No. 1999/00781/W2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Thursday 16 March 2000

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(Lord Bingham of Cornhill)

MR JUSTICE ALLIOTT

and

MR JUSTICE NEWMAN

R E G I N A

- v -

MILFORD HAVEN PORT AUTHORITY

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(Official Shorthand Writers to the Court)

MR BRIAN LEVESON QC and MR TIMOTHY BRENTON QC appeared on behalf of
THE APPELLANT

MR MICHAEL HILL QC and MISS VASANTI SELVARATNAM appeared on behalf of
THE ENVIRONMENT AGENCY

J U D G M E N T

(As Approved by the Court) Thursday 16 March 2000

1. THE LORD CHIEF JUSTICE: Just after 8pm on Thursday, 15 February 1996 the tanker "Sea Empress" was sailing into Milford Haven under the supervision of a professional pilot when she grounded on the Mid-Channel rocks. She was carrying a cargo of about 130,000 tonnes of North Sea crude oil. The initial grounding caused a loss of 2,500 tonnes of oil. The weather conditions prevailing at the time were bad and it was not until Wednesday, 21 February that she could be brought alongside a jetty. She had by then lost a further quantity of about 69,300 tonnes of crude and a quantity of bunker oil. The oil so lost caused widespread pollution in the Haven and to the coastal waters on all sides. It was among the largest oil spills ever recorded.

2. The pilot who was guiding the vessel into port, Mr Pearn, was employed by Milford Haven Pilotage Limited, a wholly owned subsidiary of Milford Haven Port Authority ("the Port Authority"), the subsidiary being set up to employ pilots for the Port Authority. The grounding occurred because of a serious navigational control error on the pilot's part. The Port Authority is responsible for managing and controlling the business of the port and maritime traffic into and out of it.

3. In due course criminal proceedings were brought against the Port Authority at the instance of the Environment Agency. An indictment was preferred, charging the Port Authority with two offences. Count 1 charged an offence against section 85(1) of the Water Resources Act 1991 of causing polluting matter, namely oil, to enter controlled waters, namely the waters of Milford Haven and the coast of South-West Wales. Count 2 charged an offence of causing a public nuisance and in the particulars of the offence specified a number of respects in which the Port Authority was said to have failed properly to perform its duty.

4. On 12 January 1999 the Port Authority pleaded guilty to count 1 before David Steel J sitting in the Crown Court at Cardiff. There was before the judge a lengthy and detailed document setting out the basis upon which the plea of guilty was tendered and accepted. That document was agreed between the prosecution and the defence. The document makes plain that the Port Authority was pleading guilty because and only because section 85 creates an offence of strict liability to which the Port Authority had no defence. The Port Authority did not accept that it was at fault, still less that it was guilty of any breach of duty, whether negligent, reckless or deliberate, or of any misconduct.

5. The Port Authority pleaded guilty because the presence of the pilot on board the vessel was

a direct consequence of the manner in which the Port Authority managed the port and the systems used by the Port Authority. There was recent House of Lords' authority in Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22, which showed that that was enough to make the Port Authority criminally liable under the section even though the Port Authority was not vicariously responsible for the actions of the pilot.

6. To count 2 of the indictment the Port Authority pleaded not guilty and that was ordered to lie on the file.

7. On 15 January 1999 the judge ordered the Port Authority to pay a fine of £4m and in addition to pay an agreed sum of £825,000 towards the costs of the prosecution. At a later hearing the judge ordered the fine to be paid by two equal instalments of £2m each by 31 January 2000 and 31 January 2001. The costs were to be paid by five equal monthly instalments of £165,000 each, the first payment being made by 31 March 1999 and succeeding payments by the end of each month. The costs have been paid. The fine, pending appeal, has not.

8. The Port Authority now appeals against the fine of £4m imposed upon it by leave of the single judge.

9. Since the essential facts of this case are summarised in the document already referred to entitled "The Case under Section 85(1)" which sets out the agreed basis of the Port Authority's plea, and since much of the summary was reproduced by the judge when passing sentence, we confine our recital of the facts to the bare minimum necessary for the purposes of our decision on this appeal.

