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**PAYMENT OF REPARATION BY THIRD PARTIES –  
CHANGING THE PROSECUTION AND SENTENCING  
LANDSCAPE**

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**Abstract**

*Under the Sentencing Act 2002, a court may impose a sentence of reparation if an offender has, “through or by means of an offence of which the offender is convicted, caused a victim to suffer loss of or damage to property, emotional harm or loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.” When reparation was first introduced as a sentence in its own right in the 1983 Criminal Justice Bill, it was promoted as being “consistent with both reformatory and deterrent theories of the purpose of punishment”, compensating victims and holding offenders to account. Reparation is determined by reference to the loss or harm suffered by the victim and the offender’s financial means. Over time, this has developed to include the capacity for third parties (including insurers and family members) to pay. In such cases reparation is not dependent on the offender’s personal financial circumstances, the offender does not personally pay, and the victim receives compensation where they may otherwise not do so. However, it is arguable that by shifting the cost of reparation from the offender to a third party, the original policy reasons for the sentence of reparation are undermined. The purpose of this paper is to consider the impact of third party payment of reparation on prosecution decisions and sentencing.*

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*Insurance*

## *I Introduction*

“Blood money” is a term used for money paid by individual defendants (rather than insurance companies) in personal injury cases. In a 2001 article, Tom Baker writes:<sup>1</sup>

“Blood money” is a term ... used for what I have been calling real money from real people - money paid directly to plaintiffs by defendants out of their own pockets. As the term reflects, blood money hurts defendants in a way that money paid on behalf of a defendant by a liability insurance company cannot. For that reason, blood money is an entirely different currency than what lawyers refer to as “insurance money”.

Baker concludes that the *source* of the money matters. While Baker was writing about tort cases in another jurisdiction, this paper will show that the source of the money also matters in relation to the sentence of reparation. The purpose of this paper is to consider the implications for prosecution and sentencing where reparation for property loss or damage, or emotional harm caused by an offence, is paid by a person other than the offender. This research shows that third party payment not only affects the sentencing outcome for the victim and defendant, but potentially also influences prosecution decision-making and the capacity for sentencing objectives to be achieved as originally intended. Payment by third parties, therefore, has implications across the prosecution and sentencing landscape, with implications for policy makers, regulators, prosecutors, defence lawyers, insurance companies and victims.

Reparation is one of the sentences available under the Sentencing Act 2002.<sup>2</sup> It has priority over other sentences and may be ordered on its own (although this is not common) or in combination with other sentences. A court must order reparation if it is lawfully entitled to so, unless this would result in undue hardship for the offender or the offender’s dependents, or other special circumstances would make it inappropriate. If a court decides not to order reparation in a case where it is lawfully entitled to do so, it must give reasons. The amount of reparation ordered is determined by reference to the victim’s loss or harm and the offender’s financial means. When reparation was first introduced as a sentence in its own right in the 1983 Criminal Justice Bill,<sup>3</sup> it was promoted on the grounds that “it individualises criminal justice from the point of view of both the victim and offender, and gives the former a realistic and enforceable right to

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<sup>1</sup> Tom Baker “Blood Money, New Money, and the Moral Economy of Tort Law in Action” (2001) 35(2) *Law & Society Review* at 275-319

<sup>2</sup> Sentencing Act 2002, s 12 and ss 32 – 38A

<sup>3</sup> Criminal Justice Bill (No.2) 1984 (70-1)

compensation from the offender”.<sup>4</sup> It was hailed as being “widely accepted by the community” and “more cost-efficient than community based sanctions”. Among its many advantages, reparation was stated to be “consistent with both reformatory and deterrent theories of the purpose of punishment”, to “encourage faith in the criminal justice system” and to “make criminals aware of the consequences of their offending.” In response, it was argued that no matter how “worthy” the proposal for reparation was, it would be impossible to fulfil on the grounds that many, if not most, offenders had no money – “if they had money they would be out enjoying it instead of burgling houses to get some.”<sup>5</sup> Perhaps because so many offenders do not have sufficient money to compensate their victims, third party payment does not appear to have been questioned by the courts. Insurance against criminal liability has traditionally been held to be unenforceable as contrary to public policy, however this approach has not been taken to reparation, where the courts have been willing to expand their view of the offender’s financial circumstances to include the capacity for third party payment when making reparation orders. This is likely to reflect an increasing focus on the interests of victims of criminal offending and the fact that reparation has been considered to be primarily a form of compensation, ordered in combination with other (more punitive) sentences.

While reparation has been considered to be in the victims’ interests, this may not be the case where it is not seen to be sufficiently holding the offender to account. A current, high profile example of third party payment of reparation is the voluntary reparation payment made by insurers to the victims of the Pike River coal mine disaster in return for the decision by Worksafe to withdraw charges against the chief executive of Pike River Coal Limited, Peter Whittall. This has been the subject of ongoing litigation and will be discussed in this paper.<sup>6</sup> However, it is not uncommon for third parties to pay reparation. While the most common scenario is where the offender has statutory liability insurance, there are also cases where offenders are indemnified by their employer, relatives or friends agree to pay on their behalf or parents are ordered to pay reparation where their children have offended. The key elements in these cases are that reparation is not dependent on the offender’s personal financial circumstances, the offender does not personally pay, and the victim receives compensation where they may otherwise not do so.

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<sup>4</sup> (13 December 1983) 455 NZPD 4792

<sup>5</sup> Above n 4 at 4795

<sup>6</sup> *Osborne v Worksafe New Zealand* [2017] NZCA 11

The penal policy implications of third party payment are far-reaching. For victims, third party payment may mean that they receive the money but do not consider that justice has been served because the offender did not personally pay. This could affect victim confidence in the justice system leading to reduced victim co-operation and participation in the prosecution process. Where a third party can pay, victims will potentially receive significantly more reparation than when payment is dependent on the offender's limited personal means. This can lead to a significant inequality of victim outcomes. Third party payment will also impact on any other sentence handed down to offenders, however, as this paper will show, the Courts have taken mixed approaches to this issue. The existence of statutory liability insurance allows for significantly higher reparation awards and, is likely to influence decisions by prosecutors (and victims where private prosecution is a possibility), as to whether to prosecute, the choice of charges, and subsequent plea discussions, although it has been held that a contract not to commence civil or criminal proceedings in return for repayment (by a third party) of stolen money is illegal.<sup>7</sup> The defence case is also influenced by the capacity for third party payment, particularly where the defendant is insured as the insurer is likely to take over the case and may seek to limit the payment if possible.

These are just some of the issues raised by third party reparation payment which will be canvassed in this paper. While third party payment does occur in a range of instances, the vast majority of cases are in the context of sentencing in prosecutions under the Health and Safety in Employment Act 1992 and its successor the Health and Safety at Work Act 2015,<sup>8</sup> therefore many of the examples in this paper are health and safety cases. I have used the term "offender" when referring to a person convicted and subject to sentencing. On occasion I also use the term "defendant" where the prosecution has not yet been completed. The term "third party" is used to collectively refer to payment by persons other than the offender on the offender's behalf. However, in many cases, the issues under discussion are specific to the issue of statutory liability insurance, in which case the term "insurer" is used.

This paper is in seven parts: Part I sets out the Introduction; Part II outlines the sentence of reparation, including the background, the legislative framework, issues with reparation, and the purpose and principles of the Sentencing Act 2002; Part III discusses third party payment in sentencing; Part IV sets out case studies; Part V looks at statutory

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<sup>7</sup> *Polymer Developments Group Ltd v Tiliato* [2002] HC 258

<sup>8</sup> The Health and Safety at Work Act 2015 and its predecessor the Health and Safety in Employment Act 1992 are collectively referred to in this paper as "health and safety legislation"

liability insurance; Part VI considers whether there is a case for specific legislative action; and Part VII is the Conclusion.

## *II The sentence of reparation*

### *A Background*

In order to consider the impact that third party payment of reparation has on sentencing, it is first useful to revisit the background and underlying principles relating to both reparation and third party payment in criminal prosecution. This Part introduces and discusses the sentence of reparation and outlines the ongoing debate over its fundamental purpose as a sentencing option.

The concept of reparation, or restitution, by an offender to their victim is an ancient one which is considered to have originated in the concept of restorative justice.<sup>9</sup> While physical force was the earliest type of community-sanctioned response to wrongdoing, rules developed in the Anglo Saxon system to allow for monetary compensation which is considered to have parallels with the concept of reparation. It is reported that early laws had a tariff of compensations for various offences.<sup>10</sup> Over time, however, as the state assumed responsibility for administering criminal justice with crimes being considered to be “public wrongs against the community at large”,<sup>11</sup> victims who suffered loss needed to take a civil claim (although there was provision in criminal statutes for some compensation). In its issues paper *Compensating Crime Victims*, the Law Commission outlined the development of compensation for victims of crime:<sup>12</sup>

Traditionally a civil action in tort was the only means by which a crime victim could recover his or her losses from the offender. Now reparation is available through the criminal justice process... However with the exception of the accident compensation scheme, these changes have generally been ad hoc and pragmatic. They have been introduced in a piecemeal fashion without much regard for any underlying principles about where the burden of harm resulting from crime should fall.

Reparation has existed as a specific sentence since 1985, first under the Criminal Justice Act 1985 and now under the Sentencing Act 2002. On introduction in 1983, the Criminal Justice Bill was described as establishing “sentencing options which are likely to be

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<sup>9</sup> David Harvey *Reparation: a conflict in goals: community interests versus victims' rights* (Legal Research Foundation, Auckland, 1994) at Foreword p 1

<sup>10</sup> Above n 9

<sup>11</sup> Law Commission *Compensating Crime Victims* (NZLC R121, 2010) at [2.4]

<sup>12</sup> Law Commission *Compensating Crime Victims*, (NZLC IP11, 2008) at 2

effective, to meet public concern, and to make the best use of limited resources.”<sup>13</sup> While increased sentences of imprisonment were proposed for serious violent crimes, for other types of crimes the interest of victims in receiving compensation was seen as an overriding priority.

