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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2019-409-000053
[2019] NZHC 2257

BETWEEN	PEGASUS ENGINEERING LIMITED Appellant
AND	WORKSAFE NEW ZEALAND Respondent

Hearing: 18 July 2019

Appearances: G Gallaway and J Lill for Appellant
N Szeto and B H McCarthy for Respondent

Judgment: 10 September 2019

JUDGMENT OF DUNNINGHAM J

This judgment was delivered by me on 10 September 2019 at 10.00 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date 10 September 2019

Introduction

[1] This is a confined appeal. What is at issue is whether the District Court correctly considered a worker who witnessed the aftermath of a workplace accident to be a "victim" under s 4 of the Sentencing Act 2002, and therefore eligible to receive an order of reparation for emotional harm or loss.[1]

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1 *Worksafe New Zealand v Pegasus Engineering Ltd* [2019] NZDC 7162.

How the issue arose

[2] Pegasus Engineering Ltd (Pegasus) is an engineering firm based in Christchurch. In June 2017 one of its employees was killed by a falling steel beam. The employee had been asked to move two steel I-beams from a work trolley using an overhead gantry crane. During the process of securing a chain around one I-beam, he was positioned under it and holding the crane's remote control as he did so. The crane lifted and a hook on the chain caught on something, causing the I-beam to tip and fall. The employee was caught under the beam and was fatally crushed.

[3] Another worker, Mr Armour, was working nearby. He could not see the incident but heard the I-beam fall. He responded immediately and is now suffering from post-traumatic stress disorder.

[4] Pegasus was duly charged with failing to ensure, so far as was reasonably practicable, that its employees were not exposed to a risk of death or serious injury under the Health and Safety at Work Act 2015 (HSWA). It entered a guilty plea.

[5] On 11 April 2019, Judge Saunders sentenced Pegasus to:

(a) a fine of $250,000;

(b) reparation to the deceased's family totalling $123,240;

(c) reparation to Mr Armour of $45,000; and

(d) costs in the sum of $936.91.

[6] Pegasus appeals only in relation to the order to pay reparation to Mr Armour. It does so on the basis that he is not a victim as defined by the HSWA and is therefore ineligible for reparation.

[7] Section 32(1) of the Sentencing Act 2002 sets out the circumstances in which reparations may be imposed on an offender. It provides:

> A court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer-
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> (a) loss of or damage to property; or
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> (b) emotional harm; or
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> (c) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

[8] Section 32(2) then narrows eligibility for reparation for emotional harm, or for loss or damage consequential on emotional harm, saying the Court cannot impose a sentence of reparation in such cases "unless the person who suffered the emotional harm is a person described in paragraph (a) of the definition of victim in section 4".

[9] Paragraph (a) of the definition of "victim" in s 4 of the Sentencing Act provides that "victim" means, relevantly:

> (i) a person against whom an offence is committed by another person; and
>
> (ii) a person who, through, or by means of, an offence committed by another person, suffers physical injury, or loss of, or damage to, property;
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> …

The District Court sentencing decision

[10] In sentencing Pegasus, Judge Saunders stated that the "most vexed question in this matter is whether Mr Armour can be considered as a victim for the purposes of assessing reparation in this case".[2]

[11] Judge Saunders then outlined the defence submissions for Pegasus which argued that Mr Armour was not a victim for the purposes of s 4 of the Sentencing Act. He was not an active participant to the accident, he was not within the danger zone, he was not a surviving victim and nor was he exposed to the risk on that particular day.

[12] However, Judge Saunders found that Mr Armour was a victim, setting out his reasoning as follows:

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2 At [9].

> [10] Having spent now some time dealing with the issue by way of reading the submissions and cases in analysis of the Sentencing Act, I have come down in favour of finding that Mr Armour does qualify for an award of reparation. I am satisfied that Mr Armour was working in close proximity to the deceased and I accept the submission that he was working as the leading hand at the same worksite and was one of the first responders at the scene.
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> [11] The charge faced by the defendant company refers to a failure to ensure the health and safety of workers who worked for the company and by the failures exposed, the workers were at risk of death or serious injury. While Mr Armour did not in fact suffer a serious injury, he was exposed to the risk factors which have been identified as an identifiable risk in which the company has failed to protect the workers against.
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> [12] As submitted by the prosecutor at paragraph 32 of her submissions, the end result is that I come down in favour of the argument that a direct consequence of the failure identified has created a situation where Mr Armour is properly classified as a victim to which reparation is potentially payable. He has clearly suffered emotional harm and as a consequence, a loss of earnings.

