

Some thoughts on RMA prosecutions

In this article Alternate Environment Judge FWM McElrea offers some insights into aspects of RMA enforcement proceedings. The paper is an edited version of a talk Judge McElrea gave to the Environment Court Judges' Conference at Taupo, 18-20 August 2007.

Case management of RMA prosecutions

The general practice with RMA prosecutions has been to take a case-management approach similar to that used by the Environment Court in "civil" work. This approach counteracts the tendency for cases to languish, sometimes with several Registrar's adjournments without plea, and then having an adjournment to a nominal date pending the availability of an Environment Judge. Time can also be wasted with defendants pleading not guilty without realising the strict liability nature of the offences, or alternatively pleading guilty, but without advising that they still dispute the Summary of Facts so that a defended hearing may be needed.

The volume of cases in the Auckland area justifies having a monthly RMA list Court, and other northern Courts are encouraged to obtain the consent of the parties to transfer the matter to the Auckland District Court RMA list day. There is usually time on such days for sentencing in some cases as well. Fixture weeks are put in the roster every three months, plus the occasional extra week if needed. Teleconferencing is also used more frequently to move cases along. One recent example concerned a defendant in the "Henderson lock up" on "P" charges who had pleaded not guilty to RMA charges. In that case the teleconference had the following benefits:

- The Judge was able to discuss the defendant's need for legal advice, and arrange for legal aid forms to be given to him.
- The defendant indicated he really wanted to plead guilty and put forward mitigating circumstances.
- The Judge asked counsel for the informant to contact the defendant's usual counsel and bring him up to speed.

Another teleconference was arranged to review whether a defended hearing was still necessary. At such a conference it will be possible to give a timetable preparatory to either a defended hearing or a sentencing.

Other parts of the country will have different needs, but this approach has been found to reduce the number of late changes of plea, avoid delay, and result in cases better prepared for hearing.

A pleading system for prosecutions

Counsel are generally happy to cooperate in trying to narrow the issues by defining the matters in dispute. The legal basis was s 369 of the Crimes Act, but is now s 9(2) of the Evidence Act 2006:

In a criminal proceeding, a defendant may admit any fact alleged against that defendant so as to dispense with proof of that fact.

The challenge is to develop an appropriate method of defining the facts to be admitted, and to encourage this process to be followed.

On the first point, the informant is usually invited to file and serve a detailed summary of facts in a similar manner to a statement of claim in a civil proceeding, ie with clearly numbered paragraphs, and to aim for one paragraph per fact to be proved. It must be stressed that the object is not to set out the evidence of the informant but rather the essential facts that have to be proved, including full particulars of the charges.

The defendant is then given time to file a detailed response, following the informant's numbering, advising whether each allegation is admitted or not, and (if desired) explaining why not. For example, a corporate defendant may have an available defence under s 340 of the RMA.

It is also stressed that there is no obligation to admit anything at this stage, and the right to silence remains intact. However, where this process is followed, the issues are narrowed and hearing time reduced, thereby saving time and money for both sides.

A typical timetable would allow say two weeks for the informant and the same for the defendant — but this is flexible of course. Counsel are invited to prepare a summary of agreed facts and of matters in dispute. This is usually done by the informant's counsel and sent to defence counsel to approve. This last step is not essential — the Judge can work it out by comparing the two pleadings, but counsel should be doing it for their own purposes in any event.

This procedure is useful in both defended cases, and sometimes in complex matters before a plea is entered, as it helps the defendant focus on whether there really is a defence. The result is sometimes a guilty plea, but with a hearing of facts for sentencing purposes on the disputed issues (if they are significant).

Finally, as a matter of record counsel should be asked to confirm in the presence of the defendant at the commencement of the hearing that the admissions are formally made under s 9 of the Evidence Act, as set out in the document signed by counsel, which is then handed up.

Proof of previous convictions of defendants

Since earlier this year there has been in place a procedure for informants to obtain a copy of the full list of previous convictions of defendants. Before then only the police and

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probation were accessing this information, which meant that Judges did not see it in RMA cases. It is as well to check that informants are aware of the protocol published by the Ministry of Justice (see *Law Talk* 21 May 2007). This is important for the following reasons:

- Previous good character, and previous convictions, are mitigating or aggravating factors under s 9 of the Sentencing Act 2002.
- If community work is being considered, it is important for the Judge to see whether there is a history of breaching periodic detention or community work.
- Informants under the old system were not necessarily aware of other RMA offences committed in other areas.

