

Sentencing in
Health & Safety:
Headlines and
high fines



Contents

1. Introduction.....	1
2. The first 12 months: the headlines.....	2
3. What do our clients think?.....	4
4. Sector focus: construction.....	6
5. Sector focus: manufacturing.....	8
6. Sector focus: local authority enforcement.....	10
7. Spotlight on the individual.....	12
8. Industry experts.....	14
9. Practical implications.....	18
10. Be proactive!.....	19
11. Step by step: how it works.....	20

Introduction

1 February 2016 saw arguably the biggest change in the health and safety enforcement sector in 40 years. The implementation of the Definitive Guideline on Sentencing in cases of health and safety, corporate manslaughter and food safety and hygiene (the “Guideline”) linked financial penalties to the turnover of defendant businesses for the first time.

With 12 months’ experience of the Guideline’s application in practice now under our belts we look back at how the Guideline has altered our legal landscape and in particular how the Courts, regulators and businesses have responded to this momentous change.

Clyde & Co’s market leading SSHE Regulatory team has monitored the progress of this sentencing revolution, from its inception, through the consultation stage right up to the present day. And as we review the impact of the first year, we necessarily take stock but also look to the future.

Utilising the available data from the HSE, together with analysing hundreds of responses from local authorities under freedom of information legislation, we have produced this comprehensive report covering the activities of the two main streams of health and safety enforcement.

A million pounds is now no longer a figure beyond which the Courts will trespass only in the case of a public disaster. Since 1 February 2016 we have seen more penalties exceed this level than in the previous 20 years combined and the multi-million pound penalties keep coming.

The Guideline directs the Court to set a fine, which is, “sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation”. Whilst organisations classified as “large” and “very large” are understandably concerned about a headline grabbing fine, away from the news, the real impact is felt most keenly amongst SMEs,

which are being deprived of a far greater proportion of turnover when fined.

Notwithstanding the very significant penalties being imposed by the Court, a survey of our clients (see page 4) found that the majority supported this change in sentencing practice and felt it produced fines that were more proportionate to the means of organisations. The Guideline was designed to ensure that it is not “cheaper to offend than to take the appropriate precautions”. With the amount of fines now far outstripping the cost of compliance, it appears that a positive and swift result has been achieved.

We hope this report proves interesting, provokes debate and assists in achieving strong investment in robust safety management tools. If you have any comments on the report, we would be delighted to hear them so please do get in touch.



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“ Sentencing guidelines must recognise that health and safety offences are criminal acts that should be treated no differently to other crimes involving violence. (Response to consultation)

The first 12 months: the headlines

HIGHEST FINES

Merlin Operations:
£5m non-fatal
incident



Network Rail:
£4m fatal
incident



£76,730,613

amount collected in fines
during the first 12 months
(compared to **£36,242,706**
in the preceding year)
111.7% increase

282 local authorities brought



**NO HEALTH
& SAFETY
PROSECUTIONS**
in the year to 31 January 2017



19 number of fines
**EXCEEDING
£1M** imposed in 2016



**1,870%
INCREASE**

total fines collected
in **local authority
prosecuted cases**
in the year to
31 January 2017



Local authority
prosecutions yielded
£15,150,664

**43 SUSPENDED
SENTENCES**

imposed



27.5%

largest proportion of
turnover taken in fines
(Monavon Construction)

**HEALTH
& SAFETY
EXECUTIVE**

prosecutions amounted
to **£61,579,949**



84%
of convictions in HSE
prosecutions result in
a **financial penalty**

**MOST
HEAVILY FINED
INDUSTRY:**

manufacturing (**£22.7m**)



**GAS
INDUSTRY:**

source of highest
proportion of
individual convictions



4%



of individual convictions
in HSE cases result in
immediate **custodial
sentences**



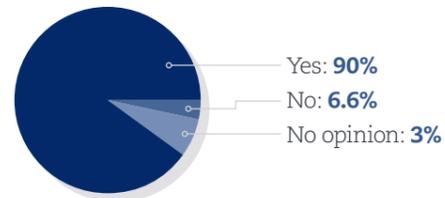
£1m: highest
fine imposed by a
**MAGISTRATES'
COURT**

What do our clients think?

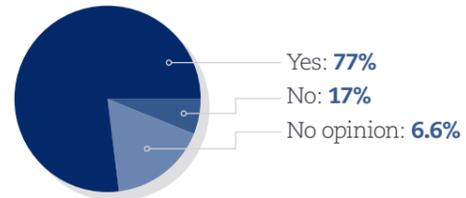
The Guideline has dominated discussions with our clients since the publication of the consultation document in November 2014. At that stage, there was much apprehension, some confusion and a great deal of concern as to what the future might hold. But now the Guideline is an unavoidable part of our system, how do our clients feel about it? We carried out a short survey to find out.

