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Judgment: approved by the Court for handing down | *Delivered:* **08/05/12**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

12/11484

THE QUEEN

-v-

J M W FARM LIMITED

His Honour Judge Burgess

[1] The defendant Company has pleaded guilty to the offence of corporate manslaughter, thereby accepting its responsibility for the death of Robert Wilson on 15 November 2010 by reason that it managed or organised its activities in a way that amounted to a gross breach of the duty of care owed by it to Mr Wilson.

[2] This is the first time that the courts in Northern Ireland have had an opportunity to sentence a Company for corporate manslaughter, and as the Presiding Judge at this court tier, I have been asked by the Lord Chief Justice's Sentencing Group to set out guidance for the courts until the Court of Appeal has had an opportunity to provide an authoritative guideline.

[3] On the day of the incident Mr Wilson was washing the inside of a large metal bin which was positioned on the forks of a forklift truck, in its raised position. To achieve this Mr Wilson was standing on another piece of equipment, a bale compactor, but when the bin was being moved away he jumped onto the side of the bin and it then toppled. He fell to the ground with the bin falling on top of him resulting in his death.

[4] Inherent in the safe operation of the raising and positioning of the bin was that the forks of the forklift fitted into sleeves on the underside of the bin so that:

a) The bin could not tilt unless the operator carried out that operation (which the forklift truck was constructed to achieve) and

b) There would be no danger of the bin falling from the forks.

That the bin was able to fall is clear evidence that the forks were not inserted into the sleeves and that the bin therefore was unstable. As such it was a danger not just giving rise to the circumstances giving rise to the death of Mr Wilson, but was an inherent and foreseeable danger to anyone working in the area around this bin.

[5] The forklift truck in question was a replacement for the normal forklift truck which had gone for servicing a number of weeks earlier. The measurements undertaken by the Health & Safety Executive showed that the position of its forks were 425mm apart, but that did not correspond with the position of the sleeves on the bin which were 610mm apart. In short no-one could use the forklift truck with its forks in the sleeves.

[6] That such a danger was recognised by the Company is shown by its own risk assessment documents to which Mr Kevin Campbell of the Health & Safety Executive of Northern Ireland refers to in the depositions at pages 27-38. Those documents show that the Company had an understanding of what was required to control the hazards involved in this operation, and had indeed put efforts into documenting control measures. The mere fact of recording of the findings of that assessment shows that the Company were fully aware of the risks and that they were so significant that it required to be recorded. Indeed any reading of the documentation, including the Operator's Instructions for such a forklift truck under the heading "Operator Techniques" instructs:

a) Make sure the container you are rotating has the fork slots to prevent dropping the container when rotating;

b) Space the forks as shown below to prevent slippage of the load during rotation, and;

c) Place the forks completely under the load with the load against the forks.

[7] But whilst this assessment had been undertaken and recorded, and notwithstanding the Company's knowledge of the risks involved, when the replacement forklift truck was deployed no assessment was made of the juxtaposition between the forks of the forklift truck and the sleeves on the bin. Indeed, given the measurements it would have been apparent to any operator that the steps that required to be taken to secure against the foreseeable dangers could not be satisfied. Therefore of particular concern is that this operation had been going on for some time. It was not an isolated event.

[8] The objective of prosecutions for offences relating to health and safety in the workplace is to achieve a safe environment for those who work there, and for other members of the public who may be affected. The obligation of all employers is to ensure so far as is reasonably practicable such a safe environment. It is an obligation that is the same no matter the size of the

business. But yet again the court is faced with an incident where common sense would have shown that a simple, reasonable and effective solution would have been available to prevent this tragedy.

[9] And the consequences in this case are all too tragic. I have read the eloquent and moving statements from the deceased's partner and his mother. The letters express the dreadful loss which they, the deceased's children, and the extended family circle have experienced and continue to experience as a result of the death of Mr Wilson. His mother has had to face a double tragedy with the death of her husband, the deceased's father, a matter of months after this incident. These have all been dealt body blows which will remain with them for the rest of their lives. A family man, a conscientious and hardworking man, who at the age of 45 had so much to look forward to in his life, and through that to enrich the lives of all of those around him. Two children have lost a father who clearly doted on them. This is the terrible reality of incidents such as this.

