

**IN THE DISTRICT COURT
AT WAITAKERE**

**I TE KŌTI-Ā-ROHE
KI WAITĀKERE**

**CRI-2017-090-000678
[2019] NZDC 18495**

WORKSAFE NEW ZEALAND
Prosecutor

v

RITCHIES TRANSPORT HOLDINGS LIMITED
Defendant

Hearing: 3 and 20 September 2019

Appearances: A R Longdill and C Pille for the Prosecutor
S A Shortall and M Ferrier for the Defendant

Judgment: 20 September 2019

SENTENCE OF JUDGE J JELAS

[1] Ritchies Transport Holdings Limited (Ritchies Transport) appears for sentencing, having pleaded guilty¹ to one charge of contravening ss 36(2) and 48 of the Health and Safety at Work Act 2015 (HSWA).² The particulars of the charge include that it was reasonably practicable for Ritchies Transport to have ensured that an adequate and effective safe system of work was developed, implemented, communicated and monitored so that arrangements for the dry hire of buses was safe and suitable.

¹ Guilty plea entered 15 April 2019.

² The maximum penalty for this offence is a \$1.5 million fine.

[2] Ritchies Transport is New Zealand's largest privately-owned transport operator. It is a family owned and run business. It has been in operation for over 80 years. It operates approximately 14,000 buses and employees 17,000 staff. Its fleet consists of a mixture of urban, school, charter and intercity buses and coaches. It undertakes approximately 48 million journeys a year.³

[3] In addition to providing bus services, Ritchies Transport also hires out buses as charters (with a driver) or as dry hires (without a driver). Dry hires were most commonly provided to experienced drivers of Ritchies Transport.

[4] Mr Talakai Aholelie was an experienced bus driver for Ritchies Transport. He had been driving buses since the 1980s. He was a metropolitan driver running urban routes only.

[5] On 20 December 2016, Mr Aholelei was contacted by representatives of a group touring from a school based in Tonga.⁴ He was asked to hire and drive the touring group to Hamilton and Gisborne for performances on 23 and 24 December 2016. Mr Aholelei agreed to do so for a koha. The following day, Mr Aholelei spoke to the operations manager of Ritchies Transport. He completed a staff dry hire request form. He specified on that form that a 55-seater bus was sought for 23 and 24 December 2016. The destinations were Hamilton and Gisborne. Mr Aholelei specifically requested bus 351. That is a bus he had previously driven as a charter bus and was familiar with it. The dry hire of bus 351 to Mr Aholelei was authorised later that day.

[6] Information loaded on to the Ritchies Transport management system included the destinations, the number of passengers as 55, the distance to be travelled of over 1000 kilometres and the hire dates of 23 and 24 December 2016.

[7] On 23 December 2016 Mr Aholelei arrived at the Swanson depot of Ritchies Transport to collect bus 351. Surprisingly, bus 351 was unavailable. He was advised he should take another bus. Mr Aholelei was not comfortable taking another bus that

³ This statistic was provided by Ms Shortall during submissions and the sentencing hearing.

⁴ Mailefihi Siulikutapu College.

he was unfamiliar with and had a different gear system. He decided to wait for bus 351 to be returned to the depot. However, after waiting for some time, he decided he would need to take the alternate bus, albeit with some reservations. Shortly after leaving the depot, Mr Aholelei saw bus 351 being driven back to the depot. He called the depot and it was agreed he would return and take bus 351. This occurred.

[8] Mr Aholelei returned to the city where he collected the touring party. They then travelled to Hamilton.

[9] The following day, 24 December 2016, the touring group left for Gisborne. There were 53 passengers in total. The intended route to be travelled was through Rotorua, Tauranga and Whakatane. However, south of Hamilton, Mr Aholelei missed the Rotorua turn off and ended up travelling to Taupo. It was then decided that he would continue travelling on to the Hawkes Bay before heading north through Wairoa and Gisborne. This was a longer route than initially planned and involved roads with sharp inclines and declines.

[10] It is not in issue that Mr Aholelei used the service brakes (the brake pedal) to slow the bus on the declines. He did not use the engine (transmission braking) system at all.

[11] Twenty minutes south of Wairoa, while the bus was travelling down a hill, a number of passengers reported that they could smell burning rubber. At the bottom of the hill, the terrain was relatively flat. When Mr Aholelei drove into the Wairoa township, he pulled over and stopped at a Z Energy Service Station. Mr Aholelei told passengers that there was a problem with the brakes, that they were hot and needed time to cool down before resuming the final leg of the journey to Gisborne.

[12] The bus remained in Wairoa for 48 minutes. It departed at 7:57 pm. Mr Aholelei did not contact Ritchies Transport by telephone for advice or assistance during his time in Wairoa. Nor did he make any inquiries of the service station if a mechanic or other similar person was available.

[13] Between Wairoa and Gisborne is the Wharerata Hills. On the downward journey towards Gisborne, there are three separate road advisory signs advising heavy motor vehicle drivers of the steep grade and the need to use a low gear. Mr Aholelei did not use the gear brake system on the downhills.

