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Sentencing in Health and Safety Cases – a Practical Compliance Tool?
Presentation to IOSH Staffordshire Branch

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Regulatory and Health & Safety Team, Howes Percival

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Sentencing in H&S cases – a practical compliance tool?

Introduction

• Presenter
• The presentation in outline
• “Health and safety offences are concerned with failure to manage risks to health and safety and do not require proof that the offence caused any actual harm. The offence is creating a risk of harm”
  – Sentencing Council (Health & Safety Offences, Definitive Guideline)
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A little history lesson

• Pre-February 1\textsuperscript{st} 2016
  – No guideline, no tariff
  – The \textit{Howe} and \textit{Friskies} cases
  – Lower court limits (pre-13 March 2015)
  – Outcome influenced
  – Cheaper than killing fish
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Sentencing Council Guidelines

• Coroners and Justice Act 2009 section 125(1):
  “Every court –
  (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and
  (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so.”
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Definitive Guideline

- Definitive Guideline
  - Health and safety offences
  - Corporate manslaughter
  - Food safety and hygiene
  - Convicted offenders
  - Organisations
  - Individuals
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The courts’ approach – 9 steps

• Structure, ranges and starting points
• Guideline specifies offence ranges for each type of offence
• In each offence
  – Category ranges
  – For each level of seriousness
  – Starting point in each category
• Further features
• Adjustments
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Step one – the offence category

Culpability

<table>
<thead>
<tr>
<th>Culpability Level</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very high</td>
<td>Deliberate breach of or flagrant disregard for the law</td>
</tr>
<tr>
<td>High</td>
<td>Offender fell far short of the appropriate standard; for example, by:</td>
</tr>
<tr>
<td></td>
<td>• failing to put in place measures that are recognised standards in the industry</td>
</tr>
<tr>
<td></td>
<td>• ignoring concerns raised by employees or others</td>
</tr>
<tr>
<td></td>
<td>• failing to make appropriate changes following prior incident(s) exposing risks to health and safety</td>
</tr>
<tr>
<td></td>
<td>• allowing breaches to subsist over a long period of time</td>
</tr>
<tr>
<td></td>
<td>Serious and/or systemic failure within the organisation to address risks to health and safety</td>
</tr>
<tr>
<td>Medium</td>
<td>Offender fell short of the appropriate standard in a manner that falls between descriptions in ‘high’ and ‘low’ culpability categories</td>
</tr>
<tr>
<td></td>
<td>Systems were in place but these were not sufficiently adhered to or implemented</td>
</tr>
<tr>
<td>Low</td>
<td>Offender did not fall far short of the appropriate standard; for example, because:</td>
</tr>
<tr>
<td></td>
<td>• significant efforts were made to address the risk although they were inadequate on this occasion</td>
</tr>
<tr>
<td></td>
<td>• there was no warning/circumstance indicating a risk to health and safety</td>
</tr>
<tr>
<td></td>
<td>Failings were minor and occurred as an isolated incident</td>
</tr>
</tbody>
</table>
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Step one – the offence category
Harm (seriousness of harm risked and likelihood of it arising)

<table>
<thead>
<tr>
<th>Seriousness of harm risked</th>
<th>Level A</th>
<th>Level B</th>
<th>Level C</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Death</td>
<td>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</td>
<td>All other cases not falling within Level A or Level B</td>
</tr>
<tr>
<td></td>
<td>Physical or mental impairment resulting in lifelong dependency on third party care for basic needs</td>
<td>A progressive, permanent or irreversible condition</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Significantly reduced life expectancy</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>High likelihood of harm</th>
<th>Harm category 1</th>
<th>Harm category 2</th>
<th>Harm category 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medium likelihood of harm</td>
<td>Harm category 2</td>
<td>Harm category 3</td>
<td>Harm category 4</td>
</tr>
<tr>
<td>Low likelihood of harm</td>
<td>Harm category 3</td>
<td>Harm category 4</td>
<td>Harm category 4 (start towards bottom of range)</td>
</tr>
</tbody>
</table>
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Step one – the offence category

