

Outer Temple
Chambers

Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences

The Guideline One Year On

25th April 2017

“The pessimist complains about the wind; the optimist expects it
to change; the realist adjusts the sails”

William Arthur Ward – US Writer

Paul Rogers

1. Some outstanding issues yet to be determined
2. Practice and procedure - issues
 1. R (HSE) v. Thelwall and R (HSE) v. Watling Tyres (2016) – the LCJ’s first pronouncements
 2. New SC Guilty Plea Guideline
3. Some sentencing cases
 1. R v. Merlin Attractions Operations Ltd (2016)
 2. R (HSE) v. ConocoPhillips (U.K.) Ltd CA
 3. R (HSE) v. MJ Allen Holdings Ltd CA (Dec’ 2016)
4. Reflections

Outstanding Issues yet to be determined

1. What can be agreed by the parties and what cannot – ie a matter for the Judge/Magistrate?
 1. Factual basis of plea
 2. Culpability?
 3. Harm Category?
 4. Paragraphs 2 i) ('exposing a number of workers/members of the public to risk')
 5. Paragraph 2 ii) ('causation') and 'Other factors' -the significance of the actions of victims which is not reasonably foreseeable

Outstanding Issues yet to be determined

2. What does 'proportionate sentence' in the 'Very Large Organisation' Box above the tabulated figures mean?

1. Proportionate to what? Does it mean proportionate to the turnover, proportionate to means? (Step 3)
2. What if any role does the 'culpability' level play in proportionality?
3. What if any role does the 'harm category' level play in proportionality?
4. See also 'Step 3' – real economic impact - and R (HSE) v. Merlin Attractions Operations Limited 2016

3. What is a 'very large organisation' – when does turnover 'greatly exceed' £50million?

Practice and Procedure Issues

1. R (HSE) v. Thelwall and Watling Tyres Oct 2016 – the Lord Chief Justice
 1. Guidelines are Guidelines
 2. Citation of decisions of the Court of Appeal Criminal Division in the application and interpretation of the guidelines is generally of no assistance
 3. It is impermissible to refer to reports from newspapers, the BBC or HSE website
 4. The system now proceeds on the basis of guidelines and not case law

5. Health and Safety cases are no different to other criminal cases. They must be approached on the basis that they are no different [NB watch out for challenges to the current law on the reverse burden]
7. There may be cases in which technical evidence is difficult, but the general approach to the conduct of these cases should be the same as any other
8. A 19 page skeleton from HSE was excessive when even the Civil Practice Direction provides for a max for a full civil appeal of 25 pages.
9. R v Friskies Pet Care UK Ltd [2000] 2 Cr App R(S) 401 is **no longer of any materiality**. The matter has been superseded by the CPR 24.11, 25.16 and Criminal Practice Direction 7Q3-7.

10. Costs on Appeal (not relevant to first instance?)

- Courts often make substantial orders against defendants for the recovery of investigative costs and to ensure equality of arms before a trial judge
- However, the Health and Safety Executive must bear in mind that in Court of Appeal the position of a respondent is generally no different to that of the Crown Prosecution Service when an appeal is brought by an offender. NOTE: appellant an individual
- On appeal, the Court declined to make an order for costs against unsuccessful appellant that included: first, the attendance of a solicitor (which CoA says is generally unnecessary for any sentence appeal); and an award to counsel that was vastly more than what would be paid to counsel instructed by the CPS
- NOTE: CoA office papers before the court indicated that the appellant has no money i.e. could not pay.