[10] The Sentencing Council in England and Wales has published definitive sentencing guidelines in relation to breaches of health and safety legislation resulting in a fatality, including corporate manslaughter. While these are not applicable in Northern Ireland I see no reason not to adopt the helpful guide to those safety and health offences where the offence is shown, as in this case, to have been a significant cause of a death issues – issues as I have said that are irrelevant as to whether the employer is a company or an individual. The guidelines provide:

> *"Seriousness should ordinarily be assessed first by asking*
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> *:*
>
> *a) How foreseeable was serious injury? The more foreseeable it was, the graver usually will be the offence.*
>
> *b) How far short of the applicable standard did the defendants fall?*
>
> *c) How common is this kind of breach in this organisation? How widespread was the non-compliance? Was it isolated in extent or indicative of a systematic departure from good practice across the defendant's operations? and*
>
> *d) How far up the organisation does the breach go? Usually, the higher up the responsibility for the breach, the more serious the offence.*

[11] In addition, other factors are likely, if present, to aggravate the offence (the list is not exhaustive)

(a) More than one death, or very grave personal injury in addition to death:

(b) Failure to heed warnings or advice, whether from officials such as the Inspectorate, or by employees (especially health and safety representatives) or other persons, or to respond appropriately to "near misses" arising in similar circumstances:

(c) Cost-cutting at the expense of safety:

(d) Deliberate failure to obtain or comply with relevant licences, at least where the process of licencing involves some degree of control, assessment or observation by independent authorities with a health and safety responsibility:

(e) Injury to vulnerable persons. In this context vulnerable persons would include those whose personal circumstances make them susceptible to exploitation.

[12] Conversely, the following factors, which are similarly non-exhaustive, are likely, if present, to afford mitigation:

a) A prompt acceptance of responsibility:

b) A high level of co-operation with the investigation, beyond that which will always be expected:

c) Genuine efforts to remedy the defect:

d) A good and healthy record:

e) A responsible attitude to health and safety, such as the commissioning of expert advice or the consultation of employees or others affected by the organisation's activities.

[13] The guidelines also afford assistance in terms of any sentence to be passed, which in the majority of cases will be a financial penalty. They provide:

> *"The means of any defendant are relevant to a fine, which is the principle available penalty for organisations. The court should require information about the financial circumstances of the defendant before it. The best practice usually will be to call for the relevant information for a three year period, including the year of the offence, so as to avoid any risk of typical figures in a single year. It is just that a wealthy defendant should pay a larger fine than a poor one: whilst a fine is intended to inflict a painful punishment, it should be one which the defendant is capable of paying, even if appropriate over a period which may be up to a number of years".*

[14] In assessing the financial consequences of a fine, the court should consider:

> *(a) Inter alia – the following factors.*
>
> *(i) The effect on the employment of the innocent may be relevant:*
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> *(ii) Any effect on shareholders will, however, not normally be relevant: those who invest in and finance a Company take the risk that its management will result in financial loss:*
>
> *(iii) The effect on directors will not, likewise, normally be relevant:*
>
> *(iv) Nor would it ordinarily be relevant that the prices charged by the defendant might in consequence be raised, at least unless the defendant is a monopoly supplier of public services:*
>
> *(v) The effect upon the provision of services to the public will be relevant: although a public organisation such as a local authority, hospital trust or police force must be treated the same as a commercial company where the standards of behaviour to be expected are concerned and must suffer a punitive fine for breach of them, a different approach to determining the level of fine may well be justified:*
>
> *(vi) The liability to pay civil compensation will ordinarily not be relevant: normally this will be provided by insurance, or the resources of the defendant will be large enough to meet it from its own resources:*
>
> *(vii) The cost of meeting any remedial Order will not normally be relevant, except to the overall financial position of the defendant: such an Order requires no more than what already have been done:*
>
> *(viii) Where the fine will have the effect of putting the defendant out of business will be relevant: in some bad cases this may be an acceptable consequence".*

[15] Applying those factors to this present case I find as follows:

(i) It was clearly foreseeable that the failure to address this hazard would lead to serious injury and indeed that the consequences could well be fatal.

(ii) The defendant Company has fallen far short of the standard expected in relation to such an operation.

(iii) This operation was permitted to continue for some time. However there is no evidence that this represents a systematic departure from good practice across the defendant's operations: and

(iv) The directors of a Company are at the end of the day fully responsible for the discharge of the duty of care to their employees. In this case

given a director was in control of the forklift, culpability went to the very top of this Company.

