

RUSSELL-COOKE | SOLICITORS

IOSH Chiltern Branch

Evening Legal Update 2019

Kizzy Augustin, Russell Cooke LLP

21 November 2019

Agenda

- Refresher on Corporate and Individual H&S Duties
- Impact of the Sentencing Guidelines
- Case Law - *common issues*
- 5 mins in the hot seat – the fun bit
 - *Volunteers please!!*

Corporate H&S Duties

Section 2

Duty to employees

Section 3

Duty to non-employees

Section 4

Duty of controller of premises

Duty to “ensure” the health safety and welfare of employees

Duty to “ensure” the health and safety of non-employees

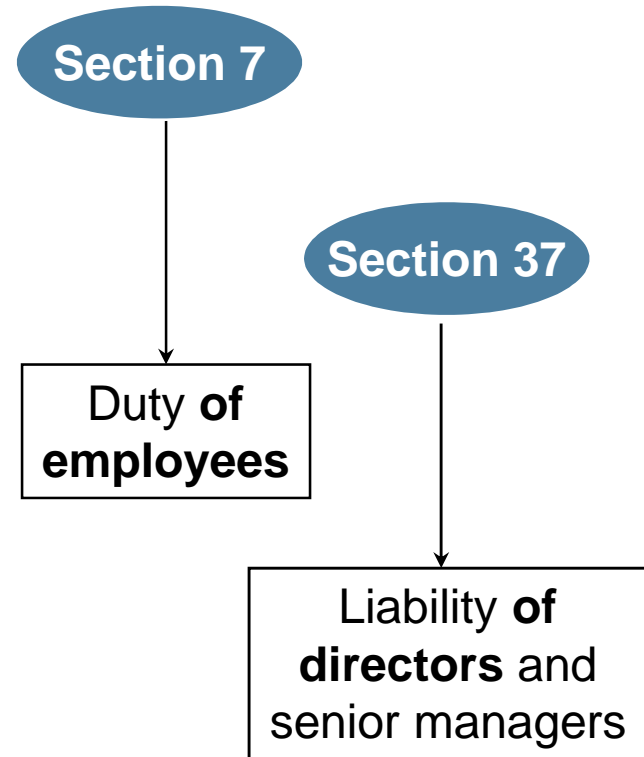
Duty of person who has, to any extent, *control* of premises to ensure premises, access and egress from premises and any plant or substance is safe and without risks to health

“So far as is reasonably practicable”

Individual H&S Duties

Duty to take reasonable care
of self and others affected
by work (**s.7**)

Where an offence... has been
committed with the **consent**,
connivance, or...attributable to
any **neglect** on the part of any director,
manager... or a person who purports to
act in that capacity, he/she as well as the
company shall be guilty of that offence (**s.37**)



