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The Health and Safety in Employment Act 1992: An Update and Developments

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Introduction

The Health and Safety in Employment Act ("the Act") is now four years old. The primary objective of the legislation is to provide a safe working environment for all employees with the cost to be borne by employers.

Essentially the Act creates:

- a shift in the financial responsibility for health and safety accidents from the government to employers;
- a stricter enforcement of the law relating to these matters; and
- a centralisation of the law.[1]

Specifically, the Department of Labour identified a number of key objectives as the basis of the Act. These included:

- a comprehensive coverage for all work situations;
- clearly defined responsibilities;
- promotion of excellent health and safety performance;
- improved hazard identification and control methods;
- involvement of employees in health and safety issues;
- health and safety training and education;
- dual approach of incentives and penalties;

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[1] For further comprehensive discussion of the implications and historical background of the Act see Kiely and Langton (1994).

- specific hazardous situation identification;
- government intervention to reduce compliance costs; and
- active administration of health and safety.

Following the Act's introduction employers essentially enjoyed a "honeymoon" period. The level of fines imposed reflected the fact that employers were being given a period of time to become conversant with their obligations and duties under the Act. A recent review of both the number of prosecutions and the level of fines imposed, reflects the Courts' view that employers have had sufficient time to adjust their practices and should have now done so.

An observation by Cartwright J in *Tegel Foods Limited v Department of Labour* (Unrep, H C Auckland, AP242/95, 18 Jan. 1996, Cartwright J) is instructive:

> The fines imposed over the last two years fit a pattern common when new legislation is introduced. At first, the Courts are tentative in imposing the fines until the full ramifications of the obligations imposed under the legislation become known to employers and until those employers have had the opportunity to adjust their practices.

Zealous Approach

Statistics relating to both the number of prosecutions and the level of fines imposed indicate a zealous approach being taken by the Department of Labour and the Courts in the implementation of the Act. As Table A indicates the majority of prosecutions (82 percent) have been against employers.

Table A: Health and safety prosecutions lodged against different defendants up to 12 August 1997

Prosecution Lodged Against	**No.**	**%**
Employer	1,147	81.0
Employee	27	2.0
Principal	78	5.5
Person in Control	93	6.5
Employees	71	5.0
TOTAL	**1,416**	**100%**

The extent and nature of obligations

The underlying intent of the Act is to encourage employers to achieve excellence in the management of health and safety at work. The Act lists three specific means by which this can be achieved. These are:

- By promoting excellence in heath and safety management;
- By requiring people in places of work to perform specific duties to ensure that others are not harmed as a result of work activity; and
- By providing for the making of regulations and approved codes of practice relating to specific hazards.

Section 6 - duty to take all practicable steps

Section 6 is a key provision of the Act. It is all encompassing in its scope and requires an employer to: "'Take all practicable steps' to ensure the safety of its employees while at work."

Presently this general duty is not limited to the employer. It extends to self-employed people, persons in control of workplaces, principals and employees. As discussed below, the extension of the duty to people in control of workplaces is currently under review.

Although the legislation provides a definition of "all practicable steps" [2], it is only a starting point against which the Courts have imposed their own principles. The obligation to take all practicable steps has been interpreted strictly with respect to employers. The obligation is to be pro-active in such matters and not merely reactive. On appeal in the High Court in *Tegel Foods Limited v Department of Labour*, Her Honour Cartwright J referred to the leading decision of *Department of Labour v De Spa* [1994] 1 ERNZ 339 quoting from that case: "No room must be left in the community for the view that it is easier to wait until an accident happens, pay the fine and try to do better in the future".

The obligation to take all practicable steps must also take into account the fact that employees may not always use their common sense when carrying out their duties at work. In the decision of *Health and Safety Inspector v Browns Barkly Limited* (Unrep, DC Invercargill,

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[2] Section 2 definition of "all practicable steps":

". . . Those which have regard for:

(a) The nature and severity of the harm that may be suffered if the result is not achieved; and
(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; and
(e) The availability and cost of each of those means."

