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# Private prosecutions within health and safety law

Benjamin Johnstone, New Zealand Trustee Services, Christchurch, asks if the potential financial incentives available for victims will cause an increase in litigation

## INTRODUCTION

It is fair to say that New Zealand has a poor health and safety record. With high levels of annual workplace injuries and fatalities, our health and safety legislation influences a large number of New Zealanders. As outlined in the April 2013 "Report of the Independent Taskforce on Workplace Health and Safety", approximately one in ten workers will be harmed while at work in New Zealand every year. WorkSafe has a crucial role as the primary health and safety regulator within New Zealand; it holds the main objective of promoting and contributing to securing the health and safety of the worker and workplaces. The ability to prosecute those who breach health and safety law is one of the enforcement tools available to WorkSafe under the Health and Safety at Work Act 2015 (HSWA).

An inevitable outcome of most successful WorkSafe prosecutions is that the victim will receive a reparation award. However, WorkSafe's decision to prosecute is not victim-centric, and is clearly not financially motivated. Essentially, only a small number of victims get to enter the 'lottery', and this will typically only be in cases involving fatalities or serious harm.

So, the question becomes what recourse is available to those who believe they have been victims of a health and safety breach, and therefore should receive compensation, yet WorkSafe has made the decision to take no action? Individuals and organisations other than the regulator have had the ability to bring private prosecutions since the Health and Safety in Employment Act 1992 (HSEA) was amended in 2002 to enable third parties to initiate prosecutions. Private prosecutions continue to remain available under the HSWA. These prosecutions have been very rare; however, recent developments in the potential reparation awards available to victims may change this significantly. It remains to be seen whether New Zealand courts will see an increase in private, economically incentivised, health and safety litigation. While many reasons may exist for a victim to bring a prosecution, such as holding the offenders accountable, future deterrence of similar offences, or an overall sense of responsibility, this article will focus solely on the potential for a victim to receive significant financial compensation in bringing a successful private prosecution.

There are normally a variety of substantial factors that would influence a decision to undertake a private prosecution, especially when the victim has suffered serious harm. In viewing such a delicate situation from a detached position, the writer apologises for any unfortunate bluntness that may occur. It should also be acknowledged that it is the writer's belief that the role of Worksafe is crucial to our society and is largely underappreciated. In writing this article, I do not mean to infer that WorkSafe is incompetent in any way. When investigating the potential role of private prosecutions in health and safety, it is necessary to enter the discussion with the presumption that there will be health and safety breaches that WorkSafe decides not to take action on, and this is not to say WorkSafe is an ineffective regulator.

## PRIVATE PROSECUTION OVERVIEW

Essentially, under s 144 of the HSWA, a private prosecution may be brought in respect of an offence if:

- WorkSafe New Zealand has not taken, and does not intend to take, enforcement action against any person in respect of the same incident, situation, or set of circumstances; and
- Another regulatory agency has not taken, and does not intend to take, prosecution action under any other Act against any person in respect of the same incident, situation, or set of circumstances; and
- Notification to that effect has been received from WorkSafe New Zealand.

There are also other issues, which are outside the ambit of this article, surrounding the requirement to seek leave of the court (s 144) and time limits for bringing a private prosecution (s 148). Previous cases are rare. At this time, the writer is aware of only five successful private prosecutions in New Zealand (*New Zealand Meat Workers Union v South Pacific Meats Limited* [2012] DCR 877; *Creeggan v New Zealand Defence Force* [2014] DCR 244; *Kelly v Puketi Logging Ltd* [2015] NZDC 15206;*Kelly v M&A Cross Ltd*, DC Rotorua CRI-2014-063-000784, 21 May 2014; *Casey v The University of Otago* [2015] NZDC 17543. It is also unhelpful to look at international jurisdictions with similar health and safety regulations, as private prosecutions are not a feature of the Australian or United Kingdom health and safety regimes. Despite the low numbers of private prosecutions, the fact that successful cases exist suggests that WorkSafe, and previous regulators, have not always made the right call on whether or not to prosecute.

