ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF WITNESS/VICTIM/CONNECTED PERSON(S) PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE DISTRICT COURT
AT INVERCARGILL

I TE KŌTI-Ā-ROHE
KI WAIHŌPAI

CRI-2018-025-000356
[2023] NZDC 25235

WORKSAFE NEW ZEALAND

v

McLELLAN FREIGHT LIMITED

Hearing:	12-15 June 2023
Appearances:	B M Finn and A R Everett for the Prosecutor B R Harris for the Defendant
Judgment:	16 November 2023

NOTES OF JUDGE D G HARVEY ON SENTENCING

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[1] McLellan Freight Limited, who I shall hereafter simply refer to as "McLellan" has been found guilty on two charges under the Health and Safety at Work Act 2015. This followed a judge-alone trial.

[2] The first charge relates to ss 34(1) and 34(2)(b) of the relevant Act. It reads:

> That McLellan on or about 24 February 2017 at South Port Bluff, being a PCBU who had a duty in relation to workers undertaking the loading, unloading and transportation of PKE at the ADM New Zealand Limited facility, failed to, so far as was reasonably practicable, consult, co-operate with

> and co-ordinate activities with all other PCBUs who had a duty in relation to the same matter, namely Herberts Transport Limited, Transport Services Southland Limited and [redacted] JB Contracting.

[3] It was alleged that it was reasonably practicable for McLellan Freight Limited to have consulted, co-operated and co-ordinated with the above PCBUs regarding a safe system of work including a traffic management plan for truck drivers and plant operators to be followed when using their PKE transitional facility.

[4] The maximum penalty for that offence is a fine not exceeding $100,000.

[5] The second charge is under ss 36(1)(a), 48(1) and 48(2)(c). That charge reads:

> Being a PCBU failed to ensure so far as was reasonably practicable the health and safety of workers including [redacted] who worked for Transport Services Southland Limited while he was at work in the business or undertaking and that failure exposed him to a risk of serious injury arising from vehicles used while loading and unloading PKE.

[6] The specific particular was that it was reasonably practicable for the defendant company to have ensured that there was a safe system of work (including a traffic management plan) in respect of workers undertaking loading and unloading activities in the transitional facility.

[7] The maximum fine for that offence is $1,500,000.

[8] The offending for which McLellan is being sentenced took place well over six years ago. This sentencing represents a long-awaited conclusion to a very long and very painful process for everybody involved.

[9] The real victims are the deceased's family. They must feel as if the Court system is hopelessly broken given the time it has taken for these matters to be resolved. However this has occurred for an unfortunate combination of reasons. It would be wrong and unfair to attempt to pin the blame for this on any one participant in these proceedings or indeed even the Court. Perhaps it would be fair to say that the responsibility for the very long delays have occurred for a variety of understandable and largely unavoidable reasons. I hesitate to blame COVID for yet another

administrative failure but it is impossible to overstate the devastating effect that COVID had on our Court system, on victims and on defendants.

[10] I have both read and listened to the victim impact reports. I endorse the comments that were made by His Honour Judge Walsh in his sentencing remarks. The anguish and the heartache of the [redacted] family is there for all to see. I can do no more than reiterate what His Honour Judge Walsh said. This was a hardworking, loving and close family who enjoyed each other's company. The loss has been devastating and the future blighted.

[11] This has been a complicated case. The amount of written material is enormous. The Court has been well served by counsel present in Court this morning and I wish to take this opportunity to thank them for their very careful, measured and detailed submissions. I have been very greatly assisted.

[12] The reasons for the orders that I am about to make are complex, they run to some 58 paragraphs and if I were to read the decision in full we would be here for a long time but worse I fear that you would leave the Court feeling somewhat bewildered. However, my full reasons will be delivered to counsel either later this afternoon or first thing tomorrow morning.

[13] The only area that I wish to address in any detail at all at the moment is the question of discounts because I appreciate that they are important and I want them to be understood. The defendant company has a clean record. I am told that they co-operated totally with the investigation and by so doing meant that WorkSafe were not involved in having to do any unnecessary work or their own investigations. I am satisfied that they immediately instituted changes to avoid such an awful accident occurring again and indeed they are no longer in this business.

