IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2017-004-011984
[2019] NZDC 16341

WORKSAFE NEW ZEALAND
Prosecutor

v

STEPHEN JOHN McKEE
Defendant

Hearing:	16 August 2019
Appearances:	B McCarthy and R Woods for the Prosecutor P Wicks for the Defendant
Judgment:	16 August 2019

NOTES OF JUDGE N J SAINSBURY ON SENTENCING

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[1] Stephen John McKee is for sentence on a charge brought under ss 36(1)(a), 48(1) and (2)(b) Health and Safety at Work Act 2015. Where an individual, as opposed to a company, is charged the maximum penalty is a fine not exceeding $300,000. The offence to which Mr McKee has pleaded guilty is described as follows:

> That he failed to ensure as far as was reasonably practicable the health and safety of a worker who worked for him, namely Sophia Grace Malthus, while she was at work in the business or undertaking namely working at racing stables and that failure exposed her to a risk of death or serious injury arising from riding a racehorse.

[2] There is an agreed summary of facts. It is the basis on which the sentencing takes place. I am not intending to read out the entirety of the summary of facts, it will be on the file and it will be available to be inspected as part of the Court file if media who are covering this matter wish to do so. That said, it is important that I do cover in summary form the basis of the charge and also of course the basis for this sentencing.

[3] Mr McKee is a horse trainer. He has been in business for 31 years. He works from premises that have two horse tracks; a longer one and then a smaller one known as "the cinders". He trains racehorses owned by independent parties. There are a number of employees who work for him or are involved in the care for and the training of the horses. At its peak there can be up to 50 horses at his training facility.

[4] Sophia Malthus was employed by him as a stable hand from late July 2016. At that time she was 19 years old. She had done a small amount of riding but had never ridden an in-work thoroughbred racehorse. She did work associated with the care of the racehorses but that did not include riding. Her aspiration though was to become an apprentice jockey.

[5] She attended an equestrian centre in Palmerston North in order to get riding lessons. That was over two weeks. She was obviously away from her work at Mr McKee's training centre while that happened. All in all she attended eight half hour riding lessons between 31 October and 10 November 2016. They covered a simple step-by-step process of how to ride in a racing saddle, how to use the bridged rein, how to maintain position and balance, while; the horse walks, trots and canters. The lessons were arranged and paid for through her family. Mr McKee however paid her wages while she was in Palmerston North.

[6] When she was at the training centre, she was training on horses that were at least eight years old. While they were thoroughbreds, they were no longer in-work or racing fit. Most of her training took place inside an arena, that was approximately 70 by 50 metres in size. It would seem that due to a minor injury she was unable to attend her last lesson.

[7] At the end of that course, she was considered by those who had been instructing her as a beginner, novice level rider who was developing well. However, she still lacked the required muscle strength needed to ride in a racing saddle and eventually on a track. Her instructors considered she was not competent to ride a racehorse. She needed additional strength and training. She was advised to gain experience on quiet horses. She was not ready to ride working racehorses.

[8] Unfortunately, there was no direct communication between the instructors at that course and Mr McKee. He did not contact them because it was something arranged by her family. When Ms Malthus returned, it was proposed that she would have her first ride on one of the racehorses. At this point Mr McKee had never seen Ms Malthus ride. He understood that she had the experience to ride this horse having done the course. As it turns out, the equestrian centre where the course took place had advised Ms Malthus she was not ready to ride an average racehorse or a young horse.

[9] Mr McKee had initially intended that this first ride would take place on a hack on private property with a professional jockey to provide her with some advice and to see how she was going. However, when that horse became unavailable, a three year old thoroughbred working racehorse was substituted. That horse was regarded as being generally well-mannered and quiet. It did not have a tendency to bolt, rear or spin.

[10] The racehorse selected was a three year old male horse, it had last raced some three days prior to Ms Malthus' nominated first ride. The horse was saddled with the normal trackwork saddle, the saddle stirrups were dropped to a longer length than generally used in racing to be more suitable for an inexperienced rider. Ms Malthus was wearing a helmet, vest and suitable boots.

[11] She mounted the horse and walked out to the small track known as the cinders. She was accompanied by an apprentice jockey on another racehorse. The cinders is approximately 700 to 800 metres in circumference, it is used for slow work, warmup and trotting.