Prior to the 1985 Criminal Justice Act, courts could order that part of the fine was payable to the victim.<sup>14</sup> As noted by the Supreme Court in the case of *Davies v New Zealand Police*,<sup>15</sup> this sentence remained available after the enactment of the 1985 Act and did not affect victims’ rights to receive compensation under the Accident Compensation Act 1972 or the recovery of civil damages exceeding the amount of the award.<sup>16</sup> For a victim to receive compensation in this way, the relevant legislation needed to provide for the offence to be punishable by way of a fine and the court needed to order a fine to be paid. The amount payable was limited to the amount of the fine determined by the court, which was established by reference to the gravity of the offending – not by reference to the amount of the victim’s loss. The establishment of a specific sentence of reparation allowed for reparation to be calculated by reference to the victim’s losses. Key developments in relation to reparation were the expansion to cover emotional harm in 1987,<sup>17</sup> and the enactment of the Sentencing Act 2002. Despite the prohibition on taking proceedings for damages for personal injury in section 317 of the Accident Compensation Act 2001, a further amendment in 2014 clarified that reparation orders can be ordered to “top up” compensation for lost earnings.<sup>18</sup> The next section outlines the relevant provisions in the Sentencing Act 2002.

### ***B The legislative framework***

Under the Sentencing Act, a court may impose a sentence of reparation if an offender has, “through or by means of an offence of which the offender is convicted, caused a victim to suffer loss of or damage to property, emotional harm or loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.”<sup>19</sup> As noted above, if the court is lawfully entitled to order reparation, it must do so unless this would result in undue hardship for the offender or the offender’s dependents, or other special

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<sup>13</sup> Above n 4 at 4792

<sup>14</sup> Criminal Justice Amendment Act 1975 s 16

<sup>15</sup> *Davies v New Zealand Police* [2009] NZSC 47

<sup>16</sup> Criminal Justice Amendment Act 1975, s 16( re-enacted in s 28 of the Criminal Justice Act 1985 and in force until the Sentencing Act 2002 came into force)

<sup>17</sup> Criminal Justice Amendment Act (No. 3) 1987, s 4

<sup>18</sup> S 32(5) was amended by the Sentencing Amendment Act 2014, s 6

<sup>19</sup> Sentencing Act 2002, s 32



circumstances would make it inappropriate.<sup>20</sup> Reparation may be imposed on its own or in addition to any other sentence.<sup>21</sup> If the court decides not to order reparation in a case where it is lawfully entitled to do so, it must give reasons for its decision.<sup>22</sup>

The Sentencing Act requires the court to have regard to any restitution or offer or agreement of compensation by the offender and/or the offender's family or community group in deciding whether to impose a sentence and the nature of the sentence.<sup>23</sup> If the court considers both a fine and reparation appropriate, but the offender does not have the means to pay both, priority is given to reparation.<sup>24</sup> The court may combine sentences, however in doing this it must be satisfied that any of the sentences alone or in less restrictive combination would not be consistent with the purposes for which the sentence is imposed or the application of the sentencing principles to the particular case.<sup>25</sup> Section 38A sets out the situations in which a court may cancel a sentence of reparation and impose another sentence, including on the application of an offender on the ground that the reparation is unaffordable because the offender's financial position has changed significantly since the sentence was imposed, or where the Registrar reasonably believes that the sentence is unenforceable because the offender provided false or misleading information about the offender's financial position that the court relied on in imposing the sentence.<sup>26</sup> Compensation can also be ordered where there is a discharge without conviction or a conviction and discharge.<sup>27</sup>

Because reparation has priority under the Sentencing Act, the first step in sentencing will be to establish whether reparation is appropriate and to set the amount following evidence as to the loss and harm suffered by the victim and the offender's financial circumstances. Where reparation is payable, this will be taken into account in establishing the rest of the sentence. By way of illustration, in the 2008 sentencing guideline case *Department of Labour v Hanham & Philp Contractors Ltd*, the High Court set out the sentencing methodology for cases under the Health and Safety at Work Act 2015.<sup>28</sup> Under the *Hanham* methodology, the court first establishes the appropriate amount of reparation.

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<sup>20</sup> S 12

<sup>21</sup> S 12

<sup>22</sup> S 12

<sup>23</sup> Ss 10, 32

<sup>24</sup> S 14

<sup>25</sup> S 20

<sup>26</sup> S 38A(2) and (3)

<sup>27</sup> S 106

<sup>28</sup> *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79

The fine is then established based on the culpability of the offending and adjusting the starting point up or down for aggravating or mitigating circumstances relating to the offender.<sup>29</sup> The fine is then adjusted taking into account the reparation. The court noted that, while there is no hard and fast rule, a discount of around 15 per cent to take account of the reparation would be reasonable for “an offender of adequate means”.<sup>30</sup> Interestingly, in the final step, which is to assess the overall proportionality and appropriateness of the financial burden of the reparation and fine on the offender, the court was open to increasing the fine “... above a level which would otherwise be appropriate where an offender has substantial means” in order to act as a deterrent.<sup>31</sup>

As noted above, the sentence of reparation differs from other sentences because it is calculated by reference to the loss and harm suffered by the victim, rather than the seriousness of the offence and the culpability of the offender. There has been ongoing debate over the purpose of reparation and its relationship to other sentences. The next section considers the issues that have been raised.

### *C Reparation – a sanction for offenders or a service for victims?*

The Criminal Justice Act 1985 and the Sentencing Act 2002 were preceded by significant periods of policy development in relation to New Zealand’s criminal justice system. The 1985 Act resulted from the Penal Policy Review project which was a far-reaching and comprehensive review of penal policy in New Zealand.<sup>32</sup> The 2002 Act was part of a suite of reforms affecting the treatment of offenders and the place of victims in the criminal justice system. These occurred after the 1999 general election and Citizens Initiated Referendum, which asked the question:

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?

The dual focus of harsher treatment for serious offending and more focus on compensation for victims of crime is considered to be reflected in the “bifurcated” approach to be found in the Sentencing Act 2002.<sup>33</sup> Nowhere is this more apparent than

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<sup>29</sup> Imprisonment was not discussed as it was not an available sentence for the relevant offence

<sup>30</sup> *Hanham* above n 28 at [69]

<sup>31</sup> *Hanham* above n 28 at [76]

<sup>32</sup> Penal Policy Review Committee *Report of the Penal Policy Review Committee, 1981: presented to the Minister of Justice* (Wellington, Government Printer 1982)

<sup>33</sup> Julian V. Roberts “Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002” (2003) 36(3) *Australian and New Zealand Journal of Criminology* 249 at 253

when considering the place of reparation within the range of sentencing options. Reparation stands apart from other sentences that the court may order because it is determined by reference to the victim's loss and the offender's financial circumstances, as opposed to the gravity of the offending and the culpability of the offender. Research and case law indicates considerable confusion as to the purpose of reparation and its relationship with other sentences. It is considered by some commentators to be more akin to civil damages than a criminal sentence, and could be argued to be essentially a transaction between the offender and the victim, rather than a sentence designed to denounce and deter. The debate over the purpose of reparation has continued throughout the more than 30 years that reparation has existed as a specific sentence.

In their 1992 review of the implementation of reparation under the 1985 Criminal Justice Act, Galaway and Spier refer to the lack of clarity over the purpose of the sentence of reparation.<sup>34</sup> While they note that "All of the judges interviewed ... agreed with the statement that reparation should be considered an offender penalty",<sup>35</sup> they recommend that "steps need to be taken to reduce the ambiguity as to whether reparation is primarily a sanction for offenders or is a service for victims."<sup>36</sup> And in a 1994 paper, Judge David Harvey states:<sup>37</sup>

The difficulty with the sentence of reparation is that there is an essential conflict that arises from an unanswered question. Is reparation a sentence of the Court that is covered by normal sentencing principles? Is it a sentence that has as its goal the overriding goal of sentencing – the protection of the community? Or is it a sentence that is more narrowly focussed? It is clear that reparation is aimed at redressing the wrong to the victim that has been caused by the offending.

In *Hanham*, the High Court clearly stated that the purposes of reparation and fines were distinct, stating:<sup>38</sup>

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

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<sup>34</sup> Burt Galaway and Philip Spier *Sentencing to Reparation: Implementation of the Criminal Justice Act 1985* (Department of Justice, Wellington, 1992)

<sup>35</sup> at [7.5] p 170

<sup>36</sup> at [7.6] p 171

<sup>37</sup> Above, n 9 Foreword (p 3)

<sup>38</sup> Above n 28 at [33]

denunciation, deterrence and accountability. Each requires separate attention in the sentencing process.

In *Davies v New Zealand Police*, the Supreme Court described reparation as enabling “speedy and inexpensive relief, additional to other remedies,”<sup>39</sup> and in *Hessell v R*, Glazebrook J described reparation as a “loss-shifting mechanism,” stating:<sup>40</sup>

It is “loss-shifting” because it is justified on the basis that it is less expensive to the victim than separate proceedings in tort, but its ability to compensate a victim is still dependent on the attribution of fault to the offender and his or her means to pay.

This appears to support the idea that the key purpose of the sentence of reparation is solely to compensate. However, the underlying premise of this paper is that the policy reasons underpinning the sentence of reparation are that it is aimed at “repairing” through compensation. Ashworth advances the view that a compensation-based approach ignores the essential criminality of the acts in question and would “... treat the murderer in the same way as the manslaughterer and might take no action to all against the attempted murderer who happened to cause no injury.”<sup>41</sup> He considers that compensation is backward focused (aimed at restoring losses), therefore other sanctions are needed for the purposes of deterrence and public protection. Ashworth also refers to the retributive or symbolic arguments that “... punishment of offenders is both appropriate and fair, since the offender has broken a law which others have refrained from breaking”, however, he acknowledges that, in some cases, compensation could also restore the social imbalance brought about by the offending.<sup>42</sup> This is the original policy basis for the sentence of reparation which was focussed on restoring the victim, holding the offender accountable, and creating community confidence in the criminal justice system. Therefore, while reparation does shift the victim’s loss to the offender, this contributes to “justice being done” by holding the offender responsible and, allowing the victim to be financially and possibly emotionally restored.<sup>43</sup> However, for this to work the *offender* needs to pay the real loss to the victim or there would need to be an effective alternative option for restoration and accountability by the offender if they cannot pay. The potential for this to be achieved through reparation is undermined where third parties such as family members and insurers pay. As will be discussed later in this paper, studies have shown

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<sup>39</sup> Above n 15 at [11]

<sup>40</sup> *Hessell v R* [2010] NZSC 135 at [84]

<sup>41</sup> Andrew Ashworth “Punishment and Compensation: Victims, Offenders and the State” (1986) 6(1) *Oxford Journal of Legal Studies* 86 at 97

<sup>42</sup> Above n 41 at 93

<sup>43</sup> See above n 4

the importance to the victim of reparation payment being made by the offender. In fact, part-payment by the offender has been considered to provide more closure to the victim than full compensation from another source.

