EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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

IN THE DISTRICT COURT
AT DUNEDIN

I TE KŌTI-Ā-ROHE
KI ŌTEPOTI

CRI-2019-012-000890
[2020] NZDC 11114

WORKSAFE NEW ZEALAND
Prosecutor

v

OTAGO POLYTECHNIC
Defendant

Hearing:	14 November 2019 21 May 2020 29 May 2020
Appearances:	T Williams for the Prosecutor J Farrow and J Cowan for the Defendant
Judgment:	18 June 2020

RESERVED JUDGMENT OF JUDGE K J PHILLIPS
Under the Health and Safety at Work Act 2015

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[1] The Otago Polytechnic faces a charge laid against it under sections 36(2) and ss 48(1) and (2)(c) of the Health and Safety at Work Act 2015 ("HSAWA"). The charge can be best described from the Caption Summary as:

> The Otago Polytechnic being a PCBU (a person conducting a business or undertaking) having a duty to ensure, so far as reasonably practicable the

> health and safety of other persons, including [the victim], is not put at risk from work carried out as part of the conduct of the business or undertaking, namely operating the Wadkin draw saw #CD 1219 in the Carpentry Department, did fail to comply with that duty, and that failure exposed any individual, including [the victim] to risk of serious injury arising to exposure to a cutting hazard created by inadequate machine guarding.
>
> **Particulars:**
>
> It was reasonably practicable for Otago Polytechnic to:
>
> a) Ensure an effective risk assessment was conducted to identify and manage the risks relating to operating the Wadkin draw saw; and
>
> b) To ensure that the Wadkin draw saw was effectively guarded or replace the Wadkin draw saw with an effectively guarded draw saw.

[2] The failure is alleged to have occurred on or about the 18 April 2018 at Dunedin. The charged laid by the WorkSafe had its first call, on 7 June 2019. A plea of guilty was entered on behalf of the defendant on 14 November 2019. Sentencing was finally set down for 21 May 2020 and following discussions with counsel further adjourned to the 29 May 2020.

[3] The defendant is a public New Zealand Tertiary Education Institute. It is an institute that was founded in 1870 and is located in Forth Street, North Dunedin. It is established as a Body Corporate under the Education Act 1989; it is a Crown Entity and a PCBU.

[4] The facts relating to the prosecution are that [the victim] was a student enrolled at the defendant's Dunedin campus, for a 36 week carpentry course. At the time of the incident, as part of that course, [the victim] was working with another student on a house build project. The draw saw was a Wadkin draw saw, serial number #CD 1219, and is situated in the carpentry barn and was being operated by the defendant on a wooden table that had slats positioned to support the lengths of timber as they are being cut by the saw.

[5] The process followed is that the wood that was to be cut would be pulled by the operator of the saw along the table from left to the right. It would then be held against a raised block known as a "fence" that ensured a straight cut. The draw saw blade was 450mm in diameter. The draw saw had a factory fitted metal nose guard

which was able to be adjusted up and down by loosening a wing nut. At the time of the incident, the nose guard had not been adjusted to provide further protection from the blade. There was no additional guarding fitted to the left side of the blade on the draw saw. As a result a significant portion of the blade was exposed. The particular draw saw had been in operation at the defendant's premises since the 1970s. There had been no other incidents recorded in connection with the use of the draw saw during that period of time. The draw saw was maintained by a technician employed by the defendant, with anything beyond regular maintenance attended to by an independent engineering company. At the date of the incident in question, no third party maintenance had been carried out on the machine.

[6] It appears that the nose guard was not often used when operating the saw, one reason being that it could obscure the view of the blade. The purpose of the nose guard is that properly adjusted it would protect the operator from the front and right side of the blade, above the height of the timber being cut. The carpentry programme manager and the tutor were not aware of any manufacturer's instructions for the draw saw. The defendant was not able to provide a copy of any such instructions when were requested to do so by the prosecutor.

[7] On the day of the incident the draw saw was being operated by [the victim] and a fellow student. It was being used to cut 4.2 meter long pieces of timber into 400mm blocking, which could then be nailed into place between joists for the house built project. [The victim] used his left hand to pull the timber into place and his right hand to hold the saw handle. The saw was back in a 'cubby hole' part of the table, far enough back for the timber length to be positioned in front of the fence in preparation for the next cut. [The victim] attempted to pull a piece of timber across from left to right with his left hand. His hand slipped off the timber and came into contact with the front of the spinning draw saw blade. As a result [the victim] suffered partial amputation of his middle finger, together with cuts and grazes to the index finger and ring finger of his left hand.

[8] [The victim]'s finger was successfully re-attached, and the other injuries attended to at hospital. This involved using tendons taken from [the victim]'s wrist and inserting a pin. The pin was to hold the top of the finger in place. [The victim]

was required to spend two nights in hospital and was able to return to his course the following week. [The victim] was able to participate in the practical elements of the course from two weeks after the incident and went on to successfully complete the course. After the incident had occurred the defendant, through its staff, offered [the victim] support, pastoral care and counselling.

[9] The Victim Impact Statement filed for the sentencing notes the above matters. [The victim] was [in his 20s] undertaking the Pre-trade Carpentry Program was using the draw saw as part of his course work, when his hand slipped off the piece of timber as he repositioned it and came into contact with the spinning blade of the draw saw. [The victim] confirmed that his finger was re-attached and that the damage to his index and ring finger was healing gradually with time and surface treatment. It took some seven months of physiotherapy to achieve "almost normal function". I emphasise the use of the word "almost". [The victim] noted ongoing sensitivity problems and that prolonged use of the hand and fingers causes discomfort. He was not sure of the future implications although the posibility of arthritis and resulting limited use of the hand and fingers had been discussed with him. He was living at home with his parents and was paid by ACC at a rate of 80% of the part time wages he earned by working at a motel but confirmed his family had supported him and ensured that he was not impacted financially.

