



Crime and Punishment: Is the existing offence for reckless breaches of health and safety duties working, or does New Zealand need something new?

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Abstract

New Zealand law currently relies on proof of recklessness as the gateway standard for offences that can allow the Court to impose the highest financial and other penalties under the Health and Safety at Work Act 2015 (HSWA).

Is the existing recklessness offence set out in section 47 of the HSWA fit-for-purpose, or would New Zealand be better served by adopting one (or both) of two available alternatives – a lower standard of gross negligence for conviction, or an additional new offence of corporate manslaughter with higher penalties in cases involving death?

Keywords

reckless; recklessness; Health and Safety at Work Act; gross negligence; corporate manslaughter

Introduction

New Zealand's workplace health and safety record is poor. As a country, we have a long history of bad health and safety performance, highlighted by several catastrophic but potentially avoidable tragedies including the 2010 Pike River Mine disaster, the CTV building collapse in the 2011 Christchurch earthquake, and the 2019 Whakaari/White Island volcanic eruption.

Legislation has historically used a 'carrot and stick' approach to health and safety, with broad duties providing a 'carrot' by giving significant discretion for duty-holders about how to manage risks, and a financial 'stick' comprising regulatory offences and penalties for health and safety offending when things go wrong.

The Health and Safety in Employment Act 1992, the now repealed predecessor to the HSWA, initially provided a maximum fine of \$50,000 for common breaches of workplace health and safety duties.¹ This proved to be woefully inadequate, and average fines of less than \$10,000 did little or nothing to motivate businesses to invest in good health and safety management in the 1990s.

The maximum fine increased to \$250,000 in 2003, but even as average fines rose into the tens of thousands of dollars, there was little discernible improvement in business behaviours or New Zealand's health and safety statistics.²

The introduction of the HSWA increased penalties again in 2016, with maximum fines increasing to \$1.5 million for a body corporate duty holder who breaches a duty and exposes a person to the risk of death or serious injury or illness.³ This is the offence most commonly charged by the main regulator, WorkSafe New Zealand (WorkSafe).

Again, increasing the maximum penalty did not create a major shift in outcomes for workers. It is common to see fines for health and safety offending in the range of \$200,000 to \$400,000 (and occasionally more). Despite this, we continue to hurt and kill people at rates far higher than our major

¹ These offences were charged under section 50 of the Health and Safety in Employment Act 1992. Higher penalties were available for charges under section 49 of the same Act, but those charges were not common as prosecutors needed to prove the defendant knew their act or omission was reasonably likely to cause serious harm to a person.

² This may be a result of businesses perceiving fines to be an operational cost rather than a criminal penalty and because so-called 'white-collar criminals' often do not fear a fine, whereas they do fear their reputation being damaged irreparably by a prison sentence. See for example Nadia Dabee *The Health and Safety at Work Act 2015: the Myth of Increased Deterrence* (2016) 47 VUWLR 585 at 590 and Donald Ritchie's paper *Sentencing Matters, Does Imprisonment Deter? A Review of the Evidence* (Sentencing Advisory Council, April 2011).

³ Section 48 HSWA.

trading partners.⁴ WorkSafe keeps statistics that paint a bleak and broadly static picture in recent years – 74 workplace fatalities in 2016, 80 in 2017, 62 in 2018, 110 in 2019 (when numbers were skewed by the deaths arising from the Whakaari eruption), 69 in 2020, 64 in 2021, 59 in 2022 and 57 in 2023.⁵

Critics seize on these statistics and argue the current regime is not sufficiently punitive and does not incentivise duty holders to really put in the work and ensure positive health and safety outcomes. It is argued that, in practice, the incentives to under-comply are often higher than the incentives to comply (or, even better, over-comply). Essentially, critics say it remains cheaper not to implement good health and safety systems than it does to implement them.⁶

Australia has created better economic incentives for duty-holders, with states and the Federal jurisdiction implementing significant increases to maximum fines.⁷

Our Parliament sought to address the need for meaningful penalties in the HSWA itself, by creating a 'bigger stick' in two ways.

Firstly, the HSWA included a more serious offence when duty holders breach a duty, the breach exposes a person to the risk of death or serious injury or illness, and the duty holder is reckless as to that risk.⁸ The maximum penalty for this offence is a fine of \$3 million for a body corporate, or up to five years imprisonment and/or a fine of \$600,000 for an individual.⁹

Secondly, the HSWA imposed a personal duty on officers, requiring them to exercise due diligence and ensure their organisation complies with its duties and obligations.¹⁰ This put senior governance leaders, including company directors and Chief Executives, at peril if they did not take reasonable steps to ensure their organisations have and maintain safe systems of work. The maximum penalty for breaching this duty is a fine of \$300,000,¹¹ but increases to a maximum of five years imprisonment and/or a fine of \$600,000 if the officer is convicted of a recklessness offence.¹²

Despite these available offences and penalties, WorkSafe and New Zealand's other health and safety regulators have been conservative in their use of them, and when they have filed charges convictions and high fines have not always followed.

