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**IN THE DISTRICT COURT  
AT TOKOROA**

**I TE KŌTI-Ā-ROHE  
KI TOKOROA**

**CRI-2019-077-000456  
[2019] NZDC 21558**

**WORKSAFE NEW ZEALAND**  
Prosecutor

v

**FOREST VIEW HIGH SCHOOL BOARD OF TRUSTEES**  
Defendant

Hearing: 24 October 2019

Appearances: N Self for the Prosecutor  
N Beadle for the Defendant

Judgment: 24 October 2019

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**NOTES OF JUDGE G C HOLLISTER-JONES ON SENTENCING**

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**Introduction**

[1] The defendant, the Forest View High School Board of Trustees, is an elected body constituted under the Education Act 1989. It has the responsibility of governing the Forest View High School, including setting the policies by which the school is to be controlled and managed.<sup>1</sup> The Forest View High School is a decile 2 secondary school in Tokoroa and has 330 students and 42 staff.

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<sup>1</sup> Clause 4, Part 2, Schedule 6, Education Act 1989.

[2] In terms of the New Zealand Secondary Schools sector, it is a relatively small secondary school. Part of Forest View High School's facilities include a performing arts space. [REDACTED], who has a background as a mechanic and hydraulics engineer, had been [REDACTED]. For 18 of those years, he had been using a mobile scaffold in the performing arts area to service the lights that illuminate the stage. He ran "the Lighting Crew" which was an extracurricular group of students who were responsible for setting up the lighting and adjusting it in the performing arts space. In 2018, [REDACTED] was a [REDACTED], then aged 16 and was a member of the Lighting Crew.

### **The charges**

[3] Following an incident at Forest View High School on 5 June 2018 involving the mobile scaffold, [REDACTED] and [REDACTED] were seriously injured. The defendant has pled guilty to two charges under s 48(1) and (2)(c) Health and Safety at Work Act 2015 ("HSWA") for failing to ensure as reasonably practicable, that the health and safety of persons, including [REDACTED] and [REDACTED], were not put at risk from work carried out as part of the undertaking of the school, namely using a mobile scaffold, and that failure exposed [REDACTED] and [REDACTED] to a risk of serious injury or death, arising from falling from a height. Today's hearing and this decision concerns the sentencing of Forest View High School in respect of these two charges.

### **The mobile scaffold**

[4] The mobile scaffold was comprised of a tower made of aluminium tube and it was 4.95 metres in height, 2.5 metres wide and 1.3 metres deep. It had a working platform that was 3.9 metres above the ground and had four lockable castor wheels with functioning brakes that could be used to lock it into place. Forest View High School purchased the mobile scaffold approximately in the year 2000 for the purposes of gaining access to the lighting gantry in the auditorium so that adjustments could be made to lights and new lights installed.

## The incident

[5] At approximately 7.00 am on 5 June 2018, the Lighting Crew were working in the performing arts area. The team that day consisted of [REDACTED], [REDACTED] and eight other students. [REDACTED] was [REDACTED] in charge. [REDACTED] and [REDACTED] climbed up the mobile scaffold and were on the platform. [REDACTED] then pushed the mobile scaffold into the centre of the auditorium and some strobe lights were attached to a lighting rig, then the mobile scaffold was pushed to another location. [REDACTED] and [REDACTED] then removed the safety rails at the top of the mobile scaffold so they could get under a lighting gantry that was lower. The mobile scaffold was then pushed to another position, the safety rails were then refitted by [REDACTED] and [REDACTED] and they were pushed to two other locations. [REDACTED] then climbed down from the mobile scaffold.

[6] [REDACTED] then climbed up the outside of the mobile scaffold onto the platform beside [REDACTED] and showed him how to change the lightbulb. [REDACTED] then sat down on the platform, facing away from the stage, with his legs hanging over the edge. [REDACTED] then reached up to take hold of the lighting gantry bar, intending to pull the mobile scaffold to the next light. As [REDACTED] began to pull the mobile scaffold along, it overbalanced and toppled over, away from the stage causing both victims to fall off the platform as the mobile scaffold fell. This resulted in both victims lying on the floor in an unconscious state and seriously injured. They were taken by ambulance to Waikato Hospital.