CRN6025004256, 29 May 1996, Callaghan J) an employee, while attempting to shift a temporary scaffold, fell and suffered a broken wrist. The employee was attempting to scale a scaffold constructed by his own making which was found to be totally unsuitable for the task. The District Court Judge stated that employees simply do not always use their common sense. Liability must rest with the employer in this particular case as no specific instructions were given to the employee regarding the correct way to complete the task.

Health and Safety in Employment Act Amendment Bill 1996

The coverage of section 6 to persons in control of workplaces is presently under review. A Bill amending section 6 of the Act was introduced to Parliament in July 1996. It has received its second reading in Parliament and was referred to the Labour Select Committee prior to the dissolution of Parliament in August 1996.

Specifically the Bill states that it will: "ensure that people in control of workplaces, including land owners will have no duty towards people visiting the workplace for purposes unrelated to the normal work and activity."

Department of Labour v Berryman(1996) 5 NZELC 98, 394.

The Bill was partly precipitated by the case of *Department of Labour v Berryman.* The case involved the prosecution of a farmer after a bee keeper, who kept hives on the farmer's property, died when a bridge on the property collapsed.

It was alleged by the Labour Department that Mr Berryman's farm, the bridge and the land on which the bridge was constructed were part of the bee keeper's place of work. The Department also alleged that Mr Berryman had failed to take all practicable steps to ensure that any person using the farm was not harmed by hazards on the farm. Specifically the Court was asked to determine whether the suspension bridge was a "place of work" for the purposes of the Act.

The bridge appeared to be on Council land, but was assumed by the Council to be a private access bridge. It had been built by the army at Mr Berryman's request some years earlier. The Court observed that Mr Berryman was the owner and had commissioned the building of the bridge. He exercised possessory rights to the bridge, which was also the main means of access to his property.

The Court held that the extended definition of "place of work" in section 2(1) of the Act was clearly intended to ensure that employees are protected while they are at work although they may not necessarily be at their place of work all the time. The bridge was not a place of work for either Mr Berryman or the farmer in question. The Court observed "place" in the context of the Act was to connote a place where a person is working in more than a transitory sense. The Court found the bee keeper did not work on the bridge. At most he passed over it en route to other areas of the farm. The Court also found the landowner did not customarily work on the bridge.

Despite the Court failing to convict Mr Berryman, this case has resulted in a number of farmers closing their properties to recreational visitors in order to avoid perceived liability under the Act. If the Amendment Bill is passed by Parliament the type of case referred to above could not arise. This will no doubt provide some comfort to landowners whose properties provide long standing public access to recreational visitors.

Occupational overuse syndrome

Employer liability for occupational overuse syndrome ("OOS") has continued to develop. Under previous legislation health and safety had a machinery or primary production emphasis. The scope of the Health and Safety in Employment Act extends to these areas. However, the Act also recognises that tertiary industry workers, including clerical and office staff may also be exposed to significant workplace hazards.

In *Department of Labour v FAI Metropolitan Life Assurance* [1995] 1 ERNZ 317, the employer was prosecuted by the Department after an employee, who had commenced work with the company just four days earlier, complained of pain in her fingers, wrists, elbows and neck. She was diagnosed as suffering from OOS.

Medically, the opinion was that eventually the employee would recover full bodily functions, and therefore there was no permanent loss. However, the woman was considered to be suffering considerable contemporary loss and the Court had to consider whether such loss of function came within the definition of "serious harm".

The Court concluded that the employer had failed to identify OOS as a workplace hazard. This failure resulted in serious harm to an employee. The company was fined $8,000. Half of this fine was awarded to the employee.

In *Masters v Wanaka Tourist Craft Limited* (Unrep, Alexandra D C, 2 May 1996, Saunders J) another employer was prosecuted for failing to take all practicable steps to prevent OOS in the workplace. The case arose when a typist already working reduced hours to assist recovery from an OOS condition, was asked to return full-time to work to complete an urgent job. The Judge observed the company was patently aware of the earlier diagnosis of OOS and further that she had been pressured to return to full-time work.

The employer pleaded guilty to the charge and was fined $8,000, of which $5,000 was awarded to the victim.