[14] The summary of facts describes the following events of the brakes failing as the bus descended down the Wharerata Hills as follows:

As the bus descended the Wharerata Hills, the brakes on the bus started to fail and Mr Aholelei struggled to slow the bus down. This was observed by an eye witness Sau Kiteau who was travelling directly in front of the bus. Mr Kiteau slowed his vehicle with the intention of having the bus drive into the back of it to help slow the bus. Mr Aholelei narrowly missed Mr Kiteau's vehicle and the bus continued to head down the hill, at speed, often on the incorrect side of the road as Mr Aholelei was negotiating the tight bends.

The bus then approached a tight 45 kilometre hour advisory left hand downhill bend, making it about half way around the corner before the back end of the bus slid out sideways in an anti-clockwise direction. The bus slid across the centre line on to the armco railing on the other opposite side of the road before rolling over on to its side and sliding on top of the Armco railing for a considerable distance.

Mr Aholelei and nine passengers fell through the glass windows on to the road at this point. The bus then continued over the armco railing, sliding on its side down into a steep gulley where it finally came to rest on its left hand side, about 30 metres down on the road.

[15] When emergency services arrived, two passengers were found deceased at the scene: Sione Taumalolo, an 11 year old boy, and Talita Fifita, a 33 year old woman. A third passenger, Leotisia Malakai, a 55 year old woman, died in Waikato Hospital on 1 January 2017. Many passengers sustained injuries.

[16] Immediately after the accident, Ritchies Transport sought to provide support to the victims. They provided transport to facilitate the victims' return from Gisborne to Auckland. They also contributed towards the costs of repatriating the deceased victims' bodies to Tonga and associated funeral expenses. Representatives of Ritchies Transport met with members of the Tongan community. In total, it is estimated Ritchies Transport contributed \$25,000 to various expenses sustained by the victims in the immediate aftermath of the accident.

[17] Mr Aholelei initially remained in the employment of Ritchies Transport but due to the investigations and then the subsequent charges he faced, he was unable to return to his former duties as a bus driver. Alternate duties were found.⁵

[18] As a result of the police investigation, Mr Aholelei was charged with, and pleaded guilty to, three charges of careless driving causing death and 27 charges of careless driving causing injury.⁶

[19] A WorkSafe investigation was undertaken. Ritchies Transport was co-operative during the investigation. That investigation identified that Ritchies Transport did not have procedures in place for ensuring its maintenance records extended to vehicles being dry hired.⁷ Further, Ritchies Transport did not have a dry hire rental agreement contrary to the relevant regulations.⁸ The WorkSafe investigation concluded there were parts of Ritchies Transport's systems that failed to comply with its duties under the HSWA.

Approach to sentencing

[20] No issue was taken between counsel as to the appropriate criteria for the present sentencing exercise.

[21] The purposes of the HSWA which the Court must have particular regard to, are set out in s 3 which provides:

- (1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—
 - (a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant; and
 - (b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and
 - (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health

⁵ Mr Aholelei was assigned the alternative duty of washing buses. Over time that work proved unsuitable for Mr Aholelei and he subsequently resigned from his employment.

⁶ *New Zealand Police v Aholelei* [2018] NZDC 996.

⁷ The word "records" places the word "programme". This change has occurred after the sentencing hearing following additional submissions by Mr Ferrier.

⁸ Land Transport Rules: Operator Licensing 2007, Part 9.2(1) and Schedule 3.

- and safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and
 - (d) promoting the provision of advice, information, education, and training in relation to work health and safety; and
 - (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
 - (f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and
 - (g) providing a framework for continuous improvement and progressively higher standards of work health and safety.
- (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable

[22] There is no issue under s 7 of the Sentencing Act 2006 to the present sentencing exercise are the need to:

- (a) Hold the offender accountable for the harm done by the offending, promoting in the offender a sense of responsibility for the harm;
- (b) Provide for the interests of the victims including reparation; and
- (c) Denunciation and deterrence, both in relation to the offender and in general.

[23] Similarly, no issue is taken with principles under s 8 of the Sentencing Act of particular relevance, being:

- (a) The gravity of the offending and the degree of culpability;
- (b) The seriousness of the type of the offence as indicated by the maximum penalty prescribed; and
- (c) The effects of the offending on the victims.

[24] Equally, it is not in issue that the approach to sentencing stipulated by the High Court in *Stumpmaster v WorkSafe New Zealand* which set out the following four step process:⁹

- (a) Assess the amount of reparation to be paid to the victims;
- (b) Fix the amount of fine by reference to the guideline bands, then make adjustments for aggravating and mitigating factors;
- (c) Determine whether further orders under ss 152 to 158 of HSWA are required; and
- (d) Make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

Step one – Assessing quantum of reparation

[25] The first step in the sentencing process is to assess the amount of reparation to be paid to the victims. Making reparation orders serves a distinctly different statutory purpose to the imposition of a fine. Reparation is compensatory in nature and is designed to compensate victims, individuals or family members for loss, harm or damage resulting from offending.¹⁰

[26] WorkSafe has filed a comprehensive folder of updated victim impact statements.¹¹ Most of the statements were prepared in July 2019. The statements include how the effects of the accident are affecting the victims over two and a half years later.

