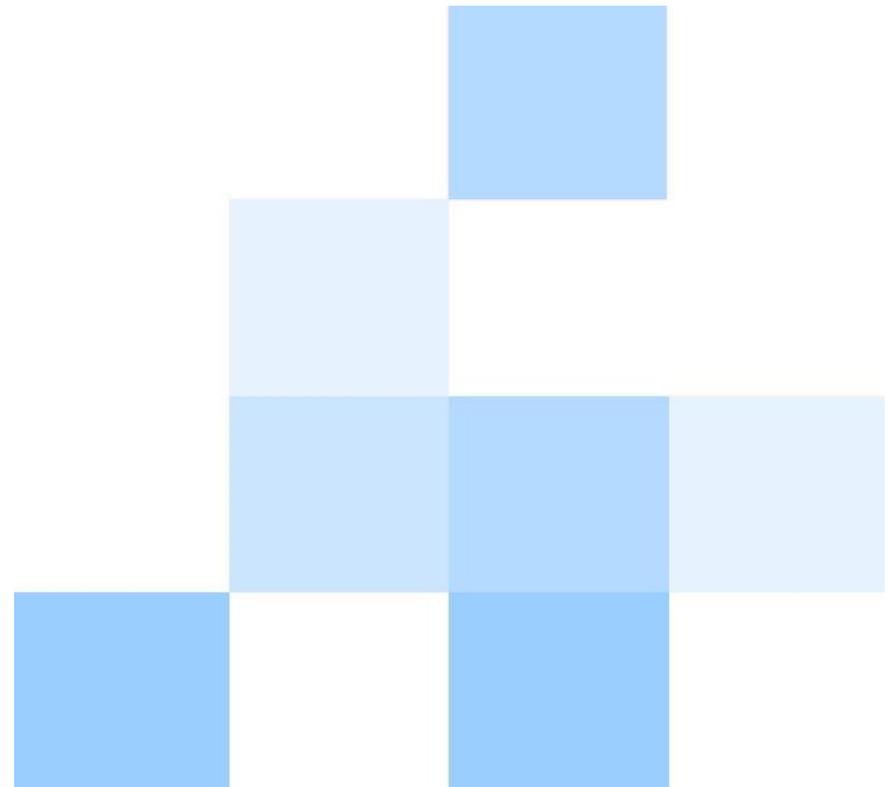


Sentencing Update

Sally Roff
Partner

 @DACB_SafetyTeam



The Definitive Guideline – Introduction

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

- The Guideline which came into force in February 2016 has resulted in a significant rise in fines for most sizes of organisations.
- The objective of the guidelines is to be “sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation’.
- In the 12 months before the Guideline came into force = 3 fines in excess of £1 m.
- In the first year after the introduction of the Guideline = 19 fines over £1m (including four fines over £3m).
- The highest fine to date remains the £5m fine imposed in 2016 on Merlin Attractions Operations following the "Smiler" rollercoaster crash at Alton Towers Theme Park.

The Definitive Guideline – A New Stepped Approach to Sentencing

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

- Culpability – very high/high/medium/low
- Harm Category – Risk and likelihood of harm
- Turnover of Company
- Aggravating and mitigating factors
- Is the fine proportionate to Company's overall means?
- Impact on employment of staff, customers, local economy (but not shareholders or directors)

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*”**

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 early guilty plea

Notable Fines Since 1st February 2016

- Tesco Stores Limited - £5 million
- Merlin Attractions Operations - £5 million
- ConocoPhillips - £3 million
- Cristal Pigment UK Limited - £3 million
- Balfour Beatty - £2.6 million
- Iceland Foods - £2.5 million
- Decco Ltd - £2.2 million
- Wilko Retail - £2.2 million
- Bakkavor Foods Limited - £2 million
- Warburtons - £2 million
- Travis Perkins - £2 million
- Tata Steel - £2 million
- Kier MG Ltd (formerly May Gurney Ltd) - £1.5 million
- Nottinghamshire County Council - £1 million
- KFC - £950,000
- Jaguar Land Rover - £900,000



