Truck's wheels towards the bank; and therefore

(c) Mr Jenkins' failure to undertake basic parking precautions was a substantial operative cause of the incident.

[47] FHL submits that the cases cited in support of Worksafe's proposition that contributory conduct of a victim is rarely relevant to assessing defendant culpability and reparation, focus inappropriately on victim contribution in the context of sentencing decisions involving employers and employees. FHL submits that

employers typically and factually have far more control over their employees than they do over their independent contractor's employees.

[48] Therefore, FHL had far more control over Mr Bilo, as an employee, than FHL had over Mr Jenkins. This control enabled FHL as an employer to safeguard against employee carelessness in a way an employer cannot do for the independent contractors they engage, or those independent contractors' own employees.

[49] FHL submits that when a person is not an employee of the entity they are claiming to be a victim of, if their own carelessness materially contributed to the harm they suffered, this is a factor that should be considered by the Court when determining culpability and imposing orders at sentencing.

[50] In the alternative, FHL submits that if the Court concludes that Mr Jenkins is entitled to reparation, the amount ordered against FHL should be proportionate to its contribution to the Ngauranga Gorge Incident and also reflect Mr Jenkins' contribution to the Mr Bilo's death.

The Law

[51] A victim is defined in s 4 of the Sentencing Act 2002 as:

> **victim—**
>
> (a) means—
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> (i) a person against whom an offence is committed by another person; and
>
> (ii) a person who, through, or by means of, an offence committed by another person, suffers physical injury, or loss of, or damage to, property; ...

[52] In *Pegasus Engineering Ltd v Worksafe New Zealand*, Dunning J held that for the purposes of s 48 of the Act, in determining who amounts to a victim, Parliament's intention:[1]

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[1] *Pegasus Engineering Ltd v WorkSafe New Zealand* [2019] NZHC 2257

> limits it to the workers present on the day of the accident who are actually put at risk. This would preclude claims for emotional harm arising merely from a connection to the victim or the workplace. In each case, the prosecutor will have to determine whether they were exposed to the risk of death, serious injury or serious illness.

[53] In *Balajadia v R*, the Court of Appeal considered whether workers exploited as part of offending by defendants against the Immigration Act 2009 that involved misleading Immigration New Zealand, qualified as victims.[2] In finding that they did, the Court held:

> ... The charges for misleading INZ do not explicitly mention the treatment of the workers, but effectively featured two classes of victim: INZ, and the workers. Although not expressly covered in argument we are satisfied that the workers are victims in terms of s 4 of the Victims' Rights Act 2002; they are persons who have suffered loss or damage to property as a consequence of Mr and Mrs Balajadia's misleading of INZ. This is because the definition of victim includes a person who "through, or by means of" an offence committed by another person, suffers loss of, or damage to, property.
>
> [17] This definition mirrors the equivalent part of the definition of victim in the Sentencing Act 2002. It is also substantially similar to the threshold for persons who may benefit from an order for reparation under s 32 of the Sentencing Act.

[54] The Court went on to consider s 32 of the Sentencing Act, which deals with reparation, citing *R v Donaldson* as endorsing a liberal "broad and common sense" approach to s 32 and the words "through or by means of an offence" that are used in that section. The Court stated:[3]

> Adopting this approach it is not necessary that the damage or harm arises from the very acts which constitute the definition of the offence. That includes the loss of entitlement to wages suffered by the victims in this case. Their loss does not arise directly from the elements of the offending, that is the provision by Mr and Mrs Balajadia of false and misleading information to INZ. However, this offending was part of their overarching scheme to bring workers into this country, exercise control over them, and subject them to inhumane and substandard working and living conditions. The provision of false and misleading information enabled the appellants to cause the victims' loss; indeed the offending and subsequent mistreatment of the victims appear to be part of the same scheme and intended consequence of the offending.