[7] [REDACTED] suffered the following injuries:

- A laceration to his head;
- a left trace frontal subarachnoid haemorrhage, causing bleeding into the subarachnoid space;
- minimally displaced posterior clinoid process fracture (skull fractures);  
and

- two rib fractures.

[8] ██████ was in hospital from the time of the incident until 11 June and then commenced rehabilitation at home.

[9] ██████ suffered:

- A fracture to his left femur;
- fractures to his left foot, including a significant compression fracture to his left foot; and
- also a head injury.

[10] ██████ required extensive surgeries to his left leg and foot. He remained in hospital until 23 June 2018 and continued his rehabilitation at home. He is yet to have further surgery.

### **The risk**

[11] The hazard involved in this incident was from two people being on top of a 3.9 metre mobile scaffold whilst it was being moved, with the clear risk of falling over onto the hard surface floor and/or bystanders. There was a clear risk of serious injury or death. In the 18 years since the mobile scaffold had been acquired by Forest View High School, up to 60 students had participated in using it. On the day in question, both victims were at risk, as were the other eight students.

### **The investigation**

[12] WorkSafe engaged a scaffolding expert to look at the mobile scaffold. It was the expert's opinion that the mobile scaffold was erected correctly and was structurally sound. There were no ladder or toe-boards, all four wheels were functioning but the brakes on the castors had not been engaged at the time of the incident.

[13] ██████████ had been provided with basic training by the company that supplied the mobile scaffold, but that was approximately 18 years prior to the incident. ██████████ had not been provided with an up-to-date training and nor had ██████████ or any other members of the Lighting Crew been provided with training in the use of the mobile scaffold.

### **Health and safety at Forest View High School**

[14] The defendant had a health and safety policy which set out a number of procedures for health and safety. The school had a health and safety committee, which comprised of two staff members and the Board of Trustees had both a policy committee and a property committee. The remit of these two sub-committees of the board included health and safety but only in a general way.

[15] No issues surrounding the mobile scaffold or its use had been raised with the school's health and safety committee. The committee was not aware of any risk assessment being undertaken on the mobile scaffold, nor was the committee aware that the mobile scaffold was being used by ██████████ and the students. Furthermore, it was not aware of any policies and procedures for staff and students regarding the use of the mobile scaffold.

[16] In particular, the defendant had not identified the mobile scaffold as a risk and it did nothing to eliminate or minimise the risk to health and safety of staff and students from its use. The defendant was unable to produce any information on:

- Health and safety documentation relating to the setup and adjustment of the lighting on the gantry in the auditorium;
- standard operating procedures for the use of the mobile scaffold;
- policy and procedures for working at height;
- policy and procedures for student involvement in the use of the mobile scaffold; and

- copies of any start-up or Toolbox meeting relating to the use of the mobile scaffold.

### **Best practice**

[17] There are a number of guidance documents regarding working at height or with scaffolding. In particular, there are the Best Practice Guidelines in respect of Scaffolding in New Zealand. Parts 4, 5.1 and 12.3 are applicable and the following aspects of those are relevant.

[18] In respect of Part 4, it states:

“Everyone involved in the scaffolding process must have knowledge, training and skills to perform the work safely, regardless of the height of the scaffold.”

[19] In respect of Part 5, and in particular 5.1, it provides that there must be implementation of a safe system of work before work starts. A safe system of work should include identifying any health and safety hazards and risks, as well as carrying out a risk assessment.

[20] Regarding scaffolding configuration, and in particular Part 12.3 which applies to tower and mobile scaffolding, it states that there is a high risk of tipping where there are people at or near the edge of the platform in conjunction with sudden movement or action. This creates a temporary high loading point, and I observe that is probably what happened here.