Evidence Act 2006

It must be remembered that the Evidence Act 2006 applies to prosecutions under the RMA, since they are District Court proceedings.

Committal proceedings for disobedience of an enforcement order

It was held by Lang J in *Conway v Auckland Regional Council* [2007] NZRMA 252 that a District Court Judge who is not an Environment Judge cannot deal with committal proceedings under s 79(2) of the District Courts Act. The appropriate procedure is to apply to the Environment Court to enforce the order, in which case an Environment Judge can issue warrants of committal under s 79(2), via s 278 of the RMA.

This decision reinforces the exclusive jurisdiction of Environment Judges in matters of environmental offending.

Costs

It is worth remembering that legal costs can be awarded under the Costs in Criminal Cases Act 1967 and regulations, and can exceed scale where the case has unusual importance or complexity. In *Interclean Industrial Services Ltd v Auckland Regional Council* [2000] 3 NZLR 489 Randerson J held that this means “importance or complexity” in comparison with run-of-the-mill criminal cases. It is not limited to unusually complex RMA prosecutions. Applying this principle in *PVL Proteins Ltd v Auckland Regional Council* (Environment Court, Auckland 61/01, 3 July 2001, Sheppard J) \$20,000 costs were awarded in addition to a \$32,000 fine.

Sentencing

(i) “Starting point”

For some years this term was used by the Courts with different meanings in different contexts. Discounts for guilty pleas were always factored in after the starting point, but otherwise there were different approaches. This issue was clarified by the Court of Appeal in *R v Taueki* [2005] 3 NZLR 372, a case of serious violence, and its application was confirmed in the RMA context by Priestley J in *Heenan v Manukau City Council* [2007] DCR 354.

The result is that the starting point reflects aggravating factors relating to the offending, and it is then adjusted according to aggravating and mitigating factors relating to the particular offender.

(ii) Sentencing guidelines

Heenan also confirmed that there are no tariffs for offences under the RMA, Priestley J stating (at para [28]):

I reject the proposition, which in fairness was not put this way to me by either counsel, that the appropriate fine to impose in this case must be linked in some way to *Tupou*. Mr Berman was correct when he submitted that the relevant penal provision under the Act is designed to cover a multitude of offending. In the same way the Court of Appeal has consistently declined to impose tariffs in manslaughter cases (*R v Leuta* [2002] 1 NZLR 215 (CA); *R v Edwards* [2005] 2 NZLR 709 (CA)), a fortiori it would be imprudent and crippling to set out sentencing guidelines for offending which damages the environment. [Emphasis added]

On the other hand Fogarty J in *Cometa United Corporation v Canterbury Regional Council* [2007] NZRMA 266 allows that there can be an “accepted starting point” for certain types of offences, which – at para [75] – he appears to treat as a “statement of fact”:

There is no basis for this Court on appeal to challenge the statement of fact by the expert trial Judge as to the starting point. He will be far better informed than this Court as to the level of fines that are being imposed across the country.

This is the first acknowledgment I have seen of the expertise of the District Court in RMA sentencing. Whether it makes any difference that it was coupled with the reference to a “trial” Judge, ie one who heard the evidence at a defended hearing, I doubt.

(iii) Upward movement of fines in recent years

The High Court has accepted that there has been an upward movement in the level of fines – see *Wallace Corporation Ltd v Waikato Regional Council* [2007] NZRMA 78 at para [28]. Here Simon France J referred to comments I had made in *Auckland City Council v North Power Ltd* [2004] DCR 740 at para [66]. There I said that since 1996 when the Court of Appeal in *Waitakere City Council v Hertzke* [1997] NZRMA 222 had noted that the highest fine at that time was \$25,000, matters had moved on. I referred to Judge Whiting’s fines and costs totalling \$103,800 in *Auckland Regional Council v Westgate Properties Ltd* [2000] DCR 649 – which is still the record – and noted at least seven occasions in the preceding two years when fines between \$25,000 and \$55,000 had been imposed for a diverse range of activities, which are set out in the passage in question.

Since then, of course, there was the much publicised case of George Bernard Shaw (*Auckland City Council v Shaw* [2006] DCR 425) who (in addition to his company’s penalty) was fined \$80,000 and subject to an expensive enforcement order for the illegal cutting down of a pohutakawa tree on a property he was developing. No appeal was filed.