This begs the question – why is it so hard to secure convictions and penalties at a level that will change corporate behaviour and see less people harmed in our workplaces?

Recklessness offences in practice

Very few prosecutions have been taken under section 47 of the HSWA in the eight years the HSWA has been in effect. When they have, charges have generally been laid against small enterprise defendants or their officers.¹³ These cases have commonly involved a single leader with significant operational knowledge and oversight and do not necessarily reflect the governance or management of larger enterprises, or how the concept of recklessness might apply to them.

In *WorkSafe v Waste Management NZ Limited*¹⁴ the District Court and, on appeal, the High Court had an important opportunity to consider the test for recklessness in the context of a large organisation. The case is accordingly an excellent test for whether a recklessness offence (and the penalties the

⁴ The Business Leaders' Health & Safety Forum report *Been there. Done that. A report into New Zealand's repeated health and safety failures* (June 2024) at 3.

⁵ WorkSafe's "Fatalities Summary Table" (6 September 2023) at www.worksafe.govt.nz.

⁶ Nadia Dabee *The Health and Safety at Work Act 2015: the Myth of Increased Deterrence* (2016) 47 VUWLR 585 at 585.

⁷ See for example the Australian *Work Health and Safety (Public Notification of Indexed Penalty Amounts) Notifiable Instrument 2024* which allows a new maximum fine of AUD\$16,634,000 for the most severe category 1 offences. The United Kingdom has gone even further - in 2016 the *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline* came into effect and allowed penalties based on a percentage of a defendant's business turnover (not its profit).

⁸ Section 47(1) HSWA. This is commonly known as 'the recklessness offence'. The creation of a recklessness standard was intended to make prosecutions easier than had been the case under section 49 of the Health and Safety in Employment Act 1992.

⁹ Section 47(3) HSWA.

¹⁰ Section 44(1) HSWA.

¹¹ Section 48(2) HSWA.

¹² Section 47(3) HSWA.

¹³ See for example *Civil Aviation Authority v Sarginson* [2020] NZAR 429.

¹⁴ *WorkSafe New Zealand v Waste Management NZ Limited* [2021] NZDC 12388 at [1].

Court can impose) can provide the deterrent effect New Zealand businesses seemingly need to improve their health and safety performance.

The facts require some explanation.

Waste Management NZ Limited's (WMNZ) business included the treatment, management, and disposal of hazardous liquid waste. In August 2017, a worker died from hydrogen sulphide poisoning after a series of systemic workplace failures while he was processing toxic waste. The worker was a well-liked and respected employee who had been employed by WMNZ for nine years as an Operator-Environment, and undertook a range of general tasks at his workplace, a Lower Hutt waste management and treatment plant.

Arrival of the waste and misidentification

In late 2016 and early 2017, WMNZ received two deliveries of waste from a decommissioned electrical substation and stored them at its Lower Hutt facility. On arrival, the waste was mis-recorded as storm water with traces of mercury. In reality, the waste was actually mercury waste containing a sodium sulphide solution, a substantially more toxic substance that required materially different treatment.

The site chemist was absent at the time of the deliveries, and upon his return he failed to properly identify the contents of the containers of waste. These containers remained on site for approximately six months without any testing to pick up the mislabelling error, despite an audit during this time.

The science - a summary

The treatment of liquid waste requires specialist chemical knowledge, to avoid the possibility of harmful chemical reactions. Here, the waste contained sodium sulphide solution and a mercury sulphide precipitate, which is a heavy alkaline.¹⁵ Substances like this can generally be mixed with another alkaline without causing a reaction. However, if the substance is mixed with an acid,¹⁶ a reaction can occur and release hydrogen sulphide gas. This is what occurred.

Events on the day

On the day of the incident, WMNZ's yard supervisor and the Operator-Environment decided to treat the waste. Importantly, neither the branch manager nor the site chemist was on-site at the time.

The supervisor instructed that acid be mixed with the waste in an attempt to complete what he perceived to be a routine task to neutralise it. Adding acid produced hydrogen sulphide, which triggered a hydrogen sulphide sensor and an alarm sounded several times. The workers exited and waited outside until this alarm stopped and was reset.

