

2014 AMENDMENT TO SENTENCING ACT

The Act has changed the wording of section 32(5) from "for which the Court believes that a person has entitlements" to "for which compensation has been, or is to be, paid". The word that created the argument of no top-up, "entitlement", has now been removed. The reports on the Bill state that the purpose of the change is to allow a court to be "able to impose a sentence of reparation for consequential loss or damage to meet any statutory shortfall in compensation".

Impact on Reparation Practice. This amendment will have a significant impact on the level of reparation awards. The scheme created by the ACC Act establishes a significant difference between the pre-accident earnings of victims and benefits (or compensation) payable under the ACC scheme. This amendment will mean that the Court will be able to top up any difference by way of a reparation award. Moreover, the change is not limited to loss of earnings. The Court will be able to make reparation awards to top-up shortfalls in other payments made by ACC including medical bills, lost income, and costs of changes to a victim's lifestyle.

Calculation of reparation awards will become an even greater part of sentencing and will require extensive investigation on behalf of the offender to ensure that awards sought are appropriate. It has always been a difficult exercise in sentencing to balance the victim's sensitivities against the offender's own property or financial interests without making an offender look less remorseful. However, opening up of this greater entitlement of compensation to victims will require defence Counsel to take a vigorous approach when it comes to compensatory calculation. It may also mean that defence counsel may have to make pre-hearing applications for disclosure of documents substantiating losses claimed and payments received. This may include seeking disclosure of any other insurance pay-outs that the victim may have received as a result of an accident including income protection insurance payments. At present, prosecution submissions in relation to reparation do not contain much evidence, however this will need to change. It will become vital for defence Counsel to seek reparation reports pursuant to section 33 of the Sentencing Act to enable proper enquiries to be made. We acknowledge that the above article was an excerpt from a more comprehensive article in a recent newsletter of Fortune Manning Lawyers. It should be noted that reparations could apply for several years if there is permanent injury to victims.



SSL Manager Name _____

Telephone/Fax _____

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HEAD OFFICE ADDRESS: 77 Tarewa Road, Morningside, Whangarei 0110
TELEPHONE 09 438 7555 or 7550, FACSIMILE 09 438 7556, MOB 021 070 9141
EMAIL: safetynz@xtra.co.nz gpaul_134@hotmail.com www.summitsystems.co.nz
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News & views from Summit January 2015



Health & Safety laws not valued in India

India has had legislation on occupational safety and health for 50 years. But regulatory authorities are limited to 1,400 safety officers, 1,154 factory inspectors, and 27 medical inspectors. These numbers are grossly inadequate even for the inspection of formal units that only employ about 10% of India's total workforce (around 26 million), let alone the millions who work in the informal sector with absolutely no safeguards.

In June 2008, at the XVII World Congress on Safety and Health at Work, organised by the International Labour Organisation (ILO) (1) in Seoul, Korea, India's labour secretary Sudha Pillai was invited to speak on strategies and programmes for safety and health in the future. This was surprising, considering India's dismal health and safety record, with safety being accorded low priority by both government and industry.

The labour secretary's presentation highlighted this aspect -- it was devoid of any visual representations, data or numbers on the present status of occupational safety and health in India. Pillai spoke at length about the Indian government's future strategies towards improving health and safety at work. But these improvements can only be made if the government has a clear view of the present situation.

It is estimated that unsafe work conditions is one of the leading causes of death and disability among India's working population. These deaths are needless and preventable. Unlike growth rates and GDP figures that are flaunted every quarter, the figures of dying and ailing workers who make this growth possible are never recorded or spoken about. The only way to get an idea of the scale of the problem is from data released by the ILO (2), which estimates that around 403,000 people in India die every year due to work-related problems. To give some idea of the scale -- more than 1,000 workers die every day from work-related diseases; that's about 46 every hour!

Though these figures are alarming, they might be a conservative estimate as the ILO does not receive complete and reliable data from India. For example, in 2003, India reported 179 fatal accidents, while the ILO put the estimate at 47,000. There are no reliable figures for occupational diseases either. The ILO arrives at these figures by extrapolating them from developed countries like Denmark where every accident and disease is reported. The principal health & safety laws of India, are based on the British Factories Act.

Key OSH legislation in India

Factories Act, 1948, amended in 1954, 1970, 1976, 1987. The Mines Act, 1952
 Dock Workers (Safety, Health & Welfare) Act, 1986
 Plantation Labour Act, 1951; Explosives Act, 1884
 Petroleum Act, 1934; Insecticide Act, 1968
 Indian Boilers Act, 1923; Indian Electricity Act, 1910
 Dangerous Machines (Regulations) Act, 1983
 Indian Atomic Energy Act, 1962
 Radiological Protection Rules, 1971
 Manufacture, Storage, Import of Haz Chemicals 1989



RURAL WORKERS WILL LEARN TO WEAR HELMETS ON BIKES

A farming couple from Canvastown near Blenheim have been fined \$20,000 each for offences involving the use of quad bikes on the farm where they have a share-milking partnership. There were multiple sightings, dating back to 2012, of Phillip Andrew Jones and Maria Anna Carlson riding quads without helmets and in some cases Ms Carlson had small children with her on the quad. Ms Carlson was witnessed twice riding her quad without a helmet after a prohibition notice had been issued and the second time she had two young children with her on the bike.

