

ONTARIO COURT OF JUSTICE

BETWEEN:

Her Majesty the Queen in right of the Region of Niagara

— AND —

William Clarke

Before Justice of the Peace Mary Alice Shelley

Heard on 1 August 2012

Reasons for Judgment released on 12 September 2012

N. Isak for the prosecution
T. Ayers for the defendant William Clarke

JUSTICE OF THE PEACE SHELLEY:

[1] William Clarke pled guilty on the second appearance before the court, a date set to have the matter spoken to, having retained counsel in the matter. In my view this signals to the court the accused desire to have the matter disposed of quickly. As it turns out, that was exactly the submissions of counsel. For a variety of reasons, Mr. Clarke wanted to resolve the matter and did so by accepting responsibility and pleading guilty to driving without a contract of automobile insurance contrary to the Compulsory Automobile Insurance Act. Counsel then made submissions to the court under section 59 (2) of the Provincial Offences Act which allows a justice to provide relief from a minimum penalty. Prosecution seeks the minimum penalty of \$5,000 for a first offence.

[2] There are authorities relied upon in submissions by both sides. The court has read and considered those as well as instructing itself as to the appropriate application of section 59 (2) of the Provincial Offences Act and will exact a penalty that is fit and appropriate according to the law.

[3] Section 59 (2) reads, “Although the provision that creates the penalty for an offence prescribes a minimum fine, where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the in-

terests of justice, the court may impose a fine that is less than the minimum or suspend the sentence”.

[4] Defence is not asking the court to impose a suspended sentence even given the circumstances of Mr. Clarke and given that s 59 (2) allows for it. Defence argues that some penalty should be imposed, but it should be something that the accused can pay.

[5] Prosecution submits that there are essentially two lines of thinking that have evolved on the proper application of section 59 (2), which he refers to as the Fagbemi line of reasoning and the Hitchon line of reasoning. That is a fair analysis. In the case at bar prosecution and defence have each, solidly placed themselves in the opposing schools of thought.

The Law

[6] R. v. Pham [2002] O.J. No. 2545 (Ont. C.A.)

An appeal to the Ontario Court of Appeal against sentence in a Superior Court conviction under the Excise Act. The fine levied was the set fine for possession of that quantum of tobacco; \$154,000 for possession of a large quantity of tobacco. Although the court saw fit to reduce the fine to \$132,000, the court also found that inability to pay a fine was not an issue since the amount of the fine could be attenuated by allowing an extended time to pay the fine.

[7] R. v. Ade-Ajayi [2011] O.J. No. 1016

The other Ontario Court of Appeal that deals with reducing the amount of a penalty was relied upon by prosecution in the case of Mr. Clark, *R. v. Ade-Ajayi*, [2001] O.J. No. 1016 (Ont.C.A.). Prosecution draws the courts attention in *Ade-Ajayi* to paragraph 13 where the court says, “The fines imposed under s. 2(3) of the Compulsory Automobile Insurance Act are designed to underscore the importance of every vehicle operated on the public roadways of Ontario being insured: *Regina v. Zwicker* (1994), 17 O.R. (3d) 171 (C.A.). The idea behind the high level of minimum fines is to make it more financially onerous to offend the legislation than to bear the required cost of insurance premiums: see *R. v. Baritz* (2006), 37 M.V.R. (5th) 121, at para. 31 (Ont. C.J.). A reduction in the minimum fine should not lightly be imposed, therefore”.

[8] But the Ontario Court of Appeal in that same paragraph adds: The court may reduce or suspend a minimum fine, however, where it is of the opinion that "exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice": *Provincial Offences Act*, s. 59(2).

[9] The case of *Ade-Ajayi* is quite different than the case at bar. Mr. Ade-Ajayi found his way to the Ontario Court of Appeal by a circuitous route where the court upheld the original sentence imposed by a justice of \$2,500 for a first offence of driving without a contract of automobile insurance. In that same decision the court says, beginning at paragraph 15,

“Appeals to this Court on matters under the Provincial Offences Act are very much the exceptions, and particularly so with respect to sentence. Trial judges must decide whether the circumstances of a particular case call for something less than the minimum fine. This Court will not “second guess” that assessment absent factors that meet the leave to appeal criteria set out in s. 139 of the Provincial Offences Act”.

