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Health & Safety Prosecutions - Sentencing Update

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1 Statistics – England and Wales

1.1 In 2016, the Sentencing Council's Health and Safety Offences, Corporate Manslaughter and Food Safety & Hygiene Offences Definitive Guideline came into force. In Scotland, the courts will have regard to those guidelines as a cross-check.[1]

1.2 On 4 April 2019, the Sentencing Council published its review of Crown Court sentences under the guidelines.[2]

1.3 That assessment revealed the following:

1.3.1 The aim of the guideline was to ensure that levels of fines imposed were proportionate to the means of the offender and reflected the seriousness of the offence committed. It was anticipated that fines would increase for larger organisations committing more serious offences. It was anticipated that there would be no change in relation to the sentencing of individuals. However, the statistics appear to show increases in sentences of all types.

1.3.2 Fines imposed on larger organisations increased considerably. The median fine for a large/very large organisation rose from £25,000 pre-guideline, to £370,000 post-guideline.

[1] *Scottish Power Generation Limited v HM Advocate 2017 JC 85*

[2] www.sentencingcouncil.org.uk/publications/item/health-and-safety-offences-assessment-of-guideline/

1.3.3 Fines imposed on smaller organisations were not anticipated by the Sentencing Council to increase, but they did, considerably.

1.3.3.1 The median fine for a medium organisation rose from £20,000 pre-guideline, to £100,000 post-guideline.

1.3.3.2 The median fine for small and micro organisations rose from £20,000 to £45,200.

1.3.4 The median fines imposed on individuals increased from £3,000 to £5,000. There was also a marked increase in the use of suspended sentences in cases where the starting point was a fine.[3]

1.3.5 There have been fewer successful appeals against sentence in the Court of Appeal. This may be because such appeals can now only consider the correct application of the guideline.[4]

1.3.6 The Sentencing Council intends to investigate further the operation of the guideline in due course and will consider at that stage whether any revision of the guideline is necessary.

2 Recent Cases - Assessing Culpability

2.1 R v Electricity North West Limited [2018] 4 WLR 148

[3] Scottish criminal procedure does not allow for the imposition of a suspended sentence.

[4] *R v Thelwall [2016] EWCA Crim 1755*

2.1.1 ENWL is a power distribution company in the north west of England. On 22 November 2013, a linesman employed by ENWL was clearing ivy from a telegraph pole which supported overhead power lines. The linesman had been wearing a work positioning belt to allow him to lean back away from the pole whilst working. The linesman had not been wearing a fall-arrest lanyard. Whilst working, the linesman cut through his work positioning belt and fell, suffering fatal injuries.

2.1.2 It was not in dispute that the task ought to have been carried out from a mobile elevated work platform (MEWP) as the most appropriate method for the working at height. A MEWP was not readily available at the material time.

2.1.3 ENWL was prosecuted for offences under HSWA 1974 section 2, MHSWR 1999 Reg. 3, and WAHR 2005 Reg. 4. ENWL was acquitted of the first two offences, but convicted under WAHR, an offence concerning selection of work equipment for work at height.

2.1.4 The trial judge applied the guideline. He found there to be a “high culpability” due to a failure to properly plan over time. The need to plan for working at height was obvious and this systemic failure put the case into the “high culpability” category. He relied on the acquittal verdicts on the other counts in concluding that the likelihood of harm was low, at harm category 3. This would have given a starting point of £540,000, but having regard to ENWL’s turnover, which made it a very large organisation, he moved outwith this range to reach what he considered a proportionate fine of £900,000. ENWL appealed against both conviction and sentence.

2.1.5 The Court of Appeal considered the issue of foreseeability. It concluded that in relation to WAHR 2005 Reg 4, the fact that a risk is not reasonably foreseeable was not an answer to the charge alleging a failure to properly

plan work at height. In this case, a MEWP was required and at the crucial time a MEWP was not available as no plan had been made for one to be there. The lack of foreseeable risk was not a defence, but was relevant to sentence.[5]

2.1.6 The Court of Appeal took the view that the failure to plan for a MEWP on the day of the accident did not make the offence one of "high culpability". That failure was not comparable to the factors which are normally indicative of "high culpability", such as failing to put in place measures which are standard in the industry or which ignore concerns previously raised. Properly characterised, and standing the acquittals, the offence was a low-medium culpability offence.[6]

2.1.7 Applying the guideline under the new categorisation, a fine of £135,000 was imposed.

3 Recent Cases - Assessing Harm

3.1 R v Squibb Group Limited [2019] EWCA Crim 227

3.1.1 Refurbishment works were undertaken at a school in London. NPS London Limited (NPS) managed the works on behalf of the local authority (see section 4 below in relation to financial considerations). The main contractor was Balfour Beattie Regional Construction Services Limited. Squibb Group Limited (Squibb) was a demolition sub-contractor.

