HM Advocate v Munro & Sons (Highland) Ltd

HIGH COURT OF JUSTICIARY

LORDS NIMMO SMITH, CLARKE AND PHILIP

28 JANUARY 2009

[2009] HCJAC 10

Justiciary — Sentence — Appeal — Unduly lenient sentence — Accused pleading guilty to health and safety offences culminating in death of a member of the public — Sentencing judge selecting starting point of £5,000 — Whether unduly lenient.

Section 3(1) of the Health and Safety at Work etc Act 1974 provides that "[I]t shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety".

A haulage and waste disposal contractor pled guilty to contraventions of ss 3(1) and 33(1) of the Health and Safety at Work etc Act 1974. The company had been involved in transporting a wheeled loader on a low loaded trailer. The loader was secured by use of the parking brake which, it transpired, had a serious defect, and two securing chains. On an incline in the road, the chains broke, releasing the loader which crushed a car, injuring one of the occupants and killing the other. The sentencing judge took a starting point of £5,000, discounted by 25 per cent to reflect the guilty plea and its timing, and imposed a fine of £3,750. The Crown appealed on the basis that the sentence was unduly lenient.

Held, that the sentence imposed was far too low and took inadequate account of the nature of the offence itself and the need for appropriate punishment in the public interest: an appropriate starting point, taking account of all the relevant circumstances, including the foreseeability of the public's exposure to grave risk of death or serious injury if the loader rolled off the trailor, the respondent's failure to comply with its statutory duty where the chains were inadequate and the handbrake was defective, along with the respondent's financial situation, would have been £40,000, discounted by 25 per cent (paras 34-40); and a fine of £30,000 *substituted*.

R v Balfour Beatty Rail Infrastructure Services Ltd [2007] 1 Cr App R (S) 65, *applied*.

Indictment

Munro & Sons (Highland) Ltd was charged on an indictment libelling *inter alia* that: "(2) On 5 July 2006 at the A9 Inverness to Scrabster Road at Tomich Junction, Invergordon, Easter Ross and at premises occupied by you at the Deephaven Industrial Estate, Evanton, Easter Ross, you MUNRO & SONS (HIGHLAND) LIMITED being an employer within the meaning of the aftermentioned Act, did fail to conduct your undertaking in such a way as to ensure, so far as was reasonably practicable, that persons not in your employment, namely Julia MacKay, c/o Northern Constabulary, Dingwall, Christina Fraser, formerly residing at Garstein, Arabella, by Tain, and members of the public using said road at the time, who may have been affected thereby were not exposed to risk to their health and safety and in particular; (a) you did cause and permit WALTER MACLENNAN, an employee of said company, to transport a load, namely a Michigan L190 wheeled loader by means of a mechanically propelled vehicle, namely an Articulated Unit and a Low Loader Trailer Combination, registered number T373 KMS and did fail to provide said WALTER MACLENNAN with sufficient and adequate load securing equipment, in particular sufficient and adequate chains or lashings and fastenings, fail to ensure that the said load was sufficiently secure and fail to ensure that the brakes of said load were effective, in working order, and in operation; (b) you did cause and permit said WALTER MACLENNAN to load said mechanically propelled vehicle with a load of 30130 kilograms, causing the gross weight of said mechanically propelled vehicle and load to be 48350 kilograms, being a load in excess of its maximum permissible gross weight of 44000 kilograms shown on the plate fitted in accordance with provisions of the Road Vehicles (Construction and Use) Regulations 1986; whereby the said chains broke and said load broke away from said mechanically propelled vehicle and rolled into the path of motor vehicle registered number P678 JAS then being driven by said Julia MacKay, whereby said Julia MacKay was severely injured and said Christina Fraser, a passenger in said motor vehicle being driven by said Julia MacKay, was so severely injured that she died: CONTRARY to the Health and Safety at Work etc Act 1974, section 3(1) and section 33(1)(a)."

The company pled guilty at a continued preliminary hearing in the High Court of Justiciary sitting at Edinburgh on 11 April 2008.

The sentencing judge imposed a fine of £3,750 discounted by 25 per cent from £5,000.

The Crown appealed.

Statutory provisions

The Health and Safety at Work etc Act 1974 provides:

"3.— (1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."

Cases referred to

Advocate (HM) v Transco Plc, High Court of Justiciary, 25 August 2005, unreported (2005 GWD 32-617).

