Comment

The Guidelines have finally arrived: "When the Levee Breaks"

By Gerard Forlin QC[1]

This is the first of a two-part article on the new Sentencing Council Definitive Guidelines on Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences.[2] These came into effect in 2016 and apply to any relevant cases heard on February 1 or after that date, irrespective of when the offence occurred. This first article will review the actual Guidelines themselves; the second will discuss some of the real practical and technical issues involved.

The new Guidelines followed a consultation exercise to which, somewhat surprisingly, only 104 organisations and individuals responded. Very little has changed from the consultation document, and although we will never be sure, industry may have lost a useful opportunity to get changes by its failure to engage with the consultation process.

Further, in December 2015 and January 2016, before the Guidelines came into force, fines had already started to dramatically increase, perhaps as judges warmed up to this new regime. Of this, some striking examples can be given. In December 2015 Total were fined £1.25 million after a gas leak into the North Sea. In February 2016, Conoco Philips were ordered to pay £3 million after pleading guilty to gas releases on the Lincolnshire gas gathering system in December 2012, and ordered to pay £159,459 costs. (As the sentencing hearing began in January 2016 the Guidelines did not apply.) In January 2016 Balfour Beatty were fined £1 million after a worker died repairing a central reservation barrier, UK Power Networks (Operations) Ltd were fined £1 million plus costs after a jogger ran into a fallen 11,000-volt wire, and CRO Ports London Limited were fined £1.8 million after pleading guilty to a breach of s.2 of the Health and Safety at Work Act in connection with an accident in which a worker suffered multiple fractures and nerve and ligament damage to his left arm. (This last case, it should be noted, was not a fatality.) These fines seem generally much higher than hitherto, and may be a precursor of what is to come.

The new Guidelines represent a significant change of emphasis in the approach to sentencing these types of offences. Hitherto, the approach was largely based upon the actual consequences of the offence. For the future, however, the courts when sentencing for health and safety offences are enjoined to remember that these are:

> "… concerned with failures to manage risks to health and safety and do not require proof that the offence caused any actual harm. The offence is in creating a risk of harm."

The new approach will be based on risks of harm, linked to the various tables which the Guidelines contain. It seems likely that, in many cases, this exercise will now require expert evidence (including medical evidence) at *Newton* hearings in order to ascertain the actual risk and the medical prognosis of physical and mental injury.

The Guidelines contain various signposts as to how to assess the appropriate fine. These include the seriousness of the harm created by the offence and the likelihood of that harm arising. The Guidelines tell us that the Court needs to consider in the round (1) whether the offence exposed a number of workers or members of the public to the risk of harm and (2) whether the offence was a significant cause of [the] actual harm. These factors may in turn affect the harm category or category range.

The next step requires the court to focus on annual turnover or equivalent (including possibly group accounts) and other financial factors including pension provisions and Directors' remuneration. It is important to note the focus is on turnover, rather than solely upon profit. This step too seems likely to herald an increased use of expert evidence: this time from accountants and pension experts to opine on the financial health (or ill-health) of the defendant.

For a practical example, let us take the case of a very large organisation which has a turnover or equivalent of £50 million and over. A table on page seven states that in very high culpability cases involving a high likelihood of harm involving death, physical or mental impairment or significantly reduced life expectancy the "starting point" should be £4 million and the "category range" is £2.6 million to £10 million. Somewhat ominously the Sentencing Council goes on to say that:

> "Where an offending organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence."

Despite calls in the consultation exercise for a more precise definition of what this meant, the Guidelines do not offer any further insight. For the thousands of UK organisations this caveat may cover, this is alarming.

The Guidelines then set out a non-exhaustive list of other relevant increasing factors, such as previous convictions and cost-cutting at the expense of safety; and conversely, factors tending to reduce the sentence, such as self-reporting and co-operation and, very interestingly, a new factor of high level co-operation with the investigation, beyond that which will always be expected. This new factor seems likely to engender lively debates as to what level of co-operation is to be expected, and what level of co-operation goes beyond it.