11. Delay and the applicability of the Guideline

1. Watling Tyres – offence 2006 **10 years** after sentence
2. Inquest in 2013
3. Papers released to HSE in 2014
4. HSE issued summons July 2015
5. Guilty plea January 2016
6. The Court should not ignore the delay – the offence pre-dated the Act which created the SC and Guidelines (let alone the Guideline)
7. The Court should have regard to the Guideline
8. Interests of Justice ‘safety valve’ applies

2. New SC Guilty Plea Guideline

Anticipated crack down on credit for plea not materialised in the way feared

Latest Guideline from the SC softens the approach (thanks to the HSLA obviously) for offences the first hearing for which is on or after 1st June 2017

Plea indicated at first stage of proceedings;
one-third discount

Plea indicated after the first stage of the proceedings;
one-quarter discount

Exception F1

Where the sentencing Court is satisfied that there were particular circumstances which **significantly reduced the defendant's ability to understand what was alleged or made it unreasonable to expect the Defendant to indicate a guilty plea sooner than it was done, a reduction of 1/3rd should still be made**

NB – if a Defendant's version of events is rejected at a Newton Hearing – reduction will be halved – if witnesses are called, perhaps even less

R (HSE) v. Merlin Attractions Ops Ltd

Huge publicity attracted by the accident on the Smiler at Thorpe Park

Turnover £385m

Initial publicity released by company – “human error” – eventually accepted to be

‘Absence of a structured and considered system ... the controlling computer system had been re-set having been overridden to enable engineers to address faults ... two years [earlier].’

R (HSE) v. Merlin Attractions Ops Ltd

Principle issues

High Culpability (defence submitted 'low')

Harm Category 1

Many thousands of members of the public exposed to harm

Thus the Judge 'moved substantially up the category range'

Bracket identified was £1.5million to £6million - £2.4million starting point

R (HSE) v. Merlin Attractions Ops Ltd

The Judge did not apply the principle set out at the beginning of the table for 'very large companies'

Instead he went for proportionality under Step 3 and **increased** the figure such that it was 'proportionate to the means of the offender'

Powerful aggravating features

Serious breach of a high duty of care

Put thousands at risk of death or serious injury

Caused devastating injuries

£7.5million down to £5million for plea

R (HSE) v. Merlin Attractions Ops Ltd

Does this approach mean that the proportionality argument

Is different at Stage 2 as opposed to Stage 3?

Can mean increasing the figure for Very Large Organisations at Stage 2 **and** Stage 3?

Stage 2 is simply proportional to turnover

Stage 3 is '**turnover plus aggravation**'

NB **not** the approach taken in R (MKBC) v. Travis Perkins PLC

R (HSE) v. ConocoPhillips (U.K.) Ltd CA

First case attracting any comment on the Guideline in the Court of Appeal (pre dated Watling Tyres and Threlfall)

Treacy LJ in the chair – Lead Judge?

Lincolnshire Offshore Gas Gathering System

Uncontrolled leak of 600kg of gas into a power turbine hall

An explosion would have been catastrophic – 70 people on board – impact on North Sea Gas fields

Removal of a valve without proper isolation in place

Some safety indication systems did not work as they should...

Guilty plea at the earliest opportunity to three charges

R (HSE) v. ConocoPhillips (U.K.) Ltd
CA

In the Crown Court the Guideline not applied by agreement (26th
January 2016!)

Court of Appeal – that was wrong

Turnover in the year of the accident - £8.2 billion – profit £122m

Year before sentence - £4.8 billion – profit

No argument about the Guideline – CA considered it anyway

R (HSE) v. ConocoPhillips (U.K.) Ltd
CA

Culpability

‘Having regard to the guideline, it seems to us that the case is one of high culpability since the offender fell far short of appropriate standards. There was a serious and systemic failure to address risks to health and safety, both in the permit to work process and in the vital systems represented by counts 2 and 3. Those breaches have persisted over a period of time.’

(Ignored a substantial chunk of mitigation on the basis of systems and PTW)

R (HSE) v. ConocoPhillips (U.K.) Ltd CA

Harm Category

‘Considering harm, we consider that the case falls into Category 1 as there was a high likelihood of serious injury or death being caused and a large number of workers were exposed to that risk.’

Conflating more than one part of the process – Harm Category and ‘paragraph 2’ in one hit

Presumably meant started off in Harm Category 2 – or just a throw away “if I am wrong about that” type of remark?