R v Balfour Beatty Rail Infrastructure Services Ltd [2007] 1 Cr App R (S) 65.
R v F Howe & Son (Engineers) Ltd [1999] 2 All ER 249; [1999] 2 Cr App R (S) 37.
R v Friskies Petcare (UK) Ltd [2000] 2 Cr App R (S) 401.
R v Jarvis Facilities Ltd [2005] EWCA Crim 1409.

Appeal

The appeal was heard before the High Court.

On 28 January 2009 the court *allowed* the appeal and *substituted* a fine of £30,000.

The following opinion of the court was delivered by Lord Nimmo Smith:

OPINION OF THE COURT.—

Introduction

[1] The Health and Safety at Work etc Act 1974 ("the 1974 Act") provides by s 3(1): [his Lordship quoted its terms set out supra and continued:] Section 33(1) provides that it is an offence for a person (a) to fail to discharge a duty to which he is subject by virtue of s 3(1), among other provisions.

[2] The respondents, Munro & Sons (Highland) Ltd ("Munro"), pled guilty at a continued preliminary hearing in the High Court of Justiciary sitting at Edinburgh on 11 April 2008 to charge 2 in an indictment, which, as amended, was in the following terms: [his Lordship quoted the terms of the indictment set out supra and continued:] The Crown accepted pleas of not guilty by Munro and by their employee Walter MacLennan to the remaining charges on the indictment.

[3] After hearing counsel, the sentencing judge imposed a fine of £3,750 on Munro, discounted by 25 per cent from £5,000 to reflect the plea of guilty and the stage at which it was tendered. The Crown have now appealed against this sentence on the ground that it was unduly lenient. No exception is taken to the 25 per cent discount so there is no need for us to set out the factors, principally the stage at which an unequivocal intention to plead guilty in the terms finally accepted was intimated to the Crown, which the sentencing judge took into account when selecting it. The issue for us is therefore whether in the whole circumstances the starting point of £5,000 can be regarded as unduly lenient.

The facts

[4] The sentencing judge was presented with an agreed narrative, on which his report to this court is based. Some additional information was provided in the course of discussion before us. This allows us to give the following account.

[5] Munro are a wholly owned subsidiary of William Munro Construction (Highland) Ltd ("Construction"). The directors of both companies are members of the Munro family, principally William Munro and his brother David, who are respectively managing director and transport director. The principal activity of Munro is that of haulage and waste disposal contracting. They operate from various premises on the Cromarty Firth, including premises at Deephaven Industrial Estate, Evanton, and Kindeace Quarry.

[6] Umax Ltd ("Umax") are international pipeline fabricators. They also have a base at Deephaven Industrial Estate and, as we understand it, are part of an international group of companies.

[7] In June 2006 Umax decided to sell a Michigan L190 wheeled loader ("the Michigan") and indicated through the trade locally that the machine was available. The Michigan had a bucket at the front, a cab in the centre and an engine at the rear, and stood on four wheels fitted with large pneumatic tyres. At the time the tyres were filled, not with air, but with a solution of water and salt, adding a weight of about four tonnes in total; this is a recognised method of giving additional stability to the machine. In that condition, the Michigan weighed 30.13 tonnes.

[8] William Munro, the managing director of Munro, expressed an interest in the purchase of the Michigan. On 3 July 2006 he and Angus Gillies, Munro's contracts manager, visited the Umax premises and test drove it. The Umax site manager, Gavin Sutherland, participated. The agreed narrative states that both Gavin Sutherland and Andrew Gillies "claim that they were not aware of and did not discover any braking defect on the machine during this process". There was in fact a serious defect in the parking brake, the nature of which we discuss in more detail below. Following the initial test drive the Michigan was moved about 200 yards to Munro's premises, where its use was further demonstrated. Angus Gillies and William Munro decided that, before a sale was concluded, further testing was required at Kindeace Quarry, where it would be used. They both understood that the Michigan weighed about 27 tonnes, and were unaware that the water in the tyres added about four tonnes.

