IN THE DISTRICT COURT
AT HAMILTON

CRI-2016-019-001096
[2016] NZDC 15489

**WORKSAFE NEW ZEALAND**
Prosecutor

v

**HAMILTON FLOORING LIMITED**
Defendant

Hearing: 5 August 2016

Appearances: C Pille for the Prosecutor
B Harris for the Defendant

Judgment: 15 August 2016

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**RESERVED DECISION OF JUDGE P G MABEY QC**

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## Background

[1] Hamilton Flooring Limited ("the defendant") is a private limited liability company. Its business is the installation of commercial and residential flooring.

[2] At the time of the incident that concerns the Court it had two employees being Mr Vaughan Le Roy Paul ("Mr Paul') and Mr Ben Evans Brown ("Mr Evans Brown").

[3] Both were experienced in flooring installation; Mr Paul has had 31 years experience and Mr Evans Brown has seven years experience.

[4] The defendant had secured a long standing contract with the Waikato District Health Board for the installation of flooring at its various premises. The incident that concerns the Court involved the supply and installation of vinyl in wards 34-36 of the Henry Rongamau Bennett Centre located at the Waikato Hospital. This particular work commenced in July 2015.

[5] On Thursday 20 August 2015 Mr Paul and Mr Evans Brown were installing vinyl flooring in a secure unit at the Henry Bennett Centre. They were working in the bathroom block in ward 35.

[6] The bathroom block consisted of a bathroom, adjoining toilet and shower cubicles. The cubicles were separated by partitions and doors. The shower cubicle, where the incident occurred, was approximately 1.85 metres by 1.2 metres by 2.8 metres.

[7] As the Henry Bennett Centre is a secure unit dedicated to adult mental health the bathroom windows were secured and could not be opened. At the time of the incident there was an extractor fan on the ceiling but this was not in use.

[8] Mr Paul and Mr Evans Brown had completed the vinyl in the bathroom and Mr Evans Brown had moved to the toilet cubicle to install vinyl there. He was using an LPG gas blow torch to heat and mould the vinyl for installation.

[9] Mr Paul was in the adjourning shower cubicle applying a solvent based adhesive with a paint brush. He was doing so from an open container which contained approximately four litres of adhesive.

[10] The adhesive being applied by Mr Paul was Ados F55 which is also known as CRC 8052 F55 Red (NZ). It contains two principal solvents; acetone and toluene and carries a class 3.1B hazardous substance classification and is highly inflammable.

[11] At approximately 5.00pm on 20 August 2015 the vapours of the adhesive being applied by Mr Paul were ignited by the naked flame of the gas torch being used simultaneously by Mr Evans Brown in the toilet cubicle. The flames travelled around the door of the toilet cubicle where Mr Evans Brown was located and into the shower cubicle and ignited the open container of adhesive which at that time was being held by Mr Paul.

[12] Mr Paul suffered burns and ran to a staff shower and was attended to by a hospital doctor who was on hand.

[13] Mr Paul received burns to approximately 21-25% of his total body. They involve mixed depth and full thickness burns to his calves and his right arm. There were superficial burns to other parts of his body. He required skin grafts on his legs and posterior thighs and was hospitalised for three weeks. Mr Evans Brown was not harmed.

[14] As a result of an investigation by Worksafe New Zealand the defendant is charged under ss 6 and 50(1) of the Health and Safety Employment Act 1992 ("HSE Act") in that:

> Being an employer, failed to take all practicable steps to ensure the safety of its employees, namely Vaughan Le Roy Ivan Paul and Ben Ryan Evans Brown, while at work, in that it failed to take all practicable steps to ensure that they were not exposed to hazards arising out of the use of a flammable solvent based adhesive, namely CRC 8052 F55 Red (NZ) also known as Ados F55 and an LPG gas torch in the same enclosed area, namely the bathroom in R3-12 in Ward 35 of the Henry Rongomau Bennett Centre at Waikato Hospital.

[15] The defendant has pleaded guilty to that charge and is to be sentenced.

**The facts**

[16] An agreed summary of facts is before the Court and in addition to the matters summarised above identifies the relevant hazards for the work being undertaken by the defendants' employees as the use of an flammable solvent based adhesive and an ignition source, namely the naked flame from the LPG gas torch, in the same enclosed area.

