

Impact of New Health and Safety Sentencing Guidelines

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New sentencing guidelines for health and safety offences, corporate manslaughter, food safety and hygiene offences came into force on 1 February 2016. The guidelines have statutory force and apply to cases sentenced after 1 February 2016 regardless of the date of the offence/s. Every court must follow the guidelines unless satisfied that it would be contrary to the interests of justice to do so.

The previous sentencing guidelines for corporate manslaughter and health and safety offences only dealt with offences resulting in death. The new sentencing guidelines are much wider and look at risk. They are having a significant impact on the sentencing of organisations and individuals (such as directors, sole traders, partners and employees) with tougher penalties.

Offence category and culpability/harm

The guidelines refer to a number of factors that the courts should take into account before deciding on the appropriate level of sentence. By way of example, sentencing courts will have to determine the category of an offence based on the level of culpability and the level of harm.

Culpability relates to the extent to which an offender failed to meet the standards required by law, for example, the extent to which an offender acted deliberately, recklessly or negligently. For organisations, the courts are likely to consider factors such as whether failings were systemic throughout the organisation as well as any short cuts taken to save money.

Examples of high culpability include:

- A deliberate breach of or flagrant disregard for the law.
- Failing to put in place measures that are recognised standards in the relevant industry.
- Ignoring concerns raised by employees or others.
- Failing to make appropriate changes following prior incidents.
- Breaches subsisting over a long period of time.
- Actual foresight or wilful blindness to the risk of offending but the risk nevertheless being taken.

Examples of medium culpability include:

- Having relevant systems in place but which were not sufficiently adhered to or implemented.
- An act or omission which a person exercising reasonable care would not commit.

Examples of low culpability include:

- Minor failings occurring as an isolated incident.
- Significant efforts being made to address risk but being inadequate on a particular occasion.
- There being no warning or circumstance indicating a risk to health and safety.

Harm is determined by considering the level of risk and the seriousness of any injury resulting from an offence. An important aspect of the new guidelines is that the courts are expected to consider the "seriousness of the harm risked" and the level of risk of injury and not the just the harm or injury actually caused. This is because health and safety offences focus on failures to manage risk to health and safety and do not require proof that offences caused any actual harm. The offence is in creating a risk of harm. This will therefore narrow the previous distinction between the level of fines for offences causing death and very serious injury and those offences causing little or no actual harm.

The new guidelines confirm that the actions of victims and injured parties are unlikely to be considered as important for sentencing purposes. Offenders are required to protect workers or others who may be neglectful of their own safety in a way which is reasonably foreseeable.

Importance of turnover

For the purposes of deciding the appropriate level of fine, the guidelines actively encourage the courts to focus on the size of an organisation and in particular, the turnover of organisations or if sentencing an individual, the financial circumstances of that individual. The courts will make that consideration before reaching a starting point for a fine and deciding on the appropriate level of fine. The guidelines specifically distinguish between organisations according to their size and turnover and are defined as follows:

- Micro companies with a turnover of no more than £2 million.
- Small companies with a turnover of between £2 million and £10 million.
- Medium companies with a turnover of between £10 million and £50 million.
- Large companies with a turnover of £50 million and over.

The sentencing guidelines confirm that for very large organisations, fines may exceed the sentencing guidelines in order to achieve a proportionate sentence.

Financial Information

Organisations are expected to provide financial accounts for the last three financial years to allow the court to make an accurate assessment of its financial status. If the organisation does not provide this information or if the court is not satisfied that it has been given sufficiently reliable information, the guidelines confirm that the court is entitled to draw reasonable inferences about the offender's means from any evidence that it has heard and which may include an inference that the offender can pay any fine. Normally only information relating to the organisation before the court will be relevant unless in exceptional circumstances, it is demonstrated to the court that the resources of a linked organisation are also available and can properly be taken into account.

The guidelines also confirm that the court should take into account directors remuneration and assets as disclosed on an organisation's balance sheet. In relation to individuals, if necessary, the court may compel the disclosure of an individual's financial circumstances (section 162 of the Criminal Justice Act 2003).

Adjusting the starting point fine

The court seek to determine the "starting point" fine and then consider whether there should be an upward or downward adjustment by looking at aggravating and mitigating features. Aggravating features can include:

- Relevant recent convictions which are likely to result in a significant upward adjustment.
- Cost cutting at the expense of safety.
- Deliberate concealment of the illegal nature of an activity.
- A poor health and safety record.
- A deliberate failure to obtain or comply with a relevant licence in order to avoid scrutiny from an authority.

Mitigating features can include:

- No previous convictions or no relevant/recent convictions.
- A good health and safety record.
- Evidence of steps taken voluntarily to remedy a problem.
- A high level of co-operation with an investigation going over and beyond that which is expected.
- Other assistance to the prosecution.
- Effective health and safety procedures in place.
- Timely guilty plea.