It is also in no way guaranteed that there will be a WorkSafe prosecution following a fatality or serious harm. In *Kelly v Puketi* and *Kelly v M&A Cross*, Nigel Hampton QC acted in two successful private prosecutions following deaths within the forestry industry. The materials on the

regulator's files showed clear health and safety breaches by the employers, and essentially no further investigations or interviews were required to bring prosecutions (Nigel Hampton QC "Legal Viewpoint — Going Private" (2016) 155 Safeguard 7). These somewhat recent cases show that the ability to take a private prosecution is invaluable within health and safety law.

Based on the information available, it appears that New Zealand has not yet seen a victim-instigated private prosecution that was predominantly motivated by financial gain; however, the fact remains that in all of these cases, reparation was awarded to the victims that would not have otherwise been available had a private prosecution not been brought.

## WHAT IS AVAILABLE TO THE VICTIM, FROM A FINANCIAL PERSPECTIVE?

### Sentencing approach

When examining what may be available to the victim, it is important to look at how the courts reach conclusions on appropriate financial amounts in sentencing. The previous approach to sentencing in health and safety cases is well canvased, having been set out by the High Court in the leading case under the HSEA, *Department of Labour v Hanham & Philp Contractors Ltd* [2008] 6 NZELR 79 (HC). The Court determined an appropriate approach to be (at [80]):

1) Assessing the amount of reparation;
2) Fixing the amount of the fine by reference first to the bands and then having regard to aggravating and mitigating factors;
3) Stepping back and making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and the fine.

Although *Hanham & Philp* was dealt with under the HSEA, it was initially agreed that there had been no material changes to the sentencing exercise under the HSWA (*WorkSafe New Zealand v Rangiora Carpets Limited* [2017] NZDC 22587 at [17]).

However, the somewhat recent High Court decision of *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 has altered the sentencing exercise. Under the HSWA, the sentencing approach is now (at [35]):

1) Assessing the amount of reparation;
2) Fixing the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;
3) Determining whether further orders under ss 152–158 of the HSWA are required;
4) Making an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This includes consideration of the defendant's ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.

The High Court noted the HSWA adds a number of potential orders available to the sentencing court that were not available under the HSEA, and the previous sentencing approach set out in *Hanham & Philp* has now been modified to reflect this.

The recent District Court decision of *WorkSafe New Zealand v Stevens and Stevens Limited* [2018] NZDC 19098 adopted the approach laid out in *Stumpmaster*, however, other than the magnitude of the fine, the judgment does not read much differently to previous judgments determined under *Hanham & Philp*. Overall, the decision of *Stumpmaster* does not differ greatly from the methodology laid out in *Hanham & Philp*, and reparation is still regarded as central to the courts' approach.

### Reparation

Reparation is considered the 'first step' in sentencing under health and safety law and is the most relevant aspect of the sentencing exercise, in terms of the focus of this article. It involves a consideration of the statutory framework, taking into account any offer of amends and the financial capacity of the offender. Reparation awards are likely to be the strongest financial incentive for a victim to bring a private prosecution.

The relevant principles for reparation sentencing are set out the Sentencing Act 2002. As noted by the Law Commission, the Sentencing Act contains a strong statutory presumption in favour of reparation (Law Commission "Compensating Crime Victims" (NZLC R121, 2010) at 23). Under s 32(1) of the Sentencing Act, the court is able to order a sentence of reparation if, through or by means of an offence, a convicted offender has caused a person to suffer:

- loss or damage to property; or
- emotional harm;
- loss or damage consequential on any emotional or physical harm or loss of, or damage to, property

As stated in the case of *WorkSafe New Zealand v Rentokil Initial Limited* [2016] NZDC 21294 at [61], the essence of liability for reparation, in terms of s 32(1) of the Sentencing Act, is that an offender must have caused a person to suffer the various types of loss, harm or damage specified through or by means of an offence of which the offender is convicted. There had been relatively little change to the way in which the amount of reparation was calculated by the courts up until 2014. However, on 6 December 2014, the Sentencing Amendment Act 2014 came into force and the subsequent Accident Compensation Corporation (ACC) "top-up" that is now available to a victim, in applicable situations, allows for significantly larger reparation awards.