[12] No other horses were training on the track at that time. Mr McKee watched Ms Malthus ride from beside the cinder track. There was another trackwork rider and a visiting veterinarian there who saw parts of the ride.

[13] At 8.30 am Ms Malthus trotted the horse one lap around the track with the apprentice jockey with her. Ms Malthus had been advised that she could go a second lap at a slow canter if she felt comfortable. She commenced the second lap. Half way around the horse, having been given the cues to speed up, broke into a canter. Ms Malthus became unable to control him. Unfortunately, this led to panic. The combination of an inexperienced rider reacting to the horse in this way only made matters worse.

[14] Attempts were made to shut the gates to try to keep the horse on the track and minimise any harm through the horse trying to jump the fencing or hitting a barrier. The other rider stopped her mount in the hope that that would cause this horse to stop as well. Unfortunately, that did not happen. The horse's speed increased. Ms Malthus lost control of the reins and of the horse.

[15] The horse became more out of control. As it came close to the perimeter fence, Ms Malthus was no longer able to stay on the horse and fell. It appears she has struck the fence as she fell. Alternatively, she may have been struck by one of the horse's hooves. She came to rest lying on her back. While she was able to talk, she complained of pain between her shoulder blades and it was immediately suspected there was a spinal injury.

[16] As a result of falling from the horse, she did sustain a serious injury. There was a break in her spine. She was diagnosed with C5 tetraplegia. There was other damage as well. She remains a tetraplegic. She has only some limited use of her arms and hands.

[17] The immediate concern was that an inexperienced rider had been exposed to the hazard of riding a racehorse. What the investigation by WorkSafe New Zealand indicated was this. Mr McKee is a horse trainer for 31 years. He knew of the hazards and risks associated with that industry. There was a lack of formal training in place

whereby Mr McKee could monitor, supervise and progress Ms Malthus from the position of stable hand to riding a racehorse.

[18] Up to the point of this ride, her experience had been riding quiet unfit horses at the equestrian centre. She had previously ridden those horses at a canter but not at a gallop. She was not riding fit and not ready to ride a racehorse on a training track. She was not ready to ride in-work or race fit racehorses. She was on the track longer than she had experienced during her lessons. It was now nearly three weeks since those lessons.

[19] WorkSafe obtained expert evidence. The two experts indicated that Ms Malthus was a novice rider and did not have the competence to ride a working racehorse. Further, at the time she was riding, she did not have an appropriate licence to ride a racehorse at a training facility or at a trainer's premises.

[20] WorkSafe New Zealand spoke to Mr McKee. He confirmed that Ms Malthus undertook manual work and there was hope that this would help her gain experience in working with horses and develop strength. He had noticed that there had been progress with her building up strength. As far as he knew she had never ridden one of the horses that he had at the facility. He had not seen her ride before. He had considered this horse would be ideal for her first ride. He had not contacted the centre where she had done the training. He had assumed because that had been signed off, it would be sufficient. He had expected that she should be able to at least trot and canter.

[21] He had instructed her on riding technique and how to communicate with the horse but acknowledged that would be hard to remember on your first ride. The plan was to do the two laps; one at a trot then trot or canter. Mr McKee noted about horse unpredictability, that experienced riders can fall off and that horses will bolt. As he put it, "they are a flight animal, they are right up there at the top of the list as far as unpredictability goes".

[22] Mr McKee had a duty to ensure, as far as reasonable practicable, the health and safety of Sophia Grace Malthus when she was working at the stables. His failure was that he did not ensure that she was sufficiently competent before

progressing her to ride a racehorse. That failure exposed her to the risk of death or serious injury.

[23] Tragically she has sustained a serious injury so that she now suffers tetraplegia. That was the result of the fall from the racehorse. It was reasonably practicable for Mr McKee to have ensured that she was competent before allowing her to ride an in-work racehorse. He could have obtained independent feedback from the equestrian centre. He could have ensured a graduated learning system and progressively built riding proficiency experience and strength. He could have supervised and assessed the progression of Ms Malthus' riding ability on more suitable horses.