Claxton Engineering Services Ltd / Encompass Project Management Ltd and David Groucott

- January 2011 - four men were constructing a large steel structure weighing several tonnes which collapsed on top of the men causing their deaths.
- The men worked for Hazegood Construction Ltd, which was operating as a contractor for Encompass Project Management Ltd.
- The HSE found serious flaws in the planning, management and monitoring of the project on the part of Claxton as well as Encompass and its director David Groucott.
- Claxton pleaded guilty to a breach of Regulation 9 of CDM 2007 and was fined £500,000 with costs of £100,000 (turnover was £27m in 2014/15).
- Encompass pleaded guilty to a breach of Section 3 of the HSWA 1974 and was fined £200,000 with costs of £50,000.
- David Groucott pleaded guilty to a breach of Section 37 HSWA 1974 and was sentenced to 7 ½ month's imprisonment suspended for 2 years and ordered to complete 200 hours of unpaid community work and costs of £7,500.

Wilko Retail

- A 1.7 metre roll cage used to move stock around the store toppled over a ledge that was created when the lift stopped at a slightly lower level than the floor.
- It fell onto a part time employee who was trying to manoeuvre it out of the doors, crushing her beneath hundreds of litres of paint tins. She sustained severe spinal injuries and now has to use a wheelchair.
- Prosecuted on the basis that the cage was incorrectly loaded, inadequate supervision and insufficient training on how to use the metal cages safely.
- The store had also failed to tailor national generic risk assessments to local requirements and the company had been warned by staff and engineers undertaking LOLER examinations about the lift not levelling properly.
- The company was fined £2.2 million.

KFC

- **KFC was fined earlier this year for two separate incidents.**
- **First incident - 16 year old boy sustained secondary degree burns when hot gravy spilled over his hands and arms as he removed it from a microwave.**
- **Second incident - another worker sustained third degree burns as she removed a gravy tub from the microwave.**
- **The workers did not use protective gloves in either incident.**
- **The Judge found that the burns occurred as a result of inadequate supervision and inadequate provision of safety equipment such as gauntlets.**
- **The company pleaded guilty to two breaches of Section 2 of the Health & Safety at Work Act 1974 and received fines of £950,000 for the first incident and £150,000 for the second incident.**

Go Ahead London

- **May 2011 - a worker was using a ladder to access the top of a fuel tank when he fell almost three metres and sustained fatal head injuries.**
- **The HSE found that the company had failed to manage their contractors effectively to ensure that they conducted work safely.**
- **The company (turnover of £7.6m) pleaded guilty to a breach of Section 3 of the Health & Safety at Work Act 1974 and was fined £600,000 together with costs of approximately £78,000.**

Iceland Foods (1)

- A contractor was on site to replace filters within an air-conditioning unit located on a plant platform above a suspended ceiling.
- The contractor fell three metres from the platform and through the suspended ceiling and died.
- Prosecution argued that the company had been warned about the area previously and had failed to carry out risk assessments.
- Iceland argued that it had intended for a guard rail to be installed around the plant platform and had paid for one during refurbishment in June 2013.
- As part of its defence – entitled to rely on specialist contractors who carried out the work on the platform to identify the missing handrail.
- 3 week trial
- The company was convicted for breaches of sections 2 and 3 HSWA 1974.

