

Returning Dignity to Labour: Workplace Safety as a Human Right

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Abstract

Universal human rights are derived from respect for human life and the inherent dignity of the person. As signatory to all major United Nations' human rights instruments, New Zealand is a 'human rights State'. However, New Zealand workers experience high levels of occupational accidents and workplace death, particularly in the mining industry where, it appears, profit commonly takes precedence over safety. The Pike River mine explosion, in which 29 men were killed, is an egregious example of the quotidian risks many New Zealand workers face. This subordination of human dignity and life to financial considerations is incompatible with basic human rights principles. In this article, we argue that the current reasonably practicable test for workplace safety is insufficient. If the dignity and lives of workers are to be taken seriously, a benchmark akin to the proportionality test of human rights jurisprudence is indicated.

Introduction

Respect for human life and the inherent dignity of the person fundamentally inform statements of universal human rights. In particular, the preamble to the Universal Declaration of Human Rights (UDHR) (1948) provides that universal human rights are founded on "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family". Human dignity "is concerned with physical and psychological integrity and empowerment".¹ Following the Vienna Declaration and Program of Action:²

All human rights are universal, indivisible and interdependent and interrelated ... it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

As signatory to all major United Nations' human rights instruments,³ New Zealand is a human rights State, and, therefore, required to promote human dignity in all aspects of its citizens' lives.

Despite this comprehensive rights commitment, workers in New Zealand experience high levels of occupational accidents and workplace death that seem inconsistent with respect for human dignity. Indeed, the legislative system for occupational health and safety balances physical and psychological integrity against costs of prevention. Indeed, in the resources industries, financial considerations appear to commonly outweigh worker safety. The 2010 Pike River mine explosion, in which 29 men died, is an egregious example of the quotidian hazards many New Zealand workers face and the ways in which health and safety seem to be subordinate to profit.

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¹ *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [5] per Iacobucci J.

² Vienna Declaration and Program of Action (25 June 1993), art 5.

³ Human Rights Commission "New Zealand and the International Instruments" (2008) <www.hrc.co.nz>.

In this article, we argue that subordination of respect for human dignity and life to financial considerations contravenes basic human rights principles, and that the reasonably practicable test for workplace safety used in the Health and Safety in Employment Act (HSEA) shows insufficient respect for human dignity. If the dignity and lives of workers are to be taken seriously, a benchmark akin to the proportionality test of human rights jurisprudence is indicated. This would require express consideration of fundamental human rights when workplace health and safety measures are instituted. The article is structured as follows: health and safety issues in the New Zealand workplace are sketched. Then, the applicability of human rights principles in the workplace is established, using the Pike River mine tragedy as an example. Further, a dignity-based workplace health and safety test is proposed.

New Zealand's Hazardous Work Environment

New Zealand has approximately 470,000 workplaces and two million workers (Statistics New Zealand, 2010).⁴ In the 12 months to June 2011, 85 workplace deaths, 445 serious non-fatal injuries and 30,800 workers' compensation events were recorded.⁵ Around 9,600 incidents are reported to the Department of Labour (DoL) annually.⁶ Occupational disease is estimated to cause an additional 700-1,000 deaths, and 17,000-20,000 new cases occur each year.⁷ The Accident Compensation Corporation (ACC) pays out approximately half a billion dollars a year for work related claims.⁸ Injury statistics show certain industry sectors have a high incidence of injury claims and fatalities, and the DoL, in its *Workplace Health and Safety Strategy*, has highlighted agriculture, forestry and fishing, construction and manufacturing in this regard.⁹ (Mining was omitted to allow the Department to take into account the outcome of various official investigations and the Royal Commission, 2011.) Underground mining epitomises a very hazardous industry and has a history of "low frequency high consequence events" that result in multiple fatalities – 204 deaths between 1850 and 1998 out of 1,096 deaths in the mining industry.¹⁰ While underground mining is universally hazardous, New Zealand's mining fatality rate is markedly worse than obvious comparators, notably Australia and the United Kingdom.¹¹

Reasonably practicable test

Workplace health and safety in New Zealand legislation uses a basic criterion of practicability. HSEA provides:¹²

In this Act, all practicable steps, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to –

(a) the nature and severity of the harm that may be suffered if the result is not achieved; and

⁴ Statistics New Zealand "New Zealand Business Demography Statistics: At February 2010" (2010) <www.stats.govt.nz>.