[24] It is a result of those failures that he was charged. He has acknowledged those failures by pleading guilty. It is also to be noted that Mr McKee has co-operated throughout the investigation. He has no previous convictions or appearances in terms of health and safety matters. Indeed, he has no criminal convictions at all.

[25] I have had the benefit of victim impact statements from Sophia Malthus herself, from her stepfather and from her grandfather. I do not intend to go through the contents of those. I have to say I found them harrowing reading. The effect on this young woman is catastrophic. The physical injury is bad enough but what follows from that is truly awful. The ripple effect of that damage works out through those she knows and her family.

[26] What is obvious I suppose from this injury, in terms of the impact on her, is that she has lost almost all movement and accordingly she is unable to care for herself. Her independence has been taken from her. The health problems that flow on from that injury are ongoing and severe. This is a 19 year old young woman with her life ahead of her. She finds herself facing a very difficult future; bringing to that task is much courage as she can muster. It is clears that the adverse impact on her is at the highest end.

[27] That leads to what is one of the difficult issues in a sentencing such as this. I accept that Mr McKee would never have wanted this to happen at all. But the point

of this legislation is that within the workplace are dangers that if not properly addressed and guarded against can have the most terrible impact. This illustrates that. So there is a tension at play. Unlike a number of other criminal matters where the culpability or fault can often have a direct correlation to the harm done because that is exactly what was intended, here, the culpability is not in that harm was intended but rather, by not taking sufficient care, harm was able to happen even though unintended.

[28] The other difficult aspect that arises in cases such as this is that it is important as far as possible for reparation to be made. I need to make this clear, reparation will never fully compensate or come anything close to compensating for the harm done. But it is important that something significant is done.

[29] The level of that reparation can be almost incidental to the actual culpability because it depends on the harm that is done. Here catastrophic harm has happened. It is important though that as far as possible reparation is properly and fairly paid. If any adjustment is to be made, it can be made in terms of the fine at the end. I will return to that.

[30] I have received written submissions from both prosecution and defence. I am grateful for the care which both parties have put into that. As it turns out, there are many areas where there is significant agreement between them. There is no argument over the fundamental principles at play in a sentencing such as this and the approach to be taken. So as far as that goes, that part is largely uncontroversial. There are, however, matters that are in issue and that need to be resolved as part of the sentencing.

[31] There are I think four issues or four aspects to the sentencing I need to cover. I start with reparation, first assessing a figure for emotional harm reparation, then considering whether there is consequential loss that should be the subject of reparation. There is then the issue of a fine and finally the issue of costs.

[32] The reason that I am dealing with matters in that way is because I am following the now well-established pattern for a sentencing of this nature. That is set out in the

case of *Stumpmaster v WorkSafe New Zealand*.[1] That case confirms that there is a four step process in sentencing:

(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 have regard to any aggravating or mitigating factors;

(c) determine whether there are any further orders required; and,

(d) make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[33] Accordingly, I start with the issue of reparation. The first aspect of reparation relates to emotional harm reparation. This can be awarded under s 32(1)(b) Sentencing Act 2002. Both defence and prosecution have addressed this is their submissions. There is little difference between them. They both responsibly and appropriately refer to cases where there has been similar levels of injury resulting in emotional harm reparation. No great issue is taken about the level that follows on from that.

[34] The prosecution suggests a figure between $100,000 and $110,000. The defence suggests a figure of $100,000. Reference is made to the cases of *WorkSafe v Ask Metro Fire Limited*; *MBIE v Fairbrass*; *WorkSafe New Zealand v WaiShing Limited* and to that I add *WorkSafe New Zealand v Supermac Group Resources Limited*.[2]

[35] In *Ask Metro Fire Limited*, emotional harm reparation of $100,000 was awarded. That was a case involving the victim falling from a ladder and becoming paralysed from the shoulders down. In *Fairbrass*, $110,000 was imposed. There, the accident resulted in the victim being left a tetraplegic. In *WaiShing Limited*,

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1 *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

2 *WorkSafe v Ask Metro Fire Limited* [2017] NZDC 13314; *MBIE v Fairbrass* DC Christchurch CRI-2013-003-000047, 7 May 2013; *WorkSafe New Zealand v WaiShing Limited* [2018] DCR 257; *WorkSafe New Zealand v Supermac Group Resources Limited* [2019] NZDC 15023.

emotional harm reparation of $110,000 was awarded. Again, injuries were suffered that rendered the victim becoming a tetraplegic.

