IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CRI-2018-463-000056
[2019] NZHC 365

BETWEEN	OCEANA GOLD (NEW ZEALAND) LTD Appellant
AND	WORKSAFE NEW ZEALAND Respondent

CRI-2018-463-000108

BETWEEN	CROPP LOGGING LIMITED Appellant
AND	WORKSAFE NEW ZEALAND Respondent

Hearing:	7 February 2019 (Heard at Rotorua)
Appearances:	G Gallaway and J Lill for Oceana Gold (NZ) Limited W Lawson for Cropp Logging Limited A Longdill for Respondents
Judgment:	7 March 2019

JUDGMENT OF VENNING J

This judgment was delivered by me on 7 March 2019 at 11 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date...............

Solicitors:	Chapman Tripp, Christchurch WorkSafe New Zealand, Auckland
Counsel:	A Longdill, Auckland

Introduction

[1] In *Stumpmaster v WorkSafe New Zealand* a Full Court of this Court reviewed the sentencing bands for offending under the Health and Safety at Work Act 2015 (the Act).[1]

[2] The Court confirmed that the approach to sentencing under the Act required four steps:[2]

(a) assessing the amount of reparation;

(b) fixing the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;

(c) determining whether further orders under ss 152–158 of the Act were required; and

(d) making an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. They included consideration of the ability to pay, and also whether an increase was needed to reflect the financial capacity of the defendant.

[3] In *Stumpmaster* the guideline bands were the focus given the increased fines available. The issue of reparation was not directly addressed. The Court noted it did not have detailed submissions on reparation but did observe that any increase in fine levels should not lower the size of reparation orders.[3]

[4] In a previous decision of the Full Court, this Court discussed reparation as follows:[4]

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1 *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.
2 At [3].
3 At [55] – [56].
4 *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79 (HC).

Reparation

[35] Sections 32 to 38 of the Sentencing Act deal with reparation. For present purposes, s 32 is of greatest relevance. The sentence of reparation may be imposed where:

- The offender has, through or by means of an offence of which the offender is convicted caused a person to suffer:

  (a) loss of or damage to property;

  (b) emotional harm; or

  (c) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property: s 32(1).

- The person suffering the harm or loss must fall within the definition of "victim" in s 4(a): s 32(2).

- The court must take into account any rights available to bring proceedings in relation to the consequential loss or damage and must not order reparation in respect of consequential loss or damage for which the court believes the person has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001: s 32(3) – (5).

- Any offer or agreement to make amends under s 10 is to be taken into account in determining the amount of reparation: ss 32(6) and 10(3).

Financial capacity

[36] In addition to s 14 of the Sentencing Act and s 51A(2)(b) of the [Health and Safety in Employment Act 1992], ss 35 and 40 [of the] Sentencing Act relate to the financial capacity of the offender and are relevant to both reparation and fines.

[37] Where an offender has insufficient means to pay the total value of the loss, damage or harm, the court may sentence the offender to less than the full value of the loss, damage or harm or order payments by instalments or both: s 35. The primacy of reparation is emphasised by s 35(2) under which any payments received from the offender must be applied first in satisfaction of the amount due for reparation.

[38] Financial capacity is also relevant to the fixing of the amount of any fine. Section 40(1) and (2) provide that the court must take into account the financial capacity of the offender which may have the effect of either increasing or reducing the amount of the fine. Importantly, if a court imposes a fine in addition to a sentence of reparation, it must take into account in fixing the amount of the fine the amount payable for reparation: s 40(4).

[39] To assist the court in assessing the amount of any loss, damage or harm for the purposes of reparation, ss 33 and 34 enable the court to call for reparation reports. Similarly, the court may require a declaration of financial capacity under ss 41 and 42.

Overview of Overview of statutory framework

> [40] This review of the relevant provisions of the HSE Act and the Sentencing Act demonstrates several key propositions. First, the object of the HSE Act is the prevention of harm in the workplace. Secondly, to achieve that object, sentencing under s 50 will generally require significant weight to be given to the purposes of denunciation, deterrence and accountability for harm done to the victim in terms of s 7 [of the] Sentencing Act. Thirdly, reparation must be a principal focus in sentencing. Indeed, the Sentencing Act gives primacy to reparation where the financial capacity of the offender is insufficient to pay both reparation and a fine. Finally, both the HSE Act and the Sentencing Act require the court to take account of the financial capacity of the offender.

[5] It is convenient to review the approach to reparation in this judgment in light of the changes made in the Act and the 2014 amendments to s 32(5) of the Sentencing Act 2002. The issue of reparation arises in both of these appeals. It arises in the following context.

Oceana Gold (New Zealand) Limited

[6] Tipiwai Stainton was employed by Oceana Gold (New Zealand) Limited (Oceana) at the Waihi Mine. On 28 July 2016 Mr Stainton lost his life in an accident at the mine. WorkSafe New Zealand (WorkSafe) conducted an investigation into Mr Stainton's death, following which it charged Oceana under the Act with failing to ensure, so far as was reasonably practicable, the health and safety of Mr Stainton, thereby exposing him to the risk of death.[5] Oceana pleaded guilty.

[7] On 8 May 2018 Judge T R Ingram delivered a reserved judgment on sentence.[6] The Judge fined Oceana $378,000 and ordered it to pay reparation for lost earnings of $350,000. In addition, the Judge ordered Oceana to pay costs of $3,672.

