Compass Chambers, Glasgow Seminar, June 2018

Health & Safety Prosecutions: Sentencing Update

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1. Custodial Sentences

a. R v Sutton [2016] EWCA Crim 540

i. The appellant was in business running private ambulances using his own adapted transit van. Whilst driving a wheelchair-bound patient to hospital, he was involved in a road traffic collision. The patient died.

ii. The defendant was prosecuted for causing death by careless driving under s.2B RTA 1988 (count 1) and a breach of s.3 HSWA 1974 (count 2). The s.3 charge arose because the defendant had not fitted a wheelchair seatbelt to the converted transit van, such that the patient was unrestrained whilst travelling.

iii. The defendant was convicted after trial on both counts.

iv. The defendant was initially sentenced to 36 weeks' imprisonment on count 1 and 26 weeks' imprisonment on count 2.

v. The trial judge took the view that the s.2B offence was aggravated because the s.3 offence was committed at the same time.

vi. The Court of Appeal considered that the trial judge had fallen into error. When passing sentence for the s.2B offence, it was important to focus on the careless driving and offences related to driving rather than other matters.[1] The proper sentence for the s.2B ought to have been non-custodial given that it involved momentary inattention. Likewise, the s.3 offence was not aggravated by the s.2B offence.

[1] Paragraph [26]

b. R v Thelwall [2016] CTLC 180 (25 October 2016)

i. The appellant was the sole director of a warehousing company. A company employee died when a MEWP fell onto him whilst being unloaded from a lorry.

ii. The appellant had a previous conviction for a previous health and safety offence involving a death where he had been fined £125,000.

iii. The appellant pled guilty to a s.37 offence and was sentenced to 12 months' imprisonment.

iv. His appeal against sentence was dismissed.

v. Although the circumstances of the appellant's previous conviction were very different from the instant case, that conviction was still a relevant sentencing consideration. The "gravamen" of the previous incident was that it showed the importance that must be attached to health and safety matters and significantly undermined the argument that the appellant did not appreciate the serious consequences that could occur if proper health and safety procedures were not followed.[2]

2. How to apply ("have regard to") the Sentencing Guidelines

a. R v Thelwall (above)

i. The court went on to make three important observations about the application of the 2016 Guidelines:

- There may be cases, which will be the exception, where the court may be asked to say something about a guideline which is unclear. In such circumstances, the court may say something which may be cited in future cases, although it is highly likely that where this occurs the

[2] Paragraph [10]

Sentencing Council will revise the guideline and the authority will cease to have any application.

- It is important that that practitioners appreciate that our system now proceeds on the basis of guidelines, not case law. It will therefore be very rare, where there is an applicable guideline, for any party to cite to the Court of Appeal cases that seek to express how the guideline works, other than the rare cases [involving a lack of clarity point]. Decisions of the Court of Appeal are of particular importance to the individuals concerned, but they are unlikely to be of any assistance to further appeals where guidelines are in issue[3].

- Secondly, when the case was before the sentencing judge, the defence cited examples of previous cases from the HSE website, the CPS website, the BBC News website, the Daily Express and Daily Star newspaper websites, which provided summaries or articles about other cases; none purported to be full transcripts of the court proceedings or sentencing remarks and thus might be quite inaccurate. The Court of Appeal wishes to make it clear that it is impermissible to adduce reports of that kind before a judge. The judge has the guideline. His duty is to apply the guideline and to make it clear that that is what he is doing.[4]

- Furthermore, there is another way in which the modern form of Guidelines is being forgotten. There is extensive reference in the documents before us to Friskies Schedules. **R v Friskies Pet Care UK**

[3] Paragraphs [21]-[22]
[4] Paragraph [23]

Limited is no longer of any materiality. The matter has been superseded by Criminal Practice Direction 7Q3-7.

- One may contrast this with the later Court of Appeal case of **R v Tata Steel UK Limited [2017] 2 Cr App R (S) 29** (7 June 2017):
    - "The judge remarked that he had been greatly assisted by the prosecution case summary and "Friskies Schedule" together with a basis of plea and other mitigation provided by Tata. We echo those observations"[5].
    - The court in **Thelwall** was presided over by the Lord Chief Justice; the court in Tata was differently constituted.

b. R v Havering BC [2017] 2 Cr App R (S) 9 (9 March 2017: Reductions for Public Bodies)

i. The appellant was a local authority. It pled guilty to two contraventions of PUWER and was fined £500,000 in respect of provision of defective equipment and inadequate PPE, whereby a worker was injured.

ii. The Court of Appeal considered how the 2016 Guideline ought to have been applied in respect of a local authority where the court was required to look at the annual revenue budget. The appellants ARB was £120M, which would place it in the large organisation category, the "base point" for that category being £50M.

