Jones v Worksafe New Zealand

High Court Nelson
31 March; 21 April 2015
Dobson J

CRI-2015-406-1; CRI-2015-406-2; CRI-2015-442-6; [2015] NZHC 781

Criminal procedure — Health and safety — Absence of realised harm — Mechanistic approach — Industry standard — Whether fine manifestly excessive — Health and Safety in Employment Act 1992, ss 17 and 19.

Rangi Christopher Holmes (Mr Holmes) was sentenced on two convictions under s 19 of the Health and Safety in Employment Act 1992 to total fines of $15,000. Maria Anna Carlson (Ms Carlson) and Philip Andrew Jones (Mr Jones) were sentenced, and each fined a total of $20,000 on two convictions under s 19 of the Health and Safety in Employment Act 1992.

In both cases, the prosecutions arose out of repeated observations of the appellants riding quad bikes on rural properties without wearing helmets. In both cases, Worksafe inspectors had issued warnings that the appellants should not ride their quad bikes without wearing a helmet and notices had also issued under the Health and Safety in Employment Act 1992 prohibiting conduct that had been observed. In Ms Carlson's and Mr Holmes's cases, they had both been observed on more than one occasion to have young children on their quad bikes with them, also not wearing helmets.

The sentencings challenged in these appeals adopted the sequence of considerations identified in *Hanham & Philp*, and the majority of the points taken on the present appeals criticised the reasoning for misapplying those considerations.

Dobson J agreed that the starting point was to be identified on the basis of culpability, before assessing the financial capacity of the appellants to pay a significant fine, any payment of reparation and other aggravating or mitigating factors relating to the appellants.

In Holmes, on the basis of culpability the District Court settled on $50,000 as the appropriate starting point for the fine.

In Carlson and Jones, on the basis of culpability the District Court settled on $50,000 as the appropriate starting point for the fine for each.

Counsel for the appellants criticised the lack of relevance attributed to the fact that no injuries or harm had actually been suffered by the appellants' relevant failures to adopt safe work practices. Mr MacKenzie

treated the Full Court decision in *Hanham & Philp* as requiring an absence of realised harm to be recognised as lessening the seriousness of the offending.

Dobson J was not persuaded that the absence of harm required the Court to adopt a lower starting point in these cases.

Dobson J recorded that the assessment of culpability was appropriately dominated by the fact that the nature of the risk had repeatedly been identified to the appellants, and Worksafe had taken specific steps to prevent a repetition. Steps that could have been taken to address the risk were readily available to the appellants, and they must be taken to have continued with a course of conduct that disregarded the existence of that risk. Their culpability was compounded by their preparedness to expose young children to the risk. It is a case in which the absence of actual harm is a matter of good luck rather than good management.

The second criticism by counsel for the appellants was that the District Court erred in applying a rigid, inflexible and mathematical application of the sentencing bands from *Hanham & Philp*.

Mr MacKenzie questioned whether the guidelines provided in *Hanham & Philp*, were intended to apply in what he treated as the very different context of dairy farmers riding quad bikes across paddocks. Mr MacKenzie argued that in these cases the District Court failed to consider whether the application of the bands in *Hanham & Philp* was appropriate due to the lack of harm to those involved in the activity and the nature of the cases. He argued that the District Court Judge had made the error often warned about, of applying too mechanistic an approach. The sentencing process was to be "an evaluative exercise, rather than a formulaic one".

Counsel for the respondent supported the District Court Judge's approach in ascertaining a starting point, arguing that it was done in an appropriately evaluative way and was not a mechanistic or unthinking application of the guidelines. Dobson J agreed with Mr Webber that there was nothing in the Full Court reasoning in *Hanham & Philp* that suggested the guidelines provided ought not to apply to small scale dairy farming operations.

The appellants' counsel further alleged there was an error in the District Court Judge's reasoning that he had wrongly treated materials from ACC and Worksafe as evidence of industry standards, when they were no more than aspirational suggestions for improving safety in this area.

In Holmes, the sentencing submissions on behalf of Worksafe included extracts from a Department of Labour publication "Guidelines for the Safe Use of Quad Bikes", and from an ACC publication "Quad Bike Safety: Tips on How to Stay Safe".

In Carlson and Jones, the Worksafe submissions included a fuller version of the ACC quad bike safety publication and the Worksafe best practice guidelines on safe use of quad bikes. In addition, the Court was provided with excerpts from a coronial inquiry into accidents involving

quad bikes on farms. There was specific support for the requirement that helmets always be worn and to prevent children riding adult quad bikes.

Dobson J accepted that the materials provided to the Court by Worksafe did not constitute "industry standards" in the narrow or formal sense. They were aspirational to the extent that they described best practice in terms intended to encourage change of behaviour in farmers' use of quad bikes.

The second aspect of Mr MacKenzie's criticism on this aspect of the sentencings was that the aspirational statements treated as industry standards ignored legislative provisions to the contrary. Mr MacKenzie argued that treating a requirement that helmets must always be worn as an industry standard was inconsistent with the exemption for farmers from the requirement to wear a helmet on a quad bike provided for in r 7.13(1) of the Land Transport (Road User) Rule 2004.