⁵ Department of Labour "The State of Workplace Health and Safety in New Zealand" (2011) <www.dol.govt.nz>.

⁶ Ibid.

⁷ Tim Driscoll and others "The Burden of Occupational Disease and Injury In New Zealand" (2004) National Occupational Health and Safety Advisory Committee <www.nohsac.govt.nz>.

⁸ Department of Labour, above n 6.

⁹ Department of Labour "Workplace Health and Safety Strategy for New Zealand to 2015, National Action Agenda 2010-2013" 2011 <www.dol.govt.nz>.

¹⁰ N Gunningham and D Neal "Review of the Department of Labour's Interactions with Pike River Coal Limited 4 July 2011" (2011) Department of Labour <www.dol.govt.nz>; K Warne "A Time to Remember, a Time to Question" (2011) 107 *New Zealand Geographic* 36, 36-39.

¹¹ National Occupational Health and Safety Commission *Occupational Injuries – How Does Australia Compare Internationally?* (Canberra, 2004).

¹² Health and Safety in Employment Act 1992, s 2(a)(1).

- (b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
- (c) the current state of knowledge about harm of that nature; and
- (d) the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and
- (e) *the availability and cost of each of those means.* [Emphasis added]

It is noteworthy that, first, despite establishing a practicable test, this benchmark is qualified and rendered a ‘reasonably practicable’ test; and, second, cost is included in the same calculus as risk of harm to human health or life.

The terms ‘practicable’ and ‘reasonably practicable’ are obviously different. Thus, in *Marshall v Gotham Co Ltd*,¹³ Lord Reid observed “there may well be precautions which it is ‘practicable’ but not ‘reasonably practicable’ to take...if a precaution is practicable it must be taken unless in the whole circumstances that would be unreasonable”. Following Asquith LJ in *Edwards v National Coal Board*:¹⁴

‘Reasonably practicable’ ... seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it can be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them.

To reiterate, profits and the risk of workers’ death or injury are elements of a calculus, and must be balanced.

John Hansen J observed in *Buchanans Foundry Ltd v Department of Labour*,¹⁵ under a reasonably practicable test, employers are not expected to provide “a certain, complete protection against all potential hazards”. Furthermore, it is context specific so that:¹⁶

...what is reasonably practicable for a large organisation employing safety officers or engineers contracting for the services of a small contractor on routine operations may differ markedly from what is reasonably practicable for a small shopkeeper employing a local builder on activities on which he has no expertise. The nature and gravity of the risk, the competence and experience of the workmen, the nature of the precautions to be taken are all relevant considerations.

Deciding whether a particular course of possible action is reasonably practicable involves a weighing of the costs against the benefits, and will be a matter of fact in each situation. And so, while protection should be provided against the ordinary risks associated with a particular, hazardous activity,¹⁷ in *Marshall v Gotham Co Ltd*,¹⁸ it was held that it was not reasonably practicable for the employer to strengthen mine workings to protect against an unusual geographic fault when the cost would have closed the mine. In *Department of Labour v Hanham and Philp Contractors Ltd*, Randerson and Pankhurst JJ, discussing the judge’s sentencing notes in the District Court, observed:¹⁹

¹³ *Marshall v Gotham Co Ltd* [1954] AC 360 at 373.

¹⁴ *Edwards v National Coal Board* [1949] 1 KB 704 at 712.

¹⁵ *Buchanans Foundry Ltd v Department of Labour* [1996] 3 NZLR 112 at 116.

¹⁶ *Department of Labour v Solid Timber Building Systems New Zealand Ltd* HC Rotorua AP464/44/2003, 7 November 2003 at [31].

¹⁷ *Akehurst v Inspector of Quarries* [1964] NZLR 621.

¹⁸ *Marshall v Gotham Co Ltd* [1954] AC 360.

¹⁹ *Department of Labour v Hanham and Philp Contractors Ltd* [2008] 6 NZELR 79 at [95].

...the cessation of mining in area B was a practical step available to Black Reef and one which could have been simply taken. There would of course have been a cost involved but the financial position of the company at that time was satisfactory for the next two years.

The critical point here is that the courts appear to have considered the financial position of the particular mine. If this is a correct consideration, the inference to be drawn is that employees of an undercapitalised employer might expect lower safety standards than those of a better funded employer.