Those surveyed comprised health and safety professionals, in house lawyers and those engaged in operational management across a range of sectors, including construction, retail, manufacturing, facilities management and logistics.

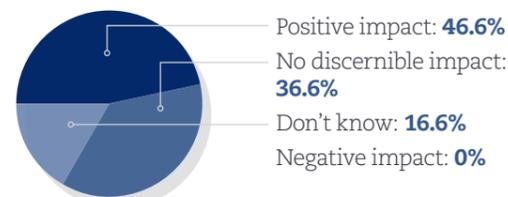
1. Are you in favour of the approach to sentencing health and safety breaches now being taken?



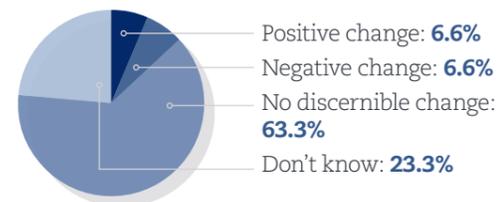
2. Do you think that the financial penalties now being imposed on organisations are more proportionate to their means?



3. In your opinion, how would you describe the impact of the introduction of the Guideline on your organisation?



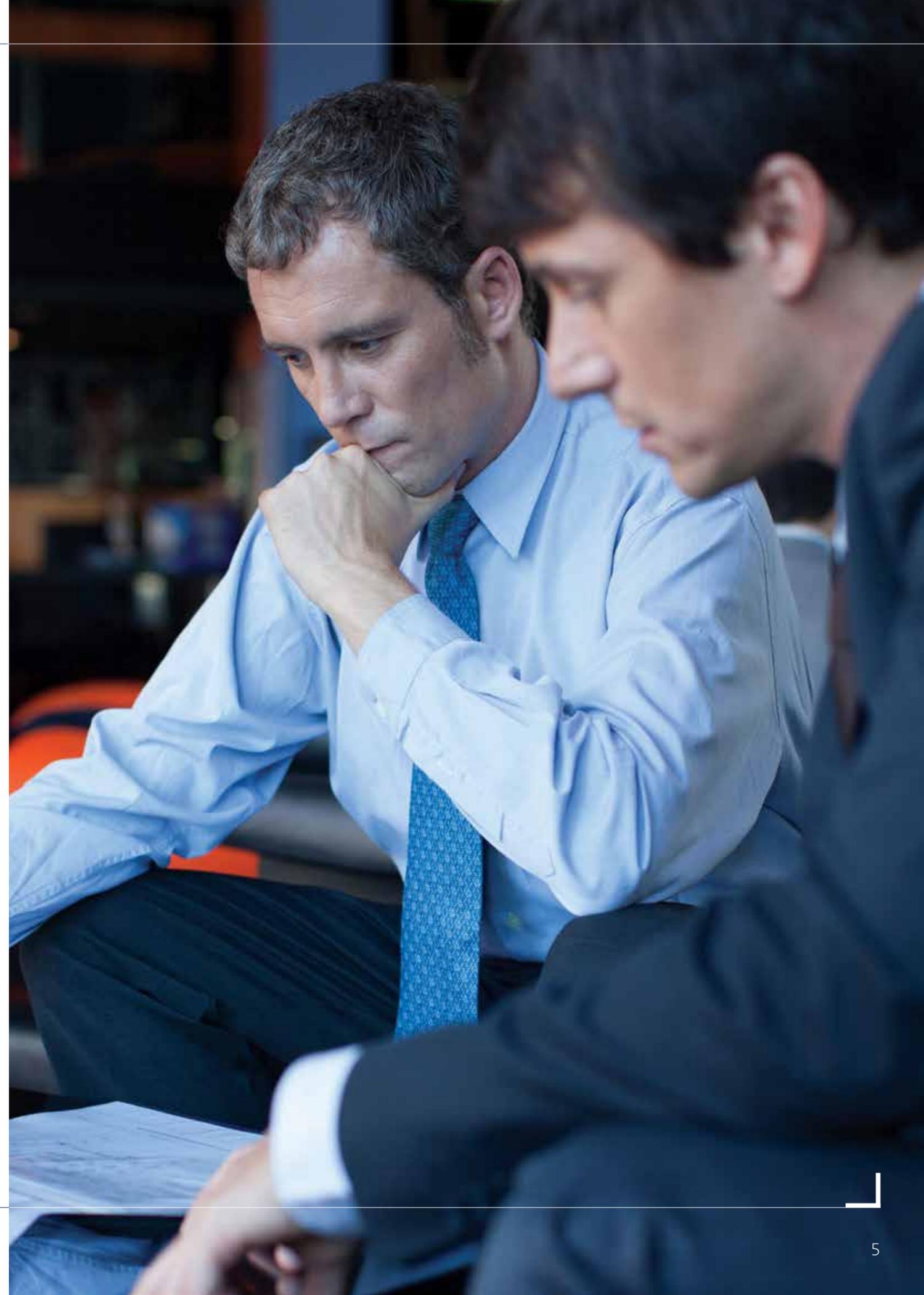
4. Based on your experience, how has the Guideline changed your relationship with the regulator?