The penalty was severe because this was the defendant's third offence of this type, Judge Bollard having warned him sternly on the previous occasion. *Auckland City Council v Shaw* is also an interesting case about restorative justice operating in a very public setting.

(iv) Effect of s 40(2) of the Sentencing Act – financial position of the defendant

Section 40(2) of the Sentencing Act requires the Court to take into account the financial capacity of the offender whether this “has the effect of increasing or reducing the amount of the fine”. Previously most Judges had subscribed to the view that fines could be reduced because of inability to pay, but the reverse did not apply. I had occasion to consider s 40(2) recently in an OSH prosecution, *Department of Labour v The Fletcher Construction Company Ltd* (Auckland District Court, CRI 2006-004-005630, 25 June 2007):

[32] This means, in my view, that the fine should be both fair and meaningful to the particular defendant. As it was put by McGechan J in respect of other regulatory offending (in that case under the Resource Management Act) which was regarded by Parliament as serious, “the Courts should not shrink from substantial fines, commercially meaningful”: *Fugle v Cowie* [1998] 1 NZLR 104, 114.

[33] Although this aspect of s 40 – the possibility of the financial capacity of an offender actually increasing the amount of a fine – has received little attention, Simon France J in *Wallace Corporation Ltd v Waikato Regional Council* [2007] NZRMA 78 at para 22 noted that in a previous District Court sentence there being discussed by way of comparison (*Nuplex Industries Ltd*) the size of the fine, \$55,000, was “increased to reflect the size of the company which had reported a net surplus of over \$19m in the previous year”.

In *Fletcher* the fines were expressly doubled because of the size of the defendants, taking the total to \$70,000.

Under s 41 of the Sentencing Act the Court can require the defendant to complete a “statement of means”. In the case of corporate defendants a copy of their latest annual accounts is routinely required by the sentencing Judge. For other defendants the Fines Office of each District Court has a form that is suitable for most purposes.

(v) A broader spread of sentences

The *Fletcher* sentencing also expressly raised the question whether the Courts are prepared to use the middle bands of the sentencing ranges, now that s 8 of the Sentencing Act states the principle that cases at or near the most serious should attract penalties at or near the maximum provided. In the criminal law, the tariff decision in *Taueki* grapples with that for the first time, providing sentences from the highest to the lowest available depending on the band into which the offending falls. Bands and tariffs are not appropriate in our area, but in this writer's respectful view the principle remains that the Courts should be prepared to use the full range of sentences available, including the middle of

the range – and, it is suggested, with the highest penalties reserved not for the worst possible case one could ever conceive, but the worst cases one is likely to encounter.

So far there are only two cases of prison terms actually served – both of three months, the first imposed by this writer in *R v Borrett* (2003) 10 ELRNZ 46 (20 weeks reduced to 12 weeks on appeal) and the other by William Young, Randerson, and Heath JJ in *R v Conway* [2005] NZRMA 274. In both cases the defendants were repeat offenders who were ignoring Court orders.

(vi) Restorative justice in RMA cases

There have now been numerous cases in the Auckland area, and a few elsewhere, where restorative justice processes have been applied. Judge Smith used Retired Judge Skelton as a facilitator in one very public conflict between the Canterbury Regional Council and Christchurch City Council in his area, with considerable success. It must be remembered that the process is entirely voluntary so that the Court never directs that a conference take place – instead after a guilty plea is entered it adjourns the case to allow this to occur and to receive a report of the conference.

The benefits of restorative justice have been numerous, and include:

- Involvement of people adversely affected by the offending, as victims or community representatives, who are able to ask questions, tell the defendant of the effects of the offending on them, receive personal apologies, and participate in finding a way to “put right the wrong” (all restorative justice cases exemplify this).
- Deterrence achieved through public education, for example when a defendant publishes an article in an ethnic community paper, or pays for advertisements about environmental projects (see for example *Auckland City Council v Raniga* (District Court, Auckland CRI-2006-004-023560, 2 April 2007, McElrea J)).
- Accountability and taking responsibility (the first two purposes of sentencing under s 7 of the Sentencing Act), as well as denunciation, achieved in a direct, face-to-face manner (*Auckland City Council v Shaw* [2006] DCR 425).
- A greater emphasis on prevention than traditional Court processes (for example *Waitakere City Council v Stanic* (District Court, Auckland CRI 2004-090-005790, 10 July 2006, McElrea J)).
- Defendants able to be reintegrated into the community and acknowledged as good neighbours after completing a remedial plan.