[27] This sentencing decision cannot adequately encapsulate the level of anguish and loss felt by the three families whose loved ones died in the accident. Nor can I realistically record all the other harms suffered by the surviving victims.

⁹ *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

¹⁰ *Department of Labour v Hanham and Philp Contractors* (2008) 6 NZELR 79 at [33].

¹¹ The folder includes the statements of four persons who fall outside the statutory definition of victims. Those statements have been included for the purposes of providing a comprehensive overview of the effects of the offending. WorkSafe does not seek reparation orders in respect of those who fall outside the definition of victim.

[28] The youngest victim was Sione Taumalolo aged 11 years. His father learnt of his son's death on the morning of Christmas Day. The shock was so great for Sione's family they did not eat for a few days. Coping with the sudden loss of their beloved son and brother has been extremely difficult for the family. Sione's father travelled to New Zealand to visit the crash scene to help him cope with his loss. The feeling of sadness and loss is ever present for Sione's family. The family does not know if it is something that they will ever recover from. Sione's mother makes daily visits to her son's grave.

[29] Talita Fifita, the mother of a four-year-old daughter and wife to Suliasi Fifita also died in the crash. Talita joined the touring group to assist her Aunt who was a teacher for the group. Mr Fifita learnt of his wife's death during the early hours of Christmas Day. He has found it very difficult to cope without his wife. They had plans to build a home and have more children together. He has not been able to move forward feeling a loss of energy and frequently feeling emotional. The support from his family, friends and teaching colleagues has been of some assistance to him.

[30] Leotisia Malakai, was the third victim to die in the crash. She died in hospital approximately one week after the accident. Leotisia was the mother of two children. Leotisia's sister, Seini Vakalahi, describes how deep sadness has descended on the family because of Leotisia's death. Leotisia was a main breadwinner for this family. In addition to the emotional impact, the family have suffered a loss of income that has made it difficult for the family to make ends meet. Leotisia's two children have been adopted by her sister.

[31] Two victims read their victim impact statements to the Court. While the accident occurred over two and a half years ago, it was obvious to all of those present that the effects of the accident are continuing to be felt on a daily basis by those directly affected.

[32] One of these victims was Tevita Lokotui. Tevita was aged 18 at the time of the accident. He was head boy of his school in Tonga and a leading rugby player.¹² He aspired to join the Tongan Army to play in their brass band and to play rugby. As a

¹² Mailefihi Siulikutapu College.

result of the accident, his left leg was amputated above the knee. He has been unable to permanently return to Tonga since the accident as treatment for his injury and his rehabilitation in New Zealand has been ongoing. His only return trip to Tonga after the accident was in June 2017. He has had to complete his schooling in New Zealand and is now undertaking training to become a builder.¹³ It has been difficult for Tevita to adapt to his injury. He has had to reframe his life goals in a different country without his immediate friends and family around him for support.

[33] After the accident, Tevita describes that he initially spent a significant amount of time in his room. He sometimes feels significant anger when thinking about the accident. He does not like it when this emotion arises. He states:

This is not the person who I want to be, I was not like this before the crash.

[34] Saunaleva Hehepoto also read her statement to the Court. Ms Hehepoto was thrown from the bus, along with a number of other passengers, before it rolled down the bank. She sustained cuts and scratches to her face and arm. The bruising to her face was significant making it difficult for her family to initially recognise her. She still suffers some lingering physical discomforts. The emotional effects of the accident are ongoing for Ms Hehepoto who suffers nightmares and feelings of deep sadness for the other victims. The whole experience has left her feeling nervous and a different person to whom she was before the accident.

[35] It is not possible to mention the names of all the other victims whose statements have been provided to me.¹⁴ Many of the victims spent multiple days in hospital. Physical injuries suffered by others in the accident included fractures and lacerations to eye sockets, as well as fractured and broken bones. One victim suffered a badly broken right ankle. Other injuries sustained included the re-attachment of a right ear; injuries to a foot that required four operations and six weeks in hospital; significant injuries to knee including ligament damage; and cuts, grazes and scratches - some of which required stitching and skin grafts and some of which have left scars. Another has suffered heart problems which now requires medication. These are just a few of the physical injuries suffered by the surviving victims.

¹³ At Otahuhu College.

¹⁴ That I have read.

[36] The emotional injuries that the victims have felt are immeasurable. They have included difficulties with sleeping with many (like Ms Hehepoto) suffering nightmares and flashbacks. Many of the surviving victims now fear travelling in vehicles, particularly buses. Many of the victims have observed changes in their behaviours and emotions since the crash. Life was difficult and hard for some when they returned to Tonga. One victim has described the ongoing emotional effects as follows:¹⁵

... if I hear the sound of a car stop suddenly it gives me shivers and makes me remember. There are lots of things that make me remind of the crash, like the plane going down to the runway makes me think of when we were going down in the bus.

