

HEALTH AND SAFETY FOR DIRECTORS AND SENIOR MANAGERS

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INTRODUCTIONS AND AGENDA



- ▶ I am a partner at BLM and a member of the national regulatory team
- ▶ I handle complex manslaughter cases and high profile inquests for a wide range of clients across multiple sectors
- ▶ Today we will review leadership in health and safety on directors and senior managers and the impact of prosecutions and sentences on companies and directors

DIRECTORS DUTIES – WHAT IS EXPECTED OF YOU?



- ▶ Each member of the board needs to accept their individual role in providing health and safety leadership
- ▶ The main responsibility for ensuring the health and safety of workers rests on employers (sections 2 and 3 HSWA 1974)
- ▶ The Management of Health and Safety at Work Regulations 1999
 - ▶ Risk assessments
 - ▶ Training
 - ▶ Appointing competent persons
 - ▶ Planning, organising, controlling, maintaining and reviewing health and safety
- ▶ Where a body corporate commits a health and safety offence and the offence was committed with the consent, connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, then that person (as well as the body corporate) is liable (section 37 HSWA 1974)
- ▶ An individual has responsibility to take reasonable care for their health and safety (section 7 HSWA 1974)

GUIDELINES FOR SENTENCING HEALTH AND SAFETY OFFENCES



- ▶ New sentencing guidelines for health and safety offences, corporate manslaughter, food safety and hygiene offences came into force on 1 February 2016.
- ▶ 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 focus more on 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.
- ▶ There is also an increase in the range of custodial sentences for breaches affecting directors, managers and employees.

GUIDELINES FOR SENTENCING HEALTH AND SAFETY OFFENCES



- ▶ The guidelines promote a step by step approach to the fines and penalty process. The most pertinent steps address:
 - ▶ **Step 1** Culpability and the likelihood of harm
 - ▶ **Step 2** The starting point and range of fine based size of business and turnover
 - ▶ **Step 3** Proportionality to overall means
 - ▶ **Step 4** The wider impact adjustment – i.e. the impact a fine will have on issues such as employees and job stability
- ▶ Other steps include adjustments for aggravating and mitigating factors and any discount for an early guilty plea
- ▶ 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

STEP 1 - CULPABILITY



Very high culpability

- ▶ A deliberate breach of or flagrant disregard for the law

High culpability

- ▶ Offender fell far short of appropriate standard, for example by:
 - ▶ 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
- ▶ Serious and/or systemic failure within the organisation to address risks to health and safety

STEP 1 - CULPABILITY



Medium culpability

- ▶ Offender fell short of appropriate standard in a manner that falls between high and low culpability
- ▶ Systems were in place but were not sufficiently adhered to or implemented
- ▶ An act or omission which a person exercising reasonable care would not commit

Low culpability

- ▶ Offender did not fall far short of the appropriate standard:
- ▶ significant efforts made to address risk but they were inadequate on this occasion
- ▶ there was no warning or circumstance indicating a risk to health and safety
- ▶ Failings were minor and occurred as an isolated incident

STEP 1 – LIKELIHOOD OF HARM



- ▶ Harm is determined by considering the likelihood of harm occurring and the seriousness of harm risked
- ▶ The offence is in creating a risk of harm, **not** just the the harm or injury **actually caused**
- ▶ The 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

CATEGORY OF ORGANISATION



- ▶ **Micro**
- ▶ Turnover not more than £2m
- ▶ **Small**
- ▶ Turnover between £2m and £10m
- ▶ **Medium**
- ▶ Turnover between £10m and £50m
- ▶ **Large**
- ▶ Turnover £50m and over
- ▶ **Very large**
- ▶ Unquantified