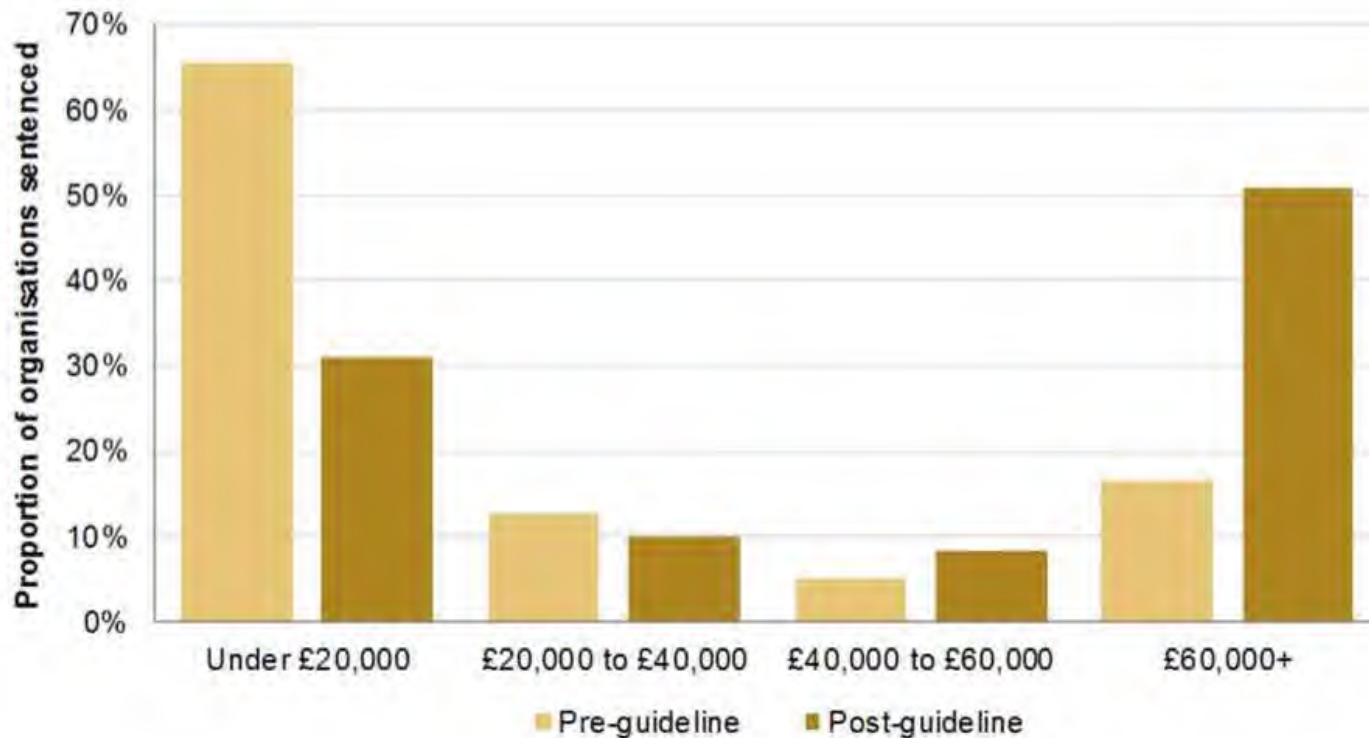
Where are we with the Sentencing Guidelines 2016?

- Definitive guidelines implemented since 1 Feb 2016
- Impact of the guidelines over the last 3 years?
- Enhanced explanations