In accordance with the principles to be applied in sentencing (discussed below in *De Spa*), the Court noted that *Wanaka Tourist Craft Limited* did not have the financial resources of a large company such as *FAI*. The Court observed that it would not be necessary to impose a substantial fine simply to provide a general deterrence to other employers.

The boundaries of "all practicable steps"

The boundaries of what is required by "all practicable steps" was considered by the High Court in *Buchanan's Foundry Limited v Department of Labour* (Unrep, H C Christchurch, AP48/96, 24 April 1996, Hansen J). The High Court overturned the District Court conviction against the employer, Buchanan's Foundry.[3]

The case arose in 1994 following a furnace explosion at the Buchanan plant. The explosion occurred when an employee put wet metal into the furnace in breach of safety rules. The employees all suffered injuries.

The case was first heard in the District Court. It held that while the company had a specific safety system in place it had not taken all reasonably practicable steps to ensure that employees wore adequate protective clothing near the furnace.

Following expert evidence, the District Court Judge concluded that a trade name brand garment on the market, "Protek or Pyrotek" would have afforded greater protection from everyday hazards arising from sparks and minor discharges from the furnace.

The employer appealed to the High Court which allowed the appeal. It found the company had made a point of keeping abreast with new developments in the market for protective clothing. It was also active in identifying hazards and educating employees on how to avoid them. It had tried out new materials and had taken safety advice from the Department of Labour, which had not raised the issue of safety clothing.

The High Court also found that it was only a *possibility* the alternative protective garments would have provided any greater protection than the cotton garments the employees actually wore.

His Honour Hansen J, observed:

> It is clear what the Act requires is that an employer takes all reasonably practicable steps to guard against potential hazards, rather than a certain complete protection against all potential hazards (p.6).
>
> The requirement to take all reasonably practicable steps is not a counsel of hindsight perfection. It involves . . . considerations of due diligence, a total absence of fault, of doing what a reasonable man would have done in the circumstances, or acting with all reasonable care (p.15).

Thus whether an employer takes all reasonable steps is not to be judged with the benefit of hindsight, but on the basis of what is known at the time. In the present case it was clear that nothing would guard against all identifiable hazards involved in furnace work, and clearly a

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[3] See *The Independent*, 21 June 1996, Lindo Penno: High Court Overturns Draconian Safety Ruling, p.22. Also see the *Evening Post*, 8 July 1996, Health and Safety Ruling Overturned, p.13.

compromise approach was required. Hansen J noted the District Court Judge had failed to take account of the need for such a compromise.

The lesson is that in spite of the broad scope approach of the Courts to the phrase "all practicable steps" up until now, employers are not expected to do the impossible. There is a limit to "all practicable steps".

Duties of principals

Section 18 provides:

> Every principal shall take all practicable steps to ensure that -
>
> (a) No employee of a contractor or sub-contractor; and
>
> (b) If an individual, contractor or sub-contractor; -
>
> is harmed while doing any work (other than residential work) that the contractor was engaged to do.

It is generally recognised that the duty of principals to employees of contractors is a high one.

A joint ruling on two recent separate appeals to the High Court has substantially clarified the responsibilities of principals under this provision of the Act.

Fletcher Construction New Zealand v South Pacific Limited

In *Fletcher Construction New Zealand v South Pacific Limited* (Unrep, H C Auckland, 26 July 1996, Cartwright J) ruled against Fletchers in its appeal against a District Court conviction under section 18. The company was convicted after an OSH inspector observed two employees of a sub-contractor working on a roof approximately 10 metres above the ground, without harnesses or other protection.

As the principal contractor, the company had agreed that roof access should be by cherry-picker but on the day in question the machinery was unavailable. The site supervisor was not aware of this and he was not present when the men climbed onto the roof. The company argued that the duties of principal and employer under the Act are not the same. Further, that the company had taken all practicable steps as principal to ensure the sub-contractors and employees were not harmed.

Her Honour took a different view:

> The Act does not lay down a demarcation of responsibilities between principal and employer . . . there is no hard-and-fast prescription, and no set of rules which, if observed, can shift responsibility from the principal to the employer.

