

INSIGHT



ISSUE 006: February 2009 **Craig Langstone & Erynn Tompkins**

High Court Increases Work Safety Fines

The landmark decision of the full bench of the High Court in *Department of Labour v Hanham & Philp Contractors Limited & Others*¹ has increased the level of fines under the Health and Safety in Employment Act 1992 ("the Act") and reaffirmed the process to be followed by District Courts when sentencing offenders. In addition, the issue of relevance of insurance to sentence has been, pending any appeal, finally determined. The findings of the High Court in this case will affect insurers and employers alike as discussed in this article.

The three respondents were Christchurch based companies Hanham & Philp Contractors Limited ("Hanham"), Cookie Time Limited ("Cookie Time") and Black Reef Mine Limited ("Black Reef"). The three cases were heard separately in the District Court. The Department appealed against each on the basis that the fines imposed were manifestly inadequate so they were all heard together in one appeal in the High Court.

- The fine imposed on Hanham in the District Court was \$5,000; an employee of a painting contractor was injured after he fell from an area of scaffolding. The High Court has increased the fine by 1,000% to \$50,000.
- *Black Reef* involved an employee who died when a mine was flooded. Black Reef was originally fined \$10,000 in the District Court and this was doubled in the High Court to \$20,000. In addition, the reparation order was increased from \$20,000 to \$25,000.
- Cookie Time had its fine increased 266% in the High Court. From the original District Court sentence of \$15,000 it was raised to \$40,000. The incident involved an employee who broke an arm after becoming caught in a conveyer belt.

The average fine up to June 2007 was \$5,403. The figures demonstrated in *Hanham* make it clear that the Department's recent campaign for a hefty increase in the level of fine has been successful. District Court judges, who in most cases sentence health and safety offenders, are bound to follow precedents set by the High Court and as a result, fines will increase in future cases.

Bands of Fines

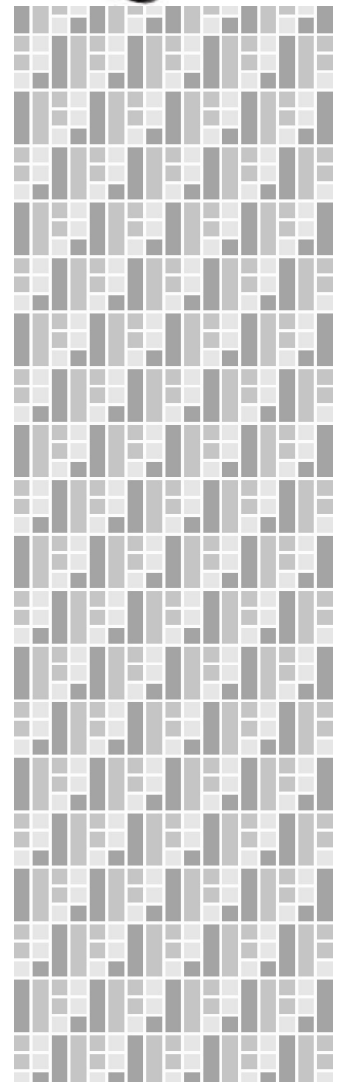
Another change is that the High Court in *Hanham* formulated ranges of appropriate starting points for fines according to whether the incident is one that involves low, medium or high culpability or blameworthiness.

The Court said that "starting points" for fines under the Act should generally be fixed at:

- Up to \$50,000 for low culpability
- Between \$50,000 and \$100,000 for medium culpability
- Incidents where high culpability is evident, between \$100,000 and \$175,000.

In cases of extremely high culpability a starting point of more than \$175,000 may be justified.

On the one hand these bands may introduce a certain amount of stability and predictability in the level of fine expected; but on the other hand they may be viewed as being inflexible. This is especially given that each case presents a situation that is unique and the High Court accepted that sentencing should not be a mathematical exercise.



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As well, there is now less likely to be any consensus between the Department's lawyer and the offender's lawyer about culpability because the Court's finding on this matter will be of utmost importance when determining the level of fine. This could result in more disputed fact hearings, a requirement for in-depth sentencing submissions and longer, drawn out argument at sentencing hearings which could significantly increase the amount of work required by the offender and their lawyer, thus increasing stress levels and legal costs.

Justification for Increased Fines

The High Court stated that "a substantial uplift in existing levels of fines is needed" to reflect inflation, the seriousness of workplace accidents and the need for deterrence. It is reasonable to assume however that employers may feel aggrieved at the increase in fines for a number of reasons. Firstly, it is illegal to insure against fines so they must be paid for directly by the employer.

Secondly, there is an argument that increasing the level of fine will not decrease the number of workplace injuries. To the authors' knowledge, there is no proven link between increased fines and decreased accidents. This may be because employees are not always free from blame in causing accidents (failure to follow instructions is a common health and safety theme) and the threat of a high fine to be imposed on an employer has no deterrent effect on the employee.

Thirdly, increased fines result in more redundancies and financial stress for employers in what is already a difficult financial time.

Fourthly, it is expected that employers will be much less willing to enter an early guilty plea (saving the injured employee the stress of a defended trial) which will result in prolonged prosecutions, more Department resources required (when arguably the money could be put to better use educating companies about prevention of accidents, rather than punishment after the fact) and significantly more Court resources needed. If the employer is found guilty after a defended hearing, the opportunity to reduce the fine by pleading guilty is of course lost.

