

**IN THE DISTRICT COURT  
AT NELSON**

**CRI-2014-042-002678  
[2016] NZDC 18502**

**WORKSAFE NEW ZEALAND**  
Prosecutor

v

**DEPARTMENT OF CORRECTIONS**  
Defendant

Hearing: 27, 28, 29 June 2016 (closing submissions received 15 July 2016 and 29 July 2016)

Appearances: D La Hood and D Brabant for the Prosecutor  
B Nathan and J Maslin-Caradus for the Defendant

Judgment: 22 September 2016

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**RESERVED JUDGMENT OF CHIEF JUDGE JAN-MARIE DOOGUE**

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### **Executive Summary**

[1] The Department of Corrections (“Corrections”) being an employer is charged with failing to take all practicable steps to ensure that no action or inaction of any of its employees while at work harmed any other person, namely Robert Charles Ian Cave (“Mr Cave”).

[2] Corrections assessed Mr Cave as suitable for serving his sentence of community work at an agency placement at the Anglican Church in Wakefield, Nelson (“the Church”). On the 7th of June 2014, Mr Cave died from injuries he sustained when he was hit and pinned under an approximately 400 kilogram log on a hillside behind the Church. The fatal accident occurred while Mr Cave and another offender were cutting up the log. The usual supervisor, the vicar of the Church, was unwell and let the two offenders complete the work unsupervised.

[3] Probation officers’ conduct in creating community work placements may harm offenders. However, Corrections failed to address this conduct adequately prior to Mr Cave’s accident by taking practicable steps to eliminate and mitigate errors in probation officers’ approach to safety in community work agency placements. I find that Corrections failed to meet its duty under s 15 of the Health and Safety in Employment Act 1992.

[4] I also find that responsibility for Mr Cave’s death specifically does sit with Corrections. The vicar’s actions on the day of Mr Cave’s death were seriously flawed

but they were flawed by reason of Corrections' failure to train its employees properly concerning health and safety matters, and to communicate and enforce requisite standards of conduct in relation to community work agency placements. Though Corrections' failures do not represent the most direct cause of Mr Cave's death nonetheless its failures do represent a cause of his death.

### **Preliminary observations on how to approach Admission of Facts**

[5] The Prosecuting Agency ("WorkSafe") and Corrections agreed, pursuant to ss 9(1)(b) and 9(2) of the Evidence Act 2006, to admit many facts surrounding the events on 7 June 2014 and Corrections' processes. The s 9(2) admission of facts includes acknowledgement by Corrections that there were 14 steps which it could have taken, but failed to take ("the Admitted Steps"). Aside from the Admitted Steps, WorkSafe sought to prove that Corrections had failed to take three further steps ("the Disputed Steps"). The Admitted Steps and the Disputed Steps are set out in Appendix 1.

[6] Corrections' admission to the Admitted Steps and acceptance that the Disputed Steps were practicable must be viewed with caution. While Corrections conceded that the Admitted Steps were steps it *could* have taken, Corrections disputes that the Admitted Steps were steps it *should* have taken. Corrections challenged the "causative link" between the practicable steps and its employees' actions or inactions, and its employees' actions or inactions and the harm.<sup>1</sup> In doing so, Corrections raised questions around the knowledge of the steps' efficacy, foreseeability,<sup>2</sup> and WorkSafe's specification of the harm. These are matters which bear on the analysis of whether a step is practicable for ensuring that no probation officer's action or inaction while at work harms any other person. Despite Corrections' concessions, the practicability of the Admitted Steps and the Disputed Steps remains in issue.

[7] A further contributing factor to my concern about Corrections' admission is the connection between the Admitted Steps and the Disputed Steps. The 14 Admitted

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<sup>1</sup> As discussed below at [48]–[51].

<sup>2</sup> For example, Corrections submitted in closing submissions that all of the factors relating to Reverend Wasley's actions demonstrate that the circumstances which arose on the day of the accident were not reasonably foreseeable.

Steps are constituent parts of the Disputed Steps. For example, the provision of a handbook may go to whether the agency knew and understood its responsibilities. The Admitted Steps and the Disputed Steps must be considered in the round and I find it necessary to reassess the Admitted Steps in order to satisfy myself on those steps and the remaining three Disputed Steps.

## **Background**

[8] Corrections is the government department which administers New Zealand's corrections system. This responsibility includes arranging and administering community work sentences. Offenders on these sentences are specifically managed by Community Probation ("Probation"). Probation officers are employed by Corrections.

[9] Offenders may complete their community work sentence at a Corrections-run community work centre or on placement with an external agency. There are three stages of assessments and agreements which are undertaken before an offender is placed at an agency. First, Corrections uses a Community Work Agency Assessment ("Agency Assessment") to determine whether an agency generally presents an appropriate site for offenders to complete their community work hours. When completing an Agency Assessment, a probation officer meets with a representative of the agency, known as the agency sponsor. At the meeting, the requirements and responsibilities of both Corrections and the agency are discussed. The Agency Assessment identifies the terms that apply to all placements at the agency and the scope of work offered by the agency. The obligations of the agency and Corrections are also set out in a Community Work Agency Agreement ("Agency Agreement") signed by a representative from Corrections and the agency sponsor.

[10] Secondly, a probation officer determines whether a specific offender should be placed at a Corrections-run community work centre or with an agency in accordance with s 62 of the Sentencing Act 2002. Probation officers conduct an interview and induction with the offender. Corrections requires probation officers to complete Community Work Induction Confirmation ("Induction Confirmation"),

Community Work Placement Assessment, and Work and Living Skills Suitability forms with the offender before any placement is made.

[11] Thirdly, where an offender is considered suitable for placement with an agency, a probation officer puts in place a Community Work Agency Three Way Agreement (“Three Way Agreement”) between the agency, Corrections and the offender. The Three Way Agreement specifies where and when the community work will be done as well as the number of hours the offender is to complete. Over the course of an offender’s placement with an agency, Corrections receives information on the placement’s progress through attendance records, site visits and annual reviews of the agency.

[12] Mr Cave was serving his sentence on agency placement with the Wakefield Parish of the Anglican Diocese of Nelson (“the Diocese”), having been assessed as suitable for agency placement. At the time of Mr Cave’s placement at the Church, Reverend Allan Wasley was acting as the Diocese’s agency sponsor though the Diocese claimed that it had no knowledge of this. The interactions between Probation and Reverend Wasley are recorded in notes on Corrections’ systems and in:

- An Agency Assessment that Reverend Wasley returned to Corrections by post in March 2012 (“2012 Agency Assessment”).
- An Agency Agreement signed also in March 2012 (“2012 Agency Agreement”).
- An Agency Assessment and review booklet completed on 21 February 2014 (“2014 Agency Review Booklet”).
- An Agency Agreement signed on 21 February 2014 (“2014 Agency Agreement”).

[13] In the 2012 Agency Assessment and the 2014 Agency Review Booklet, the community work available for offenders at the Church is described as:

- Clearing of fields & cemetery from noxious plants
- Cleaning of water courses
- Wet Weather: Clean & Vacuum of Church Plant

*The events of 7 June 2014*

[14] On 7 June 2014, another offender (“Mr P”) and Mr Cave reported to Reverend Wasley at the Church. Reverend Wasley was unwell, and left Mr P and Mr Cave to complete work unsupervised. Mr P and Mr Cave carried out work on a tree that had been felled a number of weeks prior by Reverend Wasley and Mr P. The felled tree was resting in an unsafe position on a hillside behind the Church. Mr P used a chainsaw to cut the felled tree into rings while Mr Cave collected the rings, rolling them down the slope towards the Church. The felled tree became unstable and rolled downhill at speed, struck and pinned Mr Cave who later died from the resulting injuries.

**Questions for determination**

[15] In order to determine whether the charge is proven beyond doubt, I must address the following questions: -

- (a) Is WorkSafe required to identify and prove the occurrence of specific actions or inactions of Corrections’ employees?
- (b) What does “action or inaction while at work” mean for the purpose of s 15 of the HSEA 1992?
- (c) Is the harm required to be proximate to the employees’ place of work?
- (d) Does s 15 of the HSEA 1992 require the actions or inactions of Corrections’ employees to have caused any harm or potential harm that has occurred?
- (e) Were the Admitted Steps and Disputed Steps, practicable steps for the purpose of s 15 of the HSEA 1992?

(f) Did Corrections, in fact, take the Admitted Steps and Disputed Steps?

### **Expert evidence**

[16] I heard from three experts. Dr Kathleen Callaghan and Mr Gavin Johnson provided expert evidence for the prosecution. Dr Callaghan is a qualified occupational and environmental physician with a specialisation in human factors. Mr Johnson is a qualified health and safety consultant who has over 32 years of experience providing health and safety guidance to public and private organisations throughout Australia, New Zealand, Asia and Mauritius. Mr Michael Cosman, the sole expert for Corrections, is a director of a risk and safety consultancy business who has worked in the area of occupational health and safety for 37 years and has several relevant qualifications.

