

KensingtonSwan 

NZISM

Legal update

Greg Cain
Partner

19 June 2018



Overview

- Sentencing decisions
- Culpability bands
- Financial incapacity
- Australian liability case

Starting Point bands under HSWA

Hanham and Philip approach (HSE Act – max fine \$250k unless reckless)

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

WorkSafe's approach (HSW Act – max fine \$1.5m unless reckless)

- Low culpability: A fine up to \$400,000
- Medium culpability: A fine of between \$400,000 and \$800,000
- High culpability: A fine of between \$800,000 and \$1,200,000
- Extremely high culpability: A fine of between \$1,200,000 and \$1,500,000

*WorkSafe New
Zealand v
Budget Plastics
(New Zealand)
Ltd*

- Victim's hand caught in an auger of a plastic extrusion machine
- Machine inadequately guarded, no emergency stop controls, no safe operating procedures
- Budget Plastics had inadequate systems in place for identifying hazards and inadequate policies in place for training workers
- Budget Plastics pleaded guilty to failing in its duty as a PCBU to ensure, so far as is reasonably practicable, the health and safety of its workers while they were operating a plastic extrusion machine

WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd - continued

- Starting point in the range of \$400,000 - \$600,000
 - WorkSafe submitted that a starting point of \$900,000 should be adopted
- Evidence from accountant that a fine of \$100,000 or more would cause significant difficulties for the business
- Court ordered:
 - fine of \$100,000
 - reparations of \$37,500
 - costs to WorkSafe of \$1000

WorkSafe New Zealand v Burrows

- Mr Burrows was a sole trader, trained race horses at property
- Wetting and grading a horse track, son and friend jumping on and off truck
- Son's friend inadvertently run over
- Mr Burrows pleaded guilty to breaching his primary duty of care

*WorkSafe New
Zealand v
Burrows
- continued*

- Financial capacity
 - business running at a loss
 - personal net worth of \$12k
 - realistically could only pay \$5k p.a.
- Means to pay reparation or fine, but not both
- Court ordered reparations of \$25,000 to be paid in instalments
- No fine

*WorkSafe New
Zealand v
Rangiora
Carpets Limited*

- Worker fell 2.5 metres from an unconsented mezzanine floor through a false ceiling
- Rangiora Carpets pleaded guilty for breaching its primary duty of care for failing to recognise that a fall from height was a risk and to ensure appropriate controls were in place

WorkSafe New Zealand v Rangiora Carpets Limited - continued

WorkSafe	Rangiora Carpets	Court – Judge Gilbert
Low culpability: A fine of up to \$400,000	Low culpability: A fine of up to \$100,000	Low culpability: A fine of up to \$150,000
Medium culpability: A fine of between \$400,000 and \$800,000	Low/medium culpability: A fine of between \$100,000 and \$300,000	Low/medium culpability: A fine of between \$150,000 and \$350,000
High culpability: A fine between \$800,000 and \$1,200,000	Medium culpability: A fine of between \$300,000 and \$500,000	Medium culpability: A fine of between \$350,000 and \$600,000
Extremely high culpability: A fine of between \$1,200,000 and \$1,500,000	Medium/high culpability: A fine of between \$500,000 and \$700,000	Medium/high culpability: A fine of between \$600,000 and \$850,000
	High culpability: A fine of between \$700,000 and \$1,000,000	High culpability: A fine of between \$850,000 and \$1,000,000
	Extremely high culpability: A fine of between \$1,000,000 and \$1,500,000	Extremely high culpability: A fine of between \$1,000,000 and \$1,100,000

WorkSafe New Zealand v Rangiora Carpets Limited - continued

- Cusp of low/medium – medium culpability
- Financial capacity issues
 - evidence provided by both Rangiora Carpets and WorkSafe
 - reduction inappropriate – in this case, payments could be made over time
 - court would not fine to such an extent that a business would have to close its doors
- Court ordered:
 - fine of \$157,000
 - reparations of \$20,000
 - costs to WorkSafe

WorkSafe New Zealand v Dimac Contractors Limited

Facts

- Worker was operating digger to remove contaminated soil around live power lines
- General Manager told workers that the powerlines were likely to be disconnected, but he wasn't sure
- Digger's boom hit powerline which snapped – phase wire wrapped around the cab of digger
- Driver got out of digger and another worker cut the phase wire with insulated cutters while it was live
- No one was injured

WorkSafe New Zealand v Dimac Contractors Limited - continued

- Dimac Contractors pleaded guilty to breaching primary duty of care (exposing workers to risk of serious harm from exposure to live electricity)
- Court adopted same culpability bands as the Court in Rangiora Carpets
- Starting point – \$650,000
- Financial capacity
 - evidence from both Dimac Contractors and WorkSafe
 - fine reduced on this basis
- Court ordered:
 - fine of \$90,000
 - costs to WorkSafe of \$1,000

