



Compass Chambers

# HEALTH & SAFETY

## Sentencing

Grant Markie

24<sup>th</sup> November 2017



# Sentencing

- Background:
- *HMA v Munro & Sons (Highland) Ltd*, 2009 SCCR 265
  - First case to consider in detail the principles to be applied in sentencing in H&S cases
  - Approach in *R v Balfour Beatty Rail Infrastructure Services Ltd* [2007] 1 Cr. App. R. (S.) 65 approved
  - 2010 Guideline will “be noticed” in future cases



# Sentencing

- *HMA v Discovery Homes Ltd* 2010 SCCR 765

“That Guideline has statutory effect only for England and Wales but it will, no doubt, in the future be noticed for the purposes of sentencing on like offences in Scotland.”



# Sentencing

- *HMA v Scottish Sea Farms Ltd* 2012 SLT 299

“The relevant considerations in sentencing in a case of this kind were considered in *HMA v Munro* in which the court endorsed the approach taken by the Court of Appeal in England in *R v Balfour Beatty Infrastructure Services Ltd*. [...] This approach is reflected in the Definitive Guideline of the Sentencing Guidelines Council in England...”



# Sentencing

- *HMA v Scottish Sea Farms Ltd* 2012 SLT 299

“The Guidelines have statutory effect only for England and Wales but may be noticed for the purposes of sentencing similar cases in Scotland.”



# Sentencing

- Context (sentencing regime):
- *Geddes v HM Advocate*, 2015 SCCR 230 per LJC (Carloway):

“while the court has encouraged sentencing judges to ‘have regard’ to the English Guideline in death by driving cases, it has not said that it should be interpreted and applied in a mechanistic way...”



Compass Chambers

“[...] in order to ensure a degree of consistency in this jurisdiction, albeit paying due regard to local circumstances, it may be equally important to have regard to existing precedent.”



Compass Chambers







# Sentencing

- *HMA v Scottish Power Generation Ltd*
- Facts:
  - Longannet Power Station
  - Faulty valve
  - Valve passing steam
  - Valve turned by employee
  - High temperature steam under pressure



# HMA v SPG Ltd

- Plea on Indictment before sheriff at Dunfermline
- HSWA section 2 in re failure to maintain plant & system of work that was safe
- Sheriff rejected argument not to apply 2016 Guideline
- SPG Holdings Ltd turnover of £1.3 Billion
- Fine of £1.75M (reduced from £2.5M)



# SPG Ltd v HMA

- Appeal against sentence:
  - Sheriff erred in applying Guideline
  - Guideline mechanistic & formulaic, inconsistent with sentencing practice in Scotland; apt to interfere with judicial discretion
  - *Esto*, the Sheriff was entitled to apply the Guideline he did so erroneously



# SPG Ltd v HMA

- *Scottish Power Generation Ltd v HMA*, [2016] HCJAC 99:

“[G]uidelines from the Sentencing Council will often provide a useful cross check, especially where the offences are regulated by a UK statute.”

[...]

“In relation to the 2015 Guideline, there is no need to use it in a mechanistic or formulaic fashion.”



Compass Chambers

# SPG Ltd v HMA

“As was pointed out in *Geddes (supra)*, it is important to look at existing Scottish precedent to discover what levels of penalty are appropriate, albeit that this task may involve a cross check with any relevant guidelines.”



Compass Chambers

# SPG Ltd v HMA

- Appeal allowed:
- Fine of £1.2M substituted (reduced from £1.5M)



# 2016 Guideline

- **Step One:** identify offence category by assessing culpability and harm
  - Culpability categories “Very high” (deliberate breach) – “Low” (not falling far short of standard)
  - Harm categories 1 – 4
  - Category produced by level of seriousness (death, serious injury etc...) and likelihood of harm (high, medium or remote)



- **Step Two:** identify starting point and range for relevant offence category and size of organisation
  - Micro organisations (turnover of not more than £2million)
  - Small organisations (£2million – £10million)
  - Medium organisations (£10million – £50million)
  - Large organisations (£50million +)





- Very large organisations (where a defendant organisation's turnover very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence”



- **Step Three:** “step back” from the starting point – consider the aims of sentencing in light of the wide circumstances of the offender, and adjust from the starting point of necessary
  - Examine financial circumstances of the offender in the round – incl. profit
  - Add any quantifiable benefit (of the breach) to the fine



- **Step Four:** “step back” again: consider the wider implications of the fine and adjust if appropriate
  - If the fine falls on public or charitable bodies and will significantly impact services, substantially reduce the fine
  - In all cases consider the impact of the fine on innocent third parties and on the offender’s ability to improve conditions



Compass Chambers

- **Steps Five – Nine:** standard SGC steps incl. compensation, ancillary orders, discount for plea etc.