[21] Further, when moving a scaffold, it should be ensured that there are no people or materials on the scaffold. Further, when the scaffold is being worked on, the castor brakes should be applied.

### **Failure to take practicable steps**

[22] The defendant, through its plea of guilty to the two charges, has accepted it has failed to take the following practicable steps to ensure:

- (a) An effective risk assessment on use of the mobile scaffold.

- (b) A safe system of work for the use of the mobile scaffold, including:
  - (i) Identifying and managing the risks associated with the use of the mobile scaffold;
  - (ii) documenting specific safety procedures for the use of the mobile scaffold;
  - (iii) implementing policies and procedures on the safe use of the mobile scaffold; and
  - (iv) monitoring the use of the mobile scaffold.
- (c) The provision of effective information, training and instruction in the use of the mobile scaffold.
- (d) That persons who are not experienced or formally trained in the safe use of the mobile scaffold were supervised by a competent person when they were using it.
- (e) Alternatively, ensure a scissor-lift or mobile elevated work platform was used instead of the mobile scaffold to access height.

### **Remedial action**

[23] Changes made by the defendant since the incident include:

- (a) Disassembling the mobile scaffold and preventing its use until the correct procedures were put in place.
- (b) Reconstituting its health and safety committee, which now includes five head of departments and the principal and has its own budget.
- (c) Purchasing from a provider called SchoolDocs Policies and Procedures, a new health and safety policy and procedures package, including a

package which develops a risk assessment tailored specifically to Forest View High School.

- (d) Additionally, purchasing the Safety Seek Online Health and Safety Management System, which is designed to enable the user to monitor its workplace health and safety easily and effectively.
- (e) All hazard identification forms are photocopied and provided to the school caretaker, who will organise the remediation work required and then complete the forms. These forms are stored in the school office and hazards identified and remediation works required will be reported to the Board.
- (f) The policy and property sub-committees will report to the Board each month as usual, which will include reporting on health and safety matters.
- (g) Students and staff will be provided with information regarding the identification of the hazards and how to report these hazards.
- (h) The school caretaker has completed a work at heights course and will be in charge of work at heights and provide training to any person assisting with them.

### **Victim impact**

[24] [REDACTED] has provided a victim impact statement. He is aged 65 years and had been [REDACTED] at Forest View High School [REDACTED]. As a result of the incident, he tore the rotator cuff in his left shoulder, which required surgery, he fractured ribs and he has been diagnosed with concussion. The major impact upon [REDACTED] has been from the results of the head injury. This has affected him emotionally and in particular, he struggles with the loss of his ability to concentrate and to work. He gets tired easily and is exhausted by tasks he used to find easy. He finds social settings challenging and can get overwhelmed by having his grandchildren around to play.

[25] The Accident Compensation Corporation engaged an occupational physician, Dr Douglas, to review [REDACTED] function. Dr Douglas states that, “[REDACTED] continues to suffer fatigue, irritability, headache, dizziness and nausea.” He was found to have a mild to moderate traumatic brain injury. Dr Douglas undertook an occupational assessment and concluded that [REDACTED] was only capable of light activities that were relatively low stress and should not work in situations where interpersonal contact is likely to occur. This has resulted in [REDACTED]’s retirement from [REDACTED], as Dr Douglas concluded that he was not medically fit to work as a [REDACTED]. Nor was he fit to work in the automotive sector, either as a mechanic or a vehicle inspector or a workshop manager, and effectively, any future role for [REDACTED] will be of a light duties nature.

[26] [REDACTED] has read his victim impact statement to the Court. He found the time in hospital, which was three and a half weeks, particularly distressing due to the serious pain and the procedures that he underwent. [REDACTED] had underlying disabilities of ADHD and OCD, with both conditions being exacerbated by the brain injury. [REDACTED]’s studies were significantly affected last year and this year, whilst having returned to school full-time, suffered ongoing concentration issues. He suffers from mental fatigue and ongoing pain. He also suffers from flashbacks.