[9] Accordingly, on 5 July 2006, the lorry driver Walter MacLennan was instructed by William Munro to transport the Michigan from Munro's base at Evanton to the quarry. Walter MacLennan had been employed as a jobbing lorry driver by Munro for more than 15 years. He collected a low loader trailer from other premises belonging to Munro and drove it to their premises at Evanton where the Michigan had last been tested. The low loader trailer had two loading ramps at the rear, which were raised and lowered by hydraulic arms. They were not designed to be capable of restraining the load when raised. The load required to be separately secured once placed on the trailer. Two securing chains were supplied with the trailer. At Munro's premises, Angus Gillies drove the Michigan up the lowered ramps onto the low loader trailer, put its gears into neutral, switched off the engine and operated a pull lever in order to activate the handbrake. According to the agreed statement, he "apparently remarked to the driver Walter MacLennan that 'it had good brakes'". The Michigan was butted up against the front of the trailer and its bucket was lowered onto the swan neck where the

trailer deck rose over its front wheels. Walter MacLennan was then left to secure the load. He applied the two securing chains by passing the front chain through the eyes and over the arms behind the bucket of the machine and weaving the rear chain behind the tow pin at the rear of the loader. Both chains were then tightened with a ratchet. He did not use wheel chocks. Apparently, it is not now normal practice to use them, as the size and elasticity of the tyres would necessitate very large chocks, the use of which would give rise to manual handling problems.

[10] In this situation, the following features may be noted: (1) as a result of the serious defect in the parking brake, discussed below, the Michigan's wheels were free to turn; (2) the Michigan was thus only held in place by the two securing chains, each of which, on subsequent testing, was found to have a breaking strain of 4.5 tonnes; (3) the total train weight of the articulated tractor and trailer unit was 44 tonnes. The unladen weight of the unit was 18.22 tonnes. Accordingly, when the 30.13 tonnes weight of the Michigan was added, the total weight of the laden unit was 48.35 tonnes. The amount of the overloading was approximately equal to the weight of the water in the tyres of the Michigan.

[11] Walter MacLennan then set off to drive the laden unit to the quarry. For most of his journey he travelled along the A9 road, which is comparatively level, and then turned left onto an unclassified public road leading from the A9 junction at Tomich to Newmore. This road sloped slightly uphill, at an angle of about five degrees.

[12] Meanwhile, Christina Fraser and Julia McKay were travelling in Julia McKay's Nissan Almera motor car along the A9. They both worked as beauty consultants, latterly at Debenhams store in Inverness, and shared travel arrangements. They left work at about 5.30 pm, and at about 6.30 pm they approached the Tomich junction. Julia McKay was driving and Christina Fraser was in the front passenger seat.

[13] By this time, the unit driven by Walter MacLennan was about 40 metres from the junction. Because of the incline on the road, the Michigan began to roll backwards on the low loader trailer, thereby imposing a load on the chains which was in excess of their combined breaking strain. Both chains broke, the Michigan then ran backwards down the trailer, struck the hydraulic ramps, knocked them down onto the road, and rolled backwards down the slope and onto the northbound carriageway of the A9. There it struck the Nissan Almera, and crushed it almost flat. Christina Fraser was killed outright and Julia McKay, remarkably, survived with injuries.

[14] The agreed narrative included a victim impact statement. The emergency services attended soon after the accident. Christina Fraser was pronounced dead at the scene, having died of multiple injuries. She was 24 years old at the time of her death. For nine years before her death she was in a relationship with Garry Ross and since January 2005 they had lived together at Garstein, Arabella, by Tain. They had been engaged for three years. Her fiancé chanced upon the scene of the accident on his way to pick her up and realised that the car involved was the one in which she had been travelling. He was sent to wait for news at the hospital in Inverness but discovered that only the driver — Julia Mackay — arrived there. Both Garry Ross and Christine Fraser's parents have been devastated by the loss of his fiancée, their daughter. The family enjoyed particularly close and happy bonds and Mr and Mrs Fraser and Mr Ross feel a sense of complete and utter desolation at her untimely and tragic death.

[15] Julia McKay was cut free from the wreckage and taken to hospital, where she was found to have suffered bruising and cuts and required surgery to repair two fingers on her left hand. She was in hospital for four days. Although she has recovered from her physical injuries, she has been left with a weakness in her left hand and scarring and has experienced psychological difficulties as a result of the accident, with post traumatic stress, a psychological inability to drive and extreme difficulty in travelling as a passenger. She is obtaining professional psychiatric advice.

