

# Health and Safety Sentencing Guidelines – Implications and Impact of the new sentencing guidelines'

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Pinsent Masons

# New Sentencing Guidelines in force

- Covering Health and Safety, Food Safety and Corporate Manslaughter
- In force from 1 February 2016
- Seismic increases in fines



# What do the guidelines cover?

- Sentencing for:
  - All H&S offences
    - fatal and non-fatal
    - corporate and individual offenders
  - Corporate manslaughter
  - Food Safety and Hygiene
  - They do not apply to fire safety but the logic underpinning them will influence sentencing

# The approach – 9 steps

- **Step one** – Determine offence category: harm and culpability
- **Step two** - Starting point – is the company micro, small, medium or large (or very large) based on turnover
- **Step three** – is proposed fine proportionate
- **Step four** – consider other factors that might require adjustment – e.g. Impact on employees and service users, history of previous offences
- **Plus others** – including credit for guilty plea and “totality”

# Categories of harm

- Seriousness of harm risked + likelihood of harm = Harm Categories 1-4 (NB: Risk of harm – not actual harm)
- Seriousness of harm risked classified as:

Level A	<ul style="list-style-type: none"><li>• Death</li><li>• Physical or mental impairment resulting in lifelong dependency</li><li>• Health condition resulting in reduced life expectancy</li></ul>
Level B	<ul style="list-style-type: none"><li>• 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</li><li>• A progressive, permanent or irreversible condition</li></ul>
Level C	<ul style="list-style-type: none"><li>• All others not in A or B</li></ul>

# Categories of harm

- Establish **Harm category** from Matrix

		Seriousness of harm risked		
Likelihood of harm		<b>Level A</b> <ul style="list-style-type: none"> <li>Death</li> <li>Physical or mental impairment resulting in lifelong dependency on third party care for basic needs</li> <li>Health condition resulting in significantly reduced life expectancy</li> </ul>	<b>Level B</b> <ul style="list-style-type: none"> <li>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</li> <li>A progressive, permanent or irreversible condition</li> </ul>	<b>Level C</b> <ul style="list-style-type: none"> <li>All other cases not falling within Level A or Level B</li> </ul>
	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)

# Defining culpability

- **Level of culpability extremely important – a key battleground between prosecution and defence**

## Very High

Deliberate breach or  
flagrant disregard of the  
law

## High

Fell far short of the  
appropriate standard

## Medium

Fell short of standard in  
a manner that falls  
between descriptions in  
high and low culpability

## Low

Did not fall far short of  
appropriate standard



# Issues relevant to culpability

- **High**

- Failing to put in place measures recognised as standards in the industry / sector
- Ignoring concerns raised by employees or others
- Failing to make changes after prior incidents
- Allowing breaches to subsist over a long period of time

- **Low**

- Significant efforts were made to address risk but inadequate on this occasion
- No prior event or warning indicating a risk



# Step 2 - Categories of organisation

- Establish **financial position of offender** based on turnover:
  - **Micro** – not more than £2m
  - **Small** – Between £2m and £10m
  - **Medium** - £10-£50m
  - **Large** - £50m and above
  - **Very large companies** – turnover “very greatly exceeds” £50m

# Step 2 - Categories of organisation

- Apply **Culpability** and **Harm Category** from Step 1 to relevant **Turnover** category to see **Starting Point** fine and **Category Range**

Large Turnover or equivalent: £50 million and over		
	Starting point	Category range
<b>Very high culpability</b>		
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
<b>High culpability</b>		
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
<b>Medium culpability</b>		
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
<b>Low culpability</b>		
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

# What might some fines look like

- Large company (£50m+ turnover)
- *Very high culpability/Harm cat 1*
  - Starting point £4m – range £2.6m to £10m
- *High culpability/Harm cat 1*
  - starting point £2.4m – range £1.5m - £6m
- *Medium culpability/Harm cat 1*
  - starting point £1.3m – range £800k - £3.25m
- *Low culpability/Harm cat 1*
  - starting point £300K – range £180k - £700k