[27] [REDACTED], [REDACTED]’s mother, read her victim impact statement dated 9 October and a supplementary victim impact statement dated 22 October to the Court. She has been significantly impacted by, first of all, not being able to care for her son at the scene, having to watch him go through excruciating pain in hospital and then having to care for [REDACTED], who was initially confined to a wheelchair. She has also had to deal with his mood swings and angry outbursts, which were the initial consequences of his head injury. She is distressed by watching her son not perform at the level that a 16 to 17 year old boy would normally perform at.

[28] I observed [REDACTED] today and was impressed by his courage and his ability to articulate in a courtroom setting the effect of the incident on him. Whilst this incident and the injuries are a setback for [REDACTED], in my assessment he does have a bright future.

## **The defendant**

[29] The Forest View High School has no previous health and safety history and co-operated with the WorkSafe investigation.

## **Approach to sentencing**

[30] Section 151(2) HSWA sets out the criteria for sentencing. The Court must apply the Sentencing Act 2002, in particular ss 7 to 10, and must also consider the purpose of the HSWA which is set out in s 3. This includes protecting workers and other persons against harm to their health safety and welfare, and securing compliance with the Act through effective and appropriate compliance and enforcement measures.<sup>2</sup>

[31] The Court is also required to take into account:

- (a) The risk and the potential for injury or death;
- (b) whether death or serious injury occurred or could reasonably have been expected to have occurred;
- (c) the safety record of the person;
- (d) the degree of departure from prevailing standards in the person's sector;  
and
- (e) 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.

[32] All of the above matters are set out in s 151(2) HSWA. In respect of the applicable provisions of the Sentencing Act, the Court is required to:

- (a) Hold the offender accountable;

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<sup>2</sup> Section 3(1)(a) and (e) Health and Safety at Work Act 2015.

- (b) promote in the offender a sense of responsibility;
- (c) provide for the interests of the victim, including reparation; and
- (d) to assess the gravity of the offending, together with the seriousness of the type of the offence, as indicated by the maximum prescribed penalty.

[33] A full Court of the High Court has issued a guideline judgment for sentencing under the HSWA.<sup>3</sup> The Court confirmed that there are four steps to the sentencing process:

- (a) Assessing the amount of reparation to be paid to the victim.
- (b) Fixing the amount of the fine by reference first to the guideline bands and then having regard to the aggravating and mitigating factors.
- (c) Determining whether further orders under ss 152-158 HSWA are required.
- (d) Making an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

### **Submissions**

[34] I have received very helpful written submissions from the prosecutor and from the defendant. Counsel have also provided oral submissions. The summary of the prosecution submissions is that:

- (a) There should be a reparation order for emotional harm in favour of ██████████ in the vicinity of \$50,000.

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<sup>3</sup> *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

- (b) A reparation order for emotional harm in favour of ██████ in the vicinity of \$60,000.
- (c) A reparation order for emotional harm in favour of ██████, ██████ mother in the vicinity of \$3000, and associated with that, an order for consequential loss in favour of ██████ in the vicinity of \$2325.
- (d) In respect of a fine, the prosecution submit that the defendant's offending should be categorised as on the cusp of medium and high culpability, with a starting point of \$600,000. From that, the prosecution accept that there should be discounts for a good safety record, reparation, remorse, co-operation with the investigation and remedial steps that result in a 25 percent discount for personal mitigating factors, followed by a 25 percent discount for early guilty plea.

[35] Subsequent to the filing of the prosecution written submissions, the defendant has filed an affidavit from the Principal, Ms Jocelyn Hale and a business analyst from Education Services Limited, which provides finance and property administration to Forest View High School. Both those affidavits detail the school's financial position. Following the receipt of that information and after discussions between counsel, the prosecution accept that Forest View High School is not in a financial position to meet a fine and the prosecutor seeks the Court to make an order under s 155 HSWA setting out a specified project for the defendant, and I shall come to the terms of that.

