

## Penalties and Sentencing: In-depth

### Summary

New sentencing guidelines from the Sentencing Council, published in 2015, come into force in England and Wales from 1 February 2016 and apply to prosecutions taken under the Health and Safety at Work, etc Act 1974, regulations made under the Act, corporate manslaughter cases and cases involving food hygiene legislation. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015 came into effect on 12 March 2015 and removed the cap on fines for cases heard in the Magistrates' Court. Together with the new sentencing guidelines they mean offenders face a much tougher approach from courts for health and safety and related offences.

### In Practice

#### Court Proceedings

Section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007 (the Act) states that an organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine. This means that prosecutions must be brought in the Crown Court. It also states that the offence of corporate homicide (the Scottish version) is indictable only in the High Court of Justiciary.

A trial involving corporate manslaughter charges will be governed by the normal rules of evidence and procedure for trials on indictment. In general terms, this means that matters of law are decided by the judge and questions of fact are dealt with by the jury.

Any guilt must be proven beyond reasonable doubt.

## **Matters for Consideration by the Jury**

Section 8 of the Act sets out specific matters for consideration by the jury, as follows.

- Where it is established that an organisation owed a relevant duty of care to a person, and it falls to the jury to decide whether there was a gross breach of duty, the jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation which relates to the alleged breach and, if so, how serious that failure was and how much of a risk of death it posed.
- The jury may also consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation which were likely to have encouraged any such failure or to have produced tolerance of it.
- The jury may also have regard to any health and safety guidance which relates to the alleged breach.
- This does not prevent the jury having regard to any other matters which they consider relevant.

Note:

“Health and safety guidance”, for these purposes, means any code of practice, guidance, manual or similar publication which is concerned with health and safety matters and which is made or issued by an authority responsible for the enforcement of any health and safety legislation.

## **Health and Safety Prosecutions**

While the practical implications of these provisions remain to be seen, companies may still be prosecuted for breaches of specific health and safety law as well as, or as an alternative to, corporate manslaughter.

The new offence is aimed at complementing rather than replacing existing offences under the Health and Safety at Work, etc Act 1974 (HSWA).

The Health and Safety (Offences) Act 2008, which came into force on 16 October 2008, raised the maximum penalties which can be imposed for offences under the HSWA. The 2008 Act does not directly affect sentencing under the Corporate Manslaughter and Corporate Homicide Act 2007, but increased levels of fines for health and safety offences may well be relevant to sentencing under the Act. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015 came into effect on 12 March 2015 and removed the cap on fines for cases heard in the Magistrates' Court.

## **Fines and Penalties**

Any organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to an unlimited fine. This is because the new statute applies only to organisations and not to individuals, so imprisonment is not an option.

## **Relevant Case Law**

A number of Court of Appeal cases have considered the matter of levels of fines in health and safety cases where deaths have been caused. Some of these cases deal specifically with health and safety regulations, but a number have stated general principles applicable to companies. These must now be considered in the light of definitive guidance published by the Sentencing Guidelines Council, now the Sentencing Council, with effect from February 2010.

**R v Howe and Son (Engineers) Ltd [1998], Court of Appeal**

H was a small precision engineering company. In 1996, an employee was electrocuted while cleaning H's factory. The company pleaded guilty to a number of charges. It was fined a total of £48,000. It appealed to the Court of Appeal. That court stated that it was not possible to lay down any tariff or to say that fines should specifically relate to the net profit or turnover of a defendant company.

The court made the following points of general significance with reference to the factors which were relevant in assessing levels of fines.

- A deliberate breach of health and safety law with a view to cost cutting or increasing profit was a serious aggravating feature.
- There was evidence that safety standards in small organisations might be lower than in larger ones. The degree of care required in matters of safety was not affected by the size, financial strength or weakness of a company.
- Fines should reflect public disquiet at an unnecessary loss of life.
- Aggravating features included failures to heed warnings and deliberately profiting from a failure to take necessary health and safety measures.
- Mitigating elements included a prompt admission of responsibility, a guilty plea, steps to remedy deficiencies and a good safety record.

