

THE MOST DRAMATIC CHANGE IN HEALTH & SAFETY ENFORCEMENT SINCE 1974?

3 November 2015

The new sentencing guidelines for health & safety offences published today are set to revolutionise punishment for health & safety offences.

The Sentencing Council's stated intention is to increase the level of fines for serious offences, particularly for larger companies; whilst reserving prison sentences for very serious offences. In my view, the formulaic approach laid down in the new guidelines will greatly increase fines across the board and most dramatically for very large companies. More worrying, many more directors, managers and junior employees will be handed custodial sentences due to a significantly lower threshold for imprisonment.

The new sentencing guidelines apply to health & safety offences committed by organisations and individuals, as well as to corporate manslaughter and food safety/hygiene offences. They introduce a structured 9 step approach that the Court should follow, so as to calculate sentences. This involves plugging culpability and harm factors into a series of tables to reach recommended starting point fines, as well as ranges of fines above and below the starting points.

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The new regime has been carefully calculated and will certainly improve consistency across England and Wales. It was published in draft for consultation in November 2014 and the final version published today is little changed from the draft, with the same figures and tables for fines as in the draft. These will apply to sentences handed down from 1 February 2016, which make the guidelines retrospective in the sense that they apply to offences that have already been committed and have not yet come up for sentencing.

My observations on the new guidelines are as follows:

1. Easy to fall into the 'very high' culpability category

The first step of the process is to allocate a culpability factor, ranging from 'very high' to 'low', which in turn will drive the allocation of a recommended fine. The 'very high' category is triggered if there has been a 'deliberate breach of or flagrant disregard for the law'. Although that sounds very serious, with hindsight it may be all too easy for breaches to fall into this category.

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It is not uncommon for employers to identify a safety problem and know they are non-compliant; this becomes a 'deliberate breach' if they don't remedy it. If prosecuted, they may now all too easily find themselves at the sharpest end of the new regime.

2. The shift from outcome based sentencing to risk based sentencing

The main health & safety offences are based on exposing people to risk. However, enforcement practice (as driven by public expectation) looks much more closely at outcome. Breaches causing serious injuries and death have until now been much more likely to be prosecuted than mere exposure to risk; and the sentences have also been much heavier.

The Sentencing Council has adopted a new rationale, dictating that punishment should much more closely fit the level of exposure to risk. So, exposing someone to a high risk of death should warrant almost the same sentence regardless of whether there is a fatality or merely an exposure to risk without any injury.

The consequence of this well intentioned change is to escalate offences that were previously dealt with moderately into the higher reaches of the new formulae. Imagine, a loose railing is discovered on a busy walkway that could lead to somebody falling from a height of 10 feet. The high risk of death or disability from someone falling can take this straight into the most serious harm category, even if nobody has fallen.

3. Designating likelihood of harm as 'high', 'medium' or 'low'

One of the steps is to designate the likelihood of harm as being 'high', 'medium' or 'low'. That appears to be sensible. However, it may give false reassurance as to the fairness and objectivity of the new system. If 100 people walk along the unsafe walkway each day, risking a fall of 10 feet, is there a high, medium or low risk that someone will be killed or disabled?

The problem is that 'high', 'medium' and 'low' are prone to wildly different interpretations. Suppose the experts agree that there was a 1 in 10 risk that someone would have been killed or disabled by falling from that walkway throughout the period of the breach. Even with such a precise expert view, is that a high, medium or low likelihood? The court would struggle to answer that question without understanding the wider circumstances, looking at culpability and what actually happened. But those factors are intended to be excluded from this stage of the calculation to make the process rigorous and fair.

4. Extrapolation of fines for organisations whose turnover very greatly exceeds £50million

This issue will grab headlines in due course. The guidelines, in combination with the Court of Appeal's July 2015 judgement against Thames Water Utilities, pave the way for very large companies to be fined in excess of £100million for the most serious offences. That is clearly the Court of Appeal's intention.

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5. Lower threshold for imprisonment

The culpability factor and harm category process is also used in order to produce a guideline starting point punishment for individuals. At the more serious end of the scale, the court is driven to impose a custodial sentence. So, where does the threshold for imprisonment now lie?

My interpretation of the new threshold is as follows: if a director or employee knows there is a breach of the law that has at least a medium likelihood of causing death or disability, then the court is directed as a starting point to impose a punishment of 1 year's imprisonment, with a range of between 6 and 18 months depending on other relevant factors. Many will judge this to be fair if there has been a fatal accident. But alarmingly, imprisonment will be the conclusion even if there has been no accident at all – just exposure to risk.

This is a very significant reduction in the threshold for imprisonment for health & safety offences.

In summary, the sentencing guidelines adopt a range of well-intentioned and apparently rational changes. However, I am concerned the outcome will be very much more dramatic than intended, with much greater fines across the board and more individuals being imprisoned for offences that would not previously have been regarded as sufficiently serious to merit a custodial sentence.

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It remains to be seen whether these changes will improve prevention and save lives, or drive hazardous industries abroad and bring public perceptions of over-zealous enforcement to new heights.

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