Gas continued to be emitted, and the supervisor called the site chemist for advice. The chemist suggested the workers add lime and "leave it"(meaning stay away until he returned). The supervisor misunderstood this, and interpreted the advice as being to add lime, leave it for a period, and then come back later. This is what he and the Operator-Environment did.

Later in the shift, after re-entering the area, the Operator-Environment inhaled hydrogen sulphide fumes and collapsed. He died in hospital later that evening.

The prosecution

WorkSafe investigated the incident and concluded that WMNZ had breached the HSWA, laying two charges. One charge alleged a reckless breach of duty contrary to section 47 of the HSWA while the second charge, laid in the alternative, alleged a non-reckless breach contrary to section 48 of the HSWA.

WMNZ acted responsibly and entered a guilty plea to the section 48 charge at an early stage. It denied the section 47 charge and the case proceeded to trial.

In order to commit an offence under section 47 of the HSWA a defendant must:

- have a duty under subpart 2 or 3 of the Act; and
- without reasonable excuse, engage in conduct that exposes any individual to whom that duty is owed to a risk of death or serious injury or serious illness; and

¹⁵ A substance with a pH level above 7.

¹⁶ A substance with a pH level below 7.

- be reckless as to the risk to an individual of death or serious injury or serious illness.¹⁷

The first and second requirements were uncontroversial. By pleading guilty to the section 48 charge WMNZ had effectively accepted it had a duty under subparts 2 and 3 of the HSWA and breached that duty and exposed workers to the risk of harm.¹⁸

To secure a conviction at trial, the focus was on the third element, and WorkSafe needed to prove beyond reasonable doubt that WMNZ had acted recklessly.

Sections 160 and 161 of the HSWA provide that the conduct and state of mind of a person who is an officer, employee, or agent of a corporate defendant can be attributed to that defendant if the person was acting within the scope of their actual or apparent authority.¹⁹

As a result, the focus of much of the evidence at trial was on the knowledge of WMNZ's workers. WorkSafe called 23 witnesses, including WMNZ's branch manager, site chemist, and yard supervisor. WMNZ relied in large part on these same witnesses.

The District Court decision

The term recklessness is not defined in the HSWA, so Judge Hastings drew on previous appellate authority from *R v Harney*²⁰ and *Cameron v R*²¹ to guide his analysis.

The facts of *Harney* concerned a teenager charged with stabbing another during a street brawl. The defendant argued a lack of murderous intent and provocation, but both defences were rejected. In the Court of Appeal Cooke P held that for the defendant to have had the necessary intent to inflict bodily injury he must have acted wilfully or been reckless, which in that context meant having "foresight of dangerous consequences that could well happen, together with an intention to continue the course of conduct regardless of risk".²²

Cameron was a case relating to controlled drugs, and on appeal an issue arose about whether the mental element (what lawyers call mens rea) of dealing with controlled drugs required actual knowledge of the content of the drugs or could encompass recklessness. In the Supreme Court William Young J held that recklessness could suffice, but that in order to prove this recklessness the evidence needed to show the defendant recognised there was a real possibility their actions would bring about a proscribed result and/or that proscribed circumstances existed and, having regard to that risk, those actions were unreasonable.²³

Applying these principles to the facts, Judge Hastings held that in order to convict WMNZ under section 47 of the HSWA WorkSafe needed to prove:

- a 'result' and actions alleged to bring that result to be identified and to expose workers to risk of death or serious injury. Here, WorkSafe alleged the result came about from WMNZ holding waste without a risk assessment and directing/permitting workers to continue the processing of that waste, exposing workers to the risk of harm; and
- a subjective mental element, so that through an employee WMNZ recognised there was a 'real possibility' that its conduct would expose workers to a risk of serious injury or death.²⁴

The second element was critical.

WorkSafe argued that WMNZ did not need to appreciate exactly how a worker might be at risk (ie, it did not need to anticipate the exact chemical reaction that occurred when acid was added to the waste) as long as it was aware of exposure to a similar level of risk. This was consistent with the Supreme Court's analysis in *Cameron*, where a guilty state of mind did not require the defendant to understand the precise analogue, only that it was a controlled drug.

WorkSafe submitted that WMNZ was reckless because it knew the risks associated with holding mercury waste and failed to undertake a risk assessment and implement appropriate controls to

¹⁷ Section 47 HSWA.

¹⁸ [2021] NZDC 12388 at [85].

¹⁹ [2021] NZDC 12388 at [80]-[81].

²⁰ [1987] 2 NZLR 576.

²¹ [2017] NZSC 89.

²² [1987] NZLR 576 at 579.

²³ [2017] NZSC 89 at [73].