Level of fines

We need to see more sentences passed to better assess the change in approach by the courts but already there have been fines of £3 million for an offshore explosion which caused no injuries and £2.6 million after a windfarm trench collapse fatality.

The previous sentencing guidelines that dealt with health and safety offences resulting in death stated that for such cases, fines should seldom be less than £100,000 and this sum was frequently seen as a starting point. Medium and large companies would typically receive fines of between £200,000 and £400,000 after a guilty plea in cases involving fatal accidents.

The new sentencing guidelines give rise to potentially much higher fines even for cases not involving a death given that the new guidelines provide for a range of fines up to £10 million with a starting point of £4 million against large organisations for most health and safety offences not involving corporate manslaughter. For medium companies, the guidelines provide for a range of fines of up to £4 million with a starting point of £1.6 million. For small companies, the guidelines provide for a range of fines of up to £1.6 million with a starting point of £450,000. The point within the range that a case falls is largely a matter for the discretion of the court.

The previous sentencing guidelines that dealt with corporate manslaughter stated that for such offences, fines should seldom be less than £500,000. Of the first 19 prosecution cases, the average fine was less than half that figure at approximately £235,000. However, again the new sentencing guidelines give rise to potentially much higher fines and provide for a range of fines of up to £20 million with a starting point of £7.5 million for large organisations given that such cases involve a death and corporate fault at a higher level. For medium companies, the guidelines provide for a range of fines of up to £7.5 million with a starting point of £3 million. For small companies, the guidelines provide for a range of fines of up to £2.8 million with a starting point of £800,000.

The table below refers to seven cases which were sentenced under the previous sentencing guidelines. Taking into account the size of the company and their turnover, we can determine the likely range of fines if the same company were to be sentenced under the new guidelines. By way of example, the case of Lion Steel Limited involved a fatal accident during work at height where an employee of the company died after suffering fatal injuries when he fell through a fragile roof at its site in Cheshire in May 2008. The company was convicted in 2012 and was fined the sum of £480,000. At the time of sentence, the company had a turnover of £10 million and would therefore have been a medium sized company under the new guidelines. That means if the company were to be sentenced for the same offence now, it could have faced a fine of between £1.2 million and £7.5 million.

Name of Company	Date of Conviction	Fine	Turnover	Company Size	New Range
Cotswold Geotechnical Holdings Ltd	2011	£385,000	£333,425	Micro	£180,000 - £800,000
JMW Farms Ltd	2012	£187,500	£22,254,857	Medium	£1.2m - £7.5m
Lion Steel Ltd	2012	£480,000	£10,000,000	Medium	£1.2m - £7.5m
Mobile Sweepers (Reading) Ltd	2014	£8,000	£205,058	Micro	£180,000 - £800,000
Stercycle (Rotherham) Ltd	2014	£500,000	£7,047,000	Small	£350,000 - £2.8m
Huntley Mount Engineering	2015	£150,000	£229,518	Micro	£180,000 - £800,000
CAV Aerospace Ltd	2015	£600,000	£73,531,035	Large	£2.4m - £10m

The potential for significantly higher fines is clear and the message in the guidelines is that fines must be sufficiently substantial to have a real economic impact on organisations in order that management and shareholders appreciate the need to comply with health and safety legislation and achieve a safe environment for workers and members of the public. The guidelines state that whether a fine will have the effect of putting an organisation out of business will be relevant and go as far as to state that in some bad cases, this may be an acceptable consequence.

Given that the sentencing guidelines encourage the courts to place the finances of an organisation or individual under such close scrutiny, there are fears that this will lead to organisations of different sizes and turnover and individuals of different financial circumstances receiving significantly different fines for very similar offences.

Individuals

Individuals including directors, sole traders, partners and employees that commit serious offences with high culpability can expect custodial sentences, particularly if the court forms the view that profit was a motivating factor in the offence. The new guidelines provide for custodial sentences with a range of 26 weeks right up to 2 years. However, if an individual is charged with gross negligence manslaughter rather than health and safety offences, there is no such cap on the maximum custodial sentence that can be imposed.

In February 2016, a care home company Sherwood Rise Limited was convicted of corporate manslaughter in respect of a resident who died from pneumonia following neglect at a home in Nottingham in November

2012. Two company directors were both sentenced to prison. One director received a custodial sentence of three years and two months and he was also disqualified from being a company director for eight years. The other director received a suspended custodial sentence of one year and was disqualified from being a company director for five years.

In addition to custodial sentences, the courts also have the power to impose fines and community orders against individuals. In relation to directors, the courts have the power to disqualify an offender from being a director of a company for up to 15 years if the case is heard before a crown court and five years if the case is heard before a magistrates' court.

Sentencing Tracker

BLM has produced a sentencing tracker since the new guidelines were introduced which you can request from either author. It sets out the sentences imposed and breaks the cases down into sectors.

