

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN  
[SQUARE BRACKETS]

**IN THE DISTRICT COURT  
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE  
KI TE WHANGANUI-A-TARA**

**CRI-2018-085-000538  
[2020] NZDC 2536**

**MARITIME NEW ZEALAND**

v

**NINO'S LIMITED  
ANTONINO INNOCENZO BASILE  
SHANE MICHAEL McCAULEY  
Defendant(s)**

Hearing: 3 February 2020  
Appearances: Mr D La Hood for the prosecutor  
Ms R Rasch for defendants  
Judgment: 4 March 2020

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**REASONS OF JUDGE B DAVIDSON:  
[Sentencing of all 3 defendants]**

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[1] Today, 4 March 2020, I convicted each defendant and imposed the financial penalties summarised below:

**Sentences Imposed**

*Charges under the Health and Safety at Work Act 2015*

- (1) **Nino's Ltd**  
Fine - \$380,000

**Emotional Harm Reparation**

[Victim 1]	\$25,000
[Victim 2]	\$25,000
[Victim 3]	\$10,000

(2) **Antonino Basile**

Fine - \$47,000

(3) **Shane McCauley**

Fine - \$17,500

*Charges under the Maritime Transport Act 1990*

(1) **Nino's Ltd**

CRN 18085500649

Fine - \$2,500

Reparation – \$3,000

CRN 18085500650

Fine - \$2,500

Reparation – \$1,800

[2] These are my reasons.

**Charges**

[3] The 3 defendants, who are the owner (Nino's Limited), a director of the owner company (Antonino Basile) and the skipper (Shane McCauley) of a 21.3 metre fishing boat, the Victory II, which sunk off the Kaikoura Coast on 10 June 2017, each face charges under s 48 of the Health and Safety at Work Act 2015 ("HSWA") of failing to ensure the safety of the crew who were forced to abandon the boat some 5 kilometres off shore.

[4] The company faces a maximum penalty of a fine of \$1.5m; the director a fine of \$300,000; the skipper, a fine of \$150,000.

[5] The charges against each defendant cover not only the events of 10 June 2017 when the boat sank, but an earlier period when the boat was overloaded in excess of its stability load capacity of 5 tonne. In the case of the company and the director, the prior period is for a year; in the case of the skipper from September 2016 onwards.

[6] The company also faces 2 charges under the Maritime Transport Act 1994 (“MTA”) of failing to pay 2 crew members normal wages until each was re-employed. The unpaid wages are \$1,800 for the crew member [victim 1] and \$3,000 for the crew member [victim 2]. The maximum penalty in respect of each of those charges is a fine of \$30,000.

### **Facts**

[7] Late on the morning of 10 June 2017, the Victory II was fishing off the Kaikoura Coast, near the Clarence River mouth, after a 2-day fishing trip and before returning to Wellington. On board were the skipper Shane McCauley and 3 crew members [victim 1], [victim 2] and [victim 3]. Sea conditions were good.

[8] The fishing boat was already substantially loaded with fish well in excess of the 5-tonne load stability limit. A final catch, estimated to be something in the order of 9 or 10 tonnes, in and of itself virtually doubling the stability limit, was being hauled on board. The boat had already begun listing portside with obvious signs of water on board. The boat was simply unable to cope with the additional weight. The stern slumped further portside, water was taken on rapidly and the boat began to sink. Evacuation procedures were put in place promptly.

[9] The crew evacuated, with some difficulty, to an inflatable life raft. During this a rope was caught onto the boat and had to be freed. All were rescued about  $\frac{3}{4}$  of an hour later by a local fisherman and taken to Kaikoura from where they were returned to Wellington. None of the crew members were physically injured or hurt.

[10] An investigation revealed that the boat had been regularly loaded well in excess of its stability limit; sometimes as much as 20 tonnes in excess.

[11] The essence of the charges against Nino's and Mr Basile is that each failed to take reasonably practical steps to identify the overloading risk, ensure that appropriate systems were in place to prevent overloading, operate the fishing boat in a manner that did not exceed its loading capacity and ensure the provision of adequate training and instruction for crew.