²⁴ [2021] NZDC 12388 at [88].

mitigate those risks with the two deliveries of waste it received. WorkSafe relied on the evidence of the actions it led from WMNZ's employees and argued that:

- It was not possible for the waste to have arrived on site without the branch manager and site chemist being aware of its arrival and nature.
- There was limited evidence about the circumstances of the arrival of the waste before the Court, and Judge Hastings was not satisfied beyond reasonable doubt that WorkSafe had proved this.²⁵
- The branch manager's failure to communicate the nature of the waste to the site chemist was a conscious omission which was unreasonable and, therefore, reckless.
- Judge Hastings was not satisfied the branch manager had been specifically told of the risk of neutralising sodium sulphide, or that he fully appreciated the risk. His Honour accordingly had reasonable doubt about whether the branch manager recognised there was a real possibility of harm.
- Aspects of the site chemist's evidence (when he denied knowing there was a material risk) were not credible, including the suggestion that neither he nor the branch manager perceived any risks associated with the waste.
- Judge Hastings did not accept this submission. Instead, His Honour accepted the site manager's evidence as truthful and found there was no reason for the site chemist to think the waste was different to what was labelled, and no evidence the site chemist knew that he would expose the other workers to a risk of death or serious injury. Judge Hastings considered the site chemist had been negligent, rather than reckless.
- The sum of the various employees' knowledge could be consolidated to together show that WMNZ had been reckless.

Judge Hastings noted that employees are included in the class of people specified in sections 160 and 161 of the HSWA, so their recklessness can be attributed to their corporate employer. His Honour suggested that by doing this, Parliament had extended the reach of corporate criminal liability.²⁶

This raises an interesting practical concern. If employees perceive that they are exposed to personal criminal liability (in their capacity as workers),²⁷ they may in the future rely on their individual privilege against self-incrimination and elect not to assist WorkSafe during incident investigations or in giving evidence that could "shine light"²⁸ on their involvement in corporate practices that have led to harm. This could impede WorkSafe's ability to investigate or prosecute future incidents.²⁹

Judge Hastings held that individual employees must be found to have been reckless for a prosecution to prove their employer guilty. Aggregation of knowledge was not permitted or sufficient.

WorkSafe effectively needed to prove beyond reasonable doubt that the yard supervisor recognised there was a real possibility of death or serious injury from processing the waste.

WorkSafe sought to do this, and argued that the yard supervisor was aware of the risk when the alarm sounded multiple times, and that his calling the site chemist was proof of this.

Judge Hastings held this evidence was not sufficient, because the yard supervisor did not know the true nature of the waste and thought it was safe to return to work once the alarm stopped and time passed.

The decision

Judge Hastings held the charge was not proven and acquitted WMNZ. WorkSafe's inability to pinpoint a single reckless individual meant it could not prove WMNZ had been reckless as an organisation.

²⁵ [2021] NZDC 12388 at [128].

²⁶ [2021] NZDC 12388 at [130].

²⁷ The HSWA is clear that this is the case: see section 45 HSWA.

²⁸ [2021] NZDC 12388 at [131].

²⁹ In accordance with section 168 of the HSWA, workers are not usually compellable to give statements to WorkSafe. Neither are officers. This can make things difficult for WorkSafe.

Appeal to the High Court

WorkSafe did not accept defeat quietly, and elected to seek leave to appeal,³⁰ submitting Judge Hastings had erred in his understanding of the law and in the application of that law to the facts. In particular, WorkSafe submitted³¹ that Judge Hastings wrongly:

- considered recklessness required appreciation of the specific way WMNZ's conduct might give rise to the prohibited risk;
- rejected a WorkSafe argument that a person who had taken precautions against a risk could only negate that appreciation of the risk by believing the risk was eliminated; and
- conflated the subjective and objective limbs of recklessness, by not recognising a difference between the appreciation of a risk of harm, and an appreciation that conduct might cause harm.

Unsurprisingly, WMNZ disagreed and submitted Judge Hastings had made no error and the trial judgment should be affirmed.

Simon France J noted³² that the subjective limb of the recklessness test (as explained by the Supreme Court in *Cameron*) is about knowingly engaging in conduct the defendant realises is likely to cause a prohibited outcome. The knowledge that the conduct may cause harm provides the necessary level of criminal fault.

Traditionally, the second (and objective) limb of the test for recklessness is then whether the deliberate taking of the known risk is objectively reasonable. As the level of risk (as understood by the defendant) increases, the likelihood of it being reasonable to take the risk decreases.