iii. A central issue in the appeal was what was meant by "substantial reduction" at STEP 4 when imposing a fine on a public body. It was argued that this should be a 50% reduction. The Court of Appeal noted that this contention was advanced without support from authority and without anything in the guideline to suggest such magnitude of discount. The court observed that it is deliberately left open to the

[5] Paragraph [26]

sentence to make a substantial reduction when fining public bodies or charitable organisations, but that this is plainly left to the discretion of the sentence when deciding the level of the reduction to give. STEP 4 provides for a discretion[6].

iv. Further the Court of Appeal observed that it would have helped its consideration of the case had they known the final figure which the sentencing judge had reached before he applied the reduction to reflect the public-body status.[7]

v. A cautionary note is also sounded in relation to citation of previous authority (echoing perhaps what was said in Thelwall): We wish to say that it does not assist any appellant to set out in their advice and grounds of appeal what the sentence would have been, based on experience of counsel or otherwise before the introduction of [the 2016 Guidelines]. Courts are required by s.125 of the Coroners and Justice Act 2009 to follow any sentencing guideline. To be informed of what the sentences may have been in the past is not helpful to a sentencing court.[8]

c. R v University College London [2018] EWCA Crim 835 (6 March 2018)

i. When imposing a fine for a HSWA s.3 breach on UCL (being a body established by Royal Charter and a registered charity), the CoA did not interfere with a reduction of 20% to reflect charitable status.

ii. The CoA took the view that the case was not one where a reduction was required because of the likely impact on the provision of charitable services to the needy. Whilst the appellant had charitable status, there were commercial as well as academic aspects to the scientific work being undertaken where the accident (to a student) occurred.

d. R v Whirlpool UK Appliances Limited [2018] 1 WLR 1811 (21 November 2017)

[6] Paragraphs [10]-[11]
[7] Paragraph [12] – does this suggest a more mechanical or arithmetical approach may be required?
[8] Paragraph [14] – The position in Scotland is, of course, less restrictive.

i. The appellant company pled guilty to a s.3 HSWA offence in relation to the death of a self-employed alarm and telecommunications contractor at the appellant's premises. A fine of £700,000 was imposed. This was appealed as being excessive, the submission being that the sentencing judge erred in his application of the Guidelines.

ii. The Court of Appeal was presided over by the Lord Chief Justice.

iii. The CoA observed that the Guideline is inherently flexible so as to meet the broad range of circumstances that fall to be considered under HSWA ss.2 & 3. The temptation to approach application of the Guideline in an arithmetical way should be resisted. The court should not lose sight of the fact that it is engaged in an exercise of judgement appropriately structured by the Guideline but not straitjacketed by it.[9]

iv. The CoA cited with approval the approach taken previously in sentencing very large organisations.[10]

v. The CoA considered how to treat the fact that there had been a death. It noted that a consistent feature of sentencing policy in recent years, reflected in both statute and judgements of the court, has been to treat the fact of death as something that substantially increases a sentence, as required by the second stage of the assessment of harm at Step One.[11]

vi. Importantly, for large organisations, the structure of the Guideline does not dictate an arithmetical approach to turnover. There is no linear approach: in R v Tata Steel, turnover of £4B, as opposed to £50M (the base line for large organisations) led to a step change of one harm category rather than "extravagant multiples".[12]

[9] Paragraph [12]
[10] Paragraphs [16]-[19]: **R v Thames Water Unilities Limited [2015] 1 WLR 4411** (application of Guideline for environmental cases)**; R v Tata Steel UK Limited [2017] 2 Cr App R (s) 29** (2016 H&S Guidelines)
[11] In a recent Scottish case, the sheriff invited parties to address him on whether the fact of the death was to be taken into account in the initial assessment of seriousness of the case, or later as an aggravation.
[12] Paragraph [34]

e. R (HSE) v ATE Truck & Trailer Sales Limited [2018] EWCA Crim 752

i. The appellant company pled guilty to failing to provide a suitable and sufficient risk assessment under MHSWR Reg 3. A fine of £475,000 was imposed. The case concerned the death of a contractor.

ii. The sentencing difficulty arose because of the basis of plea pragmatically agreed between prosecution and defence. Prosecution and defence had agreed prior to the guilty plea being entered that the Guidelines applied in a particular way, in terms of culpability, seriousness and causation. Parties did not agree on likelihood of harm.

iii. The basis of plea appears somewhat unusual, in that the offence was agreed to have arisen because the appellant did not have a suitable and sufficient risk assessment relative to its own employees (which the deceased was not), which had it been in place, the deceased might possible have had regard to; thus it was agreed, the failure was connected to the death.

iv. On the facts, notwithstanding that both prosecution and defence had agreed that culpability was "low", the sentencing judge decided that it was "high". At appeal, it was argued that the sentencing judge had departed from the agreed basis of plea without any or adequate justification.

