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IN THE DISTRICT COURT
AT MASTERTON

I TE KŌTI-Ā-ROHE
KI WHAKAORIORI

CRI 2019-035-1308
[2020] NZDC 19117

WORKSAFE NEW ZEALAND
Prosecutor

v

KIWI LUMBER (MASTERTON) LIMITED
Defendant

Hearing:	8 September 2020
Appearances:	Ms N Szeto for the Prosecution Ms L Castle for the Defendant
Judgment:	25 September 2020

JUDGMENT OF JUDGE B A MORRIS

Introduction

[1] On 9 November 2018 Anita McRae was at her workplace, Kiwi Lumber, in the country town of Masterton. She was required to go up onto a timber carrying conveyor to fix a fault that had occurred. The machine had already been automatically stopped through an alarm system. The power should have been turned off and a lock put on the switch to make sure no one else could turn it back on while she was up there. That was not done. While she was on the conveyor belt a fellow worker, not realising she

was up there, cleared the fault on a panel which had the effect of an unseen person turning the power back on, the conveyor started and tragically Miss McRae was knocked off her feet by timber coming along the conveyor belt. She was dragged into the machines large sprocket. She died of her injuries at the scene.

[2] The company has pleaded guilty to a charge under s 36 of the Health and Safety at Work Act 2015 of failing to ensure all reasonably practicable steps were taken to prevent the risk of serious injury or death occurring from exposure to the moving parts of that machine. The maximum fine is one and a half million dollars.

[3] The issues I have to determine are: What is the amount of reparation Kiwi Lumber should pay to Miss McRae`s family? What is the appropriate fine? To assess that I must determine, amongst other things, what was the risk involved, how foreseeable and well known was it and how easily could it have been avoided?

[4] In undertaking this task I note two matters at the outset. First, I acknowledge the palpable and enduring pain that Miss McRae's family suffer and the fact no amount of monetary compensation can begin to measure or in any way make up for the daily and ongoing suffering of the McRae family. All the court can do is acknowledge their grief and lament the loss of a much loved family member.

[5] I also acknowledge at the outset that this company is not an uncaring or unprofessional player in this industry. It has accepted responsibility, taken steps to remedy the faults and wishes to pay reparation to the family. Yes, it could have done more and yes, in a very real way it could have avoided this tragedy, but it is not a corporate cowboy. This is a responsible company who has sadly dropped below the level of safety it should have maintained. I acknowledge too Miss McRae`s work colleagues who were there on the day. They have suffered much.

The Company and The Machine

[6] Kiwi Lumber is a sawmill operator that processes logs into useable timber. One of its three sawmills is in Masterton where it employs over 60 people. The factory gets logs in at one end and processes it into wooden planks at the other. Along the

way, the wood gets sorted by both grade and length before it goes out for further processing and ultimate sale.

[7] That sorting process is done automatically by a three layered machine, the "bin sorter". The top deck, where the accident happened, consists of five conveyor belts in separate lanes with five large sprockets and lugs. They assist timber travel and transfer the planks on to a sorting conveyor and then down into appropriate bins on the second deck. When the bins are full they drop down to the third lowest deck where they are transported out to be stacked, ready to be picked up.

Potential Faults and System to Fix Them

[8] There were a number of things that could go wrong with the conveyor system. Boards could jam or they could become skewed. The relevant fault in this case was what was described as a "pusher lug fault". It was because of such a fault that Miss McRae went up on to the top deck on the day of the accident.

[9] A pusher lug fault is when the lugs get out of sequence or the camera lens that detects the logs, the proxy, needs cleaning. There is a control panel on the first and second deck that lights up if there is a lug fault and the conveyor automatically stops. Sometimes the fault can be fixed by clearing it at the panel and restarting the machine. However, on many occasions the bin runner, Miss McRae`s job, would have to go up on to the top deck to see what was happening. To do that the company had created a walkway that was horizontal to the sprockets and lugs which the bin runner would have to walk along. The planks were divided by five rods of metal dividing the lanes. The bin runner would have to step over them. All of this was not far from the large nip points created by the equally large sprockets where it met the conveyor. They were not guarded.