...

Everything has changed for me, what I used to like I do not now. I am now very emotional after the accident. I am very easy to anger even the little things, I realised I have changed a lot from the crash.

...

The only thing I felt that kept me alive was my son, I remember seeing my son's face in front of me and I kept saying to him who is going to look after this face, Lord save my life so I can look after this face.

[37] It has been particularly difficult for Sateki Aipolo, a senior member of the travelling group. He had the difficult task of identifying the three deceased.¹⁶ He was the most senior person present so took responsibility for the school. He states the formal process of identifying the three victims caused him great pain and is something he will never forget.

[38] WorkSafe have provided a table which lists the levels of reparation sought for each of the victims. For the three families whose loved ones died in the crash, emotional harm of \$100,000 is sought, along with specified amounts to reflect consequential losses that have been incurred for expenses such as funeral costs and travel.

[39] WorkSafe have submitted emotional harm and reparation payments ranging between \$8,000 and \$16,000 should be ordered to all the surviving victims, with one exception being Tevita Lokotui. The sum of \$50,000 is sought for Mr Lokotui given the significance of the life changing injury he suffered. Reparation for consequential losses incurred by some of the surviving victims is also sought.

¹⁵ Victim impact statement of Asena Fau Finau.

¹⁶ He was one of nine teachers from the college travelling with the school band.

[40] Other Courts have previously acknowledged the difficult process of determining the level of reparation when a life has been lost. The process inherently involves placing a monetary value on a lost life which will always fall short of truly reflecting the grief and anguish felt by the loved ones left behind. As the Court has previously noted:¹⁷

[R]eparation is designed to give a measure of recognition to the loss in the best way the Courts are capable of doing, because we are never capable of doing it to the extent that [the victim] will feel is necessary.

[41] Similar difficulties arise when attempting to attach monetary value to the harm suffered, both physically and emotionally, by other survivors of an accident.

[42] Ritchies Transport does not shy away from their obligation to pay reparation and does not oppose reparation orders being made. Ritchies Transport accepts without question, the harm suffered by the victims. As already noted, Ritchies Transport met some of the initial costs incurred by families and would have done more at the time but for the challenges posed by the number of victims and their varying needs.

[43] Ritchies Transport's primary submissions in respect of reparation is that the level of reparation sought by WorkSafe is disproportionate to the degree of culpability for the accident that can be attributed to it. Ritchies Transport submits the level of reparation sought by WorkSafe should be proportionally reduced for all victims in the range of 50 percent. To summarise, while Ritchies Transport takes no issue with the rationale for the varying amounts of reparation sought by WorkSafe, it submits the amounts sought are too high and are unfair to Ritchies Transport.

[44] Ritchies Transport submits Mr Aholelei, the bus driver, was primarily responsible for the harm suffered by the victims. It is submitted it would be unfair to Ritchies Transport to be ordered to pay the total sum of reparation sought by WorkSafe given Mr Aholelei's actions was the primary cause of the accident.¹⁸

¹⁷ *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865, [2017] 368 at [23].

¹⁸ Defendant's Sentencing Submissions, at [16].

[45] There can be no doubt that Mr Aholelei's actions contributed to the accident. Mr Aholelei's sentencing notes record the following:¹⁹

[9] You then made that fatal decision to continue to drive on a road that was unknown to you with no real understanding of the true nature of the problem with the brakes. You, as a professional bus driver, decided to continue to drive with 53 passengers on board in a bus that later proved to be mechanically faulty.

[10] In my assessment that was a high level risk-taking exercise by you and you are fortunate that the police have not laid more serious charges. I assess you to have exhibited a high degree of carelessness. A high standard is required by professional bus drivers such as yourself.

[46] I accept that an offender's culpability can, in some circumstances be a factor in determining reparation. Degrees of culpability may be a relevant consideration when reparation can be apportioned between identified offenders at sentencing.²⁰ Where there are two or more defendants, the total amount of reparation is frequently apportioned between defendants according to their culpability for the harm sustained.²¹ Mr Aholelei was not prosecuted under the HSWA. His prosecution was brought under the Land Transport Act 1998. Mr Aholelei's charges focused upon his driving skills falling below the standards acceptable for a reasonable and prudent driver.

[47] I have determined Mr Aholelei's culpability is not a consideration in setting the level of reparation at this step in the process. Firstly, there is only one defendant, Ritchies Transport, before the Court. Mr Aholelei was not, as I have recorded, prosecuted under the HSWA. The focus of his sentencing was intended to be punitive. Reparation was not an essential sentencing principle or purpose. Secondly, *Stumpmaster* clearly states culpability is a factor for consideration in determining the level of fine.²²

[48] Ritchies Transport has already paid \$25,000 to some of the victims. The amount paid to each victim is not known. Ritchies Transport has not expressly requested the sum of \$25,000 be taken into account when determining reparation

¹⁹ *New Zealand Police v Talakai Aholelei* [2018] NZDC 996 at [9]-[10].