[10] [The victim] noted that the injury had not impeded him in getting a job. It had not impacted upon his ability to deliver high quality work output. He is concerned at times about any long-term medical implications that may have an impact upon his career and is happy that measures have been taken to ensure that an incident like this does not happen to anybody else.

[11] Prosecuting counsel filed detailed written submissions. Those submissions are able to be summarised that the result of the prosecution should be as follows:

1) Emotional harm reparation of between $10,000 and $15,000;

2) Culpability assessed as medium, that is middle of the medium band;

3) A starting point for a fine should be $450,000;

4) That discounts that should apply for remorse; payment of reparation; co-operation with the investigation; and the taking of remedial steps are assessed in her original written submissions at 13 percent. (In the discussions with the prosecution's counsel, during the sentencing hearings, it was accepted by Ms Williams that overall credit could be seen as somewhat 'light');

5) It was submitted that a guilty plea credit of 25 percent was appropriate;

6) Contribution to costs amounting to $3,432.45, which equated to fifty percent of actual cost; and

7) A net fine after discounts of $293,625.

[12] It is submitted by the prosecution on that the above basis provides a result of the prosecution that represents the defendants level of culpability and would provide accountability for the harm done to [the victim]; promote a sense of responsibility for the harm occasioned by the failure on the part of the defendant; pay reparation to [the victim], and therefore take into account his interests and finally would provide for denunciation and deterrence to the required level.

[13] For the defendant Mr Farrow submits that:

1) The payment of reparation can be made outside of the Court in the sum of $10,000;

2) That culpability should be assessed as being in the lower end of the medium band, with a starting point of any fine being $350,000;

3) That the defendant should be allowed credits for:

(i) The assistance provided by it to [the victim];

(ii) Its co-operation with the investigation;

(iii) Its limited prior history;

(iv) The remedial steps taken by it;

(v) The acceptance of responsibility and remorse;

(vi) The payment of emotion harm; and

4) In Mr Farrows submission amounting in all to a 25 percent discount from the starting point $350,000. A 25 percent credit for the guilty plea. Mr Farrow does not take any issue with the claim for costs.

[14] However the principal submission that Mr Farrow makes is that, the defendant seeks that the sentence should include a Court Ordered Enforceable Undertaking (a "COEU") in lieu of the fine.

[15] Counsel for the two parties discussed in both their written and oral submissions various authorities and sentencing decisions of other Courts to support the starting point for the fine that they each submit is appropriate.

[16] Mr Farrow also filed an affidavit of Phillip Ross Ker, the Chief Executive of the Otago Polytechnic, which sets out in some detail the proposal of the defendant in relation to the COEU, which the defence submits is the appropriate end result.

[17] It has been made very clear by the High Court in the case of *Stumpmaster v WorkSafe* that there should be a four step approach undertaken by the Court when sentencing health and safety offending.[1] The steps are:

1) Assess the amount of reparation;

2) Fix the amount of the fine;

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1 *Stumpmaster v WorkSafe* [2018] NZHC 2020 at [35].

3) Consider orders under ss 152 - 158 of HSAWA; and

4) make an overall assessment of the proportionality and appropriateness of the penalty.

[18] In relation to the second step of fixing the fine, there were four guideline bands suggested:

1) Low culpability – 0 - $250,000;

2) Medium culpability – $250,000 - $600,000;

3) High culpability – $600,000 - $1,000,000; and

4) Very High culpability – $1,000,000 - $1,500,00.

Reparation

[19] In line with the above encapsulating of the prosecution's position, the prosecution brings to the Court's attention Justice Harrison's comments in the case of *Big Tuff Pallets Ltd v Department of Labour* where His Honour noted that:[2]

> Fixing an award for emotional harm is an intuitive exercise; its qualification defies finite calculation. The judicial objective is to strike a figure which is just in all the circumstances.

[20] The submission of Ms Williams is that the assessment is undertaken primarily with reference to the Victim Impact Statement. A number of comparative cases were put to the Court. She noted that there was no consequential financial loss. I query that in that the victim was being employed on a part time basis, outside of his studies at the polytechnic course. But no consequential financial loss needs to be assessed in the circumstances that pertain here.

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2 *Big Tuff Pallets Ltd v Department of Labour* HC Auckland CRI 2008-404-322, 5 February 2009 at [19].

[21] Mr Farrow for the defendant noted that reparation should only be for emotional harm. He discussed a number of authorities. Mr Farrow describes the injury suffered by [the victim] as being a "partial amputation," and not being as serious as cases where reparation of $15,000 was awarded, because in the defence submission [the victim] suffered a lesser injury with lesser ongoing consequences. In one of the authorities *WorkSafe New Zealand v Wimpex Ltd* where reparation of $15,000 was awarded to the victim, the accident resulted in amputation of the victims left thumb, with the victim's thumb being reattached in later surgery.[3] The further authority of *WorkSafe New Zealand v Eurocell Wood Products Ltd* $15,000 of reparation was awarded where there had been a complete amputation of the left thumb and lacerations, and the victim's thumb was not able to be reattached in that case.[4]

[22] I have read all the various authorities put to me. I note that the summary of facts describes [the victim] having suffered a "partial amputation to his middle finger on his left hand, and cuts, grazes to both his index and ring finger on his left hand." I note that he tells me in his Victim Impact Statement that the injury was "a partial amputation on his left hand middle finger through the knuckle and damage to the index and ring fingers." It is accepted that the finger was reattached and that the damage to the index and ring fingers healed gradually, but it took seven month of physiotherapy to achieve "almost normal function" and it is still sensitive and prolonged use can cause discomfort. The victim remains concerned about ongoing issues with arthritis and the possibility of limited use, and the impact that it may have on his future employment and his ability to work.

