

Safety, Health and Environment Sentencing Update

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What we will cover

- Overview of the Sentencing Guidelines for Health and Safety offences and Corporate Manslaughter
- Key sentencing decisions
- Sentencing workshop
- Practical tips to minimise risk of a prosecution

Penalties – Health and Safety offences and Corporate Manslaughter

- For any health and safety offence committed after 12 March 2015 there is no longer a £20,000 limit in the Magistrates' Court (now unlimited fine)
- Companies convicted of a health and safety offence or Corporate Manslaughter are subject to an unlimited fine
- For individuals convicted of a health and safety offence the penalties can include imprisonment (maximum of 2 years), community order, fines and disqualification orders

Overview of the Sentencing Guidelines

- Came into operation on 1 February 2016
- Largest overhaul of fines in health and safety arena since HSWA 1974
- Company turnover now the starting point
- Assessment of culpability and harm

**Health and Safety
Offences, Corporate
Manslaughter and
Food Safety and
Hygiene Offences
Definitive Guideline**

Culpability

Criteria for organisations and individuals:

- Organisations:
 - Very High – deliberate breach / flagrant disregard for the law
 - High – falling far short of the appropriate standard
 - Medium – falling short of the appropriate standard but not high or low
 - Low – did not fall far short of the appropriate standard
- Individuals:
 - Very High – intentional breach / flagrant disregard for the law
 - High – actual foresight of or, wilful blindness to risk
 - Medium – reasonable care not taken
 - Low – offence committed with little fault

Harm

Seriousness of harm risked			
	Level A <ul style="list-style-type: none"> • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Significantly reduced life expectancy 	Level B <ul style="list-style-type: none"> • Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition 	Level C <ul style="list-style-type: none"> • All other cases not falling within Level A or Level B
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
Medium likelihood of harm	Harm category 2	Harm category 3	Harm category 4
Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

Turnover

Brackets:

- Micro under £2m
- Small £2m - £10m
- Medium £10m - £50m
- Large over £50m
- Very Large no guidance but “*greatly exceeds the threshold for large organisations*”

Example – Company with a turnover of £50m convicted of a health and safety offence which falls into Harm Category 1

Culpability	Starting Point	Category range
Very High	£4m	£2.6m - £10m
High	£2.4m	£1.5m - £6m
Medium	£1.3m	£800,000 - £3.25m
Low	£300,000	£180,000 - £700,000

Aggravating Features

- Previous convictions
- Cost-cutting at the expense of safety
- Deliberate concealment of illegal nature of activity
- Breach of any court order
- Obstruction of justice
- Poor health and safety record
- Falsification of documentation or licences
- Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities
- Targeting vulnerable victims

Mitigating Features

- No previous convictions or no relevant / recent convictions
- Evidence of steps taken voluntarily to remedy problem
- High level of co-operation with the investigation, beyond that which will always be expected
- Good health and safety record
- Effective health and safety procedures in place
- Self-reporting, co-operation and acceptance of responsibility

Other Factors

- Is the proposed fine based on turnover proportionate to the overall means of the offender
- Profitability
- Fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders of the need to comply with health and safety legislation**
- Impact of fine on staff, service users and local economy
- Reduction for guilty plea (typically one third if guilty plea entered at earliest available opportunity)

Sentencing of individuals: example

Culpability	Harm	Starting Point	Category range
Very High	Category 1	18 months' custody	1 – 2 year's custody
High	Category 1	1 year's custody	26 weeks' – 18 months custody
Medium	Category 1	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Low	Category 1	Band F fine	Band E fine or medium level community order – 26 weeks' custody

Harm and Culpability : Corporate Manslaughter

- Every incident will involve death and corporate fault at a high level
- Offence categories – A and B seriousness depending on:
 - How foreseeable was the serious injury?
 - How far short of the appropriate standard did the offender fall?
 - How common is this kind of breach in the organisation?
 - Was there more than one death, risk of further deaths and serious personal injury in addition to death?
- Lowest starting point is £300,000 (micro) and the highest is £7.5 million (large) which is a long way from the previous guidance of £500,000

