

Sentencing Under the Health and Safety at Work Act 2015

Judge Tom Gilbert



Health and safety disclaimer

- My limitations
- What I am not going to cover
- My own views!



What I will cover

- The impetus for change
- Sentencing under the old Act
- Sentencing under the new Act
 - Fines and reparation
 - Ancillary orders
- What will this mean in real terms?
- When the worst happens....



The impetus for change

- A poor workplace health and safety record generally
- Pike River – 19 November 2010
- Independent Taskforce on Workplace Health and Safety - 2012
 - Reports back 2013
 - 50-60 people killed annually in work place incidents
 - 500-900 more die from work related ill-health
 - Social and economic costs of deaths/injuries - \$3.5 billion



The impetus for change

- WorkSafe
 - Formed 16 December 2013
 - Primary workplace regulator (also CAA and Maritime NZ)
 - 550 staff
 - Aims to “transform NZ’s workplace health and safety performance”
 - Reduce fatalities 25% by 2020
- Health and Safety at Work Act 2015
 - Came into force 4 April 2016
 - Restructuring of offences
 - Huge increase in penalties



Sentencing under the old Act (HSEA 1992)

- *Department of Labour v De Spa and Co Ltd* – 1994

- First “guideline” decision
- Increases in fines signalled
- Sentencing not a mathematical exercise!

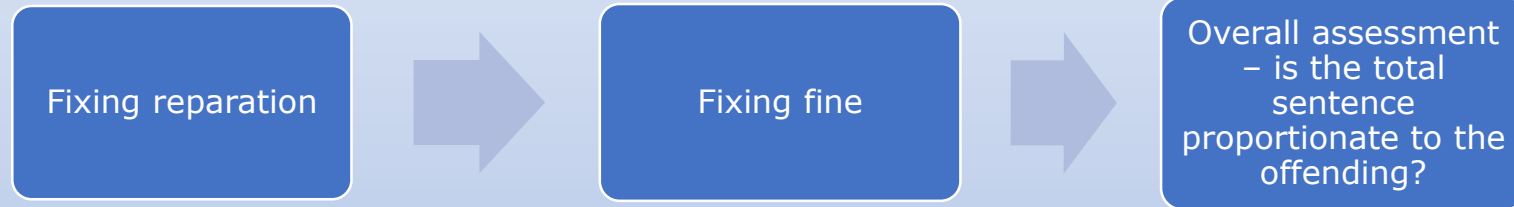
- *Dept Labour v Hanham and Philp Contractors Ltd* - 2008

- Second “guideline” decision
- Increase in fines signalled
- Sentencing is not a mathematical exercise!

- The regulator knows how to play the game...

Sentencing under the old Act (HSEA 1992)

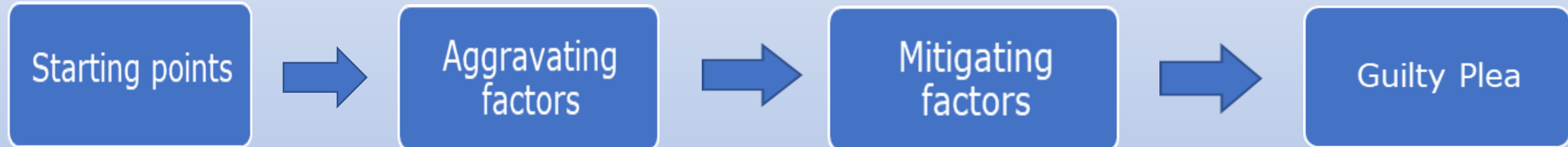
- Three step process



- Reparation (legal to insure)
 - Provides for the interests of the victim/s
 - Now largely set by reference to prior cases

Sentencing under the old Act (HSEA)

- Fines



- Overall assessment

- A sniff test
- Financial capacity

Culpability band	Starting point for fine
Low culpability	\$0 - \$50,000
Medium culpability	\$50,000 - \$100,000
High culpability	\$100,000 - \$175,000