[36] The defendant, in its submissions, agrees that there should be an award of emotional harm of \$50,000 for ██████. In respect of ██████, it is submitted by the defendant that the appropriate reparation award for emotional harm should be \$40,000. The defendant accepts an award of \$3000 is appropriate for ██████ to reflect her emotional harm, but the defendant submits that ██████'s legal costs are not compensatable under the Sentencing Act.

[37] In respect of the fine, the defendant submits an appropriate starting point should be \$500,000, then from that, the defendant's submissions agree with the

prosecution's submissions that a 25 percent discount for personal factors is appropriate. Then finally, a 25 percent discount for guilty plea.

[38] Mr Beadle emphasised that the defendant has been proactive in proposing the project order instead of a fine and that this is part of the defendant's response to the incident and is a genuine expression of its remorse. In respect of remorse, there has been a very useful restorative justice process. Two restorative justice conferences were held; one between the principal, the Board chair and [REDACTED], and the second between the principal, the Board chair and [REDACTED], on behalf of [REDACTED].

[39] At the restorative justice meeting with [REDACTED], the school were very clear about their remorse and apologised to [REDACTED] and his wife. They also made it clear to [REDACTED] that they did not consider that he was responsible for what occurred. My observation was that was an important acknowledgement for [REDACTED].

[40] The restorative justice meeting with [REDACTED] gave her an opportunity to air her concerns about initial lack of communication and also misunderstandings that had developed. The principal and chairperson were clear about the school's remorse and apologised several times. During the conference, they offered their ongoing support for [REDACTED] and also emphasised that their main expression of remorse is to make sure this does not happen again by focusing on safety in the school.

### **Reparation**

[41] Reparation is compensatory in nature and is designed to compensate an individual or family for loss, harm or damage resulting from the offending.<sup>4</sup> The task of setting reparation involves considering the circumstances of each case and in particular the effect of the offending on the victims. No two cases or two victims are alike.

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<sup>4</sup> *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 at [33].

[42] I have already detailed the injuries suffered by [REDACTED]. He resigned from work at the school on 21 August 2019 and will be covered by ACC until May 2020, when that will cease and he will receive New Zealand Superannuation. As I have already stated, it is clear he is unlikely to work again in a role that was as meaningful or remunerative as he had previously held. It is clear that there is a significant ongoing consequence to [REDACTED] from the brain injury and that affects his daily functioning and enjoyment of life.

[43] The comparable cases provided by Ms Self show that in cases of brain injury with lasting consequences, the Courts have awarded reparation in the region of \$50,000. The parties agree that this is an appropriate amount and I am satisfied that is so and order that the defendant pay \$50,000 in emotional harm reparation to [REDACTED].

[44] The prosecution submit that the injuries to [REDACTED], including the fractures and the head injury, resulting in pain, the effect on education and ongoing uncertainty regarding his future, should sound in an award of reparation in the vicinity of \$60,000. Counsel for the defendant submits that the medical evidence in respect of the ongoing severity of [REDACTED]'s head injury is less clear and that he has made a significant recovery, including [REDACTED] and undertaking most daily tasks to at least a satisfactory level.

[45] The defence submits that the effect of the offending on [REDACTED] should sound in an award of emotional harm reparation of \$40,000 to him and the defence also refers to correspondence between WorkSafe and a solicitor engaged by [REDACTED]'s mother in which it was agreed that reparation of \$40,000 for [REDACTED] was reasonable.

[46] The fixing of reparation for emotional harm and ongoing harm or damage resulting from the offending is an evaluative exercise. The victim impact statements from [REDACTED] and his mother show ongoing pain, some loss of function with his right

foot, but I note he has managed to walk the Tongariro Crossing which is a demanding one-day walk. [REDACTED]s has returned to full-time study but has to take measures to manage, for instance, blocking out noise and taking breaks. [REDACTED] is concerned about his future, in particular, whether he will be able to fill his goal of working with computers. One of his reasons for that is because of the impact of light on his head injury.