Notable Fines Since 1st February 2016

- Merlin Attractions Operations - £5 million
- ConocoPhillips - £3 million
- Cristal Pigment UK Limited - £3 million
- Balfour Beatty - £2.6 million
- Decco Ltd - £2.2 million
- Wilco Retail - £2.2 million
- Warburtons - £2 million
- Travis Perkins - £2 million
- Foodles Production (UK) Ltd - £1.6 million
- Embrace All Care Limited - £1.5 million
- Kier MG Ltd (formerly May Gurney Ltd) - £1.5 million
- KFC - £950,000
- Jaguar Land Rover - £900,000

Health and Safety Sentencing update

Merlin Attractions Operations - Alton Towers

- Largest health and safety fine imposed to date
- Engineers overrode safety feature and allowed operator to permit passenger train to collide with an empty train
- 16 passengers trapped and injured hanging at an angle of 45 degrees 20 feet high
- 17 minutes before a 999 call
- 5 hours to release and rescue
- CCTV cameras in control room would have shown a stationary train



The Charge

- Breach of s.3 - The Health and Safety at Work Act 1974
- Failed to conduct its undertaking in such a way as to ensure, so far as was reasonably practicable, that the visitors to the theme park were not exposed to materials risks to their health and safety

The Failings

- What should have been in place (Prosecution Expert):
 - A suitable and sufficient risk assessment
 - A structured and effective safe system of work to deal with faults on the ride
 - Effective provision to its staff of health and safety information, training and supervision (dealing with a zone stop fault)
 - Effective system to deal with potential impact of wind speed

The Sentencing Exercise

Key points:

- The offence is concerned primarily with punishing the criminality for **exposure to a material risk**
- Not an attempt to put a monetary value on what has happened to them or their injuries
- Seriousness of the offence is judged by assessing **culpability and harm**

Culpability

- Fell far short of the appropriate standard by:
 1. Failing to put in place measures that are recognised standards in the industry
 2. Allowing breaches to subsist over a long period of time

Judge's assessment = **HIGH CULPABILITY**

Harm – First Stage

- Public exposed to serious risk of one train colliding with another
- Those injured fortunate not to have been killed
- Seriousness of harm risk = LEVEL A (death or serious physical impairment with lifelong dependency on others)
- Likelihood of harm arising (Prosecution = high, Defence = low)
- Judge = HIGH
- Level A + High likelihood = **HARM CATEGORY 1**

Harm – Second Stage

- Did the offence expose a number of workers or members of the public to the risk of harm? **Yes**
- Was the offence a significant cause of actual harm? **Yes**
- If one or both of these factors apply the court must consider either moving up a harm category or substantially moving up within the range
- Judge decided to move substantially up the category range

Merlin Attractions Operations - Alton Towers

- Turnover over £50m = LARGE COMPANY
- Starting Point: £2,400,000
- Category Range: £1,500,000 - £6,000,000
- Despite turnover of nearly £400m a proportionate fine could be achieved within the large category
- Aggravating Factors:
 - Previous conviction following a fatality
 - Lack of proper emergency access to the accident site

Merlin Attractions Operations - Alton Towers

- Mitigation:
 - Extensive steps to remedy the problem
 - Exceptional co-operation with the HSE
 - Good health and safety record (generally)
 - Full credit for guilty plea
- **But** “tainted” by willingness to blame its employees in earlier acceptance of responsibility
- Economic impact (remains prosperous and generous share options for directors)
- Starting point of £7.5 million reduced by one third for early guilty plea
- **£5 million fine**
- **Prosecution costs £69,955.40**

Health and Safety Sentencing update

Foodles Production (UK) Ltd

- Harrison Ford's leg crushed by door in the Millennium Falcon
- Turnover was over £50m = large company
- Disney's turnover was not taken into account
- High culpability/harm category 1
- Judge started at £2.5m then gave 1/3 credit for an early guilty plea to reach £1.6m
- Costs £20,861.22