[23] I consider the victims position as being under emphasised in the defence submission I am satisfied that an appropriate amount for reparation by way of emotional harm reparation is the sum of $15,000. I acknowledge that the defendant wishes to make a voluntary reparation payment of $10,000 and may have already done so. The award that I fix is a total reparation payment of $15,000 and I have taken that sum into account in my following decisions as to penalty. I await further submissions from the defendant as to whether the Court should make an order for the $15,000 or for the extra $5,000. I am satisfied as suggested in paragraph [29] of the defence

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3 *WorkSafe New Zealand v Wimpex Ltd* [2019] NZDC 3932.
4 *WorkSafe New Zealand v Eurocell Wood Products Ltd* [2018] NZDC 21548.

written submissions, that the voluntary reparation payment of $10,000 can be made but I need clarity on the issue of payment of the balance.

Assessment of the quantum of a fine

[24] Section 151(2) of the HSAWA, when sentencing a person for an offence under s 48 provides:[5]

> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
>
> (a) sections 7 to 10 of that Act; and
>
> (b) the purpose of this Act; and
>
> (c) the risk of, and the potential for, illness, injury, or death that could have occurred; and
>
> (d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and
>
> (e) the safety record of the person … to the extent that it shows whether any aggravating factor is present; and
>
> (f) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and
>
> (g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[25] In my assessment of the level of the defendant's overall culpability I have used what have become known as the *Hanham* factors.[6] In this High Court authority, an assessment of culpability should include the following relevant factors (they significantly overlap with the factors detailed in s 151 of the HSAWA):[7]

- The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practicable steps" which the Court finds it was reasonable for the offender to have taken in terms of s 2A HSE Act.
- An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.

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5 Health and Safety at Work Act 2015, s 151(2).
6 *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NCELR 79.
7 At [54].

- The degree of departure from standards prevailing in the relevant industry.
- The obviousness of the hazard.
- The availability, cost and effectiveness of the means necessary to avoid the hazard.
- The current state of knowledge of the risks and of the nature and severity of the harm which could result.
- The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

The identification of the operative acts or omissions

[26] The particulars of the breach are listed as part of the charging allegations. That is that there was a failure on the part of the defendant, when it was reasonably practicable for the defendant to have:

> Ensured an effective risk assessment was completed so that the risks relating to the draw saw could be identified and managed.
>
> And
>
> To ensure that the draw saw was effectively guarded, and if not then to replace it with an effectively guarded draw saw.

[27] Mr Farrow for the defendant, submits that the charge as laid, is in relation to the risk assessment of the draw saw only. It is not a failure on the part of the defendant to have a safe system of work, nor is it an allegation of a failure to undertake risk assessment at all.

[28] The information available to me indicates that a formal risk assessment was scheduled to be completed every three years by staff from the defendant's carpentry department on behalf of the defendant. The most recent risk assessment that occurred was carried out between March and May 2017. That assessment consisted of a checklist, the questions included:

> Do guards stop workers touching dangerous parts?
>
> Answer Yes
>
> Can the existing guarding be improved?
>
> Answer No.

[29] As is detailed in the fact summary, the assessment failed to identify that the saw did not comply with the relevant standards as to guarding, and thus exposed students to a risk of serious injury. The omissions therefore that are identified for the purposes of this sentencing exercise, are the failure to carry out an effective risk assessment and secondly, in failing to ensure the draw saw was in fact guarded and thus safe.

Assessment of the nature and seriousness of the risk of harm occurring

[30] I accept that is limited to the person operating the draw saw at the time, and there is no argument from the defendant via Mr Farrow, that there was a risk of serious injury. In fact it appears to be accepted that the injury that occurred to [the victim] was less serious than the level of 'possible' injury.

The degree of departure from standards prevailing in the relevant industry

[31] The case for the prosecution is that the conduct by the defendant significantly departed from well-established standards. This submission relies on the lack of instructions and an inadequate Safe Operating Procedure (SOP). The SOP did not require the saw to be placed into the safe position when it was not being used; nor did it advise how to use the manual brake handle; nor was the nose guard mentioned. These are argued to be significant departures from established standards.

[32] The defendant argues that the saw was being used to teach students in a practical way of how to operate older equipment.

[33] For the purposes of the sentencing of the defendant, I find that the departures from the established industry standards to be at a moderate level; particularly the lack of guarding and the failure to allude to the nose guard.

The obviousness of the hazard

[34] Clearly the safety audits did not identify the hazards. The decision made by the defendant to use older, unguarded equipment for the purposes of education, is submitted by the prosecution as a matter that should have been a "red flag" to ensure

there was an in depth investigation into the safety requirements. I find the hazard was of moderate obviousness.

The availability, cost and effectiveness of the means necessary to avoid the hazard

[35] In relation to the means, effectiveness, cost and availability to avoid the hazard, I accept the submission of the prosecutor that there is a large amount of information in the industry generally, regarding the guarding of such machinery. The costs and/or the means of remedying the hazard as identified were not onerous.

[36] I analyse culpability by using the factors detailed in s 151 of the HSAWA and the provisions of the Sentencing Act. In my view, the culpability of the defendant is at the lower end of the medium band. The failure was limited to one piece of machinery. It was not due to neglect or failure to assess the equipment itself, but a failure to effectively identify the risk posed in its operation.

Quantum of fine

[37] I note from the prosecution submissions:

> A number of authorities were cited by counsel both for the prosecution and the defendant, which were argued as being similar and relevant in assessing the required starting point.

[38] One of the authorities is *WorkSafe New Zealand v Cave Bakery Ltd,* a decision of District Court Judge Brandts-Giesen.[8] There the Judge was considering the starting point for an incident where the victim lost his finger when it was cut off having been caught between a rotating paddle and the exterior housing of the hopper. Again the finger was able to be re-attached, but it would appear that the finger was fully amputated.[9] The failings were similar, as a person was not appointed to conduct an appropriate risk assessment and the machinery should have been guarded. The $450,000 starting point which was used was in my view, reflective of a slightly higher level of culpability than in this present case.

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8 *WorkSafe New Zealand v Cave Bakery Ltd* [2018] NZDC 5427.
9 At [8] talks about the fingertip.

