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ISSUE 005: August 2008 **Craig Langstone**

Appeal Decision Increases Health & Safety Fines Exposure

On 8 August 2008 the decision in *Department of Labour v Street Smart Ltd* was released. The decision is the first in a number of appeals that the Department of Labour has taken to the High Court in an attempt to have health and safety fines increased considerably. The Department has succeeded, with the fine in the *Street Smart* case being increased by nearly 60% and the High Court indicating that the fine imposed could have been more. So, if the District Court Judges needed any encouragement, this is it!

The Facts

Street Smart undertook kerbside rubbish collection. In December 2006 Street Smart purchased a truck. Street Smart planned to modify the truck to make it safe for use as a rubbish collection truck to be loaded by runners, but over the busy Christmas/New Year period, Street Smart chose to use the truck without first making the modifications.

The thirteen year old son of one of the drivers was tragically killed on 19 January 2007 when, contrary to instructions, he decided to assist the employed runners loading the truck. After grabbing a rubbish bag, the youth attempted to jump onto a step on the truck just as the truck moved forward. He fell into the gap next to the step, was run over by a rear wheel of the truck and suffered fatal injuries.

The Department's investigation revealed that the truck's platform, grab handles and steps did not provide a safe working platform on which runners could safely stand. The High Court said that the situation was a "very bad case of negligence".

The District Court Decision

The District Court Judge put Street Smart's culpability at 7.5 on a scale of one to ten. The Court accepted that the \$60,000.00 reparation agreed between Street Smart and the deceased's parents was appropriate. The Court then imposed a fine of \$55,000.00 on Street Smart.

The High Court Appeal

The Department of Labour appealed against the \$55,000.00 fine imposed on the ground that it was "manifestly inadequate". There was no appeal in respect of the reparation ordered.

Sentencing Considerations

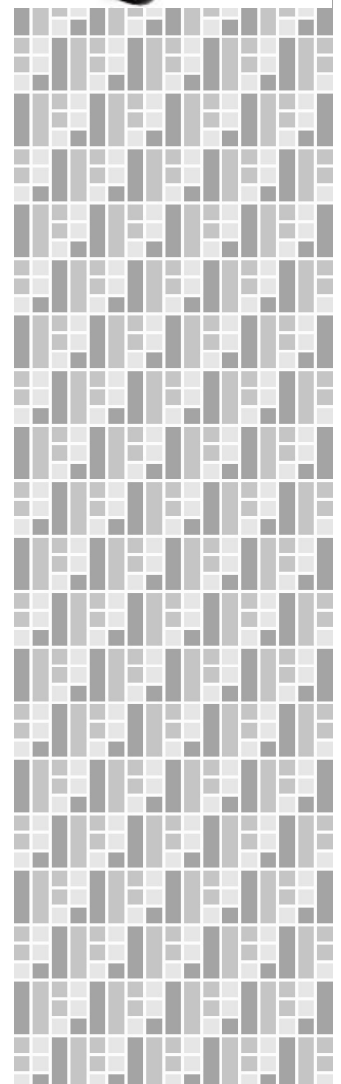
A sentencing Judge has to set a starting point for a fine. Mitigating factors then reduce the fine from the starting point indicated. In this instance, the High Court approved of the District Court Judge's starting point of \$175,000.00 (although not the reasons by which it was arrived at). \$175,000.00 was 70% of the maximum fine (\$250,000.00) and fitted with the level of seriousness of the offending, according to the High Court.

A 34% discount had been allowed in the District Court for the entry of a guilty plea. The High Court Judge said that whilst this was "on the high side", a 34% discount for all mitigating factors (including the early guilty plea) was appropriate.

But the real issue on appeal was the discount given for the agreed reparation of \$60,000.00. The District Court Judge had made a dollar for dollar reduction of the fine – in other words, the Judge took \$60,000.00 off the fine because \$60,000.00 reparation had been paid.

The High Court Judge set out a number of sentencing principles:

- Parliament wanted the emphasis to be on reparation as the first step in arriving at a total sentencing package (section 14(2) of the Sentencing Act).
- A Court must take into account any reparation payable when fixing the amount of the fine to be imposed (section 40(4) of the Sentencing Act).



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- The financial circumstances and the ability of the offender to pay reparation and/or a fine need to be taken into account by a Court.
- The total sentence (i.e. the reparation and fine) must represent the overall criminality of the offending, so reparation is to be viewed as part of the total sentencing package.

Justice Duffy said it was wrong in principle to effect a dollar for dollar reduction of the fine to take into account the reparation paid. To do so distorts the general principle that the reparation and fine should reflect the overall culpability of the offender. But reparation and the fine are the total sentencing package. Why should the full amount of the reparation paid not be considered in determining the appropriate punishment?

Reparation – Payment by an Insurer

Justice Duffy then considered what effect, if any, the fact that Street Smart was insured for reparation had on the fine to be imposed.

Street Smart's lawyer argued that employers should be encouraged to insure against work place accidents. If full weight was not given to reparation paid by an insurer, that would only discourage employers from insuring against work place accidents. And that would result in less reparation being paid to victims – something that ought to be avoided.