[55] In *Worksafe v NE Parkes*, Judge Barkle considered whether, for the purposes of the Act, a farm worker who died following a Utility Terrain Vehicle ("UTV")

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2 *Balajadia v R* [2018] NZCA 483 at [16] and [17].

3 *Balajadia v R,* at [20]; *R v Donaldson* CA227/06, 2 October 2006.

rollover and who had herself disregarded certain safety instructions, was a victim. Judge Barkle held:[4]

> (a) In consideration of causation in a health and safety sentencing context, in my view, the Court should also be guided by the principles and purposes underpinning the health and safety regime. A key purpose of the regime is to protect workers and others exposed to risk of injury or death in workplaces. A less stringent approach to causation than that routinely applied for manslaughter may be appropriate in the health and safety context in order to give effect to the sentencing criteria in s 151 of the Act and the purposes of the regime in s 3 of the Act.
>
> (b) I accept that had Ms Garzon Hortoneda not backed the UTV in the manner that she did, the UTV would not have rolled. This is not, however, in my determination the end of the inquiry into causation. The courts have long since accepted the position that there may be multiple or concurrent causes of death. What is significant for the Court's purposes is not whether there was some other cause contributing to Ms Reslinger's death, but whether the defendant's conduct was a substantial and operative cause of her death.
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> (c) In my assessment it follows from this evidence that an operative and substantial cause of Ms Reslinger's death was her failure to wear a seat belt. That failure was found to be attributable to the HSWA failures of the defendant.

[56] In *Oceana Gold (New Zealand) Ltd v WorkSafe New Zealand*, Venning J considered the issue of contribution:[5]

> In the Cropp appeal Mr Lawson sought to argue that the reparation for loss of earnings should be reduced to take account of Mr Sloan's contributory negligence and his failure to observe certain existing standards in the logging industry which, he submitted, contributed significantly to the accident which caused Mr Sloan's injuries. The practical difficulty of such an argument is obvious. A sentencing hearing is not an appropriate forum for determining what standard practices might apply to an industry, how the injury may have occurred and what contribution a victim may have contributed to it. It was in part to avoid such issues (arbitrariness of damages and the difficulty of assessing compensation and contribution in civil cases) that the accident compensation scheme was established.
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> ...
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> I accept there is force in Ms Longdill's submission that to seek to reduce the reparation payable on the basis of contributory conduct would undermine that foundational duty on an employer.

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4 *Worksafe v NE Park s& Sons Ltd* [2020] NZDC 25449 at [88], [90] and [94].

5 *Oceana Gold (New Zealand) Ltd v WorkSafe New Zealand* [2019] NZHC 365 at [58] and [63].

In *R v Donaldson* the Court of Appeal made the point that reparation is to be:

> "approached in a broad common-sense way, and resort to refined causation arguments is not to be encouraged."

[57] In *Dept of Labour v Eziform Roofing Products Ltd*, Duffy J stated:[6]

> The nature of a victim's conduct is relevant when it comes to considering such conduct as a mitigating factor in the offending, or the weight to be attached to it. Not all such conduct should be treated the same. A victim's intentional or wilful disregard for safety practices may well mitigate otherwise seriously culpable conduct on the part of an employer. But guarding against workplace accidents that result from the foolish carelessness of employees is part of the role of the Health and Safety in Employment Act. So, to allow such carelessness to minimise an employer's culpability would undercut one of the policy objectives of the legislation. This is why the Full Court in Hanham & Philp refused to place any weight on the careless conduct of the victim in the Cookie Time appeal. It is also why the carelessness of the young victim's father in Street Smart was not understood to diminish the employer's culpability. As was recognised in Street Smart (at [59]), and approved by the Full Court in Hanham & Philp (at [56]), workplace accidents are a cost to, and burden on the community. Yet the community has no means of monitoring workplace safety, other than through the Health and Safety in Employment Act. Particularly in light of the accident compensation scheme's no fault principle, the fines imposed under this Act must act as a real deterrent on employers to avoid workplace accidents, including those involving the foolishness and carelessness of employees. Unless employers are influenced by the means of this Act to change the culture of employees who display a cavalier attitude towards safety precautions, the community will continue to bear the cost of the harm that results. It would be wrong, therefore, to permit employers to rely on an injured employee's foolishness or carelessness to mitigate the employer's culpability. It follows that in matters of workplace health and safety, to attach little, if any, weight to a victim's carelessness will not be inconsistent with the requirement in s 9(2)(c) of the Sentencing Act. Indeed, to do otherwise would subvert the policy of the Health and Safety in Employment Act. Thus, the Judge was wrong to take into account the carelessness of Mr Paul and Mr McKay when she came to fix the starting point.