Dobson J agreed with the District Court Judge that the exemption under the Land Transport (Road User) Rule cannot operate to negate an industry standard requiring the wearing of helmets where their absence creates a recognisable risk, and the statutory obligation is for both employers and employees to take measures to avoid such recognisable risks.

Dobson J, on this issue, held that assessing this criticism overall, the Judge had given the materials produced by Worksafe a status as industry standards that was not justified. Dobson J, however, was not satisfied that this led to any material error in the culpability assessment that contributed to the establishment of the starting point.

A fourth alleged error submitted by Mr MacKenzie to have affected the sentencings was the District Court Judge's understanding of the ACC stance on children being on quad bikes. The Judge was not persuaded that any error here is material.

As a result of considerations adopted from *Hanham & Philp* Mr Holmes' fine in the District Court was reduced to $15,000.

As a result of considerations adopted from *Hanham & Philp* Ms Carlson and Mr Jones' fines in the District Court were reduced to $20,000 each.

Mr MacKenzie's alternative submission was that the District Court Judge had overestimated the capacity of Ms Carlson and Mr Jones to pay a substantial fine, and that, if the other grounds of the appeal were unsuccessful, there still ought to be a reduction in the fine to recognise the extent of hardship that would be imposed on them as one economic unit in paying $40,000.

Mr MacKenzie invited Dobson J to take judicial notice of the very substantial drops in pay-outs for milk that have been incurred by dairy farmers in the last six months.

Dobson J was satisfied that the reduced ability of Ms Carlson and Mr Jones to fund substantial fines meant that a reduction from the $40,000 total was appropriate. Dobson J considered that the appropriate "bite" will apply if the appeal was allowed on this ground, and fines totalling $30,000 ($15,000 for each appellant) were substituted.

Mr Holmes' records showed numerous fortnightly automatic payment commitments that Mr Holmes was paying, at least at that time the fine was incurred. On the financial information provided, it appeared that Mr Holmes would be unable to afford much more than $100, or say $125, per fortnight. At the upper end of that range, Mr Holmes would be paying the fine for some four-and-a-half years. Having regard to all the circumstances of this appeal, Dobson J considered that the $15,000 fine was manifestly excessive. Dobson J allowed Mr Holmes' appeal, quashed the sentence of a $15,000 and substituted it with total fines of $12,000. They were to be applied equally to the two convictions.

Held: (appeals allowed)

(1) The Court held that the absence of harm does not require the Judge to adopt a lower starting point. It is a case in which the absence of actual harm is a matter of good luck rather than good management (see [40], [41]).

(2) The sentencing bands in *Hanham & Philp* are relevant in measuring culpability on a case-by-case basis, but the nature of the industry or size of the operation cannot require rejection or modification of the guidelines in *Hanham & Philp* (see [46]).

(3) Where materials are provided and intended as evidence of industry standards, the reliance placed on them may need to be tempered by their relative standing for conduct in the relevant workplace activities. They are aspirational to the extent that they describe best practice in terms intended to encourage change of behaviour in farmers' use of quad bikes (see [57], [58]).

(4) Dobson J held that the exemption under the Land Transport (Road User) Rule cannot operate to negate an industry standard requiring the wearing of helmets where their absence creates a recognisable risk, and the statutory obligation is for both employers and employees to take measures to avoid such recognisable risks (see [60]).

(5) Where the income of the appellants have reduced since the sentencing fine was administered the Court may reduce the fine (see [70]).

(6) Where an employee being paid wages at a relatively modest level, and having numerous existing commitments, is penalised more than is necessary to reflect the relative seriousness of this offending, and the fine would do more than "bite", the Court may reduce the fine (see [73]).

Cases mentioned in judgment

Department of Labour v Concrete Drilling & Cutting (1992) Ltd DC Wellington CRI-2011-085-3423, 13 December 2011.

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

Department of Labour v Kiwi Plastic Co Ltd DC Porirua CRN11091500316, 27 July 2011.

Department of Labour v Schroder DC Palmerston North CRI-2009-054-2204, 15 September 2009.

Department of Labour v Sequal Lumber Ltd Partnership DC Whakatane CRI-2012-087-398, 17 July 2012.

Department of Labour v Street Smart Ltd (2008) 5 NZELR 603 (HC).

Department of Labour v VLI Drilling Pty Ltd DC Greymouth CRI-2011-018-1036, 26 October 2012.
Nelson v Ministry of Business, Innovation and Employment [2015] NZHC 218.
Nuku v R [2012] NZCA 584, [2013] 2 NZLR 39.
Proform Plastics Ltd v Department of Labour [2013] NZHC 583, (2013) 10 NZELR 449.
R v AM [2010] NZCA 114, [2010] 2 NZLR 750.
Worksafe v Collings DC Christchurch CRI-2014-009-4683.
Worksafe New Zealand v Holmes DC Nelson CRI-2014-042-599, 14 May 2014.
Worksafe New Zealand v Jones DC Blenheim CRI-2014-006-757, 16 December 2014.

Application

This application determines appeals by Rangi Christopher Holmes and Maria Anna Carlson and Philip Andrew Jones for sentences imposed.