Cropp Logging Limited

[8] As the name might suggest Cropp Logging Limited (Cropp) is a logging company. It is a small family run operation. Mr Sloan, one of its employees, was badly injured on 6 March 2007 when a log he was breaking out rolled on top of him.

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5 Health and Safety at Work Act 2015, ss 36(1)(a), and 48(1) and (2)(c).

6 *WorkSafe New Zealand v Oceana Gold (New Zealand) Ltd* [2018] NZDC 5274.

[9] WorkSafe conducted an investigation into the incident, following which it charged Cropp under the Act with failing to ensure, as far as was reasonably practicable, the health and safety of Mr Sloan, thereby exposing him to risk of death, and serious injury.[7]

[10] Judge T R Ingram assessed Cropp's culpability as high and adopted a starting point of $750,000 for the fine.[8]

[11] WorkSafe had sought a reparation order of $50,000. However, the District Court Judge ordered Cropp to pay reparation of $80,000. The Judge took into account the effects of inflation in fixing that figure. After taking account of mitigating factors and Cropp's financial position, the Judge ultimately ordered Cropp to pay a fine of $100,000 together with costs of $10,000.

Issues

[12] The appeals raise the following issues concerning reparation:

(a) whether an order for reparation under s 32 of the Sentencing Act 2002 for loss consequential on physical harm is limited to those persons suffering the physical harm (the jurisdiction issue); and

(b) if there is jurisdiction, how is the reparation for such loss to be calculated? What is the correct approach to fixing the quantum of reparation? Is the victim's contribution to the accident to be taken into account (the quantum issue)?

The jurisdiction issue

[13] The jurisdiction issue arises solely on the Oceana appeal. In fixing the reparation figure at $350,000 the Judge took into account the deceased's lifetime earning capacity, which he considered was a loss suffered by Mr Stainton's family.

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7 Health and Safety at Work Act 2015, ss 36(1)(a) and 48(1)(c).

8 *WorkSafe New Zealand v Cropp Logging Ltd* [2018] NZDC 20232.

[14] Oceana submits that while victims other than the person suffering the physical injury are entitled to emotional harm reparation or losses consequential on that emotional harm, they are not entitled to reparation for the loss of the deceased's earnings.

[15] Mr Gallaway referred to s 38(1) of the Sentencing Act 2002:

> (1) Every sum payable under a sentence of reparation must be paid to the person who suffered the harm, loss, or damage, or, with that person's consent, to that person's insurer.

[16] He submits that loss of earnings is a category of loss that must be consequential on physical harm and that reparation for such loss of earnings is restricted to the person who suffered the physical harm. In the case of a fatality the person suffering physical harm is no longer able to receive the benefit from an order of reparation.

[17] Mr Gallaway also referred to the comments of Elias CJ in *Davies v Police* that:[9]

> The effect of s 32 is that those who suffer physical or emotional harm or property damage through an offence may receive reparations at sentencing of the offender in respect of both emotional harm and property damage, and any loss consequential upon physical or emotional harm or damage to property.

to support his submission that while Mr Stainton's family members were entitled to emotional harm reparation (and any consequential loss from that emotional harm) they were not entitled to reparation for loss of earnings arising from the physical harm to Mr Stainton.

[18] Mr Gallaway submitted the reparation award was outside the Court's jurisdiction and should be quashed.

[19] It is important to put the comments made by the Supreme Court in the decision of *Davies v Police* in context. The appellant had been convicted of operating a vehicle carelessly and causing injury when towing a trailer with an insecure load. A mattress on the trailer had fallen off causing a collision in which a cyclist was injured. The District Court Judge had imposed an order for reparation totalling $20,500. Seven

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9 *Davies v Police* [2009] NZSC 47, [2009] 3 NZLR 189 at [9].

thousand dollars was ordered in respect of emotional harm. After taking account of the uninsured damage to the bicycle, clothing and equipment and miscellaneous medical expenses, $11,555 was calculated as reflecting the victim's loss of earnings claim not covered by the Accident Compensation scheme (the statutory shortfall). Both the High Court and Court of Appeal had held the Judge had jurisdiction to make the award. The issue before the Supreme Court was whether s 32(5) of the Sentencing Act prevented the District Court Judge from ordering reparation for the shortfall between the victim's lost earnings and the payments made to her by the Accident Compensation Corporation.

[20] The relevant wording of s 32(5) at the time was:

> . . . the court must not order the making of reparation in respect of any consequential loss or damage . . . for which the court believes that a person has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001.

[21] The majority of the Supreme Court concluded that loss of earnings consequential on physical harm was not able to be the subject of a reparation order under s 32(1).[10] It is loss in respect of which the victim has entitlements within the meaning of s 32(5) and was accordingly excluded from the sentence by that provision.

[22] Section 32(5) was amended on 6 December 2014 following the decision of the Supreme Court in *Davies*.

[23] The 2014 amendment was, according to the Explanatory note to the Victims of Crime Reform Bill 2011 (319-1) to "clarify" that a "court would be able to impose a sentence of reparation for consequential loss or damage to meet any statutory shortfall in compensation. The effect of this amendment is to overturn the Supreme Court decision in *Davies v New Zealand Police*…" Before the 2014 amendment and following *Davies*, the focus on reparation had primarily been on emotional harm.

[24] Section 32(5) as amended now reads:

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[10] At [37].