Commentary on the Guideline to date has focussed predictably on the very high fines that have become commonplace, with the unwritten implication being that big business must be reeling from the impact and vehemently against this new approach to punishment. Our survey, however, shows quite the opposite with the overwhelming majority being supportive of the Guideline's approach and in agreement that the outcomes are now more proportionate to the offender's means.

It is also pleasing that almost half of respondents had experienced a positive change within their organisation as a result of the Guideline. The threat of huge financial penalties has undoubtedly pushed health and safety issues further up many boardroom agendas. Clients are telling us that interest in compliance has been stimulated and investment in health and safety measures is now more forthcoming as a result.

The introduction of fees for intervention in the HSE enforced sector prompted worries that the relationship between dutyholder and regulator would become strained. That did not materialise to the extent feared and the same can be said in the context of the changes in sentencing practice. Our results show that two thirds of those surveyed felt that likewise this latest development had resulted in no discernible change in the relationship.





Sector focus: construction

Construction is home to 6%¹ of the national workforce but is responsible for nearly one third of work related deaths². It is not surprising that construction therefore remains a key enforcement target for the HSE, reinforced by a 26% increase in HSE inspection charges to the industry in the past year³.

What are the key risks?

The high risk area in this sector continues to be falls from height, which accounted for 26% of fatal injuries⁴, remaining the biggest killer in the construction sector. There have been a number of high-profile cases in the industry involving both fatal and non-fatal falls, many yielding six figure penalties.

2017 has been earmarked by some as the year we put “health” back into “health and safety”. With 4% of construction workers suffering job related illness each year, the industry is heaving under the weight of some 79,000 cases of ill health. Whilst the majority are musculoskeletal disorders (64%) a growing proportion are identified as stress, anxiety and depression (18%).

Recent industry research from Construction News⁵ found that:

- More than 25% of construction workers have considered suicide;
- 1 in 7 have known someone to take their own life; and
- Of those, 90% did not turn to their employer for support

These shocking findings only increase the importance of initiatives such as Mates in Mind, which notes on its website that “suicide kills far more construction workers than falls”. As we seek to establish equal footing for health this year, the growing need for employers in this sector to manage physical and mental health issues is clear.

What has happened?

The past year has brought not just prosecutions following incidents, but also risk based enforcement action, where no incident has occurred at all. Recent months have seen convictions following unannounced inspections, self-reporting and public complaints, something that had been largely absent in recent years. In one such case, a fine of GBP 500,000 was imposed.

In researching this report, we analysed the information available on the HSE prosecutions database⁶ and have gleaned the following:

- The range of fines levied on defendants prosecuted in the construction industry was huge; from GBP 125 to GBP 2.6m (for Balfour Beatty following a fatal trench collapse)
- The total sum collected in fines from 1 February 2016 to 31 January 2017 was an enormous GBP 12,967,395.98 with an average fine standing at a sizeable GBP 92,624.26

- In the comparable previous year (1 February 2015 to 31 January 2016), the total sum collected in fines was GBP 7,091,529
- This means that the total sum collected has risen by 82.8% when compared to the previous year
- Largest percentage of turnover taken in fines: 27.5% in the case of Monavon Construction fined GBP 550,000 for two offences of corporate manslaughter and one health and safety breach

What next?

Given the figures seen so far, it is only a matter of time before the courts impose further significant fines on “large” and “very large” construction businesses. In the meantime, the Guideline is having a painful effect on “small” (turnover between GBP 2m and GBP 10m) and “medium” (turnover between GBP 10m and GBP 50m) size entities. Whilst bigger organisations are yet to be fined anything approaching 0.1% of turnover, case after case sees construction SMEs deprived of far larger proportions of revenue (typically between 1.5% and 3.75%). The sums fined are lower but their effects on the respective businesses are far more significant.

Good health and safety management is morally right. It also makes good business sense. For larger construction businesses, the key will be in understanding of systems amongst the workforce and a sound contractor and sub-contractor management process. For SMEs, it is about education and using the available resources to achieve a safe result, keeping safety in mind when the pressures of the job begin to tell.

As the Construction (Design and Management) Regulations 2015 continue to struggle to achieve their objectives, there is a clear and increased onus on the larger industry players to help with the educational piece that is so crucial to achieving safety across the board.