The offence

[16] It is now necessary to consider in more detail the failures on the part of Munro which caused the accident and thus constituted the offence. Obviously, steps should have been taken to ensure that the Michigan was not able to roll off the low loader trailer as it did. It is not suggested, for reasons given above, that chocks should have been used or that they would have been capable of immobilising it. This leaves for consideration the use of chains and the Michigan's parking brake.

[17] According to the agreed narrative: "Expert opinion has been sought on the manner of securing the load. Remarkably there does not appear to be any compulsory training for lorry drivers in this connection nor is a lorry driver expected to be familiar with what appears to be the 'best practice' standard, ie. the Department of Transport Code of Practice for Safety of Loads on Vehicles. Some general questions are asked apparently as part of the HGV licence test and thereafter it seems to be a matter of accumulated experience … The Code of Practice provides very clear guidance as to how a vehicle of this type should be loaded and secured. It is clear that the chains selected should have been of sufficient strength to restrain 100 per cent of the weight of the vehicle in any forward motion and 50 per cent of the weight of the vehicle in any rearward or sideways motion and should at least have been lashed at each of the four wheel stations. The Code of Practice suggests that no reliance should have been placed on the effectiveness of the parking brake." Angus Gillies, who attended the scene of the accident, apparently remarked: "The chains broke when the lorry driver went up the hill and the machine came off. These old fucking chains are never checked." It is clear that the chains used by Walter

McLennan fell far short of the guidance provided by the code of practice. It is not suggested that the chains would have held if there had not been about four tonnes of water in the tyres of the Michigan. The agreed narrative states: "The breaking load of the chains is not something that Walter MacLennan would have been expected to know but is information which his employer is expected to hold and could have provided to him (together with additional chains) if requested. It is clear that inadequate plant, materials and information was available to Walter MacLennan who had no information as to the weight of the vehicle, and an inadequate number of appropriate and sufficient weight bearing chains."

[18] Notwithstanding all of this, counsel for Munro submitted to us that the main purpose of the chains was principally to stop the Michigan from bouncing on the low loader trailer, and that the failure of the chains should not be regarded as a major factor in Munro's criminal responsibility for the accident. We are unable to accept this approach, having regard to the terms of the agreed narrative and the code of practice, and above all to the terms of the charge to which Munro pled guilty. It does, however, require us to take an even more critical look at the defect in the parking brake.

[19] The parking brake was operated by a push/pull lever. When this was pulled, brake pads were applied to a disc attached to the transmission of the Michigan. The design was to prevent the Michigan from moving even with the engine running and the transmission in gear. In addition, the transmission had an interlock with the parking brake which automatically applied the service brakes if an attempt was made to move the vehicle when the parking brake was applied. As we understand it, this would only happen if the ignition was switched on and the engine was running. If the ignition was switched off and the transmission was in neutral, only the parking brake would prevent the Michigan from rolling forwards or backwards, at least on an incline. Immediately after the accident the parking brake was found to be inoperative due to a lack of adjustment. When the lever was pulled, in order to engage the parking brake, the brake disc was still free to turn. The reason for this was that the disc pads were worn. They required manual adjustment to be brought into contact with the brake disc in order to render the parking brake effective. This adjustment had not taken place for some time: there were only 3mm of wear remaining on the brake pads, and it took 20 cranks of the parking brake adjuster to bring the pads into contact with the disc. Once this was done, the parking brake was found to be capable of holding the Michigan on a ramp with a gradient of 1 in 6, i e about 15 degrees. The presence of dirt on the front side of the disc indicated that this situation had pertained for some time.

[20] Umax's service records relating to the Michigan were lodged as a Crown production. According to these records, on 24 May 2005 it was noted that the handbrake disc was cracked, site welding was unsuccessful, and a new disc required. There was no record that a new disc was ever fitted. On 12 December 2005 it was recorded that the handbrake was not holding in reverse, when the Michigan rolled backwards. On 9 January 2006 it was noted that the handbrake needed adjusting. Having regard to the state of the parking brake when it was examined following the accident, this was not done. It is not our function to pass judgment on Umax, or to comment on the credibility of their site manager Gavin Sutherland's claim that he was not aware of any braking defect on the Michigan; but the fact was that information was available to Umax which was not communicated to Munro. It may be that the interlock function tended to mask the defect in the parking brake. In any event, William Munro, Andrew Gillies and Walter MacLennan all appear to have been under the impression, on the basis of a test drive without further examination by a qualified engineer, that the Michigan was in a fit state to be transported by road on the low loader trailer, with the parking brake being used as the principal means of preventing it from rolling backwards off the trailer. Events proved them wrong.