²⁰ *R v Leslie Lewis* CA 7/98, 17 June 1998 (Anderson J).

²¹ *WorkSafe New Zealand v Phil Stirling Building Limited* [2019] NZDC 10608 and *WorkSafe New Zealand v Luke Martin Roofing Limited*, DC, Christchurch, CRI-2017-009-005381, 12 June 2018.

²² *Stumpmaster v WorkSafe New Zealand*, above n 3.

orders. Reference by Ritchies Transport to the sums paid was more for the purpose of demonstrating its commitment to assisting the victims.

[49] Having given consideration to the submissions and cases filed, I accept the amounts submitted by WorkSafe for each of the deceased's families is within the appropriate ranges. Sione's family have continued to suffer the daily anguish of his short life coming to a tragic and abrupt end. Talifa and Leotisia have all left behind dependent children and grieving families. The sum of \$100,000 emotional reparation to each of these three families can never equate to the intrinsic value these three victims brought to their families. The consequential loss reparation amounts for each of these three victims are also justified and will be ordered.

[50] For Tavita Lokotui, whose leg was amputated, I accept the figure of \$50,000 emotional harm reparation is warranted. The effects of the amputation of his leg have been profound. Apart from the physical injury, there has been the ongoing psychological and emotional consequences for him. These have been compounded for Mr Lokotui by having to remain in New Zealand for his long-term rehabilitation.

[51] I also accept the emotional and consequential reparation sought in respect of the remaining surviving victims as set out in WorkSafe's submissions. A full list of these reparation orders will be attached to these sentencing notes.

Step two – Assessing quantum of fine

[52] In *Stumpmaster*, the Court identified the following guideline culpability bands for establishing the starting point fine before relevant aggravating and mitigating features are considered:²³

²³ *Stumpmaster v WorkSafe New Zealand*, above n 3, at [4].

Low culpability – starting point of up to \$250,000;²⁴

Medium culpability – starting point of \$250,000 to \$600,000;²⁵

High culpability – starting point of \$600,000 to \$1,000,000;

Very high culpability – starting point of \$1,000,000 plus.

[53] The High Court in *Stumpmaster* endorsed the well-known list of relevant factors for assessing culpability in the earlier decision of *Department of Labour v Hanham and Philp Contractors Limited*.²⁶ Each of those factors will now be considered in turn.

The identification of the operative acts or omissions – what was reasonably practicable

[54] The WorkSafe investigation identified that Ritchies Transport had no systems in place to ensure dry hire vehicles were safe and suitable. Two particular omissions were identified which prevented Ritchies Transport from having effective and adequate systems. The first was a system for verifying that dry hire buses were safe and compliant. Ritchies Transport had an internal policy of servicing its vehicles every 5,000 kilometres.²⁷ When Mr Aholelei hired bus 351, it was overdue for its service by 226 kilometres. Due to lack of systems in place, no mechanical inspection of bus 351 was undertaken before it departed the depot on a trip of over 1,000 kilometres with 53 passengers on board.²⁸

[55] The second omission was the lack of information provided to dry hire drivers. Information which should have been given to Mr Aholelei included instructions on which steps to take in the event of bus 351 developing a fault.

²⁴ At [52]. The Court observed that low culpability cases “will typically involve a minor slip up from a business otherwise carrying out its duties in the correct manner. It is unlikely actual harm will have occurred, or if it has it will be comparatively minor”.

²⁵ At [66]. The Court noted, “We consider it likely that under the new bands a starting point of \$500,000 to \$600,000 would be common.”

²⁶ *Department of Labour v Hanham and Philp Contractors Limited* [2008] 6 NZELR 79.

²⁷ This internal Ritchies Transport policy is more frequent than the standard service intervals used by many heavy transport operators of 10,000 kilometres. Affidavit of A J Ritchie, paragraph [12].

²⁸ Bus 351 did have a current Certificate of Fitness, issued 12 November 2016.

[56] It is inherent in Ritchies Transport's acceptance of the charge that these omissions from the safe system of work exposed the passengers on the bus to a risk of death or serious injury. Ritchies Transport submits the failures of its systems was not a significant contributing factor to the accident and the resulting harm to the passengers.

[57] Ritchies Transport submits the stress the bus was placed under during the long route travelled with steeper hills and the lack of use of the engine braking system (due to Mr Aholelei's reliance on the brake pedal), coupled with Mr Aholelei's decision to continue to drive the bus, were the primary contributing factors to the accident. Ritchies Transport further submits Mr Aholelei's training as a Ritchies Transport bus driver and the relevant road signs he would have passed on the steeper inclines, should have alerted him to the fact he needed to use the engine brake system as opposed to the pedal brake. The engine braking system would have involved using the gear box to change down and hold the bus in a low gear on steep hills. This would have reduced the stress on the brakes.