[17] The summary records that a job safety analysis form had been completed by the defendant prior to the work commencing. It identified a number of hazards including hot work, risk of chemical contact and the risk of flammable gases. The job safety analysis form also identified a number of significant hazards including solvent/glue, hot work/fire and gas bottles.

[18] The analysis identified a control method being to keep the solvent in an air tight container and store it five metres away from the hot work and flames.

[19] The agreed summary records that the job safety analysis was not discussed with nor seen by Mr Paul or Mr Evans Brown prior to the work commencing.

[20] A further document, a work method statement, had also been completed by the defendant prior to the work commencing. This recorded possible hazards as glue fumes, burns, leads, and solvents. That document identified a control measure in the following cryptic form *"where [sic] respirator, experienced installer, skilled operator, minimised leads, wear respirator, store in air tight container."*

[20] As with the job safety analysis form the work method statement was not discussed with nor seen by Mr Paul or Mr Evans Brown prior to work commencing.

[21] The defendant company had formulated its own specific safety plan in respect of general installation of floor coverings which is of course its primary business. The specific safety plan listed solvents including toluene and acetone as highly flammable hazards. The specific safety plan identified a control as – *"keep*

*well away from source of ignition, if used in poorly ventilated area, use extraction or supply of fresh air".*

[22] It is accepted in the agreed summary that neither Mr Paul nor Mr Evans Brown were wearing or using any personal protective equipment at the time of the accident. Respirators had been provided by the defendant but were not in use.

[23] The specific safety plan stipulates that employees – *"Be aware of inhalation problems, use respiratory equipment as required, ensure sufficient ventilation ..."*

[24] As noted, the work was being carried out in a secure facility and as a result access and ventilation were limited. There was no active airflow in the bathroom as the windows were secured shut and the entrance door to the bathroom was closed to prevent access from patients.

[25] The agreed summary of facts records the defendant failed to take into account the need for adequate ventilation for this type of work or for controls on work sequences. In addition the confined space and the dimensions of the bathroom meant that the defendant's own control measure of ensuring the container of adhesive was kept five metres from the ignition source was not possible or practicable.

[26] The agreed summary also addressed the relevant industry standards and guidelines which apply to the circumstances that gave rise to the incident which led to Mr Paul's injuries.

[27] The Hazardous Substances (classes 1 to 5 controls) Regulation 2001 sets out the general and place specific controls for the relevant hazardous substances.

[28] Regulation 58 requires any place containing a class 3.1B substance to ensure a hazardous atmosphere zone is established. This applies to class 3.1B quantities of one litre if in an open container for continuous use.

[29] The material safety data sheet issued by the manufacturers of the Ados adhesive records that it is a highly flammable liquid and vapour. It suggests safety

measures including keeping the adhesive away from heat, sparks, open flames and hot surfaces. It also recommends use outdoors or in a well ventilated area.

[30] In addition the safety data sheet recommends gloves, overalls, safety footwear, respirator and glasses or goggles to be worn during use.

[31] The Department of Labour has issued a document entitled "practical guidelines for the safe use of organic solvents". At pages 7-8 of that document it notes a practical step to reduce the risk of a flashpoint of a flammable solvent is to use a non-flammable solvent and to take care at all times to exclude sources of ignition and to reduce the vapour concentration by ventilation or air extraction.

[32] The essential element of this charge, under s 6 of the HSE Act is the practicable steps which were not taken. The agreed summary identifies the following practicable steps which should have been, but were not, taken by the defendant to ensure employee safety. They are:

(a) To have identified and documented the site specific hazards of the bathroom units at the Henry Rongomau Bennett Centre and the appropriate controls needed to eliminate, isolate or minimise the hazards; and to have effectively communicated these to its employees.

(b) Following the abovenamed practicable step, the defendant should have ensured that the appropriate site specific controls were used by its employees; namely:

(i) There was no ignition source present when applying a flammable solvent based contact adhesive.

This could have been achieved by ensuring that the correct working sequence was followed by the workers; namely that the LPG gas torch was not used while a flammable solvent based contact adhesive was open and being used in the same enclosed area.

(ii) To have ensured that the bathroom area was safely ventilated when using a flammable solvent based contact adhesive;

Or

If this was not possible due to the secure nature of the facility or the dimensions of the working environment to have ensured that a non-flammable water based contact adhesive was used instead.

(c) To have ensured that its employees had available on site and were wearing the appropriate personal equipment when using the flammable solvent based contact adhesive.

[33] The agreed summary records that the defendant has no previous convictions.