R (HSE) v. ConocoPhillips (U.K.) Ltd
CA

Step 2 – the bracket

‘Moving to step 2 of the guideline, that combination of high culpability and Category 1 harm would for a single offence in the case of a large organisation (turnover £50 million and over) lead to a starting point of £2.4 million, with a range of £1.5 to £6 million. Since this organisation exceeds the threshold for large organisations by a huge margin, it would indeed be necessary to move well beyond that range to achieve a proportionate sentence.’

In oral submissions – thinking in terms of **£20-30million being unappealable**

Cf the (latest) £20million fine for Thames Water (HHJ Sheridan)

Very Large Companies

When will they become very large?

- Thames Water – 2015 – you know one when you see one!
 - “In the case of most organisations, it will be obvious that it either is or is not very large. Doubtful cases must be resolved as and when they arise.”
- Multiples x 5 in brackets – so £250m + turnover?
- CA in Thames said, effectively, no mathematical formula – so should it be “confined” to billion plus companies?
- R (HSE) v Tayto Group – turnover £174.2m. HSE floated it was very large.

R (HSE) v M J Allen

- A (rare) success in CA
 - Fragile roof – worker slipped put foot through – no injury.
 - HHJ Williams imposed £160,000 fine (reduced from £240,000)
 - Found, Medium culpability, level 2 Cat A harm
 - Medium company £32m
 - Extensive mitigation but Judge simply took the £240k starting point. No apparent reduction for the mitigation.
 - Did not appear to have followed carefully the step approach
 - CA noted that the Judge's net fine represented 23% of the operating profit of the company. They said “we think it is highly relevant to have regard to the company's small operating profit” which was just over 2% of turnover.
 - Reduced to £80,000

Less Successful Arguments

1. Risk – based on statistics

- HSE – statistics based gave some objective assistance to determine that the risk of death was low rather than medium.
- CA accepted that the RIDDOR statistics showed only 39 in 7000 falls resulted in death ie just over ½%. BUT they went on to observe that Level A harm is not limited to death, and observed that 40% of falls resulted in “major/specified injuries” and so they found the Judge was right to “emphasise the risk of head or brain injury from such a fall.
- However – this did not take account of the definition of these injuries which is broad: eg includes fractures (break, chip or crack) other than to fingers and toes, amputations, loss consciousness however short. Level A type of harm?

Double counting

- Repetition of the same dangerous work the day after the accident.
 - Judge found this had some aggravating element to it at step 2.
 - I argued that the longevity of the breach was a factor properly taken into account at the culpability stage – explicitly one of the “High” factors.
 - CA said no “significant” element of double counting.
 - Did not say there was none. One to watch.

Other Issues

- Use of statistics or other evidence of harm risk
 - MJ Allen
 - Asbestos cases – risk of death - evidence
 - HSE v Motorhog
 - More success here with DJ. HSE had argued medium/high risk of death from low speed forklift collision
 - AAA Foundation for Traffic Safety study Sept 2011 (USA) found the average risk of death for pedestrians was 10% at an impact speed of 23mph; severe injury risk was 10% at 16mph. This included light trucks.
 - DJ accepted “low” risk Level A harm. No evidence from HSE at all just an assertion.

Forensic Accountancy

- Increasing importance in analysis and understanding company and Group accounts
- Isolating the trading entity within the group
- Operating profit vs net profit after tax.
- Understanding expenses = administration costs
- Forecast for current trading year – exchange rate exposure
- Statement from Director/CFO re; effect on business of very substantial fine – on employees/closure (relevant to Step 4)
 - Impact of the fine on employment of staff, service users, customers and local economy.
 - Barrow BC v South Lakes Safari Zoo Ltd. 10 years to pay

Conclusions

Still a number of questions yet to be addressed

Watch this space for practice in determining risk

LCJ – wide margin of discretion to the sentencing Judge

Are we any better off in trying to advise as to outcome?

Thank You

paul.rogers@outertemple.com