Lockout Procedure

[10] The system to ensure the safety of the bin runner going on to the top deck was, as it was in the rest of the factory, an "isolating lockout" procedure: effectively a system of telling employees to turn the power off and make sure the power cannot be

turned back on by others. That procedure involved these features which were included in the company's many "safe operating procedures" (SOPs):

- Every employee had their own personal lock assigned to them with their initials engraved on it. They were required to keep that lock with them at all times. The company had a lockout board in the tea room where employees had to put their locks at night and pick them up in the morning.

- If an employee had to go on to machinery, such as the bin sorter, they had to turn the isolation switch on, that is turn the power off to the machine.

- Once the worker had turned the power off they had to "lockout", that is put their padlock on the switch, to prevent it being turned on until they had taken their personal lock off. It would also presumably let other workers know that someone was still working on the machine.

- They had to remove their key from the lock so no one could take it off and turn the power back on.

- Once they had finished working on the machine they had to ensure everyone was clear and then remove their lock.

[11] To clear the fault on this machine a reset button would be pushed on the control panel and the trim saw operator, who was in a separate area and could not see the bin sorter, would see the fault was cleared on his control panel. He would then restart the machine. At times the workers would also communicate with the trim saw operator with radios they carried. The trim saw operator also had a global e-stop he could use in the control room to shut down the entire factory.

The Fatal Accident

[12] Miss McRae was working as a bin runner that day and between 6:15 and 8:22 there were 15 pusher lug faults which triggered the alarm which in turn turned off the machine. That was, no doubt frustratingly, about every eight to nine minutes. That

was not uncommon. It triggered again at 8:22. Miss McRae contacted another staff member who suggested she try and clean the lens of the proxy.

[13] Miss McRae walked from the second deck. She did not turn the machine's power off and her padlock wasn't put on the switch. She went up to the top deck. The machine was not turned off or padlocked there either. She climbed on to the conveyor walkway and walked along it to fix the fault. Within a matter of minutes the conveyor started up as someone had cleared the fault on the control panel. She attempted to return back along the walkway to safety, jumping over the bars of the conveyor but sadly was knocked down by a piece of timber and drawn into the nip point created by the sprocket and the conveyor. A person in a control room saw her on a CCTV camera and radioed for someone to stop the machine.

[14] Work colleagues went straight to the machine to turn off the power but found Miss McRae entangled in the machine. Emergency services were immediately called and attended to her but she died at the scene from crushing injuries to her chest and lungs.

Approach to Sentencing

[15] I take into account the specific sentencing criteria set out in the Health and Safety at Work Act 2015.[1] I pay particular regard to the purpose of the Act to secure the health and safety of workers in the work place. I also pay particular regard to these factors: the risk of injury or death, the extent to which it could be foreseen and the ease with which the risk could have been avoided.

[16] The High Court in *Stumpmaster v Worksafe New Zealand*[2] confirmed there are four steps in the sentencing process:

(i) Assess the amount of reparation to be paid to the victims.

[1] Section 151(2).
[2] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020.

(ii) Fix the amount of the fine by reference first to the guideline bands provided and adjust that to take into account any aggravating and mitigating factors affecting the company.

(iii) Determine whether further orders under the Act are required.

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

Step 1 – Assessing Quantum of Reparation

[17] The first step I have to assess is emotional harm reparation. Section 32(1)(b) of the Sentencing Act 2002 says the court may make an emotional harm award for harm caused to a victim by an offence. "Victim" is defined in s 4 of the Act as the "immediate family of a person who has died". "Immediate family" is defined as "a member of the victim's family who is in a close relationship with a victim at the time of the offence". To avoid doubt the section provides, relevantly, that includes "a spouse, .. de facto partner, child, stepchild, sibling, parent …". In this case sadly Miss McRae's son took his own life after her death. I have little difficulty in finding that he was a victim at the time of the offence and therefore an award of emotional harm reparation should be paid to his estate to ultimately go to his partner and baby son.

[18] What is the effect of a large family when one is considering an emotional harm award? The prosecution submit the amount of emotional harm should be assessed for each individual and then the award should be the total sum. The defence say there should be an assessment of total sum broadly comparable to other cases and then that amount should be apportioned between the family members.