*WorkSafe New
Zealand v
Lindsay Whyte
Painters and
Decorations
Limited*

- Worker fell 2.8 metres from a single-storey roof through a glass platform
- No fall protection, workers not trained and instructed in working from height, failed to identify the risk of a fall
- Lindsay Whyte Painters pleaded guilty to breaching primary duty of care (failing to recognise fall from height was a risk and ensure appropriate controls were in place)

WorkSafe New Zealand v Lindsay Whyte Painters and Decorations Limited - continued

- Judge Maze
 - banding exercise not the domain of the District Court
 - banding approach “oversimplified”
- Adopted the general approach in Budget Plastics
- Reductions for mitigation factors and financial capacity

Court ordered:

- Fine of \$50,000
- Reparations of \$20,000

Court refused to award costs

WorkSafe New Zealand v The Tasman Tanning Company Limited

Facts

- A forklift driver was loading bins of animal skins into large mixing vessels. He driver noticed a distinct smell of rotten eggs
- He began coughing, moved away from the mixers but fainted and hit his head on the concrete floor
- He regained consciousness, and twice got up but fell again
- The driver had been exposed to hydrogen sulphide gas

WorkSafe New Zealand v The Tasman Tanning Company Limited - continued

- Tasman Tanning were charged for failing SFARP to ensure the safety of employees when they were at work – exposing them to a risk of serious harm arising from exposure to hydrogen sulphide gas
- Previous conviction for a similar incident in 2013

WorkSafe New Zealand v The Tasman Tanning Company Limited - continued

Sentencing of other criminal offences usually have a “four band” approach

- Court adopted four band approach
 - low culpability: a fine of up to \$400,000
 - medium culpability: a fine of up to \$400,000 - \$800,000
 - high culpability: a fine between \$800,000 - \$1.2 million
 - extremely high culpability: a fine between \$1.2 million and \$1.5 million

*WorkSafe New
Zealand v The
Tasman Tanning
Company
Limited -
continued*

Court ordered:

- Fine of \$380,000
- Reparations of \$13,000
- Costs to WorkSafe of \$4,000

*WorkSafe New
Zealand v
Stumpmaster
Ltd*

Facts

- Tree felling incident at a residential site
- Palm tree hit neighbour walking on footpath
- Victim knocked to the ground

- Stumpmaster pleaded guilty to failing to ensure the health and safety of other persons was not put at risk from work carried out by it

WorkSafe New Zealand v Stumpmaster Ltd - continued

Sentencing

- The Court considered four-bands too few, and six-bands too many. It instead took a new ‘five-band’ approach:

Very low culpability	Between \$0 and \$200,000
Low culpability	Between \$200,000 and \$400,000
Medium culpability	Between \$400,000 and \$600,000
High culpability	Between \$600,000 and \$1.1 million
Very high culpability	Above \$1.1 million

*WorkSafe New
Zealand v
Stumpmaster
Ltd - continued*

- Medium culpability \$450 - \$500k starting point
- Court ordered:
 - Fine of \$90,000
 - Reparations of \$18,500
 - Costs of \$1,000

*WorkSafe New
Zealand v
Niagara
Sawmilling
Company Ltd*

Facts

- Victim reached his hand into spiral roller to dislodge a small piece of timber
- His glove was drawn into a gap
- Another worker stopped the machine when he saw the ripped glove
- Victim's right index and middle fingers had been partially amputated by the machine

WorkSafe New Zealand v Niagara Sawmilling Company Ltd - continued

- The machine was guarded but did not meet the required standard
- Judge Farnan compared this to “*a swimming pool being three-quarters fenced but unfenced for the remaining quarter*”
- Medium culpability

*WorkSafe New
Zealand v
Niagara
Sawmilling
Company Ltd -
continued*

Sentencing

- Rangiora six-band approach
- Fine of \$323,437
- Reparations of \$27,000 + consequential loss payment to the victim of \$160
- Costs of \$278

WorkSafe New Zealand v Avon Industries Ltd

Facts

- Avon operated a bespoke machine for galvanising lengths of chain
- The galvanizing process involves dipping items into a bath of molten zinc that is around 450° - 465° celsius
- The zinc was largely uncovered so there was a risk that workers could be splashed by the zinc. Workers wore appropriate protective clothing
- It was common ground that it was difficult to guard workers from the splashing of zinc by shields or screens

WorkSafe New Zealand v Avon Industries Ltd - continued

Facts continued

- A worker noticed a chain in the machine became jammed
- Another worker shut off the machine
- The worker climbed onto the frame of the machine and stood on the platform that ran horizontally across part of the machine
- The worker slipped and his foot went into the zinc bath