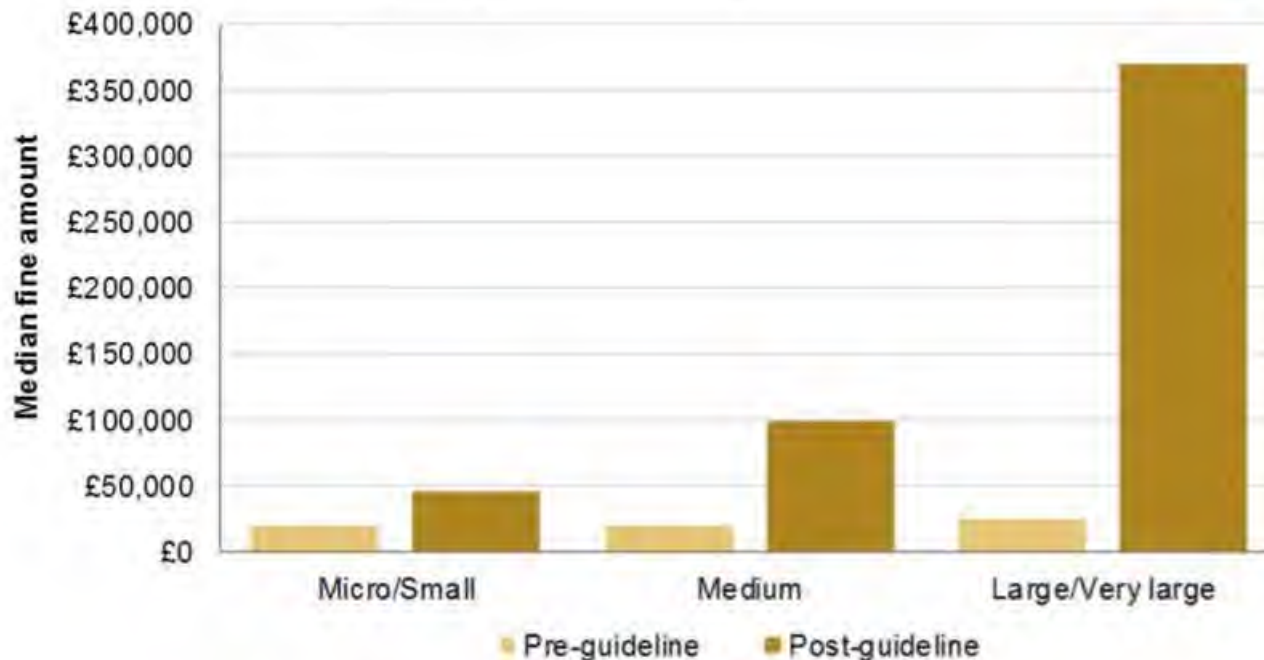


Impact Assessment of the Guidelines

- Fines increased for large (*anticipated*) and small (*not anticipated*) organisations



HSE Impact Assessment cont...



- **Individuals** – unanticipated increase in higher fines and short term change of use in some disposal types
- What about food safety and corporate manslaughter?
 - **Food Safety & Hygiene offences:** less pronounced increase in fines
 - **CM offences** – increase in fines, but low volume of prosecutions.....

Culpability

- Level of culpability extremely important

Very High
Deliberate breach or
flagrant disregard of the
law

High
Fall far short of the
appropriate standard

Medium
Fall short of standard in
a manner that falls
between descriptions in
high and low culpability

Low
Did not fall far short of
appropriate standard

Categories of harm

- Establish **Harm category** from Matrix

		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 Health condition resulting in 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
Likelihood of harm	High	Harm category 1	Harm category 2	Harm category 3
	Medium	Harm category 2	Harm category 3	Harm category 4
	Remote	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

Starting Point / Range of Fines

Large Organisations

Large Turnover or equivalent: £50 million and over		
	Starting point	Category range
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
High culpability		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
Medium culpability		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
Low culpability		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

Range of Fines cont.....

Medium Organisations

Medium		
Turnover or equivalent: between £10 million and £50 million		
	Starting point	Category range
Very high culpability		
Harm category 1	£1,600,000	£1,000,000 – £4,000,000
Harm category 2	£800,000	£400,000 – £2,000,000
Harm category 3	£400,000	£180,000 – £1,000,000
Harm category 4	£190,000	£90,000 – £500,000
High culpability		
Harm category 1	£950,000	£600,000 – £2,500,000
Harm category 2	£450,000	£220,000 – £1,200,000
Harm category 3	£210,000	£100,000 – £550,000
Harm category 4	£100,000	£50,000 – £250,000
Medium culpability		
Harm category 1	£540,000	£300,000 – £1,300,000
Harm category 2	£240,000	£100,000 – £600,000
Harm category 3	£100,000	£50,000 – £300,000
Harm category 4	£50,000	£20,000 – £130,000
Low culpability		
Harm category 1	£130,000	£75,000 – £300,000
Harm category 2	£40,000	£14,000 – £100,000
Harm category 3	£14,000	£3,000 – £60,000
Harm category 4	£3,000	£1,000 – £10,000

Range of fines cont....

Small Organisations

Small		on the Sentencing Council webs www.sentencingcouncil.org.uk	
Turnover or equivalent: between £2 million and £10 million			
	Starting point	Category range	
Very high culpability			
Harm category 1	£450,000	£300,000 –	£1,600,000
Harm category 2	£200,000	£100,000 –	£800,000
Harm category 3	£100,000	£50,000 –	£400,000
Harm category 4	£50,000	£20,000 –	£190,000
High culpability			
Harm category 1	£250,000	£170,000 –	£1,000,000
Harm category 2	£100,000	£50,000 –	£450,000
Harm category 3	£54,000	£25,000 –	£210,000
Harm category 4	£24,000	£12,000 –	£100,000
Medium culpability			
Harm category 1	£160,000	£100,000 –	£600,000
Harm category 2	£54,000	£25,000 –	£230,000
Harm category 3	£24,000	£12,000 –	£100,000
Harm category 4	£12,000	£4,000 –	£50,000
Low culpability			
Harm category 1	£45,000	£25,000 –	£130,000
Harm category 2	£9,000	£3,000 –	£40,000
Harm category 3	£3,000	£700 –	£14,000
Harm category 4	£700	£100 –	£5,000

Capstone Building Limited (March 2019)