The Court found that while a sub-contracting employer engaged to work in a specialised field may have a greater knowledge of the risks involved and a closer relationship with the workers engaged, this does not mean the Act imposes sole responsibility on the employer.

Department of Labour v Central Cranes Limited

Heard on the same day as *Fletcher Construction* was the decision of *Department of Labour v Central Cranes Limited* (Unrep, H C Auckland, AP30/96, 26 July 1996, Cartwright J). This case arose after a member of the public noticed two crane riggers employed by a sub-contractor, walking across wire ropes on a crane at a height of 41 metres without safety harnesses or helmets. The incident was filmed and screened on television news that night.

In the District Court the Judge found that the company, as principal contractor had discharged its duties by assigning the rigging work to a sub-contractor recognised as competent. The Judge also found the company was removed from activities on the site.

However on appeal to the High Court the acquittal was overturned by Cartwright J. She found that the sole responsibility for ensuring safety and safe work practices lay with the direct employer of the crane riggers.

Her Honour also noted that the company was not removed from the site, because a crane driver employed by Central Cranes was on site at the time and would have observed the riggers working at this height.

Her Honour noted: "Whether the principal and the employer have each discharged their responsibilities will always be a matter of fact and degree in the absence of a precise code of practice."

Department of Labour v H C Senior Auckland Limited

In August 1996 a decision of Judge Shaw also considered the duties of principals under the Act. In *Department of Labour v H C Senior Auckland Limited* (Unrep, D C Henderson, CRN 5090023982-3, 8 August 1996, Shaw J) the defendant company was prosecuted with failing to take all practicable steps to ensure that:

a. The contractor was not harmed; and

b. No employee of that contractor was harmed while doing work.

The facts concerned a roofing contractor who, while laying a roof on an industrial building, suffered a heart attack and fell 10 metres below to a concrete slab. Despite attempts to revive the victim, he unfortunately died.

The Judge found that the defendant company had a written health and safety policy. It was one generally known to all sub-contractors working for the company. It included steps to

prevent any accidents in the laying of roofs. The Court also noted that the victim was broadly familiar with the health and safety policy. The Branch Manager of the employer company knew the victim did not agree with the policy in the use of harnesses for roofing work. The Branch Manager knew the victim found the use of harnesses to be impractical particularly when laying long line roofing. At the time the victim fell, there was no safety harness in place to break his fall.

After reviewing the facts the Judge stated that there were two central issues for determination. The first issue was: what steps were taken by the defendant to ensure that there was no harm? The second was: were such steps as were taken all that were practicable?

Her Honour noted the first question is a factual one and the second question is a matter of law given the nature of the Act.

The Court held that the victim in this case (who was also the employer on the work site) contributed to the failure to take all practicable steps to prevent harm. The Judge noted it was clear from the evidence that the victim had deliberately rejected the suggestion that he should wear a safety harness.

However, Her Honour noted that in spite of this finding, liability also attached to the principal. In convicting the defendant on each of the charges Her Honour stated her specific reasons for this finding were:

(i) The nature and severity of possible harm from an accidental fall 10 metres below was obvious. It should have been obvious to everyone involved on the site including the Defendant company.

(ii) The health and safety policy of the Defendant company was inadequate. It lacked any arrangement or agreement, even in a general way about where the responsibility lay for supervision on the site. The failure to address a crucial issue such as supervision of the work site was a significant omission.

(iii) The communication of the policy to the employer (the victim) did not meet the requisite standard. Her Honour referred to the decision of *Department of Labour v Central Cranes Limited* where Cartwright J referred to: "A high degree of analysis of risk, and of consultation and communication amongst all those with responsibility for the work site and with the workers themselves."

(iv) In this decision the Court noted there is no point in having a policy concerning the provision of harnesses if the use of them is not enforced.

(v) Supervision on the site by the principal was inadequate. The principal in this case failed to recognise his responsibility to ensure communication to the victim of a fully practicable safety policy *on the work site.*

(vi) Her Honour concluded finally that it was not impossible for the work in question to be completed by the use of work safety harnesses. Thus the use of harnesses in terms of the Act must be seen as "reasonably practicable".