[47] I am satisfied that there has been significant impact on [REDACTED] and that is ongoing. I am not satisfied that it should result in an award of emotional harm reparation greater than that provided to [REDACTED]. In the Court's assessment, the ongoing effect of the offending on [REDACTED] is slightly less than that for [REDACTED] and I set emotional harm reparation for [REDACTED] at \$45,000.

[REDACTED]

[48] [REDACTED] is also a victim,<sup>5</sup> as she is [REDACTED] parent. The prosecution submit that she has suffered significant emotional harm as a result of the incident in having to observe her injured son and care for him. I have listened to [REDACTED] and I consider the effect on her has been considerable and is ongoing and as a result, the Court considers that an appropriate award of emotional harm reparation for [REDACTED] is \$5000.

[49] The prosecution submit that the Court should award a sum of \$2325 to [REDACTED] for consequential loss in respect of legal fees incurred by her. I accept the submission by counsel for the defendant that this is not the sort of loss envisaged by s 32 Sentencing Act and I decline to make an order for consequential loss.

### **Assessing the quantum of the fine – Step 2**

[50] The next step is for the Court to fix the starting point by reference to the guideline bands in *Stumpmaster* and then adjust the starting point upwards and downwards for aggravating and mitigating factors. The Court in *Stumpmaster* sets out four guideline bands for culpability as:

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<sup>5</sup> Section 4 Victims' Rights Act 2002.

- (a) Low culpability - starting point up to \$250,000;
- (b) medium culpability - starting point from \$250,000 to \$600,000;
- (c) high culpability - starting point of \$600,000 to \$1,000,000; and
- (d) very high culpability - starting point of \$1,000,000 plus.

[51] The relevant factors for assessing culpability are those referred to in the previous guideline decision of *Department of Labour v Hanham and Philp Contractors Ltd* and are as follows:

- (a) *Identification of the operative acts or omissions at issue.* This will usually involve the clear identification of the practicable steps. I have already set out the defendant's failure to take practicable steps. In particular, they are contained in both charging documents to which the defendant has pleaded guilty and I do not need to repeat them. I observe that the failures are clear and significant.
- (b) *The risk of and potential for illness, injury or death that could have occurred.* The platform on the mobile scaffold was 3.9 metres from the floor. There was a very high risk of serious harm or death from falling from that height onto the floor which was a hard surface. The risk to the two victims who were using the mobile scaffold at the time and eight other members of the Lighting Crew present is clear. It is estimated that since the year 2000 there have been 60 members of the Lighting Crew who have used it. So all those students have been at risk, whether they have worked on top of the mobile platform or were working around the mobile scaffold. This was an obvious and significant risk that the defendant should have been aware of. A secondary school undertakes a wide range of activities, many of which involve high risk. The school has responsibilities to its staff and students under the HSWA. Further, with respect to students, the school is acting in loco parentis, which means that the parents and caregivers

place their children in its care and expect the school to act as a parent would in protecting their children.

- (c) *Whether death, serious injury or illness occurred.* Serious injury did occur to both [REDACTED] and [REDACTED]. Both were in hospital for some time, sustained fractures and head injuries.
- (d) *Degree of departure from prevailing standards in the industry.* The lack of identification of the mobile scaffold as a hazard, the failure to provide training on how to operate the mobile scaffold safely and, in particular, how to mitigate the risk of it tipping, together with the lack of checking or supervision, amounts to a serious departure from industry standards. However, the defendant is a school and is not part of the construction industry or contracting sector, so it did not have the same fluency with those industry standards.
- (e) *The obviousness of the hazard.* The risk of the hazard was obvious but regrettably the defendant had never identified it. It had left [REDACTED] to it for a long time, whereas a comprehensive schoolwide hazard identification exercise would have picked it up. My assessment of Forest View High School in 2018 is that its health and safety processes and procedures were insufficient for the risks associated with the activities it was undertaking.
- (f) *The current state of knowledge of the risks and of the nature and severity of the harm and the means available to avoid the hazard or mitigate the risks of its occurrence.* The risks associated with mobile scaffolding are well known. The Best Practice Guidelines for Scaffolding are readily available and I have referred to them. I have already commented that the defendant is a school, rather than a participant in the construction industry or contracting sector, so it would have been less fluent with the prevailing requirements. The defendant exists to provide education, not to provide services by supplying

workers who have to work from heights. Balanced against this is the defendant's duty to provide for the safety of its staff and students.