[13] The Judge noted that Pegasus accepted that if Mr Armour could be considered a victim, then he qualified for reparation in the range of $45,000 to $55,000. The Judge made an order for reparation of $45,000 based on the shortfall in ACC payments that Mr Armour had received, as well as for emotional harm.

Principles on appeal

[14] Appeals against sentence are allowed as of right by s 244 of the Criminal Procedure Act 2011 and must be determined in accordance with s 250 of that Act. An appeal against sentence may only be allowed by this Court if it satisfied that there has been an error in the imposition of the sentence and that a different sentence should be imposed.[3]

The appeal

Pegasus' position

[15] Pegasus submits that there was an error in the imposition of the sentence of reparation because Mr Armour is not a victim of the offence as he is not "a person against whom the offence has been committed by the appellant". He is therefore ineligible for any reparation.

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3 Criminal Procedure Act 2011, ss 250(2) and 250(3).

[16] Pegasus' first argument is that the charge is a strict liability, public welfare regulatory offence. This type of offence protects the public interest generally as opposed to crimes against the person, which protect individual interests. Pegasus therefore says the offence was "committed" against the public interest and workers' health and safety, and not against any individual person. As a consequence, it is not possible for any person to meet the definition in para (a)(i) of the definition of "victim" in s 4(1) of the Sentencing Act, as they do not qualify in this regard because the offence is not committed against them.

[17] That said, a person can be a "victim" of a health and safety offence if that person meets the criteria in one of the other subparagraphs in the definition. For example, the immediate family are eligible under para (a)(iv) of the definition. Mr Armour, however, does not meet these criteria and therefore does not qualify as a victim.

[18] In the alternative, Pegasus says that if a person can be a victim of a health and safety offence through para (a)(i), the Judge erred in finding that Mr Armour was exposed to the risk identified in the charge and therefore a person against whom the offence was committed. To be a victim in this case requires exposure to "a risk of death or serious injury arising from exposure to a crushing hazard created by the movement of unsecured heavy steel beams placed on work trolleys", being the risk identified in the charge.

[19] Pegasus says that there is no evidence that Mr Armour was exposed to that risk. Indeed, he was in a different area of the work floor at the time of the accident and did not see the accident himself. Furthermore, there is no assertion in the summary of facts to which it pleaded that suggests Mr Armour was exposed to the risk. He is not mentioned. In those circumstances, he is not a person against whom the offence was committed and he does not qualify as a "victim" for the purposes of reparation.

Worksafe's position

[20] The respondent, Worksafe New Zealand (Worksafe), rejects both arguments. It says that the distinction Pegasus makes is artificial. It is axiomatic that it is not a required element of the offending that there has been an individual who has been

harmed. What is required is that an individual has been exposed to the risk of certain types of harm. It says that if Mr Armour was exposed to the risk, then he is a victim for the purposes of the HSWA.

[21] In response to the second ground of appeal, Worksafe says that it was open on the information before Judge Saunders in the District Court to conclude that Mr Armour was exposed to the same risks as the deceased prior to the accident, and he was therefore eligible for an award of reparations.

Can Mr Armour be a victim?

Submissions for Pegasus

[22] The first issue is whether Mr Armour (or anyone) can be a victim of the offending under the HSWA through the definition of s 4(1)(a)(i) Sentencing Act.[4] This is a necessary threshold to cross as s 32(2) Sentencing Act provides the Court must not impose a sentence of reparation in respect of emotional harm unless the person who suffered the emotional harm is a "victim" as defined in s 4(1)(a) of that Act.

[23] Pegasus seeks to characterise the charge against it as being a public welfare regulatory offence, which the Law Commission describes as offences intended to protect the public "from those undertaking risk-creating activities rather … than individual interests".[5] It submits that a fundamental characteristic of HSWA offences is that they are committed when a breach of a health and safety duty exposes individuals to a risk of harm. Thus, the offence is complete upon the creation of a risk, without the requirement that there be an individual victim who is offended against. Other examples of where the courts have recognised that offences against the public interest do not necessarily require a victim include drink driving offences and drug offences.[6]

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4 It being accepted he does not qualify under s 4(1)(a)(ii) as he was not physically injured.
5 New Zealand Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012) at [3.49] and n 128.
6 *Police v Paki* [2014] NZHC 3112 at [32]; and *R v Kilicaslan* [2015] ACTSC 39 at [28].

[24] Pegasus submits, therefore, that no-one was a "victim" of the offence through para (a)(i) of the definition of victim, that is, on the basis the offence was committed against him or her.

