



UPDATE AND CASE STUDIES SENTENCING

Sentencing Council Definitive and Consultative Guidelines for
Environmental, Health and Safety, Corporate Manslaughter and Food
Safety

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Scope

Environmental law

- The Definitive Guideline for Environmental Offences was published in February 2014 and came into force on July 2014.

Health and Safety, Corporate Manslaughter and Food Safety

- The Definitive Guideline was published in November 2015 and came into force on 1 February 2016.

*The Guidelines are applicable to offences **sentenced** on or after the date they came into force*

Purpose of the Guideline

- Perception – HS & E fines have been seen as "too low" for serious breaches of the law, for too long.
- Intention – ensure transparency and consistency
- Guidance for Courts
- Remove significant disparity in sentences imposed
- Reflect the very different levels of harm and culpability in health and safety offences - increase penalties for bad businesses

The New Definitive Guideline

- At their heart, the new fines are anchored to the turnover of the defendant company.
- The new Guidelines are implemented alongside the removal of the restriction on the maximum level of fines Magistrates Courts can impose.
- The new Guidelines are, in reality, mandatory for every Court to follow (unless it can be shown it is not in the interests of justice to do so).

Reminder of how the Guidelines work

- The court now considers a number of separate steps when reaching the appropriate financial penalty for companies found guilty:
 - Seriousness of the offence – risk of harm and culpability
 - Appropriate starting point – based on turnover
 - Factual elements – aggravating and mitigating features
 - The objectives of sentencing
 - Any factors indicating a reduction
- Courts will expect full financial accounts to be served.
- The fine must sufficiently substantial to have a real economic impact.

Culpability

"How far below the required standard did the defendant fall?"

■ Types of Culpability

– Very High

- *flagrant disregard*

– High

- *failing to employ industry standard*

- *ignoring employee concerns*

- *continued breaches*

- *evidence of serious systemic breaches*

– Medium

- Who knows?

– Low

- Minor, non systemic issues occurring without warning or attempts made provide inadequate

Level of harm – Likelihood and Seriousness

		Seriousness of harm risked		
		Level A	Level B	Level C
		<ul style="list-style-type: none"> • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Health condition resulting in significantly reduced life expectancy 	<ul style="list-style-type: none"> • Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition 	<ul style="list-style-type: none"> • All other cases not falling within Level A or Level B
Likelihood of harm	High	Harm category 1	Harm category 2	Harm category 3
	Medium	Harm category 2	Harm category 3	Harm category 4
	Remote	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

The classifications of organisations

- Classifications (based on turnover)
 - Micro (annual turnover of less than £2 million)
 - Small (annual turnover of between £2 million and £10 million)
 - Medium (annual turnover of between £10 million and £50 million)
 - Large (annual turnover in excess of £50 million)

 - Very large organisations
 - "Where a defendant organisation's turnover or equivalent very greatly exceeds the threshold for large organisations it may be necessary to move outside of the suggested range to achieve a proportionate sentence"***

The Guidelines

Large Turnover or equivalent: £50 million and over		
	Starting point	Category range
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
High culpability		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
Medium culpability		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
Low culpability		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

Just to get ahead of the game...

- 4 cases heard in the weeks before the Guideline came into effect.
- All large/very large companies, all of which pleaded guilty.

Corporate Offender	Date of Sentence	Harm caused	Approximate Turnover	Fine Imposed
C.RO Ports London	21 January	Arm injury	£25m	£1.8m
Balfour Beatty Civil Engineering	25 January	Fatality	£8.8bn (group turnover)	£1m
National Grid Gas	25 January	Broken leg	£3bn	£1m
UK Power Networks (Operations)	26 January	Fatality	£1bn	£1m

What has happened since
1 February 2016?

HSE v ConocoPhillips (UK) Limited

- First very large organisation convicted and sentenced
- Prosecuted for 3 offences
- Turnover £4.8 billion
- No actual injury as a result of the breaches
- Sentencing Judge: risk of death or serious injury was "extremely high"
- Harm Category 1 – seriousness of harm risked and high likelihood of harm
- Culpability – Medium – systems in place but not sufficiently adhered to
- Starting point: £1.3 million, range £800,000 - £3.2 million
- Mitigation – high level of co-operation / significant investment
- The company made a pre-tax loss of £85 million

The fine imposed?

£3 million

Prosecution costs: £160,000

HSE v Rainbow Waste Management Limited

- Micro Organisation – turnover less than £2m
- Prosecuted for breaching Section 2 (1) of the Health and Safety at Work etc. Act 1974
- Fatality - Harm Category 1
- HSE found that the basic requirements of training and supervision had not been complied with and the death was entirely avoidable - High Culpability
- In the 10 days leading to the accident, CCTV cameras captured over 200 examples of unsafe working practices
- Starting point: £160,000, range £100,000 to £250,000
- Early guilty plea and no previous convictions but aggravating feature – array of unsafe working practices and number of employees exposed

The fine imposed?

£136,000

Prosecution Costs: £64,770

HSE v Falcon Crane Hire Ltd

- Medium Organisation – turnover £22.17m
- Prosecuted for breaching Sections 2 and 3 of the Health and Safety at Work etc. Act 1974
- 2 Fatalities - Harm Category 1
- Crane significantly overloaded with 12 tonnes of counterweights instead of eight - High Culpability
- Aggravating feature – failing to investigate why four bolts on the crane failed two months earlier.
- Starting point: £950,000, range £600,00 to £2.5m
- Early guilty plea

The fine imposed?

£750,000

Prosecution Costs: £100,000

HSE v MJ Allen Holdings

- Medium Organisation
- Prosecuted for breaching Regulation 6(3) of the Work at Height Regulations
- Near miss only, but risk of life-threatening injuries, likelihood of harm considered medium - Harm Category 2
- Company failed to identify risks properly but isolated breach - Medium Culpability
- Starting point: £240,000, range £100,000 to £600,000
- Early guilty plea, "exemplary record"

The fine imposed?

£160,000

Prosecution Costs: £5,767

HSE v Balfour Beatty Utility Solutions

- Very Large Organisation
- Prosecuted for 3 offences
- Fatality and high likelihood of harm - Harm Category 1
- Failure to adequately assess /control risks – High Culpability
- Starting point: £2.4m, range £1.5m to £6m
- Early guilty plea

The fine imposed?

£2.6m

Prosecution Costs: £54,000

Analysis and trends

Corporate Defendant	Classification	Starting point	Actual Fine	Deviation from starting point	Aggravating / mitigating features
ConocoPhillips	Very Large	£1.3 m (for Large organisations)	£3 m	↑ 131%	Risk of death/serious injury "extremely high"
Rainbow Waste Management	Micro	£160,000	£136,000	↓ 15%	Array of unsafe working practices
Falcon Crane Hire	Medium	£950,000	£750,000	↓ 21%	Failing to investigate bolts issue 2 months earlier
MJ Allen Holdings	Medium	£240,000	£160,000	↓ 33%	"Exemplary record" / isolated breach
Balfour Beatty	Very Large	£2.4 m	£2.6 m	↑ 8%	Deaths preventable

What to do next

- The Courts have given a clear indication of how the Guidelines will be applied.
- Culpability remains the most decisive factor in sentencing – the importance of achieving high standards of compliance has never been greater.
- **Take Action:**
 - Make the Board and Directors aware of the increased 'boardroom risk' – get trained up!
 - Provide internal and external assurance of EHS systems
 - Consider legal compliance audit, gap analysis, stress-testing of systems and behavioural safety programmes and SMT training on risks from new Guidelines.

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