The far-reaching effects of the Sentencing Amendment Act 2014 on health and safety law are too expansive for this article to cover. However, focusing solely on an individual considering an economically motivated private prosecution — this "top-up" creates potential for higher reparation awards, which is clearly a strong financial incentive. Essentially, victims of health and safety offending may now be entitled to receive larger reparation awards following the amendment of s 32 of the Sentencing Act to allow for the recovery of consequential loss not covered by the Accident Compensation Act 2001.

In the 2009 Supreme Court case of *Davies v Police* [2009] NZSC 47, the Court outlined that loss of earnings which stemmed from physical harm was not able to be the subject of a reparation award under s 32(1) of the Sentencing Act. Section 32 barred recovery of lost earnings over the 80 per cent paid by the ACC, therefore the Court (at [18]) considered that awarding additional reparation awards, related to loss of earnings, would undermine the "social contract" established by the ACC. The Sentencing Amendment Act 2014 essentially overturns this Supreme Court decision. The Amendment Act has changed the wording of s 32(5) from "for

which the Court believes that a person has entitlements" to "for which compensation has been, or is to be, paid" therefore removing the restrictive term of "entitlements".

The practical implications of these alterations came to fruition in the case of *WorkSafe New Zealand v Wai Shing* [2017] NZDC 10333. As outlined by the Court (at [66]): "[t]he ACC scheme intends to provide fair, but not full compensation. It is clear that the intention of the Sentencing Amendment Act 2014 is to allow victims of crime to receive shortfalls not covered by ACC entitlements". Essentially, s 32(5) of the Sentencing Act 2002 now allows reparation to be awarded for the difference between a victim's full earnings and the 80 per cent provided by the ACC. These reparation awards can be substantial and are typically additional to reparations awarded for any emotional harm suffered. They are, therefore, a highly relevant factor if a victim is considering the financial incentives available in a private prosecution.

In *Wai Shing*, the impact of s 32(5) was clearly observed, resulting in a particularly large reparation payment being awarded. In discussing reparation awards, the Court stated (at [78]):

> Ultimately, this is a very clear case where the offenders, through an offence of which they have been convicted have caused the victim to suffer loss consequential on physical harm, bringing the victim's future earnings clearly within the definition of s 32 of the Sentencing Act 2002. The only limitation is therefore the 80% of his earnings that will be covered by ACC.

*Wai Shing* presented the Court with the very kind of loss that the Sentencing Amendment Act 2014 intended to address. The final amount ordered to be paid by the defendant for the ACC shortfall was $226,300, with an additional $110,000 awarded to the worker for emotional harm. It is clear from this decision, that the amendment to s 32 of the Sentencing Act allows the courts to consider much greater awards of reparation in cases of significant life changing harm.

From a financial perspective, the impact of a successful private prosecution on the victim's life could be hugely significant. It is the writer's view that the potential from the ACC "top-up" alone could be enough to incentivise an individual to undertake a private prosecution in the future. Prior to the amendment of s 32 of the Sentencing Act, the victim would not have been entitled to reparation for this loss. Some commentators have stated the impact of the Sentencing Amendment Act 2014 allows a "return to personal injury" (MinterEllisonRuddWatts, 8 February 2015 <minterellison.co.nz/our-view/return-to-personal-injury-damages-claims-covertocover-issue-3>). While this statement may imply the potential for massive amounts of litigation, which is highly unlikely, the writer does anticipate that a situation could arise where a victim chooses to bring a private prosecution against a former employer, and the decision to bring a prosecution is made purely due to the potential financial gain available, based on the increased reparation awards obtainable due to the Sentencing Amendment Act 2014.

Traditionally, the intended use of private prosecution was for victims or concerned citizens who believe the outcome of a criminal investigation should have been, but is not a prosecution, to have a 'last resort' option. Nonetheless, the ability for victims to bring a prosecution under s 144 of the HSWA, combined with the implications of the Sentencing Amendment Act 2014, effectively creates a situation where the criminal law is capable of being used as a replacement for the civil law. There is now significantly more money available in reparation awards, and a successful private prosecution could be economically life-changing, especially to a victim or victim's family who have now been placed in a vulnerable position, due to the breach of the HSWA.