> (5) … the court must not order the making of reparation in respect of any consequential loss or damage … for which compensation has been, or is to be, paid under the Accident Compensation Act 2001.

[25] Section 32(5) as clarified by the amendment, confirms that the Court must not order reparation in respect of any loss for which compensation has been or is to be paid under the Accident Compensation Act 2001. The broad concept of "entitlements" has been replaced by reference to actual compensation payments, present or future.

[26] The Court in *Davies* was not required to address the issue raised on this appeal, namely whether the sentencing Court has jurisdiction to make an order for reparation for consequential loss of earnings in favour of immediate surviving family members who are victims where the principal victim has been killed.

[27] The jurisdiction to make a reparation order is found in s 32(1) of the Sentencing Act.

> (1) A court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer—
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> (a) loss of or damage to property; or
>
> (b) emotional harm; or
>
> (c) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

[28] If the conditions in s 32(1) are met, the Court must impose a sentence or order of reparation unless it is satisfied that the sentence or order would result in undue hardship for the offender or other special circumstances would make it inappropriate, or the reparation is excluded by the remaining provisions of s 32.[11]

[29] As noted by the Full Court in *Department of Labour v Hanham & Philp Contractors Ltd*,[12] the entitlement to reparation under s 32(1) is qualified in the succeeding provisions of s 32. For example, s 32(2) provides the Court must not impose a sentence of reparation in respect of emotional harm unless the person who suffered the emotional harm is a victim as defined in s 4(a) of the Sentencing Act.

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11 Sentencing Act 2002, s 12(1).

12 *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) at [35].

[30] In the present case s 32(1)(c) applies. Oceana has caused a person (Mr Stainton's partner and child) to suffer loss consequential on physical harm, the death of Mr Stainton. The loss is the loss of Mr Stainton's lifetime earning capacity. The use of the word "any" suggests that harm on which the consequential loss is predicated does not need to be suffered by the same person claiming the consequential loss. There is nothing in the wording of s 32(1)(c) to suggest that the person who suffers loss needs to be the same person who suffered the physical harm.

[31] While on a plain reading of s 32 the reference to person is general, the meaning in this context was clarified by the Supreme Court in *Kapa v R*.[13] In *Kapa* the Supreme Court considered the application of s 32(1) in the context of a victim's entitlement to reparation for financial loss. A valuable collection of medals had been stolen from the National Army Museum. Two private donors approached the Commissioner of Police and offered to fund a reward. The Commissioner announced a reward of up to $300,000. A lawyer contacted the Commissioner and made an arrangement under which the medals were returned in exchange for the reward. The police paid over $200,000 by way of reward. In due course Mr Kapa and another were arrested and charged with theft of the medals. Both pleaded guilty. Mr Kapa and his associate were the people who had received the reward. The other offender repaid the $100,000 he had received but Mr Kapa did not. He was sentenced to imprisonment and ordered to make a reparation payment of $100,000 under s 32 of the Sentencing Act 2002.

[32] The majority of the Supreme Court rejected the Crown's argument based on the wording of s 32 that any "person" could potentially be the recipient of a sentence of reparation under s 32(1)(a) or 32(1)(c). The Court held that only victims can be the recipients of a sentence of reparation. The Court considered the key to understanding the purport of s 32 was its interrelationship with the definition of victim in s 4 of the Sentencing Act.[14] The definition of victim reads:

> victim—
>
> (a) means—
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> (i) a person against whom an offence is committed by another person; and

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[13] *Kapa v R* [2012] NZSC 119, [2013] 3 NZLR 1.

[14] At [11].

> (ii) a person who, through, or by means of, an offence committed by another person, suffers physical injury, or loss of, or damage to, property; and
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> (iii) a parent or legal guardian of a child, or of a young person, who falls within subparagraph (i) or subparagraph (ii), unless that parent or guardian is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; and
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> (iv) a member of the immediate family of a person who, as a result of an offence committed by another person, dies or is incapable, unless that member is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; and …

[33] Delivering the majority judgment, Chambers J noted that at first blush it might not be completely clear whether someone who suffers consequential loss or damage must be a victim himself or herself. The Court answered its own question by stating it was satisfied, for two reasons, that only victims can recover for consequential loss or damage. Chambers J expressed the two reasons as follows:[15]

> [16] First, it would seem unlikely that recovery of consequential loss was intended to be open-ended after reparation for loss of or damage to property and emotional harm had been carefully restricted to victims.
>
> [17] Secondly, the legislative history of s 32(1)(c) is consistent with a conclusion that consequential loss is recoverable only by victims. …

[34] At [18]–[27] Chambers J discussed the legislative history before concluding:

> [28] To recap at this point. We have established that s 32 is for the benefit of victims. Subsection (1)(a) allows reparation for *direct* loss of or damage to property. (We say "direct" as subs (1)(c) picks up a victim's consequential losses.) Subsection (1)(b) allows reparation for emotional harm.

[35] In the present case Mr Stainton's partner and family qualify as victims under (a)(iv) of the definition as members of the immediate family of a person (Mr Stainton) who, as a result of an offence committed by another (Oceana), has died.

[36] As victims, Mr Stainton's family members qualify for reparation for emotional harm under s 32(1)(b) but that reparation is separate to and in addition to their

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15 *Kapa v R*, above n 13.

entitlement to reparation for loss under s 32(1)(c). Loss under s 32(1)(c) includes consequential financial loss.

