

Stumped no longer: health and safety sentencing after *Stumpmaster v WorkSafe New Zealand*

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The recently released High Court decision in *Stumpmaster v WorkSafe New Zealand* has provided much needed clarification on the proper approach to sentencing under the Health and Safety at Work Act 2015 (Act). While increased fines for health and safety prosecutions are inevitable under the Act, the decision should make it easier to predict the likely outcome.

The four-step approach to health and safety sentencing

In *Stumpmaster*, a full bench of the High Court heard three sentencing appeals from the District Court that had proposed different approaches. In giving its judgment, the Court detailed a four-step approach to sentencing under the Act:

- Step 1: Assess the amount of reparation
- Step 2: Fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors
- Step 3: Determine whether further orders under sections 152 to 158 of the Act are required
- Step 4: Make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps.

Step 1 - assess the reparation

The first step in sentencing requires the Court to determine the appropriate amount of reparation for victims. The Court noted that, as a matter of logic, the increased level of fines under the Act did not require an adjustment to reparation payments because the harm to the victim is unchanged. The Court considered that even if reparation payments increased, the step four 'proportionality assessment' will control the overall penalty. This means that reparation orders will not be undermined by increased fines.

It is clear that a defendant will receive more credit during this assessment process where steps have been taken to assist the victim as soon as the accident occurred. This being the period of time when the victim and family are usually under the most stress and uncertainty.

Step 2 - setting the fine

Once reparation has been dealt with, the Court will address the level of the fine which requires the Court to place the offending in a culpability band. The *Stumpmaster* case involved appeals against fines imposed on persons conducting a business or undertaking (PCBU) (that were not individuals) for failing to comply with a duty that exposes an individual to a risk of death or serious injury or serious illness. The maximum fine for this offence is \$1.5m (up from \$250,000 under the previous Act).

The new culpability bands have been set as per the table below:

	Old bands	New (current) bands
Low culpability	Up to \$50,000	Up to \$250,000
Medium culpability	\$50,000 to \$100,000	\$250,000 to \$600,000
High culpability	\$100,000 to \$175,000	\$600,000 to \$1m
Very high culpability (restated)	\$175,000 plus	\$1m to \$1.5m

Once the appropriate start point has been identified using the bands, the Court will then consider mitigating and aggravating features and what effect these should have on the fine. While a standard discount of 25% will continue to be given for an early guilty plea, the Court in *Stumpmaster* cautioned against applying global discounts of 25% or 30% for 'other factors' without

considering the unique facts of each case.

The Court said that for a global discount of 30% to be applied the defendant should be able to exhibit all of the mitigating factors to a moderate degree, or one or more to a high degree. This is likely to mean that PCBUs will have to adduce evidence to WorkSafe and the Court in order to justify discounts for each of the mitigating factors.

The Court also indicated that defendants can expect greater uplift in fines if they have relevant previous convictions.

Step 3 - considering other orders

After reparation and level of fine have been set, the Court will consider the other orders available for it to make under the Act being:

- s152: [Order for payment of regulator's costs in bringing prosecution](#)
- s153: [Adverse publicity orders](#)
- s154: [Orders for restoration](#)
- s155: [Work health and safety project orders](#)
- s156: [Release on giving of court-ordered enforceable undertaking](#)
- s157: [Injunctions](#)
- s158: [Training orders](#).

Step 4 - proportionality and appropriateness of the combined packet

The final step involves the Court making an overall assessment of the 'packet of sanctions' it has put together in steps 1 to 3 to determine whether that packet is proportionate to the offending and appropriate. This step includes consideration of the defendant's ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.

Despite the overall theme of the cases being recognition of greater fines, the Court left the door open for a significant downward adjustment of fines where a PCBU's ability to pay is an issue. The Court will consider the financial means of the defendant and it is unlikely to impose a sentencing package that will result in the PCBU becoming insolvent.

One of the three appeals heard was allowed, resulting in a fine reduction from \$380,000 to \$363,000. In dismissing the other two appeals, the Court indicated that while it would have taken a different approach to some of the uplifts and discounts applied, the end figures were broadly accurate. This indicates that it is generally appropriate to assess other District Court decisions on the assumption that the numbers illustrate the new reality for prosecutions under the Act.

This update was written by [Susan Rowe](#) and [Shaun Brookes](#) (Senior Solicitor).

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