[36] There is no set formula for assessing reparation of this kind. In the circumstances given the level of harm suffered by Ms Malthus, I consider that an emotional harm reparation award of $110,000 is appropriate. It is line with similar awards for emotional harm arising from a similar level of disability.

[37] I can only reiterate what I have said before though, this can in no way be true compensation for the emotional harm that she will be suffering. It is the best that can be done in the circumstances. It is an acknowledgment, as best as the Court can do and indeed as best as Mr McKee can do, that she has suffered such terrible harm.

[38] The next issue is that of consequential loss. Here there is a real issue between the parties. The difference between them very much turns on interpretation of both the Sentencing Act and the ACC legislation. There are two matters that I need to resolve. One is how to make an assessment of consequential loss. The other is whether once that figure is arrived at there should be, or indeed there must be, a reduction to take into account the lump sum compensation that Ms Malthus has been granted under the Accident Compensation scheme.

[39] In terms of the ability to claim consequential loss, that is found in the Sentencing Act, s 32(1)(c). That provides:

> A Court may impose a sentence of reparation if an offender has through or by means of an offence of which the offender is convicted caused a person to suffer **loss** or damage **consequential on any** emotional, **physical harm** or loss of or damage to property. [my emphasis]

[40] There is consequential loss through Ms Malthus being unable to work. However, ACC provides compensation for that loss. It is not intended as full compensation, it is capped at 80 percent of her earnings at the time of the accident. There is authority that the difference between what might have been earnt and what ACC will compensate can be claimed as a consequential loss.

[41] The authority for this and the methodology to be used is found in the decision of Venning J in *Oceana Gold (New Zealand) Limited v WorkSafe New Zealand*.[3] That decision related to compensation that would be paid for a person who had been earning, as I understand it, approximately $100,000 per annum at the time of the accident. One of the issues was as to how consequential loss should be calculated. There were two competing approaches that Venning J had to distinguish between. He sets these out at paragraphs [41] and [42] of his decision. Those paragraphs state:

> [41] On the first approach, an order for reparation for financial loss, consequent on physical harm, would be constrained by the pecuniary benefit that the victim would have received, calculated by reference to net income in the period prior to the incapacitating incident, and limited to the shortfall between that amount and the victim's entitlement to compensation payments under the Accident Compensation Act for the period which they are entitled to such payments,(the "statutory shortfall approach.")
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> [42] On the second approach for reparation would entitle a victim to the prospective future value of the financial loss they had suffered, calculated by reference to anticipated lifetime earnings on the basis of actuarial reports, for a period of time unconstrained by any time limit for which the compensation may be payable under the Accident Compensation legislation, (the "open-ended approach").

[42] Justice Venning resolved the issue as to which approach should be followed by considering the Accident Compensation legislation, its underlying statutory purpose as well as the purposes of reparation. ACC is not designed to provide full compensation for loss or harm. Rather, in exchange for the loss of the right to sue for full compensation, everyone harmed by accident is entitled to a fair level of compensation on a no fault publicly funded basis. Reparation is not designed to replace the civil law or the Accident Compensation scheme, it is designed to be a straightforward, simple, workable system to be applied easily in criminal cases.

[43] Venning J concluded that the statutory shortfall approach was the right one. He made this clear in paragraphs [67] and [68] of his decision. In those paragraphs he also sets out the way the test should be applied. What he says is this:

> [67] I note that WorkSafe accepts there is merit in principle in ensuring a consistent and relatively simple approach to calculating shortfall without the need to resort to actuarial analysis in each case.

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3 *Oceana Gold (New Zealand) Limited v WorkSafe New Zealand* [2019] NZHC 365.