Compass Chambers

# Sentencing

- Confusion?
- Uncertainty?
- Difficulty in advising clients
- Strategy going forward?



Compass Chambers

# Post SPG Cases

- HMA v Sparks Mechanical & MJ Ventilation
- Fines of £72,000 and £48,000
- Breaches of sections 2 & 3 HSWA
- Injury- paraplegia



Compass Chambers

# Post SPG Cases

- HMA v Sandford Park Ltd
- Section 3 case
- Fatal
- £110,000 fine imposed



Compass Chambers

# HMA v Sandford Park

- A Glasgow based construction company has today been fined after the death of an 83-year old man in Kirkcaldy.
- Kirkcaldy Sherriff Court heard that in early January 2015 an elderly gentlemen who suffered from a number of age-related illnesses, walked onto the construction site which was closed for the holidays.
- While on the site operated by Sandford Park Ltd he fell into a flooded excavation and died from drowning.
- An investigation by the Health and Safety Executive (HSE) found that Sandford Park Ltd failed to install the appropriate level of fencing around the site to prevent members of the public including vulnerable adults and children from accessing the construction site.
- Sandford Park Ltd of St Vincent Street, Glasgow has today pleaded guilty to breaching Regulation 22(1) (l) of the Construction (Design and management) Regulations 2007, and the company has today been fined £110,000.
- Speaking after the hearing HSE Inspector Gillian Anderson said: “This tragic incident could have been prevented, had the company installed a continuous fence around the site.”





Compass Chambers

# Post SPG Cases

- HMA v Structural Metal Decks Ltd
- Section 3 HSWA
- Severe injury – paralysis
- £105,000



# HMA v Structural Metal Decks

- The worker suffered injuries to his spinal cord and is now paralysed from the neck down following the incident.
- Airdrie Sheriff Court heard how Structural Metal Decks Ltd had been sub-contracted to lay metal deck flooring by John Graham Construction Ltd who were building a new health centre in Kilsyth. On 22 April 2015, a scaffolder was moving scaffolding components when he stood on a section of decking which had been put in place by SMDL. The decking sheet gave way and the man fell more than four metres to the ground.
- An investigation by the Health and Safety Executive (HSE) found the metal deck sheets on the first level of the building had not been secured properly and the access to the first level of the decking was not adequately controlled allowing non-decking workers onto the deck.
- Structural Metal Decks Limited pleaded guilty to breaching Sections 3 (1) and 33 (1) of the Health and Safety at Work Act 1974 and were fined £105,000.
- Speaking after the verdict, HSE inspector Graeme McMinn said: “This is a tragic incident, which has had a devastating effect on a young man’s life. The accident could have been avoided if the Structural Metal Decks Ltd had taken appropriate safety precautions and ensured the decking sheets were properly secured.”



Compass Chambers

# Post SPG Cases

- HMA v Kaefer C & D Ltd
- Serious fall from height
- £20,000
- Not appealed by Crown



# R v Tata Steel UK Ltd

- Section 2(1) Case HSWA
- Fines of £1.9 Million reduced to £1.5 million
- Turnover of £4 billion
- Use of Definitive Guideline
- Allowance for "Totality"



# Questions?





Compass Chambers

# Contact

**Compass Chambers**

**Parliament House**

**Edinburgh**

**EH1 1RF**

**DX 549302, Edinburgh 36**

**LP 3, Edinburgh 10**

**[www.compasschambers.com](http://www.compasschambers.com)**

Grant Markie

Advocate

Compass Chambers

**Gavin Herd**

**Practice Manager**

**Phone: 0131 260 5648**

**Fax: 0131 225 3642**

**[gavin.herd@compasschambers.com](mailto:gavin.herd@compasschambers.com)**