

WHAT IS THE PLACE OF CORRECTIVE JUSTICE IN CRIMINAL JUSTICE?

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I. WHY ASK “WHAT IS THE PLACE OF CORRECTIVE JUSTICE IN CRIMINAL JUSTICE?”

Traditionally, “justice” in criminal sentencing has been concerned with allowing society to respond to the offender’s criminal wrongdoing by providing punishment, deterrence and denunciation. Corrective justice, the notion that a person who wrongfully harms someone else should put that harm right, has traditionally been associated with compensation and the civil law. Compensation has increasingly become a function of the criminal law in New Zealand, bringing with it the philosophical baggage of corrective justice.

A key part of the traditional notion of “justice” in criminal sentencing is that the offender’s penalty should be proportional to their wrongdoing. This is reflected in the “totality principle”: that the totality of the offender’s penalty should reflect the totality of their wrongdoing.¹ For corrective justice to be done, the offender² must provide compensation to the victim that makes up for the harm that has been caused, not compensation that is proportional to the offender’s wrongdoing. However, a morally repugnant act can result in minimal loss, while a far less blameworthy act can result in catastrophic loss. As the Royal Commission of Inquiry into Personal Injury in New Zealand³ puts it: “[r]eprehensible conduct can be followed by feather blows, while a moment’s inadvertence could call down the heavens.” So, in cases where the offender’s wrongdoing is not proportional to the harm caused, we may not be able to achieve both corrective justice and traditional criminal law notions of justice. If compensation is now part of our criminal law, a sentencing court needs a rule to determine how to take into account these competing ideas of a just outcome between victim and offender – an answer to the question “what is the place of corrective justice in criminal justice?”.

Until relatively recently, the answer has been reasonably clear: compensation in the criminal law is secondary to the pursuit of “justice” in the traditional criminal law sense. Although corrective justice may have a role in the criminal law, it is a limited one. The civil law, not the criminal law, was the place for a victim of wrongful harm to pursue full compensation. However, the Sen-

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- 1 For a recent re-statement of the principle see *R v Xie* [2007] 2 NZLR 240 (CA) at [18]: “the total sentence must represent the overall criminality of the offending and the offender.”
- 2 This paper typically refers to the parties as “offender and victim” since the context is corrective justice in the criminal law. In a civil case, the parties would of course be “plaintiff and defendant”. Conceptually speaking, the parties could also be described as, for example, “doer and sufferer of injustice”, see Ernest Weinrib “Corrective Justice in a Nutshell” (2002) 52 UTLJ 349 at 349–351.
- 3 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal injury in New Zealand; Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967) at 49.

tencing Act 2002 has given compensation a new prominence. This paper sets out the major developments in compensation in the criminal law up to and including the Sentencing Act 2002 and then discusses how the courts have addressed the new place of corrective justice in the criminal law – in particular in the area of employer prosecutions under the Health and Safety in Employment Act 1992, where the offender tends to have the means to pay reparation and a fine. This article is intended to describe the role of corrective justice in criminal justice in New Zealand rather than argue what it ought to be.

II. COMPENSATION IN THE CRIMINAL LAW

Although traditionally the criminal law has been associated with punishment and deterrence while the civil law has been associated with compensation, there has always been a degree of overlap. Fines may punish offenders but also compensate the state. Awards of exemplary damages allow the civil law to pursue punishment and deterrence independent of compensation,⁴ and various statutes have allowed for compensation through the criminal law. As Richardson J observed in *Taylor v Beere*,⁵ compensation and punishment have never been kept in water-tight compartments. As well as overlap in terms of the functions of punishment, deterrence and compensation, the civil and criminal law also overlap in terms of the types of wrongs addressed. The criminal law can be seen as addressing wrongs against the state, and the civil law wrongs against the person. There are some wrongs against the state that are not wrongs against the person, for example drug offences, and there are some wrongs against the person that are not wrongs against the state, for example breaches of contract. However, criminal acts that cause harm to person or property can be wrongs against the state as well as an individual, and could potentially receive a criminal and civil law response. Compensation in the criminal law allows criminal justice and corrective justice to be pursued without the need for separate proceedings.