The appropriate level of fine

The cases

[21] The relevant provisions of the Health & Safety at Work etc Act 1974 have been quoted above at para 1. Given that Munro were prosecuted on indictment, the penalty to which they were liable, in terms of s 33(1A) of the Act, was a fine of unlimited amount. That would have remained the position if they had been prosecuted on indictment in the sheriff court, which we were told would have been the case had the charge to which they pled guilty been the only charge in the indictment.

[22] Although there have of course been occasions — fortunately rare — in the Scottish courts where the level of the appropriate fine for a contravention of the statutory provisions causing death has had to be considered, most notably in *HM Advocate v Transco Plc* in August 2005, no case has led to a reported judgment of this court in which the relevant considerations have been discussed. We now have that opportunity. This involves a consideration of the English authorities.

[23] In *R v F Howe & Son (Engineers) Ltd* the Court of Appeal made some general observation about cases of this nature, with particular regard to the gravity of the breach, aggravating features, mitigating features and the policy underlying the legislation. Following this, in *R v Friskies Petcare (UK) Ltd* the Court of Appeal recommended the use of documents listing in writing not merely the facts of the case but also the aggravating features relied on by the Crown and the mitigating features relied on by the defence. Such documents have come to be known in England as *Friskies* schedules.

[24] We do not think it necessary to go further into the detail of those two cases, in view of the decision of the Court of Appeal in *R v Balfour Beatty Rail Infrastructure Ltd*, in which the Court of Appeal, chaired

by the Lord Chief Justice, Lord Phillips, set out principles derived by the sentencing judge in that case from the judgment in *Howe* and other cases, which at [2007] 1 Cr App R (S), p 380, para 23, they described as "a helpful summary of the guidance afforded by the decided cases, which guidance we would endorse". These principles, so far as relevant for present purposes, were stated at pp 379–380, para 22, to be as follows:

"(1) Failures to fulfil the general duties imposed by sections such as, for example, section 3 of the 1974 Act are particularly serious, as such sections are the foundations for protecting health and safety of the public.

"(2) Historically, fines for such offences, certainly those imposed by magistrates, have been too low.

"(3) It is not possible to say that a fine should stand in any specific relationship with a turnover or net profit of the defendant. Each case must be dealt with according to its own circumstances.

"(4) It may be helpful to look at how far short the defendant fell of the appropriate standard.

"(5) Generally, where death occurs in consequence of the breach, that is an aggravating feature. To that proposition I would add that by analogy with cases of causing death by dangerous driving, multiple deaths must be regarded as more serious than single deaths, though not, of course, standing in anything like an arithmetical relationship with them.

"(6) A breach with a view to profit seriously aggravates the offence.

"(7) Also relevant is or may be the degree of the risk and the extent of the danger, specifically whether it is an isolated failure or one continued over a period.

"(8) The defendant's resources and the effect of a fine on its business are important. Any fine should reflect the means of the offender, and the Court should consider the whole sum it is minded to order the defendant to pay including any order for costs.

"(9) Mitigation will include (1) a prompt admission of responsibility and a timely plea of guilty; (2) steps taken to remedy deficiencies drawn to a defendant's attention; and (3) a good safety record.

"(10) Above all, the objective of the fine imposed should be to achieve a safe environment for the public and bring that message home, not only to those who manage a corporate defendant, but also to those who own it as shareholders. Later decisions have all drawn on and confirmed the usefulness of *Howe* as an authority and they have added the following further points of possible application to this case.

"(11) The stated objective in *Howe* means that consistency of fines between one case and another and proportionality between the fine and the gravity of the offence may be difficult to achieve. Consistency may not, therefore, be a primary aim of sentencing in this area of law. *R v Jarvis* [2005] EWCA Crim 1409 paragraph 7.

"(12) The court can take a more serious view of the breaches where there is a 'significant public element', particularly where the public has to trust a company entrusted with work relating to their safety to carry that work out competently and efficiently. The court can also take into account in such cases the fact, if appropriate, that it was a matter of good fortune that the risks, and presumably their consequences, did not turn out worse than in the event they did. *Jarvis*, again, paragraph 11."