**The starting point figure is moved up or down within the range to account for aggravating and mitigating features**

# Steps 3 to 9

- Review whether figure is proportionate to means of offender and adjust, e.g. if:
  - Small or large **profit margin** relative to turnover
  - Will fine put offender out of business
- Adjust for other factors, e.g. if:
  - Charitable body
  - Impact of fine on employees or service users
- Reduce for guilty plea

# Key Relevant regulations

## **Health and Safety at Work Act 1974**

## **Management of Health and Safety at Work Regulations 1999**

- Construction Design and Management Regulations 2015
- Work at Height Regulations 2005
- Provision and Use of Work Equipment Regulations 1998
- Lifting Operations and Lifting Equipment Regulations 1998
- Control of Substances Hazardous to Health Regulations 2002
- Control of Vibration at Work Regulations 2005 (growing risk of HAVS!)
- Electricity at Work Regulations 1989
- Control of Asbestos Regulations 2012
- Manual Handling Operations Regulations 1992
- Regulatory Reform (Fire Safety Order) 2005 (not technically covered by the Guidelines but they will be highly influential on a Court)

# Top 5 Fines

Company	Fine	Fatal/Non- fatal
Merlin Attractions	£5million	Non-fatal
Tesco Stores Ltd	£5million	Non-fatal
Network Rail	£4million	Fatal
ConocoPhillips	£3 million	Non- fatal
Cristal Pigment UK Limited	£3 million	Non-fatal
(*Pre Guidelines) Network Rail, Hatfield and Ladbroke Grove disasters	All c. £3 million	Multiple fatalities, “very high culpability”

# Mind the gap...

	Pre Guidelines	Post Guidelines
Health and Safety Offences (fatalities)	A health and safety offence which resulted in death recommended a fine starting point of £100,000.	<p>A 'medium' sized organisation (turnover between £20-50 million) could see the starting point as high as £4 million depending on the level of culpability.</p> <p>For 'large' companies (£50m+) the guidelines indicate a top level fine of £10 million.</p>
Corporate Manslaughter	Fine starting point of £500,000; highest fine to date £700,000.	<p>A 'medium' size organisation would see a fine starting point of £3 million with a possibility of fines up to £7.5 million.</p> <p>A 'large' organisation faces potential fines of up to £20 million.</p>
Health and Safety Offences (non-fatal)	For companies small and large alike fines in the tens of thousands.	Potential fines in the hundreds of thousands even for smaller companies and in the millions for larger corporates

# Very Large Organisations

Company	Turnover	Application
Essar Oil	£5 billion	Regarded as “very large” range available sufficient for sentencing purposes
Whirlpool UK Appliances	£710 million	Fine seemingly moved up on basis of VLO principle
Merlin Attractions	£385 million	Regarded as “very large” but not sufficient to move beyond the range”
G4S Cash Solutions	£208 million	Regarded as “very large” but not sufficient to move beyond the range”
R v Tayto Group	£174.2m	Sentencing Judge floated the idea of the company being a VLO



# Statistics

- There have been substantial increases in the number and severity of fines for incidents that caused little or no harm to workers, evidencing a **risk based approach to sentencing**.
- Total income from the highest **20 fines in 2016** was higher than the total fine income for the **660 prosecutions successfully brought by the HSE in its reporting year of 2015/2016**
- 2014/15 raised **£19 million** in fines compared to **£38.3 million** raised in fines in 2015/2016, representing an increase in fines by a factor of two despite a concurrent reduction in successful convictions.
- Average cost of a fine rose from £69,500 to £211,000.
- **28 fines of over a million in the first 18 months under the new guidelines (more than the amount 1974-2016)**



Chris Warburton

22 August 2016

Safety, Risk assessment, Safe systems of work, Work at height



• Safety breach identified by member of the public

A construction company specialising in climbing walls and adventure parks that allowed staff to work at heights of up to 11m without any fall protection has been fined £500,000.