[14] The combined packet of sanctions against the defendant company are as follows:

(a) The first is an emotional harm reparation payment of $65,000.

(b) I am satisfied with the calculations and work done by His Honour Judge Walsh in relation to consequential loss reparation and I fix that at $50,869.

(c) The appropriate starting point for the fine is a starting point of $700,000 but after I have taken into account the various discounts that amount to 17.5 per cent there is a fine now of $577,500 with of course Court costs of $130.

(d) I am also ordering that there be a payment of costs in the sum of $41,658.

[15] A request has been made for a direction that the fine be paid in three equal instalments. Initially it was suggested that there should be an immediate payment of $200,000 with the second and third instalments paid on the anniversary of today. It is obviously important that there be immediate payment of the emotional harm reparation, the consequential loss reparation and WorkSafe costs. However there is support for the request that I allow the fine to be paid in three equal instalments and that is what I intend to order.

[16] The defendant company runs a business that provides employment for at least 29 people. Although it is necessary to punish for the lapses I have found occurred, it is not the Court's intention to bankrupt the business and therefore cost a substantial number of people their employment. It is for that reason that I am allowing that fine to be paid in three instalments.

[17] I agree with Judge Walsh that there is no public interest in the names of the victims or the loader driver to be published. They have already undergone significant suffering and they do not deserve anymore.

[18] Finally, I want to pay tribute to the victims and all others who have sat in this Court during the course of the trial and sentencing. There must have been times when evidence was given that caused great hurt. The way in which you have all behaved during what has been a very painful process has been exemplary; for that I thank you.

[19] So far as the one charge of failing to co-ordinate is concerned, on that charge I have dealt with that by a concurrent fine of $50,000 and Court costs of $130.

D G Harvey
District Court Judge

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NOTES OF JUDGE D G HARVEY ON SENTENCING
[REASONS]

Introduction

[1] McLellan Freight Limited ("McLellan") has been found guilty on two charges under the Health and Safety at Work Act 2015 ("HSWA") following a judge-alone trial.

[2] The first charge relates to s 34(1) and 34(2)(b) of the HSWA. It reads:

> That McLellan "on or about 24 February 2017 at South Port, Bluff being a PCBU who had a duty in relation to workers undertaking the loading, unloading, and transportation of PKE at ADM New Zealand Limited's facility, failed to, so far as was reasonably practicable, consult, co-operate with, and co-ordinate activities with all other PCBUs who had a duty in relation to the same matter, namely Herberts Transport Limited, Transport Services Southland Limited, and [redacted] JB Contracting.
>
> Particulars:
>
> > It was reasonably practicable for McLellan Freight Limited to have:
> >
> > (i) Consulted, co-operated and co-ordinated with the abovenamed PCBUs regarding a safe system of work (including a traffic management plan) for truck drivers and plant operators to be followed when using their PKE transitional facility

[3] The maximum penalty for this offence is a fine not exceeding $100,000.[1]

[4] The second charge is under ss 36(1)(a), 48(1) and 48(2)(c). It reads:

> Being a PCBU, failed to ensure so far as was reasonably practicable, the health and safety of workers, including [redacted], who worked for Transport Services Southland Limited while he was at work in the business or undertaking and that failure exposed [redacted] to a risk of serious injury arising from vehicles used while loading and unloading PKE.
>
> Particulars:
>
> > It was reasonably practicable for McLellan Freight Limited to have:
> >
> > (i) Ensured there was a safe system of work (including a traffic management plan) in respect of workers undertaking loading and unloading activities in ADM New Zealand Limited's transitional facility at South Port, Bluff.

[5] The maximum fine is $1,500,000.[2]

[6] The offending for which McLellan is being sentenced took place well over six years ago. This judgment represents a long-awaited conclusion to a very long and painful process for all those involved.

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[1] Section 34(2)(b).
[2] Section 48(2).

Background

[7] The defendant was contracted by ADM New Zealand Limited ("ADM") to assist with the unloading and storage of Palm Kernel Expeller ("PKE") at Southport, Bluff. The defendant, in turn, contracted Herberts Transport Limited ("HTL") and Transport Services Southland Limited ("TSSL") to provide machinery, equipment and staff for this purpose.