The introduction of a separate sentence of reparation has created considerable challenges in terms of consistency and proportionality in sentencing practice. Because amounts of reparation are highly variable, courts usually combine reparation with other sentences aimed at deterrence and denunciation such as fines or imprisonment and apply a “balancing” exercise. In doing so, they often face difficulties in balancing reparation and other sentencing tools to arrive at an “appropriate” sentence. It is contended that this “balancing” or “reconciliation” exercise at the end of the sentencing process supports the view of reparation as more than mere compensation. If reparation was solely to compensate for real loss, and the other punitive measures were aimed at fulfilling other purposes of denunciation, deterrence and punishment, then the question would be why not just have two-step process setting appropriate compensation and (separately) the appropriate punishment?

While, the practice of taking a broad view of the offender’s financial circumstances to include capacity for third party payment on their behalf unquestionably benefits individual victims, it also increases the inequality of outcome between victims depending on whether the offender has access to third party funding (or is wealthy in their own right). Third party payment also impacts on sentencing trends by increasing the amounts of reparation ordered (in line with increased financial capacity to pay), thereby impacting on the way in which reparation and other sentences are combined and affecting individual and community perceptions of the “cost” of offending.

The increasing disparity of sentencing treatment between offenders who can and cannot pay adds to the uncertainty of outcome for victims depending on the offender’s circumstances. The issue has undoubtedly been further highlighted following the 2014 amendment to the Sentencing Act potentially increasing the reparation that can be ordered in some cases to significantly higher amounts.<sup>44</sup> As noted above, in *Davies* the Supreme Court decided that reparation could not “top up” earnings entitlements under the Accident Compensation Act 2001.<sup>45</sup> The Court’s view was that, although the accident compensation scheme compensates for loss of 80 percent of earnings to a maximum amount, the intention of the legislature was that this would be the only

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<sup>44</sup> See above discussion p 8 and footnote 18

<sup>45</sup> Above n 15

income-related compensation payable to accident victims and therefore no reparation for any additional lost earnings could be ordered. Following this case, Parliament amended section 32(5) of the Sentencing Act enabling reparation to be awarded for lost earnings where this was not specifically covered by accident compensation.<sup>46</sup> This means that reparation orders can now include compensation for actual potential losses above any accident compensation entitlement, including future earnings. The effect is to greatly increase reparation payments, particularly in cases where an offence has resulted in death or serious long-term injury. For example, the recent case *Worksafe v Wai Shing Ltd* where a reparation award of \$336,300 (made up of \$110,000 emotional harm and \$226,200 “top up” to accident compensation entitlements) was made to a young man who became a tetraplegic following a workplace accident.<sup>47</sup>

As increased reparation orders start to become “the norm” in cases such as health and safety prosecutions, the issue of compulsory insurance for statutory liability is starting to be raised. This, in turn, provokes considerable debate as to the relationship between reparation and compensation under the Accident Compensation Act 2001. While this is not the topic of this paper, it is interesting to revisit one of the reasons for the no fault accident compensation scheme which was referred to in *Wai Shing* where it is noted:<sup>48</sup>

The reasons for the introduction of the accident compensation scheme are found in the report of the Royal Commission inquiring into personal injury law in New Zealand (‘the Woodhouse Report’) [where the] many disadvantages of the common law process were considered. These were noted as being:<sup>49</sup>

Compulsory insurance also undermined the claim that the threat of damages provided a financial incentive to be careful. The Commission found no evidence in New Zealand or elsewhere providing any affirmative support for the deterrent effect of tort law. Other factors, like conscience, safety education, enforcement by inspection and self-interest were clearly more important, and if these failed the sanctions of criminal law remained.

While, in theory, reparation could be ordered as the only sentence, the fact that amounts vary and it is viewed as primarily facilitating victim compensation means that this is rare in practice and would be even less likely where the reparation was not paid personally by

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<sup>46</sup> See above n 18

<sup>47</sup> *Worksafe New Zealand v Wai Shing Limited* [2017] NZDC 10333 [22 May 2017]

<sup>48</sup> At [47]

<sup>49</sup> Citing Stephen Todd (ed) *The Law of Torts in New Zealand* (7<sup>th</sup> ed, Thomson Reuters, Wellington 2016) at 23 -25

the offender. The Sentencing Act establishes purposes and principles, ostensibly to guide decision-making, however these potentially reinforce confusion about the relationship between potentially conflicting objectives for sentencing. The further “loss shifting” that occurs when the reparation for loss and harm caused by an offender is paid by a third party will also affect the Court’s decision with regard to any other sentence as I will discuss below.

#### ***D The purpose and principles of the Sentencing Act 2002***

The Sentencing Act 2002 sets out purposes and principles for sentencing decisions which, along with precedent decisions and guideline judgments, establish a framework within which judges exercise their discretion to make sentencing decisions.<sup>50</sup> Section 7 sets out eight sentencing purposes which may be used in combination with each other and specifies that no weight is to be attributed to the order in which these are set out in the Act. The purposes are: accountability to the victim and the community; offender responsibility; interests of the victim; reparation; denunciation; specific and general deterrence; protection of the community; and rehabilitation. Roberts describes this as a “smorgasbord approach to guiding judges” and states:<sup>51</sup>

In order to offer practical guidance to judges, the legislation needs to either foreclose some options, or, in the alternative, establish a hierarchy of sentencing goals; section 7 of the Sentencing Act 2002 does neither.

Hall’s view is similar stating that “The legislature has failed to develop a coherent sentencing policy from the theories of punishment that comprise this country’s penal philosophy and jurisprudence of sentencing”.<sup>52</sup> Reflecting concern that the legislature was restricting judicial discretion, in *Hessell* the Supreme Court stated that “[i]n enacting the [Sentencing Act 2002], Parliament was certainly concerned over the need for consistency in sentences, but was equally concerned that the sentence be appropriate in the particular case.”<sup>53</sup> The Supreme Court further stated that:<sup>54</sup>

...the proper application of punishment for offending remains, as it was prior to the 2002 legislation, an evaluative task... The task reflects the amalgam of sentencing discretion, on

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<sup>50</sup> Sentencing Act 2002, ss 7 and 8

<sup>51</sup> Above n 33, at 256

<sup>52</sup> Geoffrey Hall *Sentencing* (Wellington, Butterworths) at 1.3 (The aims and objectives of sentencing)

<sup>53</sup> *Hessell* above n 40 at [38]

<sup>54</sup> *Hessell* above n 40 at [43]

the one hand, which ensures the gravity of individual offending and circumstances of the offender are duly assessed and sentencing consistency on the other which tempers sentencing judgment to ensure that sentencing outcomes reflect a policy of like treatment for similar circumstances.

Sentencing can be for one or more of the purposes set out in section 7, however the Act provides that all of the principles must be taken into account. Because reparation is based on the loss to the victim, there is an awkward fit with principles directing the court to determine sentences based on the seriousness of the offending and the type of offence and it is difficult to reconcile reparation with (e) which states that, in addition to all of the other principles, the court must “take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances”.<sup>55</sup> Allowing third party payment makes it much more likely that the reparation will be paid meaning that the purpose and principles of the Sentencing Act promoting victim compensation are complied with. The Court will then look to other sentencing options for the purposes of promoting offender accountability and deterrence. In terms of how reparation is taken into account in relation to any other sentence, as noted in *Hessell*, the aim is consistency of treatment, rather than of outcome, given the highly case specific nature of reparation.<sup>56</sup>

In sentencing, the courts will look to provide effective victim compensation, as well as holding the offender personally held to account. In doing so, the goal will be to provide a sense of justice for the victim and the community and to enable the offender to reintegrate with the community by facilitating acceptance through punishment, whereby the offender is considered to have paid the price thereby restoring the social order and “earning” the right to be part of the community again.<sup>57</sup> The courts will therefore look to establish a sentence that will both compensate and “bite” by suitably punishing the offender. However, it is argued that for this to work effectively, the offender must be the one who pays and must not be able to substantially shift the cost of the offending to a third party. The next part of the paper looks at policy and practical issues arising in relation to third party payment in sentencing.

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<sup>55</sup> Sentencing Act 2002, s 8(e)

<sup>56</sup> *Hessell* above n 40 at [43]

<sup>57</sup> This draws on the concept of “reintegrative shaming” based on the theory in John Braithwaite’s text *Crime Shame and Reintegration* (Sydney, Cambridge University Press, 1989)



### *III Third party payment in sentencing*

#### *A Criminal liability and insurance*

While many statutes are silent on the issue, insurance against criminal liability has traditionally been held contrary to public policy. The Health and Safety at Work Act 2015 makes it an offence with a penalty of up to \$50,000 (for an individual) or \$250,000 (for any other person), to enter into an insurance policy or a contract of insurance indemnifying a person for their liability to pay a fine or infringement fee under that Act.<sup>58</sup> The Law Commission notes that:<sup>59</sup>

A similar approach has been taken in relation to price fixing under the Commerce Act 1986. Section 80A prohibits a body corporate from indemnifying a director, servant or agent against liability for pecuniary penalties imposed for price fixing, or for costs incurred in penalty proceedings.<sup>60</sup> A breach of that provision in turn gives rise to a pecuniary penalty that may be imposed on the company.<sup>61</sup>

In a 1996 paper considering the implications of the increasing trend for insurers to offer statutory liability insurance cover for fines and penalties under recent legislation (including environmental, health and safety and consumer protection legislation), Chris Jurgeleit states that the traditional approach is based in the maxim “*ex turpi oritur causa non oritur action* – literally “an action does not arise from a base cause”.”<sup>62</sup> He refers to the case of *Burrows v Rhodes* where it was said:<sup>63</sup>

It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void.

He notes that the Companies Act prohibits a company from indemnifying or taking out insurance for its directors or employees for criminal liability or costs in defending

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<sup>58</sup> Health and Safety at Work Act 2015, s 29

<sup>59</sup> Law Commission *Pecuniary Penalties: Guidance For Legislative Design* (NZLC R133, 2014) at [15.19]

<sup>60</sup> Commerce Act 1986, s 80A

<sup>61</sup> Commerce Act 1986 s 80B

<sup>62</sup> Chris Jurgeleit “Insurance Against Liability to Pay Statutory Fines and Penalties” (1996) 26 *VUWLR* 735 at 741

<sup>63</sup> *Burrows v Rhodes* [1899] 1 QB 816 at 828

criminal charges except where they are acquitted. Jurgeleit quotes an Australian text on liability insurance:<sup>64</sup>

If the legislature, which is the arbiter of public policy, provides that an act or activity should be visited with a penalty upon a person coming within a prescribed situation, then that should not be mitigated by an insurer. ... Insofar as the legislation imposes a penalty as such, the courts are unlikely, at least for some time, to look at the philosophical foundation of the penalty in order to decide whether it may be the subject of indemnification by the policy. The proper view is that if the legislature invokes a penalty, then it should be borne by the person upon whom it is imposed.