It must be emphasised that restorative justice is an approach to wrong-doing – not a form of mediation. The wrong-doing must therefore be admitted before the process can operate. In one recent case (*Auckland Regional Authority v PVL Protein Ltd* (District Court, Auckland CRI 2006-069-001093, 13 August 2007, McElrea J)) a community meeting was convened ostensibly as a restorative justice conference. However, the expected admission of wrong-doing did not occur, so there was no outcome except an agreement to

try and find a better way of handling odours. This was taken

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into account as an offer of amends under s 10 of the Sentencing Act, rather than as the outcome of a restorative justice process under s 8(j).

For this reason — the need for admitted wrongdoing — restorative justice is likely to have little scope in applications for enforcement orders, though the occasion may arise.

It is essential that any restorative justice process is facilitated by a trained facilitator who is a member of a recognised provider group.

There are over 30 such groups around New Zealand, funded and trained by the Ministry of Justice. That funding does not extend to RMA cases but there is nothing to stop those groups handling RMA cases on a private, fee-paying basis — and some have done so already. The fee (commonly in the range \$100 to \$1500) is payable by the defendant and is taken into account by the Court in sentencing. Defendants can contact these provider groups through the Restorative Justice Co-ordinators employed at the Auckland, Waitakere, Hamilton and Dunedin District Courts. They must understand however the need for a guilty plea as an acceptance of wrongdoing and the consent of the victims to be involved.

(vii) Victim impact reports

The Victims' Rights Act 2002 contains a wider definition of "victim", which in turn triggers a wider obligation to provide the Court with a victim impact statement. In *Auckland City Council v North Power Ltd*, the defendant cut down bush on private property without a necessary resource consent. The owners of that land suffered both loss of and damage to property, namely their trees. They were therefore "victims" and the obligation was on the prosecutor under ss 17–22 of the Victims' Rights Act to obtain and submit to the Court a victim impact statement for each victim. (All prosecuting bodies need to take note of this obligation.)

Apart from those who suffer loss of or damage to property, there are two other categories of victims whose rights are relevant in an RMA context. First, the definition includes those who suffer "physical injury". This would include effects sometimes complained of from odours, such as headaches and watery eyes, provided such effects are not trifling or transitory.

Secondly, under s 20 the prosecutor has a discretion to treat as a victim (for the purposes of victim impact statements) persons who are "disadvantaged by an offence" — a very wide phrase. A classic example of the latter could be the recent case dealt with by Judge Dwyer, *New Plymouth District Council v Allied Farmers Ltd* (New Plymouth District Court, CRN 07043500364, 5 July 2007). Here a cyclist was killed when hit by a motor vehicle at an intersection where the views of other vehicles were obscured by a land agent's sign illegally erected on the grass verge outside a property for sale. The cyclist's family could have been treated as victims under either this provision, or under the extension of the term to include deceased victims' family members. The fact of the matter is that victim impact statements were provided in respect of the cyclist's family, but only because the council realised that such statements were not limited to the victims of criminal offences.

This case is cited for a second reason. Having mentioned that the defendant had agreed to make a payment of \$5,000 to the cyclist's family, Judge Dwyer added:

the Court does not endorse [this payment] as compensation. No compensation can be adequate. Nor does the payment reimburse Ms Reeve's family for the financial costs to them of this accident. It may be regarded as an ex gratia payment made by the company to record its regret in a tangible way. It is to be accompanied by written apologies which the family has requested.

Judge Dwyer accordingly declined to treat the arrangement as an offer of amends under s 10 of the Sentencing Act. Instead, in a very sensitive way he elevated it to a higher status, as an expression of remorse. The case illustrates in a most poignant way that the law now requires Environment Judges to consider environmental offending as having, oftentimes, identifiable victims, whose human needs must be considered alongside the damage to the environment itself.

As a concluding thought, perhaps with the increasing involvement of the community and of named victims through restorative justice, victim impact statements and other means, we are helped to focus on the human face of environmental offending. This is not new to the Environment Court in its general (civil) work but is adding a new dimension to the realm of prosecutions for offences.

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