

Two recent decisions illustrate how the law around health and safety continues to develop in New Zealand and why statutory liability cover is so important. In the first case, a High Court appeal decision clarified when a bystander who is badly affected by witnessing an accident can be considered a victim and be awarded reparations. In the second case, WorkSafe withdrew a charge after a VL-funded defence lawyer argued that a partner in a partnership was not a PCBU. We cover these cases and more from the statutory liability arena in this issue.

– Jane Birdsall, Executive Manager, Health & Safety and Statutory Risk Claims & Consulting

Reparation order for \$45,000 quashed on appeal

In June 2017, an employee of a Christchurch engineering company was killed after being crushed by a falling steel I-beam. A supervisor was working nearby and heard the I-beam fall. He responded immediately and afterwards suffered from post-traumatic stress disorder. He could not return to work.

The company was subsequently charged and entered a guilty plea. It was [sentenced](#) to a fine of \$250,000 and ordered to pay \$123,240 in reparations to the deceased's family. It was also ordered to pay reparations of \$45,000 to the supervisor.

An appeal was made to the High Court against the order of reparations to the supervisor. One of the grounds was that the supervisor was not a "victim" against whom the "offence" was committed and was therefore ineligible for reparations.

An "offence" is specified in the charging document and expanded on in the Summary of Facts that is agreed between the prosecutor and the defence before a guilty

plea is entered into. In this case, the offending was around failing to manage a risk of serious injury or death arising from exposure to a crushing hazard from moving the unsecured heavy steel beams on work trolleys.

The company argued on appeal that the supervisor was not a victim of this particular offence as he was never exposed to the risk described in the charging documents. He was nowhere near the work floor when the accident occurred and there was no assertion he was exposed to the risk in the Summary of Facts. The High Court accepted this and quashed the reparation order.

The decision is not necessarily all good news for businesses, however. The High Court judgment has given WorkSafe a clear direction about how to draft both charges and the Summary of Facts to include bystander victims and secure reparations. We anticipate that we may see these types of reparations ordered more regularly.

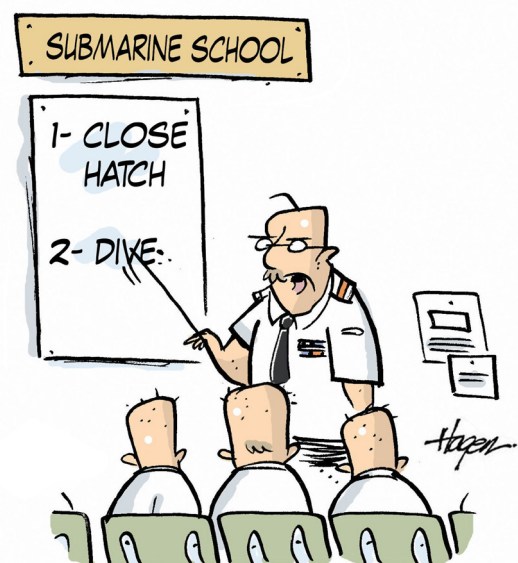
Ensuring new workers stay safe and healthy

Workers are as likely to have an accident in their first six months at a workplace as they are during the whole of the rest of their working life, says the UK's HSE. This is at least partly because when new to a job, workers are less likely to be aware of existing and potential risks.

The HSE recommends that employers take [six steps to protect new workers](#) including assessing a new worker's capabilities, and providing a comprehensive induction as well as appropriate training and supervision.

NZ's [general risk](#) and [hazardous substances](#) regulations contain specific duties for PCBUs around worker competence, supervision and training. In general terms, workers must have either adequate knowledge and experience of similar work or have adequate supervision to enable them to work safely. They also need to be adequately trained in a manner that is readily understandable to them – so businesses need to cater to their workers' language and literacy needs when providing information and delivering training.

WorkSafe provides guidance on training and supervision requirements for [general workers](#) and [workers using hazardous substances](#).



"Now I cannot overstress the importance of the order here!"

