

---

# Sentencing corporate offences – James Dwyer SC

## Corporate Enforcement Authority Conference • October 17<sup>th</sup> 2024

---

### Introduction

This paper seeks to address the issue of sentencing companies for criminal offences. Ireland has firmly adopted the approach of judicial discretion in imposing sentences generally. The approach is epitomised in the following comments of Finlay C.J. in *People (DPP) v Tiernan*:<sup>1</sup>

*“...having regard to the fundamental necessity for judges in sentencing in any form of criminal case to impose a sentence which in their discretion appropriately meets all the particular circumstances of the case (and very few criminal cases are particularly similar), and the particular circumstances of the accused, I would doubt that it is appropriate for an appellate court to appear to be laying down any standardisation or tariff of penalty for cases.”*<sup>2</sup>

Thus, each offender will be treated in accordance with their own circumstances. A person with no previous convictions will get a lighter sentence than the person with 100. A 16-year-old child will usually get a lighter sentence than a 30-year-old adult and a person with significant cognitive deficits will get a lighter sentence than the person who does not.

Initially it was thought a company could not be guilty of a crime. A company has no mind and therefore cannot have a guilty mind. As an 18<sup>th</sup> century English Lord Chancellor put it, “*Did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked?*”<sup>3</sup> He is said to have added to the comment *sotto voce* “*and by God it ought to have both*”. The emergence of large numbers of companies behaving badly in the nineteenth century swept away these theoretical difficulties. Soon companies began to be indicted.

The suite of measures available to a sentencing court in sentencing a human defendant is far wider than those applicable to a company. You cannot imprison a company. You cannot impose community service on a company (under the current legislative regime). You cannot remand a company on bail on condition that they provide clean urine analysis for six months and endeavour to keep of sober habits and stay out of public houses.

In practice, the sentences imposed on companies are confined to fines. Many of the offences are in the Companies Act 2014. In that Act, offences are divided into four categories, one being the most serious, four being the most minor. Section 871 of the 2014 Act provides for the fines that can be imposed for each offence. For each offence triable summarily, a Class A fine can be imposed. Categories 3 and 4 are only triable summarily. Categories 1 and 2 when tried on indictment have a maximum fine of €500,000 and €50,000 respectively.

The imposition of an appropriate fine with a company, as with a natural person, is usually assessed having regard to moral culpability of the offending and the means of the defendant.<sup>4</sup> The means of a company is easy to assess using company accounts. Assessing the moral culpability of a company is more difficult in the absence of a corporate mind with a moral compass or lack thereof. The court can have regard to the usual mitigating factors of absence

---

<sup>1</sup> [1988] I.R. 250.

<sup>2</sup> *ibid.*, at p. 254.

<sup>3</sup> *per* Edward, Firs Barron of Thurlow (1731-1806)

<sup>4</sup> *People (DPP) v Cavan County Council* [2015] IECA 130; at §§59-61.

of previous convictions; early guilty plea; previous good character; admissions to an investigator made, etc. as is the case with a natural person.

In *People (DPP) v Cavan County Council and Oxygen Environmental Ltd*,<sup>5</sup> a company and a local authority were both sentenced for disposing of waste at a landfill in Cavan over periods of time. They pleaded guilty. The local authority was fined €260,000. The company was fined €780,000. Both appealed to the Court of Appeal. Edwards J conducted an analysis of the sentencing of companies and of these types of offences. Ultimately the sentences were reduced to €50,000 for each defendant.