[58] Ritchies Transport accept that at the time of the accident, they failed to provide a rental agreement to Mr Aholelei in accordance with Land Transport Rule: Operating Licensing 2007.²⁹ A compliant rental agreement would have included a telephone number to be called during the period of hire and instructions as to what the hirer should do if the vehicle breaks down and needs repair. Ritchies Transport submits the failure to have the requisite rental agreement was only limited to situations where Ritchies Transport dry hired buses to experienced Ritchies Transport bus drivers. While Ritchies Transport acknowledge their systems in this regard were non-compliant, they point to Mr Aholelei's experience as a Ritchies Transport bus driver and his admitted knowledge that he could have rung Ritchies Transport. Mr Aholelei has previously stated that he thought about ringing the depot but was reluctant because "we would sit there for another five hours before a bus got there".

[59] Ritchies Transport also submits the significance to be placed on its failure to provide a rental agreement should be minimal, given the limited seriousness of the

²⁹ Land Transport Rule: Operating Licensing 2007, Schedule 3.

breached regulations reflected in the maximum applicable fine of \$10,000 for such breaches.

An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk

[60] At the time of the dry hire, Ritchies Transport were aware of the distance of the journey and the number of passengers aboard. It was known that bus 351 would undertake a long journey with a full bus.

[61] More significant, however, was the failure to provide Mr Aholelei with the requisite agreement which would have underscored and emphasised for Mr Aholelei the appropriate steps to take in the event of mechanical issues.

[62] I accept the submissions of WorkSafe that the combined effect of the omitted systems unreasonably exposed passengers on the bus and other road users to serious risk of injury and death.

[63] The realised risk and the harm suffered in this situation was significant with the loss of three lives, serious injuries to many and a large total number of victims exposed to actual harm. The majority of passengers who survived the crash have suffered significant emotional trauma.

The obviousness of the hazard

[64] All counsel agree that the combination of factors resulting in the hazard were not particularly obvious.

The availability, cost and effectiveness of the means necessary to avoid the hazard

[65] There was nothing cost prohibitive or difficult about a mechanical check of bus 351 before it left the depot or providing Mr Aholelei with the relevant rental information required by law.

The current state of knowledge of the risk, nature and severity of the harm and the means available to avoid the hazard or mitigating the risk of its occurrence

[66] The circumstances of this accident are unique and unprecedented and, as a result, there is no relevant industry guidance.

Analysis of culpability

[67] WorkSafe submits Ritchies Transport's culpability falls within the medium culpability band and seeks a start point fine of \$400,000. This amount falls just short of the half way point for offending falling within the medium culpability band which can attract start point fines of \$250,000 to \$600,000.

[68] Ritchies Transport submits the offending sits at the cusp of the low to medium bands. It submits a start point fine of \$250,000 is within range.

[69] An assessment of the above factors is required to ascertain Ritchies Transport's culpability.

[70] I consider the failure to complete a mechanical check of bus 351 prior to it being hired was not a significant failure by Ritchies Transport. There is no evidence to suggest bus 351 had an identifiable mechanical fault at the time it left the depot. Ritchies Transport's internal policy of mechanical checks every 5,000 kilometres was well below industry standards.³⁰ It is likely the excessive use of the brake pedal system by Mr Aholelei placed the brake system under pressure. After a fault to the brake system was detected, Mr Aholelei's decision to continue driving was fatal.

[71] However, the failure to provide a rental agreement is, in my view, more significant. The agreement to dry hire, which has now been formulated and implemented by Ritchies Transport, includes a section titled "Vehicle Induction: Vehicle induction to be completed when vehicle is picked up".³¹ In this section are the list of requirements to be completed at the time the vehicle is collected by the hirer. Of particular relevance to the present case are the following requirements:

³⁰ Affidavit of A J Ritchie, paragraph [12].

³¹ Affidavit of A j Ritchie, annexure AR4.

The vehicle gearing system has been explained, including how to engage engine, exhaust and hand brakes.

Reporting of mechanical faults to Ritchies.

[72] The new hire agreement also includes a specific section entitled “Mechanical repairs and accidents”. The following clauses appear in this part of the agreement:

8. If the vehicle is involved in an accident, is damaged, breaks down or requires repair or salvage, regardless of cause, the hirer must notify the owner of the full circumstances immediately.

9. The hirer must not arrange or undertake any repairs or salvage without the owner’s authority except to the extent that repairs or salvage are necessary to prevent further damage to the vehicle or to other property.

[73] As already noted, Ritchies Transport submits the lack of a hire agreement is unlikely to have resulted in a different outcome. Ritchies Transport points to Mr Aholelei’s extensive experience as a bus driver, his training and his knowledge of the need to contact the company in the event of a mechanical breakdown. However, these factors relied upon by Ritchies Transport must be assessed within the context of the circumstances of this particular dry hire.

[74] Mr Aholelei was a very experienced bus driver. However, that experience related primarily to urban bus routes. No evidence has been provided to the Court about his experience on long haul coach services on open road driving conditions. I have concluded that the driving skills required for an urban transport operator will differ to those travelling on the major highways and open roads outside the urban centres. It is most unlikely that Mr Aholelei would have had much experience of engaging the engine braking system in an urban setting.