The fine would be reduced to £15,000. This was a small company with limited resources. The full burden of the fine fell on the company because the fine was not deductible for tax purposes.

### **R v Balfour Beatty Rail Infrastructure Services Ltd [2006], Court of Appeal**

The charge in this case involved breach of duty as a cause of the Hatfield rail disaster in October 2000 when 4 passengers were killed and 102 injured.

A train from London to Leeds was rounding a bend at 115mph when two sections of track disintegrated and the train was derailed. The track had failed because of brittle fractures. The track was owned by Railtrack plc which had primary responsibility for the safety of the track. Balfour Beatty was responsible for inspections of the track. It had failed to inspect the track adequately and had failed to appreciate from the result of inspections that action was called for. The most relevant action which it had failed to take was to impose a speed restriction on the stretch of track where the accident happened.

Balfour Beatty was fined £10 million. It appealed to the Court of Appeal. The fine was reduced to £7.5 million on appeal. The following points made by the court are likely to be of relevance.

- The knowledge that breach of duty could result in a fine of sufficient size to impact on shareholders would provide a powerful incentive for management to comply with that duty.
- The fine must not always be large enough to affect dividends or share price, but must reflect both the degree of fault and the consequences, so as to raise appropriate concern on the part of shareholders at what had happened.
- Such an approach would satisfy the requirement that the sentence should act as a deterrent. It would also satisfy the requirement, which would rightly be reflected by public opinion, that a company should be punished for culpable failure to pay due respect for safety, and the consequences of that failure.
- In the present case, there had been a serious systemic failure on the part of a company, the contractual duties of which were directed at securing the safety of rail travellers. The consequence had been 4 deaths and more than 100 injured passengers.
- Balfour Beatty was a very substantial company. Its overall remuneration under its 7-year contract was £368 million. It was therefore hard to say that a fine of £10 million, although severe, was wrong in principle.

### **R v Yorkshire Sheeting and Insulation Ltd [2003], Court of Appeal**

Y was a company which specialised in roofing work. It had been contracted to work on a project. A self-employed roofing sheeter engaged by Y fell through a rooflight and was killed. Y was fined £100,000. It appealed to the Court of Appeal. That court reduced the fine to £55,000 and made the following points of general application.

- Y was a responsible company which, on this one occasion, had contributed to a failure to take the reasonable and practical steps required to ensure the safety of those who had been working on the roof.
- Although there had been serious default, in that the problem giving rise to the risk had been identified before the day on which the death had occurred, and that the problem had not been addressed by the provision of netting, the covering of all relevant rooflights and the demarcation of safe areas, such default had, to a significant extent, been due to a lack of communication

between all those involved, including the main contractor.

## Sentencing Council

In February 2010, the Sentencing Guidelines Council published its *Corporate Manslaughter and Health and Safety Offences Causing Death Definitive Guidelines*. In April 2010, the Sentencing Guidelines Council and Sentencing Advisory Panel were replaced by the Sentencing Council, with the guidelines transferring to their remit. These guidelines apply to the sentencing of organisations on or after 15 February 2010 and set out the key principles relevant to assessing the seriousness of the range of offences covered which may involve a wide variation in culpability. They apply only to the sentencing of organisations and not to individuals.

Where death occurs, there may be significant overlap between offences under the 2007 Act and under ss.2 and 3 of the Health and Safety at Work, etc Act 1974.

Factors likely to affect seriousness include the following.

- How foreseeable was serious injury?
- How far short of the applicable standard did the organisation fall?
- How common was this kind of breach in the organisation?
- How far up the organisation did the breach go?

Aggravating features include:

- more than one death or very serious personal injury in addition to death
- failure to heed warnings or advice
- cost-cutting at the expense of safety
- deliberate failure to obtain or comply with relevant licences
- injury to vulnerable persons.

Mitigating factors include:

- prompt acceptance of responsibility
- high level of co-operation with the investigation
- genuine efforts to remedy the defect
- a good health and safety record

- a responsible attitude to health and safety.

The area of financial information highlights the following.