[8] McLellan used one half of Shed 4 at Southport as a transitional facility for the storage of PKE. Trucks would be loaded with PKE at the dock and then drive towards Shed 4 whilst observing a 30 km/h speed limit. Approaching the shed, the speed limit was 15 km/h. Prior to entering the shed the driver would get out of his vehicle, roll back the load cover, and unpin the tailgate. Then, when directed to do so, the truck would drive into the shed, tip the load of PKE onto a pile and then drive to the exit door. The truck would partially leave the shed but would ensure that the rear portion of the tray remained in the shed. Once the truck came to a stop, a "spotter" (if available) would use a hydraulic hose to clean any surplus PKE off the truck before it exited the shed. This was done to comply with biosecurity obligations. When a spotter was not available, it became the truck driver's responsibility to do this.

[9] During this operation there would be at least one loader operating inside the shed. The loader would push the PKE into the main pile. Occasionally, it would be necessary for the spotter to leave their post and operate a second loader.

[10] On 23 February 2017, staff arrived at Southport to unload PKE from the 'Puket Sound'. The usual toolbox meeting was held, official procedures were completed, and unloading commenced. At approximately 1.30 am on 24 February 2017, [redacted] ("[redacted]"),[3] an employee of TSSL, entered the Shed and deposited his load. He then proceeded towards the exit door and stopped so that only a small portion of his truck was outside the shed. Consequently, more of his truck remained inside the shed than normal, further restricting the amount of manoeuvre room. There were two loaders operating at this time and, therefore, no

[3] For context, I note that the driver of the second loader and the victim of the offending are both named [redacted].

spotter on hand. One of the loaders was operated by [redacted]. [redacted] got out of his truck and moved around to the back to clean off PKE. While he was standing with his back to the pile, [redacted] struck him with his loader and killed him almost instantly.

[11] WorkSafe commenced an investigation shortly afterwards, and charges were laid against HTL, TSSL and the defendant. HTL and TSSL pleaded guilty at an early stage and were sentenced by Judge Walsh in October 2022. I found the defendant guilty following a judge alone trial on 8 September 2023. My findings included:

(a) McLellan sent a considerable volume of safety material to HTL and TSSL but, crucially, it did not send them the 'Bluff Operating Procedures' ("BOPs") which governed how work was to be done inside Shed 4;

(b) The risk of someone being seriously injured by a reversing loader was foreseeable, as there had been an accident just prior to [redacted] death.

(c) Following that accident, McLellan responded by changing the loader driver rather than reviewing the process operating in the shed;

(d) [redacted] and [redacted] made mistakes – [redacted] parked his truck in a dangerous position and walked round the back of it, whereas [redacted] was not paying close enough attention when he reversed his loader.

(e) There was a traffic management plan, but it was inadequate because it relied too heavily on workers not making any mistakes;

(f) The defendant's most significant failure was not having a permanent spotter;

(g) The defendant failed to adopt other measures which would have further reduced the risk of an accident, including:

(i) demarcation lines to assist loader drivers in determining when sufficient PKE has been piled up;

(ii) a stop line/safety cone for the truck drivers so that they knew where to stop; and

(iii) fitting the loaders with reversing camera, proximity sensors, and blue light indicators on the loaders.

(h) MPI required McLellan to clean the trucks inside the shed. The defendant cannot be blamed for not seeking a change in MPI's rules before the incident.

The purposes and principles of sentencing

[12] Section 151 of the HSWA instructs the Court to apply the Sentencing Act 2002. It also requires the Court to have particular regard to:

(a) Sections 7 to 10 of the Sentencing Act;

(b) The purpose of the HSWA;

(c) the risk of injury or death that could have occurred;

(d) whether death or serious injury occurred;

(e) the safety record of the person;

(f) the degree of departure from prevailing standards in the person's sector or industry; and

(g) the person's financial capacity.

[13] The purposes of the HSWA relevantly include:[4]

[4] Health and Safety at Work Act 2015, s 3(1).

(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;

(e) securing compliance with the Act through effective and appropriate compliance and enforcement measures; and

(g) providing a framework for continuous improvement and progressively higher standards of work health and safety.