TJ MacKenzie and *MJ McKessar* for the appellants.
JM Webber and *BM Brabant* for the respondent.

DOBSON J.

Table of contents

Background

[1] This judgment determines two appeals against sentence where the District Court has imposed substantial fines on convictions for offending against ss 17 and 19 of the Health and Safety in Employment Act 1992 (the HSE Act). Under s 50(1)(a) of that Act, the maximum fine on such convictions is $250,000.

[2] In the first case, Rangi Christopher Holmes (Mr Holmes) was sentenced in the Nelson District Court on 14 May 2014 on two convictions under s 19 of the HSE Act to total fines of $15,000. Mr Holmes only initiated an appeal in February 2015 and accordingly requires leave to pursue the appeal. Leave was opposed and I address that issue at [18]–[21] below.

[3] After receiving a sentencing indication on 18 November 2014, Maria Anna Carlson (Ms Carlson) and Philip Andrew Jones (Mr Jones)

were sentenced, consistently with the indication, in the Blenheim District Court on 16 December 2014. They were each fined a total of $20,000 on two convictions under s 19 of the HSE Act and have pursued a timely appeal from those sentences.

[4] In both cases, the prosecutions arose out of repeated observations of the appellants riding quad bikes on rural properties without wearing helmets. In both cases, Worksafe inspectors had issued warnings that the appellants should not ride their quad bikes without wearing a helmet. In both cases, notices had also issued under the HSE Act prohibiting conduct that had been observed.

[5] In Ms Carlson's and Mr Holmes's cases, they had both been observed on more than one occasion to have young children on their quad bikes with them, also not wearing helmets.

[6] In his sentencing of Ms Carlson and Mr Jones, Judge Zohrab referred back to the approach and reasoning he had adopted in sentencing Mr Holmes. Given the substantial consistency between the two sentencings, it was appropriate to hear the substantive argument on both appeals together. By agreement with counsel, I adopted that procedure, reserving the issue of whether Mr Holmes was to be granted leave to appeal until the substantive merits of his case had been aired.

The law

[7] Mr Holmes's charges were brought under s 19 of the HSE Act, which provides as follows:

> **19. Duties of employees** — Every employee shall take all practicable steps to ensure —
>
> (a) The employee's safety while at work (including by using suitable protective clothing and suitable protective equipment provided by the employer or, if section 10(4) applies, suitable protective clothing provided by the employee himself or herself); and
>
> (b) That no action or inaction of the employee while at work causes harm to any other person.

[8] Two charges were brought against each of Ms Carlson and Mr Jones under s 17, which is the comparable provision for self-employed personnel and provides:

> **17. Duties of self-employed people** — Every self-employed person shall take all practicable steps to ensure that no action or inaction of the self-employed person while at work harms the self-employed person or any other person.

The approach to such sentencings

[9] The approach to sentencing on convictions under these provisions was considered by a Full Court of the High Court in three appeals determined in December 2008.[1] The sentencings challenged in these appeals adopted the sequence of considerations identified in *Hanham & Philp*, and the majority of the points taken on the present appeals criticised the reasoning for misapplying those considerations.

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

[10] The Court in *Hanham & Philp* acknowledged that primacy should be accorded to reparation, where a prosecution arose out of an accident where injury or death had occurred. That was not the case here, so the sequence of considerations begins with what was step two in the *Hanham & Philp* analysis, namely fixing the amount of the fine that is to be imposed. In setting a starting point, the Court is to blameworthiness for the offending. That assessment was treated by the Full Court as including:[2]

- 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.
- 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.

[11] After acknowledging an earlier High Court observation that the level of penalties "must bite, and not be at a 'licence fee' level",[3] the Full Court stated that starting points should generally be fixed according to the following scale:[4]

Low culpability:	a fine of up to $50,000
Medium culpability:	a fine of between $50,000 and $100,000
High culpability:	a fine of between $100,000 and $175,000

[12] The starting point is to be identified on the basis of culpability, before assessing the financial capacity of the defendant to pay a significant fine, any payment of reparation and other aggravating or mitigating factors relating to the defendant. Predictably, any warnings or notices issued under the HSE Act were identified as a potential aggravating factor. Mitigating factors might include a guilty plea, cooperation with the authorities in relation to an investigation and prosecution of the offence, remorse shown for any harm caused by the offending, any remedial action to prevent a recurrence, and a favourable safety record.

[13] Mr MacKenzie submitted that a different emphasis was required because of the final observation in the following extract from the judgment in *Hanham & Philp*:[5]

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2 *Department of Labour v Hanham & Philp Contractors Ltd*, above n 1, at [54].
3 Citing *Department of Labour v Street Smart Ltd* (2008) 5 NZELR 603 (HC) at [59].
4 *Department of Labour v Hanham & Philp Contractors Ltd*, above n 1, at [57].
5 At [52].

> Mr Stanaway [counsel for the Department as appellant] emphasised that sentencing levels should take into account the potential for harm, since the purpose of the HSE Act was to prevent harm in the workplace. It followed, in his submission, than even when the actual harm resulting from the offending was at a relatively low level, the court should have regard to the potential for harm when fixing the appropriate fine. Mr Stanaway also submitted, correctly in our view, that very serious injury or death can sometimes result from low levels of carelessness on the part of the offender. It follows that care must be taken when assessing culpability by reference to the outcome. On the other hand, both the HSE Act and the Sentencing Act oblige the court to have regard to the degree of harm that has occurred.