> [68] For those reasons I conclude that in the case of loss of earnings, the order for reparation which in a number of cases will be additional to reparation for emotional harm, should be restricted to the statutory shortfall and compensation under the compensation legislation. That shortfall is to be calculated as the difference between the pecuniary benefit the victim would have received, and the compensation payable to them under the Accident Compensation scheme, in accordance with the entitlement set out in schedule 1 of the Accident Compensation Act, limited to the period that the payments are made under the scheme. That will enable the shortfall to be made on a basis that ensures a degree of consistency with the social contract confirmed by the Accident Compensation legislation. It should also provide a more straightforward basis for the calculation of reparation and, hopefully, a degree of certainty to sentencing Judges and the parties. It will also avoid the need for complicated and potentially contestable actuarial reports, for sentencing hearings and avoid arguments concerning contribution.

[44] The first issue is how should this shortfall be calculated. Mr Wicks QC refers to a report that, through his instructing solicitors Russell McVeagh, was prepared by Price Waterhouse Coopers. In it they provide three different approaches to calculating future wages that Ms Malthus would have earnt. That is the starting point for then calculating what would be the consequential loss, being the difference between that amount and the 80% earnings related compensation paid by ACC.

[45] The first option PriceWaterhouseCoopers did not consider to be a reasonable assessment in this case and neither prosecution nor defence propose putting that forward. I simply note in passing it followed the methodology found in the *WaiShing Limited* case. It starts with Ms Malthus' actual rate of earnings at the date of the accident, increased annually at the labour cost index plus 0.2 percent. Her benefits are linked to a minimum wage increase assumed to be plus one percent per annum. Indeed, it assumes that her future wages reduce in real terms to the extent that from 2034 they are less than the ACC payments. It is perhaps understandable that no one was keen to pursue that as an option.

[46] It is the other two approaches that are in issue. Option (b) is described in this way:

> Future wages are assumed to be Ms Malthus' actual rate of earnings at the date of the accident, ($600 per week). Increased annually at the same rate as the minimum wage. This results in future weekly wages which are less than the adult minimum wage for a 40 hour week. This could be due to Ms Malthus working less than the 40 hours per week or a lower training rate applying to her at the time.

[47] The point about this is that at the time she was working, Ms Malthus was not working a 40 hour week, hence her rate of earnings is low. The defence argument is that, when one looks at the decision of Venning J as he sets out the statutory shortfall approach, he says that that is to be calculated by reference to net income in the period prior to the incapacitating incident.[4]. Taking that passage at face value, the defence argues that the simple fact is that Sophia Malthus earnt $600 per week before the accident. So applying the literal words of Venning J, that must be the starting point for the assessment of earnings and earnings shortfall.

[48] The prosecution argue for a different approach. This is option (c) in the Price Waterhouse Coopers report. That reads:

> Ms Malthus' future wages are assumed to equal the adult minimum wage for a 40 hour week.

[49] The prosecution justify that approach by reference to the Accident Compensation legislation. Section 42(3)(b) Accident Compensation Act 2001 provides that:

> The minimum weekly earnings are, for a person 18 years of age or over, the amount as at 1 July each year which is the greater of:
>
> (i) The minimum weekly adult rate prescribed under s 4 of the Minimum Wage Act 1983.

[50] The prosecution argues that means the ACC legislation, when calculating weekly earnings, will use the minimum wage as lowest level of earnings, regardless of the fact that an individual may have earned less than that leading up to the accident. The prosecution argues that if that is the approach ACC must take, then that should be the basis for assessing consequential loss for earnings under the shortfall method. After all the calculation is between the 80% earnings compensation paid by ACC and what would have been paid. For calculating what would have been paid the ACC legislation sets the 100% figure as, at least, the minimum wage. In the circumstances of this case the earnings compensation is for all future earnings. Yet it will be pegged at the minimum wage, regardless of any potential to earn more than that had the

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4 See para [41].

accident not happened. That is one of the trade offs inherent in the Accident Compensation scheme.

[51] The difference between the two is a final figure of $156,000 on the defence approach and $262,000 on the prosecution approach. I prefer the prosecution approach in this matter. I accept that Mr Wicks is right if one looks at the literal meaning of what is in para [41] and other parts of the decision of Venning J but I do not see that as being intended by him as determinative in a case such as this. The situation of someone earning under the minimum wage was simply not an issue in *Oceana*. The issue was what is the better approach to take, statutory shortfall or open-ended. That was the real point of that case.