- The law must expect the same standard of behaviour from a large and a small organisation.
- Size is relevant: the means of any defendant are relevant to a fine.
- The court should require information about the financial circumstances of the organisation.
- Best practice will usually be to call for the relevant information for a three-year period, including the year of the offence.
- The court should look at turnover, profit and assets to gauge the resources of the organisation.

Regarding the financial consequences of a fine, the court should consider the following factors.

- The effect on the employment of the innocent.
- The effect on shareholders or directors will not normally be relevant.
- A potential rise in prices charged by the organisation will not normally be relevant unless the organisation is a monopoly supplier of public services
- The effect in relation to the provision of services to the public will be relevant
- Public organisations, eg local authorities, hospital trusts and police forces, must be treated in the same way as commercial companies in relation to expected standards of behaviour
- Liability to pay civil compensation will not ordinarily be relevant
- The cost of complying with a remedial order will not be relevant
- Whether the fine will put the organisation out of business will be a relevant consideration, but this may be an acceptable consequence.

Fines should normally be paid within 28 days by larger organisations. For smaller organisations, this may be extended.

The offence of corporate manslaughter normally involves a level of seriousness significantly greater than a health and safety offence. The appropriate fine will seldom be less than £500,000 and may be measured in millions.

Where a health and safety offence is shown to have caused death, the appropriate fine will seldom be less than £100,000 and may be measured in hundreds of

thousands.

With effect from 1 February 2016 new guidelines issued by the Sentencing Council come into effect. The new, detailed guidelines are intended to ensure that there will be comprehensive sentencing guidelines covering the most commonly sentenced health and safety offences in England and Wales. A step-by-step approach is set out, detailing the factors to which court should have regard in deciding sentences in health and safety cases. For corporate manslaughter cases there is no limit on fines. The guidelines suggest £20 million for the most serious breaches.

## Remedial Orders

Section 9 of the Act deals with remedial orders. Significant points are as follows.

- Where an organisation is convicted of corporate manslaughter or corporate homicide, the court may make a remedial order instructing the organisation to take specified steps to remedy:
  - the relevant breach
  - any matter which appears to the court to have been a cause of the death and which has resulted from the relevant breach
  - any deficiency, in relation to health and safety matters, in the policies, systems or practices of the organisation of which the relevant breach appears to the court to be an indication.
- Such an order may only be made on an application by the prosecution which specifies the terms of the proposed order.
- The terms of a remedial order must be such as the court considers appropriate, having regard to representations and evidence in relation to the matter.
- Before the prosecution applies for a remedial order, it must consult with the appropriate health and safety enforcement authorities.
- Remedial orders must specify a timeframe for the specified steps to be taken.
- The order may require the convicted organisation to provide the appropriate enforcement authority with evidence that the steps have been taken.
- Organisations may apply to the court for time periods specified in relation to remedial orders to be extended.
- Failure to comply with a remedial order is in itself an offence punishable with an unlimited fine.

The Sentencing Advisory Panel has made the following comments on remedial orders.

- The overall aim of remedial orders is the rehabilitation of offending companies by setting out steps to be taken to ensure that the failures which resulted in death are dealt with.
- Remedial orders will provide an additional safeguarding power in the limited number of cases where companies have failed to respond.
- The costs of complying with a remedial order should not result in a decrease in any fine which has been imposed for the same offence. Remedial orders are rehabilitative. Reductions in fines would reward companies which have failed to comply with health and safety standards.

Again, it should be noted that this power is new and that it will no doubt be the subject of judicial interpretation.

## Publicity Orders

Publicity orders are dealt with under s.10 of the Act.

Where an organisation is convicted of corporate manslaughter or corporate homicide, the court may make a publicity order which requires the organisation to publicise the following.

- The fact of the conviction.
- Details of the offence for which it has been convicted.
- The amount of any fine which it has been ordered to pay.
- Details of any remedial order which has been ordered.

Before a court makes a publicity order, it must consult the appropriate health and safety authority and have regard to representations made by the prosecution or the defence.

A publicity order must specify a period of time within which its requirements must be complied with. It may require the organisation to supply evidence of compliance with its requirements to the relevant health and safety authority.

Failure to comply with a publicity order is an offence punishable with an

unlimited fine.