[17] Dr Callaghan said that when formulating health and safety processes, the initial focus must be on elimination of error. Health and safety processes must be designed properly to take account of all actors' capabilities and to address errors before they arise. Responsibilities and accountabilities need to be unambiguously understood, and any gaps need to be addressed prior to work commencing. Documents addressing health and safety matters are one resource which must be formulated in this way. Open-ended questions posed in such documents, which act as a 'fishing exercise', are unhelpful. People answering the document's questions will not be able to provide accurate and helpful answers unless they know why the questions are being asked. Otherwise, the person may not recognise the relevance of particular information.

[18] Proper formulation of health and safety processes is not sufficient on its own, however. A good health and safety system also will detect errors, and contain or mitigate those errors. If a person departs from the health and safety processes developed, this deviation needs to be both detected and addressed. If it is not, the deviation will appear acceptable to the individual involved and the deviation likely will recur.

[19] Multi-layered protections of these types are required in the context of health and safety. Dr Callaghan described this requirement with reference to what is known

as the ‘Swiss Cheese Model’. Each contributing factor to an accident can be viewed as a hole in a piece of Swiss cheese. The slice of Swiss cheese closest to the accident represents the direct actions of individuals, and slices further back relate to matters such as work environment and organisational systems. An alignment of holes in a number of different slices is ultimately what leads to an accident. The existence of one single hole is not the sole cause of an accident. The purpose of a comprehensive health and safety system is to identify holes and reduce their size or cover them up. The fewer the holes in the Swiss cheese, the less the likelihood that a particular accident will occur.

[20] Both Dr Callaghan and Mr Johnson concluded that there were systemic failings in Corrections’ approach to health and safety generally at the time of Mr Cave’s accident and, specifically, its responsibility to Mr Cave as an offender serving a sentence of community work at an agency. They opined that Corrections had in place neither an adequate health and safety management policy nor adequate health and safety processes in the context of community work placements at agencies. Corrections had, in Mr Johnson’s view, taken a disjointed approach to hazard and risk management, and had not given enough attention to detail. The result being that such health and safety processes as were in place did not address the specific needs of the community work context.

[21] Mr Cosman disputed that legal responsibility lay with Corrections but did agree with Dr Callaghan and Mr Johnson’s views of how good health and safety policy and processes are developed. He also conceded that all of the practicable steps raised by WorkSafe were steps Corrections was required to take in terms of the design of safety policy and processes, and that if the court concluded legal responsibility did rest with Corrections, he had no dispute with the WorkSafe’s expert evidence that Corrections’ health and safety processes were inadequate.

*Inspector of Corrections Report and Health & Safety Investigation Report*

[22] Following Mr Cave’s death, the Inspector of Corrections investigated the circumstances of Mr Cave’s accident. The Inspector of Corrections’ findings are summarised in an undated draft report. In addition to the Inspector of Corrections’

report, a health and safety investigation report dated 7 June 2014 was produced for Corrections' Health and Safety Risk Governance Committee. Both reports were admitted in evidence by consent. While their content contains both fact and opinion, I cannot conclusively find that there was acceptance as to the truth of their contents. The reports have drawn the same or similar conclusions as I have in this judgment. However, I have not taken cognisance of the truth of their contents. In effect, both reports undertook a similar task to the court but without the totality of the evidence available to the court.

## **The Law**

### *The Act*

[23] The HSEA 1992 is an enabling and preventative piece of legislation. Higher courts have stated that:<sup>3</sup>

- The principal object of the Act is to provide for the prevention of harm.
- Employers are required to promote safety in the workplace and to take all practicable steps to ensure employees and others in the workplace are not harmed.
- While the primary obligation to promote and ensure safety rests upon the employer, this does not exonerate or diminish the responsibility of other persons in other capacities recognised in Part 2 from discharging the statutory duty imposed upon them.
- There is no valid distinction to be drawn between a positive duty to act and a negative duty to avoid harm.
- The question of what is a practicable step to ensure safety in the workplace is a matter of fact and degree in each case.

[24] The HSEA 1992's preventative object flows into the duties set out in this Act. It assigns ownership of workplace health and safety to employers and others. Those with duties under the HSEA 1992 are responsible "not only to ensure that no harm actually occurs, but to maintain safe practices which will protect themselves or others from harm".<sup>4</sup>

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<sup>3</sup> *Department of Labour v Hanham and Philp Contractors* (2008) 6 NZLR 79 at [22]; *Central Cranes Ltd v Department of Labour* [1997] 3 NZLR 694 (CA) at 701–703.

<sup>4</sup> *Department of Labour v Kay* HC Auckland AP 326/96, 8 December 1997 at 12.

*Sections 15 and 50(1)(a) of the Health and Safety in Employment Act 1992*

[25] One such duty the HSEA 1992 places on employers is that in s 15 of the HSEA 1992 which provides:

Every employer shall take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person.

[26] For the purposes of interpreting the provisions of the HSEA 1992, I have had no regard to s 36 of the Health and Safety at Work Act 2015. Whether a gap has or has not been perceived to exist is irrelevant to my task of interpreting s 15 of the HSEA 1992.

[27] Failure to meet the duty imposed by s 15 attracts the liability described in s 50(1)(a) of the HSEA 1992. Section 50 is a strict liability offence<sup>5</sup> and intention is not an element of this offence.<sup>6</sup> An employer's failure to comply with its duties may be even an inadvertent one.<sup>7</sup>

[28] An employer's duty to take all practicable steps under s 15 is not limited by another party holding the same duty.<sup>8</sup> An employer cannot completely relinquish its health and safety responsibilities to a third party.<sup>9</sup> In the context of this case this means that, regardless of the Diocese's potential liability, the question for

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<sup>5</sup> *Buchanans Foundry Ltd v Department of Labour* [1996] 3 NZLR 112 (HC) at 115.

<sup>6</sup> HSEA 1992, s 53.

<sup>7</sup> *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA) at [39].

<sup>8</sup> This is expressed in s 2(2) of the HSEA 1992 and was expanded upon by the Court of Appeal in *Central Cranes Ltd v Department of Labour*, above n 3, at 702 as follows:

"The learned Judge's concept of a "pyramid of relationships", such that Central Cranes was removed from activities on site, was misplaced. If there is some step which it was practicable for the company to take the company had to take that step. It cannot distance itself from what is occurring on the work site in the sense suggested by the learned Judge simply because the employer is more directly related to and responsible for the employees carrying out the rigging work. Nor can it satisfy its obligation under s 18 merely by retaining a contractor who is competent. The question contemplated by the statute must be asked: Did Central Cranes take all practicable steps, as that term is defined in s 2, to ensure that Skytech's employees were not harmed in doing the work which that company was engaged to do?"

<sup>9</sup> As observed at 7 in *Department of Labour v Anchor Products Ltd* DC Te Awamutu CRN 8072004463, 18 February 1998, a case involving a failure to meet the s 6 duty:

"It is not and cannot be an answer under this legislation to delegate a third party to attend to safety issues and then never check whether that third party has properly addressed and corrected those safety issues. The responsibility for the safety of this machine lay with the Defendant Company and it failed to properly undertake its statutory responsibilities in that regard."

determination remains: did Corrections take all practicable steps to ensure that no probation officers' actions or inactions harmed Mr Cave?

[29] By reason of s 6(1)(b) of the Crown Organisations (Criminal Liability) Act 2002, Corrections may be prosecuted for an offence under s 50 of the HSEA 1992. While Corrections may be ordered to pay reparation, compensation or costs, it cannot be sentenced to pay fines.<sup>10</sup>

### *Practicable steps*

[30] The term "all practicable steps" is defined in s 2A of HSEA 1992 as:

- (1) In this Act, all practicable steps, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to—
  - (a) the nature and severity of the harm that may be suffered if the result is not achieved; and
  - (b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
  - (c) the current state of knowledge about harm of that nature; and
  - (d) the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and
  - (e) the availability and cost of each of those means.
- (2) To avoid doubt, a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.

[31] The classic definition of "reasonably practicable" is found in *Edwards v National Coal Board* per Asquith LJ:<sup>11</sup>

'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it can be shown that there is a gross

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<sup>10</sup> Crown Organisations (Criminal Liability) Act 2002, s 12 (as at 7 June 2014).

<sup>11</sup> [1949] 1 KB 704 at 712.

disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them.