VL's specialist lawyer gets a great outcome for an Insured when a charge is withdrawn

In November 2018, a partner in a family partnership was charged with an offence as a PCBU under [section 36\(1\)\(a\)](#) of HASWA. The partnership itself was not charged.

The charge arose after an employee of a contractor engaged by the partnership fell over 5 metres from a fixed ladder. The victim sustained serious injuries including a neck fracture that resulted in tetraplegia. The contractor was also charged in relation to the incident.

The partner who was charged managed the commercial property which was owned by the partnership. In November 2017, the tenant of the building complained that the roof was leaking, and the partner arranged for a specialist company to repair the roof.

As part of the repair contract, a permanent fixed ladder and hatch to access the roof was installed prior to the incident. No building consent was obtained for the work by the partnership or contractor and the ladder and hatch did not meet the building code.

In August 2019, the lawyer appointed by VL to represent the Insured (including the partner) applied to the Court to dismiss the charges on the basis that WorkSafe had made a mistake in charging the partner as a PCBU instead of an

[officer](#). The definition of an officer explicitly includes partners in a partnership.

The application argued that a partnership could be a PCBU according to the [definition in HASWA](#) – even though it is not a legal entity – and that the definition of a PCBU clarifies that a person engaged solely as an officer of a PCBU is not a PCBU. In addition, the contractor was engaged by the partnership, not the partner, and so the victim was not working for the partner at the time of the incident.

As a result of the application, WorkSafe withdrew the charge against the partner. No alternative charge could be filed because more than a year had passed since the incident.

This was an excellent result for the Insured and reinforces, once again, why high-quality legal representation funded by VL's statutory liability insurance helps to protect any person conducting a business or undertaking in New Zealand.

By contrast, an [Auckland concrete company](#) was recently fined \$500,000 with no discounts given after it failed to turn up in Court for sentencing. While the company's insurance situation is unknown, it is likely that it had no statutory liability cover to fund representation or a defence to the charges.

The real costs to health from work

We often hear about horrific work accidents that kill and injure workers. Less visible is the fact that a worker is 15 times more likely to die from a work-related disease than from a work accident.

WorkSafe estimates that there are [750-900 work-related deaths](#) each year and 5,000-6,000 hospitalisations. Approximately 50% of the deaths are caused by cancer. This includes 250 deaths from lung cancer with the main causes being silica dust, asbestos and diesel engine exhaust. Approximately 90 other cancer deaths are caused by mesothelioma – a specific type of cancer linked to asbestos exposure. Less obvious is breast cancer which is estimated to account for 25 deaths due to shift work.

The main causes of non-cancer deaths are also linked to exposure to contaminated air. Approximately 200 deaths are expected to result from chronic obstructive pulmonary disease from breathing in vapours, dust, gases and fumes. A further 80 deaths may result from ischaemic heart disease partly due to second hand smoke. Asbestos also features again. Asbestosis, another disease resulting from asbestos exposure, accounts for a further 30 deaths. Overall, it is grim news for workers and tax payers.

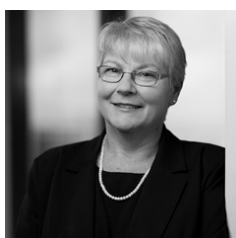
Health, safety and other statutory liability news in brief

Supporting small business owners' mental health

Beyond Blue, an Australian mental health organisation, has published an accessible and [useful guide](#) on giving support to small business owners. It provides advice on how to speak to a person who may be showing worrying signs as well as planning tools for small business owners to develop wellbeing plans.

Company ordered to pay \$400,000 for price fixing

Price fixing in the Auckland real estate market has led to a large fine for a business that advised buyers on investment properties. The company established rules so that member buyers would not bid against each other which the Court found amounted to price fixing. [Read more ►](#)



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Jane has over 12 years' experience as a health, safety and environmental regulator. She has led many significant investigations into workplace accidents as both a manager and health and safety inspector with WorkSafe New Zealand. Jane is thoroughly familiar with current health and safety practice and works with colleagues, customers and others to assist with risk analysis and reduction of risk factors in this area.

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