The thirteenth principle, which does not apply in the present case, related to the position of a public body.

[25] In later discussion the court said:

"42. Section 3 of the 1974 Act requires positive steps to be taken by all concerned in the operation of the business of a company to ensure that the company's activities involve the minimum risk, both to employees and to third parties. Knowledge that breach of this duty can result in a fine of sufficient size to impact on shareholders will provide a powerful incentive for management to comply with this duty. This is not to say that the fine must always be large enough to affect dividends or share price. But the fine must reflect both the degree of fault and the consequences so as to raise appropriate concern on the part of shareholders at what has occurred. Such an approach will satisfy the requirement that the sentence should act as a deterrent. It will also satisfy the requirement, which will rightly be reflected by public opinion, that a company should be punished for culpable failure to pay due regard for safety, and for the consequences of that failure.

"43. A breach of the duty imposed by s. 3 of the 1974 Act may result from a systemic failure, which is attributable to the fault of management. It may, however, be the result of negligence or inadvertence on the part of an individual, which reflects no fault on the part of the management or the system that they have put in place or the training that they have provided. In such circumstances a deterrent sentence on the company is neither appropriate nor possible. Where the consequences of an individual's shortcoming have been serious, the fine should reflect this, but it should be smaller by an order of magnitude than the fine for a breach of duty that consists of a systemic failure."

[26] We find these passages to be highly persuasive. In our opinion, especially given that the 1974 Act is a United Kingdom statute, and uniformity of sentencing, other things being equal, between the various jurisdictions is desirable, they should be followed by sentencers in Scotland, and we follow them.

Other materials

[27] In addition to these cases, our attention was drawn to two other documents from England. The first was the *Magistrates' Court Sentencing Guidelines*, issued by the Sentencing Guidelines Council in May 2008. Having regard to the limited sentencing powers of magistrates' courts, we find these guidelines to be of

no assistance for present purposes, beyond their recognition of the *Howe* and *Balfour Beatty* principles. The second was the *Consultation Paper on Sentencing for Corporate Manslaughter*, issued by the Sentencing Advisory Panel at the request of the Sentencing Guidelines Council in November 2007, in anticipation of the coming into force of the Corporate Manslaughter and Corporate Homicide Act 2007 on 6 April 2008. By s 1(1) of that Act an organisation to which the section applies is guilty of an offence if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. By subs (5) the offence under that section is called corporate manslaughter, in so far as it is an offence under the law of England and Wales or Northern Ireland, corporate homicide, in so far as it is an offence under the law of Scotland. This is a more serious offence than a breach of s 3 of the 1974 Act which causes death, and the panel's views require to be read in that context.

[28] In the paper, at paras 58 to 60, the panel expressed the provisional view that annual turnover is the most appropriate measure of an organisation's ability to pay a fine, and thus the starting points and ranges proposed by them were expressed as percentages of annual turnover. Annual turnover was defined as "the aggregate of all sums of money received by an organisation during the course of its business … over an annual period". The panel's provisional starting point for an offence of corporate manslaughter committed by a first time offender pleading not guilty was a fine amounting to 5 per cent of the offender's average annual turnover during the three years prior to sentencing. After taking into account any aggravating and/or mitigating factors, the court would then arrive at a fine which would normally fall within a range of 2.5 to 10 per cent of average annual turnover.

[29] Of more relevance to our consideration, the panel's provisional starting point for an offence under the 1974 Act involving death was a fine amounting to 2.5 per cent of average annual turnover during the three years prior to the offence. The fine would normally fall within a range of 1 to 7.5 per cent of average annual turnover. We were not shown any guidelines issued following the consultation process, so the consultation paper must be regarded as of some, but limited, assistance for present purposes.