[19] An attempt to quantify loss and grief is an unpalatable task and more so when asked to quantify the level of harm across a larger family. It can never be enough. It can never be exact. It is always going to be a token sum proffered as a small amount of atonement for the loss.

[20] As a matter of common sense the sum total of emotional harm is greater where there are more people harmed, particularly where there is a large number of

dependents. Emotional harm reparation however cannot simply be a multiplication of an amount based on the number of victims.

[21] In the end, what the court has to do is to stand back and assess the level of emotional harm looking at all the circumstances, including the number of people grieving, but I accept that an award should be broadly consistent with other similar cases. That comparative approach of consistency has been adopted in most cases including in the High Court. In the High Court in *Oceania Gold*[3] the Judge made reference to:

> … recent awards made in the District Court have been in a range of $75,000 to $110,000 in the case of fatal accidents.

clearly indicating that one of the factors the court should look at is consistency with other cases but always of course looking at the particular facts of the emotional harm in the case before it.

[22] I have read through all the harrowing victim impact statements which speak to the trauma caused to this family. This was amplified by the loss of Miss McRae's son after her own death. There was undoubtedly much emotional harm to many.

[23] Doing the best that I can to set an appropriate monetary figure for that, and using in part other cases as a guide, I consider the emotional harm reparation should be ordered as follows:

(i) $75,000 to Miss McRae's husband and her two stepchildren.

(ii) $10,000 each to her mother, father and two sons (one of whom is deceased).

(iii) $3,000 to her sister.[4]

[24] The total award of Emotional Harm Reparation therefore is $118,000.00

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[3] *Oceania Gold (New Zealand) Limited v Worksafe (New Zealand) Limited,* above n 5.
[4] The names of the people to be paid out are provided in paragraph 5.7 of the prosecution's submissions.

Consequential Loss – Top Up for ACC Shortfall

[25] Section 32(5) of the Sentencing Act allows the court to make consequential loss reparation orders. Here it is to make up for a statutory shortfall of the victim's lost earnings available to her husband and dependent children provided under the ACC scheme. The approach for the calculation has been determined in *Oceania Gold (New Zealand) Limited v Worksafe New Zealand*.[5] There is agreement between the prosecution and defence that the appropriate calculation comes to $145,762 made up as follows:

(a) $139,622 for consequential loss suffered by Miss McRae's husband and her two stepchildren.

(b) $6,140 reparation for consequential loss suffered by Miss McRae's younger son.

Discount For a Lump Sum Payment

[26] The dispute in this case is whether there should be any discounts from that figure. The defence say firstly that amount should be discounted by 10 per cent, as was applied in *Worksafe New Zealand v The Homegrown Juice Company Limited* [6] to recognise the amount was paid in a lump sum.

[27] I can see there is an argument for awarding the ACC shortfall loss in a way that mirrors and supplements the way the payments are paid to the victim's family by ACC. ACC will pay out a percentage of Miss McRae's income weekly or two weekly to her husband and dependent children for a fixed number of years. It would make sense for the shortfall award by the court to also be paid out every week or two weeks to top up what the victims would otherwise have received had Miss McRae lived.

[28] The courts however have in all cases awarded a lump sum amount and not made an order that a defendant pay per weekly or fortnightly payments to top up the balance. If weekly payments were the basis upon which cases calculated the

[5] *Oceania Gold (New Zealand) Limited v Worksafe New Zealand* [2019] NZHC 365.
[6] *Worksafe New Zealand v The Homegrown Juice Company Limited* [2019] NZDC 16605 at para [13].

consequential loss then there certainly should be some acknowledgement for a company volunteering to pay the full amount by way of lump sum (though I would have thought as a matter of logic that would have been best done, and usually done in a criminal setting, by way of discounting the sentence rather than reducing the amount to be paid to the victim). But that is not the way in which figures are calculated in the cases in this area,including in the High Court in *Oceania*.