Walltopia, which is headquartered in Bulgaria but works across the world, was building a high ropes adventure course at Derby's Markeaton Park.

A passerby spotted Walltopia workers using a pallet balanced on the forks of a telehandler.

Derby Magistrates' Court heard that the member of the public reported the activity to the firm. Despite receiving assurances that the practice would be addressed, the unsafe work at height continued.

The member of the public then reported the matter to the HSE.

#### Recommended articles:

[BT alarmed staff for worker's seven metre fall](#)  
[£160k fine for roof slip with potential for serious injury](#)  
[Solar panel installer fell through outbuilding's roof light](#)

# Key Cases



# Tata Steel UK Limited

- Tata Steel pleaded guilty to two offences after two incidents in which workers suffered hand injuries as a result of inadequately guarded machinery.
- Total fine of £1.985 million reflecting the fact that the second incident aggravated the first, significantly increasing the overall fine.
- Sentence reduced by a third for a prompt guilty plea, defendant was loss-making.
- The lathe in question had been operated for 15 years and over 150,000 man hours without incident .
- The Court of Appeal reduced the fine £1.5m on the basis that the culpability was medium taking into account a lower likelihood of harm
- A similar incident in January 2014 attracted a sentence of only £22,500, illustrating the increase in fines (i.e. 66 times greater)

# G4S Cash Solutions Limited

- Worker contracted Legionnaires' disease, local authority enforcement officers investigated the systems operated by G4S to control Legionella bacteria.
- Systems were inadequate, poorly communicated to staff, risk assessments and policies were out of date, and monitoring was erratic.
- The Judge found a '*flagrant breach of the law*' following G4S's persistent failure over a number of years to protect its staff and visitors from the risk of exposure to legionella bacteria which carries a risk of death from Legionnaires Disease.
- The Judge, in applying the new sentencing guidelines, **found very high culpability** coupled with a **statistically low risk of harm**.
- £240 million turnover company received a fine of £1.8 million for 2 charges (reduced for a guilty plea).
- No evidence had been found or offered that anyone had suffered from legionella as a direct result of exposure to conditions at G4S.
- Upheld by Court of Appeal - June 2017.

# Merlin Attractions Operations

- **Facts**

- The company that owns Alton Towers.
- Two rollercoaster carriages collided on the Smiler.
- 16 people were severely injured including two women who suffered leg amputations as a result of the incident.
- Caused by a lack of detailed, robust arrangements for making safety critical decisions.

- **Turnover:** £413m

- **Profit before tax:** £75m

- **Fine:** £5m (equal largest to date under the Guidelines)

# Merlin Attractions Operations

- **Sentencing remarks**

- High culpability, harm category 1.
- Exposed thousands of young people to a risk of harm and significant cause of actual harm.
- Similar offence in 2012 and failed to provide emergency services with proper access to the site.

- **Commentary**

- *“Arguable that this company’s turnover ... would justify moving outside the suggested offence range ... however , in my judgment a “proportionate sentence” can be achieved within the offence range.”*
- **Very large organisations (VLOs)?**

# Decco – Work at Height



- **Facts:**

- IP fell eight feet onto concrete from a platform with no guard rail while he was helping to unload a delivery.
- IP was an agency worker and had been working at the Decco warehouse in Latimer Road, Chesham, for less than a week.
- An investigation by EHOs from Chiltern District Council found that while Mr Richardson had undergone training in manual handling and a basic induction, there was no record of him having any training on working at height.
- EHOs also found that the safety mechanism on the platform, whereby the gate should spring closed was no longer working properly and could be, and was frequently, left open.

# Decco – Work at Height



## Sentencing Remarks

- Decco was fined £2.2m and branded 'idiotic' by the sentencing judge following the death of Mr William Richardson who sustained fatal brain injuries.

## Commentary

- The judge decided the company's culpability was high and found the offence was harm category one. Decco was classified as a large organisation; its turnover last year was £100m. He took into account this was Decco's first safety offence but also that the breach had been going on for many years.
- The starting point of the fine was £3.3m, reduced by a third for the company's early guilty plea.