Dignity and Occupational Safety

Since the UDHR and derivative rights instruments are founded on respect for human dignity, this principle must be the starting point for understanding the rights declared. This idea is recognised by the New Zealand government. Thus, “[t]he main aim of human rights, whatever the form of government prevalent in any particular state, is to protect the dignity of all human beings, no matter what their status or condition in life”.²⁰ Consequently, when UDHR provides that “[e]veryone has the right to...just and favourable conditions of work”,²¹ this guarantee ought to be considered first from a perspective of respect for equal human dignity, as should the right to safe and healthy working conditions guaranteed by the International Covenant on Economic, Social and Cultural Rights (ICESCR).²² Naturally, then, the International Labour Organization (ILO), which has become the United Nations’ specialised agency for promoting human and labour rights, espouses respect for human dignity.²³ Thus, according to Juan Somavia, ILO Director-General, “[t]he primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity”.²⁴

Cultural, economic and social rights were not expected to be immediately achievable. Nevertheless, a signatory State is obliged “to the maximum of its available resources” to achieve “progressively the full realization of the rights recognized in the present Covenant by all appropriate means”.²⁵ However, this barely qualified obligation to promote dignity in the workplace appears to be diluted significantly by the relevant ILO Convention. Thus C155 Occupational Safety and Health Convention provides:²⁶

Each Member shall, *in the light of national conditions and practice*, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. [Emphasis added]

Furthermore:

The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, *so far as is reasonably practicable*, the causes of hazards inherent in the working environment. [Emphasis added]

²⁰ Ministry of Foreign Affairs and Trade *The New Zealand Handbook on International Human Rights* (Wellington, 2008) at 10.

²¹ Universal Declaration of Human Rights (10 December 1948), art 23(1).

²² International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976), art 6.

²³ For a history of the ILO, see M Wilson “ILO – Role of New Zealand Government: Reflections of a Former Minister of Labour” (2010) 35(3) NZJER 6.

²⁴ International Labour Organization “Mission and Objectives” (1996-2011) <www.ilo.org>.

²⁵ ICESCR, above n 23, art 2.

²⁶ C155 Occupational Safety and Health Convention (opened for signature 3 June 1981, entered into force 11 August 1983), art 4(1).

Thus, partly through the agency of the ILO, an all encompassing respect for human dignity in the workplace is adulterated by what is reasonably practicable to achieve under national conditions. ILO conventions have different roots from the UDHR;²⁷ both are concerned with social justice, but the former is specifically about workers' rights while the latter essentially concerns what it is to be a human being. Informed by the ILO conventions, respect for dignity in the workplace tends to be reduced to the narrow sense of freedom from bullying or harassment.²⁸ These are, of course, critical workplace issues, but health and safety is a far broader consideration than those particular ways of devaluing human beings. Indeed, all employment relations should start from respect for the human person. The most obvious way of devaluing a human being in the workplace is to discount the worth of their life and health.

Writing from a Christian moral philosophical standpoint, specifically Roman Catholic theology, Angelini outlines the moral principles that should inform measures to prevent occupational injuries and illnesses.²⁹ These principles include: a precise concept of the worker as a human with dignity, not merely a means of production; a clear acknowledgment of fundamental human rights including the right of workers to employment in a production system that does not endanger their physical welfare or jeopardise their moral integrity; and a complete vision of prevention including the capacity to find a balance between absolute principles and concrete reality through the determination of acceptable risk.³⁰ This approach, which is consistent with the Thomist conception of interdependent, vulnerable individuals living in the society of others,³¹ appropriately captures respect for human dignity in a health and safety context. Similarly, Papadopoulos et al. argue that health and safety must be approached as “the promotion and maintenance at the highest degree of physical, mental and social well being of workers, and not only as retention of their work ability”.³²

We have argued so far that management, the holders of “command power”,³³ must respect workers' dignity; but workers must also protect and promote their physical and psychological integrity. For Kant, whose conception of dignity predominates in European thought, “human beings are possessed of a will and are capable of exercising it freely”.³⁴ This capacity “is most fundamental to the dignity and worth of human beings because it distinguishes humans from other animals and elevates them above the realm of causally determined nature”.³⁵ Consequently, in the context of workplace health and safety, the worker must behave as an autonomous bearer of human rights, and this expectation has, to some extent, been incorporated into the HSEA.