[52] What Venning J emphasised though was that in calculating this type of reparation, it was important that there is consistency with the social contract confirmed by the Accident Compensation legislation. What the prosecution suggest is consistent with the Accident Compensation legislation. It uses the approach mandated in that legislation. Further, it is consistent with basic fairness. There is much to be said that for someone, at 19, to be told their compensation will be calculated on the basis that they will be on the minimum wage for the rest of their life is actually deeply insulting. But the trade-off we have in this country is that the certainty of compensation is a social benefit and the price of that is that what someone will be paid may turn out to be far less than what they might otherwise have earned if the accident had not happened or received under a different system of compensation.

[53] Again, I think I need to make the point that this level of reparation cannot in any way be seen as being reflective of the worth of Sophia Malthus. It is simply the best that can be done in this situation. So, on that basis I consider that the minimum wage approach is the correct one.

[54] That brings me to the second point. This turns on the meaning of s 32(3). Section 32(3) Sentencing Act. That provision reads:

> In determining whether a sentence of reparation is appropriate or the amount of reparation to be made for any consequential loss or damage described in subsection (1)(c), the Court must take into account whether there is or may be, under the provisions of any enactment or rule of law, a right available to the

> person who suffered the loss or damage to bring proceedings or to make any application in relation to that loss or damage.

[55] In this case the important aspect is the reference back to subs (1)(c), that refers to "loss … consequential on any …. physical harm". The argument here is that Ms Malthus has received or will receive lump sum compensation from ACC. The lump sum compensation is $133,802. That lump sum compensation is paid under ACC for the loss in terms of the injury itself, ie the permanent impairment, the loss of use of almost all her body. It is a separate form of compensation to that of earnings. The question is that whether that compensation, that lump sum payment, is required by s 32(3) to be set against the compensation for loss of earning.

[56] The argument as I understand it is this. If one looks at s 32(1)(c) in terms of Ms Malthus, the loss or damage was the injury to her spine. Consequent on that is that she suffers tetraplegia. The tetraplegia is different from the injury to her spine. It is consequential to the damage to her spine. As a result of her being a tetraplegic, she is paid the lump sum compensation for that impairment in the sum of $133,202. In other words that amount is compensation for her tetraplegia, which is consequential damage or loss from injuring her spine. Accordingly, it has to be set off against that other form of consequential loss, her earnings compensation.

[57] I have difficulty accepting this argument. I do not accept the underlying proposition that the damage to her spine and the tetraplegia are conceptually different, one a consequential loss resulting from the other. This is an endeavour to define the circumstances in such a way as to fit within s 32(1)(c). I do not see any distinction between the damage to her spine and tetraplegia, one is just a description of the other. Her spine was broken at a particular point. When that happens to the human body, you lose the use of that body in a way technically described as tetraplegia.

[58] Accordingly, I do not see that the payment of lump sum compensation for impairment is consequential loss, it is compensation for the damage done. In other words the loss of use of her body. The impairment that flows from the damage to her spine, the loss of use of her body, her tetraplegia cannot be split apart, they describe the same thing. The point of s 32(3) is to give flexibility where there is an avenue for someone to get compensation for consequential loss. Where that is the case then the

Judge must take into account whether it is better to let that avenue be pursued rather than to impose reparation.

[59] I do not consider that the purpose of the section is reduce the compensation someone might otherwise be entitled to receive. Section 32(3) sensibly makes the point that a Judge must be aware of alternative avenues that exist for compensation and make a decision as to what is the best way for the victim of an offence to pursue that compensation, nothing more nor less.

[60] As I read s 32(3), the reference to "in relation to that loss or damage" means in relation to the consequential loss or damage that may be claimed under s 32(1)(c). Accordingly, I do not consider that I must or should take into account lump sum reparation in determining the amount of consequential loss for loss of wages. They are different types of compensation. The lump sum compensation is not for consequential loss. It would be against the very scheme itself and spirit of ACC to do so.