This decision illustrates that the duty of principals to employees is a high duty. Principals who make use of sub-contractors must ensure that their health and safety policies adequately cover the work undertaken in their businesses. They must also ensure that these policies are properly implemented on the work site and in the workplace.

General principles to be considered in sentencing

The leading case dealing with sentencing is *Department of Labour v De Spa* [1994] 1 ERNZ 339. A full Court of the High Court (Tipping and Fraser JJ) set out a list of relevant though not exhaustive criteria that ought to be considered by the Court when considering appropriate penalties under the Act. Briefly these criteria include:

- The degree of culpability.
  This must be assessed by careful appraisal of the circumstances in which the breach took place.

- The degree of harm resulting to the victim.
  A case of serious harm is regarded as more serious than one not involving serious harm.

- The financial circumstances of the offender.
  A fine at a particular level will obviously bear differently on a small possibly impecunious employer as opposed to a financially secure one.

- The attitude of the offender.
  The Court will consider the degree of remorse, co-operation with the authorities and any remedial action taken. The fact that an offender has acted promptly and voluntarily to remedy a situation will be relevant in the overall assessment.

- A guilty plea.
  A plea of guilty, if entered in accordance with ordinary principles may be relevant to the level of fine.

- The need for deterrence both particular and general.
  The weighting of this factor will differ according to the circumstances of any given case.

- The safety record.
  The safety record, both specific and general of the employer will be material.
  The absence of any previous relevant convictions may be a mitigating factor.

- Section 28(1) of the Criminal Justice Act 1985.
  Reference to section 28(1) of the Criminal Justice Act 1985. The Court may consider this provision in relation to an award of compensation to form part of whole of a fine to the victim.

Compensation to the victim and degree of culpability

To many New Zealanders it would seem fair that an employee injured by a negligent employer should be compensated to some degree. The current accident compensation legislation has abolished the former statutory regime of lump sum payments. This makes more difficult access to effective compensation for those injured.

Table B below, illustrates the general approach which the Courts have taken in the award of part of an offender's fine to injured employees.

Table B: Prosecution awards to injured workers up to 31 December 1995

	Number	Total
Convicted and fined cases	419	$1,387,895
Cases where awards made to workers and total fines paid in these cases	164	$795,350
Workers receiving awards and amount awarded	140	$438,961
Cases where awards made to dependant and total awarded	11	$113,000
Cases where awards made to non-workers and total paid in these cases	10	$19,850

Fines on the increase

Statistics from 1990, prior to the introduction of the Act, indicate that five people were killed every fortnight at work. Five employees each week were left with permanent disabilities. Two hundred employees each week were debilitated with work related injuries.[4]

By comparison, statistics published this month in Australia reveal that more than 600 Australians are killed in accidents at work every year. Another 25 to 50 die each week from work related illness. In fact almost twice as many Australians died at work as were murdered last year![5]

In New Zealand occupational health and safety statistics illustrate that fines imposed in convictions under the Act in the eight months to January 1996 total almost as much as the sum of fines for the preceding two years.

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4 Supra at note 1.

5 Occupational Hazards, Richardson and Kyriakopoulos, *The Bulletin*, 3 September 1996, p28.

Further statistics from Australia reveal the maximum allowable level of fine in this area to be significantly higher than in New Zealand. In New South Wales the penalties for offences under Occupational Health and Safety range from $250,000 to $500,000. The Courts in this jurisdiction also have discretion to jail negligent persons who breach occupational health and safety provisions. By contrast New Zealand's Health and Safety in Employment Act provides for a maximum fine of $100,000 pursuant to section 49 and $50,000 pursuant to section 50.

An offence is committed under section 49 where any person takes any action, knowing it is reasonably likely to cause serious harm to any person. Section 50 is a strict liability provision. The essence of strict liability is that a defendant may escape liability by showing on the balance of probabilities, that there was a total absence of fault on its part or that all due diligence was taken.[6]

Total fines imposed since the Act became operational in April 1993 had in August 1997 topped the $3 million mark - $3,032,545 to be exact compared with a total of nearly $1,509,845 at the time of a previous statistical period finishing in January 1996.