Discussion

[58] FHL submits that in light of Mr Jenkins' contribution to the incident, and the limited control FHL had over him, FHL should not be ordered to pay Mr Jenkins reparation.

[59] I conclude, for the following reasons, that Mr Jenkins is a victim, as defined in the relevant legislation and case law:

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6 *Dept of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526 at [52].

(a) First, FHL cited no authority for the distinction they draw between an employer's control over their employees compared to their control over the employees of their subcontractors. While I accept that generally an employer will have more control over the former, of itself that does not absolves an employer of responsibility over the employees of their subcontractors.

(b) This is because to distinguish between the two would overlook the main statutory purpose of the Act, as set out in s 3 of the Act: "The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces. ... "

(c) Section 19 of the Act provides a definition of a "worker". Under s 19(1)(c), 'a worker' means an individual who carries out work in any capacity for a person conduction a business or undertaking (a "PCBU"), including work as an employee of a contractor or subcontractor.

(d) The main purpose of the Act accordingly includes providing a balanced framework to secure the health and safety of employees of subcontractors who are working in any capacity for a PCBU.

(e) It is therefore consistent with the purpose of the Act to recognise that FHL still had some responsibility for the safety of Mr Jenkins on the Ngauranga Gorge worksite. To fail to see Mr Jenkins as a victim who is eligible for compensation as a result of FHL's failings, would undermine the purpose of the Act to avoid workplace accidents, including those involving the foolishness or carelessness of employees and other workers.

(f) While FHL may have less control over the conduct and attitudes of the employees of sub-contractors than they do their own employees, FHL still had a responsibility to inform those employees of subcontractors of the safety expectations and precautions on the worksite. the reasoning in the case law set out above is applicable. Under s 34, as a

PCBU, FHL had a responsibility to consult and co-operate with the subcontractor, another PCBU, about the health and safety issues at the Ngauranga Gorge worksite.

(g) It was reasonably practicable for FHL to have consulted, co-operated and co-ordinated activities with WCL and SEL so as to ensure the health and safety of workers and others whose health and safety was affected by work at the Ngauranga Gorge worksite by -

(i) having sufficient processes and monitoring in place to identify all other PCBUs who were operating at the Worksite; and

(ii) ensuring clear communication of safe systems of work and health and safety expectations.

(h) By pleading guilty to the charge under s 34 of the Act, FHL accepts that it failed to adequately consult, co-operate and co-ordinate activities onsite with other contractors.

(i) FHL's offending was one of the causes of the accident that resulted in Mr Jenkins' injuries, even if those injuries did not arise directly from the elements of the s 34 offence.

(j) Given the encouragement by appellate courts of a wide interpretation of the phrase "through or by means" as contained in s 32 of the Sentencing Act, it is consistent with the statutory purpose of the Act to conclude that Mr Jenkins is a victim who is eligible for a payment of reparation.