### **The ‘overspill’ problem**

The main difficulty envisaged in sentencing companies is what called the overspill problem. In *Oxygen*, Edwards J identified the overspill issue as follows:

*“63. Equally the court must be conscious of the spill over effects of a large fine that may unjustly punish persons not directly responsible for the offence such as shareholders, employees, creditors, customers, consumers, trading partners and, in the case of a public authority that might not be put out of business by a large fine in the same way that a commercial company might, but which might have to divert resources away from other public services being provided by it, the public at large. While a large fine that causes some spill over will not necessarily be wrong in principle, a court considering the imposition of such a fine is obliged to consider the potential spill over effects and satisfy itself that the proposed measure is none the less merited and proportionate, and a failure to do so would amount to an error in principle.”*<sup>6</sup>

A large company who is the subject of a significant fine is likely to mete out financial loss on others who were not criminally liable. The fine may be passed on (directly or indirectly) to shareholders who may not even have held shares at the time of the offending or customers by way of increased prices while leaving corporate bonuses intact. It is passed onto to the company’s creditors as the value of the debt is decreased by the impact of the fine on the company.

More often a significant fine will result in a cost-cutting exercise within the company. This may result in laying off of employees in the lower echelons of the company or a reduction in salary while leaving intact those at the higher end thus penalising those who are less likely to have received any direct benefit from the criminality and bear minimal moral culpability.

### **The deterrence trap**

Deterrence is an important principle of sentencing. Imposing a penalty that will deter both the defendant and others from offending. It will often require setting a fine at a very high level. However, the imposition of a very high fine may result in the closure of the company. To avoid this ‘deterrence trap’ the level of the fine must be tempered having regard to the resources of the defendant company.

In *R. v Yorkshire Water Services Ltd*,<sup>7</sup> the Court of Appeal of England and Wales made the following observations:

---

<sup>5</sup> [2015] IECA 130.

<sup>6</sup> *People (DPP) v Cavan County Council* [2015] IECA 130; at §63.

<sup>7</sup> [2001] EWCA Crim. 2635; [2002] 2 Cr. App. R. (S.) 13.

*“A balance may have to be struck between a fitting expression of censure, designed not only to punish but to stimulate improved performance on the one hand, and the counter-productive effect of imposing too great a financial penalty on an already under-funded organisation on the other.”*<sup>8</sup>

In *Oxigen*, Edwards J. made similar observations:

*“62. ...the limited sentencing options available in respect of a corporate offender mean that in reality a monetary sanction will often be the only appropriate penalty. That being so, a sentencing court will be required to avoid what Thomas O’Malley refers to as “the deterrence trap” (see Sentencing Law and Practice (Thompson Round Hall, 2006, 2nd ed., at para 19-06) of imposing a fine at a level likely to precipitate corporate dissolution. An appropriate balance must be struck between the need for deterrence on the one hand, and putting the offender out of business where that can be avoided.”*<sup>9</sup>

### **The difficulty**

A combination of overspill and the deterrence trap will result in the significant reduction in fines as evidenced by the *Oxigen* case itself. On occasion this can result in fines being imposed which can appear moderate when compared to the offending involved. In 1984, the US Court of Appeals for the Eighth Circuit made the following observation:

*“The present practice of punishing corporate crime with fines paid to the United States Treasury has done little to deter corporate crime. Once the payment is made to the Treasury, the public promptly forgets the transgression, and the corporation continues on its way, with its reputation only slightly tarnished by what it usually describes as a ‘highly technical violation’.”*<sup>10</sup>

This has led to suggestions that simple imposition of fines on companies is inadequate in sentencing corporate offenders.

### **Community Service**

Probation supervision is often deployed with natural persons in order to assist them in personal change. The wording of the Community Service Act suggests that it is confined to natural persons. It could arguably be used for corporate offenders to instil more pro-social corporate values.

There seems no reason in principle why a company could not carry out community service. A company cannot carry out painting of a community centre. However, the mandatory sponsorship of community projects associated with the harm done by the crime committed could prove a valuable sentencing tool.<sup>11</sup>

This is often done in the US. The US Sentencing Commission Guidelines provide in relation to corporate offenders that, *“Community service may be ordered as a condition of probation where such community service is reasonably designed to repair the harm caused by the offense.”*<sup>12</sup>

---

<sup>8</sup> *ibid.*, at p. 37.

<sup>9</sup> *People (DPP) v Cavan County Council* [2015] IECA 130; at §62.