## The sentencing process

[34] Section 51A of the Health and Safety in Employment Act 1992 expressly provides for sentencing under that Act. It says:

> 51A **Sentencing criteria**
>
> (1) This section applies when the Court is determining how to sentence or otherwise deal with a person convicted of an offence under this Act.
>
> (2) The Court must apply the Sentencing Act 2002 and must have particular regard to –
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> (a) sections 7 to 10 of that Act; and
>
> (b) the requirements of sections 35 and 40 of that Act relating to the financial capacity of the person to pay any fine or sentence of reparation imposed; and
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> (c) the degree of harm, if any, that has occurred; and
>
> (d) the safety record of the person (which includes but is not limited to warnings and notices referred to in section 56C) to the extent that it shows whether any aggravating factor is absent; and
>
> (e) whether the person has -
>
> (i) pleaded guilty:
>
> (ii) shown remorse for the offence and any harm caused by the offence:

(iii) co-operated with the authorities in relation to the investigation and prosecution of the offence:

(iv) taken remedial action to prevent circumstances of the kind that led to the commission of the offence occurring in the future.

(3) This section does not limit the Sentencing Act 2002.

[35] The leading authority in application of that section is from a full bench of the High Court in *Department of Labour v Hanham and Philp Contractors Limited*[1].

[36] The Court noted at [24] and [26] respectively:

> [24] Section 51A was enacted by the amending legislation which took effect in May 2003. The section makes it abundantly clear that the Sentencing Act must be applied when sentences are imposed under the HSE Act and that nothing in s 51A limits the provisions of the Sentencing Act. Section 51A(2) identifies particular provisions in the Sentencing Act and other matters to which the sentencing judge must have particular regard.
>
> [26] While s 51A provides specific focus to the sentencing exercise under the HSE Act, it is not to be regarded as dominating or overriding the Sentencing Act. The latter must remain the principal guide to the sentencing judge.

[37] At [80] the Court summarised the appropriate sentencing approach as:

> [80] Before considering the merits of the individual appeals we summarised the approach to sentencing for offending under s 50 f the HSE Act:
>
> (1) Both s 51A of the HSE Act and the Sentencing Act are relevant to the sentencing process (see paras [23] – [30] above).
>
> (2) The sentencing process involves three main steps:
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> · assessing the amount of reparation;
>
> · fixing the amount of the fine;
>
> · making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and the fine.

[1] *Department of Labour v Hanham and Philp Contractors Limited* (2008) 6 NZELR 79 (HC)

(3) Reparation and fines serve discrete statutory purposes and both should ordinarily be imposed. But where lack of financial capacity does not permit both the payment of appropriate reparation and a fine, the former is to receive priority (see paras [31] – [33] above).

(4) The first main step is to fix reparation. It involves a consideration of the statutory framework (see paras [35] – [39] above), taking into account any offer of amends and the financial capacity of the offender (see paras [41] – [40] above).

(5) The second main step is to fix the amount of the fine. This should follow the methodology established by the Court of Appeal in *Taueki*, namely fixing a starting point on the basis of the culpability for the offending and then adjusting the starting point upwards or downwards for aggravating or mitigating circumstances relating to the offender (see paras [47] – [50] above).

(6) The assessment of a starting point for the fine involves an assessment of the culpability for the offending (see paras [54] and [55] above). Starting points should generally be fixed according to the following scale:

| | |
|---|---|
| Low culpability: | a fine of up to $50,000 |
| Medium culpability: | a fine of between $50,000 and $100,000 |
| High culpability: | a fine of between $100,000 and $175,000 |

(7) The starting point for the fine is then to be adjusted for any relevant aggravating and mitigating factors relating to the offender (see paras [61] – [63] above).

(8) Reparation is then to be taken into account in fixing the fine (see paras [64] – [71] above).

(9) Financial capacity to pay a fine is also to be considered in fixing the fine (see paras [75] – [77] above).

(10) The third main step is to assess whether overall burden of the reparation and fine is proportionate and appropriate (see paras [78] and [79] above).

## Reparation

[38] Section 12 of the Sentencing Act 2002 provides that where a Court is lawfully entitled to impose a sentence of reparation it must do so in the absence of undue hardship or other special circumstances that would make such an order inappropriate. Section 32 of that Act provides:-

**32 Sentence of reparation**

(1) 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 –

(a) Loss of or damage to property; or

(b) Emotional harm; or

(c) Loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

(2) Despite subsection (1), a court must not impose a sentence of reparation in respect of emotional harm, or loss or damage consequential on emotional harm, unless the person who suffered the emotional harm is a person described in paragraph (a) of the definition of "victim" ins ection 4.