[29] Accordingly the premise under the Sentencing Act is that a company will pay the reparation figure in full so effectively the default position under s 35 of the Sentencing Act 2002 is that the shortfall will be paid in lump sum.[7] It is only if an offender has insufficient means to pay the total loss that the court may sentence the defendant to make reparation for an amount that is less or by a way of instalments. Given the way in which consequential loss has always been calculated by way of lump sum, rather than, as arguably it could be, by mirroring the payment scheme of the Act, there seems no proper basis for reducing the full amount by discounting the amount payable. That is what the company is obliged to pay in any event.

[30] The position may also be different if the company was unable to pay the amount but had borrowed money or sold assets that would not have otherwise been available to the Court to fulfil the reparation obligation. In those circumstances too however, I consider the appropriate response would be to discount the penalty rather than to discount the amount payable to the victims by way of reparation.

[31] I adopt that approach though acknowledging there is some value in a lump sum over and above payments spread out over a long period of time. I accept too that reflects common practice in the area of debt collection and settlement of civil disputes. However whilst the argument was not raised in *Oceania Gold* Venning J ruled that an appropriate order was an amount that was the full statutory shortfall notwithstanding the fact it would have been required to be paid in a lump sum. The approach I have adopted is consistent with that case. I consider without High Court authority dictating otherwise that is the approach I should follow.

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[7] Section 35(1)(a)(b)(c) Sentencing Act 2002.

[32] Accordingly I do not adopt the approach in *Homegrown*. There will be no discount for the fact the amount is ordered to be paid here, as it has been in all other cases, by way of a lump sum.

Discount as some of the wages would have been spent by Miss McRae herself and therefore not available to the family

[33] The defence contend, on the basis of *Worksafe New Zealand v Newco Logistics Limited*[8], that the amount for the ACC statutory shortfall should be further reduced by five per cent to take into account some of the income would have been used by Miss McRae personally. The victims should be compensated for loss and that involves as a matter of common sense, the defence say, making a reduction for the amount that would not have been available to her family as a result of expenditure she would have outlaid on herself. Accordingly the defence seek a five per cent discount to the award of consequential loss based on the *Newco* decision.

[34] I accept the award should reflect actual loss and there is some appeal in the submission that not all income earned by a person will be at their family's disposal. There are two reasons however why I consider it is not appropriate to make that discount. The first is that reparation in a criminal sentencing should not become overly technical and mirror a civil hearing while obviously striving for a fair result. The Court of Appeal in *R v Donaldson*[9] per Panckhurst J stated that:

> … reparation is to be approached in a broad commonsense way, and resort to refined causation arguments is not to be encouraged.

[35] This statement and decision was cited with approval by the High Court in the *Oceania Gold* case. It is simply too difficult to estimate, without any proper basis, the amount a particular individual would have spent on themselves. No doubt where there is minimal discretionary spending that sum is far less than in situations of high income. Miss McRae's income was one that could well be absorbed within a family on paying fixed costs such as mortgages or rent. In a family of four her addition to variable costs such as electricity and food is also difficult to ascertain without any proper basis for doing so. While there is some logical appeal to this approach, I consider such a

[8] *Worksafe New Zealand v Newco Logistics Limited* [2020] NZDC 12688.
[9] *R v Donaldson* CA 227/06, 2 October 2006 at [36].

discount is too arbitrary, too unsubstantiated and too contingent to make a proper and fair assessment that would ensure the discount to be no greater than is required. If there is to be an error then I consider it is best to err on the side of ensuring the family has the full benefit of the income that they would have had rather than erring on the side of eliminating betterment.

[36] The second reason is, while this matter was not argued, the High Court in *Oceania* did not see fit to make such a deduction. I do not either.

Step 2 – Assessing the Level of Fine

[37] The culpability bands confirmed in *Stumpmaster* are as follows:[10]

(a) Low culpability up to $250,000

(b) Medium culpability $250,000 to $600,00

(c) High culpability $600,000 to $1,000,000

(d) Very high culpability $1,000,000 +

[38] Once the appropriate starting point has been identified within those bands, I must consider mitigating and aggravating features effecting the company.

Starting Point

[39] I turn to assessing where this sits in terms of those bands using the factors identified in *Stumpmaster* and by cross checking with other cases cited to me to ensure consistency. I note the prosecution say this is in the middle of the high culpability band warranting a starting point fine of $850,000.00. The defence say it sits on the cusp of medium and high with a starting point of $600,000.00. There is nearly a 30 per cent difference. These things can never be scientifically exacting.