[60] In respect to Mr Jenkins, Worksafe seeks an emotional harm payment of between $35,000 - $45,000, together with a consequential loss payment to cover an ACC shortfall of $24,225.18

[61] Given that I have concluded that Mr Jenkins is, in terms of the legislation, a victim, then FHL submits that an appropriate reparation payment should be 1/3 of the amount that would otherwise be appropriate, in light of:

(a) FHL is the only defendant left before the Court, the charges against WEL, SEL and the SEL director having been withdrawn, as noted above; and

(b) The charge is under s 34, and not a ss 36/48 charge; and

(c) Mr Jenkins' operational lapses (failing to turn the trucks wheels towards the curb, and failing to put the truck into reverse gear) were "a substantial operative cause of the Ngauranga Gorge incident and the injuries he sustained", and

(d) The primary entity responsible for Mr Jenkins' workplace safety, and the continued presence on the Nissan truck of the Sanwa Seiki park brake was SEL.

[62] I accept that approach. Had all of FHL, WEL and SEL been before the Court, I consider that, in all the circumstances, an emotional harm payment of $30,000, plus the ACC shortfall figure of $24,225.18, totalling $54,225.18 would have been appropriate. One-third of that figure is $18,075.06.

[63] FHL is accordingly ordered to pay Mr Jenkins reparation of $18,075.06.

The quantum of the appropriate fine

The Law

[64] In *Stumpmaster v Worksafe,* the High Court delivered the guideline judgment on sentencing offending under s 48 of the Act.[7] The principles in *Stumpmaster* have since been used in sentencing for offending under the Act beyond s 48.

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7 *Stumpmaster v Worksafe New Zealand* [2018] 3 NZLR 881.

[65] In *Stumpmaster*, the High Court determined that a defendant's culpability should be assessed by reference to the following factors, as noted in *Hanham*:[8]

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

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

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

(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.

[66] In *Department of Labour v Safe Air Limited*, Kós J noted in reference to the above considerations:[9]

> … the 6th and 7th considerations — both of which focus upon 'current state of knowledge' of both risk and avoidance — to an extent overlap the earlier considerations. They perhaps emphasise the need to bear in mind understanding at the time of the accident, and the need not to be influenced by hindsight … They can in appropriate cases be absorbed in the first five.

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8 *Stumpmaster v Worksafe,* above n 7, at [36]; *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79, (2008) 9 NZELC 93,095 (HC) at [54].

9 *Department of Labour v Safe Air Ltd* [2012] NZHC 2677, (2012) 10 NZELR 198 at [17].

[67] The identification of the operative action or omission at issue will usually involve the 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. Section 22 provides:

> **22 Meaning of reasonably practicable**
>
> In this Act, unless the context otherwise requires, reasonably practicable, in relation to a duty of a PCBU set out in subpart 2 of Part 2, 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—
>
> (a) the likelihood of the hazard or the risk concerned occurring; and
>
> (b) the degree of harm that might result from the hazard or risk; and
>
> (c) what the person concerned knows, or ought reasonably to know, about—
>
> (i) the hazard or risk; and
>
> (ii) ways of eliminating or minimising the risk; and
>
> (d) the availability and suitability of ways to eliminate or minimise the risk; and
>
> (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

[68] In *WorkSafe New Zealand v Bulldog Haulage Limited*, Judge McIlwraith considered offending under s 34 of the Act.[10] The Judge found the approach in *Stumpmaster* should apply in cases under s 34 of the HSWA, albeit with slightly modified culpability bands. These bands were accepted in *Worksafe v Armitage Williams.*[11] The bands are:

low culpability:	-	up to $15,000
medium culpability:	-	$15,000 to $30,000
high culpability:	-	$30,000 to $60,000
very high culpability:	-	$60,000 to $100,000

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10 *WorkSafe New Zealand v Bulldog Haulage Limited* [2019] NZDC 12202.

11 *Worksafe v Armitage Williams Construction Ltd* [2021] NZDC 16630 at [36].

[69] In determining the band, the Court found the factors set out in *Hanham* were also relevant to offending against s 34 of the Act.