10. The area around Milford Haven is a beautiful, remote, environmentally sensitive area particularly sought after by bird watchers, fishermen, walkers, holiday makers and lovers of secluded countryside. It contains a national park, nature and marine nature reserves, many sites of special scientific interest, special protection areas and special areas of conservation. There has for many years been a port at Milford Haven and in recent years a major oil terminal serving several refineries. The port and its associated facilities are a major source of employment and economic activity in the area. But entering the Haven for large vessels such as oil tankers poses a number of navigational problems and risks. In particular the West Channel, which Sea Empress was entering, is narrow; the underwater contours of the Channel give rise to potential dangers; and the Channel itself is affected by significant tide patterns and flows. The weather pattern includes south-westerly gales and storms, particularly in the winter months. The entrance therefore requires careful

navigation by a sufficiently trained and experienced pilot. But the passage of vessels into and out of the port is an everyday event all the year round.

11. The Port Authority is a creature of statute, now governed by the Milford Haven Conservancy Act 1983, as amended by the Milford Haven Port Authority Act 1986. It is obliged to manage the port in the interests of safety. It is subject to specific duties to prevent or reduce the discharge of oil or the risk of discharging of oil into the water, and to have regard to the environment and the preservation of wild life. Under the Pilotage Act 1987 it is the competent harbour authority with responsibility to provide such pilotage as is required. It is obliged to have regard to the hazards that are involved in the carriage of dangerous goods. Its duties include provision for the training and authorisation of pilots, the categorisation of vessels so as to ensure that larger and less manoeuvrable vessels have the benefit of a suitably skilled pilot or pilots, and regulating the passage of vessels. Thus decisions relating to these matters were essential steps in the discharge of the Port Authority's duties.

12. The Port Authority addressed these matters. It instituted a system whereby pilots could work their way up a ladder of responsibility by showing the required levels of skill and experience. It made special pilotage arrangements for VLCCs, which were categorised as vessels over 150,000 deadweight tonnes, and laid down a different procedure for such vessels entering the port. Sea Empress was a segregated ballast tanker with a deadweight tonnage just below 150,000, but with some of the characteristics of a VLCC. After this casualty the Port Authority altered its criterion for classification of VLCCs so as to bring a vessel such as Sea Empress within that class. Had this recategorisation been effected before 15 February 1996 Sea Empress would not have been permitted to enter the Haven at the state of the tide when the casualty occurred and Mr Pearn would not have been permitted to conduct the pilotage on his own.

13. The agreed basis of the plea is helpfully summarised in paragraph 31 of the document already referred to, which reads:

> "On 15 February 1996, Pilot Pearn was a class 2 pilot. Pursuant to the bare rota system for the allocation of pilots, he was appointed to pilot Sea Empress. In bringing in Sea Empress, he was providing pilotage services in discharge of MHPA's duties and responsibilities, in particular under the Conservancy Act and as a Competent Harbour Authority, which duties and responsibilities are not delegable. His training and experience were such that he had never before attempted to bring in alone a vessel comparable to the Sea Empress so close to

low water, nor had his training involved simulation of such an entry. He made an error in bringing her in. His error was no more extraordinary or abnormal than errors made by airline pilots, train and lorry drivers, ordinary motorists. It is because such errors, and the possibility of making such errors, are ordinary facts of life that training programmes are provided so as to attempt to reduce the incidence thereof. Pearn's training as the pilot and his error were ordinary facts of life for Milford Haven."

14. Reference has already been made to the bad weather which delayed the efforts to salvage the vessel after her initial grounding, but this was nothing exceptional for the time of year.

15. The basis of the Port Authority's plea of guilty was more fully elaborated in paragraph 39 of the agreed document which read:

16. "In the present case, as a management system for the Haven to discharge its legal duties, including those under the Conservancy Act, MHPA laid down the pilotage requirements and basic entry conditions for vessels entering the Haven. Further in creating the management system, MHPA determined the training syllabus for and the authorisation of the pilots who served the Haven. Thus, it created and then operated a system which resulted in Sea Empress attempting to enter the Haven, in laden condition and under the charge of Pilot Pearn, at a time as late as or later, in terms of proximity to low water, than any comparable vessel had attempted previously. It thereby put Pearn in a position where, as a direct consequence of the management system operated by MHPA as hereinbefore set out, he could make an error of navigation when piloting Sea Empress; in fact he did make such an error which led go the grounding and pollution. If, for whatever reason, there were to be a grounding and the discharge of oil into the waters consequent upon such an error of navigation, MHPA would be guilty of the offence of causing the pollution under s85(1), unless the grounding of a laden tanker and/or the discharge of oil is an 'extraordinary' or 'abnormal' event in the life of the Haven."