<sup>10</sup> *per Heaney J. in United States v. Missouri Valley Construction Company* 741 F.2d 1542 (8th Cir. 1984).

<sup>11</sup> Murphy, ‘The Federal Sentencing Guidelines for Organizations: A decade of promoting compliance and ethics’ (2002) 87 Iowa L.R. 697.

<sup>12</sup> United State Sentencing Commission Guidelines (2018), Chapter 8, §8B1.3.

The commentary in the US Guidelines states as follows:

*“An organization can perform community service only by employing its resources or paying its employees or others to do so. Consequently, an order that an organization perform community service is essentially an indirect monetary sanction, and therefore generally less desirable than a direct monetary sanction. However, where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service directed at repairing damage may provide an efficient means of remedying harm caused.*

*In the past, some forms of community service imposed on organizations have not been related to the purposes of sentencing. Requiring a defendant to endow a chair at a university or to contribute to a local charity would not be consistent with this section unless such community service provided a means for preventive or corrective action directly related to the offense and therefore served one of the purposes of sentencing set forth in 18 U.S.C. § 3553(a).”*

So for example community service might be appropriate in a dumping case like *Oxigen* if it involved the company using its resources and available skills to carry out environmental damage reduction in the area in which the dumping occurred.

### **Corporate programmes**

In the US, legislation (at both federal and state level) encourages companies to establish internal compliance and ethics programmes to detect and avoid illicit conduct. In the 1990s sentencing guidelines were introduced which provided that the existence of an effective programme was a major factor in being treated leniently in sentence.<sup>13</sup>

The guidelines set out detailed criteria for the determination of what such programmes should contain. The commentary to the guidelines sets out the rationale as follows:

*“The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable. The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.”*

Since the introduction of these programmes, internal audits by companies will often generate incriminating material. These materials are often sought by way of discovery in civil litigation against companies. The absence of confidentiality attaching to such audits has therefore impacted on the incentives to make them truly effective at revealing criminal behaviour.<sup>14</sup>

An article by the chair of the United States Sentencing Commission made the following remarks about the impact of these programmes on corporate culture:

---

<sup>13</sup> United State Sentencing Commission Guidelines (2018), Chapter 8.

<sup>14</sup> James T. O'Reilly, 'Environmental Audit Privileges: The Need for Legislative Recognition', 19 *Seton Hall Journal of Legislation and Public Policy*: Vol. 19: Issue 1, Article 6 (1994); 'Policing Corporate Crime: the Dilemma of Internal Compliance', *Vanderbilt Law Review*; Vol. 50; Issue 1 (1997).

*“The organizational guidelines have been credited with helping to create an entirely new job description: the Ethics and Compliance Officer. Such officers develop and manage an organization’s ethics and compliance programs. The Ethics Officer Association (EOA) recently completed a survey indicating that the organizational guidelines influenced many corporations to adopt compliance programs. Nearly half of those surveyed responded that the organizational guidelines had “a lot of influence” on an organization’s commitment to ethics as manifested through the adoption of a compliance program.<sup>55</sup> In another survey by the EOA, a substantial majority (60%) of respondents believed that ethical dilemmas are not the “unavoidable consequence of business,” in contrast to the prevailing public opinion of the 1970s and 1980s that “business ethics” was a contradiction in terms.<sup>56</sup> According to the EOA, “[T]his survey.... . shows that today, a majority of workers believe that business and ethics can mix and that ethical dilemmas can be reduced.”<sup>15</sup>*

### **Conclusions**

The limitations of imposing only fines on corporate offenders are that the penalty can often be paltry and not enjoy public confidence. Innovations such as corporate probation, community service and compliance programmes have the potential to be more effective tools in sentencing corporate offenders. This could perhaps provide food for thought for the Sentencing Guidelines and Information Committee of the Judicial Council and the Minister for Justice in the present or next Dáil.

---

<sup>15</sup> Murphy, ‘The Federal Sentencing Guidelines for Organizations: A decade of promoting compliance and ethics’ (2002) 87 Iowa L.R. 697. At p. 711.