### **Overall assessment**

[52] The mobile scaffold posed a very high risk of serious injury or even death and the defendant failed to recognise it as a risk. Serious injury to two victims occurred on 5 June 2018 when they fell to the floor as the mobile scaffold toppled. The failure to identify the mobile scaffold as a hazard and the failure to provide training to both staff and students in respect of its safe use is a serious failing.

[53] The prosecutor submits that these circumstances should result in the defendant's culpability being assessed at the upper end of the medium range or the bottom of the high range, with a starting point for fine of \$600,000. The defence submits that culpability should sit at the upper end of the medium range with a start point for fine of \$500,000. To support its submission regarding start point, the prosecutor refers to *Ministry of Business, Innovation and Employment v KLS Roofing*<sup>6</sup> and *Department of Labour v Eziform Roofing Products Limited*<sup>7</sup> which were two sentencing decisions that both involved employees falling from a height resulting in injury.

[54] Both these sentencing decisions were under the former Health and Safety in Employment Act 1992 and when the starting points taken are converted by using a multiplier utilising the higher maximum penalty, the start point in those two cases equates to \$600,000.

[55] In *WorkSafe New Zealand v Agility Building Solutions Limited*,<sup>8</sup> which is one of the cases cited by the prosecution, the victim was a self-employed painter, who was a PCBU in his own right and did not comply with health and safety obligations in his contract. The starting point taken by the Court in that case was \$450,000.

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<sup>6</sup> *Ministry of Business, Innovation and Employment v KLS Roofing Ltd* [2014] NZDC 9.

<sup>7</sup> *Department of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526.

<sup>8</sup> *WorkSafe New Zealand v Agility Building Solutions Limited* [2018] NZDC 24165.

[56] If the defendant was in the business of construction or contracting, I would have no hesitation in placing its culpability in the high band. However, I consider the Court has to be realistic about the defendant's circumstances; an elected Board of Trustees in a decile 2 community. The Board of Trustees is charged with governance of a secondary school, the central focus of which is to provide education.

[57] The report by Tomorrow's Schools Independent Taskforce entitled "*Our Schooling Futures: Stronger Together/Whiria Ngā Kuru Tūātinitini*" published in 2018, noted that recruitment to Board of Trustees is proving difficult in New Zealand. In 2016, a Board election year, 43 percent of schools did not have a vote for their Board.<sup>9</sup> Many trustees and principals were concerned about the workload on the Board of Trustees being too great, particularly around property, health and safety, and finance.<sup>10</sup> The major problem with the current model regarding Board of Trustees is that the responsibilities on the Board of Trustees are too wide-ranging and complex, and the report notes that the Board of Trustees need to comply with 37 Acts of Parliament.

[58] I consider these factors reduce the culpability of the defendant and I accept the submissions made on its behalf that its culpability should be fixed at the upper end of the medium range and I fix the starting point for fine at \$500,000.

### **Mitigating factors**

[59] Counsel are in agreement that there are mitigating factors that should sound in an overall discount of 25 percent. They are:

- (a) *Previous good character.* The defendant has no previous convictions and, accordingly, a five percent discount should be awarded for that.
- (b) *Reparation.* The defendant is in a position to pay the reparation awarded, which is in the sum of \$100,000. It is agreed that there should be a five percent discount in respect of that.

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<sup>9</sup> At page 42.

<sup>10</sup> At page 39.