17. It was not suggested that those conditions were fulfilled.

18. As would be expected the discharging of some 72,000 tonnes of oil into these environmentally sensitive coastal waters caused very serious damage and aroused widespread apprehension. It was necessary to ban fishing for periods of months. Various forms of marine life were killed. Many birds suffered. So did many whose livelihoods depended on visitors attracted by the amenities of the area. There was, however, an intense, and in many respects successful, attempt to mitigate the effects of what might otherwise have been a much greater catastrophe. In this the

Port Authority fully participated, as did other bodies, agencies and individuals. The cost of all the work to counter and reduce the effects of oil pollution has been estimated at £60m. Happily, reports a few years after the casualty show its ill effects, although severe, to have been less dire than had at first been feared.

19. In passing sentence the judge delivered a judgment running to 25 pages of transcript very helpfully explaining his reasons for reaching the conclusions he did. He acknowledged more than once that section 85 creates a strict liability offence; but he rightly considered the background facts to be relevant and important. He dealt with the system for training and promoting pilots, the entry, routing and timing of vessels and the categorisation of vessels, in each case emphasising that he made no finding of negligence against the Port Authority. Turning to penalty he acknowledged that the Port Authority had tendered a plea of guilty, which had been accepted, on a basis of strict liability, but he regarded the surrounding circumstances as giving rise to concern. He referred to the damage caused by the polluting oil, accepting that the environmental impact was less severe than originally feared, partly because of the efficient and effective clean-up response. He concluded that the background to the casualty and its outcome necessitated a substantial penalty. He had regard to the Port Authority's plea of guilty, but thought the credit for that should be modest because it was difficult to see what defence there was to the statutory offence and the plea was tendered at a late stage. Had the trial gone ahead he could not envisage any verdict other than a verdict of guilty and an order for costs against the Port Authority. He referred to the Port Authority's agreement to pay costs of £825,000 to the prosecution and observed:

20. "Whilst I recognise that this agreement is realistic, I do think it limits the scope of the Defendant to pray in aid that payment by way of mitigation of their fine. If they wished the court to embark on a balancing exercise between the level of the fine and the costs, the matter could have been left at large for the court. Broadly I treat the agreed payment as reflecting the recognition that the prosecution have been put to wholly unnecessary expenditure which would have been largely avoided by a prompt plea. Of course, in the final analysis, I must pay some regard to the payment in considering the overall financial implications for the Defendants."

21. The judge was not impressed by arguments which he understood to have been put to him concerning the status of the Port Authority of which he said:

> "Leave aside the means of the Port Authority which I will deal with separately, it is said I should limit the extent of any financial penalty because the Authority is a public trust set up

as [a] statutory body under the Act of 1958. But whatever may be the laudable interests of the company in promoting the public benefit and providing employment, this cannot be relevant to the standards of efficiency and care that are required in matters of safety. Indeed, the more the local community are regarded as a special interest group, the more the need to have regard to the quality of their environment. Nor in my view is the fact that the members of the board receive modest remuneration of any direct materiality."

22. The judge was not impressed either by reference to the expense said by the Port Authority to be attributable to the casualty. Of that he said:

> "Very properly, following the casualty, a safety review was put in motion, together later with a more elaborate Safety Assessment by outside consultants. Whilst recognising the merit of such a programme it covers a whole prospectus of risk analysis, only part of which arises from the casualty. It seems to me to be something that may have been called for in any event. No doubt there has been some cost in implementing improvements pertinent to this casualty -- but not nearly to the extent put forward of £1.3 million. Nor do I feel it appropriate to have further regard to the balance of £1.7 million (making up the total of £3 million put forward as a direct cost of the casualty) as I understand this simply represents the legal costs of both parties."