[32] The factors listed in s 2A(1) of the HSEA 1992 guide the computation described by Asquith LJ, and are akin to the ‘risk’ and ‘sacrifice’ referred to in *Edwards*. When this computation is made “it should not lightly be held that to take a practicable precaution is unreasonable”.<sup>12</sup>

[33] The test of what is reasonably practicable is objective.<sup>13</sup> It is not a question of whether the defendant actually foresaw the relevant circumstances, or whether it deemed the practicable steps submitted by the prosecutor to be reasonable, but whether it was objectively reasonable to predict the relevant circumstances and take those steps. In *Department of Labour v Solid Timber Building Systems New Zealand*, Baragwanath J commented:<sup>14</sup>

I construe the definition of “all practicable steps” as essentially one of objective fact, viewing the matter at a stage shortly before the injury through the eye of an employer conducting the respondent’s operation and with the knowledge that such an employer could reasonably have been expected to possess as to the nature of prospective harm ....

[34] The s 2A assessment of whether a step was practicable is not, however, “a counsel of perfection by hindsight”.<sup>15</sup> While hindsight may provide a clearer picture of what occurred, it is not a proper basis for liability under ss 15 and 50.

### **Turning specifically to the questions for determination**

*Is WorkSafe required to identify and prove the occurrence of specific actions or inactions of Corrections’ employees?*

[35] There is dispute in this case as to whether WorkSafe must prove beyond reasonable doubt specific actions or inactions to which the practicable steps described in s 15 relate. WorkSafe contended that limiting the charge to employees’ specific, individual failings would mean employers’ most serious systemic failings

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<sup>12</sup> *Marshall v Gotham Co Ltd* [1954] AC 360 at 373 (UKHL) as cited in *Department of Labour v Solid Timber Building Systems New Zealand* HC Rotorua, AP464a/44/2003, 7 November 2003 at [29].

<sup>13</sup> *Department of Labour v Solid Timber Building Systems New Zealand Ltd*, above n 12, at [35].

<sup>14</sup> At [35].

<sup>15</sup> *Buchanans Foundry Ltd v Department of Labour*, above n 5, at 119.

would not breach s 15. For example, on this reading, an employer's ongoing failure to train or supervise employees would not breach s 15 because the risk of harm arises from the employees' general performance of their duties rather than specific conduct. The charge, in WorkSafe's view, is directed to the steps that were or were not taken by Corrections (the organisation as a whole) in order to address employees' conduct. Corrections challenged this construction, submitting that a systemic failure does not satisfy this element of ss 15 and 50, and that specific failings must be identified.

[36] The purpose of the s 15 duty is to encourage employers to identify proactively that their employees' conduct may harm other persons, and institute measures to eliminate or mitigate that possibility. An employer's failure, systemic or otherwise, to undertake that exercise is what engages s 50. An employer's failure to meet its s 15 duty may manifest in an accident, but this does not mean the prosecution is required to prove the specific employee actions or inactions that contributed to that accident. As was noted in *Waimea*,<sup>16</sup> while harm or an event may be particularised in the charge, the focus of a HSEA 1992 prosecution is not on the "micro" (being the actions on the day of an accident) but the "macro". This means that prosecution on the basis of systemic failure is one possible way of demonstrating that the s 15 duty was not met.

[37] Nevertheless, the s 15 duty's scope is determined by reference to employees' actions or inactions, and the harm that may occur if those actions are taken or omissions occur. The definition of 'practicable steps' requires the prosecution to identify both the type of actions or inactions that it alleges the employer must take steps to prevent and the type of harm that could result if those actions or inactions are not prevented. Even in view of systemic failure, the prosecution will need at least to prove the type of conduct it alleges that the employer was obliged to take steps to prevent.

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<sup>16</sup> *WorkSafe New Zealand v Waimea Sawmillers Ltd* [2015] NZDC 21082 at [36]; *Waimea Sawmillers Ltd v WorkSafe New Zealand* [2016] NZHC 915.

What does “actions or inactions while at work” mean for the purpose of s 15 of the HSEA 1992?

[38] The s 15 duty relates to employees’ actions or inactions “while at work”. Section 2(1) of the HSEA 1992 defines “at work” as: “in relation to any person, means present, for gain or reward, in the person’s place of work”. “Place of work” is defined in the same section as:

a place (whether or not within or forming part of a building, structure, or vehicle) where any person is to work, is working, for the time being works, or customarily works, for gain or reward; and, in relation to an employee, includes a place, or part of a place, under the control of the employer (not being domestic accommodation provided for the employee),—

- (a) where the employee comes or may come to eat, rest, or get first-aid or pay; or
- (b) where the employee comes or may come as part of the employee’s duties to report in or out, get instructions, or deliver goods or vehicles; or
- (c) through which the employee may or must pass to reach a place of work

[39] Section 2(3) of the HSEA 1992 relevantly reads:

To avoid doubt, a person is in a place of work *whenever and wherever the person performs work* including in a place that—

- (a) the person moves through; or
- (b) itself moves. [Emphasis added.]

[40] Relying on *Department of Labour v Berryman*,<sup>17</sup> Corrections contended that the definition of “place of work” only extends to cover a person’s usual, customary place of work at which they were present with some degree of frequency. That submission is erroneous because the Health and Safety in Employment Amendment Act 2002 amended s 2 to clarify the definition of “place of work” in the HSEA 1992. The definition allows any number of locations all to be regarded as a single employee’s “place of work” and contains no qualification that depends on how frequently an employee is present at a particular location.

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<sup>17</sup> *Department of Labour v Berryman* [1996] DCR 121; (1996) 5 NZELC 98, 394.

*Is the harm required to be proximate to the employees' place of work?*

[41] WorkSafe submitted that s 15 obliges employers to take practicable steps to ensure no employee's action or inaction harms any person in any location. This means that the s 15 duty is not limited to preventing harm to persons at or near the employees' place of work. In support of this submission, WorkSafe referred to:

- a suggestion in the Brookers *Employment Law* commentary that s 15 “seems wide enough to extend beyond the physical boundaries of the workplace”;<sup>18</sup>
- the specific inclusion of locations in the HSEA 1992's provisions where the location of harm is relevant to a duty's scope; and
- the HSEA 1992's long title which describes the HSEA 1992 as “An Act to reform the law relating to the health and safety of employees, and other people at work or affected by the work of other people”.

[42] To demonstrate the absurdity of liability being dependent on there being physical proximity between the actions and inactions, and the harm, WorkSafe referred to *Clark v Dunning Thornton Consultants Ltd*.<sup>19</sup> In that case, a tourist was injured while using a Fly by Wire device. Dunning Thornton Consultants Ltd was prosecuted on the basis that one of its employees did not properly certify the Fly by Wire device. WorkSafe argued that liability in a case such as *Clark* could not sensibly depend on whether the employee certified the Fly by Wire device at the site on which it was operated or at a different location. An employer would be liable only in the former circumstances if s 15's duty depends on physical proximity. This, in WorkSafe's view, is an unjustified distinction which is inconsistent with the HSEA's purpose and scheme.

[43] WorkSafe argued foreseeability is instead the chief determinant of the s 15 duty's scope, being that the duty is limited to taking practicable steps “in respect of circumstances that the person knows or ought reasonably to know about”.<sup>20</sup>

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<sup>18</sup> Christine Sanders (ed) *Employment Law* (online looseleaf ed, Brookers) at [HS15.01].

<sup>19</sup> DC Wellington CRN 2085012862, 8 July 2005.

<sup>20</sup> HSEA 1992, s 2A(2).

[44] Corrections argued that the WorkSafe’s broader approach would result in the s 15 duty applying ‘to all the world’. As such, Corrections submitted that the s 15 duty is limited to preventing harm only within the vicinity of the employees’ place of work. It argued this interpretation is supported by:

- the object of the HSEA 1992, being to prevent harm “in, or in the vicinity of, a place of work”;
- the focus in case law on the harm in or in the vicinity of a place of work; and
- the HSEA 1992’s legislative history.<sup>21</sup>

[45] I find that the practicable steps required by s 15 extend beyond steps to prevent harm at the employer’s work sites only. Section 15 recognises that employees’ conduct may endanger persons not employed by the employer and impels employers to address that conduct. Section 15 makes no specific reference to the harm occurring in a particular location. Although s 15 does contain the phrase “at work”, this is placed after the words “no action or inaction of any employee” and connected to those words with the conjunction “while”. On plain reading of s 15, the “at work” requirement qualifies the employee’s action or inaction, not the harm. It describes the circumstances in which the action or inaction occurs. The words “while at work” require an employer to address employees’ conduct connected to the employer’s enterprise, rather than employees’ conduct in a private capacity.