There are two main ways in which Parliament has given the criminal law a compensatory function. The first is the introduction of sentences that require a payment of compensation by the offender to the victim. The second is statutory schemes that operate through the criminal law to facilitate payments of compensation to victims of crime from a centralised fund.⁶ The focus of this paper is the former, since payments of compensation by the offender to the victim serve corrective justice by having the wrongdoer put right the harm they have caused. Payments from a centralised fund occur outside the nexus between offender and victim so provide compensation but not corrective justice. Historically, the criminal law had a limited (and little-used) provision

4 For a recent discussion of the function of exemplary damages by the Supreme Court see *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149, in particular at [19] per Elias CJ, at [58] per Blanchard J, at [94]–[95] per Tipping J, at [194] per McGrath J, and at [254] per Wilson J.

5 *Taylor v Beere* [1982] 1 NZLR 81 (CA) at 90–91 “Even today tort law cannot be fitted neatly into a single compartment. In part this is because it serves various social purposes. It is not simply a compensation device or a loss distribution mechanism. It is a hybrid of private law and public interest issues and concerns.” Also noted that: “Nor in policy terms is there legislative support for the rigid separation of the enforcement processes in crime and tort. On the contrary, there are various statutes which authorise the criminal Courts to compensate in various ways the victim of the offending.”

6 In particular, the schemes established by the Criminal Injuries Compensation Act 1963 and the Sentencing (Offender Levy) Amendment Act 2009. For a contemporaneous description of the former see BJ Cameron “The New Zealand Criminal Compensation Act, 1963” (1965) 16 UTLJ 177.

to order offenders to pay compensation for loss of or damage to property.⁷ In the latter part of the twentieth century, two new such measures were introduced: fine diversion awards and reparation. Fine diversion awards allowed for up to one half of a fine imposed on an offender to be paid to the victim “by way of compensation”, but only in limited circumstances,⁸ and were later abolished.⁹

A. *The Introduction of Reparation*

The sentence of reparation was introduced in s 22 of the Criminal Justice Act 1985. A sentence of reparation means that the offender is ordered to make a payment to the victim either as a lump sum or over time. Unlike fine diversion awards, which were parasitic on a sentence of a fine, reparation is a sentence unto itself.

Section 11 of the Criminal Justice Act 1985 created a presumption in favour of a sentence of reparation. A court was required to impose a sentence of reparation unless it was satisfied that it would be inappropriate to do so. The ability of the offender to pay reparation was a relevant factor in determining whether the sentence was appropriate and, if so, how payment should be made. The Act provided machinery to assist the courts in determining whether reparation was appropriate, and encouraged co-operation between doer and sufferer of harm. Section 22(3) allowed a sentencing court to order a report on matters such as the quantum of damage suffered and the ability of the offender to pay. Section 23 required a probation officer or other person preparing such a report to seek agreement between the offender and victim on the value of the damage, and how much reparation the offender should pay. Section 12 required the Court to take into account as a mitigating factor “any offer of compensation made by or on behalf of the offender to the victim”. In conjunction with the power to impose a sentence of reparation, s 12 allowed an offer of amends made by the offender to be crystallised into an enforceable sentence.

Reparation was initially only available for damage to property, but the Criminal Justice Amendment Act 1987 gave a sentencing court the power to award reparation for “emotional harm”. The 1987 Amendment Act also provided for the preparation of victim impact statements to ensure that the sentencing judge was informed about any harm caused to the victim.

Hammond J discussed the meaning of “emotional harm” in *Sargeant v Police*:¹⁰

The Act is silent as to what is meant by “emotional harm”. The term could obviously span a range of phenomena. At the lowest end of the scale, it could mean simply “mental anguish” occasioned to a victim by a crime; at the other end of the scale, the particular harm might be manifested in identifiable, long term, clinical conditions such as traumatic stress, or even psychotic conditions.

Hammond J considered that taking a restrictive view on the meaning of “emotional harm” would go against the restitutionary purpose of reparation and that a sentencing judge’s task was to “quantify the grief, the bereavement, the anxiety, and the mental pain and suffering.”¹¹

The introduction of fine diversion awards and reparation gave corrective justice an increased role in criminal justice. However, corrective justice was secondary to traditional criminal justice:

7 For example Crimes Act 1961, s 403.

8 Fine diversion awards were only available to victims of crime who had suffered “bodily harm” and only when the act or omission that constituted the offence was unprovoked. The fact that fine diversion awards were only available when a sentencing Judge considered a fine was appropriate was a limiting factor in itself.