[25] Pegasus notes that this does not mean that reparation is precluded in HSWA offences. The deceased and his family qualify as victims because:

(a) the deceased is a victim under para (a)(ii) of the definition because he suffered physical injury; and

(b) immediate family members, such as the deceased's widow and daughter, qualify under para (a)(iii) because they are his immediate family.

[26] Furthermore, the following individuals would still qualify as "victims" for the purpose of receiving reparation under s 32:

(a) any person who suffers loss of, or damage to, property "through or by means of" the offence; and

(b) any person who has suffered emotional harm and loss or damage consequential on any emotional harm, if that person meets any of the criteria in paras (a)(ii) or (iii) or (iv) of the definition of "victim" in s 4 of the Sentencing Act.

[27] Pegasus also submits that to accept that people such as Mr Armour could be victims under this section of HSWA offending would result in a very wide class of persons qualifying for emotional harm reparation under s 32 of the Sentencing Act. Emotional harm includes a range of effects from "mental anguish" through to "identifiable, long term, clinical conditions such as traumatic stress disorders".[7] Given there is no requirement for a medically diagnosed condition, there could be a large number of "victims" seeking emotional harm reparation which could force the prosecutor to exercise discretion over whom it treats as a victim. For example, most

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7 *Sargeant v Police* (1997) 15 CRNZ 454 (HC) at 458, per Hammond J.

(if not all) of the workers present on the day of the accident would then be eligible for emotional harm reparation. Pegasus submits that Parliament's intent when narrowing the definition of "victim" through s 32(2) Sentencing Act was to avoid this type of burden on the state.

Submissions for Worksafe

[28] Worksafe rejects Pegasus' submission that there is a discrete category of "public welfare regulatory offences" that can be described as "victimless crimes", noting that Cooke P in *Millar v Ministry of Transport* characterised the description of "public welfare regulatory offence" as "a convenient label rather than an exact definition".[8]

[29] Worksafe goes on to say that s 32 of the Sentencing Act itself does not differentiate between different kinds of offences, and there are clearly cases where emotional harm reparation has been awarded to individuals who, on the information available, appear not to have suffered any physical injury. The appellant's argument flies in the face of these decided cases.

[30] Worksafe says that it is an element of offending under s 48 HSWA that there is at least an identifiable individual who is exposed "to a risk of death or serious injury or serious illness". It accepts that it is not a required element of offending under s 48 HSWA that there has been an individual who has in fact been harmed, simply that there is an individual who has been exposed to the risk of certain types of harm.

[31] Worksafe says that it does not automatically follow that, absent actual harm being an element of the offending, the offending is against the public at large. Nor does it follow that offending against the public interest cannot include offending against an individual (or individuals). That is frequently the case with offending under s 48 HSWA.

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8 *Millar v Ministry of Transport* [1986] 1 NZLR 660, (1986) 2 CRNZ 216 (CA) at 666.

Discussion

[32] I accept the Worksafe's submissions. Section 32 of the Sentencing Act does not differentiate between public welfare regulatory offences and other offences, including those against individuals' interests. There is no reason, in principle, why a person cannot be a victim under s 4(1)(a)(i) if they have been exposed to the risk identified in the charge. Where a workplace fails to meet its obligations under the HSWA and places its employees at risk, then that employee is a victim of its failure.

[33] While Pegasus says that to accept that Mr Armour was a victim under this section would result in a very wide class of persons qualifying for emotional harm reparation under s 32 of the Sentencing Act, I do not consider that is the case. Eligibility for reparation for "emotional harm" and "loss or damage consequential on any emotional physical harm or loss of, or damage to, property" under ss 32(1)(b) and (c) is restricted by s 32(2). That limitation reflects the intention of Parliament. It does not take an unduly broad view of who is a victim, rather it limits it to the workers present on the day of the accident who are actually put at risk. This would preclude claims for emotional harm arising merely from a connection to the victim or the workplace. In each case, the prosecutor will have to determine whether they were exposed to the risk of death, serious injury or serious illness.

Was the individual exposed to the risk?

[34] My above finding leads me to consider whether Mr Armour was exposed to the risk identified in the charge and so qualifies as a victim of the offending.