[12] The essence of the charge against the skipper Mr McCauley is similar in that he failed to take the reasonably practicable steps of identifying the overloading risk, familiarising himself with the catch load capacity of the boat, ensuring that systems were in place to prevent overloading and ensuring that the boat did not operate in a manner that exceeded the load capacity.

[13] Although the crew were assisted back to Wellington, thereafter little else appears to have been done by the defendants for them. Two of the crew members, [victim 1] and [victim 2] were not paid wages as required under s 23 MTA pending the finding of new employment.

[14] It is worthy of note, at this stage, that Shane McCauley, the skipper, is both a victim of Nino's and Basile's failure to ensure his safety and is charged, in his own right, as the skipper failing to ensure the safety of his crew.

### **Victim impact statements**

[15] I received victim impact statements from the crew members [victim 1] and [victim 2]. I was told at the sentencing hearing that the third crew member, [victim 3], had not engaged in the process of providing a victim impact statement. For reasons which I will come to later, Mr La Hood contended, nevertheless, that this should not disentitle [victim 3] to an award of emotional harm reparation.

[16] Both [victim 1] and [victim 2] have been deeply affected by what in reality can only be described as a near death experience.

[17] In his victim impact statement, [victim 1] says:

I had a surge of fear that we weren't going to make it back to shore alive. ... We were now floating in the ocean in the life raft. ... then the panic started. We could not find the safety knife to cut the painter rope which was still attached to the now very fast sinking boat. We were too late and the vessel pulled our life raft 2 to 2 metres under the water. [Victim 2] and I were stuck in the life raft while McCauley and [victim 3] had fallen out. As the life raft capsized it felt like it was going to be the place we would die.

The feeling is indescribable. Mind numbing. Suffocation and the fear of being so close to death. It has given me demons I fight every day. Luckily the static release blew and the life raft fired up out of the water. We retrieved McCauley and [victim 3] again. ... There was no leadership or safety provided from him as the skipper. ... I reached out to Nino seeking some sort of financial compensation towards counselling in which he replied to me, "*if anyone needs counselling it's me*" referring to himself. Nino refused to give any form of compensation toward the costs of living and the loss of wages.

[18] He goes on to describe seeing an ACC counsellor for assessment of post-traumatic stress disorder. At the hearing I was advised by Mr La Hood that a formal diagnosis had now been made by his doctor.

[19] In his victim impact statement, [victim 2] says:

I was in the hold when the ship started to sink and if [victim 1] hadn't come to get me I'd be dead, I know it. At the time I didn't think we were going to make it and that has stayed with me. I remember being incredibly cold in the life raft and not knowing if anyone was going to rescue us. ... Since the sinking I experienced what the psychologists call disassociative episodes, my concentration is poor and I feel anxious. I am generally stressed. I've had suicidal thoughts but never any suicidal intent.

[20] He has been diagnosed with post-traumatic stress disorder.

[21] There can be no doubt that each of these crew members describes what I have earlier labelled as a "*near death experience*".

[22] I do not see the absence of any similar information from the crew member [victim 3] as disentitling him to an award of emotional harm reparation. His experiences, and the effects on him, in my view can only be expected to be similar.

### **Personal circumstances of the defendants and prior health and safety record**

[23] Nino's Ltd is a fairly substantial fishing company. It was incorporated in March 2007 and is described in Ms Rasch's written submissions as a medium-sized

enterprise. It operates 9 fishing vessels and has a fish processing plant which employs around 50 staff. I was told during the hearing, on my inquiry of Ms Rasch, that the business is financially viable. There was no evidence placed before me of financial incapability. It has no relevant insurance.

[24] The director Antonino Basile is aged 47. He is the sole director and shareholder of Nino's Limited. He comes from a New Zealand / Italian family deeply involved in the fishing industry. He is married with 3 dependent children and draws a salary of \$100,000 per annum. Again, financial incapability was not suggested.

[25] Shane McCauley likewise comes from a family deeply involved in the fishing industry. He gained his skipper's ticket in 1993 and has skippered fishing vessels since 1995. In 2003 he gained a coastal masters fishing ticket. He is well qualified and appropriately experienced. He is married with 3 dependent children and has a salary estimated at around \$60,000 per annum. Financial incapability was not suggested.