[14] I also note that ensuring the "the health and safety of workers" is a PCBU's 'primary duty of care' under the HSWA.[5]

[15] Against that background, sentencing under the HSWA will generally require significant weight to be given to the ordinary sentencing purposes of denunciation, deterrence and accountability.[6] Providing for the interests of the victims and providing reparation are also relevant purposes.[7]

[16] The most relevant sentencing principles are the gravity of the offending, the general desirability of consistency, the effect of the offending on the victims, and the need to impose the least restrictive outcome appropriate in the circumstances.[8]

Approach to sentencing

[17] *Stumpmaster v WorkSafe New Zealand* set out a four step approach for sentencing offenders under the HSWA:[9]

i. assess the amount of reparation;

ii. fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;

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[5] Section 36.
[6] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [43].
[7] Sentencing Act 2002, s 7(1).
[8] Section 8.
[9] Stumpmaster, above n 6, at [3].

iii. determine whether further orders under ss 152 to 158 of the HSWA are required; and

iv. make an overall assessment of the proportionality and appropriateness of the "combined packet of sanctions" imposed by the preceding three steps.[10]

[18] Although McLellan is convicted on two separate charges, they are closely related in time and circumstance. It would be artificial to fix separate fines for each charge. Instead, I intend to take the charge under s 36 as the lead offence (being the most serious of the two charges) and treat the charge under s 34 as an aggravating factor of the overall offending.

Sentencing of HTL and TSSL

[19] I have had the benefit of reading Judge Walsh's sentencing notes from the sentencing of HTL and TSSL.[11] That is obviously an important reference, but I emphasise that I am not bound by His Honour's decision. While it was necessary for Judge Walsh to consider McLellan's role inside Shed 4 when sentencing HTL and TSSL, His Honour was careful not to directly address McLellan's culpability. McLellan did not accept the summary of facts that HTL and TSSL pleaded to. Inevitably, further information has come to light at trial which bears on McLellan's culpability.

[20] I must begin the sentencing process afresh.

Step one: Reparation

[21] Judge Walsh took the view that the appropriate reparation was $130,000 for emotional harm and $120,128 for consequential loss. However, His Honour was faced with a difficult situation in that HTL and TSSL had both pleaded guilty on the basis that McLellan had played a more substantial role in the offending. Ultimately,

[10] This includes consideration of the defendant's ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.
[11] *WorkSafe New Zealand v Transport Services Southland Limited* [2022] NZDC 20656.

His Honour determined that HTL and TSSL should each be liable for 25% of the reparation figure. Together they had already paid $69,259 paid for consequential loss which was more than their apportioned share. Therefore, the balance of the reparation owing to the victims was $65,000 for emotional harm and $50,869 for consequential loss. HTL and TSSL were to pay these amounts in the event McLellan was found not guilty.

Emotional harm

[22] It is the submission of the prosecution that I should follow Judge Walsh's assessment of the emotional harm that has been caused to the [redacted] family.

[23] I note to the eternal credit of the defendant company that they do not take any issue with Judge Walsh's assessment in relation to emotional harm reparation.

[24] In his sentencing notes, His Honour Judge Walsh described the impact of Mr Hansen's death as being devastating and far-reaching. I have read the filed victim impact reports and I have listened as they have been read to me this morning. I endorse the comments of His Honour Judge Walsh. The anguish and heartache of the [redacted] family is there for all to see.

[25] Given the consensus in relation to emotional harm reparation I will do no more than order the defendant company to pay the sum of $65,000 to [redacted] family.

Consequential loss

[26] I now turn to the issue of consequential loss. Again, the prosecution submission is that the approach adopted by Judge Walsh was sound and I am urged to adopt it.

[27] The defence position is that by adopting Judge Walsh's approach I would in effect be ignoring the contribution to the accident of the loader driver. It is also suggested that I would be failing to take into account a true assessment of the 'overall consequential' loss given that the repayment of victims' mortgage would have benefitted the family in so many ways. Further, the point is made that by proceeding

in the manner suggested by His Honour Judge Walsh, I would in effect be saying that the defendant was twice as responsible as the other defendants.

[28] Rather than adopting a careful analysis of the true financial loss, what is suggested to me is that I award an "arbitrary figure" such as 25,000 to $35,000. Alternatively, I am invited to consider a higher emotional harm award.