[16] In relation to potential aggravating factors I find no evidence of a failure to heed warnings or advice: no evidence of cost cutting at the expense of safety: and that there was no deliberate failure to obtain or comply with relevant licences.

[17] In regards to mitigation I find as follows:

(i) In interview Mr Mark Wright, a director in the Company and who was operating the forklift truck was adamant that the forks were positioned in sleeves, when it was quite evident that they could not have been. Even in the face of that compelling evidence he remained adamant that it was secured. The court can appreciate that this tragedy would have had a profound impact on Mr Wright, not least given his close and long standing relationship with the deceased. That impact is evidenced by the medical report I have received. The court could accept that in such circumstances a person could convince him or herself that they had carried out the operation properly. However militating against that is the fact of the constant use of the forklift truck with this bin over a number of weeks, when any sort of inspection would have shown that that was not the case. Indeed in the very operation of the forklift truck as the forks were raised the operator should have quite clearly seen that it was not secured in the proper fashion. However I acknowledge that by its plea the Company, through its authorised Agents, the Directors of the Company including Mr Wright, have now accepted their responsibilities.

(ii) The Company has a good safety record and there is no evidence outwith this particular operation, no doubt arising by reason of the use of the replacement forklift truck, that they do not display other than a reasonable attitude to their employees – evidenced by their risk assessment documentation.

[18] Nevertheless the very definition of the offence of corporate manslaughter is an acceptance of a gross breach of duty – that is a high and totally unacceptable breach in circumstances where the risks involved were high, with the more than foreseeable likelihood of serious injury or death following if the proper steps were not taken. This therefore is a serious matter which requires a substantial fine to be imposed to reflect the culpability of the Company, but also to send a message to all employers that their duty to their employees is daily and constant and any failure to discharge that duty will be met with condign punishment.

[19] No penalty imposed by this court can begin to be seen as a measure of the life of Mr Wilson – that is immeasurable. Instead the penalty is imposed to reflect the factors to which I have referred including the mitigating factors. Included in those factors is the principle, as in all criminal cases, that where a defendant accepts their responsibility and chooses not to contest a matter, with all the trauma that a trail can cause, particularly those close to the deceased, the court should reduce the sentence to reflect not just the fact that no trial has to be held, but as evidence of the remorse of a defendant for their actions. The amount of reduction will also reflect the strength of the case against a defendant. The stronger the case, the less the reduction.

[20] As regards the Company itself I have as advised by the guidelines read the Company's accounts. It is a highly profitable Company and I am satisfied that the fine I intend to impose will not affect its commercial viability and in particular the employment of other innocent employees. It will of course have an impact on its shareholders and directors but there is nothing in the facts of this case which would begin to bring it inside even the exceptional circumstances where perhaps such considerations can be taken into account.

[21] In setting that fine no two cases are ever the same. The Sentencing Council at paragraph (d) referred to levels of fine. Paragraphs 24-26 inclusive state:

> *"24 The offence of corporate manslaughter, because it requires gross breach at a senior level, would ordinarily involve a level of seriousness significantly greater than a health & safety offence. The appropriate fine will seldom be less that £500,000 and may be measured in millions of pounds.*
>
> *25 The range of seriousness involved in health and safety offences is greater than for corporate manslaughter. However where the offence is shown to have caused death, the appropriate fine will seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or more.*
>
> *26 The plea of guilty should be recognised by the appropriate reduction".*

[22] I have read the annual accounts of the Company for the year ending 30 September 2011. Profits after taxation amounted to £1,379,737.00. That figure is net of Directors emoluments of £112,824.00 – a net profit before that deduction of £1.5 million. Dividends were declared of £200,000.00 giving some indication of a healthy, well capitalised Company in a good cash position.

[23] I have taken into account all of the circumstances to which I have referred. Before allowing a reduction in respect of the plea of guilty the fine would be one of £250,000. I reduce that by 25% to reflect the plea of guilty and thereby impose a fine of £187,500. I have commented on the cash position of the Company which allowed it to pay some £200,000.00 out by way of dividend for the year ending September 2011. I therefore allow the Company 6 months

to pay the fine and also the costs of this prosecution of £13,000 together with VAT.