[39] In relation to the authority of *WorkSafe v Wimpex Ltd* Judge Kellar outlined the various omissions which were wide ranging.[10] I note that the Judge said in his decision that the omissions included an overall lack of training on the equipment. He arrived at a starting point of a fine of $450,000. Upon appeal this was accepted by Nation J as an appropriate starting point, the High Court finding there was no error in Judge Kellar's assessment.[11] Judge Kellar referred to the New Zealand Standards as the 'best practice guidelines', as does Ms Williams in this current case. I accept what Judge Kellar said at paragraph [35] as to the guidance given by such standards.

[40] In the authority of *WorkSafe New Zealand v Eurosell Wood Products Ltd* the defendant did not meet the guarding standards; an in depth risk assessment was not carried out; a safe system of work was not being used; and administrative controls were preferred rather than guarding.[12] The starting point was $450,000.

[41] In this case there was an in depth assessment carried out which failed to identify the risk attaching to the saw and its lack of guarding. Otago Polytechnic was not relying on administrative controls. I assess therefore overall, that this present case is less serious than that that was before the respective Judges in *Eurosell* and *Wimpex*.

[42] I consider that a starting point of a fine of $400,000 is appropriate in this case.

[43] The prosecution submitted that the vulnerability of the victim in this case is an aggravating factor, as he had only been in the pre-trade programme for around two months, and when that is factor is combined with his age of 23, it made the victim more vulnerable. Vulnerability was discussed in the Court of Appeal in *Graham v R* in respect of the *Taueki* aggravating factors:[13]

> Many victims will have been vulnerable to some extent. Whether or not a particular factor truly aggravates offending will be a question of fact and degree requiring judicial assessment.

[44] The information that I have available to me is that students were supervised and were assessed as being competent to use the draw saw, before they were allowed

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10 *WorkSafe v Wimpex*, above n 2, at [25]-[27].
11 *Wimpex v Worksafe New Zealand* [2019] NZHC 1978.
12 *WorkSafe New Zealand v Eurosell Wood Products Ltd* [2018] NZDC 21568.
13 *Graham v R* [2011] NZCA 131 at [13]; *R v Taueki* [2005] 3 NZLR 372 (CA).

to operate it without further supervision. I accept that [the victim] was more vulnerable than a person who has had a great deal of experience (time and hours) in using the equipment, but I do not accept that [the victim] was vulnerable to the extent that any uplift is required on the basis of vulnerability.

Discounts

[45] I consider that the defendant can claim discounts for the following matters: reparation, remorse, and support.

[46] Reliance is placed by the prosecution on the comments contained within the *Stumpmaster* decision that there should not be a 1:1 credit for reparation. However, here the defendant provided both immediate and follow up assistance in the form of counselling and pastoral care and facilitated [the victim]'s gradual return to the programme. I consider there should be a discount of 5 percent for this factor.

[47] There is no argument as I understand it, that the defendant cooperated with WorkSafe. I allow 5 percent discount for cooperation.

[48] Following the incident and injury the defendant took steps including revising the guarding and the procedures and then replacing the saw. There was evidence provided of unsuccessful attempts to guard the saw prior to the incident. I consider the defendant is entitled to a discount of 5 percent for remedial steps that it took.

[49] There was a previous conviction of the defendant in 1998 relating to Occupation Overuse Syndrome, where the defendant was liable because it had not reduced hours of work. The prosecution had its origin in a different area, and it is the only conviction the defendant has. I allow a small discount at 5 percent for good character.

[50] Discounts therefor total 20 percent; leaving the starting point before guilty plea discount at $320,000.

[51] It appears to be a practice that there be a full guilty plea discount of 25 percent allowed. I note Judge Kellar's comments in the *Wimpex* authority. I note here that the

charging document is dated 7 June 2019, and the guilty plea was entered five months later; but it seems that a 25 percent discount is agreed upon, even after taking into account the strength of the prosecution case and similar such prosecutions. I allow the 25 percent discount, but I do so reluctantly.

[52] That brings the end fine to $240,000.

Orders under sections 152-158 of the HSAWA

[53] Following the terms of *Stumpmaster* I move onto consider whether orders should be made under any of ss 152 – 158 of the HSAWA. In the *Stumpmaster* decision the High Court detailed the four step approach to sentencing Health and Safety offending, which has previously been discussed. Following the assessment of the quantum of reparation that is to be ordered (and/or paid); and the fixing of the amount of the fine; the Sentencing Court then is to consider orders in the terms of ss 152 – 158 of the HSAWA. Those sections fall within sub-part 8 of Part 4 of the Act. By the provisions of s 150 a Sentencing Court upon conviction of an offender is to consider the provisions in this part of the Act.

[54] Section 151, which is set out above, outlines the sentencing criteria. In particular I note the Court must have regard to the purpose of the HSAWA and the purposes and principles of sentencing as set out in the Sentencing Act 2002.[14]

[55] In considering those provisions and noting that in the terms of the *Stumpmaster* decision, I have already fixed the fine and taken into account the matters detailed in s 151(2) as I have detailed. I am required under s 151(2)(b) to have regard to the purpose of the HSAWA. It is set out in s 3 of the Act:

> **3 Purpose**
>
> (1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—
>
> (a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant; and

[14] Health and Safety at Work Act 2015, s 151; above at [24].

> (b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and
>
> (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and
>
> (d) Promoting the provision of advice, information, education, and training in relation to work health and safety; and
>
> (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
>
> (f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and
>
> (g) providing a framework for continuous improvement and progressively higher standards of work health and safety.
>
> (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.

[56] Section 152 of the Act relates to the order for the payment to the 'regulator' of a sum towards the cost of the prosecution. In the circumstances that they pertain to this case, the prosecution seeks an order as regards to a contribution to its costs under this section. The prosecutor seeks a contribution in the sum of $3,432.45 which equates to 50 percent of the prosecution's legal and costs of external counsel. It does not seek a contribution in relation to investigation costs.

[57] The position of the defendant is that it will abide the Court's decision as to an order for payment towards costs.