## LIMITATIONS OF A PRIVATE PROSECUTION

### Public prosecution v private prosecution

Lawyers acting in public prosecutions must adhere to the Solicitor-General's Prosecution Guidelines, as well as their obligations set out in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. These obligations are unambiguous and provide structure and understanding to the court process. When acting in public prosecutions, the prosecutor acts in the public interest and does not act for a victim or the family of a victim in the same way as other lawyers act for their clients. Prosecutors must nonetheless always be mindful of the consequences for the victim and take appropriate cognisance of views expressed by the victim or the victim's family, in relation to any significant decision relating to the proceedings (Crown Law Victims of Crime — Guidance for Prosecutors (6 December 2014) at [1]–[2]).

However, issues can arise when looking at the obligations of a lawyer acting in a private prosecution, who are not bound by the same guidelines. As noted in the Crown Law Solicitor-General's Prosecution Guidelines (1 July 2013) at [4]–[5]:

> Private prosecutions are recognised in and regulated by the Criminal Procedure Act 2011 and related legislation such as the Criminal Disclosure Act 2008. The Solicitor-General has only a limited role or authority in relation to private prosecutions, for example when the power to stay a prosecution is exercised or there is a statutory requirement that a prosecutor obtains the Solicitor-General's consent. However, the Solicitor-General expects law practitioners conducting a private prosecution to adhere to the Law Society's general rules of professional conduct and to all relevant principles in these Guidelines.

From a financial perspective, the issues that arise can create complications that may diffuse a victim's economic interest in a private health and safety prosecution.

### Limitations for the lawyer

A lawyer acting in private prosecution under the HSWA will need to consider their prosecutorial obligations, contained in r 13.12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008:

> A prosecuting lawyer must act fairly and impartially at all times and in doing this must—
> (a) comply with all obligations concerning disclosure to the defence of evidence material to the prosecution and the defence; and
> (b) present the prosecution case fully and fairly and with professional detachment; and
> (c) avoid unduly emotive language and inflaming bias or prejudice against an accused person; and
> (d) act in accordance with any ethical obligations that apply specifically to prosecutors acting for the Crown …

In the recent case of *WorkSafe New Zealand v Macready Building Supplies Limited* [2017] NZDC 1760 at [37], the Court noted, "the starting point for the assessment of the

quantum of reparation is the victim impact statement". If the overall intention of the prosecution being brought is to economically benefit the victim, it is tempting for the prosecuting lawyer to accentuate the impact the offence has had on the victim, in order to attract higher reparation awards. However, it is clear from the outset that a lawyer acting in a private prosecution is not a victim advocate. As a prosecuting lawyer, you are not in a position to zealously represent your client and seek a huge financial award, rather it is your obligation to act objectively and avoid unduly emotive language and inflaming bias or prejudice against an accused person.

It will be crucial for lawyers acting in private prosecutions to ensure their duties to the court are adhered to. A client considering a private prosecution for financial gain may have unrealistic expectations as to what the prosecutor is able to. One commentator has acknowledged that prosecuting lawyers will be required to approach potential litigation with care, and balance the nuances of private client instructions with their overriding prosecutorial duty of objective detachment (Tim Mackenzie "Private Health and Safety Prosecutions" (2014) 852 LawTalk). Lawyers should be aware of the potential financial limitations that exist and advise their client from the outset that their obligations may have to trump some instructions.

### Financial limitations for the victim

While general 'access to justice' issues are outside the ambit of this article, financial limitations which may exist for victims are obviously relevant. Even if it is established that the victim has a strong case and significant financial incentives exist, this becomes irrelevant if the financial limitations are too strong. "Costs for the entire process could easily be tens of thousands of dollars, with little cost recovery at the conclusion, although reparation will often result if the prosecution succeeds" (Tim Mackenzie "Legal viewpoint — Going private" (2014) 147 Safeguard 7).