23. The judge then considered the means of the Port Authority, having before him the audited accounts of the Port Authority from 1995 to 1997, the management accounts for 1998 and the budget for 1999. With reference to that, and after highlighting various figures in those documents, he said:

> "The recent downturn in profitability of the Authority appears to reflect the costs of the safety review and assessment and the agreement to pay the prosecution costs. That apart, the Authority is a sound business, with a proven track record over the years. It has a substantial holding in unencumbered fixed assets, with borrowing powers up to £30 million.
>
> The Authority does not have the vast resources of a major oil or manufacturing company. Such a company in the circumstances would face a massive fine reflecting the financial implications of this spill. The Authority is less well endowed and I am thus compelled to impose a significantly lower fine than would be appropriate for such a company. I also have not lost sight of the remote risk of imposing a fine of such size that the viability of the Port Authority is jeopardised. Nonetheless the fine for this breach of Section 85(1) must reflect the genuine and justified public concern, taken with the factual background and economic impact that I have outlined. The Authority must pay a fine of £4,000,000."

24. In R v F Howe & Son (Engineers) Ltd [1999] 2 All ER 249 observations were made concerning the approach of the court to fines for health and safety offences. Health and safety offences are not directly analogous to environmental offences since health and safety offences inevitably present at least a threat of personal injury or death, whereas environmental offences may, but need not, do so. Nevertheless there is a general perception in relation both to health and safety offences and also in relation to environmental offences that the general level of sentencing is too low, and advice which the court has received from the Sentencing Advisory Panel concerning environmental offences refers to that perception. At page 254 of the judgment of the court in R v F Howe & Son (Engineers) Ltd the court rightly emphasised that every case must be dealt with on its own peculiar facts. Nonetheless the court drew attention to certain material factors, among them the extent to which the defendant fell short of his duty, the causing of death or serious injury, the skimping of proper precautions to make or save money or gain a competitive advantage, the deliberate breaching of a duty in order to maximise profit, the degree of risk and danger created by the offence, the extent of the breach or breaches, evidence of repetition or failure to heed warnings, the financial profit (if any) accruing to the offender as a result of the offence, admission of guilt and plea of guilty at an early opportunity, the taking of prompt and effective measures to rectify any failures, and a good record of compliance with the law. It was pointed out, correctly, that any fine should reflect the gravity of the offence and also the means of the offender, whether the offender was an individual or a corporation. The more culpable an offence the more severe, generally speaking, a penalty should be. If a commercial entity has profited from its offending, that is a very relevant consideration when assessing the level of any penalty.

25. We are grateful for the advice furnished by the Sentencing Advisory Panel which we have read with interest. Having received the Panel's advice we are required by section 80(2) of the Crime and Disorder Act 1998 to consider whether we should frame guidelines or revise any existing guidelines. We have given such consideration, but do not conclude that we can usefully do more than draw attention to the factors relevant to sentence to which we have already briefly alluded.

26. We do, however, mention five cases which have been mentioned to us as giving some assistance, indirect or direct, in the present context. In 1990 Shell UK Ltd appeared before Mars-Jones J in Liverpool. The company pleaded guilty to causing polluting matter, namely crude oil, to enter the River Mersey. The quantity involved was small compared with the present case, some 156 tonnes, but the judge was very critical of the company. In the course of his observations he said:

"I am satisfied, I regret to say, that the defendants did not discharge the high duty of care which they owed to the community as the owners and operators of a 12 inch bore pipeline, laid on or in the foreshore of a tidal estuary for some 18.6 kilometres. Because of an inadequate monitoring system, the existence of a leak in that pipeline might be undetected for up to 55 minutes and was not detected in the instant case for the best part of an hour. There was no automatic system for raising the alarm when a leak occurred in that pipeline as there should have been. There was no adequate and proper means of locating a leak if suck a leak did occur.

Of lesser importance was the attempt made by some of the Defendants' servants to pump water into the pipeline in an attempt to clear the blockage. This was repeated despite protests from a senior police officer and the district pollution control manager. This resulted in the discharge of about 7 tonnes of oil through that gap. The main clock valve was not closed until 15.20. For some reason which is not clear to me, the National Rivers Authority was not informed of this serious pollution until 17.30 when a report came from the Merseyside Fire Brigade, not from the defendants. By this time there was an oil-slick on the Mersey extending for some 10 miles. The oil was still leaking on the morning of Sunday, 20 August, although clearing-up operations were being undertaken."

27. It was against those findings that the judge went on to say:

"The only penalty I can impose is a fine, the amount of which is at large. The defendants have enormous resources and could pay any fine, even a fine of several million pounds without being unduly affected thereby. I have given careful attention to every aspect of this case and have come to the conclusion that the appropriate penalty is a fine of £1 million and that is the penalty I impose on the defendants."