While no doubt it is possible and desirable to insure against liability to a third party for breach of a statutory duty, which of course may also flow from such conduct, the position is different in respect of a penalty no matter how large. It is the purpose of the particular act to inflict a penalty on he who infringes, and if the penalty is made very large, the obvious purpose is that it should act as a deterrent. It would run counter to the intention of the legislature if the insured could divest himself of the punishment and its effects by insurance.

Jurgeleit notes that the approach is less strict with regard to the civil consequences of criminal acts and where the breach of the law is more in the nature of negligence or there is considered to be a lack of fault (as with strict liability offences). In contrast, the courts have not considered that any prohibition existed for insurance cover for the payment of reparation. This is likely to be for a number of reasons, including to ensure that victims can be compensated and because reparation is not seen as a primarily punitive part of the sentence. However, the original policy basis for reparation as a sentence extended beyond merely facilitating compensation and the research shows that it makes a difference when reparation is not paid by the offender.

### ***B Requirements for parents to pay reparation under s 233(f) of the Oranga Tamariki Act 1989***

Under section 283(f) of the Oranga Tamariki Act 1989 the Youth Court can order a young person or the parent or guardian of a young person under 16 years, to pay reparation to any person who suffered emotional harm or loss or damage to property as a

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<sup>64</sup> Derrington D. and Ashton R. *The Law of Liability Insurance* (Butterworths, Sydney, 1990) 54.

result of the offending.<sup>65</sup> The parent or guardian must be consulted and given the opportunity to make representations to the court before such an order can be made against them.<sup>66</sup> The parts of the Act dealing with youth justice and the proceedings of the Youth Court are not subject to the requirement which provides for the interests and welfare of the child or young person to be paramount considerations, however an holistic approach is required including family, whanau, and community involvement (subject to welfare considerations).<sup>67</sup> The objects of the Act include that where children and young people commit offences they are held accountable and encouraged to accept responsibility for their behaviour.<sup>68</sup>

There could be argued to be an apparent tension between holding a young person personally responsible and ordering their parents to pay reparation on their behalf, however it is assumed that the intention is that the victim will be compensated and the accountability will occur through family relationships. In a media article relating to this requirement, Police national youth-aid co-ordinator Inspector Chris Galveston is quoted as saying “A lot of parents accept reparation orders and get their son or daughter to pay back the money over time.”<sup>69</sup>

While, the issue of reparation insurance in sentencing appears to have developed organically over time - with the insurance industry seeing a commercial opportunity and the courts responding by adjusting their view in relation to the offender’s financial circumstances, the Oranga Tamariki Act is perhaps the only example of a specific requirement for third party payment of reparation. The underlying policy and cases indicate that this is primarily in the victims’ interests, however it is impossible to ignore the punitive aspects of a reparation order.<sup>70</sup> Where parents are ordered to pay, this may have a severe impact on their financial situation, despite the fact that they did not commit the offence. Because parental fault is not a pre-condition, this may mean that they were entirely uninvolved in the offending and may have had no realistic means of preventing it. The requirement appears to be based solely on the family relationship with the reasons

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<sup>65</sup> Oranga Tamariki Act 1989, renamed, on 14 July 2017, by section 5 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017(2017 No 31)

<sup>66</sup> s 288

<sup>67</sup> ss 5 and 13

<sup>68</sup> s 4

<sup>69</sup> Stuff Sunday Star Times article January 31 2009 (<http://www.stuff.co.nz/national/crime/306876/Parents-dodge-reparation-for-teens-spree>)

<sup>70</sup> (2 May 1989) 497 NZPD 502 (where the importance of the victim and offender accountability in relation to youth offending was noted)

being: that it is more “just” for the parents to pay than the victim; that there is an inference that the parents “should” have been able to prevent the offending; or, finally, that as a result of being required to pay, parents will exert pressure on the young offender to deter future offending. In any event, the requirement for parental payment of reparation has the capacity to act as a harsh punishment for people who, while related to the offender, may have little ability to bring about offender accountability or deterrence. In many cases, it is arguable that the parents themselves could be “victims” of the offending as well. Further, while statutory liability insurance allows for further “loss shifting” between the offender and the insurance company, it would be most unlikely that parents of youth offenders would be able to insure against reparation in the same manner. The next section considers the penal policy implications of third party payment.

### *C Offender payment vs third party payment*

As has been shown in this paper, the sentence of reparation was intended to be more than a means of compensation. By having offenders compensate the victims they had harmed, the offenders could repair the relationship both with the individual victims and with the community at large. Because third party payment of reparation shifts (part of) the cost of offending from the offender to a third party, it is arguable that it cannot achieve the reparative function that was intended when the legislation was enacted. The element of personal payment is considered to be fundamental to the sentence of reparation achieving its original policy intent.

In a study of 101 victims of serious crime to identify how different sentencing outcomes affected their perceptions of psychological well-being, Malini Laxminarayan identified compensation from the offender as the only sentencing option significantly positively associated with psychological effects.<sup>71</sup> It was noted that this was consistent with previous studies that had also indicated a preference by victims for compensation. Notably, Laxminarayan stated that:<sup>72</sup>

Compensation may be provided after harm has been caused that cannot be undone.  
Such a payment may balance out the harm due to an equivalent gain (Wenzel et al).  
Compensation may be viewed as giving back to the victim what was lost, at least to

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<sup>71</sup> Malini Laxminarayan “The Effect of Retributive and Restorative Sentencing on Psychological Effects of Criminal Proceedings” (2013) 28(5) *Journal of Interpersonal Violence* 938-955, at 950

<sup>72</sup> At 942 (citing Shapland, J. (1984) “Victims, the criminal justice system and compensation” *British Journal of Criminology* 24(2), 131-149; and Wenzel, M., Okimoto, T.G., Feather, N.T., & Platow, M.J. (2010) “Retributive and restorative justice” *Law and Human Behaviour*, 32, 375-389)

the extent that harm can be restored, providing a symbolic gesture recognizing the victim's suffering (Shapland 1984).

And:<sup>73</sup>

Compensation helps achieve the restorative goal of addressing the harm that was caused to the victim. The actual sum of money may not be important to the victim; rather such an award conveys acknowledgement of the suffering and position of the victim (Shapland 1984).

The findings of the study indicated both procedural and symbolic differences between state and offender compensation, with compensation from the offender resulting in a more positive result for the victim. Theories include that victims are personally involved in the case meaning that they feel acknowledged and heard. Compensation as a sentence indicates that “the legal system takes the victim and his or her suffering seriously.”<sup>74</sup> Therefore, although compensation from both the state and the offender can provide monetary restitution, it is only where the offender is ordered to pay money to the victim, that it can have that extra dimension of resetting the balance by punishing and holding the offender accountable while also acknowledging and compensating the victim. Other schools of thought also suggest that offender compensation builds confidence in the justice system meaning that victims are willing to participate, for example as witnesses, and the general public have confidence in its ability to maintain the social order. In contrast, state compensation (and arguably also third party reparation) is considered to have a “sedating” effect in relation both to criminal wrongdoing and risk taking – on the basis that the state will “pick up the tab”. Compensation from the offender may also operate as “restoration through retribution” operating as “a criminal punishment aiming at restoration.”

From a different perspective, in the article, “Restoring the Victim: Emotional Reactions, Justice Beliefs, and Support for Reparation and Punishment”, Gromet looks at the differing psychological responses to criminal wrongdoing depending on whether the focus is on the wrongdoing by the offender or the harm to the victim and how this affects lay views as to what constitutes “justice”.<sup>75</sup> Gromet states that consideration of how to deal with crime tends to focus on the offender and whether there should be punishment,

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<sup>73</sup> At 950

<sup>74</sup> At 950

<sup>75</sup> D M Gromet “Restoring the Victim: Emotional Reactions, Justice Beliefs, and Support for Reparation and Punishment” (2012) *Critical Criminology* 20:9-23 (Springer, Netherlands, published online 19 November 2011)

rehabilitation or other treatment. It is considered that this is understandable having regard to concerns about safety and future offending.<sup>76</sup> However Gromet considers that when the focus is on the offender, little thought is given to the victims. The article looks at lay people's views of victim-centered responses to crime. Of particular interest for this paper is Gromet's discussion of:<sup>77</sup>

...which psychological factors influence whether people view the addressing of victim concerns as contributing to the overall achievement of justice, which factors (such as emotional responses and political ideology) determine how people react to crime victims, and possible differences between victims about how their concerns can be addressed.

Gromet looks at whether victim restoration (including reparation) can be considered to be "justice". Punishing offenders is psychologically satisfying in response to the anger and outrage provoked by criminal offending "satisfying a psychological need to right the scales that the offenders' transgressions have imbalanced."<sup>78</sup> The answer is considered to depend on whether non-punitive options are available. Gromet states that where both options are available, people support the use of reparative sanctions (eg restitution, community service) and restorative procedures for non-violent offences and a combination of punitive and non-punitive measures for serious crimes. Gromet's research indicates that where the focus is on the victim in response to a crime, priority is given to repairing the harm from offending, and that outcomes are considered to be more "just" where victims express satisfaction with them. In considering the ways that victims can be "restored", Gromet considers that offender punishment is one potential way in which victims and others may feel that the victim has been vindicated and they are able to "move on". Whether people prefer a restorative or punitive approach may depend on people's emotional responses and their political ideology.

In her 1996 article "Reparation and Criminal Justice: Can they be integrated?", Susanne Walther outlines the state's reliance on victims of crime as complainants and witnesses allowing the state to identify and prosecute crimes (for the public good) stating that "Compared to what the victim gives the state, the state traditionally gives little to the victim."<sup>79</sup> Walther notes that changes have strengthened victims' participatory roles

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<sup>76</sup> At 9

<sup>77</sup> At 10

<sup>78</sup> At 11

<sup>79</sup> Susanne Walther "Reparation and Criminal Justice: Can they be integrated?", (1996) 30 *Isr L. Rev.* 316-330 at 316

prosecutions, but that victims also have “a profound interest in compensation of damages.”<sup>80</sup> The article discusses an increasing trend toward greater recognition of victims’ interests in reparation. Walther considers four different approaches that could be taken to accommodate victims’ interests: victim-offender mediation; reparation within the criminal justice system (either by promoting or rewarding voluntary reparation); reparation as a sanction; and combining criminal and civil proceedings. Arguably, the New Zealand sentence of reparation is closest to the concept of reparation as a sanction, of which Walther states:<sup>81</sup>

...court-ordered reparation assumes an awkward position between punishment, measure (rehabilitative, reparative or sui generis), and civil debt. Consequently, there is considerable uncertainty regarding the principles governing its administration. It is unclear, for instance, to what extent courts must ascertain the defendant’s ability to pay and tailor the compensation or restitution order accordingly. It is similarly unclear whether, and to what extent, the degree of the offender’s blameworthiness should be taken into account.