GUIDELINES FOR LARGE ORGANISATION



| Culpability | Very High | High | Medium | Low |
|----------------------|------------------|-----------------|-----------------|----------------|
| Harm category | | | | |
| 1 | | | | |
| Starting point | £4.0m | £2.4m | £1.3m | £300k |
| Range | £2.6m to £10m | £1.5m to £6m | £800k to £3.25m | £180k to £700k |
| 2 | | | | |
| Starting point | £2.0m | £1.1m | £600k | £100k |
| Range | £1m to £5.25m | £550k to £2.9m | £300k to £1.5m | £35k to £250k |
| 3 | | | | |
| Starting point | £1.0m | £540k | £300k | £35k |
| Range | £500k to £2.7m | £250k to £1.45m | £130k to £750k | £10k to £140k |
| 4 | | | | |
| Starting point | £500k | £240k | £130k | £10k |
| Range | £240k to £1.3m | £120k to £700k | £50k to £350k | £3k to £60k |

PROSECUTIONS AND PENALTIES POST SENTENCING GUIDELINES



2016 - 2018: £700,000 + fines in the construction sector

| Company | Size | Fatal? | Fine | Circumstances |
|---------------------------------|------------|--------|--------------|--|
| Porvi Construcciones y Contrata | Very large | Yes | £3 million | Worker killed when hopper collapsed whilst dismantling it |
| Balfour Beatty | Very Large | Yes | £2.6 million | Crushed in trench which collapsed. |
| Travis Perkins | Very Large | Yes | £2 million | Crushed by company vehicle |
| Kier MG | Very Large | No | £1.5 million | Broken leg/permanent injuries to ankle when trench collapsed. |
| Tata Steel | Very large | Yes | £1.4 million | Maintenance electrician fatally crushed whilst inspecting crane |
| BAM Ferrovial Kier | Very Large | Yes | £1 million | Crushed when section of Crossrail roof collapsed. Another worker injured by reversing excavator. |
| Balfour Beatty | Very Large | Yes | £1 million | Hit on head by lorry mounted crane. |
| Balfour Beatty | Very Large | No | £870,000 | Exposure to asbestos. |
| Engie Regeneration Ltd | Very Large | No | £800,000 | Tenant seriously injured during refurbishment work. |
| AGD Equipment Limited | Medium | Yes | £800,000 | Hit on head with piece of metal. |
| Crest Nicholson | Very Large | No | £800,000 | Hit by moving vehicle and pulled under it. |
| Laing O'Rourke | Very Large | Yes | £800,000 | Crushed between two vehicles. |
| Falcon Crane Hire | Medium | Yes | £750,000 | Fall from crane as it collapsed. Member of public also killed. |
| Barroerock Construction | Micro | No | £750,000 | Up to 40 workers exposed to asbestos. |
| Claxton Engineering Services | Medium | Yes | £700,000 | Four workers crushed to death. |
| Wates Construction Limited | Very Large | No | £640,000 | Carbon monoxide entered property. |

APPLYING THE NEW GUIDELINES TO OLD CASES



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

2018 FINES OF COMPANIES



| Company Name | Turnover | Size | Fine | Injury |
|-------------------------------------|--|------------|-------------------|---|
| Tuffnells Parcel Express | £182,812,000 | Very Large | £1.5m | Death from crushing between lorry and trailer. |
| Costain and Galliford Try | Costain: £157,481,4295 Galliford Try: 1,026,418,000 | Very Large | £1.4m each | 'Economic Impact' fine for lost toes. Fine band of £600 - £100k was increased to reflect size of company. |
| Tata Steel | £1,987,000,000 | Very Large | £1.4 m | Death of employee when trapped and crushed by an overhead crane. |
| Glynwed Pipe Systems Limited | £77,905,000 | Large | £1m | Death of a delivery driver. |
| Grangewood Builders Limited | £37,450,818 | Medium | £850,000 | Fined after worker left paralysed. |
| Yorkshire Water Services | £1,026,700,000 | Very Large | £733,000 | Death from fire in confined space. |
| Abbey Forged Products | £23,838,490 | Medium | £500,000 | Death from ejected component of mechanical forging hammer. |
| Blok N Mesh Limited | £18,412,835 | Medium | £260,000 | Worker injured after being struck by fence panel. |
| Woodlands Homecare Limited | £18,800,000 | Medium | £233,334 | Worker killed when struck by a side loader fork lift truck. |
| Air Liquide (UK) Limited | £79,688,000 | Large | £160,000 | Speciality gas company fined after employee overcome by fumes. |
| Tooles Transport Limited | £8,056,055 | Small | £150,000 | West Midlands haulage firm prosecuted after woker killed. |

- ▶ A customer at a builders merchants and DIY store was struck and seriously injured by a fork lift trucker operating in an outside sales and storage area
- ▶ The customer was crouched down looking at the bottom of the racking when the fork lift truck reversed into him

- ▶ Factors to consider in investigation?
- ▶ Factors to consider in sentencing?