[26] All 3 have a good prior health and safety record in what can only be described as an inherently dangerous industry. Although, as Mr La Hood submitted, their prior good record and prior good health and safety record should be tempered by the period of the offending, it seems to me this must be set against the inherently dangerous nature of the fishing industry itself.

[27] Each defendant essentially claims that the boat was well capable of carrying a load beyond its limit which had been set some years earlier when it was operating in Australia. Each, of course, accept by their pleas of guilty that they knew the limit, but each contend that the boat was well capable of carrying a load, safely, in excess of the limit. That said, no evidence was placed before me of any attempt to have the boat resurveyed with a view to resetting the load capacity.

[28] After the charges were laid and before sentencing, Nino's Limited sought prosecution agreement for the imposition of an enforceable undertaking. In the application for the undertaking, which ultimately was rejected by the prosecution, an offer of \$10,000 reparation was made to each of the crew members, [victim 1] and [victim 2]. That said, no payments were made in advance of sentencing at all.

### **Aggravating features**

[29] Inherent in the representative nature of the charges under the HSWA, is the regular overloading of the fishing boat over a period of a year, on each occasion with the obvious and real risk of sinking as in fact happened on 10 June 2017.

[30] The consequences of such a sinking at open sea are obvious. Clearly the risk from overloading can only be categorised as obvious, particularly in such a hazardous industry.

[31] This can only be described as a gross departure from plain, simple maritime safety and fishing industry standards. The risks were obvious and high. There were a number of reasonably practicable steps available to each defendant to meet that risk. These steps were simply not taken.

[32] All of this, to my mind, carries the flavour of simply maximising catch return for profit.

### **Mitigating features**

[33] Each defendant as I have already mentioned, would be entitled to a discount for its prior good health and safety record and lack of previous convictions. I accept such discount should be tempered by the ongoing nature of the offending, but it should be recognised and afforded given the hazardous nature of such an industry, both in actual fishing and processing.

[34] Each defendant should be entitled to a full credit for its plea of guilty. Despite some delay before plea, the prosecution do not suggest otherwise.

[35] The issue of reparation, although a mitigating feature, is dealt with in such cases as part of the overall sentencing construction.

[36] There should also be some discount for what appears to be co-operation with the investigating authorities, some fairly tentative offers of compensation through the

enforceable undertaking procedure and recognition that its maritime rescue plan worked.

### **Sentencing approach**

[37] The sentencing approach and methodology in such cases is well known and not disputed.<sup>1</sup>

[38] In essence, the methodology involves an assessment of reparation, an assessment of the appropriate level of fine by reference to the degree of culpability adjusted for any case specific aggravating or mitigating features; and then some overall assessment of penalty adjusting if necessary for the financial circumstances of the individual defendant.

### **Emotional harm reparation**

[39] Section 32 of the Sentencing Act 2002 (“SA”) deals with the sentence of reparation. Relevantly ss (1) and (2) are in the following terms:

#### **32 Sentence of reparation**

- (1) A court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer—
  - (a) loss of or damage to property; or
  - (b) emotional harm; or
  - (c) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.
- (2) Despite subsection (1), a court must not impose a sentence of reparation in respect of emotional harm, or loss or damage consequential on emotional harm, unless the person who suffered the emotional harm is a person described in paragraph (a) of the definition of victim in section 4.

[40] In oral submissions, Ms Rasch, on behalf of each defendant, argued that the imposition of a sentence of emotional harm reparation would be problematic as the crew had not suffered actual physical injury or harm. That submissions however, can

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<sup>1</sup> See *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

be dealt with in short order. By virtue of the definition of a victim under s 4 SA, emotional harm reparation can be ordered.

[41] I also note the default position under s 36 SA that in the absence of orders for the payment of reparation by instalments, or immediate payment or following a Registrar's determination, the sum ordered is payable in a lump sum within 28 days of its imposition.<sup>2</sup>

### **Submissions for the prosecution**

#### *Reparation*

[42] The prosecution seek orders for emotional harm reparation payment for each of the crew members. Mr La Hood referred to the victim impact material provided on behalf of [victim 1] and [victim 2]. He noted that although [victim 3] had not engaged in the process of providing the victim impact statement, that he similarly would have suffered significant emotional harm. He accepted that the defendant, McCauley likewise would have suffered some emotional harm through the failures of the company and its director to ensure his safety.