9 Fine diversion awards were introduced by the Criminal Justice Amendment Act 1975, re-enacted in the Criminal Justice Act 1985 and removed by the Sentencing Act 2002.

10 *Sargeant v Police* (1997) CRNZ 454 (HC) at 7.

11 *Ibid* at 8.

fine diversion awards were only available when application of traditional principles of criminal justice arrived at a sentence of a fine, and reparation was not available if such a sentence would be inappropriate in terms of traditional criminal justice.

B. The Sentencing Act 2002

The Sentencing Act 2002 was a response to public dissatisfaction with the criminal justice system. A citizens' initiated referendum¹² held at the same time as the 1999 general election asked:

Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

Ninety-two per cent voted "Yes" to the referendum, with an 83 per cent turnout.¹³ The referendum question contained at least two different propositions – greater emphasis on the needs of victims, and harsher sentences for serious violent offences – so it is difficult to draw any firm conclusions on the views of voters on the two propositions separately.¹⁴ Despite this, one can conclude that there was some public appetite for changes to the criminal justice system.

The legislature must have taken the results of the referendum as supportive for both propositions generally, since the main legislative response – the Sentencing Act 2002, which replaced the Criminal Justice Act 1985 as primary sentencing legislation – changed the role of the victim in criminal sentencing and made changes to sentencing of violent offenders.

The purposes of the Sentencing Act 2002, included "to provide for the interests of victims of crime",¹⁵ which made compensation for victims of crime one of the main functions of sentencing law.

The Sentencing Act 2002 removed fine diversion orders and strengthened the sentence of reparation. The presumption in favour of reparation in the Criminal Justice Act 1985 was replaced with an even stronger presumption in favour of reparation. Under s 12(1):

If a court is lawfully entitled under Part 2 to impose a sentence of reparation, it must impose it unless it is satisfied that the sentence would result in undue hardship for the offender or the dependants of the offender, or that any other special circumstances would make it inappropriate.

Further, a Court that does not impose a sentence of reparation is required under s 12(3) to give reasons for not doing so.

As well as strengthening the presumption in favour of reparation, the Sentencing Act 2002 also increased the types of losses for which reparation could be ordered. Reparation under the Criminal Justice Act 1985 had been available for emotional harm, and loss or damage to property.

12 The Citizens Initiated Referenda Act 1993 allows for a non-binding referendum to be held if proponents submit a petition to Parliament signed by 10 per cent of all registered electors, collected within 12 months.

13 Electoral Commission "1999 General Election – Return of Citizens Initiated Referenda Poll Votes – Reform of the Criminal Justice System" (1999) Electoral Commission website <electionresults.org.nz/electionresults_1999/e9/html/e9_partXIV.html>. The election itself had a turnout of 85 per cent.

14 What is the proper approach of a voter who supports some of the propositions put forward in the questions and opposes others? The author voted "No" in the referendum in question because of a discomfort with the notion of sentences of "hard labour" rather than an opposition to greater emphasis on the needs of victim per se. This – perhaps contrarian – approach to voting was in the minority.

15 Sentencing Act 2002, s 3.

Section 32 of the Sentencing Act 2002 extended awards of reparation to “loss or damage consequential on any emotional or physical harm or loss of, or damage to, property¹⁶.”

The Sentencing Act 2002 recognised reparation as an important mitigating factor in sentencing, allowing a sentencing Court to take into account a wide variety of ways in which an offender might seek to put right the harm caused to the victim.¹⁷

III. THE PLACE OF CORRECTIVE JUSTICE IN CRIMINAL JUSTICE FOLLOWING THE SENTENCING ACT 2002

The Sentencing Act 2002 was a turning point in the development of the compensatory function of the criminal law in New Zealand. Although the criminal law did facilitate offender-to-victim payments prior to the Sentencing Act 2002, the 2002 Act made clearer provision for reparation to be the sentence of choice, and arguably made compensating the victim the first priority of a sentencing judge. Allowing for consequential damage substantially widened the scope of what reparation could compensate for, making reparation closer to civil damages. This means that the courts have had to re-consider the question “what is the place of corrective justice in criminal justice?” in light of the new Act.

A. *Fines and Reparation Serve Different Purposes*

Police v Ferrier,¹⁸ a High Court decision handed down shortly after the Sentencing Act 2002 came into force, addressed the place of compensation in the criminal law.