[70] In terms of credit for reparation payments, the Court in *Stumpmaster* adopted comments from *Department of Labour v Hanman & Philip Contractors Ltd*:[12]

> [64] … Given the disparate purposes which underpin the sentences of reparation and fines, we are satisfied that a reduction in the appropriate level of fine by the total amount of the reparation ordered or monetary sum paid by way of amends is not generally appropriate unless for reasons of financial capacity. The statutory purposes of denunciation, deterrence and accountability would not be achieved if fines were reduced by the amount of the reparation on a 1:1 ratio. An assessment must be made of the whole of the circumstances including:
>
> - The desirability of encouraging the payment of reparation, or the taking of remedial measures (whether by way of a restorative justice process or otherwise).
> - The need to give significant weight to denunciation, deterrence and accountability.
> - The overall financial resources of the offender.
> - The need to impose an effective penalty which will be more than a mere licence fee.
> - The extent to which the reparation ordered will make good the harm that has occurred (including the response of the victim or the victim's family).
> - The extent to which any offer of reparation demonstrates remorse on the part of the offender.
>
> [65] Care must of course be taken to avoid double counting of mitigating factors.

[71] In *Stumpmaster*, when considering mitigating factors, the High Court stated:[13]

> By way of general guidance, we consider a further discount of a size such as 30 per cent is only to be expected in cases that exhibit all the mitigating factors to a moderate degree, or one or more of them to a high degree. That is not to place a ceiling on the amount of credit, but to observe a routine crediting of 30 per cent without regard to the particular circumstances is not consistent with the Sentencing Act.

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12 *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79.
13 *Stumpmaster v Worksafe*, above n 7, at [67].

Worksafe's submissions

[72] Worksafe submits that a starting point towards the upper end of the high band is appropriate, in the range of $50,000 - $60,000. Worksafe does not seek any uplifts to the starting point.

[73] Worksafe submits that a credit of 15 to 20 per cent of the starting point is available for FHL's guilty plea, as well as 10 per cent for FHL's substantial voluntary payments to Mr Bilo's family, which indicate remorse and responsibility.

[74] They submit a further discount of 10 to 15 per cent would be appropriate for FHL's co-operation with Worksafe's investigation and the steps that FHL has taken since the incident in relation to advocating for stricter regulations around the faulty Sanwa Seiki Limited park brake.

FHL's submissions

[75] FHL submits that its culpability places it in the medium culpability band and a starting point of $30,000 is appropriate.

[76] They submit that a guilty plea discount of 25 per cent is available. In addition to any guilty plea discount, they submit a further discount of 35 per cent is appropriate considering the following factors:

(a) Remorse;

(b) Co-operation with the Worksafe and police investigation;

(c) Remedial actions taken to prevent a reoccurrence of the Ngauranga Gorge Incident;

(d) Reparations voluntarily provided to the Bilo family; and

(e) FHL's good health and safety record.

Discussion

Starting Point

[77] The operative acts or omissions at issue:

(a) Because of the over lapping duties of FHL, SEL and WCL to ensure, as far as was reasonably practicable, the health and safety of workers and other persons, FHL had an additional duty under s 34(1) of the Act to consult, co-operate and co-ordinate activities with WCL and SEL. In order to discharge this duty, it was reasonably practicable for FHL to have sufficient processes and monitoring in place to identify all other PCBUs who were operating at the Worksite.

(b) FHL failed to have sufficient processes and monitoring in place to identify all other PCBUs who were operating at the Worksite and to have clear communication of safe systems of work and health and safety expectations at the Worksite.

(c) The informal relationship between FHL, WCL and SEL meant that it was not clear to staff on site that SEL was providing services on site as a subcontractor of WCL the evening of the Ngauranga Gorge incident. This in turn precluded FHL from directly communicating and co-ordinating with SEL. It was reasonably practicable for FHL to have identified that SEL was doing work at the Worksite.

(d) FHL provided greater health and safety direction to its direct employees than to workers of contractors and subcontractors, despite them being exposed to the same risks. FHL also failed to ensure those workers attended all relevant pre-start Tailgate Safety Meetings where health and safety was discussed.