Two further issues are worthy of consideration in relation to autonomy. The first is an apparent “false consciousness” around the naturalness of certain risks in the mining industry. Hall identifies an “economics of risk theme” in which cost and productivity considerations have a necessary and ongoing influence on the type and level of risks that both managers and miners “voluntarily” accept.³⁶ Second, workers' own disregard for self may lead to a degree of paternalism being incorporated into the reasonably practicable test. Thus, the duty requires employers to anticipate “irrational, unwitting, intentional or unthinking” behaviour

²⁷ Contrast Wilson, above n 24; J Maritain *The Rights of Man and Natural Law* (trans Doris C Anson) (G, Bles, London, 1945).

²⁸ See Department of Premier and Cabinet “M2007-02 Dignity and Respect: Policy and Guidelines on Preventing and Managing Workplace Bullying” (2011) <www.dpc.nsw.gov.au>.

²⁹ M Angelini “Ethical Behavior for the Prevention of Injuries in the Workplace” (1987) 30 *Ergonomics* 231-237. The influence of social Catholic thinking on human rights instruments is significant: see Maritain, above n 28.

³⁰ Angelini, above n 30, cited in E Kapp and K Parboteeah “Organizational Ethical Climate and Safety Performance” (2008) 53(7) *Professional Safety* 28-31.

³¹ D Bigongiari (ed) *The Political Ideas of St Thomas Aquinas* (Hafner Press, New York, 1953).

³² G Papadopoulos and others “Occupational and Public Health and Safety in a Changing Work Environment: An Integrated Approach for Risk Assessment and Prevention” (2010) 48 *Safety Science* 943-949.

³³ O Kahn-Freund *Labour and the Law* (2 ed, Stevens & Sons, London, 1977) at 9.

³⁴ S Mulhall & A Swift *Liberals and Communitarians* (Blackwell, Oxford, 1995) at 43.

³⁵ *Ibid.*

³⁶ A Hall “The Ideological Construction of Risk in Mining: A Case Study” (1996) 22 *Critical Sociology* 93-116.

by employees,³⁷ and to protect employees from “temptation”.³⁸ Such self-disrespect and reactive paternalism cannot be reconciled with a model of the dignified, autonomous worker.

Towards a Proportionality Test

If workplace health and safety were approached from a human rights perspective rather than a practicability perspective, some form of proportionality test would be more appropriate than the current reasonably practicable test. Proportionality testing, which assesses the rationality of measures adopted to pursue a legitimate objective, has already been incorporated into New Zealand’s human rights jurisprudence.³⁹ Consideration is given to impairment of rights, and to the justifiability of any deleterious effects arising from the course of action.⁴⁰

In a context of workplace health and safety, pursuing a legally permitted business activity may be presumed to be a legitimate objective. However, then focus must turn to the impact on individuals’ rights (encapsulated in respect for dignity) and the justifiability of, say, risks posed to workers by carrying on the business activity. In particular, alternatives should be considered. These alternatives may include refraining from the particular activity if workers’ rights are disproportionately affected. This would be the fundamental distinction in practice between practicability and proportionality: when human rights are taken seriously, profit cannot outweigh concerns for human dignity and life. The analogy may be drawn here with a supreme court in a jurisdiction with an entrenched bill of rights, which may strike down a disproportionate law; so a disproportionately risky activity would not be permitted.⁴¹

How would the proportionality test work in practice? Let us assume that Alpha Ltd wishes to engage in underground mining in an area of geological instability in the West Coast of New Zealand. The reasonably practicable test would require consideration of harm; knowledge, means available, their availability and cost. It is well known that underground mining presents extraordinary risks, and that New Zealand mines have lower safety standards than, for example, Queensland mines which “set a higher benchmark and [require] higher standards in the terms of operations, especially in regard to safety and health”.⁴² However, if the best available safety measures were implemented, Alpha might not be profitable and so would not carry on the activity. Under the practicability test, it seems that Alpha must do the best it can within its means, even if this results in workers facing greater risks than they would if Alpha had more capital or if the mining activity were carried on in, say, Queensland. In contrast, a proportionality test would focus on the impact on human rights. A conclusion that Alpha cannot afford Queensland-style safety standards but may still carry on its activities would appear to have a disproportionate effect on workers’ basic human rights.

Despite its focus on rights, proportionality testing does not operate in an abstract realm where money and budgetary constraints do not exist.⁴³ However, when dignity is taken seriously, human beings can never be considered a means to an end, or a mere factor of production.