[46] Though the HSEA 1992’s object might tend to suggest there should be a geographical constraint on the s 15 duty, this conclusion is not as clear when placed in context of the rest of the HSEA 1992’s scheme. The HSEA 1992’s long title refers to people ‘affected’ by work and location is specified where necessary in other sections of the HSEA 1992. For example, s 15 can be contrasted with s 16(1)(a) of the HSEA 1992 which specifically refers to a hazard that may harm “people in the vicinity of the place”. Section 16 is directed to steps to address hazards associated with a specific location, but s 15 is solely directed to steps to address employees’

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<sup>21</sup> During the second reading of the HSEA 1992, the s 15 duty was explained with reference to persons coming into a place of work.

conduct. The reference in the HSEA 1992's object to harm in or in the vicinity of a place of work does not displace s 15's broad, clear wording.

[47] To limit the s 15 duty to harm proximate to the employees' place of work would be to read in an element not present on the section's wording. I therefore find that the practicable steps an employer is required to take are not confined to harm at their employees' place of work.

*Does s 15 of the HSEA 1992 require the actions or inactions of Corrections' employees to have caused any harm or potential harm that has occurred?*

[48] Causation in health and safety is recognised as multi-faceted in nature. This is why, in many of its sections, the HSEA 1992 dispenses with the need to prove that an employer's failure to meet a HSEA 1992 duty caused actual harm. The only relevance of actual harm will be to "reinforce the allegation that the action or inaction may cause harm and, moreover, that practicable steps have not been taken to prevent that harm occurring".<sup>22</sup> This principle is well-established<sup>23</sup> and accepted by both parties as applying to s 15. However, the following remains in dispute:

- (a) Does WorkSafe need to prove causation between the practicable steps and the employees' actions or inactions?
- (b) Does WorkSafe need to prove causation between the employees' actions or inactions, and the actual or potential harm?

[49] These questions can be answered by reference to the framework provided by ss 2A and 15 of the HSEA 1992. There, undoubtedly, needs to be some relationship between the step and the action or inaction, and the action or inaction and the harm. However, for the purposes for s 15, this relationship is more helpfully viewed in the language of s 2A rather than of a quasi-causation framework.

[50] Simply, a step cannot be practicable where it has no bearing on employees' actions or inactions, or where the action or inaction it is designed to address does not

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<sup>22</sup> *Punts Painting & Waterblasting Ltd v Burt* HC Nelson M 32/95, 21 December 1995 at 5.

<sup>23</sup> See for example *Punts Painting & Waterblasting Ltd v Burt*, above n 23; *Clark v Dunning Thornton Consultants Ltd*, above n 20, 8 July 2005.

risk harm. Under s 2A, the court must have regard to matters such as the knowledge of “the likely efficacy” of means to achieve the result and the “harm that may be suffered if the result is not achieved”. If the prosecution fails to establish that the steps concern employees’ actions or inactions, the prosecution will be unable to demonstrate that the available means would have any efficacy in eliminating or mitigating the actions or inactions. If the prosecution fails to establish that the likelihood of harm has some relationship with the employees’ actions or inactions, the prosecution will be unable to establish the “nature and severity of the harm that may be suffered if the result is not achieved” for the purpose of s 2A(1)(a).

[51] Thus, what has been referred to by Corrections and in *Punts Painting* as “causation” is not a stand-alone element of s 15, but rather it is built into the assessment of whether a step is practicable. In this context, the relationship between the practicable steps and the actions or inactions, and the actions or inactions and the harm still has significant bearing on the s 15 duty but within a slightly different framework to that proposed by Corrections.

*Were the Admitted Steps and Disputed Steps, practicable steps for the purpose of s 15 of the HSEA 1992?*

[52] The expert evidence suggests that Mr Cave’s death revealed some serious failings in Corrections’ approach to the health and safety of offenders undertaking community work. However, this does not alone attract liability. WorkSafe must have proven that these failings fall within the specific duty in s 15 of the HSEA 1992.

[53] The s 15 duty requires an employer to take practicable steps to ensure no employee’s action or inaction while at work harms any other person. This, first, means the s 15 duty’s scope only requires employers to take such steps in respect of conduct that may harm. In the case of Corrections, there is a demonstrable relationship between probation officers’ conduct and harm to offenders on community work placement sufficient for the purpose of s 15. The placement and management of offenders at community work sites falls to the judgement of probation officers.<sup>24</sup> Probation officers determine the terms and existence of an

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<sup>24</sup> Section 65(2) of the Sentencing Act 2002 provides that “An offender who is directed to do community work ... is subject to the control, direction, and supervision of a probation officer at

offender's community work agency placement. This places Corrections' employees in a unique position of control over the "other person[s]", offenders. Where no account is made of health and safety issues in a probation officer's assessment of proposed community work or an agency, an offender may be compelled to complete his or her community work by doing unsafe work or using hazardous equipment. Thus, a probation officer's approach ultimately will determine the work environment that offenders will be serving their sentence within.

[54] Where probation officers' decisions and conduct mean that an offender is placed in a hazardous work environment or required to use hazardous equipment, it is reasonably foreseeable that probation officers' actions or inactions may expose the offender to harm.<sup>25</sup> While probation officers' actions or inactions may not be the direct cause of any harm, the control that probation officers have over an offender's community work placement means that their failings in health and safety management may harm the offender.

[55] Corrections contended that Reverend Wasley's intervening actions in failing to advise Corrections of the true nature of the work at the Church, and failing to supervise or act in the interests of safety on the day of Mr Cave's death, meant that probation officers' actions or inactions were remote from the harm to Mr Cave. I find that the probation officers' actions or inactions were an essential precondition to the harm that occurred. If probation officers had been more alert to Reverend Wasley's approach at the Church then Mr Cave would not have been placed at the Church or tighter controls around community work at the Church may have been in place. This connection is sufficient for the purpose of s 15.

[56] I also note that in closing submissions Corrections highlighted that probation officers did not create the forms underpinning their failure to address hazards and risk. It is also no answer to the charge to suggest that the specific employees involved did not devise the documents and systems used in assessing health and

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all times".

<sup>25</sup> This is particularly pronounced given that, as recognised by both Dr Callaghan and Mr Johnson, offenders do not have the same right of refusal as employees. It is even more incumbent on Corrections in such a setting to ensure that the health and safety processes are properly formulated and implemented.

safety risks. The very basis of ss 15 and 50 is to encourage the proper formulation of comprehensive health and safety processes. The proper formulation of documents is, in essence, a practicable step. How particular employees' failings, in fact, came to occur is only relevant to the extent that it demonstrates that a practicable step was not taken.

[57] Second, viewing the Admitted Steps and Disputed Steps through the lens of s 15, each Admitted Step and Disputed Step must have a perceptible link to the actions and inactions in order to be relevant to the duty. The practicable steps addressing probation officers' actions or inactions fall into two classes. Some of the practicable steps go to eliminating errors in the employees' conduct. In other words, the practicable steps go to ensuring probation officers only allow safe community work placements, eliminating health and safety errors in their assessments of, and interactions with, agencies. The practicable steps which are in this class are Practicable Steps (a), (b), (c), (d), (h), (i), (j), (k) and (m). In attempting to eliminate error, each of these steps is directed at preventing harmful actions or inactions.

[58] The remaining practicable steps go to mitigating errors in employees' conduct. For example, where a power tools policy is set out in documents provided to agencies, a probation officer's failure to check that an offender was not using power tools while with an agency might be mitigated by the agency following the power tools policy. This class of practicable steps covers Practicable Steps (e), (f), (g), (h), (l), (n), (o), (p) and (q). In attempting to mitigate error, each of these steps is directed at ensuring that where probation officers' actions or inactions do occur, harm will not result. All of the Admitted Steps and Disputed Steps therefore are directed towards ensuring no action or inaction of any probation officer harms an offender.

[59] Finally, the question that remains is whether eliminating and mitigating errors in probation officers' approach to community work agency placements by the means identified in Appendix 1 were reasonably practicable steps for the purpose of s 15 of the HSEA 1992. Contributing to the assessment of each Admitted Step and Disputed Step's practicability is the nature and severity of harm that may be suffered if Corrections fails to ensure that no probation officer's action or inaction while at

work harms an offender. The actual harm to which offenders may be exposed as a result of probation officers' actions or inactions depends on the particular circumstances of an agency placement. However, it was reasonably foreseeable prior to Mr Cave's accident that, in the context of power tool use and work that moves beyond the 'low level' work expected by Corrections, this harm can extend to serious harm, such as severe lacerations and death. When describing the consequences of poor communication to agencies, Dr Callaghan went so far as to suggest "the consequences of getting the message wrong, as it was in this case, were catastrophic".

[60] I find that the potential serious harm associated with offenders using power tools or undertaking high risk work, such as tree felling, was objectively known prior to Mr Cave's death. Indicative of the objective state of knowledge around community work at that time is the attention Corrections gave to the use of power tools at community work centres. For example, Corrections' *Power Tools Quick Safety Guide* identifies chainsaws as an extreme risk tool, requiring both approval from an Area Manager and qualified users. The *Power Tools Quick Safety Guide* also recognises that related hazards are flying or falling objects and that serious harm could result from chainsaw use. Corrections itself was aware that if probation officers created the opportunity for power tool use and high risk work, offenders undertaking community work in such circumstances would likely face harm of a severe nature.