France J considered three types of activity by WMNZ:

- knowing the risks involved in storing and treating hazardous waste, holding the waste for six months, not undertaking a risk assessment to determine the waste's contents or assess the health and safety risk, and failing to implement appropriate controls;
- directing and/or permitting workers to process the mercury waste containing sodium sulphide using other chemically reactive substances without first undertaking a risk assessment to assess the risks to health and safety of the intended work and then implementing the appropriate controls; and/or
- directing and/or permitting workers to continue processing the mercury waste knowing there was a real possibility that this conduct was exposing workers to potential harm as a result of unsafe levels of hydrogen sulphide gas.³³

France J considered that only the third activity had the potential to amount to recklessness. The first two series of activities were background facts which could be relevant to the question of whether anyone had the requisite knowledge of the nature of the waste, but were too remote from events on the day of the incident and could not of themselves justify a finding of recklessness.

As a result, France J held that WorkSafe could only prove the charge if it could show a relevant employee of WMNZ were aware of the true content of the waste and that same employee was also aware and foresaw that continuing with the work on the day of the incident might cause death or serious harm.

France J considered and rejected WorkSafe's argument that mitigation of a risk can only negate recklessness if the person involved believes the risk is eliminated. His Honour held that the *mens rea*/guilty mind element requires the employee to understand that the level of risk poses a real possibility of harm. Acts of mitigation inherently involve foresight of a risk; however, mitigation can also suggest that the level of perceived risk has lessened.

France J considered the yard supervisor's conduct, and noted that Judge Hastings had clearly been troubled by this aspect of WorkSafe's case at trial, as WorkSafe needed to prove its own witness had been reckless. It was unusual for WorkSafe to attempt to prove recklessness when it led exculpatory evidence from the person said to have been reckless, denying that he had appreciated a risk to his colleague. France J commented it was "very difficult to understand how the prosecution intended to

³⁰ *WorkSafe v Waste Management NZ Limited* [2021] NZHC 3444; (2021) 18 NZELR 613.

³¹ [2021] NZHC 3444 at [4].

³² [2021] NZHC 3444 at [16].

³³ *WorkSafe v Waste Management NZ Limited* [2021] NZHC 3444 at [21].

discharge its burden of proving recklessness beyond reasonable doubt".³⁴ in those circumstances, and it was contrary to the evidence to claim the yard supervisor had consciously run a risk of harm to his friend and colleague.

France J agreed with Judge Hastings that the evidence did not disclose any single employee with a sufficient guilty mind. Therefore, and damningly for WorkSafe, France J held the prosecution could never have succeeded.

Overall, France J concluded that there was no question of law involved in the proposed appeal, or at least none requiring further judicial analysis. The Supreme Court had already identified the elements of subjective recklessness in *Cameron* and there was no error in Judge Hastings' application of those principles. WorkSafe's proposed appeal, in essence, was intended to challenge findings of fact and require the rejection of aspects of WorkSafe's own evidence from trial. This could not succeed. As a result, the application for leave was declined.³⁵

A note on sentencing in the District Court

After the determination of the appeal, WMNZ was sentenced in the District Court for the charge it had admitted under section 48 of the HSWA.³⁶

WorkSafe sought a starting point of \$1million for the fine, together with significant reparations for emotional harm to the victim's family. WMNZ submitted this was too high.

Judge Davidson (who by then had assumed the conduct of the case from Judge Hastings) considered the seriousness of the hazard to be a defining feature, and commented that WMNZ had only complied with the bare minimum requirements of its resource consent and failed to follow its own intended safe system of work.

The starting point for the fine was fixed at \$850,000, one of the highest starting points seen for section 48 cases at that time and well up in the 'high culpability' range set by the High Court in the sentencing guideline case *Stumpmaster v WorkSafe*.³⁷

Tellingly, however, Judge Davidson did not see WMNZ's conduct as deserving a starting point based on very high culpability. The first defendants to suffer that fate are Whakaari Management Limited and one of the tour operators convicted in March 2024 of health and safety offences after the Whakaari/White Island volcano eruption.³⁸

WMNZ received discounts for its guilty plea, reparations paid, remorse, its good prior health and safety record, and the remedial steps it had taken since the incident. This led to a final fine of \$467,500, less than one third of the maximum available.

WMNZ was also ordered to pay reparations to the victim's widow and the yard supervisor.³⁹

Has *Waste Management* highlighted shortcomings with the status quo?

Critics – including some from within WorkSafe when speaking off the record – argue that recklessness is now too hard to prove. Section 47 of the HSWA was intended to deter unreasonable risk taking and encourage entities to strive for good health and safety outcomes. If recklessness is left in the 'too hard basket' then the penalties it allows are illusory and ineffective in supporting their intended purpose.