The Guidelines then state that the court should *"step back"* and review whether the proposed fine, based on turnover, is proportionate to the overall means of an offender and

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2 *https://www.sentencingcouncil.org.uk/wp-content/uploads/HS-offences-definitive-guideline-FINAL-web.pdf*

whether it is sufficiently substantial to have a real economic impact, sufficient to bring home to both management and shareholders the need to comply with health and safety legislation.

The last three steps in the exercise include considering what other factors may warrant adjustment of the proposed fine. These include the impact the fine would have on an offender's ability to improve conditions in the organisation so as to comply with the law, factors (like those already mentioned) which operate to mitigate the sentence, and finally a reduction for a guilty plea. (In this context we should also look ahead to the new Sentencing Council Consultation exercise in February 2016 regarding reductions in sentence for a guilty plea, which could eventually lead to a substantial reduction in the final credit for guilty pleas in these types of cases.) The final step under the Guidelines involve compensation and other ancillary orders, considering the totality principle, and the giving of reasons pursuant to s.174 of the Criminal Justice Act 2003.

The Guidelines also deal with corporate manslaughter and here the harm and culpability factors are assessed by asking:

> "(a) How foreseeable was serious injury?
>
> (b) How far short of the appropriate standard did the offender fall?
>
> (c) How common is this breach in this organisation?
>
> (d) Was there more than one death, or a high risk of further deaths, or serious personal injury in addition to death?"

In my view, these factors are also likely to lead, even after guilty pleas, to many *Newton* hearings complete with expert evidence. In the most serious cases involving organisations with a turnover above £50 million, the starting point is set at £7.5 million and the category range is £4.8 million to £20 million or greater in very large organisations. In instances where turnover is up to £50 million, the starting point is £3 million and the category range £1.8 million up to £7.5 million.

For individuals charged with health and safety offences, the Guidelines set out a series of factors to determine the relevant offence category. In cases where there is a very high culpability, as where the offender intentionally breached or flagrantly disregarded the law and created a risk of harm in a high category, such as death or grave physical or mental impairment, the starting point is 18 months custody and the range is 1–2 years. This represents a lowering of the previous custody threshold, and means more defendants now risk going to prison for longer periods. Of course, fines will also increase for individuals.

For a recent example, on February 5 Sherwood Rise Limited (providers of care homes) pleaded guilty to corporate manslaughter. A director was sentenced to 38 months imprisonment for manslaughter by gross negligence and disqualified. The manager of the care home was sentenced to one year's imprisonment suspended for two years and disqualified as a director for five years after being convicted under ss.3 and 37 of the Health and Safety at Work Act.

The Guidelines also cover food and hygiene offences for organisations and individuals.

The new Guidelines clearly represent a major gear-change in the approach to sentencing of both organisations and individuals. This development has already sent a chill through Corporate UK and many defendants, particularly larger corporate ones, and individuals. Further, as these cases often take a long time to come to court, a particular source of grievance for some defendants is likely to be that their old cases are now sentenced under the new and harsher rules.

These eye-watering changes (alongside other recent regulatory changes) must also raise a legitimate concern that some larger organisations may now consider scaling down their UK operations. Much bigger fines will also trigger much more adverse publicity and therefore have a real impact on reputational factors: big businesses do not tend to relish such developments.

(To be continued.)

Feature

Dishonesty in the first LIBOR trial

By Jonathan Rogers, Senior Lecturer in Laws at University College London

The recent trial of Mr Tom Hayes in August 2015 on eight counts of conspiracy to defraud over the manipulation of the Japanese Yen LIBOR (London Interbank Offered Rate) received much publicity. On appeal in December 2015, his convictions were upheld but his sentence was slightly reduced.

Undoubtedly the Court of Appeal had been right to dismiss the appeals against his convictions, which was based mainly on the judge's directions to the jury on the element of dishonesty. But one part of the Court's decision deserves further scrutiny. If the decision in *Hayes*[1] is taken at face value, the honesty of the defendant's conduct has to be viewed in isolation from any similar activity which is perpetrated separately by others.

The facts of Hayes

At the relevant time, the LIBOR for various currencies was determined by the British Banking Association from time to time by reference to submissions from different panel banks as to the interest rates which they were able to procure for inter-bank lending. It was understood that all banks had to submit such estimates in good faith and excluding their

1 [2015] EWCA Crim 1944.