Health and Safety Sentencing update

Cristal Pigment UK Limited

- Turnover 2015 - £197,235,000
- A worker was killed when he was overcome by a toxic vapour cloud
- Another worker survived but has irreversible lung damage
- The company had deviated from the normal operating procedures which led to a build up of Titanium Tetrachloride – a highly volatile compound
- The cloud was then blown by the wind over the river Humber and closed the shipping lanes for several hours
- Over 16 months after this incident there was another uncontrolled release of a toxic vapour
- Guilty plea to breaching section 2(1) HSWA and COMAH 1999
- Fined £1.8m and £600,000 for the first incident
- Fined £600,000 for the second incident
- Costs of £37,868



No Actual Harm - Walltopia



- A member of the public reported witnessing unsafe practices during the construction of an adventure course in Derby
- Work at height was being carried out from a pallet on the forks of a telehandler
- The HSE investigated and found that work was taking place 11 metres off the ground without the use of any means to prevent two workers falling. Additionally the workers were accessing the roof by climbing from the basket of a cherry picker
- The company was fined **£500,000** after pleading guilty to breaching Regulation 4(1) of the Work at Height Regulations 2005
- This case highlights that there does not have to be actual harm – it is the risk of harm that is taken into account under the new guidelines

No Actual Harm– G4S

- Legionella failure
- Worker fell ill; unable to prove contracted disease from site
- *“Staff had received inadequate training and there were no up to date policies or suitable and sufficient risk assessments in place to safely operate or manage the building’s water systems”*
- Very high culpability (flagrant disregard of the law)
- Harm risked Level A (Legionella fatal in 12% of cases)
- Low Likelihood of Harm = Harm Category 3
- Turnover in excess of £50m = Large Company
- Fined £1.8 million and costs of £34,000



Prosecution of Individuals

- Increase in HSE prosecutions of directors and individuals following serious workplace incidents
- 15 directors/managers prosecuted in 2014/15.
- 46 directors/managers prosecuted in 2015/16.
- Over 25 custodial sentences since February 2016



Sentencing Exercise: You be the Judge!



Case Study 1 – May-tenants Ltd

Summary of the facts:

- In 2015, Mr Jones an experienced tyre fitter, was attempting to remove split rim wheels from a customer's vehicle
- As he undid the last bolt on the outer wheel, there was an explosive release of pressure causing the outer wheel to hit him with significant force
- He sustained serious injuries

Case Study 1 – May-tenants Ltd

Summary of prosecution case:

- The risk assessment was not adequate
- There was a lack of health and safety training of managers and fitters
- No proper record of what training and experience the tyre fitters had in respect of split rims
- There was no structured training programme
- There was a failure to provide a safe system and this was a systematic failure within the Company

Case Study 1 – May-tenants Ltd

Summary of Defence – Basis of Plea:

- Although it had in place a best practice document this should have made it clear both tyre assemblies should be fully deflated prior to removal from the vehicle
- It failed to ensure its tyre fitters were competent to work on split rim wheels, and failed adequately to monitor the way they worked on split rim wheels

Case Study 1 – May-tenants Ltd

- Company pleaded guilty to a breach of s.2(1) of the Health and Safety at Work Act 1974

You be the Judge!

- What do you think?
 - Category of Company
 - Culpability
 - Harm category
 - Aggravating and Mitigating factors
 - Credit for guilty plea
 - Fine

Sentencing Outcome

Culpability:

- Medium
- Not a serious and systemic failing within the Company
- It was not a minor or isolated risk

Harm:

- Level A – there was a risk of death
- Medium Likelihood of harm
- Harm category 2

Sentencing Outcome continued ...