It is too soon to be certain, but the *Waste Management* case may well signal the death knell of recklessness charges under the HSWA against large organisations, except in exceptional cases where a single worker has sufficient knowledge and reckless intent to proceed in the face of risk. It is hard to envisage too many cases where workers will willingly admit to acting recklessly, and as soon as worker witnesses for the prosecution deny having relevant knowledge, regulators will rightly be concerned about the difficulty of proffering the necessary evidence to secure a conviction.

If this proves to be the case, and we do not see regulators using charges under section 47 of the HSWA in appropriate cases against large organisations, then the deterrent value of the higher penalties available for reckless offending will effectively be neutered for those large organisations.

³⁴ [2021] NZHC 3444 at [36].

³⁵ [2021] NZHC 3444 at [35].

³⁶ *WorkSafe New Zealand v Waste Management New Zealand Ltd* [2022] NZDC 10178.

³⁷ *Stumpmaster v WorkSafe* [2018] NZHC 2190.

³⁸ *WorkSafe v Whakaari Management Limited & Ors* [2024] NZDC 4119.

³⁹ [2022] NZDC 10178 at [74]-[75].

This would be regrettable, as in reality they are the only class of defendants who have a meaningful ability to pay large fines.

Deterrence

An integral purpose of any offence and penalty regime is deterrence. For lawyers, this refers to a concept of the way to dissuade a defendant and others from behaviour of the same kind. The prevention of crime through the fear of a threatened criminal sanction, or the experience of an actual criminal sanction, is long established.

This deterrence may be general or specific. General deterrence is aimed at reducing crime by directing the threat of a sanction at all potential offenders. Specific deterrence is aimed at reducing crime by applying a sanction to a specific offender to stop them reoffending.

With health and safety offending there is often no expectation of reoffending, although some organisations have been convicted multiple times.⁴⁰ The purpose of deterrence in the health and safety context is accordingly more likely to be general than specific, and may best be seen as sending a message to all organisations about the need to promote and provide good health and safety outcomes through a fear of penalties.

This concept of general deterrence is arguably illogical in the context of strict liability regulatory offending, because for many offences there is no relevant mental element.

In order for deterrence to be effective, a potential offender should ideally:

- realise there is a criminal sanction for the act being contemplated;
- understand the risk of incurring a sanction and take it into account when deciding whether to act;
- believe that there is a likelihood of being caught;
- believe that the sanction will be applied if they are caught; and
- be willing (and able) to alter their choice to act in light of the criminal sanction.⁴¹

Anything which limits these thought processes may detract from the effectiveness of any deterrence. For charges with no mental element, organisations can be guilty without deliberate risk taking, so how can they be deterred?

This all makes charges under section 47 of the HSWA, being the only charge with a mental element (recklessness), especially important for creating a deterrent effect.

It is beyond the scope of this article to assess whether (or how) deterrence is effective in the health and safety context, but New Zealand's continued poor death and injury statistics suggest that question is worth exploring.

There is scope too for wider debate as to whether harsher penalties lead to better health and safety outcomes. Studies⁴² have considered this question in a general criminal context, and reveal that the deterrent effect does not increase or decrease to any substantial degree according to the actual punishment level, because the perceptions of risk upon which deterrence depends do not change according to the actual punishment level to any substantial degree. These studies suggest changes in sentence have to be extremely severe to induce change.

It has been shown that the certainty of punishment is more important than the severity of punishment in providing deterrence.⁴³ Essentially, if individuals consider it likely that they will be caught and punished this is more likely to dissuade them from offending than a harsher penalty which they perceive as very unlikely to be imposed upon them.

In a health and safety context, and recognising that enterprises are usually a collective of management and workers, it seems imperative that the individuals an offence is designed to target (for example directors, managers etc) are deterred.

⁴⁰ For example, various entities in the Talleys Group of companies.

⁴¹ Donald Ritchie's paper *Sentencing Matters, Does Imprisonment Deter? A Review of the Evidence* (Sentencing Advisory Council, April 2011) at 7.

⁴² Donald Ritchie's paper *Sentencing Matters, Does Imprisonment Deter? A Review of the Evidence* (Sentencing Advisory Council, April 2011) at 10, and the work done by the Canadian Sentencing Commission.

⁴³ Donald Ritchie's paper *Sentencing Matters, Does Imprisonment Deter? A Review of the Evidence* (Sentencing Advisory Council, April 2011) at 10.

In order for penalties to achieve this and be effective it must surely be important that we have strong and effective regulators and that potential offenders are aware of the risk of conviction and punishment and perceive that risk as being real. It is an open question whether that is currently the case.

For now, the difficulty in proving charges, and the economic reality that many defendants cannot afford to pay large fines even if convicted of a recklessness offence, suggest that the deterrent effect of section 47 is limited.