- (c) *Remorse.* I have already referred to the attendance by the principal and the Board chair at two restorative justice meetings. Whilst [REDACTED] has at times been frustrated with the school, I accept that the school's remorse is genuine. That sounds in a further discount of five percent.
- (d) *Cooperation with investigation.* The defendant has fully cooperated with the WorkSafe investigation. Such an approach is to be encouraged and a five percent discount is provided for that.
- (e) *Remedial steps taken.* It is clear that the new principal of Forest View High School, Ms Hale, together with the 2019 Board, has brought about a significant culture change in respect of health and safety. It is clear that there is now some rigour regarding health and safety, particularly the policies and procedures that have been adopted, the improved health and safety committee, and the training of the school caretaker. The changes made at Forest View High School give the Court confidence going forward and I agree this should be rewarded with a further five percent discount.

[60] The total discounts of 25 percent from a starting point of \$500,000 result in an adjusted starting point of \$375,000. From that, it is accepted the defendant pleaded guilty at the earliest opportunity and a full discount of 25 percent for plea is appropriate. The level of the resulting notional fine is assessed at \$281,000.

### **Ancillary orders**

[61] The prosecution seek costs of prosecution in the sum of \$2592. That is a modest claim and it is appropriate that the Court make that award.

[62] The Court, by consent, also makes an order under s 155 HSWA for the defendant to undertake a specified project for the general improvement of work in respect of the health and safety of students and workers in educational facilities. This will require the defendant to prepare and submit a safety presentation at the national conference of the New Zealand School Trustees' Association regarding what occurred

and the actions taken, and will essentially be a case study for the benefit of all Boards of Trustees. I observe that health and safety has been quite a learning curve for Boards of Trustees and such a presentation will be extremely useful for the whole education sector.

[63] Secondly, they are to prepare and submit to the Ministry of Education a safety article for the New Zealand online school bulletin, '*He Pitopito Korero*'. This article will focus on the need for Boards of Trustees to manage their health and safety effectively.

[64] The Court considers that this project order is a central feature of the sentencing exercise today and fulfils the Court's responsibility to uphold the purpose of the HSWA and, in particular, the protection of staff and students in schools against harm to their health and safety in the school environment and in particular in the extracurricular area.

#### **Proportionality assessment and ability to pay fine – Step 4**

[65] The Court at this stage of the sentencing exercise would usually review the sum of reparation awarded, the cost of any ancillary orders and the fine and then stand back and consider whether the suite of financial penalties was appropriately balanced against the ability of the defendant to pay. It is clear that the Court is required to assess the ability of the defendant to pay a fine.<sup>11</sup>

[66] As a result of the evidence filed by Ms Hale and Ms De Pina from Education Services Limited, both parties accept that the defendant is not in a position to pay a fine. I have independently assessed this and I agree. A fine of \$281,000 would have the potential to cripple Forest View High School and could result in the Ministry appointing a statutory manager. That would be a retrograde step for the defendant in this community and would hamper the ability of Ms Hale to lead the school and to bring about culture change. Accordingly, the Court will not be imposing the fine which it has notionally assessed at \$281,000.

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<sup>11</sup> *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [43].

## Conclusion

[67] The Court makes the following orders:

- (a) Emotional harm reparation to [REDACTED] of \$50,000.
- (b) Emotional harm reparation to [REDACTED] of \$45,000.
- (c) Emotional harm reparation to [REDACTED] of \$5000.
- (d) An award to WorkSafe for the cost of prosecution of \$5000.
- (e) Payment to WorkSafe as prosecutor for the cost of prosecution in the sum of \$2592.
- (f) A Work, Health and Safety Project Order under s 155 HSWA in respect of both charges. This will be in terms of the draft order filed.
- (g) An order for final suppression of name of [REDACTED], [REDACTED] and [REDACTED].

## ADDENDUM

[68] Counsel for the prosecutor has since advised that it is not possible for the first aspect of the project order, a presentation at the NZSTA annual conference, to occur. Counsel submits that the second aspect, the article in *He Pitopito Korero* will meet the spirit of the project order and the ends of sentencing. I agree and amend the terms of the Work, Health and Safety Project Order by deleting clause 1, and condition 1.

  
G C Hollister-Jones  
District Court Judge