[14] His point was that lack of any injury in both cases had to be taken into account as lessening the seriousness of the offending.

The Judge's approach: Holmes

[15] The factors affecting Mr Holmes's culpability were the ability to take practical steps, namely wearing a helmet, when he could have done so, and to have elected not to carry passengers where the offence included carrying a young child on the quad bike. The risk of harm was seen as high, although no harm actually was suffered. Mr Holmes had previously dealt with inspectors, and was well aware of his employer's requirements, which included a prohibition notice against using the quad bike without wearing a helmet.

[16] Accordingly, the Judge treated him as departing from prevailing standards in the relevant industry to a high degree. The hazard was treated as an obvious one where a risk was created by carrying children on the quad bike and not wearing a helmet. Taking those factors into account, and that there were less and more serious features than another prosecution in *Schroder*,[6] the Judge settled on $50,000 as the appropriate starting point for the fine.

[17] Mr Holmes's cooperation with the inspectors, and it being his first offence under the legislation, justified a 10 per cent reduction, as well as a further 25 per cent reduction on account of his guilty plea. That would have resulted in a fine of $33,750, but at that point the Judge considered his financial capacity. He concluded that Mr Holmes was not a wealthy person and recognised that the size of the fine had to take into account his personal circumstances. The Judge treated Mr Holmes as having modest financial circumstances and reduced the fine to $15,000.

Holmes: leave to appeal

[18] Mr Holmes cited lack of appropriate legal advice as one ground for seeking leave to appeal approximately eight months out of time. Worksafe disputed that Mr Holmes had proceeded without the benefit of legal advice, and in oral submissions Mr MacKenzie advised that no more was made of this point than that Mr Holmes did not have prompt and appropriate advice after the sentencing. Rather, he had

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6 *Department of Labour v Schroder* DC Palmerston North CRI-2009-054-2204, 15 September 2009.

returned to the farm, somewhat shell-shocked, and "buried his head in the sand" about the severity of the consequences.

[19] Mr MacKenzie submitted that it was in the interests of justice to grant the leave sought because there was a genuine issue as to the appropriateness of the approach adopted to sentencing, and the extent to which a fine in such circumstances ought to be punitive. He argued that there could be no prejudice to the respondent, particularly as the appeal was conveniently dealt with at the same time as the Carlson and Jones appeal, where the Judge in the latter sentencing referred back to the approach adopted in sentencing Mr Holmes.

[20] Mr Webber submitted that Mr Holmes could not advance his case for leave on the basis of lack of legal advice, when there was no compelling reason that the advice he subsequently relied on could not have been sought and obtained in a timely way. Mr Webber did not contend that Worksafe was prejudiced by the delay.

[21] In the circumstances, I consider it is appropriate to grant leave for the appeal to be pursued out of time. Particularly as the issues are being aired in any event in the Carlson and Jones appeal, and the Judge's approach in that sentencing was influenced by the earlier sentencing of Mr Holmes. Further, the appeals raise genuine points for reconsideration so it is in the interests of justice to deal with the Holmes appeal on its substantive merits.

The Judge's approach: Carlson and Jones

[22] Judge Zohrab explained the sequence of considerations for sentencings somewhat more fully in his sentencing indication than when he subsequently adopted a consistent approach in sentencing Ms Carlson and Mr Jones.

[23] Ms Carlson and Mr Jones are partners in a share-milking partnership and are accordingly treated as self-employed for the purposes of the responsibilities under the HSE Act. Worksafe had significant contact with them as part of its quad bike harm reduction project. The Judge distilled the following from the summary of facts:[7]

> WorkSafe had a number of engagements with the partnership. On 29 March 2012 there was an observation made, then on 10 May 2012 an inspector met with Mr Jones regarding quad bike safety. On 16 October there was a written warning issued to Mr Jones. On 6 March 2013 there was a written warning issued to Ms Carlson. On 23 August 2013 an inspector witnessed Mr Jones again not wearing a helmet whilst riding the quad bike. He refused to engage with him and walked away, acknowledging he had previous interactions with the inspectors.
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> On 3 October 2013, after again observing Mr Jones riding without a helmet, there was a prohibition notice issued stating that the partnership had to stop riding quad bikes without helmets. That prohibition notice was affixed to the milking shed and also handed to Ms Carlson by officers.
>
> So against the background of those dealings, and the prohibition notice, there was an incident on 30 January where an inspector sighted and took

7 *Worksafe New Zealand v Jones* DC Blenheim CRI-2014-006-757, 16 December 2014 at [6]–[8].

> photographs of a blonde woman riding a quad bike without a helmet. Then there was a second incident on 6 February 2014 where an inspector observed a person that he recognised to be Ms Carlson riding a quad bike with no helmet on outside the milking shed. There were also two young children, also not wearing helmets, observed on the quad bike, and there was a prohibition notice still in place at that time.

[24] It appears that on the final occasion, the quad bike was actually carrying helmets but Ms Carlson stated she was not wearing one because it was just a little bit of a hassle.