[43] Mr La Hood noted that although there were some differences between the effects of the offending as described by [victim 1] and [victim 2], they should be treated equally. Without doubt, he submitted, each suffered significant short and long-term consequences manifesting ultimately as post-traumatic stress disorder.

[44] While accepting that the quantifying of emotional harm reparation could be difficult, he likened the appropriate level to that ordered in *WorkSafe New Zealand v Department of Corrections*.<sup>3</sup> In that case Chief Judge Jan Marie Doogue [as she then was] ordered \$45,000 emotional harm reparation for a community work detainee who saw a fellow detainee killed. He submitted that although no crew member had been actually hurt or died, they unquestionably suffered a life-threatening experience. On that basis the prosecution sought emotional harm reparation of between \$30,000 - \$40,000 for each of the crew members [victim 1] and [victim 2], less so for the crew

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<sup>2</sup> See s 36(2) Sentencing Act and s 80 Summary Proceedings Act.

<sup>3</sup> *WorkSafe New Zealand v Department of Corrections* [2017] NZDC 819.

member [victim 3] because of the absence of any specific victim impact material, and adjusted in the case of McCauley because of his personal culpability in respect of the charge he faced of ensuring the safety of his crew.

[45] The prosecution sought that the reparation orders be made against the defendant, Nino's Limited.

*Level of fine*

[46] Mr La Hood referred to the essence of the *Stumpmaster* decision. He reminded me of the following passages:

[53] The new guideline bands are:

low culpability	:	Up to \$250,000
medium culpability	:	\$250,000 to \$600,000
high culpability	:	\$600,000 to \$1,000,000
very high culpability	:	\$1,000,000 plus

[54] We are satisfied a figure of \$600,000 for the top of the middle band represents a significant deterrent that reflects the statutory purposes. It is a substantial figure, and one which may well be higher depending on the degree of departure and the actual harm caused. For many businesses it will be onerous, as the legislation intends it to be. For those for whom it is not, the legislation makes clear the obligation of the court to consider uplifts to reflect the relative wealth of the offender.

[47] Mr La Hood went on to note that there was no guideline judgment in respect of the level of fine for an officer of a PCBU (Antonino Basile) or a worker (Shane McCauley) but logically the range of penalties should be adjusted downwards to reflect the available lower maximum in each case. Mr La Hood specifically asked that I endorse such an approach for future cases. I am reluctant to do so if only because no particular or detailed argument was raised against such an approach. Nevertheless, I am prepared to observe that his submission adopts a fairly orthodox sentencing approach, often used in criminal sentencing, of adjusting tariff or band type sentencing downwards to reflect lower maximum penalties in similar types of charges.

[48] Mr La Hood went on to argue that by virtue of the culpability factors outlined in *Stumpmaster* and the earlier case of *Department of Labour v Hanham & Philp Contractors Ltd*,<sup>4</sup> he submitted here there was an obvious and real risk of the boat sinking as in fact it did. Although there was no actual injury, the risk of injury or death by drowning, was very high. More than that, the hazard had been repeated and fairly straightforward and available remedial action had never been put in place. He therefore submitted that the culpability level of Nino's Limited and Antonino Basile was at the upper end of the medium band.

[49] He referred in particular to *WorkSafe New Zealand v Agility Building Solutions Ltd*<sup>5</sup> where an incorrectly erected scaffolding collapsed leading to a fine of \$450,000. He submitted that here the overloading of the fishing boat had been ongoing and the fine necessarily should be greater. On the other hand, he noted it need not be as high as \$700,000 as ordered in *WorkSafe New Zealand v The Sunday Hive Ltd*<sup>6</sup> where death had resulted from a vehicle rolling down a hill while workers were placing beehives in a remote hilly area.

[50] Accordingly, he submitted that the fine for Nino's Ltd should have a starting point of \$600,000; for Antonino Basile, \$120,000.