¹ <http://researchbriefings.files.parliament.uk/documents/SN01432/SN01432.pdf>

² <http://www.hse.gov.uk/statistics/overall/hssh1516.pdf?pdf=hssh1516>

³ <http://www.ppconstructionssafety.com/newsdesk/2016/07/11/hse-invoice-over-4m-in-fees-from-construction/>

⁴ <http://www.hse.gov.uk/statistics/overall/hssh1516.pdf?pdf=hssh1516>

⁵ <https://www.constructionnews.co.uk/10019419.article?search=https%3a%2f%2fwww.constructionnews.co.uk%2fsearcharticles%3fparameters%3d%26keywords%3dmental+health%26PageSize%3d10%26cmd%3dGoToPage%26val%3d3%26SortOrder%3d1>

⁶ Information obtained from <http://www.hse.gov.uk/prosecutions/> and <http://www.hse.gov.uk/ProsecutionsHistory/default.asp>. Accurate as of 16/05/2017.



Sector focus: manufacturing

In terms of our most risky industries, manufacturing is classified as having a “statistically significantly higher” workplace injury rate. With 22 employees losing their lives each year and more than 7,000 injuries annually, the sector continues to grapple with its diverse and fast paced nature.

HSE statistics show that manufacturing directly employs approximately 8.5% of workforce (2.5 million people), but is accountable for 16% of reported injuries to employees. This is reflected in our research, which shows that as an enforcement sector, manufacturing has paid the most in fines, well ahead of other high-risk industries including construction.

What are the key risks?

The proliferation of machinery and the constant need to create efficiencies of process remain common root causes behind countless incidents.

It is perhaps unsurprising that guarding issues continue to present the highest risk of injury in manufacturing. Whilst many of the accidents fortunately do not result in fatalities, the Courts remain robust in the level of fines imposed, with Tata Steel attracting a GBP 1.98m penalty for two separate incidents that had resulted in worker injury. These types of cases, habitually dealt with by way of fines capped at GBP 20,000 in the Magistrates’ Court previously, have led to a huge increase in financial penalties in this sector.

Other key management concerns are:-

- Workplace transport;
- Manual handling; and
- Electricity at work

What has happened?

In researching this report, we analysed the information available on the HSE prosecutions database and were able to obtain the following figures:

- The range of fines levied on defendants prosecuted in the manufacturing industry was huge; from GBP 1 to GBP 3m.
- Cases prosecuted in this industry yielded some headline fines:-
 - Cristal Pigment: GBP 3m
 - Warburtons: GBP 2m
 - Tata Steel: GBP 1.98m
 - Parker Hannifin Manufacturing: GBP 1m
 - Watling Tyre Services: GBP 1m

- The total sum collected in fines from 1 February 2016 to 31 January 2017 was an enormous GBP 22,781,021.23 with an average fine standing at GBP 157,110.49
- In the comparable previous year (1 February 2015 to 31 January 2016), the total sum collected in fines was GBP 11,421,755.56
- This means that the total sum collected has doubled when compared to the previous year

These figures make alarming reading and it is not only the Crown Courts that have shown themselves willing to get tough on defendants. District Judges in the Magistrates’ Courts have exercised their new found sentencing might, handing down a seven figure fine to Parker Hannifin.

Interestingly companies in this sector have exercised some creative mitigation in a bid to reduce fines. A number of courts have now recognised the current impact of Brexit (relating principally to the value of the pound) on defendant manufacturing companies and have reduced fines accordingly. Similarly, in the case of Roxel Motors, the Judge reduced the level of the fine to reflect the fees for intervention costs already paid by the business to the HSE.

What next?

As the courts become more comfortable with their new sentencing powers, we suspect that high fines in this sector will continue to dominate.

With technology and particularly machines playing such a huge part in the industry, the time is ripe for a review of machinery safety across manufacturing operations. From guarding to process to risk assessment and systems of work, the time and money invested in these reviews could not be better spent.

As the sector continues to push the boundaries when it comes to automation, employers must take care to ensure that in removing one health and safety risk, they do not introduce others. Although not our highest risk industry, manufacturing has been the most harshly punished by the Guideline giving increased impetus to measures designed to better control their risks.

¹ Information obtained from <http://www.hse.gov.uk/prosecutions/> and <http://www.hse.gov.uk/ProsecutionsHistory/default.asp>. Accurate as of 16/05/2017.



Sector focus: local authority enforcement

Tasked with regulating the so called lower risk sectors, almost 400 local authorities play a significant role in the enforcement of health and safety law. Working in industries including retail, leisure, hospitality, catering, warehousing, care and office space, our local councils take a somewhat different approach to their regulatory responsibilities than typically seen from the HSE.

What are the key risks?

There is a strong consensus that the logistics sector represents the most challenging risk for the local authority to manage. Our increased preference for internet shopping has seen huge distribution centres spring up nationwide. With high level racking, mechanical handling equipment and large numbers of employees, agency and gig economy workers, the area presents something of a perfect storm.

Notwithstanding our penchant for home shopping, traditional retail premises continue to cause concern for Environmental Health Officers, who have also been extremely active in the food retail sector.

Another growing area of enforcement activity is in care, reflective of well publicised concerns over the quality and safety of provision for some of the most vulnerable in our society.