[25] The Judge adopted the sequence of steps from *Hanham & Philp*, and referred back to the sequence of considerations he had explained in his sentencing indication. Those involved assessing culpability by reference to the operative acts or omissions at issue, which involved the ability to put on helmets when they were available, to reduce a very significant risk. So far as carrying children was concerned, the Judge cited materials that had been provided by Worksafe stating that children under 15 or 16 should not be "within cooey" of being allowed to ride an adult sized farm bike. The Judge treated the hazard as being relatively obvious and that that affected the level of culpability. Not only was the use of helmets a matter of common sense, but the defendants had been put on notice of the need to do so through the issue of a prohibition notice.

[26] The Judge considered that the appellants' rejection of the need to wear helmets was a departure from standards prevailing in the industry. The Judge did not accept that farmers riding quad bikes could treat themselves as exempt from the mandatory requirement to wear helmets because of an exemption available under r 7.13(1) of the Land Transport (Road User) Rule 2004. That exemption is available for quad bikes when moving around a farm property, or from one farm to an adjoining one, at a speed not exceeding 30 kilometres per hour. The Judge reasoned that that exemption arose in a different statutory context, and could not be treated as compromising the need to adhere to the obligations under the HSE Act to avoid risks in the course of employment.

[27] The Judge adopted $50,000 as the starting point for each appellant, treating that as at the top end of the low category from *Hanham & Philp*. He then deducted 15 per cent for personal factors such as Ms Carlson's cooperation, and also in recognition that money had been spent by the couple by way of remedial steps. To the extent that Mr Jones was given 15 per cent for cooperation, it may arguably be seen as inappropriate, given that he had persisted with the practice subsequent to the issue of a prohibition notice and had shunned contact with the inspectors when they called to discuss the issue.

[28] After the first 15 per cent discount, the Judge also treated them both as entitled to a 25 per cent discount for their guilty pleas. That reduced the sum for each of them to $31,875.

[29] The Judge then considered the appellants' financial capacity. In the sentencing indication, he referred back to the deduction he had given on this consideration for Mr Holmes, and assessed Ms Carlson and Mr Jones as one economic unit. He looked at the totality of the offending

and at the impact of the fines on the economic unit. The Judge had available to him a statement of financial position that had been provided by the appellants, which showed what might be treated as a relatively standard financial position for recently established dairy farmers (by today's standards) on a relatively modest scale. Their total assets of some $2.3 million were offset by commercial and family loans of some $1.2 million, with the major secured creditor, the ASB Bank, being repaid principal at the rate of some $6,600 per month. The caveat to the financial disclosure was that the recent financial performance of the farming operation (as at October 2014) reflected a period of much higher milk prices than the dairy industry was receiving at the time of the sentencing.

[30] What the Judge made of the financial situation caused him to adopt a further reduction of $11,000 each, making a final fine for each of $20,000.

Heads of criticism on appeal

[31] Mr MacKenzie advanced four criticisms of the Judge's methodology in arriving at the size of the fines imposed. Criticisms of discrete components in the considerations used to produce an end sentence can be of limited utility to an appellant because it is the appropriateness of the end sentence, not the sequence of considerations by which the sentencing Judge got there, that matters.[8] Bearing that point in mind, it is nonetheless appropriate to review the arguments on these appeals in that sequence.

[32] First, Mr MacKenzie criticised the lack of relevance attributed to the fact that no injuries or harm had actually been suffered by the appellants' relevant failures to adopt safe work practices. Mr MacKenzie treated the Full Court decision in *Hanham & Philp* as requiring an absence of realised harm to be recognised as lessening the seriousness of the offending. He submitted that that was the meaning to be attributed to [52] of the Full Court judgment, as cited at [13] above.

[33] Mr MacKenzie also argued that the factors listed at [54] in *Hanham & Philp* that inform the assessment of culpability (cited at [10] above) implicitly attribute relevance in the second bullet point to both the seriousness of the risk of harm, as well as the extent to which that risk has been realised by injuries actually inflicted.

[34] Further, Mr MacKenzie cited the cross-referencing in s 51A of the HSE Act to the provisions in ss 7–10 of the Sentencing Act 2002, which is coupled in s 51A with references to the financial capacity of the defendant to pay a fine, and the degree of harm, if any, that has occurred.[9]

[35] I am not satisfied that the observations by the Full Court in the last two sentences of [52] of *Hanham & Philp* require a sentencing Judge to necessarily treat an absence of actual harm as requiring the offending to be seen as materially less serious. To do so would risk giving a defendant credit for what may only be a matter of good fortune involved in the circumstances where exposure to a risk did not manifest itself in harm to the persons involved.

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8 Criminal Procedure Act 2011, s 250(2).
9 HSE Act, s 51A(2)(b) and (c).

[36] Mr MacKenzie invited analogy with the High Court decision in *Proform Plastics Ltd v Department of Labour*.[10] In that appeal, Peters J observed:[11]

> Arriving at the appropriate starting point requires the Court to take an overall view of culpability. That said, in *Hanham* the Court made it clear that the Sentencing Act and s 51A of the Act require the Court to take into account the degree of harm resulting to the employee, despite the fact that often a benign outcome will be a matter of good luck rather than good management.
>
> I accept Proform's submission that, at least on the face of her notes, the Judge did not give the degree of realised risk sufficient weight, focusing more on the risk of harm.

