

Case In Point

Ontario Court of Appeal Provides Guidance on Deterrence and Sentencing in OHSA Fatality Case

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A recent decision from the Ontario Court of Appeal, [*Ontario \(Labour\) v. New Mex Canada Inc.*](#), confirms that it will only be in the rarest of cases where a jail sentence is seen to be appropriate in an occupational health and safety case, considering the weight the principle of deterrence should have on sentences given under the *Occupational Health and Safety Act* (OHSA).

Background

A worker who had epilepsy was working on a elevated order picker (platform) which was open-sided and which had a polished steel platform. There was no fall protection equipment, the worker wore dress shoes, he was not harnessed and he had never received health or safety training. The evidence established the a seizure probably precipitated the worker's fall from the platform, which resulted in his death. The employer was aware of the worker's medical condition.

Charges were laid under the OHSA against the company and its directors. The sentencing judge found all parties guilty of numerous charges and imposed a total fine of \$250,000 on the company and 25-day intermittent prison sentences plus 12 months' probation for both directors.

On appeal, the summary conviction appeal judge varied the sentences, reducing the company's fine to \$50,000 and \$15,000 in total fines for the directors. He noted that prison sentences are unusual and that in the few regulatory contexts where incarceration was imposed, "those dispositions were for conduct that was *willful* as opposed to merely negligent."

Court of Appeal

The Court of Appeal upheld the sentences as varied by the appeal judge, but disagreed with some of his findings. It stated that the question to ask in determining the appropriate sentence is essentially: "What amount of fine is required to achieve general and specific deterrence, and would otherwise be appropriate bearing in mind the principles of sentencing, including proportionality, and parity?"

Applying this question, the Court determined that the \$250,000 fine to the company was appropriate with respect to proportionality. However, on the issue of parity, the Court found that the fine was excessive in order to achieve deterrence, given the poor financial situation of the

company. The Court held that, in the circumstances, \$100,000 fine would have served as an appropriate deterrent.

With respect to the fines to the directors, the Court opted not to change the amounts set out by the appeal judge because the Court felt they provided sufficient deterrence in the specific circumstances.

Conclusion

The decision clarifies that the factors to consider in the sentencing of regulatory offences include: moral blameworthiness, judicial restraint, primacy of fines over incarceration, ability to pay and the relevance of compliance with orders issued after an accident. Notably, we are left with guidance that it will only be in the rarest of cases where a jail sentence is seen to be appropriate in an occupational health and safety case.