Comment

Hubble, Bubble, Fines and Trouble

By Gerard Forlin, QC[1]

This is the second part of an article on the new Sentencing Council Definitive Guidelines on Health and Safety offences, Corporate Manslaughter and Food Safety and Hygiene offences which came into force on 1 February 2016.[2] It will cover some of the real practical and technical issues involved.

Before doing so, it is worth noting that since Part 1 of the article was published, one can already see a steady increase in fines and prison sentences. On 29 April 2016, Travis Perkins pleaded guilty to two Health and Safety offences arising from a fatal accident. They were fined £2 million pounds and £115,000 in costs. After a *Newton* hearing on causation the judge found that their culpability was medium, the harm level Category A and a high likelihood of harm. They also had a similar previous conviction. The deceased had been loading planks onto his vehicle when he suddenly fell backwards after a strap unexpectedly gave way, then was tragically run over by a company HGV. The judge said: *"it was an accident waiting to happen"*. The turnover was £2 billion but the judge discounted the fine based on mitigation and an early plea being entered.

Also in April, Balfour Beatty were fined £2.6 million after pleading guilty to a series of Health and Safety charges arising from the collapse of a trench that killed a sub-contractor on a wind-farm project. This was the second million-pound-plus fine for Balfour Beatty in 2016.

McCain Foods (GB) Ltd were fined £800,000 after pleading guilty to offences after an employee's arm became entangled in a machine when the appropriate guard had not been fitted. A risk assessment had failed to identify. Although the employee's arm was saved, the injury resulted in him having limited future hand movement.

In March 2016 a national company, Falcon Crane Hire, was fined £750,000 and ordered to pay costs of £100,000 after two people died when the jib separated from the main mast of the crane. Metal fatigue was found to have caused this failure. The court found that the company *"… had an inadequate system to manage the inspection and maintenance of their fleet of cranes"*. The Court also heard that some bolts had previously failed – an exceptional occurrence, the significance of which should have been recognised.

Watling Tyre Services Ltd were fined £1 million and £100,000 in costs after pleading guilty to two health and safety charges. This incident occured in 2006 when a young apprentice died when repairing a puncture to a tyre of a Dresser loading shovel that exploded, throwing him more than 30 feet in the air.

In May 2016, Scottish Power Generator were fined £1.75 million after an employee was seriously scalded when he opened a valve which emitted high-pressure steam. He survived and the company pleaded guilty to one count under the Health and Safety at Work Act 1974. An investigation found that the company had been aware of the defect but had not taken appropriate steps to rectify the situation.

In another case in May 2016 two companies were fined after they pleaded guilty to Health and Safety charges arising from a failure to manage the risks to employees of vibration from tools used in the servicing of crushers and screeners. They were fined £280,000 and £12,000 plus costs respectively. This was not a fatality and the heavy fines arguably represent a major shift in sentencing severity and a precursor of what is to come.

Recent cases also show an increase in severity in sentences imposed on individuals. At Manchester Crown Court in April 2016 one director was sentenced to six years imprisonment for gross negligence manslaughter and another to eight months imprisonment for Health and Safety offences after an employee died in a fall through a skylight. The same employee had nearly fallen through another skylight the day before but was ordered back on the roof. There was no method statement on risk assessment in place. The main company pleaded guilty to various charges and was fined £400,000 and £55,000 in costs. The turnover was less than £2 million.

In May 2016, a director was sentenced to 40 months imprisonment after pleading guilty to gross negligence manslaughter and perverting the course of justice. Another director was disqualified from being a director for two years and ordered to do 120 hours of community service after pleading guilty to s.37 of the Health and Safety at Work Act 1974. The company was also fined £75,000. This was a particularly bad case in that the director tried to cover up the accident and lied to the police and cajoled workers to provide false statements. After a six metre fall the worker was driven home and put to bed. The Authorities were not notified. He was found dead on the floor the next day. With regard to both defendants the judge found that the category of culpability was high and the level of harm was medium and the seriousness of harm was level A – the highest level possible.

In May 2016, a restaurant owner was sentenced to six years imprisonment for being found guilty of manslaughter and six food safety offences when a customer suffered a severe anaphylactic shock after eating a takeaway containing peanuts. He had specified no nuts in his order.

At Swansea magistrates' court in April 2016, a self-employed contractor was sentenced to six months' imprisonment after an employee died when he entered a trench, which collapsed, burying him. The court found that the risk assessment was neither suitable nor significant.

At Peterborough Crown Court in May 2016 a sole director trading as a company pleaded guilty to a charge under the Provision of Work Equipment Regulations 1998 (PUWER) and was sentenced to 15 months' imprisonment, suspended for 24 months, fined and had full costs imposed of £45,000.