So, to improve New Zealand's health and safety record, do we need harsher penalties? Or do we need to make it easier to convict defendants so individuals perceive that there is a real risk of penalties being imposed on them?

Two alternatives

If recklessness is too hard to prove, then as a country we may need to consider other options to create better deterrence and help lift health and safety standards.

One alternative would be to lower the standard for offending under section 47 of the HSWA from recklessness to gross negligence. An offence that is easier to prove may create a heightened perception of risk for businesses and function as a greater deterrent, promoting better health and safety outcomes.

Another alternative is to introduce a new offence of corporate manslaughter, so in cases involving death higher penalties will apply.

Gross negligence

The term "gross negligence" refers to a severe degree of negligence, of a kind which does not involve deliberate risk taking or recklessness but which nonetheless falls far short of the standard expected of a reasonable person.

Proving gross negligence can involve detailed examination of the foreseeability of harm, the seriousness of the potential consequences, and known standards and guidance. These are all matters health and safety practitioners are familiar with, and they are currently assessed when deciding what is reasonably practicable. The assessment of gross negligence involves nuance and shades of grey for deficient conduct within that broader question of what is reasonable in particular circumstances.

The so-called Model Work Health and Safety Law (Model Law) is used in most Australian states as the basis for their health and safety legislation. The HSWA is based on this, but things have been changing in Australia, leaving New Zealand out of step.

By its Work Health and Safety Amendment (Review) Act 2020, New South Wales expanded its existing offence requiring proof of recklessness and allowed proof of gross negligence to suffice as an alternative.

In 2023 SafeWork Australia followed suit and introduced a Model Work Health and Safety Legislation Amendment (Gross Negligence Offences) 2023. This creates a new tier of offence based on gross negligence. When considering the defendant's conduct, the proposed law change will allow gross negligence to:

be evidenced by the fact that the prohibited conduct was substantially attributable to:

- (a) *Inadequate corporate management, control or supervision of the conduct of 1 or more authorised persons; or*
- (b) *Failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.*

Importantly, the proposed law change will also allow the necessary fault element for a defendant organisation to be proved by aggregating the conduct of more than one person, when the behaviour of relevant people is assessed as a whole. This is what WorkSafe suggested, and France J rejected, in *Waste Management*.

Would this type of law change work in New Zealand? While a hypothetical exercise, it could well do so. For example, it is easy to imagine Judge Hastings having been willing to convict WMNZ of this new offence, if it had been the applicable legal standard here when *Waste Management* was decided.

There is no discernible clamour for the introduction of a gross negligence standard here, although it would preserve our previous alignment with the Model Law. It would almost certainly lead to more convictions under section 47 of the HSWA and higher fines for larger corporate defendants.

There is no fundamental reason New Zealand and Australia need to have fully aligned health and safety laws, and the HSWA already differs from the Model Law in some important respects.⁴⁴

To the extent there is merit in this, the law change proposed by SafeWork Australia seems worthy of close consideration. It will be interesting to analyse data from Australia in the future and see if changes there are effective and any measurable improvement in health and safety standards and performance can be identified.

Industrial manslaughter

Industrial manslaughter offences have been passed in all Australian state jurisdictions except New South Wales and Tasmania. Both are currently in the process of enacting similar laws.

One example is Queensland, where section 34C of the state's Work Health and Safety Act 2011 provides:

34C Industrial manslaughter- person conducting business or undertaking

(1) A person conducting a business or undertaking commits an offence if-

(a) a worker-

(i) dies in the course of carrying out work for the business or undertaking; or

(ii) is injured in the course of carrying out work for the business or undertaking and later dies; and

(b) the person's conduct causes the death of the worker by the conduct; and

(c) the person is negligent about causing the death of the worker by the conduct.

A case example shows the potential of this offence.

Brisbane Auto Recycling Pty Limited (Brisbane Auto) operated a vehicle wrecking business, including the purchase of used motor vehicles for resale, recycling, and parts. Work was supervised by the company's directors. In 2019, a casual worker was struck by a forklift being reversed by another employee. The injuries were fatal.

One of the directors assisted after the incident. When he called for an ambulance, the director lied about what had happened, saying the worker had fallen off the forklift. He later repeated this lie to the victim's daughter.

The incident had been captured on CCTV, and when the daughter requested and saw the footage, she realised her father had been crushed by the forklift and not fallen from it. The daughter notified the Police and they and Workplace Health and Safety Queensland became involved.

During the subsequent investigation, the director admitted there were no written safety policies or procedures in the workplace, but still did not tell the true facts of how the incident occurred.⁴⁵

Brisbane Auto was charged with industrial manslaughter contrary to section 34C. The maximum penalty for this offence at the time was a fine of \$10 million.