What has happened?

In researching this report, we contacted 350 local authorities in England and Wales. Of the 340 that responded, we discovered that:-

- The range of fines levied on local authority prosecuted defendants was huge; from GBP 160 to GBP 2.2m.
- Cases prosecuted by local authorities yielded some headline fines:-
 - Wilko: GBP 2.2m
 - Decco: GBP 2.2m
 - G4S Solutions: GBP 1.8m
 - Maria Mallaband Care: GBP 1.6m
 - Embrace All: GBP 1.5m
- The total sum collected in fines was an enormous GBP 15,150,664
- This is up a staggering 1,870% on the previous year's total of GBP 768,883
- There were 14 prosecutions of individuals, with 6 resulting in suspended prison sentences. Two immediate custodial sentences were imposed

As a sector breakdown, the responses we received disclosed the following totals:-

- Warehousing: GBP 4,795,000
- Retail: GBP 4,426,630

- Catering: GBP 1,338,728
- Leisure: GBP 1,240,250
- Care: GBP 3,213,500

Interestingly there were 282 (83% of all respondents) that pursued no prosecutions at all in the year to 31 January 2017. Well publicised cuts in public sector funding have resulted in a lack of resource within environmental health departments nationwide. This understaffing has contributed to fewer incidents being investigated and fewer prosecutions, as Councils try to live within their means and prioritise matters for action. This reduced capacity is compounded by cuts to local authority legal departments, which find themselves ill equipped for the inevitable rigours of complex criminal health and safety litigation. Even though local authorities overwhelmingly achieve convictions in the cases they pursue, the litigation risk although small appears to be enough to deter some councils from proceeding at all.

What next?

With distribution centres taking on an increased importance in delivering goods to consumers, we can expect EHOs to continue to sharpen their focus on warehousing and its attendant risks. For retail businesses, this requires increased emphasis on safety management in these premises.

For the larger retail enterprise, the importance of the Primary Authority scheme cannot be overstated. The ability to work with a regulator to receive robust and reliable advice for other councils to take into account when carrying out inspections or dealing with non-compliance is invaluable. In our experience, businesses with a Primary Authority relationship are perceived as responsible and safety conscious and benefit in many ways from the time invested with their lead Council. This has helped successfully defend prosecutions and even prevent them from being instigated in the first place.

The figures contained in this report will make startling reading for those in the local authority enforced sector. Whilst the chances of being prosecuted remain extremely low, local authorities continue to achieve a 95% conviction rate and so the consequences of receiving a summons are considerable.

Spotlight on the individual

Much of the focus of health and safety law rightly falls upon the employer, and therefore the corporate defendant, with the role of the individual sometimes forgotten. Whilst at work, we all have our own health and safety duties, prescribed by statute and to be fulfilled by us as individuals. And yet our previous research, featured in the Financial Times¹, told us that in the HSE enforced sector, prosecution of individuals for breaches of their responsibilities remained something of a rarity.

The Guideline

The Guideline has continued to shine a light on corporate failings and has kept them high on the news agenda as the multi-million pound fines have been handed down. However, to much less fanfare, when used in the case of individual defendants it has been quietly but firmly enforced over the first 12 months.

The Guideline for individuals works in the same way as that used for corporate defendants, save that the Court is directed to consider any time spent on bail, which may be deducted from any further custodial sentence imposed.

In practice

In the year to 31 March 2016, 46 company directors and senior managers were prosecuted by the HSE, up from 15 in the previous year. In stark contrast however, there was just a single prosecution of an individual employee in that time.

Moving forwards, our analysis of the available data shows an increase in that the year to 31 January 2017 saw 86 individuals sentenced, with penalties ranging from a GBP 185 fine through to the maximum two years' immediate custody. The industries producing the highest numbers of individual prosecutions were construction, manufacturing and gas safety, with the latter producing the lion's share of custodial sentences, both immediate and suspended.

When will an individual be prosecuted?

The HSE guidance to Inspectors confirms that, "prosecution of an individual will be warranted in cases where there have been personal act(s) or failing(s) by an individual, and it would be proportionate to prosecute, bearing in mind the nature and extent of the breach and the risk to health and safety arising from it. In considering risk... enforcement action should be focused on those who are responsible for the risk and are best placed to control it.

Vital statistics:

Highest individual fine:

£40,000

Lowest individual fine:

£185

Highest custodial sentence:

2 YEARS

Number of suspended sentences:

39

Number of immediate custodial sentences:

8

Highest number of custody cases (immediate or suspended):

GAS FITTING/
MAINTENANCE(11)

Whilst this would include cases where there have been substantial failings by individuals (such as where they have shown reckless disregard of health and safety requirements), or there has been a deliberate act or omission that has given rise to significant risks to the health and safety of persons, the prosecution of individuals should not be restricted to such cases."²

Where the employer appears primarily responsible for the circumstances of the breach or incident, normally it is only the employer that faces action. However, if the employer can show:-

- It had done all it reasonably could to ensure compliance;
- The systems of work were generally followed by workers; and
- The offence was solely the result of the actions/inactions of the individual;

then a prosecution of the employee may follow.