Of the 1,269 cases which proceeded, only 823 resulted in conviction (with or without fine), while 63 were discharged without conviction and 343 were withdrawn. Interestingly, awards made to employees, dependants and non-employees represented approximately 40 percent of the total fines imposed.

Table C: Outcome of "Not guilty" plea cases from 1 April 1993 to 12 August 1997

Total Not Guilty plea cases		234
Resulted in Convicted and Fined	24	
Resulted in Convicted and Discharged	100	
Resulted in Dismissed	93	
Total Withdrawn	34	
TOTAL	234	
Total Cases Lodged		1,416

[6] *Department of Civil Aviation v MacKenzie* [1983] NZLR 78 and *Millar v MOT* [1986] 1 NZLR 660.

Railton Contracting Ltd v Department of Labour

In *Railton Contracting Ltd v Department of Labour* (Unrep, H C Invercargill, AP8/96, 24 April 1996, Tipping J) the High Court was required to revisit the level of fines imposed on the employer company pursuant to section 49.

The charges related to:

(i) Operating a machine while a prohibition order was in force; and

(ii) Failing to properly guard the machine in question; and

(iii) Failing to inform an employee of hazards and the necessary steps to minimise danger associated with the machine.

In the District Court a fine $14,000 was awarded against the employer ($8,000 on the first charge and two fines of $3,000 on each of the second and third charges). The employer appealed to the High Court seeking a reduction of the fine imposed.

In the High Court, His Honour Tipping J held the District Court Judge had failed to take into account the guilty plea made by the defendant employer in the first instance. A guilty plea is one of the factors to be taken into consideration when sentencing is made under the Act.

His Honour also observed there were: "The additional penalties of $3,000 each for what essentially was the same fault".

He noted the laying of three separate informations was unnecessary and could be referred to as "overkill".

Although the employer was entitled to a "discount" in respect of its guilty plea, this had to be measured against the degree of culpability which was substantial in this case. The employer, while taking steps to remedy the safety problems in the workplace was nevertheless in knowing breach of a prohibition order.

In relation to the use of the section 49 (the "knowing" section) as opposed to the more usual reliance on section 50 (the "strict liability" section), Tipping J concluded that:

> There are different levels of penalty for each and although . . . it is not just a matter of doubling for the knowing cases what might have been appropriate for the unknowing, one must bear in mind Parliament's clear intention that if people knowingly breach their obligations under this legislation they are likely to receive heavier penalties. One must, of course, always balance all the relevant factors but that seems to me to be a reasonable starting point.

His Honour also made reference to the financial circumstances of the offender observing that this was a small company with low net assets and a considerable overdraft. Again, financial circumstances of the offender is one of the relevant sentencing considerations from *De Spa*.

However, the Court observed that the financial circumstances of the defendant had not been made known to the Court at the District Court hearing. His Honour noted that if a defendant wishes their financial circumstances to be taken into account in sentencing, it must make such circumstances known to the Court at first instance.

In view of all the circumstances Tipping J concluded that a fine of $10,000 would be a reasonable and appropriate level of fine. He reduced each of the $3,000 fines to $1,000.

Table D: Health and Safety in Employment Act 1992
Prosecution Statistics from 1 April 1993 to 12 August 1997

For Breach of Section	Prosecutions	Highest fine ($)	Lowest fine ($)	Number of convicted and fined	Total fines ($)	Average fine ($)
6	545	$30,000	$95	367	$1,788,495	$4,873
7	119	$20,000	$100	52	$179,400	$3,450
8	3	$6,500	$6,500	1	$6,500	$6,500
9	3			0		
10	27	$5,000	$250	8	$23,750	$2,969
12	37	$12,500	$500	12	$36,000	$3,000
13	177	$20,000	$200	68	$287,350	$4,226
15	43	$20,000	$500	24	$82,250	$3,427
16	92	$25,000	$400	48	$318,500	$6,635
17	26	$6,000	$250	14	$19,700	$1,407
18	79	$10,000	$300	44	$141,450	$3,215
19	71	$5,000	$200	31	$31,400	$1,013
24	1			0		
25	99	$5,000	$100	44	$47,650	$1,083
26	43	$3,000	$500	18	$21,750	$1,208
39	19	$2,500	$150	15	$15,100	$1,007
42	2			0		
43	7	$8,000	$500	2	$8,500	$4,250
48	7	$5,000	$500	3	$6,000	$2,000
Totals:	**1,400**	**$30,000**	**$95**	**751**	**$3,013,795**	**$3,141**

Table D above indicates the range of fines for convicted and fined cases under the Act up until 12 August 1997.