The directors were charged with reckless conduct offences under the same legislation, for failing to comply with their duty to exercise due diligence, and without reasonable excuse engaging in conduct that exposed the worker to a risk of death or serious injury. The maximum penalty for them was a fine of up to \$600,000 or five years imprisonment.

Brisbane Auto pleaded guilty to industrial manslaughter and accepted that it had caused the death of the worker. There had been no real attempt to assess or control the risks posed by mobile plant in the workplace over an extended period of time.⁴⁶ The directors pleaded guilty too.

⁴⁴ See, for example, the different definitions of who qualifies as an 'officer'.

⁴⁵ [2020] QDC 113 at [11]-[43].

⁴⁶ [2020] QDC 113 at [57].

In considering the need for specific and/or general deterrence, Judge Rafter SC accepted that post-incident measures taken by the defendants, and their lack of criminal history, meant there was little need for specific deterrence. This meant general deterrence was the paramount sentencing consideration. The sentences needed to make it clear to others that a failure to comply with the law leading to a workplace death will result in severe penalties.

Judge Rafter concluded that the gravity of the offending and the moral culpability of each defendant was high. Brisbane Auto caused the death of its worker through its failure to effectively implement and supervise safe practices at its workplace.

Judge Rafter considered the moral culpability of both directors to be high too, as each knew of the potential consequences of the risk, which were catastrophic. There were steps which could have been implemented with relative ease which would have greatly reduced the risk. The offending by the directors was not an isolated breach, as the business had been operating for around three years without appropriate health and safety systems or controls. Both directors had also engaged in conduct designed to deflect responsibility for the incident by lying about how it occurred.

One director provided a psychiatric report recording that he was unlikely to be able to endure a long term of imprisonment and return to normal function. Judge Rafter was unimpressed and noted this did not reduce the moral culpability of his offending, holding the consideration of general deterrence is not necessarily eliminated by an offenders' impaired mental function. Instead, Judge Rafter cited prior authority that "deterrence is moderated, not eliminated, by consideration of the mental impairment"⁴⁷ and declined to reduce the director's culpability.

Brisbane Auto was fined \$3 million (less than one third of the maximum available penalty). Each director was sentenced to 10 months imprisonment.⁴⁸

Would an industrial manslaughter offence add anything to our laws in New Zealand? The jury is out. An offence of this type has been mooted in New Zealand before, but appears to be something of a political football with no short term prospect of becoming law.

In April 2024 Labour Party MP and Spokesperson for Workplace Relations and Safety, Camilla Belich introduced a Crimes (Corporate Homicide) Amendment Bill to Parliament. This Member's Bill seeks to insert a 'corporate homicide' clause into the Crimes Act 1961, rather than adding it to the HSWA.

Ms Belich argues that a law change is needed because too many employers breach workplace health and safety standards without significant consequences, and says families want more accountability. She also claims her new law would reduce fatality rates.⁴⁹

The Bill would create a new offence when a person has a relevant legal duty of care, engages in conduct that exposes any individual to whom that duty is owed a risk of serious death or injury, intends to cause the individual's death or serious injury or is reckless as to the risk, and the person's conduct causes the death of the individual. The maximum penalty on conviction for an individual would be life imprisonment or for a company a fine of \$10 million.⁵⁰

The policy statement supporting the Bill states that companies and organisations must be responsible about health and safety in their business activities. It suggests the same consequences which exist for individuals whose actions cause the death of a person should apply to an entity which does the same. The purpose is to encourage a good health and safety culture but also bring accountability and justice to individuals and families of those wrongly killed by an entity.⁵¹

While there is some merit in the argument that section 47 of the HSWA is not working as intended, the Bill relies on a similar standard of recklessness. This suggests the Bill will not fix that problem (if it is a problem).

The Bill seems unlikely to become law under the current Government, as the Minister of Justice, the Hon. Paul Goldsmith, has indicated the Government will not support it.

⁴⁷ *R v Sadri Ahmetaj* [2015] QCA 248 at [53].

⁴⁸ [2020] QDC 113 at [134].

⁴⁹ Law News 5 July 2024 *WorkSafe under the microscope* at page 11.

⁵⁰ Crimes Corporate Homicide Amendment Bill 2024 (25176 v 1.4) at clause 4.

⁵¹ 25176 v 1.4 at 1.

The future

The Minister for Workplace Relations and Safety, the Hon. Brooke van Velden, has announced a fulsome review of the HSWA, with consultation being led by the Ministry of Business, Innovation and Employment, in an effort to make the law simpler and cut red tape. Time will tell if reform of section 47 of the HSWA comes out of this review.