[37] The argument on that appeal had focused on a comparison of starting points where an employer's conduct or omissions were comparable, but a ranking of the starting point for fines was discernible by reference to the seriousness of the injury caused to respective employees.
[38] Certainly, the degree of harm that has occurred has to be taken into account. In determining the level of culpability, however, it would rarely be justified to treat the lack of actual harm as transforming the band of culpability into which a particular case would otherwise fit. The nature of the risk which the defendant ought to have been aware of, and the extent to which that risk was realised by actual harm being inflicted, are two components of the culpability analysis.
[39] Mr Webber accepted that the Judge's reasoning in Carlson and Jones did not include any separate recognition of the absence of actual harm. He submitted that in Holmes, there were acknowledgments that the risk had not resulted in harm being inflicted.
[40] Unlike *Proform* where the High Court was persuaded that the sentencing Judge's failure to give sufficient weight to the degree to which the risk was realised had led to an error in identifying the starting point, I am not persuaded that the absence of harm required the Judge to adopt a lower starting point in these cases.
[41] In the present cases, the assessment of culpability was appropriately dominated by the fact that the nature of the risk had repeatedly been identified to the appellants, and Worksafe had taken specific steps to prevent a repetition. Steps that could have been taken to address the risk were readily available to the appellants, and they must be taken to have continued with a course of conduct that disregarded the existence of that risk. Their culpability was compounded by their preparedness to expose young children to the risk. It is a case in which the absence of actual harm is a matter of good luck rather than good management.
[42] The second criticism was that the Judge erred in applying a rigid, inflexible and mathematical application of the sentencing bands from *Hanham & Philp*.

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10 *Proform Plastics Ltd v Department of Labour* [2013] NZHC 583, (2013) 10 NZELR 449.
11 At [20]–[21].

[43] Mr MacKenzie questioned whether the guidelines provided in *Hanham & Philp*, which arose out of death or serious injury in commercial workplaces, were intended to apply in what he treated as the very different context of dairy farmers riding quad bikes across paddocks. Mr MacKenzie argued that in these cases the Judge failed to consider whether the application of the bands in *Hanham & Philp* was appropriate due to the lack of harm to those involved in the activity and the nature of the cases. He argued that the Judge had made the error often warned about, of applying too mechanistic an approach.[12] The sentencing process was to be "an evaluative exercise, rather than a formulaic one".[13]

[44] Mr MacKenzie submitted that, had the Judge taken into account other decisions, such as those arising in the forestry industry, a lower starting point would have been identified. He cited the decision in *Nelson v Ministry of Business, Innovation and Employment*,[14] where the appellant breached forestry regulations in the course of felling a tree, killing a fellow employee. The final sentence of $35,000 in the District Court was reduced on appeal to $15,000.

[45] In *Department of Labour v Sequal Lumber Ltd Partnership*, an employee had tripped and fallen into a bark conveyor, suffering a serious injury.[15] It was found that deficiencies in the work system had contributed to the cause. A finding on culpability being on the cusp between low and medium categories led to a starting point of $60,000. Mr MacKenzie urged that there was more than $10,000 difference in the level of culpability between that case and the present.

[46] Mr Webber supported the Judge's approach in ascertaining a starting point, arguing that it was done in an appropriately evaluative way and was not a mechanistic or unthinking application of the guidelines. I agree with Mr Webber that there is nothing in the Full Court reasoning in *Hanham & Philp* that suggests the guidelines provided ought not to apply to small scale dairy farming operations. That aspect of the context will be relevant in measuring culpability on a case-by-case basis, but the nature of the industry or size of the operation cannot require rejection or modification of the guidelines provided by the Full Court.

[47] As to comparisons with other cases that might suggest a lower starting point, Mr Webber disputed the analogy that Mr MacKenzie had drawn from the *Nelson* decision. The component dealt with in that appeal was the liability of an employee of the logging company in his personal capacity. He was also a 40 per cent shareholder in the company, which had been fined $60,000 and paid reparation of $75,000. Accordingly, by the time Mr Nelson's fine was reduced on appeal, the total financial imposition on him and the company was some $165,000. The High Court referred to the case as containing an unusual combination of factors. Mr Webber pointed out that the starting point for Mr Nelson's culpability for the breach was $60,000, with the final reduction reflecting his ability

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12 See, for example, *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [36].
13 *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39 at [40].
14 *Nelson v Ministry of Business, Innovation and Employment* [2015] NZHC 218.
15 *Department of Labour v Sequal Lumber Ltd Partnership* DC Whakatane CRI-2012-087-398, 17 July 2012.

to pay and not his culpability. Similarly, in *Sequal*, the starting point of $60,000 took into account numerous positive aspects of the employer's health and safety approach as affecting its culpability, so that the contrast in assessing culpability was not as great as Mr MacKenzie had suggested.