IMPACT OF THE GUIDELINES



- ▶ Given the significant variation in the starting point of fines 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 pitch the seriousness of an offence high.
- ▶ 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).
- ▶ Credible evidence is needed to support the mitigating features and early intervention to gather such evidence is often crucial.

THE IMPACT OF THE SENTENCING GUIDELINES ON INDIVIDUALS



- ▶ *We will identify and prosecute or recommend prosecution of individuals if we consider that a prosecution is warranted. In particular we will consider the management chain and the role played by individual directors and managers and will take action against them where the inspection or investigation reveals that the offence was committed with their consent, connivance or to have been attributable to neglect on their part and where it would be appropriate to do so in accordance with this policy". Where appropriate, we will seek disqualification of directors under the Company Directors Disqualification Act 1986.*
- ▶ **HSE Enforcement policy**
- ▶ **Section 37 Health and safety at Work Act 1974**
- ▶ **Gross negligence manslaughter**
- ▶ **46 directors and senior managers prosecuted in 2015/16 under s37**

GROSS NEGLIGENCE SENTENCES INCREASE



- ▶ The Sentencing Council published in July 2018 the new guidelines for the sentencing of manslaughter offences
- ▶ This category of offence is proved by the prosecution demonstrating all of the following:
 1. A breach of the duty of care to the victim existed
 2. The breach caused the death
 3. The offender's conduct was so bad that it amounts to a criminal act or omission

THE CONSEQUENCES



- ▶ The proposed guideline divides the culpability of any defendant into one of four categories; it suggests a starting point and then a range of penalties upwards or downwards having regard to the circumstances of the case:
- ▶ the starting point sentence for Category A is twelve years custody. (Category range will be 10-18 years custody)
- ▶ the starting point sentence for Category B is eight years custody. (Category range will be 6-12 years custody)
- ▶ the starting point sentence for Category C is four years custody. (Category range will be 3-7 years custody)
- ▶ the starting point sentence for Category D is two years custody. (Category range will be 1-4 years custody)

- ▶ Research has shown that the number of directors prosecuted for health and safety offences in recent years has more than doubled.
- ▶ In the first 12 months of the guidelines, 4% of the individuals who were prosecuted for health and safety offences received an immediate custodial sentence of up to two years in prison.
- ▶ There has also been a marked increase in suspended custodial sentences with the Sentencing Council recently writing to all courts and judges in England and Wales to urge them to consider whether community orders may be a better option in some circumstances.
- ▶ An example of one case where it was felt that an immediate custodial sentence was justified took place in 2017 involving the company director of Cherrywood Investments Limited and a site foreman. Both were given immediate custodial sentences of nine months having been found guilty of manslaughter and health and safety offences which led to the death of a carpenter who fell through a gap in the first floor of a building. The HSE alleged that there had been a blatant disregard for the wellbeing of their workers and were critical of the failure to improve standards despite the warnings given by the HSE on a previous site visit.

SO WHAT DO WE LEARN FROM THIS?



- ▶ That the HSE has a forceful “prosecution agenda” but approaches vary based on geography and individual inspectors
- ▶ The same can be said of the judiciary and their approach – fines and penalties vary within the guidelines
- ▶ The **real battle ground** is over the ranges of culpability and harm
- ▶ More organisations are considering challenging FFI and NOCs as these are being used against businesses as **evidence of bad character** or **as the first stage of prosecution**
- ▶ The HSE have shown increased interest at sites/depots of very large organisations fined under the new guidelines
- ▶ A mitigate to litigate approach is a consideration for very large organisations
- ▶ A “big scalp” is very attractive to them and they will actively pursue them

