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# Health and Safety Sentencing Trends- A practical approach to advising clients

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Key concepts to bear in mind in terms of sentencing, at preparation stage of Health and Safety cases:

- S76 procedure;
- Sentencing Guidelines;
- recent fines in relevant cases

# S76 of Criminal Procedure (Scotland) Act 1995

- Procedure for accelerated plea of guilty where case is to be prosecuted on indictment
- Early resolution of case
- Discount in sentence (fine) to reflect timing of plea
- Can be substantial incentive to progress case quickly where a clear breach is accepted/ where evidence shows a gap in health and safety procedures amounting to a breach of regulations



- If initial instructions point to resolution of case being sought by way of a plea, helpful to discuss as early as possible with prosecutor
- S76 procedure- welcomed by Crown
- Scope for sculpting narrative of facts to be given to court/ adjusting final charge to which plea will be tendered
- Communication is key!



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# S76- what level of discount?

- Protecting position of any available discount starts with:
- full instructions
- Good communication
- Record-keeping



# HMA v Svitzer Marine Ltd

- Unreported, High Court Justiciary 13 Nov 2013
- Flying Phantom deaths
- Plea tendered in 2013, breaches of H&S legislation and resultant deaths took place in 2007
- Plea in terms of section 76



- Court had to be persuaded to allow any discount in level of fine at all
- Judge didn't accept company on face of it were entitled to any reduction
- Solicitor however had kept detailed audit trail of their correspondence with Crown over months and years- Crown had repeatedly advised they would revert to agents about matters



- Fine imposed was ultimately one of £1.7m, reduced from starting point of £2m
- 15% discount
- Judge persuaded discount appropriate on basis of the will to resolve the case which was apparent from the solicitors' correspondence file- efforts had been repeatedly made from early stage to resolve the matter by the offending company
- Case did not pass sift on appeal





# Sentencing Guidelines

- Sentencing Council: Definitive Guideline on Health and Safety Offences, Corporate Manslaughter etc 2015
- Published 3 November 2015
- Applicable to all sentences after 1 Feb 2016, regardless of date of offence
- Replacement (and extension) of Sentencing Guidelines Council 2010 Definitive Guideline

# Principal themes of guidelines

- 2 principal themes within the Guidelines:
  - Greater prominence on turnover of organisations;
  - Culpability and Harm assessment

# Scottish Power Generation Ltd v HM Advocate

- [2016] HCJAC 99
- Appeal concerning level of fine in respect of breaches of Health and Safety legislation by very large corporation
- Extent to which, if any, the Scottish courts should have regard to guidelines produced by Sentencing Council of England and Wales



- Argued at first instance that 2015 guidelines ought not to apply
- Sheriff applied 2015 guideline and imposed fine of £1.75m, reduced from £2.5m to take into account timing of plea
- Appeal successful insofar as ultimate penalty reduced
- Guidance from court as to what use to be made of guideline and impact on financial penalties



- *“the court has, on several occasions, encouraged sentencers to “have regard to” guidelines from south of the border in appropriate cases, notably, but not exclusively, those involving UK statutory offences. . . . No reason to depart from that approach in this case”*
- **Scottish Power Generation v HM Advocate**



- Court made clear it would be the 2015 Guidelines which applied, and not the earlier 2010 Guideline
- “starting point” penalty reduced to £1.5m from £2.5m
- Ultimate penalty was £1.2m (20% discount as opposed to 30% given at first instance)



# The Bad News

- Application of the 2015 Guidelines in Scotland is likely to result in significant increases in level of Health and Safety fines in Scotland
- Higher levels of sentences looking like an inevitability

# Natural Persons (1)

## Gross Negligence Manslaughter

- **R v Zaman [2018] 1 Cr App R (S) 26 (Peanut No.1)**
- **R v Rashid & Ors, Manchester CC, 7 November 2018 (Peanut No.2)**
- **Culpable Homicide (Scotland) Bill ?**



# Natural Persons (2)

## Partners – liability continues...

- **HSWA 1974, ss.36 & 37**
- **Partnerships (Prosecution) (Scotland) Act 2013**

# Natural Persons (3)

## Directors – but for how long?

- **R v Thelwall [2016] CTLC 180**
- **R v Crute [2011] EWCA Crim 3233**
- **Company Directors Disqualification Act 1986**



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# Natural Persons (4)

## Employees – imprisonment too?

- **R v Jukes [2018] 2 Cr App R 9**

# Corporate Bodies (1)

## The impecunious corporation

- **R v RK Civil Engineers Ltd & Anr, Sheffield Crown Court, April 2018**
- **R v George Hurst & Sons Limited, Leeds Crown Court, May 2018**
- **R v RS Takeaway Limited, Manchester Crown Court, 7 November 2018**
- **HMA v X Limited (pending)**

# Corporate Bodies (2)

## Charities and Public Bodies

- **R v Havering BC [2017] 2 Cr App R (S) 9**
- **R v University College London [2018] EWCA Crim 835**
- **R v Zoological Society of London, Westminster Magistrates Court, 22 October 2018**

# Financial Information

## Accuracy; Group Companies

- **R v John Henry & Sons Limited [2018] EWCA  
Crim 30**
- **R v Tata Steel UK Limited [2017] 2 Cr App R (S)  
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