Munro's financial position

[30] This brings us to the financial position of Munro. The information provided to the sentencing judge, and to us, is less than might have been hoped for. Where a company has been convicted of an offence such as the present, or indeed any other offence in respect of which its financial position would be relevant in determining the level of fine, it is for the company to place before the court sufficiently detailed information about its financial position to enable the court to see the complete picture without having to resort to speculation. In addition to the lodging of all relevant documents, it may in some cases be thought appropriate to lead the evidence of an accountant. Though this was not done in the present case, it would have been appropriate, since all that was placed before the sentencing judge was the directors' report and financial statements, in relation to Munro, for the years ended 30 September 2005 and 30 September 2006. The sentencing judge was informed that Munro employed about 60 persons and were a significant employer in the area where they operated. The sentencing judge paid particular heed to the directors' report and financial statements for the year ended 2006. From these he noted that in that year Munro had a turnover of £2,306,782. They made an operating loss of £14,281, but after various adjustments, particularly in respect of tax, they made a net profit for the year of £18,854. We would add that in the previous year turnover was £2,072,418, gross profit was £426,484, operating profit was £213,473, and net profit was £157,984.

[31] In addition, we were shown the abbreviated accounts for the year ended 30 September 2007 relating to Munro, and the abbreviated accounts for the years ended 30 September 2006 and 30 September 2007 relating to Construction. These contain abbreviated balance sheets and accompanying notes, but not profit and loss accounts. From these it can be seen that the net assets of Munro were £328,117 as at 30 September 2005, £346,971 as at 30 September 2006, and £339,150 as at 30 September 2007. The significant drop in gross profit between 30 September 2005 and 30 September 2006 was attributable to a substantial increase in the cost of sales; we were told that these were principally fuel costs. Creditors of Munro included the directors William Munro and David Munro, who as at 30 September 2006 were owed £128,011 between them, and as at 30 September 2007 £116,405. Our attention was also directed to the abbreviated accounts of Construction, but only for the purpose of showing that as at 30 September 2005 there was a balance due to the directors of £442,108, and as at 30 September 2006 £441,760. It would appear from these figures that the financial viability of both Munro and Construction is in part dependent on loans from William Munro and David Munro, but we were not told when and in what circumstances these loans were made. What we were told was that William Munro derives a salary of £40,000 gross, and his wife Jean a salary of £10,000 gross, from Construction, and not from Munro; and David Munro derives a salary of £24,000 gross from Munro, and none from Construction. Counsel pointed out that most of the operating machinery forming part of the fixed assets of Munro was leased or on hire purchase. The construction industry was currently experiencing a downturn in business, which in the case of Munro was likely to be 30 to 40 per cent. It would cause the company great difficulty to find, say, £50,000.

The sentencing judge's approach

[32] In his report to this court, the sentencing judge states: "Having regard to all the foregoing factors I

formed the view that this was a serious offence. There had clearly been failures by the appellant company in the operation of their undertaking in relation to the transport of the Michigan loader in the way described in the charge. I accept that the two technical factors referred to by counsel had some mitigatory value. It would clearly have been desirable had the owners of the vehicle drawn to the appellants' attention the increased weight caused by water in the tyres and the defective state of the parking brake. It did, however, seem to me that this mitigation was relatively slight, there being a plain obligation upon the appellants themselves to check matters of this sort. I accepted the force of the submission in relation to the early plea of guilt, and adjusted my sentence accordingly. In considering the appropriate level of fine, my principal consideration was the ability of the appellants to meet a financial penalty. In that regard I took account of the information contained in the company's accounts. I was of the view that these were the best evidence available to me as to the company's ability to meet a financial penalty. As I have already observed these were audited accounts with an appropriate certificate from chartered accountants. I had no reason to doubt the veracity or accuracy of the accounts. The accounts showed a company which made an operating loss, only turned into a profit by virtue of tax adjustments. On this basis it seemed to me that the company had a relatively limited ability to meet a financial penalty. It seemed to me that any penalty I imposed should be at a level which, whilst reflecting the serious nature of the crime, would not result in the insolvency of the company or render the company in danger of insolvency." (We do not know why the sentencing judge refers to Munro as the appellants, rather than the respondents, throughout his report.) The sentencing judge also notes that no challenge was made to the submission made to him by counsel for Munro that the drop in profitability between 2005 and 2006 was largely attributable to an increase in fuel costs. He concludes: "The grounds of appeal refer to 'An apparent drop in profitability …'. Candidly I do not understand the use of the word 'apparent'. I also note that it is said that the net worth of the company was about £347,000. That statement is factually correct. In candour I did not take it into account in considering sentence. In my respectful view it is of little assistance in calculating the appropriate level of fine. The figure is no more than a statement of the value of the company on a notional breakup and I would not consider it relevant to the question of calculation of a fine."