[10] The Court continues at paragraph sixteen and seventeen, “However, in this case, as the Crown points out, it appears that the original sentencing judge, dealing with what was then thought to be a second offence, intended to impose a fine that was half the minimum, namely \$5000 instead of \$10,000. We agree with the Crown that, given the present landscape, a reduction to \$2500 strikes an appropriate balance between the individual circumstances of the appellant and the legislative purpose behind the significant minimum fines called for in the Compulsory Automobile Insurance Act. In the particularly unusual circumstances of this case a reduction to \$2500 is in the interests of justice. We accordingly allow the appeal and reduce the penalty imposed to a fine of \$2500. As the Justice of the Peace did, we accord the appellant a period of one year from this date to make the payment”.

[11] I find in reading Ade-Ajayi, that the instruction to be taken from it is that the court must strike a balance between the circumstances of the case and the circumstances of the accused in light of exceptional circumstances, the oppressiveness of the fine, the interests of justice and the intent of the legislature behind significant minimum fines.

R. v. Ward [1980] 56 C.C.C. 2d 15

[12] There is another case from the Ontario Court of Appeal, an older case, an appeal of a criminal sentence. The case is R. v. Ward [1980] 56 C.C.C. 2d 15. In this case the court distinguishes mitigating circumstances from exceptional circumstances when imposing the penalty in the circumstances of a serious drug trafficking offence. The court instructs that the accused should be able to pay a fine in a reasonable period of time and if not, a lesser fine may be imposed.

[13] The remainder of the cases that address the proper application of section 59 (2) are from courts of equivalent jurisdiction, namely, the Ontario Court of Justice sitting as a trial court or an appeal court. In addition to that, in my view, the cases that have been handed up can be distinguished on the facts amongst those cases and as compared to the case at bar. I have considered this when determining which cases I am bound by as opposed to those I am persuaded by.

[14] My understanding of the doctrine of stare decisis is that where there are opposing views taken by courts of equivalent jurisdiction, the court below may rely on the case or cases by which the court is persuaded. The authority for that comes from R. v. Sepiashvili [2003] O.J. No. 3996.

R. v. Wust, [2000], 1 S.C.R.455

[15] I have also found instructional, the case of *R. v. Wust*, [2000], 1 S.C.R.455. The question in *R. v. Wust* that the Supreme Court of Canada was trying to resolve, was the dissonance created by two sections of the Criminal Code of Canada, section 344(a) and section 719 (3). In the time from when the amendments were made to the Criminal Code and the time the Supreme Court decided *Wust*, there had evolved a problem of statutory interpretation when various provincial courts below had reached dissimilar conclusions regarding the interaction between and application of the two sections of the Code.

[16] Quoting from the synopsis of the decision,

“Mandatory minimum sentences must be interpreted in a manner consistent with the full context of the sentencing scheme, including statutory remission. A rigid interpretation of the interaction between ss. 344(a) and 719(3) of the Criminal Code suggests that time served before sentence cannot be credited to reduce a minimum sentence because it would offend the requirement that nothing short of the minimum be served. Such an interpretation, however, does not accord with the general management of minimum sentences which are, in every other respect, "reduced" like all others, even to below the minimum. Pre-sentencing custody is time actually served in detention, and often in harsher circumstances than the punishment will ultimately call for. Credit for such custody is arguably less offensive to the concept of a minimum period of incarceration than the granting of statutory remission or parole. Section 719(3) ensures that the well-established practice of sentencing judges to give credit for time served when computing a sentence remains available, even if it appears to reduce a sentence below the minimum provided by law”.