*WorkSafe New
Zealand v Avon
Industries Ltd -
continued*

“The more difficult it is to guard against a risk by mechanical means the more important it becomes to guard against it by such means as training, supervision, monitoring and discipline”

WorkSafe New Zealand v Avon Industries Ltd - continued

- Medium/high culpability, 600k starting point
- Followed the Rangiora six-band approach
- Court ordered:
 - Fine of \$371,250
 - Reparations of \$30,000
 - Costs of \$1584.50

*WorkSave New
Zealand v
Nutrimetics
International
(New Zealand)
Ltd*

Facts

- A worker was operating a machine that filled tubes with cosmetic produces
- The worker noticed the tubes were not being filled properly
- With the machine still running, she positioned a ladder up the side of the machine
- She pushed a spatula into the hopper to scrape the product downward
- The worker's sleeve became entangled and she was drawn in

*WorkSave New
Zealand v
Nutrimetics
International
(New Zealand)
Ltd - continued*

- Medium culpability, 350k starting point
- Followed the Rangiora six-band approach
- Court ordered:
 - Fine of \$183,750
 - Costs of \$2,027

*WorkSafe New
Zealand v
Robertson*

Facts

- Sole trader – painter, decorator and asbestos removal service
- Contracted to remove asbestos from a small shed by purchaser of a property
- Mr Robertson failed to:
 - Notify regulator of asbestos removal
 - Wear appropriate safety clothing and equipment
 - Use an appropriate removal method
 - Control people accessing the site
- Purchaser of the property complained

*WorkSafe New
Zealand v
Robertson -
continued*

- Starting point of fine: \$100,000
- Reduction of fine based on Mr Robertson's ability to pay
- Court ordered:
 - Fine \$35,000
 - Remediation costs \$2580.59
 - Prosecution costs \$1297.50

WorkSafe New Zealand v Toll Logistics (NZ) Ltd

Facts

- A train wagon was stocked with pallets of Harraway's oats
- The roof of the wagon was secured by vertical, 2m long poles.
- The pole on the wagon would not secure and was placed on top of the pallets
- Forklift driver had difficulty unloading pallets. The roof pole fell to the ground.
- A site caretaker picked up the pole and to return it to its vertical position
- Three pallets, each weighing 400kg, fell off the forklift hoist onto the site caretaker

WorkSafe New Zealand v Toll Logistics (NZ) Ltd - continued

- WorkSafe investigation revealed ‘systematic failures’
- CCTV footage of the 12 days prior to the accident revealed many workers exposed to the very same risk
- High starting point: \$900,000
- Court ordered:
 - Fine \$506,300
 - Reparations \$110,000
 - Costs to WorkSafe of \$6030

Culpability Bands

- Approach to sentencing is not settled
- *Tasman Tanning Limited, Niagara Sawmilling and Stumpmaster* under appeal – appellate guidance on its way

Financial Capacity

- Court must take financial capacity into account – s 40 of the Sentencing Act 2002
- Common theme in sentencing cases so far
 - large reductions in *Budget Plastics*, *Dimac Contractors*, *Lindsay Whyte Painters* and no fine in *Burrows*
- Increased fines in the new regime redundant?
- Tougher approach likely in future as well as use of other orders available

Liability Decisions

- No decisions in New Zealand interpreting the provisions of HSW Act in a liability context
- Continue to look at cases from Australia under the Model Work Health and Safety Act

*SafeWork NSW v
Freyssinet
Australia Pty Ltd*

Facts

- Freyssinet – a specialist sub-contractor on a construction site
- Karimbla Construction Services – Principal
- In contract between Freyssinet and Karimbla, Karimbla assumed extensive health and safety responsibilities for the site
- Employee of Freyssinet lost his footing on stairs, and fell under the handrail as there was no infill

*SafeWork NSW v
Freyssinet
Australia Pty Ltd
- continued*

- Freyssinet had no right under the contract to control or alter the stairway
- Freyssinet pleaded not guilty to a charge under s 32 of the Work Health and Safety Act 2011 (NSW)
- Alleged that Freyssinet failed to take reasonably practicable measures to eliminate, or minimise, the risks of health and safety of workers including the risks from height

*SafeWork NSW v
Freyssinet
Australia Pty Ltd
- continued*

- Freyssinet could not use the contract between itself and Karimbla to limit its own duty to its workers
 - section 28 HSW Act – cannot contract out of duties under the Act
- Freyssinet should have identified the inadequate guarding of the staircase, requested Karimbla to remedy it and instruct its workers to not use the stairway until it had been fixed
- Court found Freyssinet guilty of the offence

Questions



Thank you.

CONTACT

Greg Cain
Partner

greg.cain@kensingtonswan.com
DDI +64 4 916 0963 | **M** +64 21 770 936

KensingtonSwan*