[29] I accept that for the outsider looking in there may be some unfairness in the court ignoring any contribution to the accident of the loader driver. However, that is an argument that applies equally to all three companies and must have been in the mind of Judge Walsh. The fact remains that the loader driver did not face any charges. The responsibility for this dreadful accident has been accepted by two of the companies and the defendant has been found guilty on the two charges it faced.

[30] I have read the decision of His Honour Judge Walsh and in my view he did fairly apportion and then weigh the culpability of the three companies. Of course, at the time he did this the defendant in this case had not been convicted. However there was no prejudice to this defendant as all the judge was attempting to do was to apportion culpability to HTL and TSSL.

[31] This accident occurred in the shed operated by the defendant. As I found, there had been insufficient consultation with the other operators who used the shed and there was a failure to ensure that there was a safe system of work. I consider that the other two PCBUs were complying with the system that they found operating in the shed. Accordingly I do view this defendant as being significantly more responsible for this accident given that ultimately, it controlled the shed operations. For that reason I am not minded to interfere with the very careful way in which Judge Walsh went about apportioning culpability.

[32] Finally, I acknowledge that repayment of the victims' mortgage would have significantly improved their financial position in other ways. This is, however, just one of many factors that may cause the Hansens to be in a better or worse financial situation than they were in prior to the offending. For example, we do not know whether Mr [redacted] earnings would have increased in the following years. We

also do not know whether the [redacted] family will require professional support in the future as a consequence of this ordeal. It is impossible to leave the victim's family in a financial situation that is precisely equivalent to their previous position. Judge Walsh recognised that in his judgement.[12] In my view, the overall figure decided upon was an adequate reflection of the victims' consequential loss.

[33] It follows from what I have said that I accept the prosecution position and the defendant is to make a payment to the victim's family for consequential loss in the sum of $50,869.37.

Step two: Fine

[34] Stumpmaster established the following guideline bands to assist in setting a fine:[13]

low culpability:	$0 to $250,000
medium culpability:	$250,000 to $600,000
high culpability:	$600,000 to $1,000,000
very high culpability:	$1,000,000 to 1,500,000

[35] As discussed above, s 151 of the HSWA also offers specific guidance for assessing culpability. In *Stumpmaster*, however, it was held that the above sentencing criteria are covered by the well-established culpability assessment factors identified in *Hanham*:[14]

(a) The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practicable steps" which the Court finds it was reasonable for the offender to have taken in terms of s 22 of the HSWA.

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[12] At [44] and [45].
[13] Stumpmaster, above n 6, at [4].
[14] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) at [54] cited in *Stumpmaster*, above n 6.

(b) An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.

(c) The degree of departure from standards prevailing in the relevant industry.

(d) The obviousness of the hazard.

(e) The availability, cost and effectiveness of the means necessary to avoid the hazard.

(f) The current state of knowledge of the risks and of the nature and severity of the harm which could result.

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

Starting point

[36] Weighing the defendant's culpability, the prosecution submits that a starting point of $650,000 to $700,000 is appropriate. That is slightly less than Judge Walsh would have adopted in respect of HTL and TSSL had they been "in full control of the premises".[15]

[37] The defence ask for a starting point of $600,000 and make a number of points to support that position. In particular:

(a) key guidance documents regarding traffic management and spotters were not available until after the accident;

(b) although the defendant ought to have had a permanent spotter, this "conflicts" with the prosecution's original position that the safe operating procedures were flawed "as it allowed workers to be

[15] At [64].

positioned at the rear of the trucks as a loader reversed in the direction of workers";

(c) there was a traffic management plan in place (even if it was inadequate);

(d) my finding that the defendant could not fairly be criticised for failing to approach MPI to have the rules changed;[16] and

(e) the "human factor" (i.e. the mistakes made by [redacted] and [redacted]).

[38] I address McLellan's culpability by referring to the *Hanham* factors discussed above:

(a) *Operative acts or omissions.* McLellan failed to consult with other PCBUs and failed to ensure there was a safe system of work for the operations inside Shed 4. While there was a traffic management plan in place, it relied too heavily on worker vigilance. It did not ensure the safety of pedestrians moving within the mobile plant.