- Building firm fined after death of employee following wall collapse
- Bricklayer employed by Capstone working on construction site – struck by falling masonry after a retaining wall failed while being back filled with concrete
- Failure to appropriately manage work on site / failure to ensure health and safety of employees and non-employees
- Breach of sections 2 and 3 HSWA – **NG plea**
- **Found G** after a trial - **£900,000** fine and £60k costs

Karro Foods Limited (March 2019)

- Two workers from food manufacturing company suffered injuries after falling 4m through rooflight
- **13 April 2016:** workers investigating a roof leak - both stood on the same rooflight and fell through
- Injuries – one suffered fractured ribs, punctured lung and contusions to right thigh; other suffered fractured skull and injuries to right leg and ear (balance issues)
- HSE concluded rooflights not visible because of dirt and moss build-up / employees not informed about location
- **G plea** to section 2 HSWA breach – fined **£1.8m** and £8k costs

Celsa Steelworks (Oct 2019)

- Death of two engineers following explosion in basement of a steelworks factory / others injured in the blast
- Company employs over 500 people and produces 1.2 million tonnes of steel each year from scrap, used to reinforce concrete
- Safety mechanism failed to shut down heater – got too hot and exploded
- Charged with failing to make a suitable risk assessment
- G plea - **£1.8million** plus £145k costs (section 2 charge to lie on file)

DHL Group Limited (Oct 2019)

- Employee crushed to death in office inside storage facility in Feb 2016
- Warehouse stores tyres picked for distribution in UK
- Practice of high and top heavy stacking of tyres in metal frames adjacent to the office were too close to each other / at risk of being knocked over by fork lift trucks
- Employee from head trauma and spinal injuries from tyre stack collapse; other employees hurt during the same incident
- **G plea** to section 2 HSWA breach – fined **£2.6 million**
- Previously fined £2m last year (May 2018) after worker crushed to death by reversing lorry in a depot

Bedford Borough Council (Oct 2019)

- Passenger suffered fatal injuries after stepping off bus and being hit by lorry during construction of Bedford bus station
- Lorry was delivering sand to a contractor - bus station demolished and was being reconstructed
- Visibility at this crossing was obstructed by buses which had been permitted to park on double-yellow lines between the crossings for years
- Council / Cambus Ltd (bus company) failed to coordinate and cooperate with each other to manage pedestrian and vehicle interaction
- Bedford Council – **G plea** (s.3 HSWA): £300k + £16k costs
- Cambus – **NG plea** (s.3 HSWA): found guilty and fined £350k

Enhanced explanations

- Judges and magistrates to consider additional contextual information when weighing up aggravating and mitigating factors
- Reflect current best practice / removes “seriousness” guidelines
- Most significant for aggravating factors – cost cutting at the expense of safety (increase seriousness, indicate higher level of culpability)
 - E.g. failing to disclose matters to an authority, failure to obtain relevant licence or permission
- Most significant for mitigating factors – high level of cooperation with investigation beyond the expected
 - E.g. self-reporting
- **In force from 1 October 2019**

*5 Minutes in the “hot seat” –
how not to be interviewed under
caution*

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Introduction

- Health and safety in the UK – current trends
- Legal obligations owed by organisations and senior management to employees and non-employees under HSWA 1974
- Sections 2, 3, 4, 7, 37 HSWA 1974
- Impact of 2016 Sentencing Guidelines for health and safety
- Corporate Manslaughter – trends / joint Work Related Deaths protocol with the Police
- What about H&S in your industries?

5 minutes in the HSE “hot seat”

- Different H&S incidents have occurred – various scenarios
- Volunteers to be the interviewee please!!
- Observe how the interview is conducted, how the interviewee answers questions, the type of issues that are addressed in interview

Scenario: Industrial Estate Incident

Person being interviewed: Site Manager / Supervisor of Joint Venture Company, Poole McGuinness Russell.

Legislation Breach:

- Section 2 Health & Safety at Work Act 1974
- Section 4 Health & Safety at Work Act 1974
- Regulation 3 of Management of Health & Safety at Work Regulations 1999

Scenario: A forklift truck was driven into a yard at an industrial estate. Whilst in the yard the driver reversed around a trailer and hit a yardman, causing injuries resulting in the amputation of his leg.