(3) 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)©, 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.

(4) Subsection (3) applies whether or not the right to bring proceedings or make the apoplication has been exercised in the particular case, and whether or not any time prescribed for the exercise of that right has expired.

(5) Despite subjections (1) and (3), the court must not order the making of reparation in respect of any consequential loss or damage described in subsection (1)© for which compensation has been, or is to be, paid under the Accident Compensation Act 2001.]

(6) When determining the amount of reparation to be made, the court must take into account any offer, agreement, response, measure, or action as described in section 10.

(7) The court must not impose as part of a sentence of reparation an obligation on the offender to perform any form of work or service for the person who suffered the harm, loss, or damage.

(8) Nothing in section 320 of the [Accident Compensation Act 2001] applies to sentencing proceedings.

[39] There is no tariff judgment for the assessment of emotional harm to victims of offences. The assessment is case specific within the statutory framework taking into account any offer of amends and also a defendant's financial capacity.

[40] In *Department of Labour v Hanham and Philp Contractors Limited*, at [40] the Court provided an overview of the relevant statutory provisions governing an award of reparation. It said:

> This review of the relevant provisions of the HSE Act and the Sentencing Act demonstrates several key propositions. First, the object of the HSE Act is the prevention of harm in the workplace. Secondly, to achieve that object, sentencing under s 50 generally require significant weight to be given to the purposes of denunciation, deterrence and accountability for harm done to the victim in terms of s 7 of the Sentencing Act. Thirdly, reparation must be a principle focus in sentencing. Indeed, the Sentencing Act gives primacy to reparation whether financial capacity of the offender is insufficient to pay both reparation and a fine. Finally, both the HSE Act and the Sentencing Act require the Court to take account of the financial capacity of the offender.

[41] Counsel have made submissions on the quantum of reparation appropriate in this case. Ms Pille submits that an award between $20,000 and $30,000 is appropriate for the emotional harm suffered by Mr Paul as a result of the incident. She refers to his victim impact statement which I have seen and read.

[42] He had been working for the defendant for about a year at the time of the incident but had previously worked for the defendant. As noted, he is experienced in laying flooring.

[43] He refers to the pain suffered and the skin grafts that were required to almost a quarter of his body and that he was hospitalised for almost one month.

[44] He has obtained compensation through ACC of 80% of his pre-incident earnings. He has resumed his employment with the defendant.

[45] He talks of the ongoing treatment that is needed for his skin grafts including moisturising and the need for compression stockings and that although he has returned to work full time he doubts if he ever will be able to perform to the same standard or with the same energy.

[46] Although it is not expressly referred to in the victim impact statement it is clear from the fact that he has returned to work that he acknowledges the support of the defendant.

[47] Ms Pille refers me to four cases which she says assist in the intuitive exercise I must undertake in assessing the quantum of emotional harm reparation. The cases are:

- *Department of Labour v Avo - Plus*[2]

- *Worksafe New Zealand v McKechnie Aluminium Solutions Limited*[3]

- *Department of Labour v Fletcher Steel Limited T/A Fletcher Reinforcing*[4]

- *Worksafe New Zealand v Molten Metals Limited*[5]

[48] Mr Harris by reference to *McKechnie Aluminium, Molten Metals and Worksafe New Zealand v BR & SL Porter Limited*[6] contends for a reparation order in the range of $15,000 to $20,000.

[49] He records in his submissions that the defendant has made an offer of $22,500 made up of:

(a) Emotional harm reparation of $20,000.

(b) Consequential loss by way of ACC shortfall $2500.

[50] I am told by Ms Pille that Mr Paul has accepted that offer but of course that does not bind me in my ultimate assessment of what is appropriate.

[51] As to consequential loss, s 32(1)(c) enables an award to be made, subject to the limitations contained in s 32(5).