[37] But there is a restriction on the financial loss that can be recovered as reparation. Section 32(5) confirms that the Court must not make an order for reparation in respect of any consequential loss or damage described in subs (1)(c) for which compensation has been or is to be paid under the Accident Compensation Act 2001. The practical result in the present case is that the reparation order for financial loss must take into account (and deduct) compensation payments to Mr Stainton's family members under the Accident Compensation Act 2001 for the loss of Mr Stainton's income.

[38] Nor is Mr Gallaway's argument supported by s 38(1) as he suggests. As Ms Longdill submitted, the section refers to reparation being paid to the person who suffered "the harm, loss or damage". While Mr Stainton suffered the harm, the loss for which the reparation is to be made has been suffered by Mr Stainton's immediate family. It is they who will suffer an ongoing loss. Such loss is not restricted to the person who suffered the harm. While the reference to harm could be a reference back to emotional damage or to emotional harm, the term loss or damage itself refers back to loss or damage to property or loss or damage consequential on physical harm under s 32(1)(c).

[39] In summary to this point, for the above reasons I conclude there is jurisdiction under s 32 of the Sentencing Act for the sentencing Court to make an order for reparation in favour of victims for loss consequential on the physical harm to another. Such a conclusion is supported by the general purposes of the Sentencing Act. Section 3(d) of the Act confirms that one of the purposes is to "provide for the interests of victims of crime".

The quantum issue

[40] The second issue raised in the appeal is the more difficult one. How is the reparation for loss of earnings reparation to be calculated? Is it to be on a basis consistent with the principles of the Accident Compensation legislation and the social

contract upon which that legislation is based, or is it to operate as a true exception to the Accident Compensation legislation and the social contract?

[41] On the first approach an order for reparation for financial loss, consequent on physical harm, would be constrained by the pecuniary benefit that the victim would have received (calculated by reference to net income in the period prior to the incapacitating incident), and limited to the shortfall between that amount and the victim's entitlement to compensation payments under the Accident Compensation Act for the period which they are entitled to such payments (the "statutory shortfall approach").

[42] On the second approach an order for reparation would entitle a victim to the prospective future value of the financial loss they have suffered (calculated by reference to anticipated life-time earnings on the basis of actuarial reports), for a period of time unconstrained by any time limit for which compensation may be payable under the Accident Compensation legislation (the "open-ended approach").

[43] Under the "open-ended approach" the Accident Compensation Act is only relevant to the extent that compensation payments under the Act are deducted from the quantum of the reparation payable.

[44] The Judge in the present cases did not directly address this issue but proceeded on the basis of the open-ended approach. Nor was the issue referred to in the cases of *WorkSafe New Zealand v Transport Waimate Ltd* and *WorkSafe New Zealand v Gordon Developments Ltd*.[16] While the issue was referred to in *WorkSafe New Zealand v Corboy Earthmovers Ltd*, *WorkSafe New Zealand v Hamilton City Council* and *WorkSafe New Zealand v South Port New Zealand Ltd* it was resolved on a pragmatic basis.[17] It was discussed in more detail in the decision of Judge C J McGuire in

[16] *WorkSafe New Zealand v Transport Waimate Ltd* [2016] NZDC 9468; *WorkSafe New Zealand v Gordon Developments Ltd* [2016] NZDC 5535.

[17] *WorkSafe New Zealand v Corboy Earthmovers Ltd* [2016] NZDC 21982; *WorkSafe New Zealand v Hamilton City Council* [2016] NZDC 18590; and *WorkSafe New Zealand v South Port New Zealand Ltd* [2017] NZDC 8050;

WorkSafe New Zealand v Wai Shing Limited and identified in a minute of Judge Neave in *WorkSafe NZ v Peter Fletcher Transport Limited*.[18]

[45] There are a number of general statements of principle in the *Davies'* case as to the extent of reparation for lost earnings which suggest it is appropriate for restraint in this area and which support a conclusion that reparation should be determined on the statutory shortfall approach with regard to the general principles underlying the accident compensation scheme and to the detailed provisions for payments in each particular case.

[46] The following passages from the *Davies'* decision are instructive. By reference to ss 32(3), (4) and 38(2) of the Sentencing Act Elias CJ emphasised the summary nature of an order for compensation in the criminal sentencing context and noted that:[19]

> [10] … the court "must" take into account other such remedies available to the victim. Where there is substantial dispute as to causation or as to measure of loss, the court may take the view that compensation is not appropriately dealt with through the summary criminal procedure for ordering reparation. … These provisions recognise that not all losses suffered by victims will be suitable for a sentence of reparation. And even where a sentence of reparation is suitable, it may not be appropriate to award reparation which amounts to full compensation for loss. The sentence of reparation therefore provides summary remedy for victims of crime, without limiting their ability to seek compensation outside the criminal justice process.
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> [11] Reparation may not amount to full compensation and may not always be appropriate. But it enables speedy and inexpensive relief, additional to other remedies. …

[47] There are also a number of relevant provisions in the Accident Compensation Act itself which support a restrained approach to the ambit of reparation. For example, s 3 refers to the social contract represented by the first accident compensation scheme and confirms the purpose of the Act to provide for a "fair and sustainable" scheme.