[61] Corrections' failure to respond to the likelihood of serious harm in the particular context of community work agencies was due to Corrections' assumptions around agencies' practices and legal responsibilities. Although Corrections did have a health and safety management system, there was a disjunct between Corrections' policy and the implementation of that policy as recognised by Mr Johnson. It was not the case that the likelihood of harm was minute or unforeseeable at the time.

[62] Having reviewed each step, I observe that all of the Admitted Steps and Disputed Steps concern training or information. Each step relies upon probation officers having received sufficient training and instruction on community work agency placements, or otherwise information being communicated by Corrections.

This means none of the Admitted Steps or Disputed Steps is onerous or novel. In October 2014 following Mr Cave's death, a report was produced for Corrections' Health and Safety Governance Committee which reviewed community work placements from a health and safety perspective. The estimated cost of new training was included in that report. By Corrections' estimate, the necessary training comes at a cost of approximately \$260,000. Further, Corrections itself had mechanisms available at the time by which the information referred to in the Admitted Steps and Disputed Steps could have been distributed, including by management-led workshops and internal correspondence. Prior to Mr Cave's death, probation officers were providing documents to and holding meetings with agencies in order to impart information about safety. Not only were the means for the Admitted Steps and Disputed Steps readily available, there was objective knowledge of the means to achieve the result at the time, and the means were known to be efficacious in changing the conduct of employees and other parties.

[63] Corrections argued that Reverend Wasley's actions on the day of Mr Cave's accident were not reasonably foreseeable circumstances. However, narrowing focus to the particular characteristics of Reverend Wasley and his actions on the day of the accident is unhelpful to the assessment of reasonable practicability. Instead, as indicated in *Waimea*, a macro approach is needed. The proper focus is whether Corrections could have reasonably foreseen the circumstances by which an offender may come to use power tools or undertake high risk work at an insufficiently vetted or monitored agency. I find that such circumstances were reasonably foreseeable at the time prior to Mr Cave's accident, meaning Corrections was required to take practicable steps to address these circumstances.

[64] In any event, Corrections ought to have had knowledge of Reverend Wasley's particular approach to health and safety, supervision and work scope. A note on Corrections' files dated 22 December 2011 records that Mr P was enjoying community work "as [he] is doing arborist work – his usual job at a church cutting down a tree". The work described in this note is outside of the agreed scope of work. Issues with Reverend Wasley's approach and understanding would have been brought to Corrections' attention if documents had been adequately formulated or warning signs properly recognised by probation officers.

[65] Weighing the risk of harm and the burden of taking the Practicable Steps, I find that all of the Admitted Steps and Disputed Steps, being Practicable Steps (a)–(q), were practicable. This is consistent with the expert witnesses’ expectations of a good health and safety system as summarised at [16]–[21] above. The practicable steps were all open to Corrections at the time, and indeed some steps were even within Corrections’ contemplation in the context of placement at centres. Given the severity and risk of the harm, I am satisfied that the cost of Corrections taking the Admitted Steps and Disputed Steps is not disproportionate. I am satisfied beyond reasonable doubt that Practicable Steps (a)–(q) were shown to be practicable steps to ensure no action or inaction of any probation officer while at work harms an offender.

*Did Corrections, in fact, take the Admitted Steps and Disputed Steps?*

[66] Having found that all 17 Admitted Steps and Disputed Steps were practicable steps, I turn now to consider whether Corrections failed to take each of these practicable steps. In assessing the Admitted Steps and Disputed Steps, I have regard to several considerations. First, there is a conceptual distinction between the actions and inactions which the 15 practicable steps are designed to prevent or mitigate, and the conduct of Corrections’ employees which demonstrates whether a practicable step was taken. The actual conduct of Corrections’ employees is relevant to whether a practicable step was taken, but this is not to be equated with a requirement that WorkSafe prove that actions or inactions resulting from Corrections’ failure to take a practicable step, in fact, occurred.<sup>26</sup> The question for determination remains: did Corrections take the Admitted Steps and Disputed Steps? In other words: did Corrections do the things listed in Appendix 1?

[67] Second, the account of Corrections’ most recent interactions with Reverend Wasley came from the evidence of Rayma-Lee Katu, the probation officer who arranged Mr P and Mr Cave’s placement at the Church. However, many of Mrs Katu’s answers were phrased in the conditional tense. For example, when asked whether she asked Reverend Wasley further questions in response to his answer “Of course” on an Agency Assessment form, Mrs Katu stated that she “would’ve

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<sup>26</sup> As discussed above at [35].

definitely have asked more questions”. The Agreement Assessment in which the answer “Of course” appeared was completed while Jane Andrews was overseeing the community work placements at the Church. Mrs Katu’s evidence, given with the benefit of hindsight, appeared to reflect what Mrs Katu perceived her general practice ought to be rather than being clear evidence of what actually occurred during her interactions with Reverend Wasley. I consequently have treated her evidence with caution.

[68] Third, Reverend Wasley’s interactions with Corrections must be viewed in the whole, and not limited solely to Mr P and Mr Cave’s placements. Mrs Katu was not the first probation officer to interact with Reverend Wasley. Offenders had been placed at the Church for approximately six to seven years before Mr Cave’s death. This means that though Mrs Katu was the probation officer most proximately involved with placements at the Church, the evidence of other probation officers, and that concerning placements other than Mr P and Mr Cave’s placements, is relevant also.

**Practicable Step (a): Were Probations Officers sufficiently trained in health and safety relevant to community work placements, so as to adequately understand the principles of hazard management, including physical controls, PPE, training and competency requirements?**

[69] It was common ground in the evidence of all probation officers that, at the time of Mr Cave’s accident, probation officers had not received health and safety training relevant to community work agency placements. Ms van Gunst said that while documentation such as the Agency Assessments included health and safety questions, she had no training on what to look for in agencies’ answers to those questions. The Richmond-based probation officers instead learnt on the job and by asking questions on their own initiative. Therefore, I find that WorkSafe has proven Corrections failed to take Practicable Step (a).

**Practicable Step (b): Did Probations Officers carry out a sufficient risk and hazard assessment considering the type of work to be undertaken and suitability of both the Agency and the Offender?**

[70] During cross-examination, several of the probation officers were asked whether the work listed on the Agency Assessments was the type of low risk work

expected for community work. While the probation officers agreed that it was, WorkSafe Investigations Manager Lee-Anne Milne declined to make such an assessment on the basis that she needed further information on how the work was going to be carried out, and Mr Johnson emphatically said his “mind goes berserk when [he] think[s] about cleaning of waterways with regards to hazards associated with that”. There is a mismatch between the probation officers’ assessments of the risks involved with work at the Church and assessments done by those with health and safety knowledge.

[71] Mr Johnson indicated that to undertake a proper risk assessment the probation officers should have been asking questions such as:

- What plant and machinery may be used?
- What tools and equipment may be used?
- What materials, chemicals and other hazardous substances will be used?
- What is the actual physical work environment and area?
- Who are the personnel involved with the job?
- What will be the actual supervision involved and is there a need for additional or specific supervision?
- What personal protective equipment and clothing will be used?
- Is any specific training, information or instruction needed?
- What emergency procedures are in place?
- Should we really look at the hazards in relation to the work?

[72] There was no evidence that any of the probation officers who oversaw the community work placements at the Church carried out, or were capable of carrying out, a risk and hazard assessment on such a basis prior to Mr Cave’s death. Instead, the work listed on the 2012 Agency Assessment and 2014 Agency Review Booklet

was read as acceptably safe without informed consideration being given to its substance.

[73] Without proper training, a sufficient risk and hazard assessment was absent from the probation officers' approach to community work placements at the Church. I find that WorkSafe has proven Corrections failed to take Practicable Step (b).

**Practicable Step (c): Did Probation Officers, when they had the opportunity to become aware that there may have been changes to the type of work that could materially affect the hazard and risk assessment undertaken, conduct a new risk and hazard assessment?**

[74] Again, Corrections' ability to take Practicable Step (c) was hampered by the absence of proper training for probation officers on health and safety, and community work. An example particular to the community work placement at the Church was a 2012 site visit where two probation officers, Ms Andrews and Ms van Gunst, observed Mr P in a climbing harness. Though it was unclear whether a comment was made by Ms Andrews at that time, Ms van Gunst said that "[b]ecause both the agency and [Mr P] seemed to be fine and comfortable with the work he was doing, and because he was a qualified arborist, or at least familiar with that type of work, we left it at that and felt it was dealt with properly". Neither probation officer therefore undertook a new risk and hazard assessment in view of Mr P apparently doing work which was outside of the original scope of work agreed with Reverend Wasley. I find that WorkSafe has proven that Corrections failed to take Practicable Step (c).