16 Reparation for physical injury was excluded because New Zealand’s accident compensation scheme (Accident Compensation Act 2001) provides compensation for physical injury. However, the Sentencing and Parole Reform Bill, which eventually became the Sentencing Act 2002, initially provided for reparation for physical injury until the overlap with the ACC scheme was identified. Section 32(5) of the Sentencing Act 2002 addresses the overlap, and provides that “the court must not order the making of reparation in respect of any consequential loss or damage described in subsection (1)(c) for which the court believes that a person has entitlements under the [ACC scheme].” The interpretation of section 32(5) was addressed by the Supreme Court in *Davies v Police* [2008] NZSC 4, [2009] 3 NZLR 189.

17 Section 10(1) of the Sentencing Act 2002 requires a sentencing Court to take into account:

- (a) any offer of amends, whether financial or by means of the performance of any work or service, made by or on behalf of the offender to the victim;
- (b) any agreement between the offender and the victim as to how the offender may remedy the wrong, loss, or damage caused by the offender or ensure that the offending will not continue or recur;
- (c) the response of the offender or the offender’s family, whanau, or family group to the offending;
- (d) any measures taken or proposed to be taken by the offender or the family, whanau, or family group of the offender to—
 - (i) make compensation to any victim of the offending or family, whanau, or family group of the victim; or
 - (ii) apologise to any victim of the offending or family, whanau, or family group of the victim; or
 - (iii) otherwise make good the harm that has occurred;
- (e) any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.

That said, although reparation can be a mitigating factor, this does not guarantee it will be given much weight. The weight attached to reparation as a mitigating factor will depend on other factors relating to the offender and offending, and whether or not the reparation has actually been paid. See *Otufangavalu v R* [2010] NZCA 585.

18 *Police v Ferrier* HC Auckland CRI 2003-404-000195, 18 November 2003.

Mr Ferrier was convicted of careless driving causing death – a case of a moment’s inadvertence calling down the heavens.¹⁹ The Crown sought reparation of around \$18,500 for the family of the deceased. The District Court was concerned that awarding the full amount of compensation would be a punishment out of proportion with the wrongdoing, using the maximum fine payable of \$4,500 as a kind of benchmark for the appropriate level of punishment for the offending in question. The District Court awarded reparation of \$5,000 and gave the totality principle of sentencing as a justification.

Harrison J stressed that fines and reparation are conceptually different and serve different purposes:²⁰

A fine is essentially punitive, it is a pecuniary penalty imposed by and for the state. By contrast, an order for reparation is compensatory in nature, designed to recompense an individual or her family for financial loss or emotional harm suffered as a result of another’s offending.

In other words, a fine serves traditional criminal justice and reparation serves corrective justice. Since in this case traditional criminal justice is served by a financial penalty of around \$4,500 and corrective justice is served by a payment to the victim’s family²¹ of around four times that, how ought a court to resolve the conflict? The District Court’s answer was essentially that traditional criminal justice should take precedence. The High Court disagreed, finding that there was no place to apply the totality principle and the full order of reparation fell “squarely within Parliament’s clear prescription to compensate victims and their families in cases such as this”²²

Ferrier illustrates starkly the new role for corrective justice in the criminal law following the Sentencing Act 2002. Historically, imposing a punishment on an offender that was out of proportion with their moral wrongdoing for the purpose of compensating a victim would be unthinkable – but in *Ferrier* the Court ordered precisely that. In *Read v Police*,²³ a further High Court decision that followed shortly after *Ferrier*, William Young J also found that there was nothing in the Sentencing Act to confine reparation to the maximum fine applicable under the circumstances.

B. Financial Capacity of the Offender a Limiting Factor

While the Sentencing Act 2002 gives compensation a much greater prominence, the financial capacity of the offender still limits the availability of the sentence of reparation. If an offender has insufficient means to pay, s 35 of the Sentencing Act 2002 allows the court to sentence the offender to pay reparation for less than the total loss inflicted on the victim, or pay reparation by instalments. Under s 12(1), the presumption in favour of reparation is lifted if reparation would result in undue hardship for the offender. Professor Hall in *Sentencing Law and Practice*²⁴ reads these provisions together as suggesting that “if there is no ability to make reparation, then it is not correct in principle to order reparation, no matter how appropriate that might otherwise be”. The

19 See above n 3 and accompanying text.

20 *Ferrier*, above n 18 at [15].