- ▶ The HSE launched a new procedure for challenging Fees for Intervention (FFI) invoices.
- ▶ The new process came into force on 1 September 2017. It requires the HSE to disclose information to complainants on how inspectors have determined the organisations to be in “material breach” of the law, which is the trigger for a notification of contravention (NOC).
- ▶ Most disputes will be decided by an independent panel by examining written evidence. However, it has the discretion to call a meeting with the HSE and duty holder in exceptional circumstances, for instance, when the panel considers the case cannot be decided on written information alone and with agreement of both parties.
- ▶ A separate disputes process is to be established for cases where the FFI bills are small (£1,000 or less) or where there is no dispute as to the material breach but only the amount of the bill. The process involves consideration by a non-lawyer panel member based on papers alone. This should assist in reducing costs and burdens on businesses as no meeting will be required.

- ▶ Given the agenda we have discussed what approach should we adopt?
- ▶ Clarify and review each FFI invoice and assess the allegation of material breach very carefully
- ▶ Collate all relevant documents early on – do not delay – this is a very important stage
- ▶ Think about the processes and the interaction of parties such as contractors/supervisors/managers so we can assess the correct system of work
- ▶ Prepare a response which sets out our dispute or any mitigation in full
- ▶ If accepting the FFI but there is mitigation or a technical breach only, we will respond setting out the basis of what we accept or dispute – this can head off the use of previous convictions or a suggestion of systemic failings
- ▶ But we will need a good basis to do this so we will need to consider carefully with you the systems of work

- ▶ On 4 July 2018 the HSE released its annual figures for workplace fatal injuries for 2017/18. The data revealed that between April 2017 and March 2018, 144 employees suffered fatal injuries at work in Great Britain. This is an increase of nine when compared to the same period from the previous year.
- ▶ Workplace fatality figures have reduced steadily since monitoring by the HSE started in 1981 and the slight increase is not in our view evidence of an emerging upwards trend.
- ▶ Nevertheless, this increase in fatal numbers may make the HSE more determined to crack down on safety matters relating to the most common causes of fatal injuries, which have remained the same as the previous year and are due to:
 - ▶ Workers falling from height (35 fatalities)
 - ▶ Being struck by a moving vehicle (26 fatalities)
 - ▶ Being struck by a moving object (23 fatalities)

- ▶ When incidents arise in the context of CDM projects, the HSE will closely look at the role each party has played within the project and very often will prosecute a number of different companies in the contractual chain.
- ▶ A recent example of this involved a worker who fell through a fragile structure and sustained a fractured back. The principal contractor, main contractor and subcontractor were ordered to pay fines totalling £526,500. The main contractor, Wessex Building Services shouldered the largest fine of £425,000 for breaching the Work at Height Regulations 2005 but the prosecution costs were split equally between all three companies.
- ▶ Another significant risk area within the construction industry remains traffic management and the segregation of vehicles and pedestrians. In the case of *R v MV Kelly* [2018], *MV Kelly*, a civil engineering and construction company, was fined £500,000 when a worker sustained serious injuries, including the amputation of his right leg, when he was struck by a truck. The HSE prosecuted the company on the basis that the traffic management plan was out of date and the walkways were insufficiently protected contrary to the CDM Regulations 2015.

- ▶ Another example of this was the prosecution in 2016 of a principal contractor, Crest Nicholson Operations, where a fine of £800,000 was imposed in similar circumstances.
- ▶ Redrow was fined £500,000 in January 2018 following the death of a sub contractor. Traffic management and the failure to update the traffic management plan was the reason for Redrow's breach although the breach was not held to be causative of his death.
- ▶ A sizeable number of the prosecutions of construction companies involve companies which would be classified as 'micro' or 'small' under the Guideline. In such cases, the fines tend to be lower as the court will not usually seek to impose a fine which is so large that it will put a company out of business.

