



Compass Chambers

# Health and Safety Crime Update

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Compass Chambers

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# Issues to Consider

- Victim Surcharge (Scotland) Regulations 2019
- Workplace Fatal Injuries in Great Britain 2019
- Proposed Culpable Homicide (Scotland) Bill 2019
- Recent Sentencing Developments

# Victim Surcharge (Scotland) Regulations 2019

- Come into force on 25 November 2019.
- Apply to any offence committed on, or after that date.
- Surcharge in all cases where fine imposed.
- Where fine is  $> \text{£}10\text{k}$ , surcharge = 7.5%

# Workplace Fatal Injuries in Great Britain

## 2019

- **Scotland:**
- Highest rate of workplace deaths per 100,000 workers.
- Most recorded workplace deaths in UK
- 70% increase in workplace deaths since 2018 (5% in UK)

# Proposed Culpable Homicide (Scotland) Bill 2019

- Proposal: to amend law of culpable homicide to ensure that,
  - “where loss of life is caused by the recklessness or gross negligence of individuals, companies or organisations that, where proved, the wrongdoer can be convicted of the offence that reflects the appropriate seriousness and moral opprobrium of what occurred.”

# Sentencing Update: List of Authorities

- *R v F Howe & Son (Engineers) Ltd (1999) 2 ALL ER 249*
- *R v Sellafeld Ltd (2014) EWCA Crim 49*
- *Whirlpool Ltd v R (2017) EWCA Crim 2186*
- *R v Squibb Ltd & NPS Ldn Ltd (2019) EWCA Crim 227*
- *R v Palmer Timber ltd (2019) EWCA Crim 611*
- *R v ATE Truck & Trailer Ltd (2019) EWCA Crim 752*
- *Faltec Europe Ltd v HSE (2019) EWCA Crim 520*
- *Bupa Care Homes Ltd v R (2019) EWCA Crim 1691*



# List of Sentencing Issues

- Taking advantage of Crown delay.
- Is the Court bound by terms of narrative?
- How is fact of death reflected in sentence?
- How is likelihood of harm assessed?
- In what circumstances may the corporate veil be breached?



## *R v Howe Engineering*

- “The objective of prosecutions for health and safety offences in the work place is to achieve a safe environment for those work there and for other members of the public who may be affected. A fine needs to be large enough to bring that message home where the defendant is a company not only to those who manage it but also to its shareholders”.  
*Per Scott Baker J at page 255.*





## *R v Sellafield Ltd*

- “A fine of the size imposed...would in our view...achieve the statutory purpose of sentencing by bringing home to the directors...and its professional shareholders the seriousness of the offences committed and provide a real incentive to the directors and shareholders to remedy the failures which the judge found existed”. *Per LCJ at para 65.*



## *R v ATE Truck & Trailer Ltd*

- “...As a matter of constitutional principle the imposition of sentence is a matter for the judiciary. Principles of transparent and open justice point to the same conclusion. A private agreement between prosecution and defence will doubtless inform the Court but, helpful though it may well be, cannot be determinative of sentence...” *per Gross LJ at para 51.*

# Assessment of seriousness of harm under Guidelines

- “Consider whether the offender’s breach was a significant cause of actual harm...if factor applies the court must consider moving up a harm category or substantially moving up within the category range”.



## *R v Truck & Trailer Ltd*

- “Without more, we consider that the fact of death would justify a move not only into the next category but to the top of the next category range...” para 64



## *R v Squibb Group Ltd*

- “But that is not a reason to reject or disregard whatever scientific evidence is available. The rational approach for a court to adopt in these circumstances is to rely on the best evidence it has...the only reasonable conclusion on the available evidence was that the likelihood of harm arising from the offence was low”. *Per Leggatt LJ at para 46.*

# Piercing the Corporate Veil (step 2: identifying “starting point”)

- Only in the most exceptional circumstances eg
  - “where a subsidiary had been used to carry out work with the deliberate intention of avoiding liability for non-compliance with health and safety obligations”. *R v NPS at para 15 per Leggatt LJ*

## Piercing the corporate veil (step3 “ensuring that the fine is proportionate”)

- “Normally, only information relating to the organization before the court will be relevant, unless exceptionally it is demonstrated to the court that the resources of a linked organization are available and can properly be taken into account”

*Step 3 of Guidelines*



## *Faltec Europe Ltd v HSE*

- The approach to be taken:
- “consider the financial circumstances...in the round to assess the economic realities of the organization...a fact-specific inquiry”.
- ”question should be approached with a degree of caution...fact that companies are members of the same group or have a subsid-parent relationship will not of itself satisfy the test”. Para 89





- Does the subsid have access to loans from the parent undertaking? (*Faltec*)
- Has the parent agreed to provide sufficient funds to subsid, if required, to meet its liabilities? (*Faltec, NPS, Tata*)

# Bupa Care Homes(BNH) ltd v R

- “It is generally wrong...to increase the fine at step 3 absent some special factor...we decline to speculate on what such special factors might be...defendant was large profitable organization in its own right...the fact that... remits its profits to its parent is nothing to the point” *para 85 per Knowles J*



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