On the issue of combining criminal and civil proceedings, Walther describes this as combining procedures determining the state’s claim to punishment and the victim’s claim to reparation, raising issues as to whether these are two related systems or one system combining elements of both.<sup>82</sup> This was also discussed in the Report of the Penal Policy Review Committee where consideration was given to the requisite standard of proof, the need for the offence to be proved beyond reasonable doubt, and whether a reparation order could cover actions that were not prosecuted for.<sup>83</sup>

The open questions that Walther leaves the reader with are: Whether reparation can or even should be a direct goal of the criminal justice process; and whether it is possible to integrate reparation into the criminal justice process. On the first issue, she considers that reparation is fundamental to criminal justice and the converse of the duty not to harm. She notes:<sup>84</sup>

The victim's specific right to reparation when harmed by crime has been incorporated in international conventions and declarations, and in national constitutions. On the

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<sup>80</sup> At 316

<sup>81</sup> At 325

<sup>82</sup> At 326

<sup>83</sup> Above n 32

<sup>84</sup> At 327

international level, the Council of Europe in 1985 endorsed recommendations for the improvement of the rights of victims of crime, namely the right to receive restitution, within the criminal justice process.

On the issue of the place of reparation in the criminal justice process, she considers that reparation is for matters that are “reparable” and punishment for the “irreparable”<sup>85</sup>. She concludes with the comments:<sup>86</sup>

To the extent that reparation is a legitimate goal of the criminal justice system, a revision of the structure of the state’s responses to crime and of the functions of prosecutors and judges would be called for. Such a revision would be aimed at greater recognition of the needs of both victim and offender in coping with the effects and consequences of crime. This might lead to a kind of intervention which would better reflect both the fairness due to the offender and the justice due to the victim.

The discussion above looks in particular at victims’ interests in reparation and the idea of a “just” outcome. However the courts have been clear that prosecution and sentencing involves balancing a range of factors in the overall public interest. The next section sets out some case studies with regard to third party payment of reparation, showing that this is relevant to prosecution decision-making as well as sentencing.

#### *IV Case studies*

*Osborne v Worksafe New Zealand*, is a recent high profile example of where the victims do not consider that justice has been served through reparation by an insurer.<sup>87</sup> At the time of writing the appeal from this decision had just been heard in the Supreme Court.<sup>88</sup> A crucial factor in the facts of *Osborne* is that reparation was not ordered as a sentence following conviction, but rather was offered by the defendant’s insurer on condition that the case was terminated.<sup>89</sup> The Court of Appeal considered that reparation was a relevant public interest consideration for Worksafe to take into account in deciding whether to proceed with the prosecution. It was noted that the Solicitor-General’s Prosecution Guidelines include as a public interest factor against prosecution:<sup>90</sup>

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<sup>85</sup> At 329

<sup>86</sup> At 330

<sup>87</sup> Above n 6

<sup>88</sup> SC 23/17 on Thursday 5 October 2017

<sup>89</sup> *Osborne* (CA) above n 6 at [72]

<sup>90</sup> *Solicitor General’s Prosecution Guidelines* Crown law, Wellington, 1 July 2013 at [5.9.10]



Where the *victim accepts that the defendant has rectified the loss or harm that was caused* (emphasis added) (although defendants should not be able to avoid prosecution simply because they pay compensation).

In this case, however, the payment was made by an *insurer* (not the defendant) and the victims *did not* accept it as rectifying the loss – leading to on-going litigation. By way of background, *Osborne* was an appeal from the decision of Brown J following an application for judicial review by two of the mothers of victims of the Pike River mining disaster.<sup>91</sup> The initial prosecution of Pike River Coal Limited (PRCL) had resulted in a sentence which included an order to pay reparation of \$3.41 million to the families of the deceased and the survivors of the Pike River mine explosion. However the company was by then in receivership. Also prosecuted was Peter Whittall, chief executive of PRCL, as a party to the PRCL failings and for personal failure to comply with the requirements of the Health and Safety in Employment Act 1992. Mr Whittall was covered by a directors' and officers' insurance policy. In the Court of Appeal case it was noted that, "economically the insurer was indifferent to whether a dollar paid by it went to reparation or to defence of Mr Whittall."<sup>92</sup> A proposal was therefore made that a voluntary payment of \$3.41 million would be made on behalf of the directors and officers of PRCL "if and after Worksafe advised the Court that no evidence would be offered in support of any of the charges."<sup>93</sup> Worksafe decided not to proceed with the prosecution of Mr Whittall for a number of reasons which included consideration of the likely sentence and the fact that "a reparation order was unlikely". Worksafe also took account of the conditional payment proposal by Peter Whittall.

The Court of Appeal judgment contains a lengthy consideration of the issue of reparation as the basis for decision by the prosecutor to discontinue the prosecution. In response to an argument that Worksafe was wrong to consider the payment where the victims had not accepted that the defendant had rectified the loss or harm caused and that "[defendants] should not be able to avoid prosecution simply because they pay compensation", the court stated:<sup>94</sup>

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<sup>91</sup> *Osborne v Worksafe New Zealand* [2015] NZHC 2991, [2015] 2 NZLR 485

<sup>92</sup> *Osborne* (CA) above n 6 at [13]

<sup>93</sup> Above n 6 at [14]

<sup>94</sup> Above n 6 at [77] (citing *Department of Labour v Hanham & Philp Contractors Ltd* (above n 28))

The significance of reparation as a consideration may be greater where the victims accept that loss or harm has been (or will be) rectified. But that does not mean that reparation is to be disregarded altogether where it cannot rectify the loss caused, or where a victim considers that it will not do so. There is a significant public interest in reparation, especially under the HSE Act.

The court acknowledged that there was also a significant public interest in the defendant accepting responsibility (citing *Hessell*),<sup>95</sup> however it noted that the weighing of the refusal to acknowledge guilt against the importance of reparation was a matter for the prosecution and not for the court to consider on judicial review.<sup>96</sup>

In *Osborne*, the court referred to the decision in *Polymer Developments Group Ltd v Tilialo* where it was stated that “[r]eparation (whether by the offender or a relative) could well be a matter that could be taken into account in a decision not to prosecute, but there must be no bargain about it.”<sup>97</sup> It was therefore stated that while “an agreement to stifle a prosecution in exchange for payment is clearly unlawful ... this does not mean that the defendant may not advance an undertaking to pay reparation in the event that charges are not pursued further.”<sup>98</sup> The court held that “reparation may be a relevant consideration in a decision not to pursue charges,<sup>99</sup> but that the prosecutor must not enter into an agreement to drop charges in exchange for payment. In both *Osborne* and *Polymer*, the defendants had the benefit of third parties willing to promise high reparation payments in exchange for charges not to proceed. In *Osborne*, at least, there was considered to be a significant public interest in the reparation payment being made. It would be interesting to consider whether the view would have been the same if the amount of reparation offered was much less.

*Polymer* provides an interesting consideration of the legality of entering into a contract not to prosecute. Mr Tilialo and Polymer entered into a contract whereby Polymer Developments Group Ltd (Polymer) agreed not to commence civil or criminal proceedings in return for Mr Tilialo repaying money that Mr Tilialo’s brother had stolen. The court rejected the idea that a distinction could be drawn between “public and private

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<sup>95</sup> Above n 40

<sup>96</sup> *Osborne* above n 6 at [56] and [79] (referring at [56] to Citing *Secretary for Justice v Simes* [2012] NZCA 259, [2012] NZAR 1044 at [50])

<sup>97</sup> *Polymer Developments Group Ltd v Tilialo* [2002] 3 NZLR 258 (HC) at [46]

<sup>98</sup> Above n 6 at [55] [56]

<sup>99</sup> Above n 6 at [56] following *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173 (CA) at 184 - 185

crimes” stating that “the very fact that something is constituted an offence means that the legislature considers there is a public element involved.”<sup>100</sup> The judgment in *Polymer* reinforced the state’s interest in prosecution in serious cases and therefore invalidated the agreement to the extent that it purported to be an agreement not to prosecute in return for reparation. In that case, therefore, the victim’s interest in receiving reparation (which was only available because a third party had agreed to pay) was not considered to be stronger than the state’s interest in prosecuting if it decided to do so.

The relevance of reparation in prosecution decision-making is again reinforced in the Independent Police Conduct Authority (IPCA) *Review of Pre-Charge Warnings*.<sup>101</sup> The IPCA stated:<sup>102</sup>

The Authority notes that recent research conducted by Police shows that pre-charge warnings appear to be particularly successful in reducing re-offending rates by those committing theft from retail outlets. Notwithstanding that, the Authority’s view is that the victim should have the right to seek reparation, and that the actions of the Police should facilitate rather than impede the exercise of that right.

There is therefore a need to change both policy and practice so that a per-charge warning is not given unless either the victim agrees to that course of action or enforceable and realistic arrangements for the payment of reparation are made.

This arguably goes further than the Court in *Osborne* in terms of the significance of reparation for prosecution decision-makers. However, it is clear that the capacity for victims to receive reparation is now becoming a significant for regulators, Police and prosecutors. While views vary on the degree of victim involvement, it is clearly considered to be in the public interest for victims of crimes to receive reparation. The capacity for third party payment could further influence this due to the higher likelihood of payment and the far greater amounts that may be payable, meaning that victims are considered to have even more of a “stake” in the decision whether or not to prosecute and any decisions to withdraw charges.