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2 The first part appeared in *Archbold Review* Issue 3.

A worker entered a machine when it suddenly started, killing him.

Another recent case concerned a director who was sentenced to 26 weeks' imprisonment after being found guilty by a jury of s.3 of the Health and Safety at Work Act when an elderly lady died in the defendant's specially adapted vehicle, which he was driving. The seat-belt was inadequate and in consequence the lady came out of her seat and struck her head when the vehicle was involved in a collision. He was also sentenced to 36 weeks for causing death by careless driving, reduced to 11 weeks on appeal[3]. This case clearly indicates the new climate of higher individual penalties.

Not all these cases, it should be noted, involved fatalities.

Turning to some of the practical issues, and in no particular order:

Guilty Pleas

We all wait in anticipation for the new guidelines on guilty pleas. The draft guideline on which a final decision is currently awaited "seeks to encourage those defendants who are aware of their guilt to enter a plea as early in the court process as possible".[4] With the aim of increasing speed and efficiency, the proposal seeks to cut down the one-third reduction for a guilty plea in cases where defendants do not plead guilty at the outset; with the likely result that, in practice, fewer defendants will in future qualify for the full discount. The draft purports to provide some degree of flexibility for defendants whose delay is not caused by their attempting to "play the system", but it is minimal. If the consultation process, which closed on 5 May, does not lead to major changes to the draft guideline, the new regime for credit could cause havoc not only in these types of cases, but in all regulatory cases.

It is, disappointingly, not uncommon for the prosecution not to have served adequate disclosure by the first hearing. This makes advising clients extremely difficult. Further, the current time anticipated by the guidelines will be often be insufficient to obtain evidence and to instruct experts, who are often highly specialised and involved in numerous other cases.

Many defendants will be corporate and require instructions to be taken from various management layers, including Boards which may be headquartered abroad.

Additionally, the proposed changes involving *Newton* hearings and the potential reduction of credit will prove to be particularly problematic. As explained in the first part of this article, there will inevitably be more *Newton* hearings, both in relation to sentencing, as to what was the real risk as shown by the evidence, and recourse to experts in accountancy, risk and highly technical issues.

The criminality in these types of cases are rarely clear-cut and in my view, shared by many others, the current status quo should continue. I further suspect that if the proposed changes come into effect, there will be an actual increase in the numbers of trials as defendants take the view that the best method of bringing the full mitigating factors to the forefront is by fighting the case. This would, of course, result in the complete opposite objective that the proposed Guidelines are attempting to achieve.

Listing Issues

Both in the magistrates' and Crown Courts there are already very lengthy waiting times. These types of complicated cases, especially fatalities, are meant to be listed before a High Court judge, or another judge only when the presiding judge had released the case or the resident judge has allocated the case to that judge.

Since s.85 of the LAPSO came into effect on 12 March 2015 these types of cases, as set out in Annex 3 of CPD XIII, mean that an authorised District Judge must deal with any allocation decision, trial and sentencing hearing in proceedings for either way offences which, *inter alia*, involve death, or a significant life-changing injury, or a high risk.

To this we must add the stringent new requirements set out in the Better Case Management system implemented since 5 January 2016 and the new allocation guideline effective from 1 March 2016.

Many of the less serious cases will be heard in the magistrates' courts which already have very serious delays. In certain localised Crown Courts the situation is even worse! Further, with more *Newton* hearings requiring experts and other witnesses, lasting several days – the delay to cases being resolved will simply increase. This is, of course, unsatisfactory not only defendants but also for witnesses and victims and their families.

Other Factors

In addition to the above, much greater thought and immediate attention will need to be given to the extent of defence co-operation even before summonses are served. This includes draft internal investigation reports, submissions under caution, group accounts, directors' remuneration, pension provisions and shareholder dividends and a plethora of other important issues.

Given that these recent cases clearly illustrate the emphasis being placed on the risk or likelihood of harm and not the actual outcome and fines intended to have a real economic impact, much more investigation and preparation front-loading will be required by organisations and individuals in the aftermath of an incident. To simply sit and wait to see what the prosecution does and says will be to miss an opportunity which the new proposed timetable will punish.

Conclusion

It is demonstrably the case that penalties are dramatically ramping up and centred on the risk of harm, rather than just the actual consequences. To repeat a point made in the first part of this article, these higher fines will not only have an impact domestically, but could also have a knock-on effect internationally, from both a regulatory and reputational perspective.

It is hoped that this change of emphasis may trigger greater awareness that incident prevention is the touchstone of corporate survival and that in the event of an occurrence, immediate steps relating to internal investigations and improvement need to automatically happen: the prosecutors wait in the wings for the unready, or unwilling!

3 *Sutton* [2010] EWCA Crim 540.

4 http://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.pdf