**Practicable Step (d): Were an Agency's health and safety systems assessed and recorded as part of reaching agreement with an Agency?**

[75] Ms van Gunst said that copies of agency documentation on their health and safety policy and processes were only sometimes taken by Corrections, depending on the bulk of the documentation. Though Mrs Katu recalled Reverend Wasley referring to the Diocese's health and safety information, there was no suggestion that the Diocese's documentation was read by probation officers, let alone assessed. Reverend Wasley confirmed that probation officers never asked to see the Diocese's health and safety documents. This is consistent with Corrections' view at the time

that the particular health and safety processes used at the agency community work sites were a matter for the agency. I find that WorkSafe has proven that Corrections failed to take Practicable Step (d).

**Practicable Step (e): Did the Agency Handbook set out all appropriate health and safety requirements and expectations?**

[76] Corrections' *Community Work Agency Handbook: A guide to managing offenders in partnership with Community Probation and Psychological Services* ("Agency Handbook") published sometime prior to Mr Cave's death only sets out health and safety requirements in broad terms, reflecting the wording of the HSEA 1992. This approach to health and safety in the Agency Handbook seems to reflect the failings in Corrections' health and safety management system on the whole, as identified by the expert witnesses.<sup>27</sup> While there were references to health and safety in the Agency Handbook, the requirements and expectations were not explained in sufficient detail so as to allow particular application in the community work context. This means the Agency Handbook does not contain all appropriate health and safety requirements and expectations. I find that WorkSafe has proven that Corrections failed to take Practicable Step (e).

**Practicable Step (f): Was the Agency Handbook provided to all Agency sponsors at the time of signing the Three Way Agreements?**

[77] No clear answer was given during the trial as to whether the Agency Handbook was still in use at the time Mr P or Mr Cave's Three Way Agreement was signed. Kirsten Roderique, a Service Manager who was based at the Richmond office, did indicate that based on its reference to Community Probation and Psychological Services the Agency Handbook is an out-dated document and may not have been relied upon by probation officers in 2014. Neither the probation officers nor Reverend Wasley addressed whether Reverend Wasley was provided the Agency Handbook. The focus in evidence was instead on the Agency Assessments, Agency Agreements, Three-Way Agreements and the 2014 Agency Review Booklet.

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<sup>27</sup> See above at [20].

[78] It is possible that Corrections' admission to Practicable Step (f) was in response to a matter earlier disclosed to the prosecution but not introduced into evidence. However, in the absence of relevant evidence produced during the trial, I find that WorkSafe has not proven that Corrections failed to take Practicable Step (f).

**Practicable Step (g): Did the Agency Handbook set out explicit instructions on what to do in special circumstances, including illness of the sponsor?**

[79] The Agency Handbook does not provide full instructions on what an agency should do in special circumstances, including illness of an agency sponsor. Under a heading of "What to do if ... The agency liaison person is unavailable", the Agency Handbook directs that:

When the agency contact is not available for extended periods, discuss the situation with the probation officer. Who will either agree an alternative agency contact with you, or find temporary placement for the offender

[80] The Agency Handbook also suggests that if the probation officer is not available, "you may wish to contact the service manager responsible for community work in your area". The Agency Handbook does not address an agency sponsor's one-off absence due to illness. I find that WorkSafe has proven that Corrections failed to take Practicable Step (g).

**Practicable Step (h): Did the scope of work to be undertaken during community work placements expressly exclude hazardous work?**

[81] On review of the 2014 Agency Review Booklet, Mr Johnson and Ms Milne agreed that the work types listed did not expressly exclude hazardous work.<sup>28</sup> This is because the 2014 Agency Review Booklet's description of the scope of work makes no mention of how the work is going to be carried out. Without this, the scope of work could not have been limited to low risk work on its face.

[82] Even when read in the context of relevant Corrections documentation, the scope of work in the 2014 Agency Review Booklet does not expressly exclude hazardous work. The references to health and safety considerations in the Agency

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<sup>28</sup> See [70] above; the 2014 Agency Review Booklet's layout is substantially similar to the 2012 Agency Assessment.

Handbook and the 2014 Agency Review Booklet do not limit the scope of work. These documents direct that an agency must comply with the HSEA 1992 but this is not the same as excluding specific types of work. Hazardous work may still meet health and safety requirements where the hazards are properly controlled. The 2014 Agency Review Booklet neither mentions a restriction on hazardous work nor defines hazardous work. The Agency Handbook appears to suggest that work breaching health and safety requirements is not excluded, merely inappropriate. The documentation on the scope of work does not, on its own, expressly exclude hazardous work from the scope of work.

[83] Further, the deficits in documentation were not remedied by any action on the part of probation officers. Mrs Katu said that she would only address matters such as a restriction on hazardous tools if she recognised that the work might involve such tools. When put in the context of Dr Callaghan's evidence at [17] above, this approach is insufficient. Any such questions on scope of work needed to be given context. Agency sponsors needed to be given clear direction on why the questions were being asked in order to yield relevant and informative answers. The questions in the 2014 Agency Review Booklet require supplementary information on their purpose but as Reverend Wasley said there was "no instruction given by Probation on how to identify the exact work. They give you a carte blanche, and it's extremely vague". The discussion around scope of work therefore did not ensure the scope of work expressly excluded hazardous work.

[84] The documentation around scope of work and probation officers' practices were inadequate in ensuring the scope of work expressly excluded hazardous work. I find that WorkSafe has proven that Corrections failed to take Practicable Step (h).

**Practicable Step (i): Were clear instructions provided to Probation Officers outlining what to do if it was recognised that the scope of work had changed?**

[85] Probation officers learnt how to manage community work agency placements on the job and were not given specific training. In these circumstances, clear instructions on matters such as change of scope were not provided by Corrections to its probation officers or by the probation officers to agency sponsors. This is reflected in the probation officers' failure to take action when a change in scope was

apparent.<sup>29</sup> I find that WorkSafe has proven that Corrections failed to take Practicable Step (i).

**Practicable Step (j): Was a power tools policy for community agency placements implemented, including what could be used, by whom and in what circumstances?**

[86] While Corrections' documentation shows that there was a power tools policy in existence, this policy was limited to community work centre placements and Corrections had no equivalent policy for community work agency placements. I find that WorkSafe has proven Corrections failed to take Practicable Step (j).

**Practicable Step (k): Was the power tools policy communicated to and understood by Probation Service employees?**

[87] As no power tools policy existed for community work agency placements, it could not have been communicated to Probation employees. Moreover, the probation officers said that they were not familiar with Corrections' documentation relating to the use of power tools. I find that WorkSafe has proven Corrections failed to take Practicable Step (k).

**Practicable Step (l): Was the power tools policy communicated at the induction of offenders and during the monitoring of the Agency and Offenders?**

[88] Again, the power tools policy for community work agency placements could not have been communicated when it did not exist. The Induction Confirmation does advise offenders that "You will be shown how to safely operate the tools you will use during community work". Ms van Gunst said, however, that the discussion around this point could be only very general as the induction occurs prior to the location and nature of the offender's community work being determined. Nothing akin to a power tools policy was communicated at offenders' induction. I find that WorkSafe has proven Corrections failed to take Practicable Step (l).

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<sup>29</sup> See, for example, [74].

**Practicable Step (m): Were clear instructions provided to Probation Officers outlining what to do if it was recognised the power tools policy was not being adhered to?**

[89] As with Practicable Step (i), clear instructions on the power tools policy were not provided. While Mrs Katu indicated that she knew that discussion with an agency or removal of an offender from a placement may be necessary if a chainsaw was being used, this was neither the result of there being a formal power tools policy for community work agency placements nor the result of clear instructions to probation officers on what to do if any such policy was not followed. I find that WorkSafe has proven that Corrections did not take Practicable Step (m).

**Practicable Step (n): Did the Agency Handbook set out the power tools policy?**

[90] The Agency Handbook does not set out any power tools policy and I find that WorkSafe has proven that Corrections failed to take Practicable Step (n).

**Practicable Step (o): Was it ensured that all community work agency sponsors know and understand what is required of them while supervising offenders?**

[91] WorkSafe argued that Corrections' failure to take Practicable Step (o) is demonstrated by the differing understanding of supervision held by Reverend Wasley, probation officers and Corrections. The confusion around supervision, according to WorkSafe, reveals Corrections' failure to ensure clear communication and common understanding. In response, Corrections submitted that Reverend Wasley did know and understand what was expected or required of him while supervising offenders and that his failure to supervise on 7 June 2014 stemmed from illness clouding Reverend Wasley's judgement rather than any failure on Corrections' part to ensure Reverend Wasley knew and understood his supervision obligations.