The aim of publicity orders is to provide the public with information as to what has been done to deal with an organisation's shortcomings. It is hoped that the availability of such orders will encourage organisations to avoid management failures and will deter them from disregarding their health and safety responsibilities.

The Sentencing Advisory Panel made the following comments in relation to publicity orders.

- Concern remains over the sufficiency of the impact of fines on large companies. The power to make publicity orders already exists in Australia, Canada and the USA.
- It is thought that publicity orders will normally be made in addition to fines, but they can be imposed alone.
- Publicity orders are aimed at deterrence because of the impact they can have on the public reputation of a company through damage to consumer confidence, equity value and market share.
- The HSE already has a "name and shame" database which provides a public record of all health and safety convictions and the names of convicted companies.
- It is thought that the wording of publicity orders will normally be a matter for consultation with the family of the victim.
- Publicity orders may be useful where the court has reduced a fine because of a company's financial circumstances, or where a company has a poor record of compliance with the law, or where it is thought that the customers, creditors and shareholders of the company should know about the conviction.
- A publicity order should be made in all cases where there are convictions for corporate manslaughter.
- Options for the form of the order may include publication on television, radio and the press, publication on the company's website, notice to shareholders, and written notice to customers and suppliers of the company.
- Publicity orders will involve costs for the convicted company. The indirect financial costs may be large and are difficult to estimate.

Critics of the new publicity order regime have stated the view that the orders will result in greater damage to the reputation of the company, causing lower share

prices, higher insurance premiums, difficulty in recruiting and greater difficulty when tendering for future work.

In February 2015 Peter Mawson Ltd was ordered to post a publicity order on its website and to make a half-page statement in the local newspaper following the company's conviction for corporate manslaughter.

## Compensation Orders

Courts have powers to make orders requiring defendants to pay compensation for any personal injury, loss or damage resulting from the offence. These powers, conferred by the Powers of Criminal Courts (Sentencing) Act 2000, will also apply to the new corporate manslaughter statute. Courts are required to give reasons if they do not make such orders.

The following points may be particularly relevant to corporate manslaughter cases.

- Compensation orders may be made in favour of the relatives and dependants of the deceased for bereavement and funeral expenses.
- An order for the payment of funeral expenses may be made for the benefit of anyone who has incurred them.
- Compensation for bereavement may only be made in favour of persons who may claim under the Fatal Accidents Act 1976, that is, the spouse of the deceased or, where the deceased was a minor, the parents of the deceased.
- The maximum sum which can be claimed for compensation for bereavement is £10,000.
- The amount of compensation which may be ordered is a matter for the discretion of the court.
- In cases where both a fine and a compensation order are imposed, and the defendant does not have the means to pay both, then the compensation order takes priority over the fine.
- Any compensation paid is deducted from damages received in civil proceedings.

The Sentencing Advisory Panel takes the view that in cases of corporate manslaughter, compensation issues are likely to be complex, and better dealt with through civil proceedings.

From April 13 2015 criminal courts have imposed fixed charges for those found guilty of offences. These charges are on a fixed scale and range from £150 for a guilty plea in the magistrates' court to £1200 for a Crown Court trial.

## Appeals

The Act does not make specific provision for appeals, and general principles will therefore apply. Appeals from the Crown Court can be made to the Court of Appeal (Criminal Division) within 28 days of the decision to be appealed. The notice of appeal must state the grounds of appeal. The application is initially considered by a single judge who decides whether or not to grant or refuse leave to appeal. Where leave to appeal is refused, the appellant may ask the full Court of Appeal to reconsider.

The appeal is not a rehearing of the trial. The Court of Appeal considers written and oral arguments but will only rarely hear fresh evidence. It will only intervene in an appeal against conviction where the conviction is shown to have been unsafe. Where an appeal is against sentence only, the Court of Appeal has no power to increase the sentence but will only reduce it where it is shown to have been wrong in principle or manifestly excessive.

The prosecution can refer serious cases to the Court of Appeal where it is considered that the Crown Court sentence was unduly lenient. In such cases, the Court of Appeal has the power to increase the sentence.

A further appeal may be made to the House of Lords in the very limited circumstances that a point of law of general public importance is involved.