[5] Paragraph [33]
[6] Paragraph [50]

3.1.2 NPS commissioned an asbestos survey from another company. The survey contained various caveats. The survey did not identify all asbestos in the building. Squibb subsequently carried out demolition works during which its employees were exposed to asbestos not identified in the survey.

3.1.3 NPS and Balfour Beattie pled guilty to certain offences under HSWA 1974.

3.1.4 Squibb was convicted after trial of an offence under HSWA 1974 section 2. The basis of the prosecution had been that Squibb had not properly considered the asbestos survey, including the various caveats, and that had it done so it would have realised that a more thorough survey was necessary before it could commence demolition works.

3.1.5 The trial judge assessed culpability as "high" in that Squibb had fallen far short of the appropriate standards – it was incumbent on a company working in this field, where they are likely to have to address issues of asbestos on a regular basis, to have a system in place for doing so. Such system should provide for a proper consideration of an asbestos survey, and not as here the carrying out of works "on false and lazy assumptions made by word of mouth".[7]

3.1.6 It was agreed that the seriousness of the harm risked by Squibb was level A because exposure to asbestos can potentially lead to a person who has inhaled fibres contracting a fatal disease. The trial judge assessed the likelihood of that harm arising as medium.

3.1.7 Squibb was a medium size organisation having regard to turnover, giving a starting point of £450,000, modified to £400,000 after mitigation.

[7] Paragraph [37]

3.1.8 It was argued at appeal that the trial judge had mis-categorized both culpability and harm.

3.1.9 The Court of Appeal did not interfere with the categorization of culpability. Squibb's failings were serious and systemic in addressing a material risk to the health of its employees.

3.1.10 The Court of Appeal did interfere with the categorization of harm. It acknowledged that an assessment of harm under the guideline required a consideration of both the seriousness of the harm risked and the likelihood of that harm arising.[8] It concluded that there was no proper basis for the trial judge's conclusion that there was a medium likelihood of such harm arising. The likelihood or otherwise that exposure to asbestos at a particular level for a particular period will ultimately cause a fatal disease is not something which is rationally capable of being assessed simply on the basis of supposition, impression or imagination. It was a scientific question to be answered, if possible, with the assistance of scientific evidence.

3.1.11 Squibb had placed scientific evidence before the trial judge which demonstrated that the likelihood that one of Squibb's employees would die as a result of Squibb's breach of duty was extremely small. The trial judge had been wrong to ignore it. Having had regard to it, the Court of Appeal re-assessed the likelihood of harm arising from the offence as low.[9] In the result, the fine on Squibb was varied to £190,000.

3.2 **Faltec Europe Limited v HSE [2019] EWCA Crim 520**

[8] Paragraph [38]
[9] Paragraph [47]

3.2.1 Faltec, a manufacturer of car parts, pled guilty to offences under sections 2 & 3 HSWA 1974 in respect of two outbreaks of Legionnaire's Disease sourced to pipework in a cooling tower (the legionella offences[10]). Four employees and one non-employee contracted the disease.

3.2.2 The sentencing judge assessed the legionella offences as falling at the top end of the medium category as the danger posed by legionella were well known, especially having regard to the HSE ACOP. The offences arose from a failure by Faltec to properly monitor its sub-contractors and its failure to train its own employees for that task.

3.2.3 The sentencing judge concluded that the legionella offences fell within Harm Category 1, Risk Level A, as he concluded from expert evidence that legionella posed a high risk of harm arising within the urban area.

3.2.4 In assessing financial standing, there was no dispute that Faltec was a Medium organisation with £50M annual turnover. Thus, the legionella offences fell within fine range £300,000 - £1.3M.

3.2.5 There were aggravating factors: Faltec had twice been warned by HSE concerning pipework. It had a significant, though non-analogous, previous conviction for section 2 HSWA 1974. The judge took account also of Faltec's holding company's resources.

3.2.6 The fine imposed was £1.2M, discounted by 1/3 to £800,000 to reflect the timing of the guilty pleas. Faltec appealed.

[10] A fine imposed in respect of a third offence, relating to an explosion, was not disturbed on appeal.

3.2.7 The Court of Appeal decision is heavily fact-specific. However, in relation to application of the guideline, the court approved and followed Squibb[11] concerning the assessment of harm relating to legionella, concluding that this could only be assessed having regard to the scientific evidence before the court. The court could not, for instance, substitute an impressionistic view in place of scientific evidence concerning the link between exposure to legionella and injury.[12] The more difficult task for the court, and not for the scientific expert, was in characterising the scientific evidence as representing a high, medium or low likelihood of harm arising in terms of the guideline. That was an evaluative exercise for the court where the court must be permitted a margin of appreciation. That evaluation cannot ignore the scientific evidence of likelihood of harm.[13]

4 Financial Considerations

4.1 R v NPS London Limited [2019] EWCA Crim 228

4.1.1 NPS pled guilty to an offence contrary to HSWA 1974 section 3 for its failure to recognise the deficiencies in the asbestos survey and to act upon those to ensure that all asbestos was identified and removed prior to demolition works.