“Parliament did not exempt the s. 344(a) minimum sentence from the application of s. 719(3). Indeed, unjust sentences would result if the s. 719(3) discretion were not applicable to the mandatory s. 344(a) sentence. Discrepancies in sentencing between least and worst offenders would increase, because the worst offender, whose sentence exceeded the minimum would benefit from pre-sentencing credit, while the first-time offender, whose sentence would be set at the minimum, would not receive credit for his or her pre-sentencing detention. These sections are to be interpreted harmoniously and consistently within the overall context of the criminal justice system's sentencing regime”.

Reading from the decision of *Wust*:

[17] 9 The task before this Court is to settle the controversy regarding whether or not s. 719(3) may be applied to sentences imposed under s. 344(a), and, by implication, to mandatory minimum sentences in general. For the reasons that follow, I find Rosenberg J.A.'s analysis in *McDonald* compelling. **The McDonald decision makes it clear that this Court can uphold both Parliament's intention that offenders under s. 344(a) receive a minimum punishment of four years imprisonment and Parliament's equally important intention to preserve the judicial discretion to consider pre-sentencing custody under s. 719(3) and ensure that justice is done in the individual case (emphasis added).**

[18] Continuing at paragraph eighteen:

18 Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the Code, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the Code: the principle of proportionality. Several mandatory minimum sentences have been challenged under s. 12 of the Charter, as constituting cruel and unusual punishment: see, for example, *R. v. Smith*, [1987] 1 S.C.R. 1045, *R. v. Goltz*, [1991] 3 S.C.R. 485, and *Morrissey*, *supra*.

21 Even if it can be argued that harsh, unfit sentences may prove to be a powerful deterrent, and therefore still serve a valid purpose, it seems to me that sentences that are unjustly severe are more likely to inspire contempt and resentment than to foster compliance with the law. It is a well-established principle of the criminal justice system that judges must strive to impose a sentence tailored to the individual case: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92, per Lamer C.J.; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 93, per Cory and Iacobucci JJ.

22 Consequently, it is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system. This is entirely possible in this case, and, in my view, such an approach reflects the intention of Parliament that all sentences be administered consistently, except to the limited [page468] extent required to give effect to a mandatory minimum.

23 In deciding on the appropriate sentence, the court is directed by Part XXIII of the Code to consider various purposes and principles of sentencing, such as denunciation, general and specific deterrence, public safety, rehabilitation, restoration, proportionality, disparity, totality and restraint, and to take into account both aggravating and mitigating factors. The case law provides additional guidelines, often in illustrating what an appropriate range of sentence might be in the circumstances of a particular case.

[19] Reading this, in my view, begs the question, “How can it be any less so for regulatory offences such as the Compulsory Automobile Insurance Act”? Although Wust clearly deals with criminal offences and minimum penalties in the Criminal Code of Canada, in my view, the intent of the instructions are the same for regulatory and provincial acts.

[20] In another decision of the Supreme Court of Canada, *R. v. Wu* Her Majesty The Queen, appellant v. Yu Wu, respondent, and Charter Committee on Poverty Issues, intervener [2003] 3 S.C.R. 530. In this case the Court provides that if an accused cannot afford to pay a fine, he or she should be given time to pay as his or her circumstances may improve over time.

[21] **R. v. Fagbemi [2000] O.J. No. 2550**

The Ontario Court of Justice sitting as an Appeal Court dealt with two issues. 1) the appellate review of sentences and 2) the standard to be applied in assessing the fitness of sentences that

were imposed as a result of statutory provisions prescribing minimum fines, even though those fines clearly exceeded the defendant's present ability to pay. In other words, the question that arises is whether a court should be concerned about reconciling a policy decision made by the Legislature with the generally accepted sentencing principles that would otherwise apply.