Iceland Foods (2)

- **Sentencing Judge:**
 - **Medium culpability bracket**
 - **High likelihood of level A harm = Harm Category 1.**
 - **The company in terms of its turnover (£2.7 billion) was a very large company but for the purposes of assessing a fine under the Sentencing Guideline it stayed within the large business category.**
 - **The starting point was £1.3 million.**
 - **Fine of £1.25 million for each breach of HSWA resulting in a total fine of £2.5 million.**
 - **The total prosecution costs paid were £65,000.**

London Borough of Havering Council (1)

- **March 2015 - employee of the Council sustained a serious laceration just above his left knee whilst using a petrol driven cut off saw to cut trees and branches. The blade became stuck and as he tried to pull it free the blade ran across the top of his left knee.**
- **The blade that had been fitted was inappropriate and there had been no risk assessment for using the saw and blade.**
- **The employee had never been provided with the operating manuals for the machine he was using and had not been given any safety equipment.**
- **The Council pleaded guilty to breaches of Regulations 4 (2) and 4 (3) of the Provision and Use of Work Equipment Regulations 1998 and received a fine of £500,000 together with costs of £8,240.**

London Borough of Havering Council (2)

- **The Council appealed the fine.**
- **Argued that it was manifestly excessive on the basis that the Sentencing Court had not made a sufficiently large reduction to soften the impact that it would have on services to residents.**
- **Council argued that there should have been a 50% reduction in the fine after mitigating factors and discount for early guilty plea.**
- **Arguments rejected by the Appeal Court who said that the guideline had been correctly applied and that there was no authority for the suggestion that a substantial reduction was one of at least 50%.**

Tata Steel (1)

- **Two incidents:**
 - **September 2014 – employee lost the middle and ring fingers on his left hand while trying to clear a blockage on machinery at the company’s site in Corby, Northamptonshire.**
 - **February 2015 – employee lost part of his little finger when his hand was caught in a lathe at the same plant.**
- **The two incidents were investigated by the HSE, which found the guarding on the two machines was inadequate.**
- **The company pleaded guilty to two breaches of s.2 HSWA 1974.**
- **After assessing culpability and harm category, the Judge has to reach a starting point based on the company’s annual turnover before adjusting for aggravating and mitigating factors.**
- **The largest category is for companies with a turnover of £50m or more.**

Tata Steel (2)

- For ‘Very Large’ Organisations, the Guidelines states:
“Where an offending organisation’s turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence”
- The Guideline also states:
“The fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation”

Tata Steel (3)

- **The Sentencing Judge:**
 - **High Culpability for 2nd offence because of prior incident and prior service of Improvement Notice.**
 - **Level B Harm risk and high likelihood of harm = Harm Category 2.**
 - **Very large organisation with turnover of £4 billion.**
 - **Starting point for a large organisation would be £1.1m with a range of £550,000 to £2.9m.**
 - **Judge took starting point of £2.4m by moving up to Harm Category 1 to reflect turnover.**
 - **Then increased to £2.75m to bring home the message to management and shareholders.**
 - **Declined to adjust downwards to reflect losses borne by parent company.**

Tata Steel (4)

- After a reduction for early guilty plea the fine for the second offence was £1.8m.
- Fine of £185,000 for second offence.
- Total fine £1,985,000 and costs of £22,500.
- Fine was appealed on following grounds:
 - Should have been medium likelihood of harm.
 - Judge had erred in moving up a harm category.
 - Erred in double counting by increasing starting point from £2.4m to £2.75m.
 - Erred in failing to adjust downwards to reflect financial losses.

Tata Steel (5)

- **Court of Appeal:**
 - **The Judge should have categorised the second offence as one of medium likelihood of harm.**
 - **He was entitled to have moved up a harm category to reflect that the Company, judged by turnover was a very high turnover**
 - **The Judge had not erred in increasing the starting point to £2.75m given his conclusion that senior management had been inadequately focused on day-to-day safety.**
 - **The Judge had taken the resources of the parent company into account when deciding not to make a downwards adjustment of the fine to reflect the defendant company's recorded losses.**
 - **Given the correct categorisation of the second offence as medium likelihood the correct starting point was £2m and taking into account an early guilty plea the appropriate fine was £1,315,000.**
 - **The fine of £185,000 was correct.**

Whirlpool UK Appliances (1)