The impact of reparation insurance on sentencing has been specifically addressed by the Courts. As noted earlier, in *Hanham* the Court was clear that reparation is a

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<sup>100</sup> Above n 97 at [66]

<sup>101</sup> Independent Police Conduct Authority *Review of Pre-Charge Warnings* (Independent Police Conduct Authority, Wellington, 14 September 2016)

<sup>102</sup> At [105] and [106]

compensatory measure to be used in combination with other sentences aimed at deterrence, denunciation and community protection such as a fine, community-based sentence, or imprisonment.<sup>103</sup> The Court considered that, while reparation justified some discount to a fine, this would not be to the total value of the reparation unless financial capacity dictated. It was stated “[T]he statutory purposes of denunciation, deterrence and accountability would not be achieved if fines were reduced by the amount of the reparation on a 1:1 ratio.”<sup>104</sup> The Court dealt specifically with the issue of the payment of reparation by insurance, noting:<sup>105</sup>

[70] ... [It] is not uncommon for employers to arrange insurance to cover the payment of reparation or to indemnify themselves against losses which might be the subject of a reparation order. This is potentially relevant in two respects. First does the availability of cover make it appropriate to increase the amount of a fine under s 40(2)? Secondly, should an offender who has taken such insurance cover be entitled to a discount from the fine for having done so?

On the first issue, the Court endorsed the view taken by Judge Harding in *Department of Labour v Preco Ltd*:<sup>106</sup>

[20][It] cannot be correct to increase an otherwise appropriate fine because a company lawfully has insurance cover which may cover liability for reparation. If such a result diminishes the deterrent effect of the range of fines available, that is a matter for Parliament and not the Courts. On the other hand, insurance cannot be irrelevant – it impacts upon the general financial position of the company and that is a fact which must be taken into account when fines are considered. Further there is no linear relationship between amount of reparation and reduction of fines.

The court’s view was that “an offender is not to be penalised because insurance cover has been arranged to cover reparation, but the existence of the cover is material in assessing the overall financial capacity of the offender to meet reparation and fines.”<sup>107</sup> On the issue of whether the offender should obtain some form of credit for having insurance, the court stated:<sup>108</sup>

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<sup>103</sup> See above n 28

<sup>104</sup> *Hanham* above n 28 at [64]

<sup>105</sup> *Hanham* above n 28 at [70]

<sup>106</sup> *Department of Labour v Preco Limited* (District Court, Tauranga CRI 2007-070-3246, 26 September 2007) noted in *Hanham* above n 28 at [71]

<sup>107</sup> *Hanham* above n 28 at [72]

<sup>108</sup> *Hanham* above n 28 at [73]

[A] cost will have been incurred by the offender in arranging insurance cover whether by way of premiums paid, the payment of an excess where applicable or both. We also accept that employers should not be discouraged from arranging insurance cover for the benefit of their employees and their families by the ordering of full reparation with no recognition of that fact when fixing the amount of the fine.

The court considered, however, that the 10 to 15 per cent discount already made for reparation was adequate recognition for having insurance.

The case of *Department of Labour v Eziform Roofing Products Ltd* was an appeal from a District Court sentencing decision in a prosecution under the Health and Safety in Employment Act 1992.<sup>109</sup> The amount of the reparation order was not at issue, however the case highlights the interaction between reparation and fines. The District Court judge was held to have wrongly given credit for the defendant's remorse twice – having regard to it both in setting the amount of reparation and the fine. Reparation insurance was also considered to be significant as it was considered to reduce the financial impact of the reparation order and therefore have an effect on the company's ability to pay a fine. The Court on appeal noted with regard to the first instance decision:<sup>110</sup>

[T]he Judge recognised that Eziform was insured against reparation payments. Thus, it needs to be recognised that Eziform will not be directly responsible for making payment of the \$40,000 reparation. Despite noting this fact, the Judge did not then go on to address the financial circumstances of Eziform and its ability to pay a fine. I consider that the presence of reparation insurance has a significant and recognisable impact ... [which] ... must necessarily reduce the financial impact of the reparation order on Eziform. This in turn will affect the size of the fine that it can pay. ...

This is not a case where a higher level of fine would have precluded Eziform from paying the reparation ordered. The insurance would cover the reparation. All Eziform had to find payment for was the fine.

In that case, the Court found that the District Court had paid excessive account to Eziform's financial circumstances and substituted a fine of \$60,000 for the initial amount of \$18,000 commenting that, if possible, the amount would have been higher.<sup>111</sup>

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<sup>109</sup> *Department of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526

<sup>110</sup> *Eziform* above n 109 at [60] and [69]

<sup>111</sup> *Eziform* above n 109 at [71] [72]

*Clutha Chain Mesh Products Ltd v Department of Labour*, was an appeal from a District Court sentencing decision under the Health and Safety in Employment Act 1992 following a milking shed fatality.<sup>112</sup> The Department prosecuted the supplier of the milking machine. Before sentencing, the appellant’s insurer agreed to pay \$50,000 to the victims. In chambers, the appellant requested the Court to approve the amount but not to make a reparation order. The Judge then proceeded to make the reparation order in open court calling the case “a truly one off situation” which “should not be taken as a precedent for other cases” because of the defendant’s ability to pay due to the fact that they had insurance “at some heavy annual cost”, which the judge complimented them on. On that basis he stated that the reparation “should not reflect on other offenders who do not have insurance, nor on insurance companies who set the premiums for such policies. This is a truly one off situation and should be regarded as such.”<sup>113</sup> On appeal, Ronald Young J considered that the judge had erred in deciding that “an order for reparation of \$50,000 could properly be made without any (in his words) “precedent” effect and at a level above which could be justified because the appellant was insured.”<sup>114</sup> He stated:<sup>115</sup>

A Judge’s function is to identify what the proper level of reparation is in a particular case. The Judge then must consider the offender’s capacity to pay. If capacity to pay is unlimited, that does not justify any increase in a reparation order because an offender is insured or wealthy. At best the victim will get the full amount which can be justified.

In the case of *R v New Zealand School of Outdoor Studies Limited and Tony Te Ripo*, the fact that the school was insured but Mr Te Ripo was not was taken into account in the way that both the reparation and fine were apportioned between the defendants.<sup>116</sup> Judge Menzies considered that culpability and responsibility were shared equally, however that was “academic” as “[t]he financial circumstances of the two defendants are markedly different.”<sup>117</sup> While the school had means to pay the fine and was insured for reparation, Mr Te Ripo was in difficult financial circumstances. It was considered that the priority was the payment of reparation and therefore the school was ordered to pay the full

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<sup>112</sup> *Clutha Chain Mesh Products Ltd v Department of Labour* [2004] 2 NZELR 261

<sup>113</sup> At [6]

<sup>114</sup> At [17]

<sup>115</sup> At [17]

<sup>116</sup> *R v New Zealand School of Outdoor Studies Limited and Tony Te Ripo* [2016] NZDC 3081 [29 February 2016]

<sup>117</sup> At [70]

amount of \$150,610.50 in reparation (from insurance) as well as a \$53,625.00 fine. Taking into account Mr Te Ripo's financial capacity, he was fined \$10,000.

The case of *Police v Z* focussed on an order made s 283(f) of the Oranga Tamariki Act 1989 that parents must pay reparation in respect of offending by their son.<sup>118</sup> The case was an appeal by the New Zealand Police from the judgment of Mallon J overturning an order for reparation made by the Youth Court against the parents of a young person.<sup>119</sup> In that case, the court noted the view taken in *R v Donaldson* and stated:<sup>120</sup>

In considering reparation, the focus is not the level of culpability of the offender or the punishment appropriate to the crime committed. Rather it is on the harm done to the victim and the need to “make good” the damage done, and the repair of the social relationships between the victim, offender and wider community.

It was also noted that Hall doubts whether reparation can be considered to be a punishment at all,<sup>121</sup> and that reparation has been equated to civil damages.<sup>122</sup> The case concerned discussion as to the proper basis for requiring parents to pay reparation for the young person's offending. The issues included whether something more was needed than the mere relationship between the parents and the young person, or the young person's inability to pay, for the parents to be required to pay.<sup>123</sup> The court noted the emphasis in the Act on the family, however it did not consider that this requires parental fault to be a precondition to ordering the parents to pay reparation. The need for the decision to be based on individual circumstances as they arise was reinforced.<sup>124</sup> A 2009 media article “Parents dodge reparation for teen's spree” criticised the decision to overturn the requirement for the parents to pay “because they could not be held responsible for their teenage son's crime wave,” and reported that the decision “has outraged victims' rights campaigners who say parents should be responsible for the actions of their children in such circumstances.”<sup>125</sup>

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<sup>118</sup> *Police v Z* [2008] NZCA 27; [2008] 2 NZLR 437

<sup>119</sup> Reported as *MK v Police* [2007] NZFLR 1029; [2007] DCR 770

<sup>120</sup> *Police v Z* at [24] (referencing Zedner, “Reparation and Retribution: Are They Reconcilable?” (1994) 57 MLR 228 and *R v Donaldson and anor* CA CA227/06 [2 October 2006])

<sup>121</sup> *Hall's Sentencing* at para I.3.5

<sup>122</sup> At [24] referencing *R v O'Rourke* [1990] 1 NZLR 155 (CA) at 158 (this case was under s 22 of the Criminal Justice Act 1985)

<sup>123</sup> At [28]

<sup>124</sup> At [31](a)

<sup>125</sup> Above n 69

*Police v Z* was subsequently cited in a later parental reparation case, *Police v TT*, where the court considered an argument that the parents would be unable to pay reparation due to financial hardship.<sup>126</sup> Both the parents and the victim were beneficiaries and the court noted the need to “balance the needs of the family against the needs of a victim to a burglary.”<sup>127</sup> The court also referred to guidance available in the Act which it considered applied to orders for reparation, including s 4(f) which is aimed at ensuring that young offenders are held accountable and “are encouraged to accept responsibility for their behaviour.” The Act also places focus on the interests of the victim.

### V *Statutory liability insurance*

Statutory liability insurance for reparation is becoming increasingly common, particularly following the 2014 amendment to section 32 of the Sentencing Act which opened the door to much higher reparation orders. While some may view this as paying a premium to offend with impunity or “hedging ones bets” to ensure that one can pay if necessary, statutory liability insurance is viewed by many as being a responsible step to take. In an address to the Australian Insurance Lawyers Association National Conference in 2013, Chief Justice Bathurst outlined the specialist expertise of insurance companies as regulators of risk:<sup>128</sup>

Theirs is the business of evaluating risk likelihood and likely levels of loss when loss occurs. ... Where the criminal law merely hopes to deter by threat or example an insurance company has much more effective tools at its disposal, particularly in the context of commercial activities. Insurers can require safety precautions and distribute financial burdens according to risk far more effectively than any warranted inspector.

There are now calls for compulsory insurance for some activities to be considered. The effect of this would be that those who did not or could not hold insurance (for example because they did not meet the required criteria) could not undertake the relevant activity.