28. In June 1991 the British Railways Board appeared before Wright J at the Central Criminal Court to face charges arising from the rail crash at Clapham in which 34 passengers were killed and 100 injured. The judge described it as

"one of the most grievous train disasters of recent years, certainly in this country."

29. The judge again was critical of the Board. He said:

"The immediate cause of the signalling failure, which led to the situation in the Clapham area on the morning of the accident, was the failure to observe basic rules of electrical engineering practice by an individual technician. The details are now well-known and I do not propose to repeat them. But that failure was able to occur, and to go uncorrected, in the context of a series of systems failures in the signals and telecommunications department of the Southern Region of British Rail, which went to the very top of the organisation.

Again, details are unnecessary, but it is entirely clear from the evidence that is before me that there was a failure of any proper systems of preparation for work,

supervision of work, inspection of work, testing and checking of work of the re-signalling work that was being carried out at the material time in the Waterloo area. Standing instructions were not properly distributed; individual personnel were not fully trained or instructed in their responsibilities; there was no proper co-ordination of instructions or system for ensuring that these instructions were complied with.

The level to which these standards had fallen is illustrated by the fact that there were, in fact, two other incidents, fortunately causing no accident: one at Oxted in November 1985, and one at Queen's Road, Battersea in June 1988."

30. The judge summarised his view of the responsibility of the Board by observing:

"The accident of 12 December 1988 occurred because these defendants, the British Railways Board, allowed those standards to fall below any acceptable level. The result was a state of affairs in the railway cuttings between Earlsfield and Clapham Junction stations on that morning of quite horrifying danger."

31. The judge acknowledged that there were weighty matters upon which the Board was entitled to rely in its favour. He then said:

"In cases of this kind -- and I do not wish to be misunderstood when I say this -- penalty is not usually of major importance or the greatest importance. The real impact of a prosecution under the Health and Safety at Work Act, especially in the case of a major public undertaking, is the disgrace; the disgrace of being publicly condemned before a criminal court. As I have already said, in my judgment the British Rail response to what must have been a traumatic experience for all involved, has been entirely commendable.

But, in the case of a public authority that is funded either by the tax payer or, as here, by a combination of the tax payer and the fare-paying public, the question of penalty raises an acute problem. As I indicated to Mr Henderson, I take the view that a financial penalty is the only one realistically open to me.

A swingeing fine of the magnitude that some, even now, might consider appropriate in the circumstances of this case, could only be met by the Board either by increasing the burden on the fare-paying passengers -- which is hardly logical, having regard to the fact that it is for the benefit of the fare-paying passengers that this legislation exists -- or by reducing the funds available for improvements in the railway system in general. That, again, could hardly be regarded as a desirable state of affairs.

On the other hand, I must bear in mind the necessity of marking the disapproval of society at the failures demonstrated by those charged with British Rail management at the material time leading up to, and causing, this accident.

An insignificant fine would rightly, in my judgment, bring down upon myself, and upon the whole system of justice, universal condemnation. I, therefore, have to steer a narrow course between these two alternative hazards."

32. That the judge sought to do when he imposed a fine of £250,000.

33. In February 1997 Clarke J imposed fines on those responsible for the collapse of a walkway at Port Ramsgate which resulted in the death of six people and serious injuries to seven more. The four defendants were between them ordered to pay fines totalling £1.7m. Two companies and Lloyd's Register were held to be guilty of gross negligence. Port Ramsgate was held to be less culpable but did not accept responsibility by pleading guilty and was convicted following a trial. It was ordered to pay a fine of £200,000.

34. More recently, on 27 July 1999, Scott Baker J, who delivered the judgment of the court in R v F Howe & Son (Engineers) Ltd, imposed fines on Great Western Trains Company Limited for its failures which led to the crash at Southall, which caused the death of seven passengers and injured 150 more. The judge said:

> "The fine I impose has to reflect the following:
>
> 1: the extent to which Great Western Trains fell short of the standard required of them and the risk that was thereby created. In my view it was a serious failure.
>
> 2: the extent of the disaster and in particular the number of people killed and injured.
>
> 3: the need to bring home the message to Great Western Trains and others who run substantial transport undertakings that eternal vigilance is required to ensure that accidents of this nature do not occur. In my judgment a substantial fine is required to emphasise this to a large and profitable enterprise such as the Defendant.
>
> It has not been suggested that the accident in this case was the result of a deliberate risk taken in pursuit of profit. Rather the thrust of the complaint is that Great Western Trains did not have in place a system for preventing a high speed train operating with the AWS isolated and no alternative in place.
>
> That, in my judgment, was a serious fault of senior management. More time and energy should have been devoted to appreciating the risk of what occurred and taking steps to avoid it.
>
> In mitigation I take into account:
>
> 1: the Defendants' plea of guilty, tendered not at the first opportunity but at what counsel considered to be the first practicable opportunity. For the avoidance of any doubt, I give full credit for the plea.
>
> 2: the fact that the Defendants have a good safety record and have never before been prosecuted for an offence under the Health and Safety legislation.
>
> 3: the fact that prompt action was taken after the accident to ensure there was no

> further breach of the Health and Safety Act.
>
> 4: the fact that they did not breach any safety requirement imposed on them by either Railtrack or the Railway Inspectorate.
>
> I am surprised that neither Mr George, who it is said is in personal charge of safety at Great Western Trains, nor any other director of the company came to Court to express personally remorse for Great Western Trains' breach of the Health and Safety Act and to allay any impression of complacency that may have been conveyed to the victims, their families and the public.
>
> That said, I accept Mr Caplan's submission that Great Western Trains does very much regret its responsibility for this disaster.
>
> The fine that I impose is not intended to, nor can it reflect the value of the lives lost or the injuries sustained in this disaster. It is, however, intended to reflect public concern at the offence committed. There will be a fine of £1.5 million."

35. In the brief moments since the court rose for the short adjournment we have been shown a press release relating to the conviction of two defendants in relation to the collapse of a tunnel at Heathrow. The principal contractors, Balfour Beatty, were fined £1.2m after pleas of guilty to offences under the Health and Safety at Work Act. It is noted that, according to the press release, Cresswell J in his closing remarks described the incident as a "disgrace". He indicated that people were exposed to very serious risks and that fines were needed to bring the health and safety message home to shareholders and managers.

36. All those cases turn very much on their own facts and circumstances. None of them provides anything approaching an exact analogy. They do not in our judgment enable us to indicate an appropriate level of fine in cases such as the present. We do, however, observe that in each of those cases serious breaches of duty were held against the respective defendants and in three out of the four cases death or injury was caused.

37. On behalf of the Port Authority Mr Leveson QC, who represents the Authority here as he did below, makes a series of submissions. First, he submits that the judge gave inadequate recognition to the relative lack of culpability of the Port Authority. That, as Mr Leveson urges, was a low level of culpability since the plea of guilty was tendered and accepted on the basis of strict liability without admission of fault. The case is accordingly to be distinguished from cases in which any negligent, reckless or deliberate breach of duty is shown, or any misconduct. There was, he urges, no question of cutting corners or skimping on safety or operational requirements to maximise profit or of seeking to gain any competitive advantage. There was no record of previous offending; there was no history of non-compliance; there were no warnings which were said to be unheeded; there

was no suggestion that the Port Authority's behaviour in relation to this incident was in any way cavalier or lethargic. He points out that, once the incident occurred, the Port Authority exerted itself to the utmost to mitigate the damage and thereupon initiated a searching review of all its operations to see how its procedures could be improved.

38. We see very considerable force in this point. The culpability of the Port Authority would have been very much greater had it pleaded guilty or been convicted on any basis other than one of strict liability. It is, however, important to bear prominently in mind a countervailing consideration. Parliament creates an offence of strict liability because it regards the doing or not doing of a particular thing as itself so undesirable as to merit the imposition of criminal punishment on anyone who does or does not do that thing irrespective of that party's knowledge, state of mind, belief or intention. This involves a departure from the prevailing canons of the criminal law because of the importance which is attached to achieving the result which Parliament seeks to achieve. The present case affords a very good example. The danger of oil pollution is so potentially devastating, so far-reaching and so costly to rectify that Parliament attaches a criminal penalty to breach of section 85 even where no lack of care or due diligence is shown. As Lord Hoffmann pithily put it in his opinion in the Empress Car Co case at page 32B:

> "Strict liability is imposed in the interests of protecting controlled waters from pollution."