[33] It is apparent from these passages that the sentencing judge was not invited to consider the decisions of the Court of Appeal in *Howe* and *Balfour Beatty*. It is also apparent that, as he expressly states, his "principal consideration was the ability of [Munro] to meet a financial penalty", and that in assessing that ability he proceeded on the basis of the net profit for the year ended 30 September 2006.

Discussion

[34] In our view the sentencing judge fell into error in approaching the question of the determination of the appropriate fine in this manner. He should have taken into account the gravity of the offence, and any aggravating or mitigating features, along with the ability of Munro to pay a fine. He should, above all, have borne in mind the policy underlying s 3 of the 1974 Act and the public interest in the requirement that Munro should be punished for its culpable failure to pay due regard for safety, and for the consequences of that failure: *Balfour Beatty* at p 386, para 42.

[35] Munro were under a clear statutory duty to protect the health and safety of the public. They were responsible for transporting the Michigan, a very heavy wheeled vehicle, on a low loader trailer along public roads, including the A9 trunk road. It was entirely foreseeable that if the Michigan rolled off the low loader trailer, members of the public using the road would be exposed to grave risk of death or serious injury. It would, of course, be a matter of chance whether, if it did so, it would collide with no vehicle or, as actually happened, with a vehicle containing two occupants, or with a vehicle, such as a bus, containing many occupants. Their duty was to conduct their undertaking in such a way as to ensure, so far as was reasonably practicable, that such a thing did not happen.

[36] While, in the circumstances, little turns on the fact that its actual train weight was about four tonnes in excess of the maximum permissible gross weight of the loaded tractor and trailer unit, Munro failed to comply with their statutory duty because the chains were inadequate and the handbrake of the Michigan did not work. If, as counsel submitted, it was not intended that the chains alone should be sufficient to prevent the Michigan from rolling off the low loader trailer, that is not only incompatible with the terms of Munro's plea of guilty, but it also means that they were relying on the handbrake alone for that purpose. No doubt Umax should have told them that problems with the handbrake had been reported. No doubt the test drive, for the reasons explained above, did not disclose that the handbrake was defective. But if the intention was to rely on the handbrake, and that alone, to prevent the Michigan from rolling off the low loader trailer, more was clearly required: most obviously, the Michigan should have been properly inspected by a person sufficiently qualified and experienced to detect the defect. This had, after all, already manifested itself to the extent that it had been recorded in the service records kept by Umax.

[37] The driver, Walter MacLennan, is not to be blamed. So far as individuals are concerned, the fault lay higher up in the company. William Munro and Andrew Gillies were in a position to take the appropriate decision at a managerial level. In the context of the operations of a small family company, we regard this as a systemic failure. The consequences of Munro's corporate error of judgment were catastrophic, and need to be brought home to Munro's directors, Con-

struction as their shareholders, and the Munro family members who ultimately own them.

[38] On the other hand, we accept that Munro have no previous convictions and that, particularly since the Michigan was in their possession for only a short time, this was an isolated occurrence. There can be no doubt that there has been a prompt admission of responsibility and a timely plea of guilty. Munro have taken the whole matter very seriously, as is evident from the attendance of William Munro at every stage of the court proceedings.

[39] As has been seen, it is not easy to form a complete picture of Munro's financial position. Net profit is not the only relevant factor in assessing the level of fine which will serve the purposes of retribution and deterrence, and thus serve as punishment without bringing a company to its knees. We accept that, although their turnover is substantial, they are not a particularly profitable company and are very much exposed to such factors as increases in fuel prices as well as fluctuations in the economy.

[40] Taking a broad view of the matter, in light of the passages from *Balfour Beatty* quoted above and the other considerations we have discussed, and making due allowance for the timing of the plea of guilty, we have come to the view that the sentence imposed by the sentencing judge was far too low and took inadequate account of the nature of the offence itself and the need for appropriate punishment in the public interest. In our view an appropriate starting point, taking account of all the relevant circumstances, would have been one of £40,000, which would then have been discounted by 25 per cent, to reflect the plea of guilty and its timing, resulting in a fine of £30,000.

Result

[41] We shall accordingly quash the fine imposed by the sentencing judge and substitute a fine of £30,000.

Counsel for Appellant, Bain, QC, AD; Solicitor, N McFadyen, Crown Agent — Counsel for Respondents, J G Thomson; Solicitors, The Anderson Partnership.