(e) FHL failed to communicate known issues with the defective Sanwa Seiki Limited park brake to its contractors and subcontractors. Instead,

it assumed that potential issues with the brakes in its contractors' and subcontractors' trucks would be managed by New Zealand's regulatory regime. The agreed summary of facts concludes, and I accept, that it was reasonably practicable for FHL to communicate the known issues with the Sanwa Seiki park brake to its contractors and subcontractors.

(f) FHL did have detailed written procedures setting out systems of work, risk control plans and risk registers. I accept FHL's submission that it is committed to creating and maintaining a safe work culture. However, not all of these documents were passed on to contractors and subcontractors on site.

(g) As already noted, it is accepted that FHL's failures contributed to but were not the sole cause of the incident that resulted in Mr Bilo's death and Mr Jenkins' injuries.

(h) The principal omission by FHL was its failure to consult and communicate about the health and safety risks at the Ngauranga Gorge worksite with the employees of its contractors and sub-contractors.

(i) Given the safety risks on a site such as this was, as clearly evidenced by the tragic events giving rise to these proceedings, this was a significant omission.

[78] The nature and seriousness of the risk of harm occurring as well as the realised risk:

(a) Building sites, involving the operation of heavy machinery, generally have a high degree of risk involved. The Ngauranga Gorge worksite was a large, busy and complex site which had many workers and vehicles onsite, operating through the night.

(b) There are clear risks associated with a failure by the head contractor to communicate effectively across a large and complex worksite such as

this was. Specifically, there were risks involved in failing to identify PCBUs at the Worksite and failing to ensure clear communication of health and safety expectations to all workers onsite.

(c) A failure to appreciate and mitigate these risks can result in catastrophic outcomes, as was seen in this case.

(d) The nature and seriousness of both the risk of harm occurring, and the realisation of that risk here, point towards a higher starting point.

[79] The degree of departure from standards prevailing in the relevant industry.

(a) There are no industry standards for co-operation and co-ordination as such. However, the need for co-operation and co-ordination is written into the Act and is well known to a very large and very experienced operator such as FHL.

(b) As noted by FHL, not having all workers attend Tailgate Safety Meetings is not a departure from industry best practice, given practical considerations, and the availability of other workers to take those that miss the meetings through any risk control plan put together at the Tailgate Meeting.

(c) FHL submits that it is difficult to identify, consult, co-operate and co-ordinate with a subcontracted PCBU when formal approval has not been sought to have the subcontractor onsite.

(d) Overall, I consider that the departure from the prevailing standards in the industry was low to moderate.

[80] The obviousness of the hazard:

(a) The hazards posed by a lack of communication and co-operation are potentially wide ranging. The specific hazard of the defective Sanwa

Seiki park brake as fitted in this case on the Nissan truck was well-known to FHL.

(b) FHL had attempted to mitigate the risk associated with the faulty park brake by co-operating and communicating with the PCBUs that it knew about.

(c) Further, industry entities and regulators had repeatedly endorsed "low-level administrative controls". Seemingly in accordance with this approach, but remarkably, the Nissan truck involved in this case had recently received a certificate of fitness with a full pass from VTNZ.

(d) Nevertheless, the hazards posed by a lack of communication and co-operation are well known. I consider that the obviousness of the hazards in this case was moderate.

[81] The availability, cost and effectiveness of the means necessary to avoid the hazard:

(a) In order to avoid the hazard, FHL would have needed to better document the relationship with contractors, ensure their inclusion in relevant meetings and their receipt of relevant health and safety information.

(b) While it is not always practical or possible for all workers to attend Tailgate Safety Meetings, FHL would not have incurred significantly more expense by ensuring the relevant health and safety information was passed on to all employees of contractors and subcontractors onsite who were unable to attend these meetings, or to create an effective system to do so.