[58] I am satisfied that it is appropriate in all circumstances as they pertain in this case to make an order in the terms of s 152(1) of the HSAWA for the payment of the sum of $3,432.45 by the defendant.

[59] Section 153 of the Act relates to adverse publicity orders. There is no application before me for any such non-financial sanction. In the circumstances of

this particular case I do not see the necessity for such an order to be made in relation to the defendant polytechnic.

[60] Section 154 allows the Court to make orders for restoration, requiring an offender to take certain specified steps within a set period to remedy any matter caused by the commission of the offence. In my view, there is no need for any such order in this particular factual set of circumstances.

[61] Section 155 provides for work, health and safety project orders which would require an offender to undertake a specified project for the general improvement of work health and safety, within a stated period. An example of such an order is detailed in the authority of *WorkSafe v Nicks Components and Accessories Ltd*.[15] There the Court accepted that the punitive function of sentencing could be met by making an order requiring the defendant company to prepare a safety presentation to students at an Institute of Technology, produce a safety training film about the defendant's experience in connection with the incident, and that such film be available as a training resource. The Court imposed such a project order together with a file of $60,000 and reparation of $40,000 for what it found to be a clear, avoidable and preventable breach.

[62] Section 156 gives the Court the power to make an order for the release of the defendant upon the defendant giving an undertaking with specified conditions. This is described as a Court Ordered Enforceable Undertaking ("COEU"). Section 156 states:

> **156 Release on giving of court-ordered enforceable undertaking**
>
> (1) The court may (with or without recording a conviction) adjourn a proceeding for up to 2 years and make an order for the release of the offender if the offender gives an undertaking with specified conditions (a **court-ordered enforceable undertaking**).
>
> (2) A court-ordered enforceable undertaking must specify the following conditions:
>
> (a) that the offender appears before the court if called on to do so during the period of the adjournment and, if the court so specifies, at the time to which the further hearing is adjourned:

[15] *WorkSafe v Nicks Components and Accessories Ltd* [2018] NZDC 26212.

> (b) that the offender does not commit, during the period of the adjournment, any offence against this Act or regulations:
>
> (c) that the offender observes any special conditions imposed by the court.
>
> (3) An offender who has given a court-ordered enforceable undertaking under this section may be called on to appear before the court by order of the court.
>
> (4) An order under subsection (3) must be served on the offender not less than 4 days before the time specified in it for the appearance.
>
> (5) If the court is satisfied at the time to which a further hearing of a proceeding is adjourned that the offender has observed the conditions of the court-ordered enforceable undertaking, it must discharge the offender without any further hearing of the proceeding.
>
> (6) The regulator must publish, on an Internet site maintained by or on behalf of the regulator, notice of a court-ordered enforceable undertaking made in accordance with subsection (1), unless the court orders otherwise.

[63] In this particular case, the defendant seeks such an order be made. It has provided proposed conditions of any COEU in an affidavit filed by Phillip Ker, the Chief Executive Officer of the defendant. The offer made is that the defendant would design, deliver and offer free of charge, a unique training provision to educate construction workers about Health and Safety requirements. The defendant, acting proactively, has approached local construction firms operating in the industry and has had positive responses and indications from such businesses that such online training would be "hugely beneficial." In the submissions from counsel for the defendant there is an has estimated total cost of the programme of $275,000. The detail includes some $18,000 worth of scholarships to be awarded for student attendance at other construction or health and safety programmes/courses that are being offered to the community by the defendant.

[64] In the case of *WorkSafe New Zealand v Niagara Sawmilling Co Ltd,* Judge McIlraith discussed this particular provision of the Act:[16]

> [34] There was no specific reference in *Stumpmaster* to a court-ordered enforceable undertaking under s 156. It was, however, clearly specified by the High Court that the third step in the sentencing approach must now be the

16 *WorkSafe New Zealand v Niagara Sawmilling Co Ltd* [2019] NZDC 9720 at [34]-[35].

> determination of whether further orders under ss 152-158 are required. That clearly includes any potential orders under s 156.
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> [35] As discussed with counsel, the orders contemplated by ss 152-158 are, of course, different in nature. Section 152 contemplates an order for payment of the regulator's costs in bringing a prosecution. It is now common for such an order to be made. Section 153 contemplates adverse publicity orders. Counsel are not aware of any having been made. Section 154 provides for orders for restoration. Once again, counsel are unaware of any being made. Section 155 provides for health and safety project orders. I was advised that this has been done in one reported case. Section 158 provides for training orders. While none have been made, it is possible to envisage the appropriate situation when one may be. Section 157 provides for a court-ordered injunction. None have been ordered.

The discussion in those two paragraphs shows Judge McIlraith was clearly carrying out a similar assessment to what I have done above.

[65] Then the Judge went on to say:[17]

> [37] After consideration of counsel's submissions, it is my view that as contemplated in *Stumpmaster*, while s 156 could be seen to contemplate an alternative sentencing outcome in many ways, it nevertheless is properly one of the orders to be assessed as part of the third step in the *Stumpmaster* sentencing process. I do not consider that court-ordered enforceable undertakings are necessarily confined to an alternative sentencing outcome. It may well be possible that in an appropriate case (for example an offender with incapacity to pay a fine) that court-ordered enforceable undertakings are the appropriate outcome (quite possibly combined with an order to pay reparation). I can see no reason to confine the circumstances in which an order under s 156 may be made to an alternative sentencing process.

[66] Judge McIlraith said, that in his opinion it was more likely that an outcome of sentencing being a COEU would be where the level of culpability is low, and while it was not always necessary, that it was more likely that a COEU would be appropriate were a defendant does not have prior health and safety convictions, or at least not of a serious nature, as *Niagara* had. In that particular case the Judge had found that *Niagara*'s culpability was at the upper end of the medium range, and a starting point of $600,000 was assessed.