Impact of guidelines

The guidelines significantly increase the potential level of fines with fines of an unprecedented level being reserved for corporate offenders with high turnovers. Custodial sentences for individuals are becoming more common place.

Whilst the guidelines suggest that the courts should consider the risk created by an offence and not the actual harm suffered, the reality appears to be that the injury suffered goes a long way to determining the overall harm category.

For offences that involve a risk of death, life shortening illness or permanent injury the starting point for individuals is generally a custodial sentence. The maximum sentence is two years. However, sentences following conviction for gross negligence manslaughter are likely to be considerably more than two years.

Given the significant variation in the starting point of fines (and custody threshold for individuals) between different offence categories, and the wide range within individual bands, the real battle ground is becoming the negotiations regarding the basis of plea and agreeing the appropriate offence category. Experience tells us that regulators, whether that be the Health & Safety Executive, local authority or otherwise, pitch the seriousness of an offence high – for example it is regularly submitted that a defendant fell 'far' short of the standard required and that breaches existed over time rather than being isolated. Negotiations will, therefore, take on greater significance and it is foreseen that the unwillingness of parties to compromise will result in more cases going to trial or a *Newton* hearing (which is a trial of a specific issue).

Defendants need to provide cogent evidence to support their negotiations/submissions on levels of culpability/harm and perhaps accountancy evidence where there are issues as to the actual size of the organisation/means of the defendant. In addition, credible evidence is needed to support the mitigating features and early intervention to gather such evidence is often crucial.

Practical advice

One purpose of the new guidelines is to try and ensure that businesses properly manage health and safety. That means proper investment in achieving health and safety compliance with a view to avoiding investigations and prosecutions. Measures that can be taken include:

- Health and safety being discussed at board level to ensure that health and safety management is a top priority;
- Reviewing policies, procedures and relevant documents such as risk assessments and assessing any immediate areas for improvement;
- Ensuring that policies, procedures and the measures contained in documents such as risk assessments and systems of work are implemented;
- Ensuring that employees are aware of the above policies, procedures and measures through relevant instructions and training;
- Being proactive with supervision and audits to monitor employees to ensure that they are following instructions and training;
- Responding to any near miss incidents and learning from them;
- Having a policy for crisis management which provides guidance by detailing, for example, the procedures to be followed in the event of an accident taking place;
- Reviewing insurance policies to ensure that there is adequate cover for regulatory investigations/prosecutions.

The costs of poor health and safety management are many but have been brought into sharp focus by the introduction of these new guidelines and the potentially severe penalties that can be imposed. Proactive and effective management of health and safety will go a long way to avoiding accidents, subsequent prosecutions and where an incident does occur, provide powerful evidence to help mitigate the impact of the guidelines.

The authors:



Sarbjit Bisla
Solicitor

T: +44 (0)207 865 8468

E: sarbjit.bisla@blmlaw.com

Sarbjit is a solicitor in the regulatory team. He has dealt with several health and safety investigation and prosecution cases brought by authorities including the CPS, HSE and EHO. Sarbjit's experience includes representing clients such as limited companies, directors, partners, sole traders and employees at regulatory interviews and any subsequent prosecutions before the magistrates courts and crown courts. Sarbjit regularly undertakes advocacy at magistrates court hearings and inquests. Significant reported cases include *R v Electric Gate Services* where the defendant was acquitted after a part heard trial, Court of Appeal hearing and a retrial and assisting in the corporate manslaughter cases of *R v Linley Developments* (2015) and *R v Princes Sporting Club* (2013). Sarbjit is ranked as an individual for health and safety work (Legal 500, 2015 edition) - quoted as "developing a following in this field".



Christopher Newton,

Partner

T: +44 (0)207 865 3374

E: christopher.newton@blmlaw.com

Chris is a partner in the regulatory team. He has extensive experience of managing health and safety investigations from day one and dealing with the HSE/CPS/CQC/EHO. He is regularly instructed on high profile claims including gross negligent manslaughter/corporate manslaughter. Chris represents and advises clients at regulatory interviews and undertakes the advocacy at Magistrates' Court hearings and Inquests. He is instructed to handle both criminal and civil proceedings and regularly presents to his clients on all aspects of health and safety law. Significant reported cases include *R v Malden Plumbing* (2012), where the defendant was acquitted after a four month Old Bailey trial, *R v John and James Binning* (2014) where the CPS discontinued the gross negligence manslaughter indictments and paid James' costs for an "improper prosecution" and the recent corporate manslaughter case of *R v Linley Developments* (2015). Chris is ranked in Chambers and Partners 2016 which notes that he comes highly recommended for his work advising individuals and organisations caught up in health and safety-related investigations and prosecutions. One interviewee remarks: "He is fantastic with clients and very much has his finger on the button."