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[2] *Department of Labour v Avo – Plus* DC Tauranga CRI-2012-070-001985, 27 August 2012

[3] *Worksafe New Zealand v McKechnie Aluminium Solutions Limited* [2000] NZDC 16087

[4] *Department of Labour v Fletcher Steel Limited T/A Fletcher Reinforcing* DC Manukau CRI-070-92504217, 18 March 2008

[5] *Worksafe New Zealand v Molten Metals Limited* DC New Plymouth CRI-2015-043-000721, 17 June 2015

[6] *Worksafe New Zealand v BR & SL Porter Limited* DC Tauranga CRI-2014-070-001606, 5 August 2014

[52] Mr Paul suffered a shortfall between his pre-incident wages and the amount paid by ACC. The defendant has been making "top up" payments to Mr Paul to compensate for the shortfall but counsel are agreed that the net shortfall outstanding is $1982.82. That is a consequential loss that falls within s 32(1)(c).

[53] On my assessment, and having regard to the various authorities referred to by counsel, I consider that an appropriate emotional harm reparation award is $22,500. In addition Mr Paul should recover the consequential loss of the ACC shortfall.

[54] I will make formal orders of those amounts at the end of this judgment.

**Fine**

[55] Counsel are a considerable distance apart in their submissions as to the appropriate start point. There is agreement as to the absence of any aggravating factors that would justify an increase from any start point but that there are mitigating factors that would justify a decrease.

[56] In particular counsel agree, and I accept, that the defendant is entitled to the full credit of 25% for the guilty plea which was entered at the earliest opportunity. In addition counsel agree, and I accept, that there are further mitigating factors that would justify a reduction of between 20-30%.

[57] In accordance with the *Taueki* methodology the guilty plea reduction is applied to the net figure arrived at after reductions to the start point for all other mitigating factors.

[58] The particular mitigating factors which apply in this case, in addition to the guilty plea are: -

- Co-operation with Worksafe in relation to the investigation and prosecution of the offence.

- Remorse shown for the offence and the harm caused to Mr Paul.

- A favourable safety record.

- Remedial action taken to prevent the recurrence of the circumstances that led to the offence.

[59] Those matters are referred to in [62] of *Department of Labour v Hanham and Philp Contractors Limited.* The defendant can claim the benefit of each in this case.

[60] I consider that a reduction to the start point of 30% is appropriate before credit of the 25% for the defendant's guilty plea.

[61] Mr Harris drew my attention to [74] of *Department of Labour v Hanham and Philp Contractors Limited* which refers to a modest allowance which "may" be justified to recognise an employer's responsible approach in securing insurance cover to provide for reparation to injured employees.

[62] In that same paragraph the Court referred to [69] which noted that a discount from a start point would be appropriate to recognise a reparation order made against a defendant of adequate means. As the Court noted in [74] any allowance for securing insurance cover is subsumed within that discount.

[63] I record that the 30% reduction to the start point incorporates a recognition of the reparation payment which will be made.

[64] Mr Harris advises that his client is of adequate means. He does not make a financial disability submission.

*Start point*

[65] It is necessary to determine the culpability of the defendant by reference to the scale identified in *Department of Labour v Hanham and Philp Contractors Limited.* An assessment of the culpability factors set out in [54] of that decision is necessary. The culpability factors identified by the Court are:

- The identification of the operative acts or omissions at issue.

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

- The degree of departure from standards prevailing and the relevant industry.

- The obviousness of the hazard.

- The availability, costs and effectiveness of the means necessary to avoid the hazard.

- The current state of knowledge of the risks and of the nature and severity of the harm which could result.

- The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[66] Ms Pille submits that the defendant's culpability is near the top of the "medium" band and contends for a start point of $90,000. In relation to the culpability factors she submits:-

(a) Operative acts or omissions - she points to the practicable steps identified in the agreed summary of facts.

(b) Nature and seriousness of risk – it is clear that the risk of harm is serious. The realised risk in the form of injuries to Mr Paul is self-evident.

(c) Degree of departure from industry standards – Ms Pille points to the standards and guidelines set out in the agreed summary of facts. The Hazardous Substances (clause 1 – 5 controls) Regulations 2001 apply to the class 3.1B adhesive in quantities of 1 litre if in an open container for continuous use. A hazardous atmospheric zone must be established in those circumstances. That was not done in this case.

As is noted below, Mr Harris took issue with Ms Pille's submission that there was a significant departure from industry standards in this case.

(d) The obviousness of the hazard – the hazard arising from the contemporaneous use of the inflammable solvent in close proximity to an ignition source would have been obvious not only to the directors of the defendant company but the employees, Mr Paul in particular, all of whom have significant experience in the flooring industry.