(b) *Nature and seriousness of the risk of harm and the realised risk.* Workers would put themselves in the path of moving vehicles, in a confined space, while preoccupied with other tasks. The workers were performing repetitive tasks, and they worked long into the night. There was always a risk that someone would be struck by a vehicle and this is exactly what occurred. Tragically, [redacted] died as a result.

(c) *Degree of departure from prevailing standards.* The defendant *did* have a traffic management plan (the BOPs), but it was written without reference to any WorkSafe guidance. As already discussed, there were numerous measures detailed in the guidelines that McLellan could and should have adopted. I recognise that detailed guidance documents

[16] *WorkSafe New Zealand v McLellan Freight Limited* [2023] NZDC 15451 at [115].

were released *after* the incident; nevertheless, there were guidance materials available prior to the incident which recommended the safety measures that the BOPs lacked.[17]

(d) *Obviousness of the hazard.* The hazard was very obvious. Indeed, there was an accident just prior to the incident which should have alerted McLellan to the dangers inherent in their system of work. Instead, they replaced the loader driver. The defence still seeks to downplay McLellan's culpability by highlighting the mistakes made by [redacted] and [redacted] (stating, for example, that [redacted] truck was in an "unusual and unexpected" position). I cannot accept that. The carelessness of an employee cannot diminish the employer's culpability.[18]

(e) *Availability, cost and effectiveness of the means to avoid the hazard.* I accept that McLellan were constrained in what they could do by MPI's biosecurity requirements. It may have meant McLellan's workers had to clean PKE off the trucks while still inside the shed, but it did not prevent McLellan from implementing any of the measures set out above. These measures were relatively inexpensive and could have been easily implemented. They may not have eliminated the risk, but Shed 4 would have been a lot safer. I do not see that MPI's involvement mitigates McLellan's culpability to any significant degree.

(f) *Current state of knowledge of the risks, potential harm, and the means to avoid the hazard.* Clearly, The risks were well understood in the defendant's industry.

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[17] See for example, the WorkSafe Fact Sheet: Keeping safe around moving plant (March 2014) and the WorkSafe Quick Guide: Overlapping Duties (January 2017).

[18] *Department of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526 at [52]. See also *Oceania Gold Ltd v WorkSafe New Zealand* [2019] NZHC 365 at [61].

[39] The three authorities that provide the greatest assistance in the present case are *Toll Networks*,[19] *Alderson*,[20] and *Cardinal Logistics*.[21] I have considered the other authorities referred to me by defence counsel, but they all involve materially different facts.

[40] In *Toll Networks*, the defendant failed to develop a safe system of work for the unloading of wagons (among other things). A worker was killed when 1,200 kilograms worth of pellets fell from a fork heist and struck them. The Judge determined that Toll must have been aware of the hazard because it had the relevant guidance material in its possession. CCTV footage showed that many workers had been exposed to the very same risk over the previous twelve days. Toll had also produced safety documents which, if followed, placed workers at risk. The starting point was fixed at **$900,000**.

[41] In *Alderson*, the defendant failed to implement a traffic management plan separating the forklifts and pedestrians. Alderson had engaged an expert and developed 'Safe Task Procedures', but failed to properly implement and monitor them. The Judge further determined that Alderson had failed to mitigate the risk arising from the forklifts' blind spots (although there were some practical difficulties associated with this), and that the protective equipment provided to workers was not fit for purpose (although Alderson had taken some steps to improve it). The starting point was **$700,000**.

[42] In *Cardinal Logistics*, the defendant's business required staff to carry out work in a confined space at the same time as large pieces of moving machinery. The defendant had recently moved to a new premises, where it had begun operating before implementing its traffic management plan. The victim was struck by a forklift and sustained significant injuries, requiring numerous surgeries and possibly the amputation of his leg. Cardinal Logistics was aware of the risks, and had taken "significant steps" to address them. In fact, the Judge concluded that the defendant had attempted to put appropriate arrangements in place, but had to an extent been let down by their supplier. The Judge observed that the move to the new premises had allowed

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[19] *Toll Networks (NZ) Limited* [2018] NZDC 11132.
[20] *WorkSafe New Zealand v Alderson Poultry Transport Limited* [2019] NZDC 25090.
[21] *Cardinal Logistics Limited* [2018] NZDC 19686.

something of a "lacuna" in the safety plan to develop. A starting point of **$700,000** was considered appropriate.