Where a more senior person is the focus of investigation, the authorities would consider prosecution where:-

- The company has committed an offence; and
- The individual under investigation is truly senior; and
- They knew what was happening and consented; or
- They were aware of what was going on and did not stop it; or
- What happened was attributable to their neglect.

Self-preservation

With a real emphasis on holding individuals to account now emerging, what can you do to protect yourself?

• **For employees**, the message is simple: follow your instructions, follow your training and co-operate with your employer in their management of health and safety. Your responsibility is to take reasonable care for yourself and others as you go about your work. If you do this, you cannot be faulted for an incident having occurred.

• **For senior managers and directors**, the position is more complex. You must:-

- *Lead by example*: show strong and active leadership by a visible commitment to health and safety
- *Know your role*: you cannot be prosecuted for negligence if you have conscientiously discharged the requirements of your job
- *Integrate health and safety into decision making*: when authorising spend, particular activities, investment in equipment, ways of working etc, do you know what the safety implications are? Have you given them due weight?
- *Communicate*: how do you know your message on health and safety is being heard? Are you confident your workforce can (and will) raise concerns that are heard? Are relevant employees consulted properly?
- *Manage*: satisfy yourself that your organisation knows its risks and has in place the systems, advice, resources, people and equipment to manage them
- *Monitor and review*: set targets for safety performance and review these regularly. Implement audits and benchmark with other industry players if appropriate



Health and safety is integral to success. Board members who do not show leadership in this area are failing in their duty as directors and their moral duty and are damaging their organisation.

Leading Health and Safety at Work³

¹ <https://www.ft.com/content/bb955028-9e87-11e6-891e-abe238dee8e2>

² http://www.hse.gov.uk/foi/internalops/ocs/100-199/130_8.htm

³ Leading Health & Safety at work – a joint HSE and IoD publication

Industry experts

The Guideline has prompted much debate. We asked some of the health and safety sector's thought leaders for their views.



Chris Morrison
(Head of SSHE Regulatory,
Clyde & Co)

I still believe there are a couple more years of 'bedding in' required as the

criminal courts grapple with achieving proportionality and consistency. The disparity our research shows between the percentage of turnover SMEs are being fined compared with large business is clearly disproportionate. Further, the notion of a GBP 50m turnover business being subject to the same sentencing band as a GBP 1bn + business has clearly yet to be satisfactorily resolved and it would not surprise me if the Court of Appeal provide greater clarity on sentencing Very Large Organisations in a judgement sooner or later.

At a practical level I am of the view the significant hike in fine levels has emboldened regulators in respect of their prosecutions, encouraging them to allege breaches with both higher levels of culpability and seriousness of harm risked, resulting in a far more adversarial and litigious regime. Gone are the days when a 'commercial decision' may be made to plead guilty and with the financial stakes now being so much higher we have seen a marked increase in businesses willing to plead not guilty and stand trial.



Graham Parker
(President of IOSH)

One year on and significant penalties are making employers take notice and motivating them to ensure individuals

are not harmed by their work practices and processes. Like any occupational health and safety professional I want the workforce and members of the public to go home without risk of harm or ill health. The focus is quite rightly on the potential to harm and therefore proportionate pragmatic solutions which are honestly and clearly communicated, need to be managed by organisations to ensure that we protect those who are at risk.



Dr Karen McDonnell
(Head of RoSPA Scotland)

Health and safety is quite simple: accidents and cases of work related health damage don't have to happen.

Investigations show that the vast majority can be easily prevented by taking relatively simple measures. It is refreshing that the Guideline has been used to good effect to highlight the need for closer attention to health and safety. More still needs to be done however. Freedom from preventable harms of all sorts is an important goal for society as a whole and thus organisations have a responsibility to adopt a balanced approach to health safety and risk. Stronger sanctions are only part of the answer. RoSPA has advocated independently supervised remedial programmes imposed by the courts, to re-shape management approaches towards health and safety within failing businesses and ensure that they had a safe and sustainable future. We believe that, where appropriate, there are still opportunities to add this to 'the sentencing mix'. As well as punishment, creative use of remediation also needs further careful examination if we are to save lives, reduce injuries and safeguard health in the years ahead.



Louise Ward
(Policy Standards &
Communications Director,
British Safety Council)

As we celebrate the 60th year of the British Safety Council, we continue to work towards our founder James Tye's vision that nobody should be injured or made ill at work. We therefore continue to campaign for sensible, proportionate and effective management of health as well as safety risks. The Guideline is now playing a part in that. In my experience, businesses are broadly supportive of the changes introduced by the Guideline. They welcome clarity and consistency and are keen to see those that fail in their health and safety duties being properly held to account. There is of course some concern about potential liabilities, but in general this seems to be driving some very positive conversations about effective risk management, which is definitely a positive change.