Possibilities

³⁷ See, for example, *Mair v Regina Ltd* DC Dunedin CRN-304-500-4405, 4 March 1994.

³⁸ See, for example, *Tranz Rail Ltd v Department of Labour* [1997] ERNZ 316.

³⁹ M Taggart “Proportionality, Deference, Wednesbury” [2008] NZ Law Review 423.

⁴⁰ *R v Oakes* [1986] 1 SCR 103.

⁴¹ Trade unions have similarly supported a safety case regime requiring regulatory approval before a mine could commence operation: see Department of Labour “Summary of Public Submissions of Discussion Paper: Improving Health and Safety Hazard Management in the Underground Mining Industry” (2008) <www.dol.govt.nz>.

⁴² Royal Commission on the Pike River Coal Mine Tragedy “Transcript of Phase Two Hearing Held on 6 September 2011 at Greymouth” (2011) at 1121 <<http://pikeriver.royalcommission.govt.nz>>.

⁴³ On the right to life-saving treatment in the face of finite health budgets: see, for example *Soobramoney v Minister of Health (KwaZulu Natal)* 1998 (1) SA 765 (CC).

For Helen Kelly, Council of Trade Unions president, the rate of workplace injuries and deaths in New Zealand is “shocking” and “appalling”, especially in the mining sector.⁴⁴ The Pike River mine disaster has laid bare the risks that workers in the mining industry, in particular, face. Peter Sattler, an Australian mining safety specialist described New Zealand health and safety processes as “backward” compared with Australia, and, on complaining to Pike River mine management was told, “you’re not in Australia, you’re in New Zealand” where, for example, “there were no strict rules limiting who could touch anything electrical, despite the increased fire risk in a coalmine”.⁴⁵ Sattler also observed that “monitoring systems to detect highly-explosive methane gas were lacking, and Queensland’s compulsory tube bundling system, which ‘sniffs’ the air to find out what kind of gases are present, didn’t exist at Pike River”.⁴⁶ A previous mine manager had proposed a tube bundling system for the Pike River mine at a purchase cost of \$980,000-\$1,000,000 and then investigated a leasing alternative, but the proposals were deferred for consideration by the company to April 2011 because of budgetary issues.⁴⁷ Media reports overwhelmingly indicate that the tragedy resulted from cost concerns trumping workers’ health and safety.⁴⁸ It is also notable that the laxity at the Pike River mine does not appear to be anomaly: both Burkes Creek mine and Roa mine were shown not to comply with health and safety.⁴⁹

Kelly attributes New Zealand’s high rate of occupational death and injury to a culture of “deference” to employers; she says “[w]orkers don’t challenge, don’t ask. They shut up because they are grateful for a job”.⁵⁰ Such subordination would undermine health and safety: as Haworth observes, “the employee participation dimensions of the [HSEA] are particularly important for building a workplace-level co-operative partnership around [health and safety]”.⁵¹

Dave Feickert, a mines safety consultant, argues that the critical health and safety problem is structural rather than inter-personal:⁵²

The tragedy at Pike River will come to be seen as another market failure, I believe. The professional mines inspectorate and the regulatory system that we inherited from the UK, along with Australia, was abolished in the 1990s, along with the worker safety inspectors, elected by the men from among experienced miners. The industry was moved to self-regulation. Pike River represents a spectacular failure of self-regulating companies in a high-risk industry. Why we allowed an economic theory of business competition to persuade us that competing companies would co-operate on mine safety is something else I will never fathom.

Both Kelly’s and Feickert’s conclusions can also be explained by insufficient respect for basic human rights principles. On the one hand, everyone’s dignity ought to be respected “no matter what their status or condition in life”,⁵³ but, if workers must trade off their safety for the sake of employment, that fundamental equality imperative is discounted. On the other hand, the dominance of market imagery and theory leads to work and, indeed, workers themselves, becoming conceived as

⁴⁴ J Weir “Rate of Workplace Injuries and Deaths Falls, but Still Shocking, Says Union Leader” *The Dominion Post* (New Zealand, 20 October 2011) at C1.

⁴⁵ T McLean “Aussie Miner ‘Shocked’ by Doomed NZ Mine” *The Sydney Morning Herald* (Australia, 16 June 2011).

⁴⁶ Ibid.