In terms of achieving a just outcome, the ability to bring a private prosecution might seem to be a useful mechanism for unfortunate victims; yet the practical reality is these cases are difficult to pursue. If not undertaken correctly, the prosecuting party could be liable for costs to the defendant. Victims approaching a potential private prosecution should ensure they have a sound basis for doing so and are aware of the entire process. Suggestions that private criminal prosecution will prove an efficient and satisfying use of resources for the victims of crime have to be doubted. It many situations, it appears likely that the expenditure will be significantly in excess of that originally contemplated. The right to take a private prosecution is an important safeguard in cases where the regulator fails to act. However, without the support of a union, pro bono lawyers or a lawyer in the family, the option may become inaccessible ("Community" (2016) 156 Safeguard 60). Anyone contemplating a private prosecution needs to be well-resourced, patient, and probably most importantly, have access to good legal advice.

While private prosecutions offer victims a theoretical alternative if WorkSafe does not pursue a reported breach, in reality, there may be many victims who are still unable to consider this route, purely due to the financial requirements. Those who are under-resourced and in a vulnerable financial position are most likely to suffer from this, which is highly concerning.

## INCREASE IN PRIVATE PROSECUTIONS?

### Likelihood of success

The issue of likelihood of success in a private prosecution is directly relevant and intertwined with the financial incentive factor of considering a financially motivated private prosecution. It is obviously a financial burden to go into a trial with uncertainty, and an expensive exercise to come out of the trial with nothing. The writer argues that, should a private prosecution get past the initial 'hurdles', there is likely to be a much higher prospect of a successful prosecution than with many other criminal proceedings outside of the health and safety realm, due to the fact that the offences within the HSWA are offences of strict liability. Obviously, there are variabilities in each case, and a successful outcome for the prosecution is by no means inevitable. In addition, there are sufficient safeguards in place to avoid vexatious actions. Under s 144 of the HSWA, the three 'hurdles' that exist in bringing a private prosecution are;

1) The regulator takes no action;
2) Notice is received from the regulator that no action will be taken, and;
3) Leave from the court to bring an action must be obtained.

However, if these initial 'hurdles' are avoided, the victim has a strong chance of receiving a reparation award. As stated earlier, the *NZ Meat Workers Union* brought the first successful private prosecution in New Zealand. After the District Court found there had been a breach of the HSEA, the decision was appealed (*South Pacific Meats Ltd v New Zealand Meat Workers Union Incorporated* [2012] NZHC 2424). In her judgment, Justice Mallon stated (at [50]):

> … where an employee is at fault, an employer is not exonerated if the employer has itself failed to take all practicable steps to ensure the safety of the employee. Under the legislation the employer has the primary responsibility."

A similar observation was seen in *Waimea Sawmillers Limited v WorkSafe New Zealand* [2016] NZHC 915, where Justice Collins said (at [63]):

> I have considerable sympathy for Waimea's predicament. Waimea was clearly a conscientious company that had put in place a series of work safety rules which, if complied with, would have ensured [the victim] was not injured. As I have emphasised however, the fact [the victim] was injured is not relevant and the fact that he contributed to his injuries did not in itself negate the obligation on Waimea to take all practicable steps to ensure [the victim] and other employees were not exposed to hazards in the workplace.

Rightfully so, in these cases we see the courts are not willing to find that employee contribution overrides an employer's obligation. It is also clear that employers that are mostly compliant, and generally adhere to health and safety obligations, can still be found liable. This is encouraging to those that may be considering a private prosecution, as they have the knowledge that going down this road is not necessarily a 'dead end', and if sufficient evidence exists, a reparation award would be highly likely.

### The balancing act

When asking whether financial incentives exist, the answer is a resounding yes. However, the question as to whether to privately prosecute is still a difficult one. If WorkSafe is

taking no action, and all the ingredients for a potential private prosecution exist, the circumstances surrounding the alleged HSWA offence can be hugely variable, and a wide array of factors will need to be taken into account.