21 “Victim” under s 6 of the Sentencing Act 2002 includes a member of the immediate family of a person who dies as a result of an offence. Thus, reparation can be paid to the family of the deceased as victims themselves without relying on the deceased’s estate making any sort of claim. In terms of corrective justice, it could be argued that while the offender might be obliged to put right harm caused to the primary victim, the obligation does not extend to compensating the *family* of the deceased, but this line of thought will not be explored further here.

22 *Ferrier*, above n 18, at [17].

23 *Read v Police* HC Christchurch CRI-2003-409-000-70, 10 December 2003 at [48].

24 Geoff Hall *Sentencing Law and Practice* (LexisNexis, Wellington, 2004) at 416.

Court Appeal has found that reparation “must be set at a level which makes it realistic given the financial circumstances of the person against whom it was made”.²⁵

A decision by a sentencing court not to award reparation does not prejudice the victim’s ability to pursue a civil claim and under s 38(2) a sentence of partial reparation does not affect the right of the victim to recover any remaining loss by civil proceedings. So, the financial capacity of the offender limits the place of corrective justice in criminal justice, without prejudicing the victim’s ability to seek corrective justice from the civil law if they so choose.²⁶

Arguably, a reparation order that will not be paid serves neither corrective justice nor traditional criminal justice: such an order will not be a particularly effective punishment or deterrent, and the victim’s loss is not made right. Accordingly, it makes sense to impose a sentence other than reparation – a sentence that will at least provide punishment and deterrence and satisfy traditional criminal justice, instead of providing no justice at all.

There is one type of offending where the offender’s ability to pay is not usually an issue: prosecutions of employers for breaches of the Health and Safety in Employment Act 1992.²⁷ Employers typically have the means to pay reparation, and can insure against it: the Act expressly prohibits insurance against fines²⁸ thereby impliedly approving insurance against reparation. Thus, it is in the context of reparation for employee injuries that the courts have had to address further questions about the place of corrective justice in criminal justice.

C. *Punishment and Deterrence Still Matter*

The High Court addressed the relationship between reparation and a fine in *Department of Labour v Areva T & D New Zealand Ltd*,²⁹ an appeal on sentencing from the District Court. The prosecution of Areva followed the death by electrocution of an employee of the company. Prior to sentencing Areva paid \$138,000 to the family of the deceased employee, \$100,000 of which was covered under a liability insurance policy. The District Court convicted and discharged Areva without a fine, on the basis that the company had “done enough” by compensating the family of the deceased.³⁰

Priestly J considered that a conviction and discharge did not sufficiently serve the purposes of deterrence and denunciation, especially considering that the legislature had just increased the maximum penalties fivefold.³¹

Areva can be seen as the reverse scenario of *Ferrier*: by the time of sentencing, corrective justice had already been satisfied by the payments that the employer had made to the deceased’s family. The High Court in *Areva* disagreed with the view expressed in *Ferrier* that the totality principle had no application in the context of the Sentencing Act 2002, and referred to the totality

25 *R v Bailey* CA306/03, 10 May 2004 at [25], followed in *R v Donaldson* CA227/06, 2 October 2006 at [43].

26 Of course, the offender’s financial capacity is a practical limit on the victim’s prospects of actually recovering damages under civil proceedings.

27 The Health and Safety in Employment Act 1992 imposes various obligations on employers, in particular (at s 6) a duty to take “all practicable steps to ensure the safety of employees while at work”. Under s 50 it is a strict liability offence to fail to comply with the requirements of the Act.

28 Health and Safety in Employment Act 1992, s 56I, added by the Health and Safety in Employment Act Amendment Act 2002.

29 *Department of Labour v Areva T & D New Zealand Ltd* HC Rotorua CRI-2005-463-42, 9 November 2005.

30 *Ibid* at [20] sets out the relevant parts of the District Court’s reasoning.

31 Health and Safety in Employment Amendment Act 2002.

principle as a justification for imposing a fine so that the total penalty reflected the employer's wrongdoing.

Areva makes it clear that criminal justice has retained its traditional objectives of punishment and deterrence. While corrective justice has a place in criminal justice, it co-exists (somewhat uneasily) with traditional criminal justice, and has certainly not displaced it entirely.