## Director of Public Prosecutions

The consent of the Director of Public Prosecutions (DPP) is required before proceedings are brought under the Act.

The practicalities of the "DPP consent" requirement are well illustrated by the notorious case of *R v Director of Public Prosecutions and others ex parte Jones* [2000] IRLR 373, High Court. That case concerned the old offence of common law

manslaughter.

The facts of that case, in summary, were that in 1998, J was sent by an employment agency to work at Shoreham docks. He was employed by Euromin, whose managing director was M. J's work involved the unloading of bags of cobblestones from the hold of a ship. The system for this involved workers standing near an open grab bucket attached to a crane. The lever in the driver's cab for closing the bucket was very sensitive. When it was operated, the bucket closed in one second. J was decapitated when the grab bucket closed on him.

The HSE and the police investigated the matter. The HSE issued improvement and prohibition notices and decided to prosecute Euromin for statutory offences. The Director of Public Prosecutions decided not to prosecute the company or M for negligent manslaughter. This decision was challenged in the High Court by an application for judicial review. That court ruled as follows.

- The DPP's decision not to prosecute should be quashed.
- The DPP had been wrong in applying a test of subjective culpability rather than objective liability for the dangerous system of work.
- The test for negligent manslaughter was objective. Negligence would be criminal if, on an objective basis, the defendant demonstrated a failure to advert a serious risk, going beyond mere inadvertence in respect of an obvious and important matter which the defendant's duty demanded he should address.

The common law offence of manslaughter by gross negligence is abolished, in its application to corporations, by s.20 of the Corporate Manslaughter and Corporate Homicide Act 2007. The *Jones* case illustrates how the decision of the DPP, in relation to workplace deaths, may be successfully challenged by judicial review. It is anticipated that this case will continue to be relevant.

## **Corporate Manslaughter Prosecutions**

The first reported application of the Corporate Manslaughter and Corporate Homicide Act 2007 was in April 2009. It was reported by the Crown Prosecution Service (CPS) that it had authorised a charge of corporate manslaughter against a company, Cotswold Geotechnical Holdings Ltd, in relation to the death of Alexander Wright on 5 September 2008. Mr Wright was employed as a junior

geologist by the company and was taking soil samples from inside a pit which had been excavated during a site survey. The sides of the pit collapsed and crushed him, causing fatal injuries. Peter Eaton, a director of the company, was charged with gross negligence manslaughter and an offence under s.37 of the HSWA, and the CPS concluded that there was sufficient evidence for a realistic prospect of conviction for a breach of a duty of care under the Corporate Manslaughter and Corporate Homicide Act 2007.

The company was convicted and fined £385,000 payable over 10 years. The Court of Appeal refused leave to appeal. The Court considered the sentencing guidelines for corporate manslaughter. It noted that account must be taken of the financial circumstances of the defendant organisation. A fine is intended to inflict painful punishment, but should be one which the defendant is capable of paying. Another factor is whether the fine will have the effect of putting the defendant out of business. There could be no justifiable criticism of the fine imposed.

The second corporate manslaughter prosecution was that of JMW Farms Ltd in May 2012 following an incident in which an employee was crushed to death. The court stated that the appropriate fine would have been £250,000, but this was reduced to £187,500 because the company had pleaded guilty. This was a serious matter that required a substantial fine to be imposed to reflect the culpability of the company and to send a message to all employers that their duty to their employees is daily and constant and any failure to discharge that duty will be met with condign punishment. The company's directors had accepted their responsibilities by the guilty plea, and the company had a good safety record.

The third prosecution for corporate manslaughter was that of Lion Steel Equipment in July 2012. An employee of the company was killed when he fell through a fragile roof panel. The company was fined £480,000. The court stated that this represented a 20% reduction in recognition of factors such as the company's guilty plea and its financial position. The judge also took into account the risk of endangering the jobs of the 142 employees of the company. Lion Steel was ordered to pay the fine in four instalments by 2015 and was ordered to pay £84,000 costs.