Submissions for Pegasus

[35] Pegasus says this is a fact-specific enquiry. In *Worksafe New Zealand v Lyttelton Port Company Ltd*, the Court did not award reparation to an employee who suffered emotional harm following the death of a colleague, on the ground that he was not a "victim in terms of the law" even though, in a general sense, he was "a victim in terms of what happened and in terms of the consequences to him".[9] In *Worksafe New Zealand v Department of Corrections*, Judge Doogue had to consider a claim for

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9 *Worksafe New Zealand v Lyttelton Port Company Ltd* [2015] NZDC 15922 at [8].

reparation by a co-worker who was working alongside the worker who died when struck by a log.[10] She acknowledged that if the co-worker was simply a "bystander" who suffered emotional harm, he would not be entitled to reparation, as was the case in *Lyttelton Port Company*. However, she distinguished the facts of that decision and said that the co-worker's position in the case before her was more akin to that of a surviving victim where the victims were at risk, but not physically harmed.

[36] The distinction drawn in these cases is between whether the individual claiming emotional harm reparation was at risk or was merely an observer to the risk faced by other employees. Pegasus submits that it is not enough for there to have been a breach of a HSWA duty for a Court to infer exposure to the risk identified in the charge; evidence of actual exposure is necessary for a specific individual to be a "victim" through para (a)(i).

[37] In that respect, Pegasus says the Judge misapplied the legal test when he found that Mr Armour "was exposed to the risk factors which have been identified as an identifiable risk in which the company has failed to protect the workers against".[11] It says the agreed summary of facts makes no reference to Mr Armour. Had it suggested that he was exposed to the actual risk the deceased was exposed to, this would have been rejected by Pegasus. It is submitted that there is no proper evidential foundation to support the Judge's finding that Mr Armour was exposed to the risk.

[38] Pegasus says not every worker who was at work on the day of the incident could have been exposed to a risk of death or serious injury arising from exposure to a crushing hazard created by the movement of unsecured heavy steel beams placed on work trolleys. On the available evidence the only workers who might have been exposed to the risk were those working on the same task as the deceased or who could have been struck by the beam as it tipped.

[39] Pegasus says Mr Armour was not one of these individuals. He was not involved in the lifting of the two beams. He heard, but did not see the incident, because he was in a different area of the work floor. Pegasus submits there is no evidence to

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10 *Worksafe New Zealand v Department of Corrections* [2016] NZDC 24865.
11 *Worksafe New Zealand v Department of Corrections*, above n 1, at [11].

show Mr Armour was at risk of being crushed by the unsecured heavy steel beams as identified in the charge. Therefore, he was not exposed to the risk and the Judge's finding was wrong.

Submissions for Worksafe

[40] Worksafe submits that there was a proper factual foundation on which the Judge was entitled to find (and did find) that Mr Armour was exposed to the same risks as the deceased was, prior to the incident. The fact he is not identified as a victim in the summary of facts is not a barrier to receiving an award of reparation.

[41] In *Worksafe New Zealand v Department of Corrections*, it was similarly argued by the appellant that the worker to whom reparation was to be paid had not been identified as a victim in the summary of facts and was carrying out a different role.[12] Despite that, Judge Doogue held:

> [47] Though the charge was particularised with reference to Mr Cave, Mr P was a person in my view, against whom an offence was committed for the reasons submitted by Worksafe. He was present and he was working under the same conditions as Mr Cave when Mr Cave died.
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> …
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> [49] Contrary to what was submitted by Corrections, it is, in my view, unhelpful to rely on a distinction between Mr P and Mr Cave's duties while cutting up the log. Mr P was equally at risk as Mr Cave. Mr P was not in a danger zone as the log gained speed by virtue of him realising the danger and moving out of the logs path and it is in Corrections' favour that he was not physically injured, but this does not obviate the fact that he was an active participant in hazardous activity being placed there by Probation. He was not simply a witness to the accident.

[42] Worksafe does not dispute that the issue of whether Mr Armour is a victim in terms of the definition in s 4(1)(a)(i) of the Sentencing Act requires a factual analysis of Mr Amour's circumstances in the context of relevant legal principles. Worksafe submits that this is precisely what Judge Saunders did when determining Mr Armour's entitlement to reparation. In doing so he found that Mr Armour was exposed to the risk of harm, and therefore was a victim under the Act.

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12 *Worksafe New Zealand v Department of Corrections*, above n 10.

[43] In particular, the Judge found that:

(a) Mr Armour was working in close proximity to the deceased;

(b) he was working as the leading hand at the same worksite and was one of the first responders at the scene;

(c) while Mr Armour did not in fact suffer a serious injury, he was exposed to the risk factors which have been identified as an identifiable risk in which the company has failed to protect the workers against;

(d) a direct consequence of the failure identified has created a situation where Mr Armour is properly classified as a victim to which reparation is potentially payable; and

(e) he has clearly suffered emotional harm and, as a consequence, a loss of earnings.