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<sup>126</sup> *Police v TT* YC CRI 2012-283-000004 [2012] NZYC 20 (3 October 2012)

<sup>127</sup> At [16]

<sup>128</sup> T F Bathurst, Chief Justice of the Supreme Court of New South Wales “Insurance law – A view from the bench” (speech to Australian Insurance Lawyers Association National Conference, 19 September 2013) at [7]–[8] quoted in Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014) at [15.28]



Examples of compulsory insurance often discussed are: compulsory motor vehicle insurance; tenancy insurance; and builders' insurance. In cases where insurance is optional, there is less potential for insurers to act as effective regulators of risk because lack of insurance would not exclude the uninsured from the relevant activity. For insurance to apply effective pressure with regard to risk management the consequences of non-payment must be significant. In the case of reparation, because it is so dependent on offender means, where no insurance is held the court will look to an alternative punishment. However in some cases that is also dependent on financial means (for example a fine). With an increase in the payment of high reparation by insured parties, it is likely that there will be increased victim discontent and societal disapproval where uninsured offenders are considered to have "got away with it" by not paying anything. This will be compounded where the alternative sentence is not considered to be sufficiently punitive to act as a fair alternative to large reparation payments. This too is likely to increase calls for compulsory reparation insurance for high risk activities. Baker notes with regard to US tort cases that insurance has become so much the norm that it is usual for the damages claim to be set by reference to the maximum insurance cover available. This is considered to be both practical and efficient.<sup>129</sup>

However there are also objections to insurance against reparation on the same basis as the public policy argument against insuring for criminal penalties. In the Australian health and safety case *Hillman v Ferro Con (SA) Pty Ltd (in liq)* the court stated that the (insured) defendant's actions:<sup>130</sup>

...have also undermined the Court's sentencing powers by negating the principles of both specific and general deterrence. The message his actions send to employers ... is that with insurance cover for criminal penalties for [health and safety] offences there is little need to fear the consequences of very serious offending...

The Law Commission makes a similar point when considering insurance cover for pecuniary penalties citing the moral hazard whereby there will be a reduced incentive to avoid cost if people are not actually bearing the cost.<sup>131</sup> There are two points to make in this regard, first that this argument applies not just with regard to insurance but in all cases where a third party will pay reparation, although it is noted that in the youth justice context, the family relationship may reduce the risk of moral hazard. The second point is

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<sup>129</sup> Baker above n 1

<sup>130</sup> *Hillman v Ferro Con (SA) Pty Ltd (in liq)*[2013] SAIRC 22

<sup>131</sup> Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014) at [15.30]

the general view that the purpose of reparation is to compensate, and that therefore other penalties will be used to provide the deterrent effect. On that point, Tooma argues that where liability insurance becomes commonplace, the courts will respond by looking to impose harsher alternative sentences that cannot be insured against - such as custodial sentences on individuals.<sup>132</sup> He also notes:<sup>133</sup>

The availability of statutory liability policies has an impact on prosecution strategies also. Knowing that a corporate defendant is “insured,” a regulator will be more inclined to pursue individual directors and other officers personally. The difficulty with this trend if it takes hold is that one of the effects of having a liability insured is loss of control of the matter. The extent of such loss of control will depend on the insurer but some loss of control is inevitable when someone else is paying the bills. This means that individuals may face greater exposure with a decreased ability to control the strategy deployed in their defence.

It is clear that insurance companies do have a keen interest in the outcome of cases where they have provided insurance cover. Law firms and insurance companies have responded to the potential for much higher reparation by publishing promotional material for their clients recommending reparation insurance.<sup>134</sup> Insurance companies also amended their motor vehicle insurance policies to include reparation insurance.<sup>135</sup> A recent law firm client web bulletin states that the potential for significant increases in reparation following the 2014 amendments has “potentially wide ramifications for insurers, including potential calls for compulsory motor and employer’s liability insurance ...”.<sup>136</sup> They further note:<sup>137</sup>

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<sup>132</sup> Michael Tooma Is statutory liability insurance damaging?

Published online <<http://www.wolterskluwercentral.co.au/author/michaeltooma/>>

<sup>133</sup> At 2

<sup>134</sup> See for example <https://minterellison.co.nz/our-view/return-to-personal-injury-damages-claims-covertocover-issue-3>;

<<http://www.stuff.co.nz/business/opinion-analysis/78351006/personal-injury-reparation-is-a-gamechanger-in-compulsory-car-insurance-debate>> (April 11 2016);

<<http://www.icnz.org.nz/for-consumers/motor-insurance/>>

<sup>135</sup> NZI Distinction Motor Vehicle Policy Wording Change Summary NZ6224 12-15

<<http://www.nzi.co.nz/Documents/NZ6224%20NZI%20Distinction%20Motor%20Vehicle%20Insurance%20CS%20LR.pdf>>

<sup>136</sup> <https://minterellison.co.nz/our-view/return-to-personal-injury-damages-claims-covertocover-issue> -3 (downloaded 5 March 2017)

<sup>137</sup> At p 2

The relevant provisions [of the Sentencing Act] appear to imply that the Court must impose the maximum permissible reparation, unless this would cause hardship to the offender or other special circumstances apply. Where the defendant is insured in relation to reparation, the level of reparation is unlikely to be reduced. Insurance companies therefore face a new risk of “top up” payments.

Referring to the complexity of calculating future loss, it is recommended that insurers “may wish to consider commissioning an actuary or other relevant expert ... in order to be able to contribute better data to reparation reports on behalf of defendants... ”<sup>138</sup> The publication goes on to note the potential for insurance to substantially affect the level of reparation awarded leading to reparation awards being “reduced due to lack of insurance” potentially resulting in calls for compulsory insurance “to ensure greater equality of recompense for accident victims.”<sup>139</sup> Their advice to insurers is to manage their risk having regard to the potential for more private prosecutions and increased defence costs due to the complexity of reparation calculations, and that “[d]efendants and their insurers may wish to investigate the insured person’s losses for themselves in order to test the alleged loss and, if appropriate, argue that the true measure of loss is lower.”<sup>140</sup> This could lead to the practice known to occur in other jurisdictions where insurance companies employ investigators to report on their observation of victims to challenge the extent of their alleged injuries. This in turn could lead to higher prosecution costs and have the effect of re-victimising the injured party. In some cases victims may choose to be legally represented to ensure that the reparation issue is dealt with in their best interest – although the victim is, of course, not a party to the prosecution.

Insurance Companies have pro-actively responded to the increased potential for reparation orders by amending motor vehicle and other policies to include reparation cover (presumably at a cost to the insured party). For example, NZI’s Distinction Motor Vehicle updated policy includes reparation cover up to \$20,000,000 per event for property damage and up to \$2,000,000 per event for bodily injury, as well as covering the costs of defending a manslaughter or reckless driving charge. It does not cover “...any legal defence costs or court costs arising from the prosecution of any offence under any Act of Parliament including any Regulations, Rules or By-laws made under any Act of Parliament.”<sup>141</sup>

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<sup>138</sup> P 2

<sup>139</sup> At p 3

<sup>140</sup> P 3

<sup>141</sup> NZI Distinction Motor Vehicle Policy Wording Change Summary, above n 131 Section 2 clause 4

The policy also includes a requirement to obtain the insurance company's written approval before "you negotiate, offer to pay or pay any reparation, including but not limited to, offers made as part of any case management conference or sentencing hearing...".<sup>142</sup> This raises an interesting practical and legal issue. The amount the court will order by way of reparation will be significantly higher if the defendant has reparation insurance cover, however the requirement for the defendant to have insurance company approval before paying reparation appears to imply that the court would need to know if the insurance company agrees to payment before a reparation order is made. This puts the insurance company in a powerful position. If the order was made on the assumption that cover was available and it was declined, this would be likely to make the payment impossible and lead to the sentence not being fulfilled or needing to be amended.

## *VI A case for legislating*

The cases illustrate the complex balancing process that the courts use to try to achieve a degree of consistency and proportionality in sentencing while navigating the difficult course of trying to hold the offender appropriately responsible, compensating the victim, and sending a clear deterrent message to the community at large. As the discussion above has shown, the aim of sentencing is to achieve all of these goals. Reparation is considered to primarily compensatory but to also potentially contribute to the goals of accountability and deterrence, however this is more likely where it is paid by the offender.

The impact of third party payment significantly changes the nature of reparation as a sentence. Whether offenders personally have the means to pay becomes less of an issue in cases where the courts can order parents to pay in youth offending, or can take into account insurance cover when assessing the offender's financial capacity. As increased funding is available, reparation is likely to be awarded more often and in much larger sums, affecting victim and societal expectations and perceptions of the "cost" of crime. Large pay-outs could start to become the norm with a number of flow-on effects. A possible consequence is that, where the amount of reparation is limited due to the offender's finances, there may be a perception that the offender has not been fully held accountable, leading to calls for harsher alternative sentences. This is despite the fact that sentences other than reparation are determined by reference to the seriousness of the offending and the culpability of the offender (not the loss or harm to the victim or the offender's financial means).

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<sup>142</sup> Clause 3

For victims, third party payment may mean that they receive the money but are not satisfied with the outcome, considering that justice has not been achieved because the offender did not personally pay. The lack of “blood money” may mean that the offender is not seen as being held accountable for their wrongdoing and showing genuine remorse, thereby affecting victim confidence in the justice system and leading to reduced victim co-operation and participation with prosecutions. There will also be increasing inequality for victims with third party involvement meaning far higher payments for some victims. The capacity for third party payment will also have an impact at the pre-prosecution stage, where it is likely to influence the decision whether or not to prosecute, the choice of charges, and subsequent plea discussions as well as creating an incentive for private prosecution in some cases. For offenders too, third party payment will impact on any other sentence handed down to them as the courts seek to arrive at a just and proportionate outcome.

As noted in Parts I and II of this paper, there has been ongoing debate and uncertainty over the proper purpose of reparation since its introduction as a sentence in the 1980s. In *Hessell* it was considered that reparation is a “loss-shifting” mechanism, transferring the victim’s loss and to the offender.<sup>143</sup> In compensating for the loss and harm, it is also possible to argue that the offender is going some way to repairing the overall harm caused to the victim and the community by the offending. Even on this basis, courts consider that reparation only achieves some of the sentencing purposes and therefore usually combine reparation with other more punitive sentences. Allowing the loss to be further shifted to a third party arguably undermines the original policy view that reparation is a means by which the offender repairs the harm they have caused. The question is whether these issues mean that there is a case for legislative intervention to revisit the policy basis for reparation and specifically address the issue of third party payment in the Sentencing Act. Options include either prohibiting or limiting insurance or, conversely, requiring compulsory insurance, meaning that insurers could become the de facto regulators of risk.