In April 2014, a King's Lynn flower nursery was convicted of health and safety breaches but cleared of corporate manslaughter charges in connection with the death of a worker from electric shock. PS & JE Ward Ltd, trading as Belmont

Nursery, was charged with corporate manslaughter as well as failing to discharge a duty imposed by s.2(1) of the Health and Safety at Work, etc Act 1974. While cleared of manslaughter, it was found guilty of the breach of health and safety law. It was fined £50,000 and ordered to pay £47,937.20 costs.

In June 2014 MNS Mining, the company that owned the Gleision colliery in South Wales where four men were killed when the mine flooded, was acquitted of charges of corporate manslaughter.

In November 2014 Sterecycle, a specialist autoclave company, was convicted of corporate manslaughter. The conviction related to an explosion at the company's waste processing plant in January 2011 which caused the death of a worker. The company went into administration in 2012. It was fined £500,000 as a mark of condemnation and to act as a deterrent. The judge stated that the majority of blame for the incident must be borne at senior management level, that is the true or supposed brains of the company.

In January 2015 Pyranha Mouldings, a kayak manufacturing company, was convicted of corporate manslaughter following the death of a worker who was trapped in an industrial oven.

In February 2015 Peter Mawson Ltd, a building and joining company, was sentenced for corporate manslaughter following the death of an employee in a roof fall. The company was fined £200,000 for corporate manslaughter. It was ordered to post a publicity order on its website and to make a half-page statement in the local newspaper.

In April 2015, it was announced by the CPS that Sherwood Rise Limited would become the first care home company prosecuted under the Act.

It was also reported in April 2015 that Maidstone and Tunbridge Wells NHS Trust was charged with corporate manslaughter.

In May 2015 it was reported that Sherwood Rise Ltd, a care home company, was charged with corporate manslaughter following the death of an 86 year old woman days after she left a care home in Nottinghamshire owned by the company.

In October 2015 Linley Developments, a building company, was fined £200,000

for corporate manslaughter following the death of a worker when a wall fell onto him. The judge also made a publicity order against the company.

## List of Relevant Legislation

- [Corporate Manslaughter and Corporate Homicide Act 2007](#)
- Powers of Criminal Courts (Sentencing) Act 2000
- Fatal Accidents Act 1976
- [Health and Safety at Work, etc Act 1974](#)

## List of Relevant Cases

- *R v Balfour Beatty Rail Infrastructure Services Ltd* (2006) *The Times*, July 18
- *R v Director of Public Prosecutions and others ex parte Jones* [2000] IRLR 373
- *R v Howe and Son (Engineers) Ltd* (1998) *The Times*, November 27
- *R v JMW Farms Ltd* (2012) Belfast Crown Court, May 8
- *R v Linley Developments* (2015) St Albans Crown Court, September 7
- *R v Lion Steel Equipment Ltd* (2012) Manchester Crown Court, July 20
- *R v Peter Eaton and Cotswold Geotechnical Holdings Ltd* (2011) Court of Appeal, May 11
- *R v Peter Mawson & Peter Mawson Ltd* (2015) Preston Crown Court, February 3
- *R v Pyranha Mouldings* (2015) Liverpool Crown Court, January 12
- *R v Sterecycle* (2014) Sheffield Crown Court, November 7
- *R v Yorkshire Sheeting and Insulation Ltd* [2013] 2 Cr App R (S) 93

## Further Information

### Organisations

- Health and Safety Executive (HSE) <http://www.hse.gov.uk/> The HSE is responsible for the regulation of the risks to health and safety arising from work activity in England, Scotland and Wales, except in certain businesses, which are the responsibility of local authorities. Its roles are to prevent work-related

death, injury or ill health. It is an enforcement agency for transport of dangerous goods issues by road and rail.

- Health and Safety Executive for Northern Ireland (HSENI)<http://www.hseni.gov.uk> The HSENI is responsible for the regulation of the risks to health and safety arising from work activity in Northern Ireland.
- Sentencing Council<http://sentencingcouncil.judiciary.gov.uk/> The Sentencing Council is an independent, non-departmental public body of the Ministry of Justice which issues sentencing guidelines to assist all courts in England and Wales, to help encourage consistent sentencing. It replaced the Sentencing Guidelines Council and the Sentencing Advisory Panel in April 2010.

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