- **March 2015 - Contractor fell from an elevated working platform and suffered fatal injuries when an overhead conveyor was activated by a separate maintenance team.**
- **The company had not required the contractor to prepare a job-specific risk assessment and method statement for the work, and could have prepared a more detailed permit to work identifying the potential risk of the work.**
- **The company pleaded guilty to breach Section 3 of the Health & Safety at Work Act 1974.**
- **The Judge found that the breach involved low culpability and that it was harm category 3.**
- **The company had a turnover of £500 million – ‘very large’ organisation for the purpose of the Guideline - the Judge adopted a starting point of £1.2 million, before reducing it by £150,000 for good character and remorse, and then giving a further 1/3 credit for the guilty plea.**
- **The company was fined £700,000.**

Whirlpool UK Appliances (2)

- The company appealed on two grounds:
 - (i) the Judge's starting point (£1.2 million) was too high when compared to the starting points and category ranges for 'large' organisations; and
 - (ii) the impact of relatively poor profitability when considering whether the fine was proportionate to the company's overall means.

Whirlpool UK Appliances (3)

- **Court of Appeal:**
 - Whilst agreeing that Whirlpool was a 'very large' organisation (the Court of Appeal also agreed with the court's decision as to Harm Category 3 – low culpability and low likelihood of level A harm), suggested that the sentencing judge had not expressly considered Step 3 of the Guideline which requires the Court to consider the financial circumstances of the offender.
 - The Court of Appeal therefore determined that the starting point should be £250k (rather than the £35k that would usually be the starting point for a 'large' organisation) on the basis that there had been a fatality. The fine was then adjusted to £500k to take into account the company's turnover but was reduced to £450k following mitigation and finally reduced to £300k to take into account the early guilty plea.
 - The Court of Appeal fell short of actually suggesting how a 'very large' organisation would be determined as such, but this case highlights the importance of highlighting profitability, especially in cases where turnover is significant.

Essar UK Ltd

- **November 2013 - highly flammable hydro-carbons were allowed to enter an unignited furnace**
- **Heat from another furnace nearby triggered an explosion which destroyed the furnace and caused several fires at Stanlow Refinery Ellesmere Port.**
- **Safety valve installed incorrectly, failure to adequately assess a new safety critical trip and a fuel line had not been isolated.**
- **Company pleaded guilty to breach of Regulation 4 of the Control of Major Hazards Regs 1999**
- **Fined £1.65m plus costs of £57,600.**

Waites Construction and RJ Fitters

- Sub-contractor blocked a live boiler flue during a project to remove cowls to redundant flue pipes from a block of flats causing carbon monoxide to escape into the property.
- No marked lift levels on scaffolding and no markings to identify floor levels on walls.
- Problem identified following homeowner's investigation.
- Damaged boiler switched off before any serious ill health.
- HSE found that Waites Construction and RJ Fitters had failed to manage the risks involved in the project.
- Both companies entered guilty pleas to a breach of s.3 HSWA 1974.
- Waites Construction fined £640,000.
- RJ Fitters fined £30,000.

Conclusions ...

- **Statistics recently released by the Health and Safety Executive :**
 - **A rise in the total amount of fines from £38.8m in 2015/16 to £69.9m in 2016/17**
 - **The average fine per case resulting in prosecutions in 2016/17 was approximately £126,000, which is more than double the average fine in 2015/16.**
- **Whilst this is the first full year where the new Definitive Guideline has been in effect, this is the second consecutive year which has seen a large increase in the amount of fines resulting from convictions for health and safety offences.**

Conclusions ...

- **The increasing trend in fines shows the importance of businesses taking preventative action, such as regularly reviewing their health and safety policies and procedures, ensuring risk assessments and method statements are in place and adequately reflect the risks involved, providing refresher training to staff and ensuring proactive and effective management of health and safety is taking place at their workplace.**
- **In cases where prosecutions cannot be avoided, the increasing trend in fines also reminds us of the importance of careful management of the regulator's investigation to minimise risk and financial exposure for a company, and preparation of a robust defence.**

Questions?