[75] Ritchies Transport submits Mr Aholelei should have been aware of the different brake systems and when each should be employed. Mr Andrew Ritchie, Director of Operations, has described training Mr Aholelei received during his employment. Attached to Mr Ritchie’s affidavit was a Driver’s Manual provided to Mr Aholelei on 5 February 2004 and the updated replacement manual in 2010. Refresher training specifically focused on engine braking was given in 2011.

[76] Ritchies Transport also runs yearly refresher training courses which are compulsory for all drivers. The components of these courses included how to drive safely, customer relations, and response to accident or emergency situations. The content of the annual refresher trainings does not touch upon the different brake systems and their use.

[77] As noted, there was no evidence that Mr Aholelei was familiar with using engine brake systems on a regular basis. I infer from his urban driving experience that his reliance would have been on the pedal brake system which he continued to rely on for this fateful journey.

[78] Given Mr Aholelei's limited experience using engine gear brake systems, coupled with his lack of recent relevant training of the different braking systems and their usage, I have concluded Mr Aholelei's driving experience is of limited weight when assessing the significance of the lack of the rental agreement.

[79] Ritchies Transport also points to Mr Aholelei's experience and knowledge of the steps to take in the event of mechanical fault. There can be no doubt Mr Aholelei knew he should contact Ritchies Transport. However, a rental agreement would have ensured that Mr Aholelei was expressly aware of both Ritchies Transport's expectations on drivers to make contact in the event of fault and the mechanism for doing so. Mr Aholelei was travelling far from the Auckland urban centre at Christmas time. The value of underscoring for Mr Aholelei Ritchies Transport's expectations cannot be underestimated in those circumstances.

[80] In my view, the lack of the rental agreement and the general circumstances surrounding Mr Aholelei's hiring of bus 351 reflect poorly on Ritchies Transport. They do not demonstrate a company operating best practice at that time. Those circumstances included that Mr Aholelei had specifically requested bus 351. When he arrived to pick up that bus, Mr Aholelei was informed bus 351 was currently in use and was late returning. Another bus, bus 126, was offered to Mr Aholelei. This bus had a manual gear system as opposed to an automatic gear changing system that Mr Aholelei was more familiar with in bus 351. There does not appear to have been any consideration given to the fact a bus with a completely different gear system

was being offered to Mr Aholelei who was about to embark on a significant journey on less familiar roads.

[81] Mr Aholelei was initially reluctant to take up the offer to hire bus 126, a reluctance that can be understood in the circumstances. However, after some time had passed and bus 351 had not been returned to the depot, he eventually did leave the depot with the alternate bus, bus 126. While driving away from the depot, Mr Aholelei saw bus 351 returning. He rang the depot and asked if he could swap buses. The request was agreed to. Mr Aholelei returned to the depot, secured the keys for bus 351 and drove away with it. No mechanical checks were undertaken, and it is noted that there were no discussions with or no bus hire forms handed to Mr Aholelei.

[82] In my view, these circumstances themselves suggest a degree of casualness by which the dry hire services were being operated by Ritchies Transport at that time. Despite Ritchies Transport's statements about health and safety in the workplace, these circumstances would suggest health and safety was not at the forefront of the dry hire practices.

[83] I, of course, cannot say with any certainty that the practices now in place would have changed the outcome. However, it may well have been an additional factor considered by Mr Aholelei before he made his fateful decision to continue driving. Ritchies Transport emphasising to Mr Aholelei of the need to make contact in the event of a fault may have been more at the forefront of Mr Aholelei's decision-making. The dry hire agreement is more than a piece of paper. Its purposes and express messages are significant.

[84] The level of harm that resulted cannot be understated. Resultant harm is relevant to assessing Ritchies Transport's culpability. This was emphasised in *Stumpmaster* when the Court said:³²

... It is correct the level of actual harm can be a matter of chance, but this is a statement equally true of a lot of offending. The conduct and intent will often be the same, but the consequence is very different. The different consequences has always lead to significant differences in sentencing jeopardy. We remain

³² *Stumpmaster v WorkSafe New Zealand*, above n 3, at [40]; Health and Safety at Work Act 2015, s 151(2)(d).

of the view that actual harm occurred is a relevant and important feature in fixing placement within the bands. That a defendant is “lucky” no one was hurt does not absolve it of liability under s 48, but the actual harm caused is still a relevant sentencing factor in determining how serious the offence was.

[85] The level of harm has already been referred to in detail in setting the reparation level. The loss of lives, the large number of significant injuries and emotional trauma for all, cannot be underestimated. The level of harm involved in this instance was significant for a large number of persons.

[86] I acknowledge in this analysis of culpability the obviousness of the combination of factors was not readily apparent and there is no prior industry experience for Ritchies Transport to draw upon.