Rhian Greaves
(Head of Compliance & Strategic
Support, Clyde & Co)

Good health and safety management is morally right. It also makes good

business sense. This has never been truer than it is today. With the Court of Appeal ready to impose fines equal to 100% of pre-tax net profit in the worst cases, compliance with health and safety law is now a business critical issue. Leadership in safety management is essential; safe working is not a minefield for employees to navigate themselves. They need relevant guidance and workable solutions from those with the expertise and experience to deliver. The importance of emergency preparedness also cannot be underestimated. The impact of the Guideline is such that businesses must make swift post-incident decisions on investigation response if they are to react responsibly and appropriately to the regulator. This means acting now; devising an incident response protocol that can be triggered if the worst happens and training those likely to play a part in the aftermath of an accident.



Andrew Thomas QC
(Lincoln House Chambers)

The Guideline has changed beyond recognition the way in which cases are dealt with by the courts. Judges and

Magistrates now have greater confidence in dealing with health and safety cases and, when called for, they are more willing to impose tough sentences. The Court of Appeal has also made it clear it is prepared to back their decisions. The message is deliberately hard hitting: the Lord Chief Justice has said that health and safety cases should be treated as, "no different to other criminal cases". There is a positive message for business however; the Courts have made it clear that they will give very substantial credit to organisations who can demonstrate a responsible approach to health and safety.



Graham Freeman
(Claims Manager, Aviva)

The first year of the Guideline's implementation has had a major impact on our policyholders. We have

seen the Courts imposing large fines on businesses, which coupled with the publicity has now focussed their attention on their risk management and assessment systems. As a major insurer we will assist our policyholders in reviewing and improving their procedures, but there are still some who do not heed the warning. Ignore health and safety at your peril!



Mark Donaldson
(Partner, Clyde & Co (Scotland))

Historically Scottish judges have not taken terribly kindly to being told what to do in any more than very general

terms. The Scottish Appeal Court has decided that the English Guideline should not be substituted for the approach traditionally taken but could be used for the purposes of a cross check, particularly where the offence in question is governed by legislation which applies equally north and south of the border. My suspicion is that we will only see in depth use of the Guideline in cases involving larger organisations. The neutral approach of Scottish prosecutors towards fine levels is unlikely to change which means that the dialogue in Scotland will be between the judge and the defence rather than the all-party approach taken south of the border. The Appeal Court has made it clear that if a judge chooses to use the Guideline he or she needs to set out the workings behind his or her calculations in detail for the benefit of higher courts if further scrutiny is sought. There is no doubt that in any health and safety case in Scotland the defence must be prepared to address the court in accordance with the Guideline if invited.



Graham Barr
(Director, Henderson Insurance Brokers)

As an Insurance Broker it is imperative that changes to any legislation which impact on policy coverage is communicated effectively to our clients. When discussing the changes to the Sentencing Guidelines, it is clear that the impact of the changes has not been lost on clients of all sizes. Clients recognise the increased exposure to their business and, with our guidance, have sought to ensure that sufficient cover is in place, either through extending their Employers, Public or Corporate Legal Liability policies or increasing the levels of cover they already hold. Partnering with specialist solicitors in the field of Regulatory Governance has also been key in ensuring our clients have a sound knowledge of the changes and can implement risk improvement measures that can better protect their business.

“ impact on policy coverage is communicated effectively to our clients. When discussing the changes to the Sentencing Guidelines, it is clear that the impact of the changes has not been lost on clients of all sizes. Clients recognise the increased exposure to their business and, with our guidance, have sought to ensure that sufficient cover is in place, either through extending their Employers, Public or Corporate Legal Liability policies or increasing the levels of cover they already hold. Partnering with specialist solicitors in the field of Regulatory Governance has also been key in ensuring our clients have a sound knowledge of the changes and can implement risk improvement measures that can better protect their business.



Rod Hunt
(Partner, Clyde & Co)

With the Sentencing Council having dipped its toe in the water with the Environmental Sentencing Guidelines,

“ there was an air of inevitability that a similar, formulaic approach to sentencing would be introduced for health and safety and corporate manslaughter offences with the main aim of achieving consistently bigger fines. Whilst the new Guideline has certainly resulted in a marked increase in fine levels, we have not yet seen the headline fine many anticipated. However, we suspect this is just a matter of time. With the Court of Appeal indicating that the worst environmental cases may attract fines equal to 100% of pre-tax net profit “even if this results in fines of GBP 100m”, and commenting that the financial regulators are already imposing fines of this magnitude, the key message has to be “watch this space”. My prediction is that fine levels will continue to increase, and the anticipated headline fine will arrive when a very large corporate with big profit margins commits a health and safety offence with the aggravating feature of profit before safety.