4.1.2 The appeal for NPS concerned the application of the guidelines in relation to financial standing.

4.1.3 NPS was a joint venture company, partly owned by another parent company, which parent company was itself owned by the ultimate parent company.

[11] *Squibb at [44]*
[12] Paragraph [62]
[13] Paragraphs [63]-[64]

4.1.4 On turnover, NPS was a small organisation. The parent company was a large organisation. The trial judge used the table for large organisations as the relevant one, as he considered that he could, exceptionally, take the resources of the linked parent company into account. The effect of this was to move the starting point for the fine from £100,000 to £1.1M. Ultimately, a fine of £370,000 was imposed.

4.1.5 The Court of Appeal decided that the trial judge was wrong to read the guideline as entitling him to treat NPS as if it were a large organisation. The court emphasised that it is the offending organisation's turnover, not the turnover of any linked organisation, which is used at Step Two to identify the relevant table. This reflects the distinct legal personality of the defendant.

4.1.6 Under reference to authority, the Court of Appeal identified when it may be appropriate to lift the corporate veil, such as where a parent company uses a subsidiary to carry out work with the deliberate intention of avoiding or reducing liability for non-compliance with health and safety obligations.

4.1.7 The mere fact however that the offender is a wholly owned subsidiary of a larger corporation, or that another linked organisation is in practice likely to make funds available to pay the fine is not a reason to depart from established principles of company law or treat the turnover of the linked organisation as it if were the offending organisation's turnover at Step Two.[14]

4.1.8 By contrast, whether the resources of a linked organisation are available to the offender is a factor which may more readily be taken into account at Step Three when examining the financial circumstances of the offender in the round and taking into account the "economic realities of the organisation". It may certainly be relevant at that stage when checking if the proposed fine is

[14] Paragraph [15]

proportionate to the overall means of the offender to take into account the economic reality that the offender will not be dependent on its own financial resources to pay the fine but can rely on a linked organisation to provide the requisite funds.[15]

4.1.9 Applying those principles to this case, the Court of Appeal concluded that the trial judge was entitled to have regard to the resources of the parent company, but at Step Three only. Thus, the correct starting point was £100,000, reduced to £50,000 to take account of mitigating factors and the guilty plea. However, the fact that NPS was loss-making and insolvent on a balance-sheet basis with no resources of its own, did not justify reducing of that £50,000 further as the resources of the linked parent company could be counted on to provide the required funds.[16]

4.2 **R v Palmer Timber Limited [2019] EWCA Crim 611**

4.2.1 The Court of Appeal did not interfere with a fine which, whilst imposed correctly in terms of the guideline, exceeded the annual pre-tax profit of the company. Fines which do so are not reserved for only the most serious of cases, the guideline makes no such prescription. Fines are based on turnover.[17]

4.2.2 That the company was given time to pay over four years meant the fine was not disproportionate and was within its means.[18]

[15] Paragraph [16]. This approach is consistent with *R v Tata Steel UK Limited [2017] EWCA Crim 704.*

[16] Paragraphs [19]-[20]

[17] Paragraph [18]

[18] Paragraph [18]

4.3 **Faltec Europe Limited v HSE [2019] EWCA Crim 520**

4.3.1 In finalising the sentence as a whole, the court should have regard to the profitability of the organisation at that end stage. A small profit relative to turnover, or a loss on turnover, may (though need not) require some downward adjustment in the overall level of the fine.[19]

4.3.2 The guideline expressly provides that in exceptional cases where the resources of a linked organisation are available and can properly be taken into account, they may be taken into account. Whether "the economic realities" test is satisfied will depend on a fact-specific inquiry in the individual case; there is no "catch-all" answer. In any event, the question should be approached with a degree of caution as ordinarily it is only the resources of the offender which are to be taken into account; the fact that companies are members of the same group, or have a subsidiary-parent relationship, will not of itself satisfy the test. It is only in exceptional cases that the resources of a linked organisation fall to be considered.[20]

4.3.3 Faltec had made a prudent reserve in its annual accounts of £1.6M for payment of a fine. The size of the reserve ought to be left out of account when assessing the proportionality of the fine. To do otherwise might discourage prudent reserving. Such provisions should be left out of account.[21]

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[19] Paragraph [87]

[20] Paragraph [89] In this case, as in *R vTata Steel*, exceptional circumstances were found to exist given certain undertakings from the parent company contained expressly in previous accounts and impliedly in the most recent accounts which were prepared on a going-concern basis. Curiously, whilst the court in *Faltec* did refer to *Squibb*, it did not refer to *NPS* on the issue of linked organisation.

[21] Paragraph [93]