Discussion

[44] As is clear from the examples discussed above, the question of whether an individual is a victim (and therefore eligible for reparation for emotional harm) depends on the facts establishing that he or she was exposed to the risk. Both the *Lyttelton Port Company* decision and the *Department of Corrections* decision recognise that simply being employed in the same workplace is insufficient to bring an individual into the category of someone who was exposed to the risk; there needs to be some evidence that the individual was actually exposed to the same hazard.

[45] Worksafe accepts that an entitlement to reparation for emotional harm in the context of a charge under HSWA does require it to establish that the claimant was exposed to the risk of death, serious injury or serious illness. However, I am not satisfied that the evidence in this case achieves this. Neither the summary of facts nor the victim impact statement establishes that Mr Armour was exposed to the crushing hazard created by the movement of unsecured heavy steel beams placed on work trolleys. The particular risks in this case arose from poor lifting practice of the beam

and, in particular, inappropriate use of work holding equipment for tall narrow beams and inappropriate crane operation (traversing the hook and holding the remote control while rigging). The summary of facts explains how the victim came to be struck by the falling I-beam. It also notes that "another worker jumped out of the way as the beam fell".

[46] There is nothing in the summary of facts or the victim impact statement which identifies how Mr Armour was exposed to that risk. I have considered the factors relied on by the District Court Judge. While he says Mr Armour was working "in close proximity" of the deceased, he was clearly not working where the beams were being lifted. He did not see the accident. He only came when he heard the beam fall. This can be contrasted with the worker who jumped out of the way of the falling beam. The fact that Mr Armour was the leading hand at the same workplace does not obviously assist. While it suggests he had some responsibility to come to the deceased's aid, it does not confirm that he undertook the same kind of work or was at the same risk. Similarly, the fact he was one of the first responders at the scene does not assist. It clearly explains why he suffered the emotional harm, but not why he was a victim of the offending in a sense of being exposed to the risk on that particular day.

[47] While it is unpalatable to deny Mr Armour an award of reparation when he has obviously suffered harm, it is clear that the provisions of the Sentencing Act intended to limit eligibility for emotional harm payments to a specific class of people.

[48] Although Worksafe urges on me that the case in *R v Donaldson* endorsed a "liberal and non-technical approach" to s 32(1) of the Sentencing Act, that case was discussing the statutory wording of "through or by means of an offence" which is used to establish a victim's entitlement.[13] It does not overcome the fact that s 32(2) narrows eligibility for emotional harm and loss to those who are defined as victims.

[49] While Worksafe points to a number of decisions where a wide range of people were held to be eligible for emotional harm payments, it is clear from those cases that all were exposed to the harm in question. For example, in *Department of Labour v Pike River Coal Ltd*, the "surviving victims" were awarded emotional harm reparation,

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13 *R v Donaldson* CA227/06, 2 October 2006 at [32].

but they were obviously exposed to the same risks as those who died in the coal mine.[14] Similarly, in the case of *Ministry of Business, Innovation and Employment v Taranaki Outdoor Pursuits and Educational Centre Trust*, where two individuals were swept off a rock face into the sea when attempting to cross it near high tide, all the group had been put at the same risk through venturing to cross the rock face in the circumstances alleged.[15] Finally, in *Maritime New Zealand v Fullers Group Ltd*, emotional harm payments were made to both passengers who suffered physical injuries and passengers who did not, when the ferry they were on hit the wharf.[16] Again, it is clear on the face of the decision that all passengers were put at risk by the events which gave rise to the charges.

[50] While the outcome of this case will be disappointing from Mr Armour's point of view, it is incumbent on Worksafe to identify in each individual case how the individual claiming reparation qualifies as a victim. In a charge under s 48 HSWA, this will require evidence of how the individual was exposed to the risk of harm which was the subject of the charge. That was not provided in the present case.

Outcome

[51] Accordingly, the appeal is allowed. The award of $45,000 in reparation to Mr Armour under s 32 of the Sentencing Act is quashed.

Solicitors:
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14 *Department of Labour v Pike River Coal Ltd* DC Greymouth CRI-2012-018-822, 5 July 2013.
15 *Ministry of Business, Innovation and Employment v Taranaki Outdoor Pursuits and Educational Centre Trust* DC New Plymouth CRI-2013-043-271, 23 October 2013.
16 *Maritime New Zealand v Fullers Group Ltd* [2017] NZDC 11241.