39. Causation as defined in that case is enough. So although the Port Authority is fully entitled to rely strongly on its relative lack of culpability -- and its position would be very much more vulnerable if it were unable so to rely -- it cannot reasonably hope to escape a very substantial financial penalty when its commission of an offence against the section has such serious results.

40. Secondly, Mr Leveson urges that the judge was wrong to deny the Port Authority full credit for its plea of guilty on the ground that the plea was inescapable and entered at a late stage of the proceedings. Mr Leveson points out that, as late as 9 December 1998, the prosecution were persisting in allegations of fault which the Port Authority have never accepted and do not accept; and that the prosecution case went through four drafts between December 1997 and October 1998. There were negotiations concerning the contents of the document which became "The Case under Section 85(1)" between July 1998 and December of that year when agreement was reached on the basis that the Port Authority would plead guilty on a basis of strict liability only. Mr Leveson makes the point that it was proper for the Port Authority to obtain expert evidence to displace accusations of fault made against the Port Authority which inevitably took time. He points out that there were

compelling reasons, having regard to the civil claims threatened against the Port Authority, why it should resist allegations of negligence and fault. He submits that it is simply unrealistic and unfair to criticise the Port Authority for failing to plead guilty before the basis of the plea could be agreed, and that even at that stage the prosecution was insisting on agreement to pay its costs instead of simply leaving that to the court.

41. Again we see very considerable force in this point. Even if a plea of guilty on a strict liability basis was inevitable (and that may have been doubtful until the House of Lords' decision in the Empress Car Co case in February 1998), such plea was not acceptable to the prosecution, as it would appear, until a month before the hearing. We do not think it fair to criticise the Port Authority because it was unwilling to admit to criminal liability on a basis which has not in the event been pursued against it. We see no reason why the Port Authority should not be entitled to full credit for its plea of guilty.

42. Thirdly, Mr Leveson urges that the status of the Port Authority as a public trust port was relevant to assessment of a proper fine, not because such bodies are subject to any lesser standard of duty or care in safety or environmental matters, but because the burden of paying the fine falls not on shareholders or directors or employees of the company but on either customers of the Port Authority, if the fine can be passed on in the form of increased dues, or the public on whose behalf the Port Authority carries out its operations.

43. It would be quite wrong to suggest -- and counsel for the Port Authority does not suggest -- that public bodies are immune from appropriate criminal penalties because they have no shareholders and the directors are not in receipt of handsome annual bonuses. The policy of Parliament would be frustrated if such a notion were to gain currency. But in fixing the amount of a fine it is proper for the judge to take all the facts of the case into account, as Mars-Jones J expressly did in the Shell case, as Scott Baker J did in the Great Western case, and as Wright J did in the British Railways Board case.The judge has to consider how any financial penalty will be paid. If a very substantial financial penalty will inhibit the proper performance by a statutory body of the public function that it has been set up to perform, that is not something to be disregarded. In the present case there is nothing to suggest that the cost of any fine can simply be recouped from customers by raising charges. Material before us (but not before the judge) shows that it could not. We do not consider that the judge gave adequate weight to this point.

44. Fourthly, Mr Leveson submits that the judge (perhaps through no fault of his own in the

absence of expert guidance) misunderstood the financial position of the company. We have the benefit of a detailed report by an eminent accountant who has modelled various predictions of the financial future of the Port Authority on the basis of varied assumptions. Needless to say, neither he nor anyone else can be sure how the future will turn out. We also have a detailed and authoritative review provided by him of the Port Authority's trading position. He advanced a series of observations made after inquiry into the Port Authority's financial position. He considers -- and we accept -- that predictions of the Port Authority's future must be very heavily influenced by the levels of its borrowing, themselves affected by the ability of the Port Authority to borrow, the willingness of lenders to lend, and of course the ability of the Port Authority to repay. It seems clear that revenue earned by the Port Authority is heavily dependent on the level of traffic generated by the two refineries in the port area, and that rationalisation in the oil industry could lead to closure or reduction of production and loss of revenue. 1999, as it appears, has been an unusually good year, but there is no guarantee that that level of business will continue. Most of the Port Authority's costs are fixed and are not dependent on the volume of business in the port. It seems highly questionable whether any loss of business could be made good by increased charges to other users without a risk of losing business. There is a limit to the extent to which the Port Authority can cut back on capital expenditure without jeopardising safety and operational requirements. It is already weakened by its payment of £825,000, plus its own costs, and the costs of the clean-up operation and the safety review. It has already realised assets of £606,000, and at the time of the report was expecting to raise £80,000 additionally, but those totals were seen as all that the Authority could raise.