A POLICE/HSE INVESTIGATION



- ▶ A **major incident or RIDDOR will trigger interest** in any very large organisation
- ▶ It may be an immediate response or in non fatal accidents after several weeks
- ▶ The investigation will be broad – the inspectors will want to look at this incident and the site generally and individual responsibilities
- ▶ Be prepared for this – ensure documents are checked/risk assessments and training records are reviewed
- ▶ Review and where necessary improve general housekeeping – they **will** look at contractors, training, risk assessments, young workers, induction processes
- ▶ Practice your response – run through the doomsday scenario

PRIVILEGE – DEVELOPMENTS



- ▶ The principle of legal professional privilege allows a client to refuse to disclose certain legal communications to regulatory bodies such as the police, the Health and Safety Executive and Environmental Health Officers during a criminal investigation.
- ▶ It encompasses:
 - ▶ Litigation privilege - applies when litigation or adversarial proceedings are in progress or in contemplation, providing protection to communications between the client, solicitor, and third parties which are for the dominant purpose of obtaining legal advice.
 - ▶ Legal advice privilege - protects from disclosure those communications between a lawyer and their client which are for the purpose of seeking or receiving legal advice

A RECENT CASE CHALLENGED PRIVILEGE



- ▶ The case involved allegations of financial criminality in relation to subsidiary companies of Eurasian Natural Resources Corporation Limited (ENRC). Alerted to the allegations by a whistle blower in December 2010, ENRC instructed solicitors and forensic accountants to conduct an internal investigation.
- ▶ In 2013, the Serious Fraud Office (SFO) opened a criminal investigation, requesting disclosure of the communications and documentation produced by ENRC in their investigation. This included notes taken by external lawyers in interviews with employees, books and records generated by the forensic accountants, and presentations given by external lawyers to the ENRC board of directors. Whether these documents were subject to litigation and legal advice privilege, was disputed.
- ▶ In May 2017 the High Court held that the documentation was not subject to litigation privilege, on the basis that an investigation by the SFO does not amount to adversarial litigation. Rather, it was the first stage in deciding what further steps would be taken and therefore litigation was not in contemplation when the documents were created.
- ▶ **The decision meant that caution would have to be exercised in conducting internal investigations with legal support, with the documentation produced capable of being seized and used as evidence in a subsequent prosecution.**
- ▶ On appeal by ENRC, the Court of Appeal overturned the decision.
- ▶ On litigation privilege, it held that criminal proceedings were reasonably contemplated by ENRC from when they began their investigation after receiving information from the whistle blower.
- ▶ Moreover, it considered it was in the public interest that companies should be able to investigate allegations without losing the benefit of legal professional privilege. To hold otherwise might act as a deterrent to conducting internal investigations.

▶ **Going forward**

- ▶ This case marks a step in the right direction, enabling organisations to seek legal advice during the early stages of a regulatory investigation with the benefit of knowing that, with the right legal advice and safeguards, communications created should be protected from disclosure.
- ▶ The Court of Appeal emphasised that this case was fact-specific, so it remains to be seen what approach will be taken in future cases. Because of this, it is important that when a serious incident occurs, early legal advice is taken on how best to ensure that privilege applies to the investigations into the incident and that communications remain confidential so that privilege is not lost.
- ▶ The SFO has confirmed it will not appeal the decision.
- ▶ Always take early legal advice and consider privilege.

- ▶ The HSE has indicated it will actively review wellbeing and health in the construction industry focussing on occupational risks as well as accidents
- ▶ Asbestos risks, respiratory allergens, deafness and stress assessments could be part of this review
- ▶ **Work-related stress**
- ▶ The HSE has recently reported that, last year, 15.4 million days were lost in Britain as a result of work-related stress, which is the equivalent of 57% of all working days lost to ill health.
- ▶ The HSE has launched a “talking toolkit” which it says can assist organisations to prevent work-related stress. The focus is on consultation and communication with employees, and the HSE has produced templates to assist managers to start conversations about stress and work demands, in particular where there is organisational or other change.
- ▶ Mental health is at the forefront of many conversations and the HSE is keen to emphasise that the management of risk in organisations extends to the assessment of work-related stress, and that organisations are expected to conduct stress risk assessments which put control measures in place to control those risks.
- ▶ In light of the figures published on lost work days in Britain due to work-related stress, there is obviously a significant benefit to businesses if they address work-related stress issues early, as effective measures are likely to reduce sickness absence and lift morale which may in turn increase productivity.



THANK YOU