D. The Insurance Context

Around seventy per cent of the payment to the deceased's family in *Areva* was paid under an insurance policy. Allowing liability insurance for reparation facilitates compensation and serves the interests of victims of crime. However, liability insurance means that an offender can pass the cost of reparation on to their insurer, reducing the punitive and deterrent effect of the sentence. The High Court in *Areva* did not address this point explicitly, but it was discussed in more detail in *Department of Labour v Street Smart*.³²

Like *Areva*, *Street Smart* was an appeal by the Department of Labour of a District Court sentencing decision. The prosecution in *Street Smart* followed the death of the thirteen year old son³³ of an employee of Street Smart, a rubbish collection company. The boy had been riding in the cab with his father, and died after attempting to assist the runners. He tried to jump onto a step on the truck after grabbing a rubbish bag, was unable to maintain his grip on the handrail, fell, and was run over. The subsequent investigation revealed that the truck did not provide a safe platform for the runners to stand on.

The District Court approached sentencing by taking a starting point of a fine of \$175,000, and then adjusting for mitigating factors by deducting \$60,000 for reparation³⁴ and \$60,000 for an early guilty plea. This reduced the fine to \$55,000 – around thirty per cent of the starting point. In theory, this made the total penalty³⁵ to the employer \$105,000 but the reparation was in fact paid by the employer's insurer.

This practice of deducting reparation from the fine on a dollar-by-dollar basis in health and safety cases had by this point become standard practice in the District Court.³⁶ As the High Court realised, this approach is flawed: deducting reparation from the fine on a dollar-by-dollar basis only makes sense if a dollar of reparation provides the same level of punishment and deterrence as a fine of a dollar – which is not the case if reparation is paid by the insurer. The High Court in *Street Smart* thought that “[t]he fact that the respondent's insurance company will meet the reparation payment is a relevant matter to be taken into account when determining the total appropriate sentence”.³⁷

32 *Department of Labour v Street Smart* (2008) 5 NZELR 603 (HC).

33 The Health and Safety in Employment Act 1992 duty breached was the duty in s 15 to “take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person”.

34 The sum had been agreed to by the employer and the parents of the deceased at a restorative justice conference.

35 Reparation plus the fine.

36 See Anna Clark “Reparation and Sentencing” (2008) NZLJ 437–438 at 437 “It was generally accepted that the offender could expect a dollar-for-dollar reduction from the starting point of a fine.”

37 *Street Smart*, above n 32, at [61].

As in *Areva*, the High Court in *Street Smart* found that the totality approach to sentencing was still appropriate,³⁸ and stressed that for the punitive and deterrent objectives of criminal justice to be achieved “penalties must bite and not be at a ‘license fee’ level”.³⁹

The different views expressed on the totality principle in *Areva* and *Street Smart* compared to *Ferrier* may suggest a difference of view on the place of corrective justice in criminal justice. The High Court in *Areva* and *Street Smart* sought to ensure that the criminal law’s role in providing compensation does not limit or undermine the criminal law’s role in punishing and deterring wrongdoing. The High Court in *Ferrier* sought to ensure that the criminal law’s role in providing compensation is not limited or undermined by the criminal law’s role in punishment and deterrence. This perhaps suggests a difference of view as to whether corrective justice is subservient to traditional criminal justice or vice versa. However, it is not clear whether the High Court in *Areva* and *Street Smart* intended that the totality principle of sentence should trump compensating the victim in cases like *Ferrier* where the offender’s wrongdoing is minor but the damage caused is major. The High Court had an opportunity to clarify this point in *Department of Labour v Hanham & Philp Contractors Ltd*.⁴⁰

E. A Full Bench of the High Court on Reparation and Fines

The *Hanham* case was the judgment of a full bench of the High Court,⁴¹ convened to hear three Health and Safety in Employment Act 1992 sentencing appeals and to address the proper sentencing methodology in such cases.

The High Court in *Hanham* stressed that reparation and fines served distinct purposes:⁴²

Reparation is compensatory in nature and is designed to recompense an individual or family for loss, harm or damage resulting from the offending. On the other hand, a fine is essentially punitive in nature, involving the imposition of a pecuniary penalty imposed by and for the state. A fine is intended to serve the statutory purposes of denunciation, deterrence and accountability. Each requires separate attention in the sentencing process.

The High Court thought that these distinct purposes were best addressed by a three-step process:⁴³

1. Fix reparation, which includes considering what losses the offending caused and taking into account the financial capacity of the offender;
2. Fix the amount of the fine, by:⁴⁴
 - a. fixing a starting point on the basis of the culpability of the offending; then
 - b. adjusting the fine upwards or downwards from the starting point based on aggravating or mitigating circumstances relating to the offender (which includes reparation, although not on a dollar-by-dollar basis⁴⁵).