[22] Fagbemi was convicted of three serious offences under the compulsory Automobile Insurance Act. He was charged with failing to have insurance, lying about having insurance and with having a false insurance card. Each offence is punishable by a minimum fine of \$5,000. The justice sitting as a trial judge, sentenced him to pay \$5,000 for the failing to have insurance and half of the statutory minimum for each of the other two convictions considering the principle of Totality. Fagbemi appealed because the fines were beyond his means to pay and argued that section 59 (2) should be applied to provide relief. The sentence imposed by the trial justice was upheld by the appeal court. In Fagbemi, Mister Justice Fairgraves deals mostly with whether or not under the POA, an appeal court can interfere with the sentence imposed by the trial justice. In my view, much of what Mister Justice Fairgraves says about the imposed by the trial justice was upheld by the appeal court. In Fagbemi, Mister Justice Fairgraves deals mostly with whether or not under the Provincial Offences Act, an appeal court can interfere with the sentence imposed by the trial justice. In my view, much of what Mister Justice Fairgraves says about the imposition of minimum fines and the application of section 59(2) beginning at paragraph 31 and following is obiter dicta and I am not persuaded by it.

[23] **R. v. Fong [2004] O.J. No. 4117**

Madam Justice Brown was sitting as a trial judge in the matter not as an Appeal court. As such I have considered her judgment, but I'm not bound by it, nor am I persuaded by it. The other thing about *Fong* is that Madam Justice Brown begins her sentencing in this matter by rejecting a joint submission put before her for a penalty less than the minimum. The circumstances of Mr. Fong, were quite different than Mr. Clarke and the case at bar. Mr. Fong had a lengthy driving record. There was a collision from which he fled. At the time that he plead guilty to the insurance charge as well as other charges laid that arose out of the same incident, he was a student relying on the support of his parents. The joint submission rejected by the court was relief from the minimum and a fine of \$2,000 for the insurance charge. The court ruled that the onus is on defence to establish exceptional circumstances.

[24] **R. v. Racine [1999] O.J. No. 5598**

In this case, the Ontario Court of Justice sitting as a trial court, had discretion under the Provincial Offences Act to impose less than the minimum penalty when imposing it would be unduly oppressive. Racine plead guilty to two criminal code charges and also a drive suspended charge and failing to have his motor vehicle insured. The court opted to impose a fine of \$500 for driving without insurance. It was noted that imposing massive fines under the circumstances did not have the desired deterrent effect since individuals such as Racine

who could never pay them would simply continue to drive, but without insurance. The high fines had the effect of encouraging people to drive while their licences were suspended. It was also an error in principle for a court to impose a fine without any regard for the offender's ability to pay, the nature of the offence and ordinary sentencing principles. In addition to the \$500 ordered and his driving privileges were suspended for one year.

[25] R. v. Thornborrow [2007] O.J. No. 5373

The Ontario Court of Justice sitting as an appeal court found that in order to apply section 59 (2) of the Provincial Offences Act, it was necessary to first find exceptional circumstances. Beginning at paragraph six,

6 So in my view and I think Mr. Godin is very correct in this and certainly the cases that I've been provided with talk about exceptional circumstances. So you have to first, before you can exercise your discretion under the Provincial Offences Act, you have to find that there are exceptional circumstances. If there are no exceptional circumstances, you don't get into considering whether these exceptional circumstances would make the fine, the minimum fine unduly oppressive or otherwise not in the interests of justice because that's the way the section is worded.

7 So in my view, the crown in this case must win on the appeal and the appeal is allowed for the simple reason that when I look at the transcript that was provided to me, the circumstances of Mr. Thornborrow are not even as exceptional as those of the students. He's a man who works, he's seasonally employed, he happened to be on Employment Insurance at the time. That's not an exceptional circumstance. If it were an exceptional circumstance such as being a student and that hasn't been found to be an exceptional circumstance but if it were an exceptional circumstance, then in that case most people as indicated by Justice of the Peace Kitlar would not be able to pay the minimum fines and therefore minimum fines should be disregarded but that's not the intent as I see it from the legislature. You have to have an exceptional circumstance and I agree with Ms. Scott that, such determination has to be done on each individual set of facts, but when you look at the Fong case, [2004] O.J. No. 4117, the Fagbemi case, [2000] O.J. No. 2550, that are referred in the transcript and these other cases; they have determined there's no exceptional circumstance in being poor and not being able to pay the required fine. It's not. So then you don't even get into whether payment of a minimum fine would be unduly oppressive or otherwise not in the interests of justice. You don't even get into that because first of all, the circumstances have to be exceptional. So that's where, the test is. I can certainly sympathize with Justice Kitlar's view of things because it's true. A lot of people in this province would have a lot of difficulty paying just like that, a \$5,000 fine, no matter what their income. It's something that you have to come up with the money, you have to pay it and it's difficult. Of course, people earmark their monies for all sort of different things and you can rest assured that one of the things that people don't earmark their money for are possible fines that you may incur from time to time.