v. The CoA opined that there is much to be said in an area such as this – with a specialist prosecution agency – for sensible agreement between the parties, not least saving resources and court time and permitting a focus on remedial measures. Such sensible agreement is to be encouraged and it is expected will be weighed carefully by any court before departing from it. However and ultimately, no such agreement can bind the court; as a matter of constitutional principle the impostion of a 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 thought it may well be, cannot be determinative of sentence.[13]

vi. The CoA opined that it could not avoid expressing some concern as to an air of artificiality surrounding the plea, but were not minded to ignore the appellant's concession. The CoA cautioned that the case stood as a further reminder of the need for care when tendering and accepting a basis of plea.[14]

vii. The CoA followed the approach in **Whirlpool** when considering application of the Guidelines, reminding itself that the Guidelines do not "straitjacket" the court.[15]

3. Financial Information

a. The Scottish position is regulated at common law whereby the court expects relevant financial information to be provided to the Crown prior to the relevant hearing[16]. Limited companies require to lodge annual accounts with Companies House in accordance with the relevant statutory period. Failure to do so is an offence (Companies Act 2006, s.441). Whilst the Crown will often obtain accounts from Companies House and disclose them as Crown Productions early in the prosecution process, the sentencing hearing may occur after one or more successive year-ends. Parties must not lose sight of the need to update the financial information to reflect the position as at the sentencing diet.

b. **R v John Henry & Sons Limited [2018] EWCA Crim 30** (16 January 2018: Provision of accounts)

i. The appellant company was convicted of a s.3 HSWA offence concerning severe injury caused to a ground worker when a section of trench which he was excavating collapsed on to him fracturing his leg. The three-week trial was "hotly contested".

[13] Paragraph [51]
[14] Paragraph [56]
[15] Paragraph [57]
[16] **HM Advocate v Discovery Homes (Scotland) Limited 2010 SLT 1096 at [16]**

ii. A fine of £550,000 with further award of costs of £166,217 was imposed.

iii. The fine and costs awards were appealed on the basis that these were too high, as taken together they were more than double the annual profit before tax.

iv. Having considered the application of the 2016 Guidelines by the trial judge, the Court of Appeal noted that it would be very slow to interfere with challenges to decisions made by a well-informed first instance judge in such circumstances where that judge had a feel for the case.[17]

v. The judge was well placed to consider relevant aggravating and mitigating factors. One feature of the case, which the Court of Appeal confirmed to be an aggravating factor, was the example of a method statement which was signed by workmen after the accident but which bore an earlier date so as to give the impression that it had been signed on the day works commenced![18]

vi. Mitigating factors included that the company had been in business for over 35 years, with no accidents, no previous convictions (even although it worked in dangerous environments), a record described as "exemplary".

vii. The Court of Appeal considered that the case had taken "a slightly unusual turn". During the appeal process, the Crown produced the annual accounts for the appellant for y/e 31 January 2016, which showed increased turnover and increased profit. Those accounts had been approved by the Board on 25 April 2016 and were lodged with Companies House on 6 November 2016, 10 days prior to the sentencing hearing. The Court of Appeal recorded "with some surprise" that they were not placed before the sentencing judge, especially because the increase in turnover would have moved the company from being medium-sized to large-sized in the Guidelines.

viii. Defence counsel apologised to the Court of Appeal. Clearly the Court was unhappy, noting that it would not have been unduly cynical to observe that had the 2016 accounts shown a significant downturn in the company's position, this would have

[17] Paragraph [15]
[18] Paragraph [21]

been likely to have been drawn to the attention of the sentencing judge by the appellant company[19].

ix. The Court of Appeal reiterated that Page 6 of the Guideline places the primary obligation in producing comprehensive accounts on the offender. However, that does not discharge the prosecutor from "an obligation of scrutiny" of those materials. In this case, the Court of Appeal stated that as the last set of accounts were well out of date by the time the judge came to sentence, it behoved the prosecutor at the very least to have drawn the judge's attention to the fact that the deadline for filing private company accounts 9 months after its year-end had passed as at 31 October 2016, with no accounts having been filed. Had this been done, the judge and/or the defendant would have been spurred into providing the latest accounts in accordance with their duty. [20]

4. Group Companies

a. R v Tata Steel UK Limited

i. In 2015, TSUK recorded a post-tax loss of £851M. That loss was borne by the ultimate parent company Tata Steel Limited (TSL).

ii. On appeal in respect of a fine of £1.985M for two offences under HSWA s.2, it was argued that the sentencing judge ought-not to have taken into account the financial position of TSL as it was irrational to penalise TSL for managing its own affairs so as to enable the loss-making TSUK to continue trading and to continue to employ many people.