[51] For the defendant Shane McCauley, he submitted the starting point for the fine should be \$42,500 recognising that to some extent he was entitled to rely on health and safety systems and procedures being put in place and enforced by his employer.

[52] Mr La Hood accepted that the fines could be discounted to reflect the lack of prior convictions and the good health and safety record of the defendants, tempered however by the ongoing nature of the offending. He accepted that a full discount for the pleas of guilty of each defendant of 25% was also appropriate.

[53] As to the charges under the Maritime Transport Act faced by Nino's Ltd, he submitted that reparation should be ordered for the unpaid wages for each crew member and that a further fine of some \$7,000 should be imposed against the

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<sup>4</sup> *Department of Labour v Hanham & Philp Contractors Ltd* [2008] 6 NZELR 79.

<sup>5</sup> *WorkSafe New Zealand v Agility Building Solutions Ltd* [2018] NZDC 24165.

<sup>6</sup> *WorkSafe New Zealand v The Sunday Hive Ltd* [2018] NZDC 20796.

company. Looked at globally, he submitted such an uplift would not offend the totality principle. He noted that maximum penalty for those offences of \$30,000, describing the culpability as being in the medium range.

### **Submissions on behalf of the defendants**

#### *Reparation*

[54] No further or specific reparation offer was made at sentencing on behalf of Nino's Ltd. Ms Rasch noted the offer made in its application for an enforceable undertaking of \$10,000 in respect of each of the crew members, [victim 1] and [victim 2].

[55] Her submissions on the issue of reparation concentrated on what she described as the problematic reasoning for the imposition of such a sentence. I have already dealt with and rejected her submission about that point.

#### *Level of fine*

[56] Ms Rasch submitted that there was good evidence that because the load capacity had been exceeded on earlier occasions without difficulty, that the capacity in and of itself was inadequate.

[57] She noted that no actual harm arose to any crew member during the sinking.

[58] She submitted, therefore, that the culpability level for each of the defendants should be placed in the low range. She submitted that the appropriate starting point for a fine for Nino's Ltd was \$125,000.

[59] As far as the defendants, Antonino Basile and Shane McCauley were concerned, in a virtual throw-away written submission, it was argued they could be discharged without conviction. This was not pursued at the sentencing hearing and no material was placed before me upon which I could conclude that there may be consequences of conviction for each out of all proportion to the gravity of their offending.

[60] Ms Rasch went on to submit there should be discounts against the fine imposed on Nino's Limited, firstly of some 40% in recognition of its response to the circumstances of the offending and the other mitigating features outlined; she went on to submit there should then, as accepted by the prosecution, be a further discount of some 25% for the company's pleas of guilty.

### **Sentence**

[61] In my view, this can only be categorised as a case either approaching or at the top of the medium culpability band. To regularly overload a fishing boat carrying the risk that it would sink as it did on 10 June 2017, is a case of medium culpability. The risks were obvious and the consequences, equally in my view, obvious. I see it as amounting to a fairly substantial departure from fishing industry standards. There were reasonably practicable steps available to avoid the risk either by adhering to the load limit or if there was credible information to support a capability for a greater load, to ask for the boat to be re-surveyed.

[62] What occurred on 10 June 2017 was even worse. At the time of the return trip to Wellington, there was some 18 – 28 tonnes of fish in the hold, well in excess of the limit. A further 10 tonnes were hauled and attempted to be loaded. Put in blunt terms, this basically dragged the boat backwards under water. I see it as a case of an ongoing breach of the load limit, made significantly worse by the events that unfolded on 10 June 2017.

[63] It is worthy of note that against a maximum available penalty for Nino's Ltd of \$1.5 million, an upper level medium culpability fine of around \$600,000 is only 40% of the available maximum. The circumstances here are aptly categorised as the kind of case referred to a paragraph [54] of *Stumpmaster*.

[64] As far the other two defendants are concerned, I see appropriate downward adjustments reflecting the available maximum penalty as appropriate.