(e) Ability to avoid the hazard – Ms Pille submits that an effective site specific assessment could have readily been carried out and the hazard avoided in a cost effective way. Ventilation could have been ensured, the correct work sequence followed and if necessary a non-flammable contact adhesive used.

(f) Current state of knowledge of the risks and potential harm – the risks are known, there are publications and literature available in the form of the adhesive manufacturers recommendations, statutory regulations and industry knowledge.

[67] Ms Pille, in support of her start point refers to a number of authorities: -

(a) *Worksafe New Zealand v Molten Metals Limited*

An employee was engaged in gas cutting at a scrap yard operated by the defendant. There was a lack of supervision to ensure safety precautions are taken before gas cutting commenced. There was no checklist to be completed by a supervisor or manager and no steps were taken to ensure personal protective clothing was of an adequate standard was available. A start point of $60,000 was adopted.

(b) *Worksafe New Zealand v BR & SL Porter Limited*

The employee was welding inside a tanker which ignited causing serious burns. There was an inadequacy of training, control, supervision and appreciation of the risks involved. There was no active steps to minimise the risk.

The employee had over four years welding experience. A start point of $80,000 was adopted by the Court.

(c) *Worksafe New Zealand v McKecknie Aluminum Solutions Limited*

The defendant operated an aluminium foundry. The employee suffered burns after an explosion at a casting table. The employee sought to unblock a channel to ensure the flow of molten aluminium. He did so by prodding the channel with a metal bar. That caused an explosion and he suffered burns.

The defendant did not have an effective system for training or monitoring health and safety issues or a process to deal with high risk practices. There was no personal protection equipment available and ready for use. A start point of $80,000 was adopted by the Court.

[68] Ms Pille contends that the culpability of the defendant in this case exceeds that of *Porter* and *McKechnie*.

[69] Mr Harris, in response to Ms Pille's submissions on start point addresses the major culpability factors identified in *Hanham and Philp*.

<u>*Operative acts or omissions*</u>

[70] The defendant accepts, as it must, the practicable steps it failed to take as set out in the agreed summary but emphasises that the employees were experienced in the use of the solvent based adhesive. The work could have been carried out safely if they allowed more time between the application of the adhesive and the use of the ignition source. The defendant's failure comes down to not reminding the workers to strictly follow the well known work sequence.

[71] Mr Harris also identifies the lack of communication between the employees as a central issue. He is careful to say that he has not attempted to lay responsibility upon Mr Paul and his co-worker but seeks to distinguish this case from the authorities referred to by Ms Pille by noting that the risks were well known, the employees were experienced and the defendant was entitled to expect that they would apply established work processes.

[72] It is correct that employee knowledge and experience is relevant in assessing the culpability factors. An inexperienced apprentice tasked to carry out work in circumstances which give rise to a risk of harm is in a different position than an experienced employee, well versed in work procedures and who is aware of the risks.

[73] Mr Harris' submission on this point however needs to be balanced against the purpose of the Health and Safety Legislation which is to ensure workplace safety. An employer's obligation cannot be avoided by any suggestion that experienced workers can be relied upon to protect themselves. It needs to be remembered that the Act creates offences of strict liability.

*Nature and seriousness of risk*

[74] The defendant had completed a job safety analysis and work method statement in advance of the work at the Henry Bennett Centre. Mr Harris notes that the director of the defendant company had visited the work site on the day of the incident and saw no issue with the layout, amount of work space, availability of the personal protection equipment, adequacy of ventilation or the products being used.

[75] I do not consider that submission assists the defendant. The reality is that no work site specific assessment was carried out and the fact that the director of the defendant company was oblivious to what must have been an obvious risk when he visited the site in fact adds to the defendant's culpability in my view.

*Degree of departure from industry standards*

[76] Mr Harris takes real issue with any suggestion that there has been a significant departure from industry standards. He says that the use of solvent based adhesives is common place in flooring and that the risks are well known if used in conjunction with an ignition source. He says that the prosecution emphasis upon the hazardous substance controls in the manufacturers safety data relate more to the particular chemical rather than industry standards with regard to those who work in commercial flooring.

[77] A particular point he makes is that the Hazardous Substances (classes 1 to 5 controls) Regulations 2001 apply when the particular chemical is in *continuous use*. It is only when the chemical is in continuous use that an atmospheric hazard zone is established.

[78] In oral submissions Mr Harris sought to demonstrate circumstances where a chemical may be in continuous use such as in a manufacturing workshop or factory.