Other HSWA sentencing decisions

[82] In *Worksafe v Bulldog*, a truck driver sustained serious leg injuries after being hit by a forklift at a distribution centre.[14] An investigation by Worksafe identified failures on the part of Bulldog to comply with its statutory duties under the Act and Bulldog subsequently plead guilty to one charge of contravening s 34 of the HSWA. The particulars of the charge were that Bulldog failed to consult with other PCBUs about a safe system of work for truck drivers and forklift operators to follow at the distribution centre when loading 'curtainsider' trucks. Bulldog was one of many subcontractors operating in the distribution centre. Judge McIlraith found Bulldog's culpability to be in the low band and a starting point of $10,000 was held to be appropriate.

[83] In *Armitage Williams*, an employee of one of the three defendants suffered a significant fall while the defendants were engaged in renovation works at a mall.[15] Armitage Williams was charged with failing to consult, co-operate with, and co-ordinate activities with all other PCBUs under s 34 of the HSWA. Armitage Williams was contracted to carry out the renovations, and had engaged MacMillian plumbing as the plumbing contractor, who had in turn contracted Smartflow Plumbing as a subcontractor. The victim, who was an employee of MacMillian plumbing, suffered very serious injuries that will affect him for the rest of his life. In assessing Armitage's culpability Judge Lynch stated:[16]

> In my assessment the company's culpability sits on the cusp of the low and medium culpability bands for s 34 offending. $15,000 is the top of the low culpability band and the bottom of the medium culpability band ($15,000 - $20,000).
>
> Armitage Williams had appropriate systems in place to mitigate the risk of those working from height at its workplace. It was on notice and ought to have had greater awareness of what was happening on its site. Put colloquially, it dropped the ball. Accordingly, I would adopt a start point of $15,000

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14 *Worksafe New Zealand v Bulldog Haulage Ltd* [2019] NZDC 12202.
15 *Worksafe v Armitage Williams*, above n 11.
16 At [80].

[84] In *Worksafe v Premier Project*, the defendant also pleaded guilty to a charge under s 34 of the HSWA.[17] The victim had fallen from scaffolding and was seriously injured, resulting in six days in hospital and five months off work. The defendant had been engaged as a contractor to manage a building project. The Court found that there had been a failure in terms of inspection and oversight and a starting point of $25,000 was adopted.

[85] I conclude that viewed overall culpability in the present case sits around the medium to high band level. As the head contractor in charge of the Ngauranga Gorge worksite, FHL failed to consult, co-ordinate, and co-operate with its contractors and subcontractors on a high-risk night-time worksite, resulting in tragic outcomes. A starting point of $30,000 is in my view appropriate.

Aggravating factors

[86] Both Worksafe and FHL accept that there are no aggravating factors that warrant an uplift from the starting point.

Mitigating factors

[87] FHL has demonstrated genuine remorse for the tragedy that Mr Bilo, and his family, have suffered. This is reflected in FHL's substantial voluntary payments to Mr Bilo's family. A discount of 10% is available for remorse.

[88] FHL also actively co-operated with the Police and Worksafe investigations into the Ngauranga Gorge Incident. A discount of 5% available for this co-operation and display of accountability is appropriate.

[89] FHL has taken remedial steps since the incident in order to prevent the reoccurrence of a similar incident. These steps include raising awareness of the defective Sanwa Seiki park brake and lobbying Waka Kotahi NZTA to recall these park brakes. FHL has also introduced new processes and requirements when sub-

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17 *WorkSafe New Zealand v Premier Project Management Ltd* [2018] NZDC 27598.

contractors are used on site. A 10% discount is available for these remedial steps taken by FHL.

[90] FHL has no prior convictions under the Act since it began operating in 1993. A discount of 5% is appropriate.

Guilty plea discount

[91] FHL's guilty plea came after prolonged discussions between counsel in the lead up to trial. However, FHL pleaded guilty as soon as the charge against it was amended. FHL's guilty plea resulted in the saving of time and resources and, importantly, spared the victims of the incident from having to endure the full trial process.