There has been the potential for private prosecutions to be brought since the Health and Safety in Employment Act 1992 was amended in 2002, yet it took nearly a decade for the first successful case to occur. However, we have seen multiple cases in recent times, and many commentators have noted that health and safety law is certainly an area to watch. There is an increased awareness that private prosecutions exist as a viable alternative. When examining the potential for a surge in litigation, the 'return to personal injury' created by the Sentencing Amendment Act 2014 is perhaps the strongest incentive that exists for a victim considering prosecution. In addition, the Accident Compensation Scheme obviously bars most forms of civil personal injury litigation, which provides much of the economically incentivised litigation in other jurisdictions. Unlike other jurisdictions, the New Zealand courts do not generally encourage litigation for purely economic gain. It is fair to say that, usually, successful litigation in New Zealand results in somewhat nominal awards by the courts. However, this general rule is not seen within health and safety law. The following table sets out the reparation awards in the private prosecution cases to date:

| Private Prosecution Case | Reparation Award |
|---|---|
| *NZ Meat Workers Union* | $5,000 |
| *Creeggan* | $20,000 (on top of the $70,000 already paid) |
| *Kelly v Puketi* | $75,000 |
| *Kelly v M&A Cross Ltd* | $105,000 |
| *Casey* | $60,000 |

These awards are not insignificant. This is likely because a private prosecution is only considered in cases of severity, so the reparation awards will therefore be relatively high if a private prosecution is successful. Although all of the above cases were motivated by non-commercial interests, it is undeniable that, especially in cases of severity, financial incentives clearly exist. Each case is distinct from the next. However, purely from a financial perspective, the writer believes the economic incentives that currently exist will generally outweigh the limitations.

## CONCLUSION

In an ideal world, strengthened legislation, increased funding, more inspectors, and greater worker participation could lead to an increased vigilance over workplace safety. If WorkSafe's '2020' plan to reduce fatalities and serious injuries by 25 per cent in the coming years is implemented successfully, we may see a decline in serious incidents, and therefore a decline in potential private prosecutions. The 'wave of litigation' may never occur. However, this is likely wishful thinking, and the continuation of consistent health and safety incidents throughout the country is highly probable. The writer contends that it is simply not possible for WorkSafe to prosecute in all situations that warrant prosecution and the existence of private prosecutions is crucial for victims. In *Creeggan*, during sentencing, Judge Hastings spoke directly to Sergeant Stevin Creeggan and noted (at [48]):

> … you have managed to create a silver lining from an unimaginable tragedy that has seared itself into the nation's psyche. You have demonstrated what the amended legislation permitting private prosecutions set out to achieve.

**setting aside whether a prosecution is financially motivated, a general increase in litigation means that employers have an added incentive to adhere to health and safety legislation, which is clearly a good thing**

The introduction of private prosecutions to New Zealand's health and safety law was clearly not intended to provide individuals with the option of an obscure version of a personal injury claim. However, taking into account the potential for higher reparation awards, and the perceived likelihood of success if the initial 'hurdles' are crossed, an increase in private prosecutions due to the higher financial incentives available is entirely possible.

While we have not seen financially motivated private prosecutions yet, the writer holds the view that a slight rise in private prosecutions will be seen in health and safety law, and should not be viewed in a negative light. There are sufficient strongholds in place to restrict vexatious or untenable prosecutions, and although the potential rise in private prosecutions may concern employers, we can only hope it will have the effect of creating a safer workplace environment in New Zealand. Fundamental to the writer's positive interpretation of the rise in litigation is a focus on the fact that these financial awards are not exemplary; reparation awards seek to compensate a victim who has suffered harm through the fault of another party's offence. Also, setting aside whether a prosecution is financially motivated, a general increase in litigation means that employers have an added incentive to adhere to health and safety legislation, which is clearly a good thing.

If the regularity of negative health and safety incidents continues to occur within New Zealand, there will be countless future situations that will potentially warrant private prosecution. Due to the success of recent private prosecutions, alongside the higher reparation awards being delivered by the Courts, a larger number of victims may consider bringing a private prosecution to be a viable option. The writer therefore argues it is probable the significant financial incentives now available will have the effect of motivating victims to pursue private prosecutions in search of large reparation awards, therefore causing a slight increase in litigation within health and safety law in New Zealand.

*The writer offers special thanks to Samuel Moore, Barrister. Your regular advice was greatly appreciated.* ❐