[79] However his attempts to establish that distinction were unsuccessful. The reality is that when Mr Paul was applying adhesive from an open container containing four litres of the flammable solvent based adhesive, the adhesive was in continuous use. He was using it continuously for the time that he was applying it. The container was open and fumes were emanating from it. The regulations were in breach as no hazardous atmospheric zone was established.

[80] There is a departure from industry standards. I am in no doubt that any person involved in the flooring industry would readily agree that the regulations apply to the use of the adhesive in the way that it was being used in the Henry Bennett Centre. The risks were obvious, the work sequence which involved separation from an ignition source, ventilation and personal protection equipment are well known.

[81] In relation to the authorities referred to by Ms Pille in support of her start point Mr Harris disputes that the defendant's culpability in this case is higher. To contrary he says that the authorities referred to by Ms Pille demonstrate the opposite.

[82] He attempts to distinguish the activity in *McKechnie Aluminium* (working with molten aluminium at 700°C) and *BR & SL Porter* (the direct application of heat from a welding torch to inflammable tallow) on the basis that those activities are "inherently dangerous". The submission being those very tasks carry with them an easily identified and inherent danger.

[83] On the contrary, he says the application of a flammable solvent based adhesive is not in itself dangerous. Nor is the use of a blow torch to assist in the application of flooring an inherently dangerous activity.

[84] The difficulty with that submission is that it is the application of the adhesive *at the same time* as the use of a heat source in close proximity in an unventilated environment that creates the danger. Whilst the individual component activities may not themselves be inherently dangerous it is the combination of events which is dangerous.

[85] Cases cannot be distinguished on the basis that danger comes about by a combination of separate steps which may not in themselves be particularly dangerous. The distinction is artificial and ignores the purposes of the legislation.

[86] There is however some force in Mr Harris' submissions that the defendant's culpability in this case is less than that of *Porter* and *McKechnie*.

[87] In *Porter* the Judge noted at [10]:

> There was an inadequacy of training, control, supervision, appreciation of the risks, preparation for those risks or active steps to actually minimise the risk.

[88] In *McKechnie* at [13] the Judge said that the defendant:

> Should have had an effective system for training and monitoring safety performances of employees to eliminate high risk practices. It should have had the appropriate protection gear available.

[89] In this case the defendant had completed a job safety analysis and had an established work method statement. Personal protection equipment was available but was not being used. In addition the employees, Mr Paul in particular, were very experienced. Mr Paul acknowledged in his interview that he was aware of the proper procedures for the use of the adhesive which he had worked with for nearly 30 years. Mr Paul said:

> *"It is not the glue, it is the person using it."*

[90] As to circumstances where there is little or no ventilation he said: *"We have to wait ages for the fumes to go away*".

[91] I do not accept the submission of Ms Pille that the defendant's culpability in this case exceeds that of *McKechnie* or *Porter* . To the contrary I accept Mr Harris' submission that those cases demonstrate that the defendant's culpability is in fact lower.

[92] Mr Harris contends for a start point in the range of $45-$55,000. He submits that the defendant is within the low culpability band in *Hanham and Philp.*

[93] On my assessment the defendant is at the lower end of the medium culpability band and I assess the appropriate start point at $65,000.

[94] From that, it is noted, there is a deduction of 30% which incorporates the various mitigating factors identified in [62] in *Hanham and Philp* together with the offer of reparation.

[95] That reduces the start point to $45,500 from which a guilty plea credit of 25% must be deducted.

[96] That produces a net fine of $33,125.

[97] I have already assessed emotional harm reparation at $22,500 plus a consequential loss payment of $1982.88.

## Proportionality

[98] The third stage in the analysis dictated by *Department of Labour v Hanham and Philp Contractors Limited* is to assess whether the overall burden of the reparation and fine is proportionate to the defendant's culpability. That assessment is to be made against the background of the statutory purposes and principles of sentencing.

[99] I consider that the totality of the fines and reparation as assessed is not disproportionate to the defendant's culpability and I make no reduction in the assessed amounts.

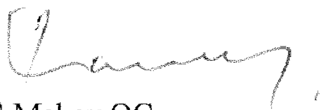
## Result

[100] The defendant is ordered to pay:

(a) A fine of $33,125.

(b) Emotional harm reparation $22,500.

(c) Consequential losses of $1982.88.



P G Mabey QC
District Court Judge