[10] *Stumpmaster v Worksafe New Zealand,* above n 2.

The Practicable Steps that were Reasonable for the Offender to have Taken

1. Risk Assessment

[40] To ensure the machine was compliant with the set safety standard (AS/NZS 4042) the company should have screened a risk assessment through the lens of that standard. I note too it did not engage any experts in guarding or health and safety to do that. Had they done so I am sure the advice would have been to guard rather than rely on worker compliance.

2. Lack of Guarding

[41] This machine should have been guarded. The nip points were large, obvious and very likely to cause serious injury or fatality if someone was caught in them. The system was for the worker to walk along a plank close to the many nip points. The risk of unguarded nip points are well known within the industry. It is accepted that guarding it was economically feasible. It should have been done.

[42] What the company did do is have a detailed and laudable lockout system included in their SOPs. That however relies heavily on perfect human compliance. It relied on sufficient supervision and sufficient monitoring. It relied on workers not being tired, stressed, not frustrated with repetitive faults nor having a sense of urgency to get the job done. It is common for the promise of the policy menu not to reach the practice plate. This case is a very sad illustration of that. A manifestly better method of eliminating the risk was to guard the hazards created by the nip points. And it was not just the 5 main sprockets that were unguarded. There were other unguarded chains and sprockets. They should all have been guarded in accordance with safety guidelines.[11] A perimeter fence within a locked gate would have ensured there was no access. There could have been no access to the machinery's moving parts while it was in motion. There would have been no accident. There would have been no death.

[11] AS/NZS 4024.

3. Lack of Warning Alarm

[43] There should have been a prestart warning alarm sounding prior to the machinery restarting following the clearance of a fault. I note however that that would not have been required had the guard been in place, but certainly where the company relied on worker compliance an alarm system should have been installed in case of non-compliance.

4. A Safer Work System including a better SOP for the Bin Runner

[44] This company had 80 SOPs and did have one for the bin runner which included what to do with the lug fault but it did not cover the restart process once the fault was cleared nor how faults were to be logged with the engineers None of this, including the alarm, was critical if the machine had a guard, and it is the lack of guarding that lies at the heart of this case, but without these features the current system was even more unsafe. If the company was to rely on the current system then it should also have had more detailed SOPs in place and more monitoring to ensure workers complied with the lockout procedure.

[45] I accept too this is a far cry from a case where a company does nothing. It had a very detailed lockout procedure and it followed up if a worker breached that, as illustrated by the warning given to Miss McRae in 2017 for failing to lockout before she went onto a machine. She was told if she did that again, and that warning was still in effect at the time of the accident, she could be dismissed.

[46] I note too that the mill itself was undergoing a wider process of upgrading all its equipment and interlocking had already been installed on other machines. Sadly the bin sorter had not been reached. It should have been.

Whether Death, Serious Injury or Serious Illness Occurred or Could Reasonably Have Had Been Expected to Have Occurred

[47] The risk of death was real. These were large nip points in moving machinery. The system was for the worker to walk beside them. It was readily foreseeable that if the worker did not comply with the isolate and lockout system then serious injury or death could eventuate. I take into account it did.

The Degree of Departure from Prevailing Standard and the Persons in Industry

[48] The Best Practice Guidelines Safe Use of Machinery (May 2014) provides guidance on when a fixed interlock guard should be installed. It states that sprockets should be securely fenced unless they are safe because of their position or construction. It further recommends interlock guards are used when a machine is accessed often and records that a "lockout tag out" system of work, which relies on extensive instruction, training and supervision is a less effective form of control to guarding given the reliance on human behaviour.

[49] This conveyor system stopped very regularly. This was not a once a month event. In those circumstances there is a greater chance of human mistake. The statistical chances of something going wrong and the worker overlooking the lockout system out of familiarity, frustration or psychological complacency creeping in was far higher. I acknowledge that the system had been in operation for many years without incident but that does not mean to say it was not an accident waiting to happen. It was simply that it took a long time for the accident to happen.