18 *WorkSafe New Zealand v Wai Shing Limited* [2017] NZDC 10333; and Minute of Judge Neave, *WorkSafe NZ v Peter Fletcher Transport Limited,* Christchurch DC CRI-2018-009-1333, 19 September 2018.

19 *Davies v Police*, above n 9.

[48] Importantly a central plank in the social contract implemented through the legislation is compensation for loss which is fair rather than full.[20] In the context of the Health and Safety at Work legislation Elias CJ noted:

> [25] … In the case of losses compensated under the Injury Prevention, Rehabilitation, and Compensation Act, such remedies have been replaced by an exclusive statutory regime, as is discussed further below. Reinstating them in a partial way through the criminal justice system would be inconsistent with that regime. Section 32(5) prevents such inconsistency.

[49] Section 317 of the Accident Compensation Act prevents proceedings for damages arising directly or indirectly out of personal injury covered by the Act, except for property damage. While s 317 does not apply to a sentence of reparation since the sentence of reparation is not a proceeding for damages, s 317 is a pivotal provision in the social contract implemented through the Accident Compensation legislation.[21] Again, as Elias CJ said:

> [28] If reparation can be ordered under the Sentencing Act to make up for perceived inadequacies in entitlement under the Injury Prevention, Rehabilitation, and Compensation Act, victims of crime stand outside the general prohibition. If "entitlements" for the purposes of reparation eligibility depend on what is actually paid, ineligibility under the Injury Prevention, Rehabilitation, and Compensation Act would revive the ability to obtain redress through reparation for victims of crime, but not victims of civil wrongs. It is not at all clear why "top-up" claims for victims should be available in sentencing proceedings but not in civil suit. …

[50] Tipping J put it rather more strongly:

> [48] There would be no logic, and indeed substantial illogic, in prohibiting civil proceedings seeking compensation for personal injury yet allowing the same result to occur through criminal proceedings. It would go against the whole philosophy and purpose of the accident compensation scheme to allow those suffering injury as a result of an offence to have the potential to gain greater compensation than those suffering the same injury when no offence is involved or no one is prosecuted. I am not persuaded that Parliament meant to do this.

[51] In *Davies* it was noted that compensatory payments under the former legislation (prior to the Sentencing Act) had also been effectively capped in that they were limited to the fine imposed.[22]

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20 At [18].
21 At [27].
22 At [31].

[52] The 2014 Amendments were clearly intended to overturn the decision in *Davies* and to allow for reparation payments consequential on physical harm to be ordered for the benefit of victims to address the statutory shortfall so that any shortfall between Accident Compensation entitlements and actual loss could be recovered for the period the compensation payments were made. The explanatory note to the Bill makes that much clear. While such reparation payments will top-up the entitlements under the Accident Compensation legislation, the legislation provides a useful context against which the calculation of quantum for such reparation payments can be based, and can still be consistent with the purpose of the social contract underpinning the accident compensation scheme, by providing compensation which is fair rather than full.

[53] The Deaths by Accident Compensation Act 1952 (the DAC Act) is a relevant consideration also. That Act permitted claims for damages in this context, but not where there was an entitlement under the Accident Compensation Act.

[54] The DAC Act was a response to the common law rule that a person who suffered financial loss on the death of another as the result of a tort had no claim against the tortfeasor. Section 4(1) of the DAC Act provides that where the death of a person is caused by a wrongful act, neglect or default, which would, if death had not occurred, have entitled the party to bring an action and recover damages, the person who would have been liable to the deceased is liable to an action in damages. However, if the death is covered by accident compensation the defendant is not liable. As personal injury under the Accident Compensation Act covers death, the death is covered so there can be no claim under the DAC Act.

[55] There are further practical considerations which support the statutory shortfall approach rather than the open-ended approach. The Supreme Court in *Davies* cautioned against the practical problem of assessing what might be payable at a sentencing hearing on a summary basis.[23]

[56] Even where the Court has approached the assessment of reparation on an open-ended basis with the assistance of an actuarial report, the Court will often still take a

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[23] At [34]–[36].

broad-brush assessment of the appropriate amount to ensure it avoids over-compensating. For example, in the Oceana case the Judge halved the lowest sum suggested as the relevant loss by the report.

[57] The need for such detailed actuarial reports is a further complication in the context of a sentencing hearing. While ss 33 and 34 of the Sentencing Act provide for reparation reports, from their terms I do not consider that full detailed actuarial reports as to future losses were contemplated by the legislature.

[58] There is also the complicating issue of contribution. In the Cropp appeal Mr Lawson sought to argue that the reparation for loss of earnings should be reduced to take account of Mr Sloan's contributory negligence and his failure to observe certain existing standards in the logging industry which, he submitted, contributed significantly to the accident which caused Mr Sloan's injuries. The practical difficulty of such an argument is obvious. A sentencing hearing is not an appropriate forum for determining what standard practices might apply to an industry, how the injury may have occurred and what contribution a victim may have contributed to it. It was in part to avoid such issues (arbitrariness of damages and the difficulty of assessing compensation and contribution in civil cases) that the accident compensation scheme was established.

[59] The issue of contribution in this context was considered in *Department of Labour v Eziform Roofing Products Ltd*.[24] The High Court considered s 9(2)(c) of the Sentencing Act (which required the conduct of the victim to be considered as a mitigating factor in sentencing an offender) in the context of a sentence under Health and Safety legislation.

