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!
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
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)
• 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) 29
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