Additional harm factors

i) Whether the offence exposed a number of workers or members of the public to the risk of harm. The greater the number of people, the greater the risk of harm.

ii) Whether the offence was a significant cause of actual harm. Consider whether the offender’s breach was a significant cause* of actual harm and the extent to which other factors contributed to the harm caused. Actions of victims are unlikely to be considered contributory events 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.
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Step two – starting point and category range

- Tables
- Organisations
  - Micro – turnover up to £2 million
  - Small – between £2 million and £10 million
  - Medium – between £10 million and £50 million
  - Large - £50 million and over
  - Very large - off the scale
- Individuals
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Example table – ‘small’ organisation

<table>
<thead>
<tr>
<th>Culpability</th>
<th>Starting point</th>
<th>Category range</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>£300,000 – £1,600,000</td>
</tr>
<tr>
<td>Very high culpability</td>
<td>£450,000</td>
<td>£1,000,000 – £1,600,000</td>
</tr>
<tr>
<td>Harm category 1</td>
<td>£200,000</td>
<td>£800,000 – £1,600,000</td>
</tr>
<tr>
<td>Harm category 2</td>
<td>£100,000</td>
<td>£400,000 – £800,000</td>
</tr>
<tr>
<td>Harm category 3</td>
<td>£100,000</td>
<td>£200,000 – £400,000</td>
</tr>
<tr>
<td>Harm category 4</td>
<td>£50,000</td>
<td>£100,000 – £200,000</td>
</tr>
<tr>
<td>High culpability</td>
<td>£250,000</td>
<td>£1,000,000 – £4,000,000</td>
</tr>
<tr>
<td>Harm category 1</td>
<td>£100,000</td>
<td>£450,000 – £1,000,000</td>
</tr>
<tr>
<td>Harm category 2</td>
<td>£54,000</td>
<td>£200,000 – £450,000</td>
</tr>
<tr>
<td>Harm category 3</td>
<td>£24,000</td>
<td>£120,000 – £200,000</td>
</tr>
<tr>
<td>Harm category 4</td>
<td>£12,000</td>
<td>£100,000 – £120,000</td>
</tr>
<tr>
<td>Medium culpability</td>
<td>£160,000</td>
<td>£1,000,000 – £3,000,000</td>
</tr>
<tr>
<td>Harm category 1</td>
<td>£100,000</td>
<td>£230,000 – £3,000,000</td>
</tr>
<tr>
<td>Harm category 2</td>
<td>£54,000</td>
<td>£120,000 – £230,000</td>
</tr>
<tr>
<td>Harm category 3</td>
<td>£24,000</td>
<td>£40,000 – £120,000</td>
</tr>
<tr>
<td>Harm category 4</td>
<td>£12,000</td>
<td>£10,000 – £40,000</td>
</tr>
<tr>
<td>Low culpability</td>
<td>£45,000</td>
<td>£130,000 – £1,000,000</td>
</tr>
<tr>
<td>Harm category 1</td>
<td>£9,000</td>
<td>£40,000 – £130,000</td>
</tr>
<tr>
<td>Harm category 2</td>
<td>£3,000</td>
<td>£14,000 – £40,000</td>
</tr>
<tr>
<td>Harm category 3</td>
<td>£700</td>
<td>£5,000 – £14,000</td>
</tr>
<tr>
<td>Harm category 4</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
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Step two – factors increasing/decreasing seriousness