[60] In the earlier decision of *Hanham* the Full Court had declined to use the victim's careless conduct as a mitigating factor of offending stating:[25]

> [156] … We regard Hanham & Philp's culpability in this instance as in the high category but towards the lower end of that band. The conclusion cannot be escaped that the construction of the temporary scaffold was obviously inadequate. The reaction of the company's management on that issue speaks

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24 *Department of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526.

25 *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79 (HC).

> volumes. The company is obliged to accept responsibility for the failures of its employees which were inexplicable given their level of experience.

[61] In *Eziform* Duffy J referred to the passage from *Hanham* and went on to conclude that:[26]

> [52] … But guarding against workplace accidents that result from the foolish carelessness of employees is part of the role of the Health and Safety in Employment Act. So, to allow such carelessness to minimise an employer's culpability would undercut one of the policy objectives of the legislation. … Particularly in light of the accident compensation scheme's no fault principle, the fines imposed under this Act must act as a real deterrent on employers to avoid workplace accidents, including those involving the foolishness and carelessness of employees. … It would be wrong, therefore, to permit employers to rely on an injured employee's foolishness or carelessness to mitigate the employer's culpability. It follows that in matters of workplace health and safety, to attach little, if any, weight to a victim's carelessness will not be inconsistent with the requirement in s 9(2)(c) of the Sentencing Act. Indeed, to do otherwise would subvert the policy of the Health and Safety in Employment Act.

[62] There is force in the above observations, which, while made in the context of assessment of a fine, apply equally in the case of reparation, quite apart from the practical difficulties that I have identified above. It is also consistent with the observations of Davison J in *Lynfox Logistics (NZ) Ltd v WorkSafe New Zealand*:[27]

> [52] The title to s 36 describes the duty as the "primary duty of care". Contrary to Mr Nicholson's submission, the adjective "primary" in this context means first in terms of being of fundamental application and importance, rather than the numerical first in a sequence. Section 36 itself is expressed in broad terms, and in light of the Act's overarching purpose being to secure the health and safety of workers and workplaces, it is properly viewed as setting out the Act's foundational duty. …

[63] I accept there is force in Ms Longdill's submission that to seek to reduce the reparation payable on the basis of contributory conduct would undermine that foundational duty on an employer.

[64] In *R v Donaldson* the Court of Appeal made the point that reparation is to be:[28]

> approached in a broad common-sense way, and resort to refined causation arguments is not to be encouraged.

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26 *Department of Labour v Eziform Roofing Products Ltd*, above n 24.
27 *Lynfox Logistics (NZ) Ltd v WorkSafe New Zealand* [2018] NZHC 2909 (footnote omitted).
28 *R v Donaldson* CA227/06 20 October 2006 at [36].

[65] In a New Zealand Journal article, Simon Connell suggests that the social contract is a kind of origin myth which is illusory and the Supreme Court in *Davies* erred by taking it too seriously. As noted above however, the Accident Compensation legislation expressly talks of a social contract and there is unarguably value in the right to sue for personal injury which has been replaced as part of the social contract.

[66] Finally, if Parliament had intended that reparation for financial loss under the Sentencing Act was to sit outside the social contract under which the Accident Compensation Act applies and for compensation in this one area to be open-ended one would expect a very clear message to that effect. The focus of the amendment to s 32(5) was very much on addressing the effect of the *Davies'* decision which held there could be no top-up of the statutory shortfall by way of reparation. I do not read it as any more extensive than that.

[67] I note that WorkSafe accepts there is merit in principle in ensuring a consistent and relatively simple approach to calculating shortfall without the need to resort to actuarial analysis in each case.

[68] For those reasons I conclude that in the case of loss of earnings the order for reparation (which in a number of cases will be in addition to reparation for emotional harm) should be restricted to the statutory shortfall in compensation under the compensation legislation. That shortfall is to be calculated as the difference between the pecuniary benefit the victim would have received and the compensation payable to them under the accident compensation scheme, in accordance with the entitlements set out in Schedule 1 of the Accident Compensation Act limited to the period that the payments are made under that scheme.[29] That will enable the shortfall to be made on a basis that ensures a degree of consistency with the social contract confirmed by the Accident Compensation legislation. It should also provide a more straightforward basis for the calculation of reparation and, hopefully, a degree of certainty to sentencing Judges and the parties. It will also avoid the need for complicated and potentially contestable actuarial reports for sentencing hearings and avoid arguments concerning contribution.

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[29] See Schedule 1 to the Accident Compensation Act 2001.

[69] Ultimately as the Full Court observed in *Stumpmaster*, the final step in the sentencing process will be to make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions,[30] but bearing in mind the primacy of reparation as noted in *Department of Labour v Hanham & Philp Contractors Ltd*.[31]

The appeals

[70] I turn to consider the individual appeals in more detail.

Oceana Gold Limited

[71] Mr Stainton had been employed at the Waihi Mine since November 2007. On 1 July 2016, his employment was transferred to Oceana when it took over the operation of the Mine. Mr Stainton was a fully qualified bogger operator and was working as such on the day of the incident. A bogger is a load haulage vehicle.

[72] On 28 July 2016, Mr Stainton had been tasked with using the bogger to build a bund prior to backfilling a void created by the mining operation.