[67] Judge EP Paul in his decision of *WorkSafe New Zealand v Discoveries Educare Ltd and Heng Tong Investments Ltd* also considered s 156.[18] In that decision Judge

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17 *WorkSafe New Zealand v Niagara Sawmilling Co* Ltd, above n 16, at [37].

18 *WorkSafe New Zealand v Discoveries Educare Ltd and Heng Tong Investments Ltd* [2019] NZDC 13056.

Paul held that there was nothing 'exceptional' about the circumstances of that case that dictated a departure from normal sentencing outcomes. It was a case that related to where pre-school aged children and a teacher, were hit by a falling branch from a tree that had been dead for some time. A child suffered a serious injury and a fractured skull. Judge Paul found the *Discoveries Educare* culpability to be in the medium band with an appropriate starting point of $430,000.

[68] As is seen from the wording of s 156, the Court is given (in terms of s 156(1)) a wide discretion to release a defendant with or without recording a conviction upon the giving of a COEU. Section 156(2) states particular specifications required to be within that undertaking. There is no reason that I can see to read down the provisions of s 156 to a point of where there needs to be a low level of culpability or restrict such sentencing option to first offenders in health and safety matters. In relation to Judge Paul's comments in looking at the question of whether or not there was something "exceptional" again there is no such requirement in the clear wording of the section.

[69] My reading of s 156 requires the Court to consider the principles and purposes of the Act; to take into account all the relevant factors and culpabilities assessed in relation to the particular case; the suitability of the particular COEU together with its utility, and whether the Court decides it meets the relevant principles and purposes of the HSAWA and of general sentencing.

[70] The proposal as put in Mr Farrow's submissions on behalf of the Polytechnic and in accordance with the matters detailed in the affidavit of Mr Ker, is that the defendant would expend a minimum of enforceable undertaking activities to the sum of $275,000.[19] The proposal, as detailed in the affidavit, is comprehensive both as to the proposed undertaking and its conditions as per paragraph [15] of the Ker affidavit. Counsels submissions noted earlier communications between the defendant and WorkSafe New Zealand where the defendant sought agreement to a voluntary enforceable undertaking under s 132 of HSAWA, which was declined by Work Safe New Zealand.

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19 Affidavit of Mr Ker dated 28/1/2020.

[71] Mr Farrow's submission is that a COEU is a discretionary decision of the Court, which in his submission is unfettered. That the Court can consider WorkSafe New Zealand criteria but that the Court should not substitute WorkSafe New Zealand's decision making for the exercise of its unfettered discretion. Mr Farrow submits the purposes and principles of sentencing are meet by an order under s 156 in that it would provide accountability for harm, reparation in the interests of the victim and also establish denunciation and deterrence. Mr Farrow's submission is that it should be for a period of 12 months, and as such it would be a commitment faced by the Polytechnic, its staff, workers, students and also a commitment to the community.

[72] Mr Farrow notes that [the victim], is supportive of the undertaking. Particularly, Mr Farrow submits, that the defendant as an educator is uniquely positioned to create and to deliver such health and safety training, and thus meet the purposes detailed in s 3 of the HSAWA, of promoting the provision of advice, information, education and training, in relation to work health and safety, that such an undertaking would also provide a framework for continuous improvement in, and the provision of progressively higher standards of, work health and safety. Mr Farrow notes that the defendant is a Crown organisation in the terms of the law, and a fine being imposed (which is permissible in the terms of Crown Organisations (Criminal Liability Act 2002)) would be transferring education funds from one Crown entity to another.

[73] Ms Williams in her submissions on this issue makes the position of the prosecution clear at para [3.2] where she says "that in the view of the prosecutor a COEU is not an appropriate sentencing option as it would not satisfy the purposes and principles of sentencing in there terms of the Sentencing Act 2002, or the criteria detailed in s 151 of HSAWA."[20] In her submissions she notes denunciation and deterrence; the interests of the victim; and the holding of the offender accountable and promoting within the offender a sense of responsibility as the most relevant principles. She submits that in the terms of s 8 of the Sentencing Act the Court needs to consider the gravity of the offending and the degree of culpability, the impact upon the victim,

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[20] Ms Williams' submissions dated 19/05/2020.

and the seriousness of this type of offence. She then details the criteria pursuant to s 151(2)(b).

[74] It is the prosecution's submission at [3.5] that:

> … there is nothing exceptional about the circumstances of this case that dictates a departure from the normal sentence of a conviction

With respect to Ms Williams she is reading words into the provisions of s 156 that are just not there. In my view, there does not need to be an exceptional set of circumstances. Ms Williams submits that the proposed COEU and its terms do not address the failings of the defendant, nor the inherent system failures, and would not provide deterrence and denunciation to the defendant nor to the industry, to sufficient levels.

[75] The submissions by the prosecution are that as the culpability for a "significant departure" falls within the middle range of the medium culpability band, for this defendant to receive a COEU would be out of step with other cases and not a proportionate response. Ms Williams discusses in her submissions the authorities of *Discoveries Educare* and *Niagara* and notes the following factual issues:[21]

(a) The draw saw had been operated in this carpentry department of the defendant since the 1970s and the risk posed by the inadequate machine guarding had never been identified. Ms Williams assessed that the case was similar to *Discoveries Educare* and submits that in this case, as the defendant is a public tertiary education institute, that the comments by Judge Paul in the *Discoveries Educare* decision are helpful;

(b) The defendant was in a position as an educator that required it to "exemplify standards in health and safety" and yet utilised older machinery. The submission is made that the defendant should have been training students to refuse to operate unsafe machinery;

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[21] Ms Williams' submissions dated 19/05/2020 at [4.13]-[4.14].

[76] Overall, the prosecutor submits that a fine, together with the other orders, including a conviction, would meet the purposes of under s 3(1)(e) of the HSAWA.

[77] Albeit Ms Williams' position did not change she did accept the suggestion/direction made by me to have some input into the proposed undertaking conditions proposed by the defendant. The discussion that the Court had with counsel following the initial hearing, were helpful in settling the overall detail of the conditions of such an enforceable undertaking if it was to become part of this sentencing.