[50] Here there was a lockout procedure which I accept was detailed and was enforced but the level of supervision was insufficient and that form of control was made more risky due to the fact no alarm system had been installed and more so when the person restarting the machine could not see if anyone was on it. I accept as noted before that this company had a full health and safety management system in operation and it had full SOPs and trained the workers in them. The defence say the company effectively was "getting around to it" in that it had started elsewhere in the factory to review the risks. But it is no answer to say its review had not reached the bin sorter. Where the risk was high and the solution possible that solution should have been implemented sooner rather than later.

The Obviousness of the Hazard

[51] I think I can add little to what I have already stated. These were unguarded sprockets which the system provided for a worker to walk beside. If a worker did not turn the machine power off and if the machine was to be restarted the hazard of many unguarded large nip points was obvious and the consequences equally so.

Availability Costs and Effectiveness of the Means Necessary to Avoid the Hazard

[52] There is no dispute with the fact that costs of installing a guard was not prohibitive relative to risk. Such a guard has now been put in place.

Comparable Case Law

Cases

[53] I have also been referred to three cases. They are *Eastern,*[12] *Homegrown*[13] and *Guru.*[14] . In both *Homegrown* and *Eastern*, a fatality was caused by an obvious hazard of an unguarded nip point and in both the worker departed from the "administrative" system of work. In *Homegrown* the Judge assessed the culpability as high and a starting point of a $700,000 fine was adopted. In that case the worker entered a bottling machine when it was operating, got caught in a nip point and died of asphyxia. It was not guarded and Worksafe had visited the site two years earlier informing the company that there was a requirement for interlocks on the machine. The company anticipated that the interlock would be installed in late 2016. It was never done and as at 2018, two years later, was described as "slipping through the cracks".

[54] The second of the cases was *Eastern*. In that case an agricultural worker worked on his own with a machine designed to dig up and pick up potatoes. There was an obvious and unguarded nip point that he was drawn into causing his death. That too should have been guarded. The worker had been told to clear blockages keeping a safe distance from the roller using a steel bar that had been specially fabricated. The steel bar was found hanging in its usual place on the machine and it was not clear why the worker was close to the rollers that drew him in.

[55] It would seem that the blockages were to be cleared while the machine was operating given there was a direction to keep a safe distance from the rollers but that is not clear from the case. In that case the Judge, prior to *Stumpmaster* held that the level of culpability was medium to high, which on *Stumpmaster* would result in a fine somewhere around the $600,000 level. However the Judge translated that in that case

[12] *Worksafe New Zealand v Eastern Agricultural Limited* [2018] NZDC 2003.
[13] *Worksafe New Zealand v The Homegrown Juice Company Limited* above n *6.*
[14] *Worksafe New Zealand v Guru NZ Ltd* [2020] NZDC 2955.

to a starting point of $800,000. It is a little difficult to make a comparison between that case and others in that it is not clear whether after *Stumpmaster* the Judge would have found the fine still appropriate and put it in the high range or found the categorisation as medium to high appropriate and put it at a level of a $600,000 fine. However, I consider it is safest to take the categorisation of the culpability as the most appropriate assessment rather than a fine, in which case if I am right the fine would have been somewhere in the order of $600,000.

[56] The final case I was referred to was *Guru*. That was a different type of hazard but similar in that the system relied on human compliance without any backup. In that case there was a large excavator used to help people working below to shut doors on a container. The obvious risk was that if the excavator was not immobilised, the digger boom and the arm of excavator could have caused serious injury or death if it had been activated during the process. The system to avoid that was that the driver was told to disengage the boom during the process and he had to tuck a clamp under the boom to hold it in place, but there was no security chain to secure the grapple against inadvertent movement. In the accident the driver did not immobilise the excavator and the grapple on the excavator weighing a tonne was released, striking the deceased.

[57] Whilst the operator was told to immobilise the hydraulics and only when that happened should workers be allowed to close the doors, that in fact did not happen. That procedure was not written down at all. Part of the steps that were not taken included a safe operating procedure, a security chain and an exclusion zone monitored and enforced separating the workers from the mobile plant. He declined to redefine the bands in *Hanham,*[15] as other Judges had, noting that would have to await a new High Court judgment. We now have *Stumpmaster*.