- Turnover £18 million
- Sentencing range £100,000 to £600,000
- Starting point £250,000
- Good health and safety record
- Attempts were made to implement effective systems
- Reduced starting point to £200,000
- Discount of one third for an early guilty plea
- Fine = £134,000

Case Study 2 – Mr Petey and Ray

Summary of the facts:

- Mr Petey, Director of Petey Properties Ltd engaged a contractor, Ray Roofer to carry out repairs to the roof of one of the company's buildings
- Mr Petey and Ray discussed the job of work and it was agreed that access to the roof would be via an existing scaffold tower and work on already existing wooden boards left by earlier contractors
- Mr Petey left the site and Ray then proceeded to work on the roof with assistance from a labourer, Lenny
- Mr Petey was not aware that Lenny would be assisting Ray on the roof
- During the course of the day, Lenny fell through a part of the fragile roof on to a lower platform (height of 3 metres) and sustained life threatening injuries

Case Study 2 – Mr Petey and Ray

HSE prosecuted Mr Petey for a breach of s.37 HSWA 1974 on the basis that:

- Personally chose Ray to repair the roof
- Did not make adequate enquiries as to Ray's competency
- Did not ask to see RAMS
- Did not undertake any meaningful supervision of the work and left site before it had commenced

Case Study 2 – Mr Petey and Ray

- Mr Petey pleaded guilty at the first hearing
- He is a man of previous good character

You be the Judge!

- What do you think?
 - Culpability
 - Harm
 - Was the breach a significant cause of actual harm?
 - Aggravating and mitigating factors
 - Sentence
 - If custodial should it be suspended?

Sentencing Outcome

- Medium culpability
- Level A Harm
- High Likelihood of Level A Harm
- Harm Category 1
- Significant cause of harm (albeit not the sole cause)
- Aggravated because more than one person exposed to harm
- Previous good character
- 6 months custody reduced to 4 months (suspended for 12 months)
- Prosecution costs - £8,000

Conclusions

- Significantly higher fines
- Greater risk of custody for individuals
- More contentious sentencing hearings
- More prosecutions even if no actual harm
- In depth consideration of factors when giving evidence
- Up-to-date financial information is vital – profitability is a relevant factor for the Court to consider
- Increased use of experts to consider harm, culpability and accounts
- Increased defence and prosecution costs

So how can we help?

- A **dedicated** national team which provides a mix of knowledge, experience, and local presence to ensure that you receive the appropriate **support**
- The locations of our regional offices mean that we can provide **essential early advice** and attendance when required day and night
- Our **extensive experience** ensures we can support you in dealing with any health and safety, environmental and regulatory incident or challenge
- Our lawyers are **responsive** to ensure you obtain advice when it suits you
- We provide **pragmatic** advice and commercial **solutions** that work for your business

Managing Risk : Working Together

So how can we help?

- 24 Hour Response
 - Telephone access to specialist lawyers and experts for support in the immediate aftermath of an incident
 - National offices so we can reach you whenever you need us

So how can we help?

- Legal Privilege
 - Your right to confidential communications with your lawyers
 - Enables you to refuse to disclose certain confidential, legal documents to third parties including the court, tribunals, enforcement agencies and regulatory bodies
 - Important to ensure lawyers instructed as soon as possible so we can ask you to prepare an internal investigation subject to legal privilege
 - All correspondence must be marked “**privileged and confidential**”

Timing is extremely important as any document produced before you contact us may be disclosable upon request

So how can we help?

- Enforcement Notices
 - Prohibition or Improvement Notices
 - Can be appealed – 21 days from the date of the notice or else must be complied with within 21 days
 - Appealing improvement notice suspends the appeal – not the same for a prohibition notice (although a court can order the suspension)
 - Any appeals are heard before the Employment Tribunal
 - Tactical appeals – gives some breathing space to comply with the improvements as 21 days may not be enough time

So how can we help?

- Fee for Intervention
 - HSE can charge those in 'material breach' of health and safety law £129 per hour during their investigation of the breach
 - Invoices are to be paid within 30 days of the date of the invoice
 - Invoices can be challenged!
 - You can challenge both the amount and whether there was a 'material breach'
 - Initial step is to query the invoice – **must be done within 21 days of the date of the invoice** (the HSE do not charge for the query stage and if successful any monies paid will be refunded)
 - If the query is not upheld you can dispute the invoice – the HSE will charge £129 per hour for this and if unsuccessful you will be liable for the original invoice and the additional time incurred
 - Careful consideration as to whether or not to pay – does payment amount to an acceptance of the breach?

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