[26] It's clear from Madam Justice that she is reading s 59 (2) as a process that contains two steps and that she is following the Fagbemi line of reasoning when imposing the penalty.

[27] **R. v. Nemtsov, 2009 CarswellOnt 3321 (Ont. C.J.)**

Defence relies upon Nemtsov in the argument to provide relief against the minimum fine to Mr. Clarke. Beginning at paragraph 4, Lane, J states in referring to Fong and Fagbemi,

4 I very much respect the positions of Madame Justice Brown and Mr. Justice Fairgrieve. I appreciate that they have taken principled positions to uphold a minimum sentence of \$5,000. I have concerns, however, particularly in light of R. v. Morrissey, with a strict application of the minimum where the Legislature has provided for relief against the minimum sentence.

5 s. 59 (2) of the Provincial Offences Act states, "when in the opinion of the Court, exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice, the Court may impose a fine that is less than the minimum, or suspend the sentence."

6 I have no doubt that Parliament determined that a fine of \$5,000 was necessary because the issue of driving without insurance is extraordinarily important. There is a public interest in ensuring that all classes in society adhere to the requirement. Hence a fine of \$5,000, as Mr. Justice Fairgrieve said, is sufficiently high that almost every member of the community would find that it was a very high fine, and the costs of insurance to most people in society would be significantly less than that. Therefore, there would be a monetary incentive on all economic classes in society to adhere to the requirements.

7 It strikes me, however, that there is a disproportionate effect of this \$5,000 fine on different economic classes in society. A person who earns a good income, has a steady income, or earns a good salary and is working would find it significantly less onerous and less oppressive to pay a \$5,000 fine than would someone of a lower socioeconomic level. Someone who has access to a Visa card or credit facilities, or who can go to a bank or a credit union to borrow money, would be in a position to pay a \$5,000 fine relatively expeditiously, and then get on with their lives.

8 It's my observation that there is a disproportionate effect of this minimum fine on people of low income, and it strikes me that Mr. Nemtsov is such a person. He can be distinguished from the appellants in Fagbemi and in Fong, who were young people, students. I don't know all the facts, but it strikes me that they didn't have the domestic responsibilities that Mr. Nemtsov has. They were not of his age. They were not supporting a family. They were not trying to make a go of it on a very limited income.

[28] That same reasoning applies to Mr. Clarke. Defence submits in the application under s. 59 (2) that Mr. Clarke had insurance until he succumbed to a mental health disorder. Because of that disorder, he did not pay for his insurance and the policy lapsed. It was not in his character to operate a motor vehicle without insurance as he had previously been a contributing member of society and conducted himself accordingly.

[29] **R. v. Hitchon, [2000] O.J. No. 5260**

In an appeal against sentence, the court found that section 59(2) of the Provincial Offences Act allows the reduction of minimum penalties where exceptional circumstances make the minimum unusually or unduly oppressive, or where the minimum penalty was otherwise not in the interest of justice. The fine must be proportional to the nature and seriousness of the offence,

to the background of the offender and to his ability to pay. The massively disproportionate minimum penalties contained in the Act were not in the interest of justice as they excluded the consideration of the issue of proportionality, the character of the accused and his ability to pay, and usurped the function of an independent judiciary. They could be modified by Justices of the Peace in determining appropriate sentences. The fines imposed had to deter an individual and others from driving without insurance. The cost of insurance for the particular defendant should be a starting point in determining the appropriate fine. There was no error in judgement in the Justice's decision on sentence. At paragraph 12 and following:

12 However, as noted in *Regina v. Racine*, since the Magna Carta¹ the magnitude of the fine must be proportional to the nature and seriousness of the offence, to the background of the offender, and to the offender's ability to pay. It is an error in principle to sentence otherwise, just as it is an error in principle to impose fines without conducting some investigation of the defendant's ability to pay. Though the fine should create some hardship, it should not result in the defendant being unable to pay, or obliged to pay only by instalments for a lengthy period of time.²

13 It is the responsibility of an independent judiciary to sentence with proportionality. Massive minimum penalties usurp that function, assault the independence of the judiciary, and assault natural sentencing principles. The Supreme Court of Canada recently dealt with the issue of minimum penalties as they relate to time served in a case which is cited as *Regina v. Wust*, reported at 143 C.C.C. (3d) 129. I quote from page 138 and 139, paragraphs 18 and 21:

[29] R. v. Boronka [2010] O.J. No. 5920

In this case, Boronka was convicted in absentia and then appealed the sentence imposed by the justice. The appeal court was asked to provide relief against the minimum penalty. The appeal court decided that it would not interfere with the lower court sentence in this particular case because exceptional circumstances had not been established. The court acknowledged that the fines were oppressive and that they were meant to be. In the end, the court varied the sentence only to the extent that it increased the amount to time to pay and allowed for periodic payments.

[30] R. v. Mundy [2007] O.J. No. 3954

Mundy was convicted in absentia and fined the minimum fine for driving without having his motor vehicle insured. Although he attended the earlier trial dates, he eventually missed a court date and the matter was heard ex parte. He eventually appealed the conviction and the sentence. It was argued in the appeal that the sentence imposed was excessive. Lacavera, J. addresses the two lines of thinking with regard to the application of section 59 (2). However, in the final analysis, LaCavera, J. rules that the onus for establishing exceptional circumstances is on defence who did not attend court and was convicted in his absence. Beginning at paragraph 21,

21 It may very well be, in this case, that the justice hearing the matter could have exercised some discretion under s. 59(2), but he was not given the benefit of exceptional circumstances because the accused was not there to relay the exceptional circumstances to him.

22 I have already indicated that, in my view, the failure of the accused to be there lies with him, not with the prosecution. I am not convinced he made a serious effort after the 20th of January to ascertain what took place on that court date. He was well aware that he

should have been there, made efforts to have that date postponed. Having made those efforts, it would have been incumbent, in my view, upon him to follow up to see what became of the January 20th appearance. Having failed to do so, he cannot be heard now to complain of the imposition of less than the maximum fines that could have been imposed. And, therefore, the appeal with respect to sentence will likewise be denied.

[31] Mister Justice Rick Libman deals with this in his book, *Libman on Regulatory Offences in Canada*. Justice Libman states at 11-16, “To put it another way, there is a requirement of consistency. There should be “similar sentences for similar offences for similar offenders”.¹ That is, “like offences for like offenders should attract similar sentences”.² One of the “best tests”, then, in assessing fitness of sentence is to compare it to other sentences imposed for similar offences. There has to be “some uniformity of sentence”, within reason, so as to “preserve the appearance of fairness in the courts in dealing with the public.”³ A sentence which is “disparate” is offensive to the notion of “equal justice” before the courts.⁴ But s. 718.2(b) of the Criminal Code, which states that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances, does not mean that merely because a person is charged with a particular offence “this necessarily mandates a specific or particular sentence that is in line” with other sentences imposed for similar offences on other offenders. The court must also consider the circumstances in which the offence was committed.⁵ Disparate sentences will be warranted for differences in areas such as degree of involvement in the offence and the offender’s background”.⁶