Awards to victims - the Tasman and Ansett decisions

Two decisions involving the Tasman Pulp and Paper Company Limited and Ansett (New Zealand) Airfreight illustrate the growing tendency to award a portion of the fine imposed to the victim.

***Health and Safety Inspector v Tasman Pulp and Paper Company Limited* (D C, Auckland, 31 Jan. 1996, O'Donovan J)**

In January 1996 an award of $45,000 was imposed against Tasman Pulp and Paper Company Limited. The company faced three charges under the Act. An award of $15,000 was made against the company pursuant to each charge. The charges related to:

- Failing to take all practicable steps pursuant to section 6 of the Act to ensure the safety of an employee;
- Failing to take all reasonable steps to ensure that the employee was supervised by a person with sufficient knowledge and experience of the machinery in question to ensure that harm would not ensue; and
- Failing to take all practicable steps to ensure that the employee was adequately trained in the use of the machinery.

The case involved severe injury to an employee whose feet became caught between a spike roll and flat plate of a spike roll conveyor as he attempted to clear a log jam. He suffered severe lacerations and the loss of toes on one foot and bone damage to the other. The Court found that although the employer company had a written isolation procedure explaining to the employees how to correctly isolate the conveyor, it had failed to ensure that employees were trained in its use.

The Court rejected the argument that the charges should be seen as one single failure to act by the defendant. It found that it was appropriate for the employer to be charged with specific failures in the three areas to highlight the important separate obligations imposed by the statute.

The Court also noted it was not helpful to look at other cases where similar injuries had been sustained. It found each case should be determined by reference to its own merits. In this decision $30,000 of the $45,000 imposed was directed to be given to the victim employee.

Department of Labour v Ansett (New Zealand) Airfreight **(Unrep, D C, Otahuhu, 2 Feb. 1996, Treston J)**

In February 1996, Ansett Airfreight faced three charges similar to those in the *Tasman* decision.

The employee in this case suffered severe crushing to his left leg resulting in amputation above the knee, when he was struck by an aircraft loader. The company operates a cargo terminal at Auckland International Airport and was the owner of the aircraft loader. The accident occurred as a loader being used to transport containers to aircraft, reversed away from the aircraft and struck the victim in the left leg, trapping him. The Court found that the machine was unsuitable for the task for which it was being used. It also found the operator's vision was obscured as he used the machine. No formal warning lights or reverse bleeper signals existed on the machine.

His Honour referred to the decision (noted above) of Cartwright J in *Tegel Foods Limited* and her comment that fines under the legislation have been steadily increasing. He referred also to the *Tasman* decision, noting that the approach in these decisions has been to highlight to all employers the obligations under the Act which need to be taken seriously and the need for penalties to be rigorous in particular cases.

As in the *Tasman* decision, the Judge rejected a global approach to the apportionment of fines as recommended by Counsel, deciding that the charges against the company related to separate issues and it would not be the proper approach to view them all in the same manner.

The fine amounted to $20,000 on each charge totalling a sum of $60,000. Pursuant to section 28(1) of the Criminal Justice Act, two thirds of the penalty ($40,000) was directed to be paid to the victim.

These decisions illustrate the growing trend to award part of the fine imposed to victims of workplace accidents. Without the right to sue or any substantive accident compensation provisions, it is likely this controversial trend will continue.[7]

Exemplary damages

Another recent development in the area of health and safety concerns the award of exemplary damages against employers. Exemplary damages are available as a remedy to victims of "outrageous or highhanded conduct". While it is not common practice for employees to bring claims the possibility exists in certain circumstances.[8]

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[7] Supra at note 3.