[78] The Otago Polytechnic is a tertiary education institute, and in my view, particularly involved in the training of people employed within the commercial construction industry. As such, it is principally, and most significantly available, to provide a particularly designed and detailed training provision to enable the workers that it has available within its community to learn about health and safety requirements and duties. The fact that in today's environment such education and training would be provided free of charge I consider very important, when one has regard to the present community drive to ensure ongoing commercial projects are financially sustainable and work to the benefit of the overall community, by providing employment opportunity and facilities.

[79] The response of local construction companies, as pointed to by the defendant is also an important consideration. The estimated costs of the programme is some $275,000 and includes $18,000 worth of scholarships for other construction/health and safety courses that the defendant offers. The proposal has been clearly detailed and has been considered by the prosecutor and its staff. Mr Ker in his affidavit notes that the training proposed and detailed in the undertaking, would not otherwise occur as the defendant does not currently provide training in this area because it cannot earn revenue under tertiary education rules for such training.[22]

[80] Mr Ker notes that the undertaking would result in the defendant giving its educational expertise and resources, with the aim of enhancing Health and Safety knowledge and education within primarily the Dunedin/Otago construction industry. Mr Ker correctly identifies that there is some $3 billion worth of construction being

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[22] See Mr Ker's affidavit at [11].

planned within the Dunedin city educational facilities, the hospital, and other areas of the city.

[81] Mr Ker notes that the demands of such a "boom" in the construction industry will mean that labour sourcing will have to be widely undertaken and that it will be essential to ensure that the enlarged construction workforce no matter where it has its origins, understand and can implement the Health and Safety regulations within New Zealand.

[82] At paragraph [12] Mr Ker notes the benefits from the provision of free training opportunities online through electronic means; that training would be translated into other languages; the training would increase the knowledge and awareness within the industry about the risks associated with older fixed machinery and the need for investment so as to ensure the requirements under HSAWA are met. I accept those matters as are detailed in that paragraph [13] of the affidavit.

[83] Mr Ker details ongoing conversations that the defendant had had with WorkSafe New Zealand. I do not consider that information to be relevant issues for me to consider. Rather I am satisfied having considered my finding as to the level of culpability that the making of COEU in this case would met the principles and purposes of sentencing in the terms of ss 7, 8, 9 and 10 of the Sentencing Act; and also meet the purposes of the HSAWA in the following ways:

1) There will be accountability, a need on the part of the defendant to expend revenue into the undertaking;

2) To publicise the programme and thus its position in relation to the accident to [the victim] which be discussed within the community and therefore the defendant will be held accountable;

3) I consider the level of denunciation to be high and higher than the amount of fine that I would have imposed;

4) I do not accept the submission of the prosecution that the gravity of the offending in this case is at the same level as the *Discoveries Educare* or *Niagara* cases, indeed in the particular assessment required in the terms of this prosecution, I have found it to be lower; and

5) I have noted and taken into account the effects of the offending upon [the victim]. I note what is detailed in the victim impact statement. And I note that he is a man who states:

> I feel no ill will towards Otago Polytechnic or anyone involved in my incident, however I am happy that measures have been taken to ensure an incident like this does not happen to anyone else.

[84] Moving to the purposes of the HSAWA, I note that a fine in this case will result in a tertiary educational institute paying a fine to WorkSafe New Zealand when the monies being expended could be expended in a way that clearly promotes and mitigates the risks and relation to Health and Safety in the significant amount of building work that is planned to take place in Dunedin in the next few years. Clearly the COEU would promote the provision of advice, information, education and training in relation to work health and safety. Particularly important is that it would be made and promoted free of charge and be easily accessible. In my view this would, in a major way help secure future compliance with health and safety in the workplace as the standards and requirements of the Act would be known to employers, managers and particularly workers at the 'coal face'.

[85] It has been suggested that a COEU would provide a platform of promotion for the defendant. Against that of course is that the costs of doing what is proposed would be greater than the end fine. Secondly, it is noted that as part of the "story" element of the programme, that is the advertising outlined, there is to be inclusion in that that the programme results from an accident and is part of a COEU.

[86] Finally, whilst I appreciate that COEUs have not been imposed by the Court thus far in New Zealand, the provision of s 156 in HSAWA means that the legislature foresaw that there would be cases where such an order was appropriate. I note the term in the s 3 purpose, "balanced framework". I see a COEU as providing such

balance that is referred to, by encouraging, promoting and directly improving the future health and safety, against a more punitive approach. This case in my view is one of those cases. When I have regard to the unique placement of the defendant's abilities to have the resources and the paths established to provide the training and information the implementation can only further the purposes of the Act.

[87] Accordingly I am well satisfied that in these circumstances that following the directions in *Stumpmaster* that I should make an order in the terms of s 156 of the HSAWA. The proceedings will be adjourned following the entry of a conviction against the defendant on the charge to a date to be fixed by the Registrar in June 2022. The defendant will pay the assessed reparation and contribution to prosecution costs I further order that the defendant be released upon it having given the undertaking with the specified conditions as are detailed in the appendix to this sentencing decision. The undertaking will be subject to the specified conditions as detailed in s 156 (2). The mandated reporting will take place and be available to a Dunedin based District Court Judge as is detailed in the COEU.

[88] Having made the order in the terms of s 156 I move on to the overall assessment of proportionality and appropriateness as is required in *Stumpmaster*, I consider the reparation of $15,000, the payment of the agreed contribution to the prosecutor's costs and the detail of the undertaking, and that the end result overall is both a proportionate and appropriate response to the defendants offending.

[89] I order and direct accordingly.