[32] Although not regularly relied upon in Highway Traffic Act sentencing, the case of Cotton Felts is instructional. In appeal from Ontario in an Occupational Health and Safety act charge, the court was deciding two issues. First, could a sentence be varied upon appeal and two the fitness of the sentence? The court begins by stating that sentences will be imposed after a complex of considerations. At paragraph twenty one,

21 Another example is provided by this Court's decision in *R. v. K-Mart Canada Limited* (1982), 66 C.C.C. (2d) 329. In that case the Court increased a fine of \$25,000 to \$100,000 for a company convicted of conspiring to interfere with the formation and operation of a trade union, contrary to the Labour Relations Act, R.S.O. 1970, c. 232, now R.S.O. 1980, c. 228. In so doing Chief Justice Howland had this to say at p. 332:

- In our opinion, the fine imposed did not adequately reflect the gravity of the offence and was an error in principle. The fine must not be tantamount to a licence fee to commit illegal activity, but must be sufficiently substantial to warn others that such illegal activity will not be tolerated.

22 The main factors in the computation of a fine expressed in these decisions are the same as those expressed by Judge Dnieper. Without being harsh, the fine must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere licence fee for illegal activity.

23 With reference to these offences, deterrence is not to be taken only in its usual negative connotation of achieving compliance by threat of punishment. Recently my brother Zuber in *R. v. Ramdass*, a judgment pronounced on November 17, 1982, referred to deterrence in a more positive aspect. There he was dealing with a driving offence and he quoted an earlier unreported decision of this Court in *R. v. Roussy*, [1977] O.J. No. 1208 (released December 15, 1977), where the Court stated:

- But in a crime of this type the deterrent quality of the sentence must be given paramount consideration, and here I am using the term deterrent in its widest sense. A sentence by emphasizing community disapproval of an act, and branding it as reprehensible has a moral or educative effect, and thereby affects the attitude of the public. One then hopes that a person with an attitude thus conditioned to regard conduct as reprehensible will not likely commit such an act.

This aspect of deterrence is particularly applicable to public welfare offences where it is essential for the proper functioning of our society for citizens at large to expect that basic rules are established and enforced to protect the physical, economic and social welfare of the public.

[33] Prosecution argues that not imposing the minimum fine usurps the intention of the legislation. This is in keeping with the Fagbemi line of reasoning. However, the legislators have also enacted s 59 (2) of the Provincial Offences Act empowering a justice to provide relief from the minimum fine that was set by *that same body*. In my view, it is the intent of the legislators to signal the gravity of certain regulatory offences by setting a fine that would be onerous for almost every citizen, but also recognizes, notwithstanding the possibility of attenuating the burden by allowing time to pay, that there should be exceptions to imposing minimum fines when the fine is crushingly onerous. The legislators then confer that discretion on a justice.

[34] I am instructed by the cases of *R. v. Wust* [2000], 1 S.C.R. 455, *R. v. Ade-Ajayi*, 2001 ONCA 192, [2001] O.J. No. 1016 (Ont.C.A.) in my understanding of it, *R. v. Cotton Felts Ltd.*, [1982] O.J. No. 178 and *R. v. Ward* [1980] 56 C.C.C. 2d 15. I have considered *R. v. Racine* [1999] O.J. No. 5598 and *R. v. Fong* [2004] O.J. No. 4117. I am persuaded by *R. v. Hitchon*, [2000] O.J. No. 5260 and *R. v. Nemtsov*, 2009 CarswellOnt 3321 (Ont. C.J.). I agree with *R. v. Thornborrow* [2007] O.J. No. 5373 to the extent that the court clearly delineates that in the proper application of s 59 (2) the court must first find exceptional circumstances before proceeding to the next two considerations the oppressiveness of the fine and the interests of justice. This is also clear from the plain and grammatical reading of that section.