[92] Different understandings of what "supervision" entails did exist at the time of Mr Cave's accident. On one hand, Reverend Wasley suggested that his comment that he would supervise offenders "with binoculars" in the 2012 Agency Assessment was directed at expressing that the supervision he could offer may not be 'hands on' and could be intermittent depending on his availability. This approach was likely

influenced by an earlier placement during which, according to Reverend Wasley, he informed Corrections he would have to leave the Church while offenders were working if the need arose. On the other hand, the Richmond-based probation officers referred to supervision involving someone being watched at all times, having a line of sight or someone being on-site with the offender. There was also a suggestion that the intensity of the supervision might depend on the type of work an offender is undertaking. Additionally, Ms Roderique questioned the definition of “suitably qualified people” for supervision purposes.

[93] As demonstrated by the variable understandings of supervision, to the extent that Correction had measures beyond those identified in Practicable Steps (a)–(n), these were insufficient to meet Practicable Step (o). Corrections’ processes did not ensure agency sponsors understood their supervision responsibilities at the outset of their involvement or throughout. Corrections documentation was not formulated in a way that would have communicated supervision requirements to agency sponsors. For example, the 2012 Agency Assessment and the 2014 Agency Review Booklet both ask “How will the sponsor maintain oversight of the offender(s) at all times?”, but neither document defines ‘oversight’ or ‘supervision’. The written information that would have aided agency sponsors’ understanding was absent.

[94] Training which would have allowed probation officers to supplement this material was not provided. For example, Mrs Katu could have ensured Reverend Wasley properly understood his supervision obligations at her meeting with Reverend Wasley to complete the 2014 Agency Review Booklet, but she did not have the skills to productively facilitate the discussion. A discussion may have occurred, but it was not robust. This is why in her evidence Dr Callaghan also disputed that Three Way Agreement meetings provide a good opportunity to ensure a match in understanding as communication to this end needs to be underpinned by understanding, training and experience to have any usefulness.

[95] Misunderstanding was perpetuated, rather than addressed at any later stage, due to a lack of error detection and change on Corrections’ part. Corrections did not have adequate processes in place to assist Probation Officers in recognising errors in Reverend Wasley’s understanding. As such, probation officers missed opportunities

to ensure Reverend Wasley's understanding was correct. For example, Reverend Wasley wrote "with binoculars?" on the 2012 Agency Assessment under a question asking about supervision. Ms Andrew, the probation officer who arranged the 2012 Agency Assessment, said that she may have 'flagged' the comment as something to bring up with Reverend Wasley but that she did not consider it a major concern in view of the apparent scope of work.<sup>30</sup> Further, probation officers meet with Reverend Wasley while an offender was undertaking community work hours.<sup>31</sup> This would have signalled acceptance of a form of supervision that did not involve line of sight observation.

[96] Despite several opportunities to do so, Corrections did not ensure that the Diocese's agency sponsor, Reverend Wasley knew and understood what was required of him when supervising offenders. I find that WorkSafe has proven Corrections failed to take Practicable Step (o).

**Practicable Step (p): Was it ensured that each community work agency and the offender understand what is required of them in terms of health and safety obligations and the expectations of Probation in terms of supervision?**

[97] WorkSafe submitted Corrections failed to take Practicable Step (p). WorkSafe relied on evidence relating to Practicable Step (o) to the extent that there is overlap. WorkSafe submitted that prominence should be given to the absence of adequate training when assessing whether Practicable Step (o) was taken. The reason for this being that probation officers would not have been able to explain health and safety obligations which they did not understand. WorkSafe argued that Corrections' forms and processes used were also inadequate for the proper communication of health and safety information.

[98] Corrections relied upon its submissions concerning Practicable Step (o) and noted that WorkSafe did not address the offender's understanding. It asserted that the

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<sup>30</sup> Similarly, while Mrs Katu said that she attempted to call Reverend Wasley about the attendance records, she only spoke with another person who said they would be supervising. Mrs Katu said she would not have explained what supervision meant to that person and did not follow up with Reverend Wasley following the call.

<sup>31</sup> Any miscommunication around the extent of supervision required would have been reinforced by probation officers holding a meeting with Reverend Wasley sometime in early 2012, and on Saturday 31 May 2014 when Mr Cave's Three Way Agreement was signed, while Mr P was working elsewhere on Diocese property.

Diocese was responsible for Mr Cave's health and safety and that this was discussed with and understood by Reverend Wasley. According to Corrections, any failure by Reverend Wasley was not evidence of Corrections' inadequate communication on health and safety matters.

[99] I agree with Dr Callaghan and Mr Johnson's opinion that Practicable Step (o) was not taken.<sup>32</sup> Any measures taken to meet Practicable Step (p) beyond those described in Practicable Steps (a)–(n) were inadequate. Similar to Practicable Step (o), Corrections documentation was inadequately formulated to secure agency and offender understanding of health and safety and supervision requirements. Where health and safety obligations were referenced, these were not sufficiently specific so as to enable an agency to understand its obligations. Again, the absence of training given to probation officers meant that probation officers were unable to supplement properly the information in Corrections' documentation. Any discussions on health and safety were predicated on assumptions made by the probations officers around the risk involved with the work due to their lack of training.

[100] The absence of training also impeded Corrections' ability to detect and correct errors in understanding. This is exemplified in Ms Andrews' treatment of the 2012 Agency Assessment. When reading Reverend Wasley's answers, she said she only looked to whether Reverend Wasley had indicated 'yes' on important aspects of the document and assumed that Reverend Wasley's response "Of course" in the answer box regarding health and safety risk was him agreeing that he was responsible for health and safety matters. As Ms Andrews had no training on interpreting the form from a safety perspective, she did not recognise that Reverend Wasley's response was of concern. This meant Corrections did not secure the Diocese's understanding of its health and safety obligations when there were indications its understanding was incorrect.

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<sup>32</sup> Dr Callaghan's opinion was that "the work agency did not understand what was required of, of him in terms of health and safety obligations and the expectations in terms of supervision" nor did offenders appear to understand what was required of them in terms of health and safety. Mr Johnson suggested that "[t]here appears to be no evidence the Agency is made aware of how to "take all practicable steps" to ensure the safety of the offender".

[101] In terms of communication to offenders, Mr P said that at the time of his community work induction, a probation officer discussed health and safety with him. His understanding of Corrections' expectations was that he was to call Corrections if he had any health and safety concerns about the work he was doing. This is a limited expectation which relies on Mr P's personal judgement of health and safety matters. In any event, any discussion with Mr P could not have been robust for the reasons discussed above at [100]. Like the communication to agencies, the communication to offenders was inadequate in ensuring understanding.

[102] Corrections' communication to agencies and offenders was hampered by inadequate documentation and improper training. While health and safety and supervision may have been mentioned, any discussion around these obligations would have been neither informative nor robust. It would not have ensured that either agency or offenders understood their health and safety obligations. I find that WorkSafe has proven Corrections failed to take Practicable Step (p).

**Practicable Step (q): Was it ensured that the scope of work to be undertaken including any exclusion on hazardous work is communicated to both the community work agency and the offender prior to the commencement of the placement?**

[103] WorkSafe submitted that Corrections did not take Practicable Step (q) as specifically evidenced by Reverend Wasley and the probation officers' different understandings of and approach to the work scope, and the probation officers' failure to identify and address Reverend Wasley's different understanding. Conversely, Corrections submitted that the scope of work was clear, as contained the 2014 Agency Review Booklet, and that Reverend Wasley knew of the importance of the scope of work to Corrections.

[104] I observe at the outset of assessing Practicable Step (q) that Corrections would have had difficulty communicating any exclusion of hazardous work when the scope of the work it agreed to in the 2014 Agency Agreement did not clearly exclude such work.<sup>33</sup> When ambiguities around the nature of the community work meant that

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<sup>33</sup> Corrections' failure to take Practicable Step (h) is discussed above at [81]–[84].

it is possible that the scope of work included hazardous activities, it cannot be properly asserted that the scope of the work was clear and excluded hazardous work.

[105] Even apart from the measures in Practicable Steps (a)–(n) which were not taken, Corrections failed to communicate any exclusion on hazardous activities either in its documentation or through its probation officers. As discussed above at [82], the documentation which was relied upon by Corrections did not direct that hazardous work was excluded. Documents such as the Three-Way Agreements and Agency Assessment only direct that an agency is to take all practicable steps in accordance with the HSEA 1992. These documents make no reference to excluded work. The questions in these documents that might have enabled Corrections to acquire information on an agency's understanding of the scope of work were not properly formulated so as to allow unambiguous responses. For offenders, the Induction Confirmation has no mention of an exclusion of hazardous work and the Three Way Agreement only refers to an agency's obligation to take practicable steps. Neither of these comments communicate to offenders that hazardous work was not to be undertaken.