[43] Here, I view that the lowest starting point available is **$700,000**. The offending is at least as serious as *Cardinal Logistics* or *Alderson*. In both those cases, the defendants had developed safe systems of work, but they were not being properly implemented at the relevant times. The evidence at trial revealed McLellan made good faith attempts to enforce a safe system of work, but that it missed the mark. In particular, I note the fact that the defendant did not learn from the accident that occurred prior to [redacted] death. The decision to change the loader driver demonstrated a serious lack of insight.[22] It is notable that the victim survived in *Cardinal Logistics*. Also, in *Alderson*, the defendant did at least provide a copy of its 'Safe Task Procedures' to its co-defendant, Tegel. Conversely, McLellan's failure to send the Bluff Operating Procedures to HTL and TSSL was a significant omission.

Aggravating and mitigating features of the defendant

[44] McLellan had a clean health and safety record prior to this incident. They also took remedial steps in the wake of [redacted] death by obtaining permission from MPI to clean PKE off the trucks outside the shed. Subsequently, the defendant has left the industry.

[45] The defence says that some credit may be appropriate may for the reparation that will "eventually" be paid to the victims. I disagree. McLellan has had more than six years to pay some form of reparation to the victims, and it has not. There is a suggestion that McLellan helped "coordinate" the reparation provided by HTL and TSSL. Without further information, however, I cannot possibly conclude that this justifies a discount.

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[22] In *Alderson*, above n 20, there was a previous incident where a chicken catcher's leg was broken. Alderson responded appropriately by improving its personal protective gear (but these steps did not go far enough).

[46] It is further submitted that the Court should take into account the defendant's cooperation with the authorities. I am not satisfied, however, that McLellan has done anything beyond comply with its statutory duty to give "all reasonable assistance".[23]

[47] For McLellan's mitigating features, I allow the following discounts:

(a) Good character – 5 per cent

(b) Remedial action – 7.5 per cent

(c) Total co-operation – 5 per cent

Calculation

[48] McLellan is entitled to a 17.5 per cent reduction from the starting point. This results in an end fine of **$577,500**.

Step three: Ancillary orders

[49] The Court may order the offender to pay a sum it thinks "just and reasonable" towards the costs of the prosecution.[24]

[50] WorkSafe seeks half of its internal and external legal costs, being $28,468.21. It also asks for a contribution of $13,190.45 towards the cost of engaging Mr Nealer who gave expert evidence. In total, $41,658.97 is sought from McLellan.

[51] The defence does not take issue with Mr Nealer's costs, however, they suggest a slightly reduced payment of $20,000 towards WorkSafe's legal costs.

[52] It is common practice for the Court to require payment of 50% of the legal costs incurred by WorkSafe. I see no reason to depart from that in the present case. McLellan's decision to plead not guilty has resulted in the expenditure of considerable time and money, and the costs order will reflect that.

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[23] Health and Safety at Work Act 2015, s 176.
[24] Health and Safety at Work Act 2015, s 152(1).

[53] McLellan is to pay costs of **$41,658.**

Step four: overall assessment

[54] The "combined packet of sanctions" for McLellan is as follows:

(a) Emotional harm reparation: $65,000

(b) Consequential loss reparation: $50,869

(c) Fine: $577,500 (starting point: $700,000, discounts: 17.5 per cent)

(d) Costs: $41,658

[55] I acknowledge that this is a significant penalty for McLellan, but it is an appropriate one. This was serious offending and it has caused considerable harm.

[56] A letter has been provided from McLellan's accountant, Findex Dunedin, which states that McLellan *could* pay a penalty of up to $500,000 with significant reparation orders to the victims, but that it could not safely afford to do so in a single lump sum. It is suggested that $200,000 could be paid on sentencing, with two further annual instalments.

[57] I accept Findex's evidence. The approach suggested is reasonable. McLellan is to pay the reparation ($115,869) and the legal costs ($41,658). The fine is to be paid in three equal instalments with the first payment within 28 days of sentencing and the two other instalments on the anniversary of the first payment.

[58] In relation to the s 34 charge, there is a concurrent fine of $50,000 with $130 Court costs.

D G Harvey
District Court Judge