38 Ibid at [44].

39 Ibid at [59].

40 *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) “*Hanham*”.

41 Randerson and Panckhurst JJ.

42 *Hanham*, above n 40, at [33].

43 Ibid at [80].

44 The approach to fines set out in step 2 is the methodology established by the Court of Appeal in *R v Taueki* [2005] 3 NZLR 372.

45 Reparation in this sense includes payments of compensation, or offers to make such payments, occurring prior to sentencing and later crystallised into a sentence of reparation.

3. Assess whether the overall burden of the sentence (reparation plus the fine) is proportionate and appropriate.

This process has several noteworthy features:

First, reparation features in all three steps, reflecting the complex relationship between corrective justice and traditional criminal justice:

1. Reparation is an end in itself in step 1;
2. The provision of compensation to the victim can be a mitigating factor that serves to reduce the fine in step 2.b;⁴⁶ and
3. Reparation forms part of the total sentence, which is then compared to the totality of the wrongdoing in step 3.

Second, steps 1 and 2 resemble the approach taken in civil proceedings where a court initially awards compensatory damages to provide appropriate compensation and then awards punitive damages on top of that to punish and deter. Here, a court first awards reparation to compensate and then imposes a fine on top of that to punish and deter. However, the court must then go on to step 3. The circumstances in which a court would revise its sentencing in step 3 are not clear. The point of step 2 seems to be to arrive at a fine that is appropriate for the offender and the offending, taking into account any reparation, which seems to be the point of step 3. The High Court describes step 3 as involving:⁴⁷

[Consideration] of the total imposition on the offender of reparation and fine. The total imposed must be proportionate to the circumstances of the offending and the offender. This assessment is to be made against the background of the statutory purposes and principles of sentencing already discussed.

At first glance “the total imposed must be proportionate...” might imply a wholehearted endorsement of the totality principle. This might suggest that in a factual scenario like *Ferrier*, the total sentence should perhaps be reduced so that the penalty is not out of proportion with the wrongdoing, implying that *Ferrier* may have been incorrectly decided. However, the assessment in step 3 must be done against the background of the purposes of the statute, which includes providing for the interests of victims of crime. So step 3 does not necessarily imply that the totality principle trumps compensation.

Step 3 is perhaps a hedge: the High Court is allowing for the possibility of some circumstance where steps 1 and 2 would result in an inappropriate sentence. This kind of “never say never” thinking might allow future courts discretion to deal with extraordinary cases, but it does so at the expense of certainty in ordinary cases – and the extraordinary may never occur.⁴⁸

46 The High Court in *Hanham*, above n 40, considered at [69] that a discount of up to ten to fifteen per cent was appropriate to recognise the order for reparation. The High Court thought at [74] that “some modest allowance may be justified to recognise the employer’s responsible approach in securing insurance cover to provide for injured employees” but saw this as sufficiently allowed for in that ten to fifteen per cent.

47 *Hanham*, above n 40, at [78].

48 “Never say never” thinking also swayed the majority of the Privy Council in *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721 to reject a bright line rule that restricted exemplary damages to advertent wrongdoing. Lord Nicholls gave the argument for “never say never” thinking at [26]: “if experience teaches us anything, it is that sooner or later the unexpected and exceptional event is bound to happen” and thought that “never say never” was a “sound judicial admonition”.

IV. WHAT IS THE PLACE OF CORRECTIVE JUSTICE IN CRIMINAL JUSTICE?

Although this discussion must necessarily conclude that the place of corrective justice in criminal justice as the law in New Zealand currently stands is not certain, it is nevertheless clear that it has changed significantly. While historically, corrective justice was only a secondary consideration in criminal justice if it was a consideration at all, compensation is now one of the main aims of sentencing in New Zealand. Yet corrective justice has not taken over criminal justice. The traditional objectives of criminal justice still matter, and the pursuit of corrective justice within the criminal law is limited by the financial capacity of the offender and to some extent by the totality principle. The new place of corrective justice in criminal justice reflects that society is now demanding that the criminal law does more than simply respond to the offender's wrongdoing. Society demands corrective justice for the victim as well as criminal justice for the offender: justice in the round.

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