Best Comparison

[58] Given *Eastern* was before *Stumpmaster*, I consider *Homegrown* is a better reference point for consistency in sentencing.[16] I note too that both *Homegrown* and this case occurred in the context of a factory and it would seem obvious, whilst not

[15] *Department of Labour v Hanham & Philp Contractors Ltd and Ors* HC Christchurch CRI 2008-409-2, CRI 2008-409-34, CRI 2008-408-9, 18 December 2008.
[16] *Stumpmaster v WorkSafe New Zealand,* above n 2.

stated in the *Homegrown*, that there would be other workers around. In contrast in *Eastern*, the worker was out in a paddock on a vehicle on his own. There was no risk another worker might restart machinery that the worker had stopped. That risk in contrast was present in *Homegrown* and here. The *Guru* case was less helpful given the different context and in addition it was a novel problem without the well-known industry risk of unguarded nip points with the associated clear industry guidelines.

[59] It is always difficult comparing cases, particularly from a judgement rather than the full file. However, I make these points of comparison. I note in *Homegrown*, the culpability was categorized as high, without dispute, and the starting point fine was $700,000.00.

[60] Both *Homegrown* and Kiwi Lumber had an unguarded machine that had the capacity to draw a worker in and cause their death. The risk was obvious, the predicted consequences severe, guarding was the standard industry response and was possible to implement. In both cases employees had departed from the system that had been set up. There is nothing in either case to suggest that the chances of death were any different. They had both had "administrative control systems" of telling workers not to go near the machine while it was going, that is the worker was told they must turn the machine off or "isolate it" before they went near it.

[61] To that extent culpability is similar, however there are in each case factors that push and pull comparative culpability up and down. I do not accept the prosecution's submission that all the culpability factors in this case go up when compared to *Homegrown*.

[62] *Homegrown*'s culpability was higher than Kiwi Lumber's because WorkSafe had told it to guard the machine approximately two years earlier. It had not. There was a sign to say do not go into the machine while it was going. It had fallen off.

[63] It was also higher because there was no safety operating procedure at all for that machine. The workers were simply told to change the spaces from behind the side door, so it seems not to enter the moving machinery area itself, and not to go in when it was operating.

[64] In comparison, Kiwi Lumber had a safe operating procedure throughout this factory including this machine. The workers were taken through that written SOP, had it explained to them and they signed it to confirm that had occurred. It is true that while the SOP included the "shut down" procedure, it omitted a "restart" procedure, but its system was a world away from *Homegrown*'s, which was simply to tell the worker to work from outside and not to go in while a machine was operating. In addition, Kiwi Lumber did take enforcement steps where they were aware of any breaches. That was demonstrated by the considerable written warning given to Miss McRae in which the company informed her she could be dismissed if she went up onto the machine without locking it out again.

[65] Whilst we do not know the position of other workers in *Homegrown* or the risk of anyone else turning in the machine on, certainly Kiwi Lumber had a very detailed lockout procedure to prevent any other workers turning on the machine and they could tell if someone else was working on it. There is nothing of that nature in *Homegrown*, though of course the extent to which it was necessary I could not assess.

[66] On the other hand, there are factors that elevate Kiwi Lumber's culpability in comparison to *Homegrown*. In *Homegrown*, it seems the system was not to go near the machinery itself but rather undertake the task required, of "changing the spaces" which I take to be a cleaning operation, by using the "jog mode" from "behind the side door". In this case if there was a fault the system designed was for the worker to go up the beside the very large sprockets, with associated very large nip points, along a walkway that had a number of obstructions on it. The risk was made higher when there was no alarm and the person responsible for the restart could not see if someone was on it. In addition, if the machine was to restart the risk to the worker was not only their own independent actions that may bring them into contact with the moving parts, but in this case timber would come barrelling along the conveyer belt toward the worker significantly increasing the risk of a fall and associated trapping. I note too this was not one unguarded nip point but many and some of them significant.