[35] However, in my view, even if the court doesn't apply section 59 (2) the court may consider the goals and principles of sentencing to arrive at a fit and proper sentence in the circumstances and that sentence maybe less than the minimum fine as set out by the legislature. If after applying the goals and principles of sentencing, the court finds that the minimum fine should be imposed, the burden of the fine can be attenuated by granting the offender time to pay. In my view, although there should be deference to fines as set by the legislators minimum fines are not a one size fits all sentence to be imposed in absolutely every case that comes before the court. I share the opinion of the Supreme Court as stated in *Wust*, "even if it can be argued that harsh, unfit sentences may prove to be a powerful deterrent, and therefore still serve a valid purpose, it seems to me that sentences that are unjustly severe are more likely to inspire contempt and resentment than to foster compliance with the law. It is a well-established principle of the criminal justice system that judges must strive to impose a sentence tailored to the individual case".

[36] Turning now to the circumstances of Mr. Clark, at the time of the conviction for driving without insurance, Mr. Clarke had only recently been released from the Credit Valley Hospital under the care of Dr. Dale where he was treated for extreme anxiety and depression. He was unable to at-

tend court due because he was heavily medicated. Entered as an exhibit was a part of his treatment record. The charge originates because of this mental illness. He is remorseful. He has rid himself of a motor vehicle. He has no prospects for employment until his mental illness is under control. The enormity of the fine is aggravating his illness. He is in receipt of ODSP and the family is barely getting by. The amount of the fine is roughly equivalent to one year of rent for him. Defence submits that it would be rehabilitative for Mr. Clarke to have a fine imposed that is one that he could pay incrementally.

[37] I find that the case of Mr. Clarke is on all fours with the case by which I am persuaded, that being R. v. Nemtsov. I find as a fact that the circumstances of Mr. Clarke are exceptional. I find that although the intention of the fines for operating a motor vehicle without insurance are meant to be oppressive, in the case of Mr. Clarke the fine would be unduly harsh and crushingly oppressive. For that reason, it is not in the interests of justice to impose the minimum fine. However, a fine must be imposed that will address the goals of sentencing those being specific and general deterrence. Defence argues that the goal of specific deterrence has already been met in the case of Mr. Clarke. That may be true. But in regulatory offences, the goal of general deterrence is paramount. I would hasten to add, that the goal of general deterrence doesn't mean that Mr. Clarke gets to be the scapegoat for every uninsured driver in Ontario. In my view, to meet the goals of specific and general deterrence, the fine imposed should be at least equivalent to the cost of a contract of automobile insurance. Otherwise the fine becomes a licensing fee for those who opt to drive without insurance and take their chance on being caught, convicted and fined.

[38] For those reasons, section 59 (2) of the Provincial Offences Act being applied, a fine of \$3,000 dollars will be imposed with the costs and victim fine surcharge added. Mr. Clarke will begin with a period of one year to pay the fine and as always, it remains open to him to apply for an extension of time to pay. I do not know if this court will be the court to consider his request if one is made, but in these cases, this court is most persuaded to allow for an extension of time to pay for those people who have made an honest, good faith effort to pay their fine in the allowed period of time.

Released: September 12, 2012

Signed: "Justice of the Peace Mary Shelley"

Table of Cases

R. v. Ade-Ajayi, 2001 ONCA 192, [2001] O.J. No. 1016 (Ont.C.A.)

R. v. Baritz [2006] O.J. No. 2885, Ontario Court of Justice, Toronto, Conacher, JP

R. v. Boronka [2010] O.J. No. 5920

R. v. Creations by Helen Inc., [2007] O.J. No. 5560

R. v. Cotton Felts Ltd., [1982] O.J. No. 178

R. v. Fong [2004] O.J. No. 4117

R. v. Hitchon, [2000] O.J. No. 5260

R. v. Nemtsov, 2009 CarswellOnt 3321 (Ont. C.J.)

R. v. Pham [2002] O.J. No. 2545 (Ont. C.A.)

R. v. Racine [1999] O.J. No. 5598

R. v. Sepiashvili [2003] O.J. No. 3996

R. v. Thornborrow [2007] O.J. No. 5373

R. v. Ward [1980] 56 C.C.C. 2d 15

R. v. Wust [2000], 1 S.C.R. 455