[87] Having regard to all these factors, I have concluded that Ritchies Transport’s culpability falls squarely within the middle culpability band. Its failure to have a rental hire agreement was significant. The potential effects of underscoring the need of appropriate use of the bus and the different driving condition with Mr Aholelei before he left, as well as emphasising the steps to be taken in the event of a mechanical fault and the significant consequences that resulted, in my view all place Ritchies Transport’s culpability squarely within this band. I have not ignored Mr Aholelei’s actions in this process. Clearly, they contributed to the result.

[88] A notable change introduced to the HSWA was the introduction of the classification of duty holders. Under s 36 of the HSWA, the primary duty of care falls upon Ritchies Transport. Primary responsibility for compliance with the HSWA rests with Ritchies Transport being the company conducting the business of providing transportation services. It is Ritchies Transport that must ensure, as far as reasonably practical, that the health and safety of other persons is not put at risk from work carried out as part of the company’s business. The classification to duty holders and the primary duty of care being placed on Ritchies Transport is reflected in the offence provisions with the highest sanctions are imposed upon business entities, in this case Ritchies Transport or its executive officers. While Mr Aholelei’s actions contributed to the accident, the HSWA imposes a foundational duty on employers to protect

workers and other persons from harm. Reducing culpability on the basis of contributory conduct would undermine this duty.³³

[89] In the circumstances, I consider the \$400,000 start point fine submitted by WorkSafe to be within the appropriate range and that is the start point fine I adopt.

Aggravating and mitigating factors

[90] It is accepted there are no aggravating factors. Ritchies Transport have an exemplary record. They have no prior convictions for health and safety offending. Mr Ritchie's affidavit helpfully sets out its different systems designed to provide and maintain its safety record. Many of these systems are overseen and assessed by external regulatory bodies. While I note that Mr Ritchie refers to persons appointed to oversee health and safety systems and issues within Ritchies Transport, no detail as to how that is carried out in terms of everyday practices of their drivers was provided.

[91] WorkSafe submits a small amount of credit should be given to reflect the high total value of the reparation orders. Ritchies Transport seeks a greater level of credit, submitting there should be some proportionality between the level of fine and the reparation ordered. It is submitted it would be unfair to Ritchies Transport to be ordered to pay a high level of reparation when its culpability was not correspondingly high.

[92] The purpose of reparation is to provide for the victims. The fact there were three fatalities and a large number of others with serious injuries should not reduce the level of reparation ordered. I have already quoted the relevant passage from *Stumpmaster* where the Court acknowledges that culpability and consequences do not always correlate. The purpose and approach for determining reparation is different to that for determining fines. Reparation is victim-focussed and a fine is culpability focussed. However, I accept WorkSafe's submission that a level of credit may be given in the particular circumstances of this case. Credit for reparation will also provide some recognition of the financial and emotion support Ritchies Transport provided immediately after the accident. A 20 percent credit will be given for reparation.

³³ *Oceania Gold (New Zealand) Ltd v WorkSafe New Zealand* [2019] NZHC 365 at [63].

[93] Further credit is warranted for Ritchies Transport's assistance with the WorkSafe investigation. Ritchies Transport was completely co-operative with the WorkSafe investigation and as already noted, have taken steps to ensure that all its practices are compliant. Ritchies Transport seeks further discount for improving its dry hire system and devising a dry hire agreement. I have reviewed the dry hire agreement. In my view, it was an inexpensive and uncomplex agreement to put in place. No significant costs would have been incurred by Ritchies Transport in devising implementing this agreement. I consider discrete credit for these steps is not warranted in light of the limited effort those steps took.

[94] Finally, there is no issue that Ritchies Transport is entitled to credit for its guilty plea. The level of discount is accepted by all counsel to be 25 percent. It was a plea entered at the first reasonable opportunity having regard to the substantial material that both WorkSafe and Ritchies Transport jointly navigated their way through for a resolution to this prosecution.

[95] A fine to be imposed and is calculated as follows:

Start point fine	\$400,000.00
Twenty percent credit for reparation ordered; five percent credit for prior good safety record; and five percent credit for co-operation with the WorkSafe investigation	120,000.00
	<hr/>
	\$280,000.00
Twenty five percent credit for early guilty plea	70,000.00
Fine imposed	<hr/> \$210,000.00 <hr/>

Step three – ancillary orders

[96] No ancillary orders are sought.

Step four – proportionality assessment

[97] No further adjustments are sought by Ritchies Transport to the final total reparation orders or end find. Ritchies Transport through its insurance and company resources have the ability to pay the sums ordered.

[98] I do not consider there are any other factors raised that warrant further adjustments.

Conclusion

[99] In conclusion, it is hoped that for the many victims of this tragic event, the conclusion of this sentencing process will bring them some closure. I end this decision with an extract from a hymn I have been advised members of the Tongan community will be familiar with.

E hoku kaunga mamahia
kau pilikimi ongosia
ihe fononga ni
tau fakangalongalosi'i
'A e kovi he mouini
O hanga kihe langi

To victims
and tired followers
of this journey,
let us forget
the darkness of this life
and look upon the Heavens.

Judge J Jelas
District Court Judge

Date of authentication: 23/09/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.