[65] Accordingly, I set starting point fines as follows:

Nino's Limited	\$600,000.00
Antonino Basile	\$120,000.00
McCauley	\$ 40,000.00

[66] The starting point fine of \$40,000 for McCauley reflects that Nino's Ltd and Antonino Basile had health and safety obligations upon which he was entitled to place some reliance.

### **Individual fines and reparation**

#### *Nino's Ltd - Fine*

Starting point		\$600,000.00
Discount – for good safety [although the offending occurred over a period of one year, this must be seen against the size of the fishing operation and the hazardous nature of the fishing industry] and an evacuation plan that worked) – 10%	\$60,000.00	
Discount for some offer of amends through enforceable undertaking process – 5%	\$30,000.00	<u>\$90,000</u>
		<u>\$510,000</u>
Plea of guilty – 25%	.	<u>\$127,500</u>
Net Fine		<u>\$382,500</u>
(rounded):		<u>\$380,000</u>

#### *Reparation*

[67] I fix emotional harm reparation for [victim 1] and [victim 2] at \$25,000 each. It cannot be, it seems to me, as much as \$45,000 where an actual death was witnessed; nevertheless, each suffered what can only be described as a “near death experience”.

[68] For the crew member [victim 3], emotional harm reparation is fixed at \$10,000. I do so because of the lack of any specific victim impact material.

[69] Total emotional harm reparation is \$60,000.

[70] The overall penalty against Nino's Ltd, of a fine of \$380,000 and emotional harm reparation of \$60,000 (total \$440,000), I do not see as excessive or oppressive. No evidence of financial inability was placed before me. Nino's Ltd operates a fairly sizeable business, as I have mentioned, with 9 boats and a fish processing plant. The business is described as being financially viable.

*Antonino Basile - Fine*

[71] Although Nino's Ltd and Antonino Basile are distinct legal entities, they are clearly interwoven. Antonino Basile is the sole director and shareholder of Nino's Ltd; in real terms he is Nino's alter ego.

[72] Nevertheless, he carried some individual personalised culpability, which can be fixed at the top of the medium range with a starting point of \$120,000. However, I simply cannot ignore the reality that Nino's Ltd's failure is his, and vice versa his is Nino's Ltd. A significant discount must be made to avoid the risk of double punishment. Accordingly, the starting point fine I adopt for him is \$75,000.

[73] Similar discounting factors would see an end fine of \$47,000.

[74] Because Nino's Ltd and Antonino Basile are so interwoven in the way I have described, I see their overall financial penalty, fines and reparation, of \$487,000 as appropriate. To my mind against the overloading that had been occurring over the previous year and the events of 10 June, I do not see the overall fines and reparation again as out of kilter.

*McCauley - Fine*

[75] Mr McCauley had been the skipper on the day and from September 2016 onwards. As I have mentioned, he was entitled, to some extent, to rely on the health

and safety processes of his employer, but nevertheless he carried a personal responsibility. In essence on 10 June at least, he was the one who had the obvious practicable step available of refusing to attempt to take on more fish.

[76] His starting point fine is \$40,000. This should be discounted firstly by his personal entitlement to reparation; as noted, he is a victim of the charges against Nino's Ltd and Antonino Basile. His emotional harm reparation I would fix at \$12,500, but it is discounted off the fine.

[77] After adjustment for the other features, his end fine will \$17,500.

### **Nino's Ltd – charges under the Maritime Transport Act**

[78] Reparation for unpaid wages in the case of [victim 1] of \$1,800 and [victim 2] of \$3,000 is not challenged by Nino's Ltd. There will be orders accordingly.

[79] The prosecution also seek fines totalling \$7,000 (presumably \$3,500 per charge). Mr La Hood points to the obvious failure of Nino's Ltd to meet its employer obligations under the MTA. He submits that a \$7,000 fine would not be excessive.

[80] There have been no prior prosecutions apparently brought in respect of this provision of the MTA. It seems to me that Nino's Ltd's failure was fairly significant and, on the material placed before me, deliberate. Nevertheless, to some extent the penalty of emotional harm reparation for the HWSA charges incorporates the employer's failure to meet employee obligations.

[81] Recognising that in respect of each charge, a fine of \$2,500 will be imposed.

B Davidson  
**District Court Judge**