[8] For further discussion on the implications of this development of awarding exemplary damages see *The Independent*, 24 May 1996, Rebecca Macfie: Negligent Employers Face Increased Risk Following Landmark Court Case.

Somerville v McLaren Transport Limited

In *Somerville v McLaren Transport Limited* (1996) 5 NZELC 98,393 the District Court in Dunedin was required to consider a claim for exemplary damages for personal injury caused by negligence. The injured man visited the defendant's garage to have a new tyre fitted to a wheel rim of his hay conditioning machine. When a tyre of the appropriate size could not be found an attempt to fit a smaller tyre was made by an employee of the garage. The employee inflated the tyre to more than double the recommended pressure. The employee had no special training as a tyre fitter (a fact emphasised by the District Court Judge), and was unaware of basic safety requirements. The tyre exploded while being inflated and caused severe injury to the victim who was standing nearby.

The District Court awarded exemplary damages of $15,000 to Mr Somerville. The Court concluded that the garage's conduct was grossly negligent.

The garage company's negligent conduct was held to include a casual approach to safety in the workshop and a sceptical and indifferent attitude to training. The injuries to the plaintiff victim were severe. Upon the explosion of the tyre Mr Somerville suffered severe shock, intra-abdominal bleeding, liver injury, scalp lacerations, several bone fractures and his left leg was almost severed at the knee.

While the garage's conduct predated the Health and Safety in Employment Act, the Judge concluded that there was certainly nothing in principle to prevent an action for exemplary damages arising from personal injury as a result of negligence:

> The difficulty for a plaintiff will be establishing the extent or degree of conduct which justifies an award . . . I am satisfied that this is one of those rare and exceptional cases where the defendant's conduct can be described as outrageous and merits condemnation by the Court.

The District Court also stated that the award of exemplary damages is not restricted to any particular category of tortious conduct. Claims for exemplary damages are also not barred by the current accident compensation legislation.[9]

The employer appealed to the High Court.[10] The appeal was dismissed by Tipping J who stated:

> exemplary damages for negligence causing personal injury may be awarded if and only if the level of negligence is so high that it amounts to an outrageous and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment.

His Honour stated that he was "not without sympathy" for the premise that exemplary damages should now be developed in New Zealand to include a compensatory aspect. However, His Honour ultimately declined to accept this submission observing:

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[9] Accident Rehabilitation Compensation Insurance Act 1992, section 14.

[10] Unreported, Dunedin High Court, AP2/96, 13 August 1996, (Tipping J).

> The statutory scheme must be deemed to provide adequate compensation for personal injury as it would be a near impossible task for the Court to decide on what basis a compensatory aspect should be assessed. It is not for the Courts to undermine the statutory and social purpose of the Acts and compensation legislation by allowing actions for exemplary damages to contain an element of compensation.

This decision will serve as an alternative warning to employers who take a cavalier approach to health and safety matters or who fail to correct a dangerous situation after an accident has occurred. It may become the case that awards of exemplary damages will become a financial "top-up" in personal injury claims.

The desirability of exemplary damages together with the clear tendency to award part or all of the fine under the Health and Safety in Employment Act to the victim is a policy matter that Parliament may well have to address in the future.

Conclusion

The primary object of the Health and Safety in Employment Act is to provide a safe working environment for all employees.

In an attempt to enforce the objectives of the legislation, the number of prosecutions has more than doubled in the 1995/1996 year, with the majority of prosecutions under the Act arising from an accident or incident in the work place.

An examination of recent developments under the Act illustrates that harsher penalties are also being imposed by the Courts. Given the Act is now three years old, the Courts' view is increasingly that employers have had sufficient opportunity to consider their health and safety policies and may no longer plead ignorance of the legislative scheme.

It is not clear whether the development of awards of exemplary damages to victims will continue. Arguably, it is undesirable that victims of workplace accidents seek compensation under the Act as de facto personal injury actions. Such a development may well require legislative intervention.

However judicial recognition of the limit to "all practicable steps" and the 1996 Amendment Bill are recognition that there must be some limit to the liability for employers and people in control of workplaces.

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