Street Smart's lawyer also argued that employers would not pay premiums for cover if reparation by an insurer was not given proper effect. Instead, employers would not insure; instead using monies paid as premiums to meet any fines that might be imposed.

Nonetheless Justice Duffy decided that the fact that an insurer was paying the reparation was something that should be taken into account when the level of fine was being considered. As justification, the Judge

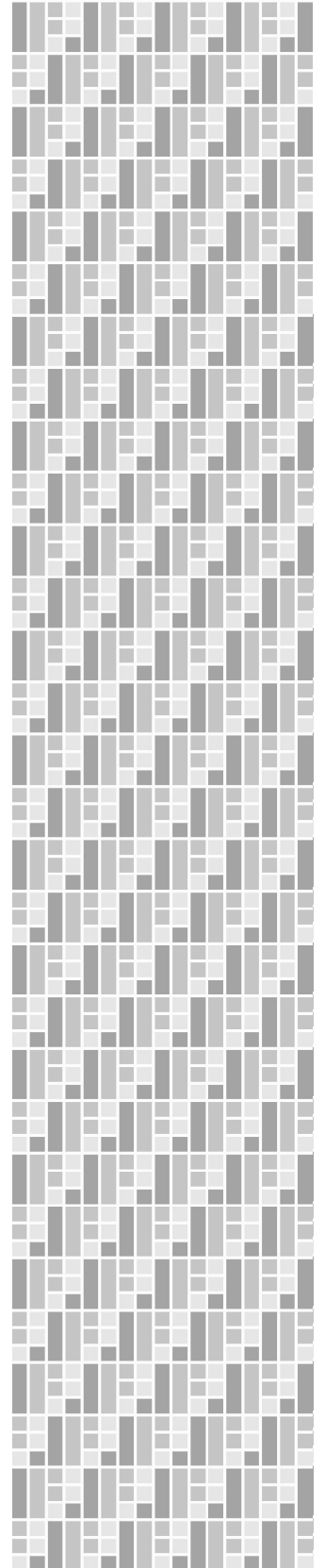
considered the opposite situation and said that knowledge that an employer had no reparation insurance, would not necessarily tell in favour of reducing the amount of a fine.

This comment is probably correct if the employer is in a financial position to pay the total sentence imposed. But it cannot be right if an employer is not in a position to pay both reparation and a fine. In that event, if the employer has no insurance for reparation, the limited financial circumstances of the employer must be taken into account when setting the amount of the fine (section 14(2) of the Sentencing Act).

But what of subrogation and the legal fiction that the insured and the insurer are one and the same, one might ask?

The answer is section 10(1)(a) of the Sentencing Act which allows a Court to take into account financial offers "made on behalf of" the offender. This led Justice Duffy to say that when an insurer assumes responsibility for paying the offered sum (i.e. the reparation), the financial impact on the offender will be diminished. And accordingly this is something that can be taken into account as part of the fine assessment.

Justice Duffy said the Sentencing Act required the Court to consider the financial capacity of the offender and that this applied whether it has the effect of increasing or decreasing the amount of the fine. Importantly Justice Duffy held that: "...where the offender's financial capacity to pay a fine is unaffected by a reparation order, through an insurer meeting the payment, that is a fact that may be taken into account in fixing the fine".



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And because there was nothing to suggest that Street Smart did not have the financial capacity to pay a fine, it was simply a matter of determining the appropriate discount level, if any, to reflect the reparation paid by the insurer. The Judge decided that the reparation paid by the insurer was worth a 16% reduction in the fine. In dollar terms, this equated to \$28,000.00, as opposed to the \$60,000.00 discount given in the District Court. No rationale was given for the 16% reduction, other than it reduced the fine overall by 50%. Justice Duffy said this was appropriate for an appeal, if perhaps a little generous overall.

Quite frankly, this reasoning seems open to challenge on a number of grounds.

The Result in the High Court

This left Street Smart and its insurer paying \$147,500.00. This was 59% of the maximum fine which the Judge said was proportionate to the criminality of the offence. Justice Duffy specifically referred to the fact that approximately 41% of the total would be paid by an insurer, and so the impact on Street Smart was reduced considerably.

Fines will Rise

The decision will presumably be championed by the Department of Labour as justification for fines to be increased across the board by at least 60%, particularly as Justice Duffy said she would have imposed a higher fine had she been the original sentencing Judge, rather than a Judge hearing an appeal! Certainly fines will rise, although it will be interesting to see where the other High Court appeals take matters.

But the Judge's comments about "insured" reparation will be of concern to those in the insurance industry. Insureds may have less reason to take out statutory liability cover if the reparation paid by an insurer is not as likely to reduce the fine the insured has to pay, as it was in the past.

And at the end of the day, why should a party who can afford to pay both reparation and the fine, get a higher fine simply because the reparation is insured? Surely the totality principle of sentencing demands that the same overall penalty should be imposed, irrespective of whether the reparation is insured or not.

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