# Warburtons - PUWER



- Warburtons pleaded guilty to breaching Regulation 11 of the Provision and Use of Work Equipment Regulations 1998.
- A worker was cleaning parts of the bread line when his arm was trapped causing friction burns which required skin grafts (he subsequently died for unrelated reasons).
- The company was fined £1.9 million.
- HSE investigators found CCTV footage showing the worker cleaning parts of the line. He reached into the line and became trapped between two conveyors. Part of the machine was dismantled to release the injured workman.
- The court heard that localised guarding could have been installed to prevent access between the conveyors.
- Starting Point was **£2.4 million** suggesting a high harm, high culpability offence
- Warburtons had been fined £2m previously (January 2017) for a non-fatal fall from height
- By contrast in 2014 Warburtons received a fine of only £5,000 for a serious injury to an employee's hand

# Wilko Retail

- **Facts:**
  - 20 year old employee seriously injured while manoeuvring an overloaded roll cage out of a lift.
  - Roll cage toppled over due to overloading, uneven weight distribution and uneven ground.
  - Sustained a fractured spine, paralysed below hips and only 1% chance of ever walking again.
- **Turnover:** £1.5bn
- **Profit before tax:** £26m
- **Fine:** £2.2m

# Wilko Retail

- **Sentencing remarks**

- High culpability, harm category 2.
- Exposed a number of employees to a risk of harm.
- *“With a turnover in the region of over £1.4bn, it is very significantly higher than figures anticipated in the guideline – it is not even in the same unit of measurement”.*

- **Commentary**

- For a large company facing the same charge, the starting point would be £1.1m with a range of £550k to £2.9m
- Actual fine of £2.2mn also takes into account credit for guilty plea and mitigation therefore judge moved outside of usual range when imposing the fine

# Appeals against sentence

## Watling Tyre Service Limited

- 10 years to get to court!
  - 27 January 2006 – fatal incident
  - 2006 to 2011 – the police investigate
  - 2011 to 2013 – Coroner's investigation and inquest
  - 2014 – papers released to the HSE
  - July 2015 – summonses issued
  - 29 January 2016 – company pleads guilty
  - 1 June 2016 – **fine of £1m** imposed

# Appeals against sentence

## **Watling Tyre Service Limited – Appeal October 2016**

- Appealed on the grounds that:
  - the guideline should not be applied;
  - if the guideline was applied, the sentence should be reduced;
  - full credit should be given for an early guilty plea.
- Court of Appeal disagreed on all points.

**Delayed prosecution can be mitigation but the Court considered the sentence was in line with the general increasing trend prior to the Guidelines. Courts are allowed to have regard to, but do not automatically apply, Guidelines to incidents pre-dating 6 April 2010.**

# Appeals against sentence

## **MJ Allen Holdings Ltd**

- Clear risk of death (fall through an asbestos sheet at 8-10m)
- Medium company (turnover £32m)
- Starting point £240k, reduced by a third for Not Guilty plea to £180k
- Court accepted on appeal that this was excessive and failed to take account of the significant mitigation put forward by the Company
- Reduced on appeal to £80k

# £100m fines in the future?



## Environmental Guidelines

### **R v Thames Water [2015]**

- To bring the message home to the directors and shareholders of organisations which have offended negligently once or more than once before...this may therefore result in fines measured in millions of pounds.”
- “In the worst cases, when great harm exemplified by Category 1 harm has been caused by deliberate action or inaction, ...This may well result in a fine equal to a substantial percentage, up to 100%, of the company's pre-tax net profit for the year in question (or an average if there is more than one year involved), even if this results in fines in excess of £100 million.”