Sentencing under the new Act

- New maximum penalties
 - Primary offence provision is s 48
 - Captures breach of duty to ensure safe workplaces that expose workers to risk of death/serious injury/illness – strict liability
 - Individuals – max \$150k or \$300k depending on role
 - Non- individuals – max \$1.5million
 - Sections 47 and 49 less common
 - S 47 – recklessness – max 5 yrs prison (people) and \$3million (non-natural)
 - S 49 – breach of duty, but no risk/no recklessness – max \$500K



Sentencing under the new Act

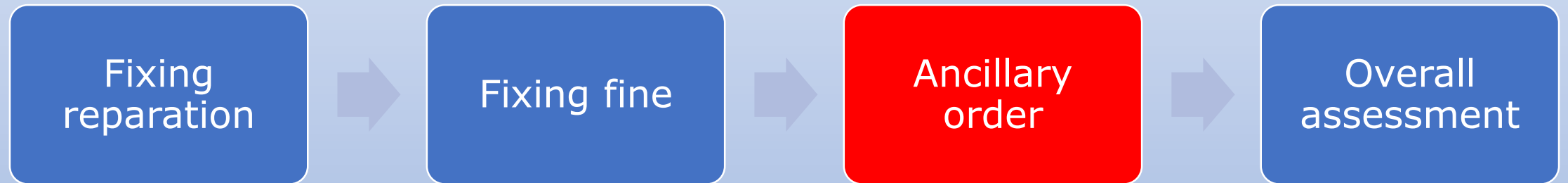
- New ancillary orders – s152-158
 - Costs awards
 - Adverse publicity orders
 - Restoration orders
 - Work health and safety project orders
 - Training orders

Stumpmaster v Worksafe - 9 August 2018

- Key points

- Increase financial penalties for all offenders – not just the worst
- Basic methodology for sentencing remains largely unchanged
- Approach to reparation unchanged
- Fines – still four culpability bands but increased penalty levels
- Discounts for mitigating factors may have been overly generous in past
- Ancillary orders
- Financial capacity highly relevant - to increase or decrease sentence

The new four-step sentencing process



New culpability bands



Culpability band	Starting point for fine
Low culpability	Up to \$250,000
Medium culpability	\$250,000 to \$600,000
High culpability	\$600,000 to \$1,000,000
Very high culpability	\$1,000,000 plus

Previous cases = good comparators to help fix level of culpability

Culpability requires an assessment of following factors:

- Identification of the operative acts or omissions
- Assessment of risk of harm as well as realised harm
- Degree of departure from industry standards
- Obviousness of hazard
- Availability, cost and effectiveness of avoiding the hazard
- Actual knowledge of risks and nature of potential harm
- Actual knowledge of the means available to avoid risks

Personal ag/mitigating factors

- Fine can be tailored by reference to individual's factors:
 - Previous convictions = uplift from 5% to 15%
 - Personal mitigating factors = global discount of up to 30%
 - Amends
 - Remedial steps to prevent future breaches
 - Co-operation with the investigation
 - Prior good character



Financial capacity

- Review of financial capacity should occur as part of the overall assessment.
- Evidence of financial position required
- Where reparation is appropriate but financial incapacity means both reparation and fine cannot be met, reparation takes precedence.
- Legal to insure for reparation (not fines)
 - You will get credit for this as a mitigating feature for being responsible
 - But it might impact financial capacity



What all this means

- Starting points for fines will increase by a factor of 6 cf old regime
- End penalty heavily influenced by financial capacity
- Expect costs awards – potentially large if unsuccessful defence
- Expect courts to become more adventurous with ancillary orders

What can we do?

- Be pro-active - spend effort and money on health and safety to avoid liability
- If the worst happens, do all you can to help the victim/s
 - That is not an admission of liability.
 - If you are liable, your help will be recognised
- Implement appropriate remedial steps quickly
- Cooperate
- Insure for reparation
- Focus on financial capacity



SENTENCING IS NOT
A MATHEMATICAL
EXERCISE

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Yeah right.


Tui

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