At this point no-one can say for sure whether or not the increased fines will decrease the number of workplace accidents, but there is sure to be some close study of the statistics over the next few years.

In increasing the level of fines the High Court also considered the 2003 amendment to the Act where the maximum fine increased five-fold from \$50,000 to \$250,000. The High Court interpreted this increase as a signal from Parliament that sentences should be increased overall.

However it could also be argued that the purpose behind the increase in maximum level of fine was to give the Courts the ability to impose a fine that "bites" on multinational and international corporations with high culpability. Otherwise, it could potentially be more cost-effective for large companies to allow a breach of the Act and pay a maximum of only \$50,000, rather than have to spend more than \$50,000 on improving safety.

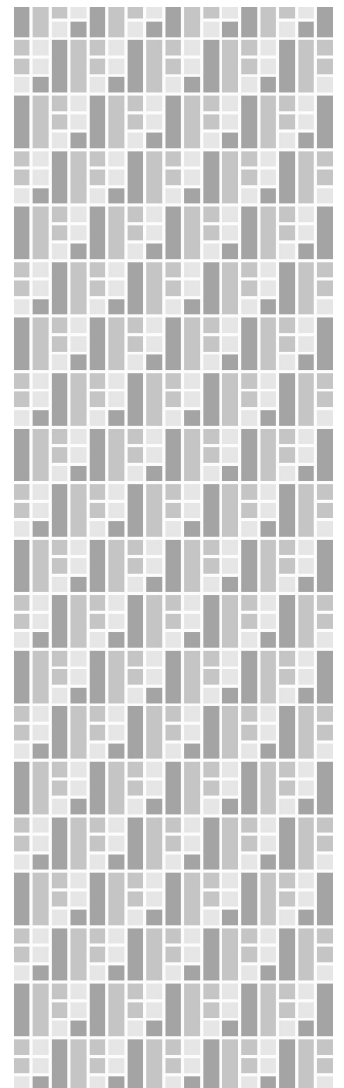
Method of Calculation of Fine

The levels of fines suggested in *Hanham* are to be used as starting points before taking into account other mitigating and/or aggravating factors which will reduce or increase the final fine ordered in any particular case.

Mitigating and aggravating features and other circumstances are set out in the Sentencing Act 2002 and are well known. They include the need for deterrence and accountability, previous convictions, early guilty plea and financial resources of the offender. A statutory declaration, as well as full disclosure to the judge of a company's financial accounts for the past 12 to 24 months, is generally required before a Court will consider financial resources as a relevant factor.

Relevance of Insurance

Prior to *Hanham* there had been conflicting views amongst the District Court judges as to the relevance of insurance cover. Some judges held that the insurance status of the defendant was irrelevant, while others held insurance had a real impact on sentencing.



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The Department has consistently argued that insurance is relevant and that the fine should not be discounted if a voluntary, pre-sentence payment or Court ordered reparation to the injured employee had been met by an insurance company, rather than the employer. This is contrary to the principle that an 'offer of amends' to the victim will reduce the level of fine; and if the Department's argument was sound it would have the effect of reducing the number and amount of voluntary payments to victims, which is clearly not in the best interests of the victims. The Court in *Hanham* decided this issue once and for all when it stated:

"An offender is not to be penalised because insurance cover has been arranged to cover reparation but the existence of the cover is material in assessing the overall financial capacity of the offender to meet reparation and fines".

In addition, Harrison J. in the recent High Court case, *Big Tuff Pallets Ltd v Department of Labour*² (a successful appeal against the level of reparation awarded, argued by the authors of this article) stated:

"The fact that BTP's underwriter would meet the reparation is irrelevant (the existence of indemnity cover for statutory liability cannot operate as a factor favouring reparation or the amount, given the means to pay were not in dispute)."

This is clearly the correct position and in accordance with common sense. An employer with insurance cover cannot claim inability to meet reparation; but having insurance will not increase the appropriate amount of reparation, and contrary to the Department's submission, insured reparation or insured voluntary payments will indeed have the mitigating effect of reducing the level of fine.

As well as the significant increase in the level of fines evident in *Hanham*, it is also noteworthy that uninsured fines will now in most cases amount to more than insured reparations. Insureds may now wish to take a more "hands on" approach to strategy and defence as they arguably have more than the insurer at stake.

Also, as an uninsured will be in a better position to plead poverty, smaller companies may see it unnecessary or undesirable to retain statutory liability insurance cover. It is important to keep in mind though that insurance also covers legal costs and expert fees, which can be very significant. In addition, insurers and their appointed lawyers have many years' experience in dealing with statutory liability claims and are well able to assess liability and provide accurate and cost-effective advice. These types of practical issues will need to be considered in the wake of *Hanham*.

To Finish

Hanham should be regarded as an important case to the insurance and health and safety industries. *Hanham* plainly states that the existence of insurance which covers reparations will not penalise offenders — good news for both insurers and employers. The only relevant of insurance within any of the sentencing stages is when looking at the overall financial capacity of the offender to meet the reparation and the fines. *Hanham* also helpfully sets out in a methodical way the steps to follow when setting the level of fine and reparation.

The decision is one that brings certainty to insurers and employers. In this sense, the decision in *Hanham* is a constructive one. But be aware — well aware — fines in this area will increase to a level not previously known in this country.

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¹ High Court at Christchurch, CRI 2008-409-000002, 17 December 2008

² High Court at Auckland, CRI 2008-404-322, 5 February 2009.

