

# The Safe Side

Developments in health and safety from New Zealand and around the world

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Perhaps the most significant recent development in statutory liability insurance has been the rising costs of reparation payments to victims following health and safety prosecutions. In this issue, we look at the numbers involved in some recent cases and highlight the importance of maintaining an adequate limit of indemnity to protect a business' exposure. We also touch on the latest work-related fatality figures from across the ditch, some useful new apps, the risks of fatigue and recent health and safety news. I hope you find the articles interesting and helpful.

- Jane Birdsall, Health & Safety and Statutory Risk Consultant

## Statutory liability insurance needs to go beyond "band-aid" coverage

Paying reparations to victims has been a routine part of sentencing in health and safety cases for many years. The payments help compensate the victim for the emotional harm resulting from a work accident as well as any further losses that arise as a consequence of any emotional or physical harm.

Reparations awarded for emotional harm have been steadily rising. It is now common to see payments of \$110,000 or more ordered if a person is killed at work. Ten years ago, this figure was likely to be around \$60,000.

But it is the orders of reparations for consequential losses that have led to the most significant increases over recent years.

The increases can be traced back to the Sentencing Amendment Act 2014 which allowed the Courts to order reparations to "top up" the 20% of a person's earnings not covered by ACC income compensation payments.

In 2017, in the first case of its kind, the Court ordered that a 27-year old victim who sustained tetraplegia from a work accident, be compensated for the 20% shortfall in his ACC compensation up until he was 65 years old. The Court discounted the total top up amount, which was based on a conservative actuarial calculation, by 50% after observing that the victim had "benefitted" from ACC in other ways. Nevertheless, the reparations still amounted to \$226,300 and, along with reparations for emotional harm of \$110,000, the victim was awarded \$336,300 in total. [Read more ►](#)

A few months later, a 52-year-old victim who sustained severe and permanent spinal injuries in a fall at work, was awarded reparations of \$76,940 to bridge the 20% ACC income gap until he retired. On this occasion, the Court applied a significantly lesser discount of 15% for the benefit brought by ACC. In addition, \$100,000 was ordered for emotional harm. [Read more ►](#)

The highest payment to victims to date came in 2018 when Oceana Gold (New Zealand) Ltd paid over \$1 million to a deceased worker's family, including voluntary



*"We offer a comprehensive benefits plan that covers everything from minor cuts to nasty scrapes."*

payments of \$660,000 and an additional \$350,000 ordered by the Court to compensate for lost future earnings not covered by ACC. Following an appeal, the High Court set aside the additional reparation payment ordered by the District Court.

### Where does this leave businesses?

Health and safety reparations are fully insurable. Businesses need to make sure they have adequate limits of indemnity to cover what may be very large reparation orders as well as fees for legal representation and orders for regulator costs. If several or many people can be injured in one event like an explosion or structure collapse, the limit will need to factor in the potential for multiple reparation orders.

In a nutshell, businesses need to ensure their coverage really is "comprehensive" and extends beyond indemnifying for minor cuts and nasty scrapes only.

## Australian workplace fatality figures released

According to the latest statistics released by Safe Work Australia, 190 workers were fatally injured at work in Australia during 2017. More than half of those fatalities occurred in the transport, postal and warehousing sector (54 deaths) and the agriculture, forestry and fishing sector (52 deaths). Construction accounted for 30 deaths.

[Read more ►](#)

### How does this compare with New Zealand?

The fatality rate in Australia was 1.5 fatalities per 100,000 workers; New Zealand's [fatality rate](#) was 2.1 deaths per 100,000 FTEs. Despite New Zealand's progress on reducing work fatalities, we still have a long way to go if we are to catch up with our cousins over the ditch.

## Fatigue - wake up to the risks

Fatigue is a health and safety hazard. It reduces alertness and can lead to errors which may result in workplace incidents and injuries.

Businesses must manage the risks of injury that arise from fatigue in the same way they manage other risks. WorkSafe provides guidance and resources on how to do this including posters and several videos. [Read more ►](#)

We expect that WorkSafe will pay more attention to fatigue – including during investigations. For example, in April 2018, an agricultural contracting business was fined \$10,000 (reduced from \$325,000 for reasons suppressed by the Court) and ordered to pay reparations of \$89,361 after its employee died in a tractor crash as he drove home from work. The 23-year-old victim had worked over 197 hours in the two weeks leading up to his death and almost 17 hours on the day of the accident. The offending company failed to ensure it had an effective fatigue management system in place. [Read more ►](#)

## Free safety apps from NIOSH

Workers are increasingly comfortable with digital technology and it is likely to be the health and safety tool of choice amongst many young workers.

The US Government organisation, NIOSH, has produced two free apps to help workers stay safe. The [Ladder Safety App](#) assists with setting up a ladder correctly by measuring the angle it is pitched at. It also includes interactive information to help with the selection, pre-inspection, set up and safe use of ladders. Much of the information is relevant to New Zealand.

The NIOSH sound level meter app allows users to measure noise in the workplace via a smart phone's microphone. It also provides additional information on conducting noise surveys and how to select hearing protection. While no substitute for expert advice, it will be useful for businesses thinking about controlling noise in the work place. Search for the NIOSH SLM app in Google Play or the App Store.



## Health and Safety in the News

### February 2019 – UK HSE

New scientific evidence shows that exposure to all welding fume, including mild steel welding fume, can cause lung cancer. In response, the UK's regulator, the HSE, has advised that control of the cancer risk will require suitable engineering controls, e.g. local exhaust ventilation, for all welding activities indoors. [Read more ►](#)

### 15 February 2019 – WorkSafe NZ

WorkSafe announced it will partner with the FMG Young Farmer of the Year competition to build rapport with rural communities and help create generational change.

[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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