<table>
<thead>
<tr>
<th>Factors increasing seriousness</th>
<th>Factors reducing seriousness or reflecting mitigation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Statutory aggravating factor:</strong></td>
<td>No previous convictions or no relevant/recent convictions</td>
</tr>
<tr>
<td>Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction</td>
<td>Evidence of steps taken voluntarily to remedy problem</td>
</tr>
<tr>
<td><strong>Other aggravating factors include:</strong></td>
<td>High level of co-operation with the investigation, beyond that which will always be expected</td>
</tr>
<tr>
<td>Cost-cutting at the expense of safety</td>
<td>Good health and safety record</td>
</tr>
<tr>
<td>Deliberate concealment of illegal nature of activity</td>
<td>Effective health and safety procedures in place</td>
</tr>
<tr>
<td>Breach of any court order</td>
<td>Self-reporting, co-operation and acceptance of responsibility</td>
</tr>
<tr>
<td>Obstruction of justice</td>
<td></td>
</tr>
<tr>
<td>Poor health and safety record</td>
<td></td>
</tr>
<tr>
<td>Falsification of documentation or licences</td>
<td></td>
</tr>
<tr>
<td>Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities</td>
<td></td>
</tr>
<tr>
<td>Targeting vulnerable victims</td>
<td></td>
</tr>
</tbody>
</table>
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Low culpability offenders

• Significant efforts made to address the risk; no warning or circumstance to alert offender to the risk; minor failings; and isolated incident.

• Because it equates to “nearly compliant” this category of offender is least likely to be prosecuted, other kinds of enforcement action being sufficient.

• Dutyholder is minimising risk on account of -
  – Effective and implemented H&S arrangements
  – Appropriate and sufficient response to warnings etc.
  – Every incident managed such that it is ‘isolated’
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High culpability offenders
• Falling “far short” of the appropriate standard, e.g:
  – Absence of measures that are recognised standards in the industry
  – Ignoring concerns raised
  – Not making changes following prior incident
  – Allowing breach over long period
• Serious and/or systemic failure to address H&S risks
• High culpability carries extremely high likelihood of enforcement action and high likelihood of prosecution
• ‘Medium’ culpability offenders fall short of the appropriate standard in a way between ‘high’ and ‘low’ culpability
Avoiding high culpability situations

- Recognised industry standards
  - Guidance
  - Associations
  - Dialogue with others
  - H&S professionals

- Concerns raised
  - Identifying a ‘concern’
  - Measured response
  - Documented action and closing
  - Getting sign-off from the ‘raiser’
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Avoiding high culpability situations (cont’d)

• Making changes
• Means to swiftly identify and correct breaches
• Managing the risk of serious or systemic failure
• “Systemic failure”:  
  – Failure not related specifically to an event, but to the manner in which an organisation, or project, is managed, organised and/or communicated.
  – A systemic failure not identified and acted on risks the same or a similar failure occurring again.
  – Many H&S events have some aspect of systemic failure*.

*Preventing Catastrophic Events in Construction” – CIRIA/Loughborough University and HSE 2011
Very high culpability offending

- Deliberate breach or flagrant disregard
- Causes include:
  - The rules don’t apply to me
  - Pressure on time or resources
  - Right equipment not available
  - Lack of understanding
  - Cost cutting
  - Assuming experience is the primary safety measure
- Individual offenders risk custody at all harm categories
- Combat via H&S culture
Factors increasing seriousness

- Placing the offending in context
- The strategy of time and distance -
  - Poor health and safety record
  - Previous relevant conviction (statutory)
- On your own head be it -
  - Cost-cutting
  - Obstruction of justice
  - Concealment of illegal activity
  - Falsification
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Discussion and Q&A
SEMINAR SPEAKER

Alan Millband – Partner, Regulatory and Health & Safety Team

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Alan heads up Howes Percival’s Regulatory and Health and Safety Team. He has specialised in health and safety law since 1988 during which time he has advised, assisted and represented many clients, from individuals and small businesses to nationals and multi-nationals; and across a wide variety of sectors. He is a guest university lecturer in health and safety law and editor and co-author of the Institute of Quarrying textbook, ‘Health and Safety Law in Quarries’

Alan and the Team engage in proactive health and safety matters, advising on law and compliance; and in reactive matters, including challenges to and appeals in respect of enforcement action, and defending prosecutions. Howes Percival is a Legal 500 Top Tier firm for health and safety.

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Thank you for attending today and we hope you found this presentation interesting. If you need further advice or assistance, please speak to a member of the team.

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