The fines were imposed on the pair by Judge Tony Zohrab in the Blenheim District Court today. Both were charged under the Health and Safety in Employment Act – Mr Jones with failing to take all practicable steps to ensure no other person was harmed at work while riding a quad bike and Ms Carlson with failing to take all practicable steps to ensure her own safety by wearing a helmet, and the safety of others by not carrying her children on a quad bike.

Mr Jones refused to talk to WorkSafe New Zealand during the investigation and Ms Carlson admitted, despite the partnership owning helmets, that she didn't wear a helmet because 'it becomes just a little bit of a hassle'. "WorkSafe warned the couple, then issued a prohibition notice which was ignored," says Francois Barton, WorkSafe New Zealand's Manager of National Programmes. "This behaviour does not represent the sensible approach taken by most farmers to quad safety, but as a regulator, we could not ignore this wilful refusal to meet their legal obligations."

Quad bikes pose a serious risk on farms – on average five people are killed and 850 are injured every year. The best way to stay safe on a quad bike is to always wear a helmet, never let kids ride adult quad bikes, choose the right vehicle for the job and get proper training. The vast majority of quad bikes used on New Zealand farms are designed for one rider and the manufacturers say they should not be used to carry passengers.

Changes to Employment Relations Amendment Act 2014

Major changes to employment law in New Zealand come into effect on 6 March 2015. Employees and employers will need to know what the changes are and how those changes will affect them. The key changes include:

- Extending the right to request flexible working arrangements to all employees.

- How employers and employees should agree on rest and meal breaks.

- Establishing a process for the transfer of employees in some industries if there is a restructure in the business or a change in business owner.

- Clarifying the confidential information that employers are obliged to give to affected employees in dismissal or redundancy situations.

- Changes to collective bargaining: reaching new collective agreements, opting out of multi-employer bargaining, removing the 30 day rule for new, non-union employees and allowing pay deductions of employees who take part in partial strikes.

- Setting time frames for the Employment Relations Authority to make determinations in an employment dispute.

For the full report it is recommended that you follow this link.

<http://www.dol.govt.nz/er/services/law/legislationreviews/er-amendment-bill-2014.asp>

HEALTH AND SAFETY POLICY – GROUNDS FOR DISMISSAL

Mr Moukharris was a refuse removal driver employed by Northland Waste Limited. On 20 January 2012 Mr Moukharris had been carrying out his usual rubbish collection routes. Due to the steepness of a street on his route, Mr Moukharris decided to collect the refuse in the street by only travelling downhill crossing the centre line from time to time in order to collect the rubbish from both sides of the street; "double-siding" as it is known in the industry. Mr Moukharris used his hazard lights, but crossing the centre line meant that he was at times travelling downhill directly into the path of oncoming traffic. Unfortunately for Mr Moukharris, a manager from Northland Waste happened to view the collection that day. Mr Moukharris was suspended pending a meeting, after which his employment was terminated.

Safety concerns. Mr Moukharris had taken the view that the process he adopted was safer for his runners at the back of the truck, as he had been anxious about the state of the booster on his truck's clutch. The clutch had been having some problems and there was a risk that when going up a steep hill he may miss the gear change and the vehicle would potentially roll backwards. Northland Waste had specifically banned double-siding in its health and safety policy as it considered it to be unsafe. This ban was subject to specified exceptions recommended by drivers and pre-approved by management as being in the interest of the health and safety of the company's employees.

Justifiable dismissal. The ERA was satisfied that the dismissal of Mr Moukharris was justifiable. The Authority specifically said "While there may be some infelicities in the procedures adopted by Northland Waste, there [sic] earnest commitment to health and safety principles and their refusal to deviate from the very sensible basis on which they have developed the policy on double siding, is to their great credit. This is an example of a small company developing a health and safety regime with the active participation of the people it is designed principally to protect and then implementing that procedure as company policy."

The ERA did not disagree that Mr Moukharris had been acting with good intentions. However, the company policy had been designed to protect the employees. Mr Moukharris knew of the rules and could have applied to management to make the street concerned an exempted area. The ERA noted that if he was particularly concerned on that day he could have telephoned Northland Waste before proceeding in order to get temporary exemption.

Many thousands of workers exposed to silica in India and NZ

The longest word in the English language is the full form of silicosis. No one knows it, just as no one knows that 10 million workers in India are at risk of silicosis, a fatal disease often mistaken for tuberculosis. Some industries, like the slate pencil industry in Mandsaur, report a 59% prevalence of silicosis. One village in Andhra Pradesh is even known as Widow's Village because most of the men in the village were stonecrushers who died of silicosis

Dust may seem inconsequential, but it can -- and does -- kill. Dust is a serious occupational hazard and a major cause of occupational disease and work-induced mortality. Workplace dust often contains toxic elements. Respiratory illness among workers in the stone crushing industry is a significant problem all over the world. It's estimated that 1 million people worldwide die annually from respiratory illnesses; 1.7 million are affected in India alone. Billions of rupees are spent annually on their treatment.

At least 100,000 workers are reported to have died due to exposure to asbestos, according to the International Labour Organisation. Workers at the Sheffield factory in England, who were exposed to iron dust whilst sharpening knives and scissors, were known to die at a very young age, of siderosis, a lung disease caused by iron dust. Coal miners exposed to coal dust suffer coal miners' pneumoconiosis, while workers exposed to cotton, jute or hemp dust could get byssinosis.