[48] Mr Webber cited a range of other cases which illustrated that starting points at the upper end of band one and the lower end of band two are not unusual in cases where no actual harm was caused.[16]

[49] I am not persuaded that the Judge's analysis was inadequate before settling on $50,000 as the starting point. The assessment of the level of culpability is specific to the facts of the situation confronting the Judge, and in both cases there were ample features that justified placing the culpability in these cases at the top of the first band. Adequate allowance can be made for distinctions such as the nature of the industry in which the acts or omissions occurred in subsequent steps in settling on a final sentence.

[50] The third alleged error in the Judge's reasoning was that he had wrongly treated materials from ACC and Worksafe as evidence of industry standards, when they were no more than aspirational suggestions for improving safety in this area.

[51] The Full Court in *Hanham & Philp* had observed that relevant material relating to industry standards should be supplied to the Court wherever it was available.[17] This was seen as an aid to the Court in assessing the level of culpability, recognising that the informant is likely to have a body of knowledge about the practices in the industry in which a prosecution arises.

[52] In Holmes, the sentencing submissions on behalf of Worksafe included extracts from a Department of Labour publication "Guidelines for the Safe Use of Quad Bikes", and from an ACC publication "Quad Bike Safety: Tips on How to Stay Safe".

[53] In Carlson and Jones, the Worksafe submissions included a fuller version of the ACC quad bike safety publication and the Worksafe best practice guidelines on safe use of quad bikes. In addition, the Court was provided with excerpts from a coronial inquiry into accidents involving quad bikes on farms. The excerpt included recommendations which endorsed the programme and projects MBIE had instituted to support guidelines for the safe use of quad bikes. There was specific support for the requirement that helmets always be worn and to prevent children riding adult quad bikes.

[54] Mr MacKenzie criticised the Judge for treating these materials as evidence of industry standards. In Carlson and Jones, the Judge found that the failure to wear helmets departed from prevailing standards:[18]

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16 *Proform Plastics Ltd v Department of Labour*, above n 10; *Department of Labour v VLI Drilling Pty Ltd* DC Greymouth CRI-2011-018-1036, 26 October 2012; *Department of Labour v Concrete Drilling & Cutting (1992) Ltd* DC Wellington CRI-2011-085-3423, 13 December 2011; *Worksafe v Collings* DC Christchurch CRI-2014-009-4683, and *Department of Labour v Kiwi Plastic Co Ltd* DC Porirua CRN11091500316, 27 July 2011.

17 *Department of Labour v Hanham & Philp Contractors Ltd*, above n 1, at [55].

18 *Worksafe New Zealand v Jones*, above n 7, at [27].

> In terms of the degree of departure from standards prevailing in the relevant industry, fortunately I think that times have moved on, that farmers are better educated and more enlightened, and it is not a situation where this sort of requirement is routinely ignored. There has been significant publicity and Agriculture Industry Training Organisation, the health and safety and employment people have all been trying to educate farmers, and there has been attendant publicity given the number of deaths each year and also injuries as well.

[55] Mr MacKenzie argued that there was no evidence to justify this finding, and nor could the Judge reach the conclusion on his own by way of taking judicial notice of these matters because the facts are not uncontroverted.[19]

[56] It appears that the Judge's reference to the Agriculture Industry Training Organisation relied on a statement on the back cover of the ACC quad bike safety publication, where it was stated:

> Endorsed by the New Zealand Agricultural Health and Safety Council and proudly supported by the Ministry of Business, Innovation and Employment.

[57] I accept that the materials provided to the Court by Worksafe do not constitute "industry standards" in the narrow or formal sense that may have been contemplated by the Full Court in *Hanham & Philp*. They are not of the same type as, say, the precise definition of the safe mode of operating a particular type of saw in a sawmill or a joinery factory. Nor are they issued by an industry group with specific responsibility for promulgating standards for the safe operating practices within the industry. They are aspirational to the extent that they describe best practice in terms intended to encourage change of behaviour in farmers' use of quad bikes.

[58] This distinction does not mean that such materials are not appropriately placed before the Court, but the reliance placed on them may need to be tempered by their relative standing for conduct in the relevant workplace activities.

[59] The second aspect of Mr MacKenzie's criticism on this aspect of the sentencings was that the aspirational statements treated as industry standards ignored legislative provisions to the contrary. Mr MacKenzie argued that treating a requirement that helmets must always be worn as an industry standard was inconsistent with the exemption for farmers from the requirement to wear a helmet on a quad bike provided for in r 7.13(1) of the Land Transport (Road User) Rule 2004. The point had been made to the Judge, but he dismissed the statutory exemption in the land transport legislation as not compromising the appropriate industry standard because of the different purposes of that legislation. Mr MacKenzie asked rhetorically if Parliament had exempted farmers from the requirement to wear helmets on quad bikes, how could the Court recognise an industry standard that required helmets to be worn.

[60] I agree with the Judge that the exemption under the Land Transport (Road User) Rule cannot operate to negate an industry standard

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19 Compare Evidence Act 2006, s 128.

requiring the wearing of helmets where their absence creates a recognisable risk, and the statutory obligation is for both employers and employees to take measures to avoid such recognisable risks. At most, the inconsistency is an anomaly and the purpose of the HSE Act could never have been intended by Parliament to be subverted by the land transport exemption.

