

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

12/103361

R. v GALLAHER (JTI) LIMITED

Burgess J

- [1] The defendant Company has pleaded guilty to two counts under the Health & Safety at Work (Northern Ireland) Order 1978. The counts relate to an incident that occurred on the 25th July 2011 at the defendant's factory premises at Lisnafillan, Glengormley. As a result of the failures of the Company to which I will turn in a moment, Mr Trevor Allen, then aged 63, and a long serving employee of the Company tragically lost his life.
- [2] Counsel for the Prosecution and Defence have agreed a factual basis on which the plea has been entered, and this is appended to my sentencing remarks. The Court is grateful to them. The background to the operation and incident are recorded in paragraphs 5 to 15 inclusive.
- [3] 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 basic and obvious steps would have prevented this tragedy.
- [4] And the consequences in this case are all too tragic. I have read the eloquent and moving letter from Mr Robin Allen, the son of the deceased, expressing the impact of his death on the family. The letter express the dreadful loss which the immediate family and the extended family circle have experienced, and continue to experience, as a result of the death of Mr Allen.
- [5] The strong, central figure in a close knit family, his son describes his father as having been a quiet, humble man, devoted to his family but with a host of friends. As he neared retirement after a lifetime of hard work, he and his wife were planning their future, one involving travel and well-earned enjoyment in each other's company. In one catastrophic moment that all

disappeared – all those plans and hopes were lost. Mrs Allen describes death as a ‘silence’, which all the support and help which is all too readily available, cannot fill. This is the terrible reality of incidents such as this.

- [6] The Sentencing Guidelines Council in England and Wales has published definitive sentencing guidelines in relation to breaches of health and safety legislation resulting in a fatality. In *R. v J M W Farms Limited* earlier this year I had reason to consider these Guidelines and their potential role in sentencing in this jurisdiction. I concluded then, as I do now, that I see no reason not to adopt the helpful guidance they afford to safety and health offences, where the offence is shown, as in this case, to have been a significant cause of a death. The guidelines are the same whether the employer is a company or an individual, and they provide:

“Seriousness should ordinarily be assessed first by asking:

- 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.*

- [7] 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.

[8] 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 health and safety 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.*

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

(a) The defendant company has not been charged by the prosecuting authorities with corporate manslaughter – where the legal test is the presence of a gross breach at a senior level. This would ordinarily involve a level of seriousness significantly greater than a Health and Safety offence. However I consider that the breaches in this case were nevertheless extremely serious. This was an operation which, given its obvious dangers, required considerable care to be taken, a fact known to those involved at a level of responsibility above that of the deceased and his colleague. It was an operation which was planned – not something that arose unexpectedly or suddenly. Preparatory work had been undertaken. Over and above the opportunity over several years to prepare the necessary assessments and training to tackle the problem, there was more than sufficient time in the context of this repair – on the day and in the preceding days – to undertake both an assessment and for instructions to be given. The lack of experience of the deceased and his colleague was known, as was the fact they had embarked on the work in the absence of anyone who had any experience of the proposed operation. Several opportunities were therefore available to address this matter, any one of which, if taken, would have avoided this tragedy.

As was stated by Mr O'Donague, with customary frankness at the date of arraignment, this was an incident that was easily avoidable, something which is common in far too many of such work related incidents.

(b) In so saying I accept that given the record of the defendant company this kind of breach is not only not common in this factory, no history has been given to the court of any such breaches in the past.

(c) There are none of the aggravating features as contained in the guidelines – there is no evidence of a failure to heed warnings; no evidence of cost cutting at the expense of safety; no failure to operate without necessary licences; and no evidence of the exploitation of vulnerable people.

(d) In mitigation

- There was prompt acceptance of responsibility particularly in the interviews of Mr Robert Bisailon, a director of the Company, with a very high level of co-operation in the investigation. As has been said in all criminal trials, the sooner responsibility is accepted the greater the discount that the Court can afford in line with its statutory duty in Article 33 of the Criminal Justice (Northern Ireland) Order 1996. That principle applies whether a sentence is one of custody or monetary;
- A real and proper effort has been made to rectify the systems that were previously absent in this operation;
- The Company has a good safety record;
- Outwith this operation the evidence points to a company conscious of its obligations in health and safety of its employees and those attending this factory.

[10] Turning to the penalty to be imposed, the court makes clear that no monetary penalty imposed by this court can begin to be seen as a measure of the life of Mr Allen – that is immeasurable. Instead the penalty is imposed to reflect the factors to which I have referred, including mitigating factors.

[11] 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”.

[12] 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:*
- (ii) Any effect on shareholders will, however, not normally be relevant:*
- (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:*
- (vi) The liability to pay civil compensation will ordinarily not be relevant:*
- (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 would 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”.*

[13] As regards the finances of the Company, it is an internationally renowned company with substantial profits and assets, evidenced in the Financial Reports I have read. I do not believe that the fine I intend to impose will affect adversely its commercial viability, including the employment of other employees.

[14] In setting that fine no two cases are ever the same. The Sentencing Guideline 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 than £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”.

- [15] This death followed a chapter of failures in respect of an operation that clearly cried out for caution and care, an operation that was planned – and yet none of the steps that would have avoided this tragedy were taken. Those failures led directly to the death of Mr Allen. Therefore this case is at the upper end of cases in terms of culpability. Given that chapter of failures; the nexus with the death of Mr Allen; and the financial strength of the defendant company, I find the cases in the Schedule provided of limited assistance. The total fines before the reduction for the pleas of guilty would have been one of £200,000. To reflect the plea in circumstances where the case against the company was strong, I fine the defendant company £75,000 on each Count – a total of £150,000. In addition the Company will pay the prosecution costs to be advised. All fines and costs will be paid within 4 weeks.
- [16] One final matter. At the conclusion of the letter from Mr Robin Allen he asks if I have powers to give instructions to, or impose requirements on the defendant company in terms of safety. That power does not reside in me, but first in the legislature to impose responsibilities on employers, and secondly on the Health & Safety Executive to enforce those duties. However at the end of the day the duty lies on the employer, and in that respect I would suggest that the Company should address those matters Mr Allen raises and by their adoption honour the memory of the late Mr Allen.