iii. The CoA noted that in applying the Guidelines, the financial circumstances of the offender are to be examined in the round to assess the economic realities of the organisation. In this regard, Step Two provides that normally only information relating to the organisation before the court will be relevant, unless exceptionally it

[19] Paragraph [30]
[20] Paragraph [31]-[32]

is demonstrated that the resources of a linked organisation are available and can properly be taken into account.

iv. The CoA stated that it kept well in mind the separate corporate personalities of TSUK and TSL in approaching the matter. However, the CoA had regard to a passage in TSUK's accounts which recorded that TSUK had adequate resources including the support of TSL to continue in operational existence for the foreseeable future. On that footing, CoA concluded that this was one of those exceptional cases where the resources of the ultimate parent company could properly be taken into account.

v. The CoA noted that as the support of the ultimate parent company was of the first importance to ensuring that the appellant company could continue as a going concern, it seemed wrong not to take the position of the ultimate parent company into account. This was to recognise the economic realities of the situation.[21]

5. Insolvency /Non-trading Situations

a. R v RK Civil Engineers Ltd and RK District Heating Limited, Sheffield Crown Court, April 2018

i. Guilty plea to breaches of s.2 & s.3 HSWA respectively, when worker crushed under large pipes which were being unloaded from a trailer. Failures to have safe system of work.

ii. Date of accident was 10 December 2015.

iii. The defendant companies went into administration on 2 June 2016 and 29 March 2017 respectively.

iv. In April 2018, each company was fined £1M plus costs.

b. R v George Hurst & Sons Limited, Leeds Crown Court, May 2018

i. Guilty plea to breach of s.2 HSWA when employee fell from height on a scaffold suffering broken ribs and internal injuries. Failure to have suitable edge protection.

ii. 26 August 2014 was the date of the accident.

[21] Paragraphs [52]-[59]

iii. Company had gone into administration on 13 April 2017 with loss of 65 jobs.

iv. Company fined £1.

c. X Limited (anonymised pending Scottish prosecution)

i. Incorporated 5 April 2012

ii. 5 April 2013 (first, and only, Annual Return)

iii. No accounts or further annual returns lodged

iv. Date of accident: 27 January 2014

v. 8 April 2014: Striking-Off Notice issued by Registrar (Companies Act 2006, s.1000)

vi. 13 May 2014: Temporary Suspension of Striking-off and dissolution as objection made (by COPFS).

vii. 4 July 2017: application by director for voluntary striking-off

viii. 20 July 2017: striking-off and dissolution suspended as objection received by the Registrar (from COPFS) (hence prosecution still possible).

6. Delay

a. R v Watling Tyre Service Limited [2016] EWCA Crim 1753

i. On 27 January 2006, the appellant's employee died when a tyre he was repairing exploded.

ii. On 29 January 2016, the appellant pled guilty to HSWA offences.

iii. On 1 June 2016, sentence was imposed – a £1M fine.

iv. Delay had arisen because between 2006-2011 the police investigated the matter before concluding that manslaughter charges would not be brought; between 2011-2013 there was a Coroner's investigation and inquest. In 2014, the Coroner released papers to HSE which commenced proceedings in July 2015.

v. The sentencing judge applied the 2016 Guidelines.

vi. The CoA took the view that as the offence pre-dated the Coroners and Justice Act 2009, the sentencing judge was not required to follow the Guidelines as that Act now requires, but that what was required was that the sentencing judge should have "had regard to" the Guidelines as opposed to being required to "follow it".[22]

vii. The CoA found that the sentencing judge, whilst erroneously purporting to follow the Guideline, had in any event found the level of fine arrived at by following the Guideline was broadly similar to the level of fine she would have imposed prior to it, no doubt having had regard to the increasing levels of sentence in recent years for regulatory offences committed by large financially-sound organisations.

viii. In relation to delay, the CoA acknowledged that the delay in the prosecution was not the fault of the appellant company. The CoA considered the police investigation process to have been unduly cumbersome and that the effect on the family of the victim by reason of denial of timely closure to have been particularly regrettable.[23]

ix. The CoA went on to observe that the effect upon the corporate entity is much less marked that it would be in the case of an individual defendant. Nonetheless the delay was strongly to be deprecated.[24]

x. The CoA noted that a company can set aside funds to cater for the possibility of a prosecution or fine, or it can choose to enjoy the use of available funds in the interim as this company did. A company does not suffer the same sort of anxiety or concern that an individual defendant does.[25]

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1 June 2018

[22] Paragraph [20]: Is this a distinction without a difference?
[23] Paragraph [27]
[24] Paragraph [27]
[25] Paragraph [27]. No application to stay the proceedings as an abuse of process had been pursued by the appellant, the view being taken that a fair trial was still possible.