[73] In the process of mining, large voids (stopes) are created which require backfilling to comply with the mining operations' consent conditions. The stopes are filled with compacted waste rock. Before the stope is backfilled a bund is built no less than two metres from the edge to make the backfilling operation safer. Once completed the bund acts as a wheel stop which prevents the bogger driving over the edge.

[74] Until the bund is built, the area is secured by gates and chain barricades. Only after complying with a number of procedures and checks is the bogger operator supposed to pass the gates and chain barricade with a bucket of waste to begin building the bund wall.

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30 *Stumpmaster v WorkSafe New Zealand*, above n 1, at [3](d).
31 *Department of Labour v Hanham & Philp Contractors Ltd*, above n 12.

[75] The procedure requires the bogger operator to first walk around the area to establish that a painted line is present and clearly defined on the ground two metres from the edge. If necessary, the mark is repainted. The bogger operator then uses the mark to ensure the bogger remains a safe distance back from the edge of the stope whilst the bund is created.

[76] As Mr Stainton had been assigned to the task of bund building he was authorised to work past the gate and chains. To enable him to create the bund the gate had to be open and the chain removed to provide a clear path. As a result, there was no physical barrier between the bogger and the vertical edge prior to construction of the bund.

[77] The procedure is that the bogger operator approaches the edge in first gear with the bucket raised, stops when the bucket is still two metres from the edge level with the painted two metre line (which places the front wheels about four to five metres from the edge), then, after placing the machine into reverse, lowers the bucket to dump its load.

[78] Mr Stainton was last spoken to by a co-worker at 3.30 pm and last seen at 4.00 pm. At 4.45 pm the bogger tag stopped working. At 6.10 pm the bogger was located upside down over the vertical edge at the bottom of a 15-metre drop. Mr Stainton was already deceased. He had died as a result of extensive head injuries sustained in the fall.

[79] As a result of its investigation into Mr Stainton's death WorkSafe New Zealand (WorkSafe) identified that it was reasonably practicable for Oceana to have developed and implemented a safe system of work for the creation of the bunds above vertical stopes. This could have been achieved by:

- conducting a deep and detailed risk assessment of the building of bunds above a vertical stope that drew on more than known industry practice;

- through that process, identifying a method for placing a physical barrier (such as the use of steel bollards) prior to the creation of a bund; and

- using reflective candy canes to increase the demarcation of the stope edge.

WorkSafe concluded Mr Stainton sustained his fatal injuries as a result of Oceana's failure to take these reasonably practicable actions.

District Court sentence

[80] Judge Ingram started by considering the issue of reparation. Mr Stainton was earning a salary of about $100,000 a year at his death. After deducting payments made or to be made under the Accident Compensation Act and other payments already made to his family after Mr Stainton's death,[32] a report calculated the estimated value of Mr Stainton's earnings lost over the course of his working life at between $700,000 and $2.77 million.

[81] The Judge queried the underlying assumptions relating to the Consumer Price Index (CPI) and interest rate in the report and also noted the short projected life of the mine. He considered the low assessment of $700,000 to itself be over-optimistic and fixed the figure of $350,000 as the realistic assessment of the net loss of earnings. He made an order that that sum be paid for the loss of future earnings to address the financial deficit to Mr Stainton's family caused by his death.

[82] The Judge considered that further payments for emotional harm were not warranted. He noted:[33]

> [39] … I consider that further emotional harm reparation is not warranted given the sums already paid.

[83] He then went on to impose the fine of $378,000 and made the order for costs.

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32 Oceana had paid $50,000 to Mr Stainton's partner and placed $150,000 in trust for his child. Further payments of $450,000 were made under an insurance policy taken out by Oceana for Mr Stainton's (and his family's) benefit.

33 *WorkSafe New Zealand v Oceana Gold (New Zealand) Ltd,* above n 6.

Discussion

[84] Mr Galloway submitted that the actuarial report relied on by the Judge was factually incorrect in that it failed to include the $200,000 paid to Mr Stainton's partner and child. The Judge was wrong to have assessed the loss in the way he had.

[85] WorkSafe does not seek to support the District Court's decision on the facts of the case. WorkSafe did not seek any order for reparation for consequential loss at the sentencing hearing in light of payments made pursuant to life insurance policies of $450,000, along with other payments made by Oceana. Ms Longdill accepted that the payments totalling $200,000 to Mr Stainton's partner and 11-year old son fulfilled Oceana's responsibilities in relation to emotional harm as reflected by the District Court's recognition that a further order for reparation for emotional harm was not warranted.

[86] On Mr Gallaway's calculation, applying the methodology from Schedule 1 of the Act, the statutory shortfall (until the child reached 18) of lost earnings would be $121,275.36. That sum is much less than the payments already made by Oceana.

[87] For the reasons given above, I agree with Mr Gallaway's submission. Taking account of the insurance and voluntary payments made by Oceana, and that the shortfall in accident compensation payments was $120,000 approximately, the reparation order of $350,000 was excessive.