[61] Finally, I wish to make it clear that I respectfully disagree with the approach taken in the *WaiShing Limited* case. I note that neither party is suggesting that there should be any further discounting to their respective figures. But insofar as the social contract regarding ACC would have a bearing, it is clear that Ms Malthus has more than paid her share. She is getting limited lump sum compensation and she gets limited emotional harm reparation. She gets limited earnings compensation from ACC and that can only be topped up using the minimum wage as a baseline here. At every step she is paying heavily, when compared to what she might otherwise have received. It is noted by Venning J that the level of compensation is not full but fair. It is an interesting question to consider what would be "full compensation" for someone in Ms Malthus' position. I posed that question to both counsel. No one was keen to give me an answer and I suspect no one probably could. I do not think any of us could think of a figure that would put this right. So, I have no difficulty whatsoever in awarding reparation without any need for actuarial discounts and the like. What that means then is that on the issue of consequential loss, I take the position urged on me by the prosecution and award a figure of $262,000.

[62] I now turn to the issue of a fine. Again, there is a general unanimity in the approach to be taken. As I referred to earlier the case of *Stumpmaster* provides guidance on this. There are bands set out in that case. Using the figures for an individual rather than a company they are:

(a) Low culpability, a fine up to $60,000.

(b) Medium culpability, $60,000 to $120,000.

(c) High culpability, $120,000 to $200,000.

[63] Factors that are relevant at sentencing are the omissions or faults that gave rise to the accident, the nature and seriousness of the risk of harm as well as the realised risk, the degree of departure from standards prevailing in the industry, the obviousness of the hazard, the ability cost and effectiveness of the means necessary to avoid the hazard, the state of knowledge of the risks and the nature and severity of the harm that could arise and the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[64] Really in setting out, as I did at the beginning, the circumstances surrounding this, the relevant circumstances are obvious here. I accept this was not an intentional action but rather greater care was needed in an industry of high risk. Sadly that degree of oversight and care did not happen on this occasion leading to tragic results.

[65] Both defence and the prosecution I think quite rightly identify a starting point somewhere towards the upper end of medium culpability. If I was to just deal with it on the basis of a fine as set out in *Stumpmaster*, then something in the region of $100,000 would be the appropriate starting point.

[66] There are discounts that can be provided. The previous safety record I think is very much something that Mr McKee is able to draw on. It is to his credit that he is someone who has been in this industry a long time, who has no convictions and no

history of offending of this nature. He was co-operative with the enquiry. That is also very much to his credit.

[67] I can accept entirely that he is deeply remorseful for what has happened. There was an offer to attend restorative justice. That was not able to happen and although there has been this argument around aspects of reparation, it has never been an issue that it should be paid.

[68] I consider that there are legitimate factors that would require a significant discount. What is set out in the submissions as something around 20 percent, once you put those factors together. I take that as a perfectly sensible approach. The prosecution does not take issue with that. There is a discount for the guilty plea of 25 percent. Again there is no issue surrounding that.

[69] Approaching it on that basis, it would get to an end fine of around $60,000.

[70] I do however come back to what I said earlier. One of the difficulties in these cases is the level of harm can vary so greatly and often without true equivalence to the underlying culpability. That means Mr McKee is in a position where he is being required to pay a significant amount of reparation. Not that that adequately compensates Ms Malthus, but from the perspective of the criminal law, it is still a significant penalty. One of the reasons for that penalty is to punish and deter. I consider I can take into account that level of reparation in making my assessment of level of fine.

[71] So while an end fine of say $60,000 would be appropriate in and of itself, I do think it should be adjusted because the priority is the reparation. In the circumstances I halve that to a fine of $30,000.

[72] There is then the issue of costs. It is agreed costs in the sum of $3000 should be awarded.

[73] What that means in summary is this:

(a) I award emotional harm reparation of $110,000.

(b) Reparation for consequential loss in relation to earnings, $262,000.

(c) A fine of $30,000.

(d) Court costs of $3000.

[74] I can only hope for Ms Malthus and her family things do improve. I am very grateful for the material that they provided to me. It made very difficult reading. I think it is also appropriate to acknowledge what Mr Wicks had to say in terms of Mr McKee, expressing his sympathy. I know that would be difficult to accept because of the circumstances for the family, but that is not to mean it is not genuine. It is just very sad that there is, as things stand, so little can be done to undo what has happened. Maybe that will change in the future but we do not yet know. I just wanted to acknowledge those that were here and the difficulty that this situation has created for them.

Judge NJ Sainsbury
District Court Judge

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