GUILTY or **NOT GUILTY?**



Scenario: Care Home Investigation

Person being interviewed: Director of the Company,
Pleasant Hills Care Home

Legislation Breach:

- Section 3 of the Health & Safety at Work Act 1974

Scenario: A sixty year old man residing in a privately run care home, Pleasant Hills Care Home, suffered third degree burns after being lowered into a bath of hot water on 2 September 2018.

GUILTY or **NOT GUILTY?**



Scenario: Investigation into school

Person being interviewed: Head Teacher on behalf of Ashford Comprehensive School

Legislation Breach:

- Section 2 (failing to ensure health and safety of employees) Health & Safety at Work Act 1974
- Section 3 (failing to ensure the safety of pupils) Health & Safety at Work Act 1974

Scenario: A chemistry laboratory technician lost part of three fingers and suffered a ruptured bowel whilst preparing a highly sensitive explosive for use in a firework demonstration in front of children.

GUILTY or **NOT GUILTY?**



Scenario: Worker falling from height

The person being interviewed: Construction Director of We Build UK Ltd.

Legislation Breach:

- **Section 2 Health & Safety at Work Act 1974**

Scenario: A construction operative, employed by subcontractor We Build UK Ltd, was working on the fifth floor of a new block of flats being built by developer Prestige Homes Ltd. The operative stepped out onto a temporary platform covering a vertical shaft which collapsed beneath him and he fell approximately 20 metres and died as a result of his injuries.

GUILTY or **NOT GUILTY?**



Scenario: Office - Assault on employee

Person being interviewed: HR Manager on behalf of UBM Finance Ltd.

Legislation Breach:

- Section 2 Health & Safety at Work Act 1974
- Article 8 of Regulatory Reform (Fire Safety) Order 2005
- Section 47 Offences Against the Person 1861

Scenario: An employee, Peter Smithson, was attacked by a fellow employee, Elliot Connolly. The attack left Peter Smithson with a black eye and concussion.

Following the attack, Elliot Connolly started a fire in the room he was in with Peter Smithson.

GUILTY or **NOT GUILTY?**



Scenario: Factory incident

Person being interviewed: Technical Director on behalf of Olympia Pots & Pans Ltd

Legislation Breach:

- Section 2(1) Health & Safety at Work Act 1974
- Regulation 10(1) Control of Lead at Work Regulations 2005

Scenario: An employee of a saucepan manufacturing factory, Olympia Pots & Pans Ltd in Staines (part of the Olympia Group) contracted dermatitis.

The factory worker works with substances containing lead on a daily basis. The employee visited his doctor who diagnosed the dermatitis and the HSE were duly informed.

GUILTY or **NOT GUILTY?**



Scenario: Wall collapses on 6 year old girl

Person being interviewed: Housing and Regeneration Manager, reportable to the Executive (for Property and Assets) for Putney Council.

Legislation Breach:

- Breach of section 3(1) of the Health & Safety at Work Act 1974

Scenario: A 6 year old girl was seriously injured on 21 October 2017 when a brick boundary wall, owned by the London Borough of Putney Council, collapsed on top of her.

The wall spanning the back of two houses had become damaged over a number of months and collapsed on top of her whilst she was playing with a ball in her garden during a family BBQ.

GUILTY or **NOT GUILTY?**



Scenario: Psychiatric Hospital - Death of teenager

Person being interviewed: Director of Healthcare Services and Board Member, Norwood NHS Foundation Trust

Legislation Breach:

- **Section 3 Health & Safety at Work Act 1974**
- **Section 1 Corporate Manslaughter and Homicide Act 2007**

Scenario: A forty two year old woman had been sectioned due to concerns that she was a danger to herself.

Whilst in the hospital she was left unsupervised for a number of hours and was able to access the kitchen on the ground floor, take a sharp knife out of the drawer and slit her wrists which resulted in her death.

GUILTY or **NOT GUILTY?**



Conclusions?

- Understand your rights and entitlements when invited for interview
- The need for an incident response protocol
- Relevant H&S training for employees, third parties and Senior Management / Board
- Policies and practices that are followed and understood
- Risk of liability to organisation / senior management and employees (and those in control of buildings)
- Risk of high fines and/or imprisonment for H&S breaches, in light of the 2016 sentencing guidelines
- Proactive and robust H&S management is the key!

Questions?



Contact details



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