### **2017**

- Thames Water was hit with a record fine of £20.3m after huge leaks of untreated sewage into the Thames and its tributaries and on to land, including the popular Thames path

# Individuals

- Determine the offence category:
  - Culpability
    - **Very high** - Intentionally breached or flagrant disregard for the law
    - **High** – actual foresight of or wilful blindness to risk, and risk taken
    - **Medium** - **an act or omission that a person exercising reasonable care would not do**
    - **Low** – little fault i.e. minor error of judgment



# Individuals

- Similar 9-step approach based on culpability & risk of harm

	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	18 months' custody	1 – 2 years' custody
Harm category 2	1 year's custody	26 weeks' – 18 months' custody
Harm category 3	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 4	Band F fine	Band E fine – 26 weeks' custody
<b>High culpability</b>		
Harm category 1	1 year's custody	26 weeks' – 18 months' custody
Harm category 2	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 3	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 4	Band E fine	Band D fine – Band E fine
<b>Medium culpability</b>		
Harm category 1	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 2	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 3	Band E fine	Band D fine or low level community order – Band E fine
Harm category 4	Band D fine	Band C fine – Band D fine
<b>Low culpability</b>		
Harm category 1	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 2	Band D fine	Band C fine – Band D fine
Harm category 3	Band C fine	Band B fine – Band C fine
Harm category 4	Band A fine	Conditional discharge – Band A fine



# Individual Prosecutions – Post February 2016



# Kenneth Thelwall of Thorn Warehousing Ltd (Dissolved)

- August 2016 sentencing
- A worker died when a remote controlled Mobile Elevated Working Platform he was loading on to a truck fell from the ramps and crushed him.
- The gradient of the ramps were above the manufacturer's specification and they were not secured to the lorry.
- Manchester Crown Court heard how the worker had not been adequately trained on the use of the ramps, the lorry and the Mobile Elevated Working Platform. There was no risk assessment in place and no safe system of work had been created for the equipment. The gradient of the ramp was also above the manufacturer's specification and not secured to the lorry.
- This fatality followed a guilty plea from Mr Thewall over a separate incident in 2010 when an employee was crushed to death in a metal gate.
- Kenneth Thewall was found guilty of section 37 HSWA
- 12 months in prison, £4,000 costs, disqualified for 7 years



# H&S Consultant Imprisonment

- Basement excavation in 2010 on a residential property in Fulham requiring underpinning of the supporting walls;
- Operative working in an unsupported trench when side wall collapsed and he was fatally crushed;
- Deceased employed by ground works sub-contractor;
- Richard Golding was an independent H&S consultant contracted to provide advice to the contractor.
  - Responsible for drafting method statement / undertaking site inspections

# H&S Consultant Imprisonment

- Trial at Southwark Crown Court in November/ December 2014;
- Site manager convicted of gross negligence manslaughter: **3 years and 3 months imprisonment;**
- Safety adviser convicted of s7 HSWA offence: **9 months immediate imprisonment;**
- Sentencing Judge commented that the safety advisor's failure to do anything when on site showed a level of disregard for safety that was staggering.

# Key Battlegrounds

- Fines for all companies are going to be substantially increased
- Risk, not consequence, is the overriding factor
- Battlegrounds:
  - The extent to which failures were systemic v. isolated lapses
  - Establishing whether culpability was “low” as opposed to “medium” (or “high”)
  - Whether a risk was death or serious injury, whether it has to be a substantial risk
  - Therefore, important to examine safety management systems and their implementation, and what role was played by senior management and directors (leadership and direction)
  - The impact of “actual” harm
  - Mitigation

# Future Trends

- Changes to discounts for early guilty plea could mean more early pleas, however the guidelines actually discourage this where the parties are unable to agree and the defence feel they have strong arguments
- In those circumstances we may see more Newton hearings or even trials
- Defendants likely to push back more strongly and earlier, more legal challenge to investigations, privilege engaged and asserted earlier and a greater investment in parallel investigations by the defence
- Ancillary matters which could suggest guilt, such as Enforcement Notices, likely to be contested more and more rigorously, or stayed pending the outcome of an investigation/proceedings
- Defendants more likely to provide independent legal advice to employees, particularly given individual sentencing changes

# Questions and thank you for your time

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