The Law Commission considered that insurance was one of the relevant legislative design issues that needed to be addressed in relation to the creation of new pecuniary penalties. They noted that the issues included:<sup>144</sup>

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<sup>143</sup> *Hessell* above n 40

<sup>144</sup> Above n 131 at [15.1]

- Whether indemnities and insurance should be available from a public policy perspective;
- How their availability might influence the behaviour of those operating in environments regulated by pecuniary penalty status;
- Whether such measures support the regulatory objectives of a particular regime (through the imposition of market disciplines); or
- Whether they potentially undermine them (by diluting the penalty's punitive effect).

The Law Commission stated:<sup>145</sup>

The absence of specific provisions in the pecuniary penalty statute confirming whether a penalty may be insured or indemnified against creates uncertainties for regulators and market participants, as the existing law concerning insurance or indemnities for criminal liability is not necessarily fit for purpose in the context of pecuniary penalties. Reserving the issue for analysis by the courts where the issue arises in a particular case does not provide sufficient regulatory certainty.

And later:<sup>146</sup>

The advantages of express statutory confirmation include greater certainty for directors and officers, as identified by Justice Bathurst. It would also confirm that the impacts of indemnification on the regulatory regime have been addressed by policymakers in designing the regime, thus ensuring a robust regime and providing a clearer indication to the public of how issues of liability may be dealt with.

On this basis we conclude that pecuniary penalty statutes should expressly confirm whether contracts that indemnify or insure against liability to a pecuniary penalty are legal, or whether they are subject to any particular prohibition or limitation.

Similarly, it can be argued that legislation specifically addressing the issue of third party payment of reparation would allow many of the issues raised in this paper to be addressed on a principled basis, rather than through case law.

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<sup>145</sup> Above n 131 at [15.4]

<sup>146</sup> Above n 131 at [15.23] and [15.24]

As noted above, legislative options could include compulsory insurance or alternatively a prohibition on insurance coupled with a limit on reparation orders so that they are at levels similar to a fine for the relevant offending. The latter would address the issue of the potentially vast inequality of amounts payable depending on the specific circumstances of the victim and offender – meaning that there is more potential for consistency of outcome for similar offending. However, the challenge is to find a sentence that does not allow wealthy defendants to “buy” their way out of a sentence, or factor in a payment as “the cost of doing business” or mean impecunious offenders cannot be ordered to pay reparation to their victims. An option that is often raised is having a system where offenders would undertake minimum wage work to pay their reparation.<sup>147</sup> The advantages are that this would be equitable (placing all offenders in the same situation) and could be both punitive and rehabilitative. The rehabilitative effect could be achieved both in terms of the opportunity for some offenders to gain skills and work experience, but also by operating as a reintegrative measure allowing offenders to “buy back” their place in society. Problems that have been identified with this option include the ability to find enough suitable work for offenders while not depriving other law-abiding people of work opportunities. While this option could work while offenders were in prison, it would have the added benefit that it would be more likely to allow them to remain the community. For offenders with dependents, it would be important to ensure that the reparation payments did not mean family hardship. Having structured “work for reparation” systems would avoid the risk identified when the Criminal Justice Bill was introduced, that a sentence of reparation would cause offenders to reoffend to make the payments.

An alternative approach would be to require insurance either universally or in relation to specific activities. There are arguments for and against compulsory reparation insurance, including the argument that this duplicates the accident compensation scheme. As noted above, the Law Commission warns of the moral hazard that may result from insurance against criminal liability having a “sedating” effect on the deterrent nature of sentencing – leading to reduced incentive to avoid or refrain from actions that may constitute offences.<sup>148</sup> Conversely, the Report notes Justice Bathurst’s view that a prohibition on insurance against pecuniary penalties may result in people adopting overly risk-averse behaviour which could have a negative impact on society.<sup>149</sup> It is contended that these

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<sup>147</sup> See for example the discussion in Julian V Roberts and Loretta J Stalans “Restorative Sentencing: Exploring the Views of the Public” (2004) 17(3) *Social Justice Research* 315-334

<sup>148</sup> See above n 131

<sup>149</sup> See above n 131 at [15.3]

arguments would also be made if the issue of compulsory reparation insurance was under consideration.

Legislative reform would also allow the issue of reparation as a sentence to be revisited, although it appears that there is little appetite to discard reparation entirely. An option would be to separate it from the more punitive aspect of sentencing by clarifying that it is a form of additional order that is made, if possible, purely to compensate the victim. This is alluded to in the Court's comments in *Davies*, above, where it describes reparation as enabling "speedy and inexpensive relief, additional to other remedies."<sup>150</sup> This would be consistent with the view that it is more a matter of practical convenience and sympathy for the victim that reparation orders are made as part of the criminal sentencing process; however it would be a departure from other statements of sentencing theory, which refer to the use of reparation orders to create offender accountability and to restore the offender-victim relationship and to restore the social imbalance caused by the offending.

## *VII Conclusion*

Reparation has its origins in restorative justice. The policy basis for implementing a specific sentence of reparation in 1985 was to repair the harm done by the offending. While the immediate goal of the sentence of reparation is compensation for the victim, the penal policy objectives were to hold the offender accountable and to deter future offending as well. The fact that the victim's loss is shifted to the offender when reparation is paid is both punitive and restorative. The effect is practical - the victim receives compensation which contributes to making them "whole" again - and also symbolic - because the offender is seen to atone for the harm they have caused. This, in turn, facilitates the reintegration of the offender into the community.

However, as shown in this paper, achieving those objectives is dependent on the offender being held accountable and personally paying the reparation. Where they do not do so, there is a risk that victims and the community will not consider the outcome to be just or fair. These issues are clearly illustrated in the ongoing litigation, including the Supreme Court case of *Osborne v Worksafe New Zealand* which was heard on 5 October 2017.<sup>151</sup> Media coverage of the case reported that the appellants' lawyer, Nigel Hampton QC "... said it was a case about whether the criminal justice system applied to everyone, rich or poor, or whether it was a system in which the payment of money could be used to end a

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<sup>150</sup> Above n 8

<sup>151</sup> *Osborne v Worksafe New Zealand* SC 23/17



prosecution.”<sup>152</sup> It was noted that Mr Whittall’s insurer paid reparation following an agreement that payment would be made if the charges against Mr Whittall were withdrawn. The money would have otherwise been used for Mr Whittall’s defence. The same media article reported Chief Justice Dame Sian Elias as asking “... if public policy was served if the effect of the agreement was that the prosecution did not go ahead because compensation was paid.”<sup>153</sup> As noted earlier in this paper, third party payment of reparation is a significant factor in this case as the insurance cover allowed the large offer of reparation. It was also significant that, in the Court of Appeal case it was stated that “... [e]conomically the insurer was indifferent to whether a dollar paid by it went to reparation or to defence of Mr Whittall.”<sup>154</sup> This highlights the differences between the situation where the offender’s money is at issue and where an insurer is in charge. It is unlikely that a defendant would have such a neutral attitude towards funding their defence in a case where there was a prospect of conviction. It is also possible that the victims would have been more disposed to consider that it was a just outcome if Mr Whittall had paid the reparation personally – even where this meant that the prosecution did not proceed. By personally bearing the cost he could have been considered to be accepting some responsibility and taking measures to repair the harm.

While this is one case that has been discussed in this paper, it incorporates a number of key problems that arise where reparation is paid by third parties. As this paper has shown, the effectiveness of reparation as a sentence is changed where third parties can pay. The larger sums available from insurers (or even from parents in the case of youth offending) change perceptions about the “cost” of offending and this in turn impacts on the relativity between different sentences. This has created challenges for courts in attempting to achieve proportionality and consistency of treatment between cases. The variability of outcome between cases where the defendants are insured and where they are neither insured nor wealthy has also led to increased inequality between victims. Because of the high potential amounts of reparation potentially at stake, victims and insurers are now more likely to take an active role in prosecution and sentencing to protect their interests. The emphasis on facilitating compensation above all else creates a risk that this will become more important than the prosecution and conviction itself – to the point where the state’s interest in prosecution is not determinative of whether a

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<sup>152</sup> Stuff article (5 October 2017): “Worksafe defends decision dropping charges against mine boss Whittall <<https://www.stuff.co.nz/national/97549858/two-pike-river-women-make-final-attempt-to-see-mine-boss-prosecuted>>

<sup>153</sup> Above n 147

<sup>154</sup> Osborne CA, above n 6

prosecution takes place. The decreased centrality of the state's interest in prosecuting runs the risk of making the process similar to a civil damages claim. However, as is shown in the victims' arguments in *Osborne* the idea of a person being "held accountable" rather than merely compensating is important to the state and to victims.

In *Osborne*, the court argued that reparation is important in the public interest even where the victim does not consider that it achieves justice, however it is arguable that this is at odds with the general view of reparation as achieving justice because it compensates the victim and punishes the offender – thereby achieving accountability through loss shifting. It is also potentially overlooking the fact that these objectives are usually achieved when reparation is ordered as a sentence – meaning that the offender has been convicted – and that reparation is usually combined with other (arguably more punitive) sentences.

For reparation to be considered to be a valid part of a sentence it must have a reparative function. While this is not purely to be judged from the victims' perspective – as this would risk allowing the victims to take the law into their own hands – perhaps the "reasonable person" perspective could apply. No other sentence can be transferred to a third party. This ability to further shift the loss strains the argument that reparation promotes offender accountability or is, in fact, a punishment in its own right and arguably reinforces the incongruity of reparation as a sentence. It also raises a very real question as to the reason for having a sentence of reparation where it will not be paid by the offender in a jurisdiction that also has no-fault accident cover. If reparation is no longer capable of "repairing" the offender-victim relationship and promoting accountability, it becomes merely compensation. The question then arises whether there is a good reason for victims of some crimes to receive more compensation than *other* accident and crime victims. As reparation insurance becomes increasingly common, there is discussion of compulsory reparation insurance for health and safety and motor vehicle offences. This has the capacity to make insurers the de-facto regulators of risk because they control the degree to which companies and individuals can undertake activities for which they require insurance.

As this paper has shown, where offenders do not personally pay reparation, this affects accountability, deterrence, the amount of reparation ordered (and paid), the behaviour of insurance companies and prosecutors, societal expectations, and criminal justice policy. It also widens the gap between victims and offenders and affects people's appetite for risk. The requirement for parents to pay on young people's behalf also goes to the heart of family relationships and the idea of personal responsibility. Having regard to the

extent to which third party payment impacts on the initial reasons for reparation as a sentence, the question must now be whether it is time for a fundamental review with the potential for specific legislation.

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