



Compass Chambers

Regulatory Update

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TOPICS

1. Sentencing
2. Notice Appeals

Sentencing

- Background:
- *HMA v Munro & Sons (Highland) Ltd* 2009 SLT 233
 - 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
 - Guidelines will “be noticed” in future cases

Sentencing

- *HMA v Discovery Homes Ltd* 2010 SLT 1096

“That (2010) 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

After Scottish Sea Farms looking at:

- Seriousness of offence
- Aggravating factors
- Mitigating factors
- Minimum of £100,000 if death resulted
- Extended to non fatal cases

Sentencing

- RTA context (sentencing regime):
- *Geddes v HM Advocate* 2015 SLT 415 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...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...”

2016 Sentencing Guidelines

- In force in England & Wales 1st February 2016

Require:

- 1 - Assessment of culpability
- 2 - Assessment of the likelihood of harm and extent of harm
- Application of 1 and 2 to financial matrix
- RESULT = BREATHTAKING PENALTY LEVELS?
(Guidelines cover range from £50 to £10M...)

Longannet PS



Sentencing

- *HMA v Scottish Power Generation Ltd*
- Facts:
 - Longannet Power Station
 - Faulty valve
 - Valve passing steam
 - Valve turned by employee unaware of fault
 - High temperature steam under pressure
 - Non-fatal but severe injury to permanent impairment and disfigurement

HMA v SPG Ltd

- Plea on Indictment before Sheriff Macnair at Dunfermline
- HSWA section 2 in – failure to maintain plant & have a 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 - argued:
 - 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; 2016 SLT 1296 per LJG (Carloway):

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

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



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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.”

SPG Ltd v HMA

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

Sentencing

- Confusion? Decision in Scottish Power not easy to follow...
- Not clear where the Appeal Court got its starting point of £1.5M from
- Difficulty in advising clients

Strategy going forward?

- Reach a starting point based on pre 2016 principles, having regard to Scottish precedent
- Use the 2016 Guidelines as a cross-check
- WHAT IF A MATERIAL DIFFERENCE? LJG doesn't assist...

What to do?

- Consider the financial profile of the accused – it may be beneficial to rely on the Guidelines (charity, public, small/micro or large?) – if it is, use them
- If it's not? Submit to the Court that no regard should be had to them
- Assess level of culpability – how? Common sense? Expert evidence? Technical breach? ANALYSIS

Culpability

- Different experiences
- Peter Gray, QC— recent discussion with Gary Aitken, Head of the Health and Safety Division suggests:
 - Crown may not be unduly concerned about levels of culpability
 - In some cases Crown may be willing to agree the level of culpability
 - In some cases the Crown may refuse to make any submission
 - What concession may the Crown make? Not dispute “low” culpability or suggestion of technical breach

What to do?

- Can agreement be reached between Crown and Defence – is that desirable? Maybe not...
- Can “low culpability” be agreed – what if “high”?
- Culpability/likelihood of harm/extent of harm
- Can the Court’s involvement and issues for consideration in assessing culpability and harm be managed?
- Expert evidence?

Domestic Precedent

Fairly limited - examples:

- Scottish Sea Farms (2102): 2 fatalities — £500,000 discounted by one third for early plea — turnover £93M
- Dundee Cold Stores (2012): severe injury/non-fatal - £75K discounted to £50K for appellants 1 & 2 — drastic drop in profit - £60K discounted to £44K for appellant 3 — small family company
- Svitzer Marine (2013): 3 fatalities and a previous near miss — £2M discounted to £1.7M for plea — turnover £55-60M

Domestic precedent

- Very little
- Court required to have regard to it
- Does it assist in any way?
- If it does not assist, what are the options? Look at the Guidelines (if they assist)
- If it does assist? Don't need to look at the Guidelines as process envisages looking at domestic precedent at the end of the process anyway
- More appeals against sentence?

Notice Appeals

- Improvement & Prohibition Notices may be appealed per section 24 of HSWA
- The nature of the test?
- *Railtrack Plc v Smallwood* [2001] ICR 714 per Sullivan J:

“[the function of the Tribunal is] not limited to reviewing the genuineness and/or the reasonableness of the inspector’s opinions. It was required to form it’s own view, paying due regard to the inspector’s expertise.”

Notice Appeals

- *Chilcott v Thermal Transfer Ltd* [2009] EWHC 2086 (Admin) per Charles J:
“...in determining whether or not that risk exists as at that time, the court does not close its eyes to matters that occurred after that time, but that is not the same approach as I would understand generally to be the expression ‘judged with the benefit of hindsight.’”

Chilcott

“the court’s function is... to identify on the evidence before it, which is not restricted to matters that were in evidence before a particular date, what the situation was at that particular date. Did the relevant risk exist?”

Notice Appeals

- Hague v Rotary Yorkshire Ltd [2015] EWCA Civ 696
per Laws LJ:

“In my judgement, Charles J’s approach in the Chilcott case was correct; the question for the inspector is whether there is a risk of serious personal injury. In reason such a question must surely be determined by an appraisal of the facts which were known or ought to have been known to the inspector...”

Rotary

“The Employment Tribunal on appeal are and are only concerned to see whether the facts which were known or ought to have been known justify the inspector’s action.”

Captain FPSO



Notice Appeals

- *Chevron North Sea Ltd v HM Inspector*
- Facts:
 - Planned inspection of Captain FPSO
 - Corroded gratings on port, starboard & forward access points to helideck
 - “Hammer test” conducted by HSE using fire axe
 - Remedial works agreed and implemented
 - Prohibition Notice served

Chevron

- Appeal to ET heard in Aberdeen in 2014
- Judgment issued March 2015
- Report of testing of gratings (Exova Report dated 2014) taken into account
- Appeal allowed

- HSE appeal to Court of Session
- *HM Inspector v Chevron North Sea Ltd* 2016 SC 709
- Issue for appeal:
 - Scope of appeal per section 24
 - Whether *Rotary* correct

HM Insp v Chevron

- HM Inspector v Chevron North Sea Ltd 2016 SC 709 per Lord President (Carloway):

“In normal course, the appellant ought to be able to lead such evidence as he wishes to demonstrate that, at the material time...the metal was not in the averred condition. It is thus not immediately apparent why an appeal “against” a notice should be confined to an enquiry into the correctness or reasonableness of the inspector’s decision”

HM Insp v Chevron

“The fundamental problem with the approach of Laws LJ (in *Rotary*) is that it prohibits an appeal on the facts in a situation where it can be demonstrated that the facts or information upon which the inspector proceeded were wrong. That is the essence or purpose of many appeals on the facts.”

HM Insp v Chevron

- HSE appeal refused
- Appeal to Supreme Court (a first re a Notice)
- Issue for the SC:
The scope of an appeal under section 24
- HEARING DATE TO BE CONFIRMED BUT
LATE 2017 - SIST PENDING APPEAL?

Questions?





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