[92] A guilty plea discount of 25% is appropriate.

[93] Overall, then, discounts totalling 55% are available and appropriate.

Result

[94] Accordingly, FHL is fined $13,500.00

Costs

Worksafe's submissions

[95] Worksafe submits that their legal costs are as follows:

(a) Internal legal costs amounting to $12,782; and

(b) External legal costs (excluding those incurred from the month of August 2022) of $64,750.

[96] Worksafe submits that a just and reasonable sum towards the costs of prosecution would be $38,766 (being approximately 50% of all legal costs).

FHL's submissions

[97] FHL does not oppose an order for costs but does oppose the quantum of costs sought by Worksafe.

[98] FHL submits that an award of approximately $3,000 would be consistent with the majority of recent costs awards.

[99] FHL submits that such an award would be consistent with the majority of recent costs awards, which are between $1,000 and $3,000, unless the matter involves particular complexities.

The Law

[100] Section 152(1) of the HSWA provides:

> **152 Order for payment of regulator's costs in bringing prosecution**
>
> (1) On the application of the regulator, the court may order the offender to pay to the regulator a sum that it thinks just and reasonable towards the costs of the prosecution (including the costs of investigating the offending and any associated costs).
>
> …

[101] In determining what level of contribution to regulator costs under s 152 is "just and reasonable", the Court in *Worksafe New Zealand v Budget Plastics (New Zealand) Ltd* adopted the list of factors provided by the Court of Appeal in *Balfour v R*:[18]

(a) the nature of the charges;

(b) the complexity of the trial;

(c) the time spent on the case;

(d) the conduct of the parties;

(e) the extent of the success of the prosecution;

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[18] *Worksafe New Zealand v Budget Plastics (New Zealand) Ltd* [2017] NZDC 17395 at [62]; *Balfour v R* [2013] NZCA 429.

(f) the sentence imposed;

(g) the defendant's financial position; and

(h) whether the defendant was legally aided.

[102] In *Stumpmaster*, the Court noted that costs awards should not be limited to cases where extra punishment is merited:

> [106] The costs challenge is without merit. As noted, the Act allows for these orders and the manner in which WorkSafe is presently calculating them, which is to focus only on lawyer litigation expenses, is modest. We are not to be taken to be encouraging or otherwise higher claims, but think it likely the legislation contemplates rather more cost recovery than that.
>
> [107] Mr Mackenzie's challenge was that no features were identified that made a costs order appropriate. The defendant had been co-operative, there were no unnecessary steps taken and accordingly no reason for an order. However, we do not consider this type of order is to be reserved for cases where extra punishment is merited. There is nothing in the legislative scheme to suggest that and costs orders in the regulatory context are commonplace.

[103] In *Armitage Williams*, a sum of $2,225.40 in costs was ordered to be paid between the three defendants. The Judge described this as "extremely modest" and not reflective of the true costs of a prosecution such as this.[19] In *Premier Project*, costs of $1490 were ordered in favour of the Prosecution.[20] In *Bulldog*, the Judge made a self-proclaimed "arbitrary approach" to costs, awarding $500.[21]

Discussion

[104] The costs awards in cases concerning offending under s 34 of the Act have all been relatively modest in the past, and not reflective of the actual costs incurred by the prosecuting agency. I see no reason to depart from that approach in this case.

[105] This matter was, of course, resolved by negotiation and a guilty plea prior to trial. I record that extensive and appropriately thorough sentencing submissions were filed. Both parties were responsible in their conduct of the case, and whilst serious, in

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19 *Worksafe v Armitage Williams*, above n 11, at [102].

20 *Worksafe v Premier Project*, above n 17.

21 *Worksafe v Bulldog,* above n 10, at [33].

the end it was not overly complex. In my view costs of $5,000.00 are appropriate, to be paid by FHL.

A I M Tompkins
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 21/11/2022