[61] Assessing this criticism overall, the Judge has given the materials produced by Worksafe a status as industry standards that was not justified. I am, however, not satisfied that this led to any material error in the culpability assessment that contributed to the establishment of the starting point.

[62] A fourth alleged error submitted by Mr MacKenzie to have affected the sentencings was the Judge's understanding of the ACC stance on children being on quad bikes. In both sentencings, Judge Zohrab cited ACC material as suggesting that children should not be allowed "within cooey" of being on a quad bike.[20] In contrast, Mr MacKenzie argued that the ACC material only stated that children should not be allowed "within cooey" of driving a quad bike.

[63] The claimed misconstruction is understandable. The ACC publication included the following:

> Rule of thumb. Abide by the manufacturer's recommendations for the particular bike concerned and currently for adult sized quad bikes this is 16 years of age.
>
> Kids under this age shouldn't be within cooey of being allowed to ride an adult sized farm quad bike. It's just too risky.

[64] In context, the preferable interpretation of this guidance is that parents should not allow children under 16 to be in control of an adult sized quad bike. However, "riding" could apply equally to a pillion passenger as to the rider in control of the quad bike.

[65] I am not persuaded that any error here is material. Although the Judge's reasoning on sentencing may have included a view that the appellants carrying children on quad bikes with them compounded the level of culpability because it breached an industry standard, the more relevant point was that the exposure to a risk that could have been reduced was compounded by putting the children similarly at risk when they were on the quad bikes, and not wearing helmets.

[66] Accordingly, I am not persuaded that the starting point adopted of $50,000 is outside the range that was reasonably available to the Judge.

Financial capacity

[67] Mr MacKenzie's alternative submission was that the Judge had over-estimated the capacity of Ms Carlson and Mr Jones to pay a substantial fine, and that, if the other grounds of the appeal were unsuccessful, there still ought to be a reduction in the fine to recognise the

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20 *Worksafe New Zealand v Jones*, above n 7, at [26] and [33] and *Worksafe New Zealand v Holmes* DC Nelson CRI-2014-042-599, 14 May 2014 at [10].

extent of hardship that would be imposed on them as one economic unit in paying $40,000.

[68] A statement of their financial position as at October 2014 was presented in somewhat informal form, apparently from their accountant. The essence of it is summarised at [29] above.

[69] Mr MacKenzie did not seek leave to update their financial position, but invited me to take judicial notice of the very substantial drops in pay-outs for milk that have been incurred by dairy farmers in the last six months. I am prepared to take judicial notice of the fact that the dairy pay-out is currently not much more than half of the payment levels that were received by dairy farmers, as reflected in the more profitable year reported for Ms Carlson and Mr Jones to 31 May 2014. There can be no reliable projection of how long the current prices will apply. However, the extent of the drop justifies a concern that the ability of Ms Carlson and Mr Jones to pay a large fine is now substantially less than the Judge would reasonably have predicted on the basis of their financial position as reported in October 2014.

[70] The final step in setting the level of fine requires the Court to assess the defendants' financial capacity to pay, so that any reduction from the level of fine that would otherwise be appropriate leaves the penalty at a level that will "bite" in terms of being, at the least, a meaningful sacrifice for those required to pay. The Judge cannot be criticised for not anticipating, in late 2014, the extent of deterioration in Ms Carlson and Mr Jones's financial position. However, in the context of this appeal, it would be unjust not to have regard to it in light of the publicly available information about the state of, and current prospects for, dairy farmers. I am satisfied that the reduced ability of Ms Carlson and Mr Jones to fund substantial fines means that a reduction from the $40,000 total is appropriate. I consider that the appropriate "bite" will apply if the appeal is allowed on this ground, and fines totalling $30,000 ($15,000 for each appellant) are substituted.

[71] No similar financial analysis was offered on behalf of Mr Holmes.

[72] It is not clear from all the material on the file whether Mr Holmes's level of earnings is directly affected in the same way by the level of pay-out, as is the case for Ms Carlson and Mr Jones. The documents on the District Court file include bank statements which suggest that Mr Holmes is in receipt of fortnightly wages from the partnership that employs him. Those records also show numerous fortnightly automatic payment commitments that Mr Holmes was paying, at least at that time.

[73] No material change in circumstances was advanced in support of Mr Holmes's appeal. However, I am left with a similar concern that an employee being paid wages at a relatively modest level, and having numerous existing commitments, is penalised more than is necessary to reflect the relative seriousness of this offending, and the fine would do more than "bite", at the level of $15,000. On sentencing, the Judge acknowledged that Mr Holmes would need to make arrangements to pay the fine of $15,000. On the financial information provided, it appears that

Mr Holmes would be unable to afford much more than $100, or say $125, per fortnight. At the upper end of that range, Mr Holmes would be paying the fine for some four-and-a-half years.

[74] Having regard to all the circumstances of this appeal, I consider that the $15,000 fine is manifestly excessive. I accordingly allow Mr Holmes's appeal, quash the sentence of a $15,000 and substitute it with total fines of $12,000. They are to be applied equally to the two convictions.

Reported by: Cherie Holland, *Barrister*