⁴⁷ Royal Commission on the Pike River Coal Mine Tragedy, above n 43, at 1186, 1189 and 1192.

⁴⁸ See, for example, O Carville “Pike River Mine’s Safety Systems Failed Repeatedly” (2011) Stuff <www.stuff.co.nz>.

⁴⁹ B Garland and T Watson “Mine Safety - Audit Report Burkes Creek Mine” (2011) Department of Labour <www.dol.govt.nz>; B Garland and T Watson “Mine Safety - Audit Report Roa Mine” (2011) Department of Labour <www.dol.govt.nz>.

⁵⁰ Weir, above n 45.

⁵¹ N Haworth “Beyond the Employment Relationships Act: The Wider Social Agenda for Employment Relations and Social Equity in New Zealand” in E Rasmussen (ed) *Employment Relationships: New Zealand’s Employment Relations Act* (Auckland University Press, Auckland, 2004) at 198.

⁵² D Feickert “Mine Safety Policy Failed Us” *The New Zealand Herald* (New Zealand, 12 July 2011).

⁵³ Ministry of Foreign Affairs and Trade, above n 21, at 10.

a commodity like any other and obey[ing] exactly the same rules” of supply and demand.⁵⁴ It is noteworthy that the Declaration of Philadelphia 1944 concerning the aims and purposes of the ILO declared as its first principle, “Labour is not a commodity”.⁵⁵ Respect for human dignity demands that people lives and health are excluded, as far as possible, from a market calculus.

A conceptual shift in the focus of workplace health and safety from practicability to respect for dignity and proportionality is not, in itself, likely to dramatically impact on occupational injuries. By analogy, citizens of countries with entrenched bills of rights do not necessarily enjoy more freedoms and protections than those without recourse to charters. That depends greatly on the institutions of government, and respect for and enforcement of the rule of law.⁵⁶ Likewise, without fundamental attitudinal and behavioural shifts, a proportionality test might prove no more effective than a reasonably practicable test. Conversely, a reasonably practicable test might be formulated that appropriately subordinates the role of money. Thus, Australia’s Model Work Health and Safety Bill provides:⁵⁷

In this Act, reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

- (a) the likelihood of the hazard or the risk concerned occurring; and
- (b) the degree of harm that might result from the hazard or the risk; and
- (c) what the person concerned knows, or ought reasonably to know, about:
 - (i) the hazard or the risk; and
 - (ii) ways of eliminating or minimising the risk; and
- (d) the availability and suitability of ways to eliminate or minimise the risk; and
- (e) *after assessing the extent of the risk and the available ways of eliminating or minimising the risk*, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is *grossly disproportionate* to the risk. [Emphasis added]

Nevertheless, just as bills of rights “translate into discernible differences in the shape and potency of human rights discourse in terms of its capacity to *defend* and *extend* human rights values”,⁵⁸ so of respect for human dignity and life as a starting point for employment relations would inform all discourse on workplace health and safety.

Conclusion

Having the 23rd worst workplace death rate among developed countries,⁵⁹ New Zealand’s general performance in protecting its workers’ physical and psychological integrity is self-evidently poor; in the underground mining sector, it is appalling. Despite certain progressive features, notably employee involvement, the HSEA, in using its particular reasonably practicable test, facilitates the subordination of human dignity to profit. This outcome is incompatible with New Zealand’s obligations as a human rights State. Commitment to international human rights conventions requires respect for human dignity to inform employment relations, especially workplace health and safety. Replacing the current reasonably practicable test with a proportionality benchmark would be a significant step towards meeting that commitment.

⁵⁴ W Hutton *The State We’re In* (Jonathan Cape, London, 1995) at 99.

⁵⁵ Wilson, above n 24, at 6.

⁵⁶ J McLean “Legislative Invalidation, Human Rights Protection and s 4 of the New Bill of Rights Act” [2001] New Zealand Law Review 421-448.

⁵⁷ Model Work Health and Safety Bill 23 June 2011 (Cth), cl 18.

⁵⁸ L McNamara *Human Rights Controversies: the Impact of Legal Reform* (Routledge-Cavendish, Abingdon, 2007) at 262.

⁵⁹ P Hämäläinen, KL Saarela and J Takala “Global Trend According to Estimated Number of Occupational Accidents and Fatal Work-Related Disease at Region and Country Level” (2009) 40(2) Journal of Safety Research 125-139.

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