[67] Standing back as best I can having regard to all the factors, including the need for consistency with other cases, the latter factor above leads me to the view that this case, despite all the company did do, should sit in the high culpability area. There

needs to be a very loud message sent to industries that unguarded moving machinery that carries the risk of trapping a worker causing injury or death must be, where possible, guarded. The assessment should be from the top down of possible remedies, not from the bottom up. A system that relies on a perfectly operating worker one hundred per cent of the time is not enough when one is dealing with unguarded machinery that can kill. I should add it seems to me that it would be better if the legislation directed that moving machinery that carries a risk of entrapment must if possible be guarded. The other methods of control including administrative are never found to be enough. There must be an engineering solution. If that is the case, then it would seem better for industries to know that rather than seemingly being told it is a matter of assessment in each case. When it comes to unguarded machinery, it rarely is.

[68] Where in the band should this sit? Again I am most assisted by a comparison with *Homegrown* and one of the factors I must be cognisant of is consistency. When I consider the factors that increase the relative culpability of this company to *Homegrown* but also the factors that decrease it I consider the overall culpability settles in is similar place. Accordingly the starting point of this fine is $700,000.00.

Movement from Starting Point – Aggravation and Mitigation

[69] It is accepted there is nothing about this company and what it has done to make the company`s position worse. Everything makes it better.

Good Character

[70] This company operates three large factories. It has done so for a number of years. It has never been prosecuted under this Act or any other. It is deserving of having its fine reduced to acknowledge that. I reduce the fine to $665,000.00 for that reason.

Cooperation with the Investigation

[71] It is also accepted this company responsibly let Worksafe know of this tragedy immediately and has done all it can to assist in the investigation. Again it is deserving of a further reduction of the fine to $630,000.00

Reparation

[72] It is accepted there should be a further discount for the significant reparation to be paid, willingly and in a lump sum. The company has taken steps to ensure, in these precarious economic times, the money would be available. I reduce the fine in acknowledgment of those payments to $560,000.00

Remedial Steps taken

[73] The fact a company has since does what it is required to do in law, and should have done long ago, will never justify a further discount. It would warrant an increase if they had not done it and fast enough. That is all this company has done the prosecution say: it has only remedied "woeful deficits". I do not agree. It has guarded this machine as promptly as possible. There is no congratulations to be given for that. But it has done more. It has spent nearly three quarters of a million dollars on safety improvements over the last three years not including the cost of the company's own employees, with most of that being spent since the accident. It has installed further CCTV cameras, it has put all staff though a construction course, engaged experts and reworked its SOPs and training. It seems to me it has gone further than simply rectifying this bin sorter machine as required under an improvement notice. This too is worthy of a further discount. The fine is reduced to $525,000.00

Plea

[74] It is not in dispute this company should be given the maximum discount for its early acceptance of responsibility reflected in its guilty plea. That means the family of Miss McRae is spared the ordeal of a trial and the state is spared the expense of one. I reduce the fine to 350,000.00

Remorse

[75] I accept this company is extremely remorseful for what occurred and that is already reflected in what it has done since. In addition it was prepared to reach out to the family, has offered some assistance and wanted to undergo restorative justice. A discrete discount for remorse however is not for customary compassion that is usually seen. It is available when steps show more and significant remorse. Such a case might be evidenced where for example the company has already paid the full reparation amount or has gone the extra mile in assisting the family in advance rather than the normal compassion this company has shown. While undoubtedly remorseful, there are not factors here that would elevate this case to one where the guilty plea discount should have an extra five per cent added to it to reflect real remorse.

Fine

[76] Kiwi Lumber is fined $350,000.00. The company accepts it has the financial ability to pay the fine. No reduction is required.

Step Three – Ancillary Orders

[77] It is accepted the company should pay prosecution costs of $2,391.00

Step Four-Proportionality Assessment

[78] The final amount this company must pay is $616,153.00 calculated below. That is a significant penalty for a first offender but I do not consider it requires adjustment to result in a fair outcome:

Fine:	$350,000.00
Consequential Loss:	$145,762.00
Emotional Harm Reparation:	$118,000.00
Costs:	$2,391.00

Acknowledgments

[79] I would like to thank Miss McRae's family for their dignity and patience during the sentencing process. I would also like to thank the company representatives for

their assistance and patience throughout. Finally I record my gratitude to each counsel for the high calibre submissions and their assistance. That made this difficult task less difficult.

B A Morris
District Court Judge