[106] Though the documentation was ambiguous, Reverend Wasley maintained that no instruction was otherwise given to him on how to properly identify the scope of work and that no probation officer ever told him what Corrections' preferred type of work was. Mrs Katu accepted that there was no formal process for establishing whether power tools were going to be used and there was no formal mechanism directing an agency to gain approval of any change in work scope with a probation officer. Instead, as a result of probation officers having no relevant training, assumptions were made in the conversations which did occur about what the scope of work at the Church was and what Reverend Wasley would do if there was a change in the scope of work. Further, health and safety matters were only discussed with offenders in the abstract, prior to the offenders' placement at a centre or agency having been determined. These discussions would have been similarly unhelpful to offenders' understanding of the scope of work.

[107] Insufficient communication around the scope of work and limits on hazardous work does not appear to be an issue limited to the community work

agency placements at the Church. A review following Mr Cave's death revealed that a community work offender placed at Tapawera School was undertaking work involving a chainsaw. This was work that was not apparent on the face of the work types listed on the Tapawera School Agency Assessment. Thus, Reverend Wasley's approach to the scope of work was not peculiar to him and is attributable to Corrections' failure to take Practicable Step (q) rather than any deliberate deviation on Reverend Wasley's part. I find that WorkSafe has proven that Corrections failed to take Practicable Step (q).

### **Summary of practicable steps findings**

[108] I find that WorkSafe has proven that there were practicable steps available to Corrections as an employer to ensure no action or inaction of its employees while at work harmed another person and that Corrections failed to take some of those practicable steps, being Practicable Steps (a)–(e) and (g)–(q). This means that Corrections failed to comply with its duty under s 15 of the HSEA 1992. I find that WorkSafe has proven the charge set out at [1] above.

### **Final observations**

[109] The degree and nature of Corrections' contribution to the actual harm that occurred on 7 June 2014 will be relevant to sentencing. Reparation is determined with reference to loss, harm or damage resulting from the offending.<sup>34</sup> I set out the below guiding observations with the intention of aiding counsel in their submissions on the level of Corrections' culpability and what, if any, reparation is appropriate. I do so with the benefit of the submissions already made on causation by WorkSafe and Corrections.

[110] WorkSafe submitted that Corrections' failure to take all practicable steps created the risk of harm. If probation officers, for example, had been properly trained in health and safety, and Corrections had appropriate systems in place, the probation

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<sup>34</sup> In *Department of Labour v Rogers Earthmoving Ltd* DC Auckland CRI-2008-004-6668, 22 June 2009, Judge Gittos cited with approval at [18] commentary which suggested that when assessing the causal link between offending and harm for reparation purposes, "the matter should be approached in a broad common sense way in the light of the compensatory purpose of the provision, and resort to refined causation arguments is not to be encouraged".

officers may well have identified Reverend Wasley's limited understanding of his health and safety obligations and the chainsaw use at the Church. This would have prompted Mr P's removal from the Church placement and precluded Mr Cave from being placed there. If neither Mr P nor Mr Cave were at the Church, the particular harm on the day could not have occurred.

[111] Corrections disputed that the relevant actions or inactions of Corrections' employees caused Mr Cave's death. Instead, according to Corrections, Reverend Wasley and the Diocese's failings amounted to a break in the chain of causation. In Corrections' view, whether the practicable steps would have lessened the risk or actual harm to Mr Cave was purely speculative as there was insufficient evidence to suggest the Admitted Steps and Disputed Steps would have altered Reverend Wasley's approach to health and safety, and supervision.

[112] I reject the suggestion that, even if Corrections had complied with its s 15 duty, Reverend Wasley's conduct on the day would have been the same. To the extent that Corrections suggests Reverend Wasley would have not have changed his approach to health and safety and supervision, the evidence demonstrates that Reverend Wasley was pliable to Corrections' instructions. For example, a note written by Ms van Gunst on 20 February 2013 records that Reverend Wasley did not favour the 20 day site visits but agreed to meet with Ms van Gunst on that basis as it was a Corrections requirement. I accept Ms van Gunst's evidence that Reverend Wasley responded to her concern about the infrequency with which he submitted timesheets and complied with her instruction. The Admitted Steps and Disputed Steps therefore would have altered Reverend Wasley's conduct, mitigating any error in Corrections' employees' conduct.

[113] Moreover, had Corrections take the Practicable Steps to ensure its employees were properly approaching health and safety during agency placements, deficits in Reverend Wasley's approach would have been detected, and Mr Cave and Mr P would not have undertaken hazardous work. Indeed, Mr Cave and Mr P may not have been placed at the Church at all. In not addressing Reverend Wasley's approach to health and safety, the failure by Corrections to take all practicable steps increased the likelihood of harm to Mr Cave.

[114] This only leaves Reverend Wasley's illness as a possible intervening factor. However, sickness is not an unforeseeable event. Corrections should have provided Reverend Wasley clear direction on what to do if he was ill and unable to supervise the offenders. The decisions that Reverend Wasley made were compounded by the absence of instruction by Corrections on matters such as power tool use, high risk activities and supervision. Simply, the activity of felling a log with a chainsaw would not have even been in Reverend Wasley's contemplation if that type of work was clearly excluded on Corrections' instructions at the induction and approval phases of interaction between the two parties.

[115] Responsibility for Mr Cave's death does sit with Corrections by its failure to meet its s 15 duty. Reverend Wasley's actions on the day of Mr Cave's death were seriously flawed, but they were flawed by reason of Corrections' failure to communicate or enforce requisite standards of conduct in relation to community work placements. Though Corrections' failure does not represent the most direct cause of the actual harm suffered by Mr Cave, its failures do still represent a cause of that harm. Mr Cave's death resulted from Corrections' failure to take all practicable steps in accordance with its s 15 duty.

[116] I leave the implications of these findings for sentencing.

**Orders and directions: -**

- (1) The defendant is guilty of the charge.
- (2) Counsel for the prosecution is to file closing submissions by 6 October 2016.

- (3) Counsel for the defendant is to file closing submissions by 20 October 2016.
- (4) The sentencing shall take place at 10.00am on 2 November 2016.

Jan-Marie Doogue  
Chief District Court Judge

## **Appendix 1: Practicable Steps**

### *The Admitted Steps*

- (a) Probations Officers were sufficiently trained in health and safety relevant to community work placements, so as to adequately understand the principles of hazard management, including physical controls, PPE, training and competency requirements (“Practicable Step (a)”);
- (b) Probations Officers carried out a sufficient risk and hazard assessment considering the type of work to be undertaken and suitability of both the Agency and the Offender (“Practicable Step (b)”);
- (c) Probation Officers, when they had the opportunity to become aware that there may have been changes to the type of work that could materially affect the hazard and risk assessment undertaken, conducted a new risk and hazard assessment (“Practicable Step (c)”);
- (d) An Agency’s health and safety systems were assessed and recorded as part of reaching agreement with an Agency (“Practicable Step (d)”);
- (e) The Agency Handbook set out all appropriate health and safety requirements and expectations (“Practicable Step (e)”);
- (f) The Agency Handbook was provided to all Agency sponsors at the time of signing the Three Way Agreements (“Practicable Step (f)”);
- (g) The Agency Handbook set out explicit instructions on what to do in special circumstances, including illness of the sponsor (“Practicable Step (g)”);
- (h) The scope of work to be undertaken during community work placements expressly excluded hazardous work (“Practicable Step (h)”);
- (i) Clear instructions were provided to Probation Officers outlining what to do if it was recognised that the scope of work had changed (“Practicable Step (i)”);

- (j) A power tools policy for community agency placements was implemented, including what could be used, by whom and in what circumstances (“Practicable Step (j)”);
- (k) The power tools policy was communicated to and understood by Probation Service employees (“Practicable Step (k)”);
- (l) The power tools policy was communicated at the induction of offenders and during the monitoring of the Agency and Offenders (“Practicable Step (l)”);
- (m) Clear instructions were provided to Probation Officers outlining what to do if it was recognised the power tools policy was not being adhered to (“Practicable Step (m)”); and
- (n) The Agency Handbook set out the power tools policy (“Practicable Step (n)”).

#### *The Disputed Steps*

- (o) Ensure that all community work agency sponsors know and understand what is required of them while supervising offenders (“Practicable Step (o)”);
- (p) Ensure that each community work agency and the offender understand what is required of them in terms of health and safety obligations and the expectations of Probation in terms of supervision (“Practicable Step (p)”); and
- (q) Ensure that the scope of work to be undertaken including any exclusion on hazardous work is communicated to both the community work agency and the offender prior to the commencement of the placement (“Practicable Step (q)”).