Court Ordered Enforceable Undertaking

[90] The Otago Polytechnic is to create and implement the following:

Activities – Industry/Sector	**Estimated Cost**	**Completion Date**
A. Awareness raising campaign 1. Otago Polytechnic will consult with a suitably qualified and certified machine safety expert or Certified Professional Engineer with sufficient knowledge and experience in AS/NZS 4024, to design and deliver a detailed safety campaign using the incident that is the subject of this	**$12,000**	Design completed by **27 November 2020**

enforceable undertaking as a compelling story for taking action to manage hazards and risks associated with using building tools and machinery. 2. In referring to this incident in the campaign, Otago Polytechnic will ensure the importance of risk assessments and machine guarding is addressed as well as the replacement of aged machinery and equipment.		
Activities – Industry/Sector	**Estimated Cost**	**Completion Date**
3. Otago Polytechnic will design a brand story and advertising campaign targeted at the Dunedin building industry. The campaign will include posters, video and social media. 4. It is expected that the campaign will contribute to improvements in health and safety in the building industry, through increased awareness of managing workplace hazards and risks associated with using tools and machinery, in accordance with all applicable Health and Safety Standards including (but not limited to) the following Standards: a. AS/NZS 4024 Safety of machinery Series; b. WorkSafe New Zealand Best Practice Guidelines for the safe use of machinery, May 2014. c. WorkSafe New Zealand Introduction to the Health and Safety at Work Act 2015, March 2016.		Campaign delivered by **28 May 2021**
B. Safety Training Otago Polytechnic will develop and deliver safety training in the following areas: 1. Health and Safety for worksite managers. This will cover the role of the manager on the worksite, how to ensure that the worksite meets the requirements of the Health & Safety at Work Act 2015, and how to create an environment of continuous improvement when it comes to Health & Safety. 2. Safe working practices for the construction worksite. Aimed at all construction workers, this module will	Development of learning packages - **$60,000**	Training designed by **28 October 2020**

equip workers with the knowledge of the Health and Safety at Work Act 2015 and how to apply it, how to safely use tools and machinery, and how to properly use personal protective equipment.		
Activities – Industry/Sector	**Estimated Cost**	**Completion Date**
3. A training course targeted at workers new to the construction industry or construction workers new to New Zealand, called Certificate in Fundamentals of Construction Worksite Tool and Machinery Safety which is aimed at providing construction site workers with the skills to work safely with tools and machinery. 4. A training course for senior construction workers, or managers/leaders in the construction industry, which will provide them with the knowledge and skills to properly oversee health and safety in relation to tools and machinery, and to safely teach the appropriate use of tools and machinery to staff under their supervision. Otago Polytechnic will consult with a suitably qualified certified machine safety expert or a Chartered Professional Engineer with sufficient knowledge and experienced in AS/NZS 4024, to develop the training content (referred to above at B1-4), in accordance with all relevant Health and Safety Standards but particularly in accordance with the following Standards: a. AS/NZS 4024 Safety of machinery Series; b. WorkSafe New Zealand Best Practice Guidelines for the safe use of machinery, May 2014. c. WorkSafe New Zealand Introduction to the Health and Safety at Work Act 2015, March 2016.		
The training will be made available online using interactive learning.	Development of online and mobile phone based delivery mechanisms - **$60,000**	Online and mobile phone based delivery mechanism developed by **November 2020**

The training will be translated into other languages to meet the needs of the Otago workforce.	Translation of course materials into alternative languages - **$25,000**	Translation of course materials completed by **31 March 2021**

Activities – Industry/Sector	**Estimated Cost**	**Completion Date**
The training will be delivered to workers at no cost to the first 1,000 people (across all programmes) to enrol between 1 December 2020 and 31 December 2022.	Assessment of learning – **$100,000**	Training offered and delivered between **1 December 2020** and **28 May 2022** Assessment of learning undertaken as completed, within OP's usual timeframes of within 14 days of submission/completion.
C. Provision of scholarships for construction courses Otago Polytechnic will offer three 50% scholarships for the 2021 academic year and a further three 50% scholarships to students who would not otherwise be eligible for 'fees free' study, to enrol in any of its courses within the construction or health and safety disciplines	**$18,000**	Scholarships promoted by **31 July 2020** Scholarships awarded by **27 November 2020**

[91] A District Court Judge will review the court-ordered enforceable undertaking approximately every six months during the adjournment period. The purpose of the review is to allow the court to review progress of the court-ordered enforceable undertaking and order any variation the court thinks fit.

[92] Otago Polytechnic will file in the District Court a progress report in the form of a memorandum two weeks prior to the Court's six-monthly reviews. The progress report will:

(a) Report progress and/or completion of the undertaking activities.

(b) Include a report from Otago Polytechnic's Director of Business Services confirming spend to-date on individual undertaking activities and overall spend.

(c) Propose variations (if any) to the undertaking conditions, activities, and/or timeframes.

(d) Contain confirmation from the appointed expert (as outlined above) of the experts input into the design, planning and training areas of the undertaking.

[93] Otago Polytechnic will at the same time as filing each progress report serve a copy on WorkSafe New Zealand. WorkSafe New Zealand may at its election file a memorandum in the District Court addressing any matters in relation to the court-ordered enforceable undertaking.

[94] The District Court on receiving a progress report may give any direction or make any order available to it. This may include calling on Otago Polytechnic to appear before the court and/or varying the court-ordered enforceable undertaking.

[95] Otago Polytechnic must incur cost to a minimum of $275,000 on the activities contained in and compliance with the court-ordered enforceable undertaking.

[96] Otago Polytechnic will engage a suitably qualified independent auditor with sufficient knowledge and experience in AS/NZS 4024, to complete an audit of its completion of and compliance with the court-ordered enforceable undertaking conditions. The independent auditor will produce the following reports:

(a) an interim audit report to be filed at the same time as the second six-monthly progress report filed by Otago Polytechnic; and

(b) a final audit report to be filed at the same time as the fourth six-monthly progress report filed by Otago Polytechnic.

[97] WorkSafe New Zealand has reviewed the proposed conditions of the court-ordered enforceable undertaking outlined above to confirm reference to applicable health and safety standards and resources.

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Judge KJ Phillips
District Court Judge

Date of authentication: 18/06/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.