45. Mr Macdonald, who has written these reports and presided over the modelling exercises, questions whether it is correct to speak, without more, of the Port Authority's proven track record. In recent years it has invested a greater amount in fixed assets, but its turnover has been relatively stagnant and its net profit and return on assets have fallen. He questions whether it is right to refer to the Port Authority as having a substantial holding in unencumbered fixed assets. It has raised, or is about to raise, the total of £686,000 already referred to. It has no investments. It has no further assets which it can sell to raise more funds without adversely affecting its operations and the performance of its statutory obligations. The value of its assets in the balance sheet may well not reflect their market value, even on the assumption that they are saleable or could be regarded as good security for a loan.

46. The judge referred to the Authority having £30m worth borrowing capacity. In fact its total borrowing capacity is £36m, but of that total only £6m may be used for non-capital purposes and

£30m may be raised for capital purposes only. The problem is to measure the Port Authority's ability to borrow and the lender's willingness to lend, and to calculate the effect of re-payment on the viability on the Port Authority's operations.

47. It is plain that, in order to meet the fine and because of the other expenses to which it has been put by this disaster, the Port Authority has cut back on expenditure and attempted to retrench. This has provoked a letter from the Pembrokeshire County Council dated 6 March 2000, and written with specific reference to this appeal. In the penultimate paragraph of that letter written by the Chief Executive of the County Council it is said:

> "The Council considers that Pembrokeshire has had to suffer twice from the impact of the Sea Empress. The economic damage and the associated negative publicity of the oil spill itself was a disaster, the fine and curtailment of investment plans by the Port Authority has worsened the situation at a time when the County needs additional support."

48. The Pembrokeshire County Council is not of course responsible for assessing the appropriate level of fine, but it does represent a body of citizens who might well have been expected to wish a severe penalty to be inflicted on a body regarded as responsible for violating its environment in this way.

49. We fully appreciate the judge's reasons for regarding this as a very serious case calling for a substantial penalty. He was rightly anxious to make clear that offences of this kind on this scale come high in the scale of seriousness. But we conclude that he did fall into error in failing to give effect to the agreed basis of the Port Authority's plea of guilty, in failing to give full credit for its plea of guilty, and in failing to consider the possible impact of a £4m fine on the Port Authority's ability to perform its public functions. We also conclude (although largely on the basis of material which was not before the judge) that he took much too rosy a view of the Port Authority's financial position and prospects.

50. We are satisfied that in the result the fine imposed was in all the circumstances manifestly excessive. That leaves us with the difficult task of substituting what we consider an appropriate fine. It must be at a level which recognises the seriousness of such disasters and the need to ensure the highest levels of vigilance. But it should not be such as to cripple the Port Authority's business and blight the economy of Pembrokeshire. We conclude that, in the light of all the circumstances now known to us, an appropriate fine is one of £750,000. We will grant a reasonable period of time

for payment to be made.

51. MR LEVESON: My Lord, following the submissions I made to your Lordship this morning, might I ask for time to pay in this way? £250,000 every three months, the first payment on 1 June 2000?

52. THE LORD CHIEF JUSTICE: Yes. You have no comment on that, I am sure, Mr Hill?

53. MR HILL: No, my Lord.

54. THE LORD CHIEF JUSTICE: Very well. We shall say £250,000 every three months, the first payment 1 June. Thank you very much. We are most grateful, Mr Hill, and Mr Leveson -- and also those who remained silent today -- for their assistance in this matter.

Monday 20 March 2000

55. THE LORD CHIEF JUSTICE: On Thursday, 16 March the court gave judgment on an appeal against sentence by the Milford Haven Port Authority. On that appeal the Port Authority achieved a considerable measure of success such as would have led to the making of a defendant's costs order had leading counsel asked for such an order. In the heat of the moment he omitted to do so. However, he has communicated with the court since the court rose on Thursday. We have indicated that there is no need for his attendance, or that of those instructing him or his junior and that the court will make such an order. We accordingly make a defendant's costs order.