[88] In the present case Mr Stainton's family (partner and child) would be entitled to reparation for emotional harm and for the statutory shortfall for loss of Mr Stainton's income. While the reparation for emotional harm will necessarily depend on the facts of the particular case, recent awards made in the District Court have been in the range of $75,000 to $110,000 in the case of fatal accidents.[34] In Mr Stainton's case, and on the information before the Court an award of between $80,000 and $100,000 would have been appropriate reparation for emotional harm. In addition, the appropriate figure for reparation for the statutory shortfall for loss of earnings was $120,000

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[34] *WorkSafe New Zealand v Transport Waimate Ltd*, above n 16; *WorkSafe New Zealand v Corboy Earthmovers Ltd*, above n 17; and *WorkSafe New Zealand v South Port New Zealand Ltd*, above n 17.

approximately, so in total at the most reparation of $220,000 was appropriate. Oceana made direct payments of $200,000 and its employer provided insurance policy provided a further $450,000 to Mr Stainton's partner and family. Sections 32(6) and 10(1)(c) and (d) of the Sentencing Act apply. In fixing reparation the Court must take into account Oceana's response to the offending and the measures taken by it to make compensation. While the insurance payment was of course made by a third party insurer, Oceana had at least put the cover of a substantial sum in place. Having regard to the compensation of $200,000 paid by Oceana and the measures it took to otherwise make good the harm (economic loss) no further order for reparation was required in this case.

Result

[89] The appeal is allowed. The order for reparation of $350,000 is set aside. As Oceana does not seek repayment, I make an order as suggested by Ms Longdill pursuant to s 350 Criminal Procedure Act 2011 that Oceana is not entitled to the return of the payments made.

Cropp Logging Ltd

[90] Mr Sloan was injured on his first day working for Cropp. However, he was a qualified and competent logger with some 10 years' experience. Mr Sloan was designated as head breaker-out the day he was injured. Mr Sloan's colleague attached a strop to a log situated towards the top of the ridge lying diagonally across the other logs in the pile. It appears the incident occurred when Mr Sloan headed further down the ridge to attach a strop to another log. That was in breach of approved industry guidelines for safely breaking out stacked logs. During this process, a log dislodged and rolled on to Mr Sloan seriously injuring him. At the time of the incident a digger was operating approximately 80 to 100 metres away on a ridge above the location of Mr Sloan. The vibrations of the machine may have elevated the risk of breaking-out by increasing the risk of dislodgement of the logs Mr Sloan was working on.

[91] As a result of the incident Mr Sloan suffered both physical and psychological injuries. The injuries necessitated surgery on internal organs and the use of a catheter for six weeks. As a result of the accident, Mr Sloan's pelvis was broken in four places

and his hip crushed and shattered. His left femur was fractured as was his lower spine. He expects to be left with a severe limp. His relationship with his wife and family has been affected.

[92] WorkSafe conducted an investigation into the incident, following which it concluded that Cropp had breached its obligations by:

(a) failing to complete an Adequate Safety Behavioural Observation of Mr Sloan when he started work;

(b) failing to induct Mr Sloan into his role as head breaker-out; and

(c) failing to ensure that machinery was not operating about the area where Mr Sloan was working.

District Court sentence

[93] Although both Cropp and WorkSafe suggested a figure of $50,000 for reparation, Judge Ingram imposed a reparation order of $80,000. The Judge did not identify what part of that sum was for emotional harm and what was for other loss.

[94] The Judge then assessed Cropp's culpability as high and took a starting point for the fine of $750,000. After taking account of mitigating factors and Cropp's limited financial capacity, the Judge ultimately imposed a fine of $100,000, reparation of $80,000 and costs of $10,000.

Analysis

[95] Cropp appeals the sentence on the ground it was manifestly excessive. Mr Lawson submitted:

(a) the sentencing Judge erred in categorising the appellant's culpability as high; and

(b) the reparation award was excessive in light of the material before the Court.

[96] At the outset of the appeal Mr Lawson confirmed that the fine ultimately imposed was not challenged on appeal but he suggested the Court should make a finding the Judge was wrong to assess Cropp's culpability as high to guide future sentencing. I am not minded to do so. There is no need for this Court to provide further guidance on sentencing in this area (for fines). A full Court did that in *Stumpmaster*. Also, the issue is moot in this case given the ultimate fine imposed. The focus of the appeal was properly on the reparation order.

[97] Mr Lawson does submit that the reparation order of $80,000 was manifestly excessive and the Judge fell into error in the following ways:

(a) the Judge failed to take into account the desirability of consistency in sentencing levels;

(b) the Judge failed to take into account Mr Sloan's contributory conduct;

(c) the Judge took into account an irrelevant matter, namely inflation (without any information); and

(d) the Judge placed too much weight on information relating to Mr Sloan's loss of earnings.

He submitted a reparation order in the range of $20,000 to $30,000 was more appropriate.

[98] I agree the Judge fell into error in the present case by taking account of inflation without any data to support that view and in failing to identify what part of the reparation order was for emotional harm as opposed to reparation for the statutory shortfall loss. However, for the reasons given above, I do not accept the Judge was in error in failing to take account of Mr Sloan's actions.

[99] The evidence is that the statutory shortfall after Accident Compensation entitlements to Mr Sloan is $6,337.15. In addition, there are costs relating to medical

appointments and miscellaneous costs. On that basis an order for consequential economic loss of $7,500 is appropriate. It is also clear the accident and resulting injuries have had a major emotional effect on Mr Sloan and his family. He is struggling to cope with the long-term impact of the injuries, and the effect of his injuries on his life and relationships. In the circumstances reparation in the sum of $50,000, close to the figure suggested by Ms Longdill, is an appropriate figure for reparation for emotional harm.

Result

[100] The appeal is allowed to the extent the reparation order of $80,000 is set aside and replaced with a reparation order in the sum of $57,500.

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Venning J