Catherine Rawlin
(Partner, RGL Forensics)

We have noticed an increased requirement for forensic accountancy services in relation to sentencing

“ decisions. Although the Guideline uses turnover to arrive at the starting point, the Court is directed to consider a number of other financial factors. These include the level of profitability, the funds taken out of the business by the directors and the company’s assets. Our recent experience suggests that in the interests of achieving proportionality, Courts may be particularly interested in data demonstrating that the profit margin of the company was significantly lower than other businesses in its turnover bracket. Recognition of pension liabilities to be borne by the company is another area which we have seen lead to a reduction in the fine. Although we have not yet been required to give oral evidence on these points, we expect it will be only a matter of time before this happens.



Alena Titterton
(Partner, Clyde & Co (Australia))

Our multi-national clients are certainly sitting up and taking notice of the new Guidelines implemented in the UK.

“ There are differing views as to whether turnover is the most appropriate measure for linking to penalties (with some advocating a link to profits instead) but conversations with our clients suggest that the significance of ramifications for breach in the UK has focussed the minds of officers such corporations. Maximum penalties under most health and safety laws in Australia are AUD USD 3m for the most serious offences. However, with very few exceptions, the penalties actually imposed upon sentence are typically quite low. Over the last 12 months, we have seen average penalties around AUD USD 300,000 for larger companies, USD 200,000 for smaller companies and between AUD USD 12,000-USD 20,000 for individual directors prosecuted. There is also significant variance in sentences being imposed as prosecutions are heard in a variety of different courts in Australia’s States and Territories all producing varied results. Penalties are not commensurate with community expectations (particularly in cases of fatalities). A number of commentators are advocating for industrial manslaughter provisions in that context and increasingly, the criminal law is being used in relation to industrial fatalities. If this continues, we may find Australian legislators looking to the experience of the UK and establishing similar sentencing guidelines.



Practical implications of a health & safety prosecution

 Operational shutdown

 Unmotivated workforce

 Inability to satisfy business demands

 Employee absence

 Share price

 Brand damage & adverse PR

 Lost management time

 Contracting & tendering

 Commercial viability

 Financing

 Consequences of conviction

 Remedial works

 Due diligence

Be proactive

The figures speak for themselves. The research done in preparing this report reveals some startling truths about the levels of fines being imposed.

What this report does not cover, are the myriad of other costs involved in breaching the law. It is not simply the fine, but also the legal fees, the expert fees, the consultancy costs, the management time, the lost business, the lost working days and most importantly the human cost to the injured and the deceased that must be accounted for.

For all these reasons good health and safety management makes good business sense. That mantra has never been truer than it is today. A recent study found that health and safety fines now cost GBP 75,000 more than the cost of compliance. But quite aside from the monetary value, good health and safety management is a moral responsibility; it is the right thing to do.

What can you do?

The first year under the new sentencing regime has reinforced the importance of emergency preparedness. There is a close correlation between how well an incident is managed from the outset and its final outcome, whether that be in avoiding a prosecution or mitigating its impacts. Where businesses are in breach of the law, early admissions and guilty pleas have never carried more weight than they do today. Equally, taking a responsible (and human) approach to the investigation has been rewarded by the Courts.

Don't wait until you have an incident before you consider how you would manage it. Make clear plans for the eventuality so that in the unfortunate event of having to instigate it, your approach has been set with clarity of thought, away from the stress and the pressure of dealing with a serious incident.

Also use this opportunity to look at your health and safety management system. Consider whether:-

- It is up to date;
- It is risk based;
- It reflects your business embracing all operations, plant and machinery;
- It complies with current industry standards;
- It is understood throughout the organisation; and
- It is upheld by all those working within (and with) the business

Talk to those working within your business. Do they really understand the systems in the way you anticipate or hope they do? Do they feel able to

raise safety concerns? Do they have a legitimate expectation that any such concerns would be acted upon? Importantly, do they see health and safety as important and Board led?

Share information with others across your industry sector. Whilst you may be competitors in business, this is surely an area in which learning from the experiences of others to improve conditions transcends the usual commercial hostilities. Industry forums, publications, seminars and interest groups represent an invaluable source of helpful information.

What can we do?

Clyde & Co has one of the largest and most respected health and safety teams in the UK. The team is trusted by leading global insurance clients, FTSE 100 companies, privately owned household names to advise on contentious matters in addition to providing upstream compliance advice.

In recognition of the team's market leading service and reputation, we are consistently recognised as one of the UK's leading firms in this area of law by Chambers & Partners and Legal 500, the key independent legal directories.

We are routinely instructed in some of the UK's largest and most significant health and safety cases, across a wide range of industry sectors. Our lawyers have been involved in some of the most high profile cases in recent years including the Grenfell Tower fire, Buncefield oil depot explosion, Potters Bar rail disasters as well as the corporate manslaughter trials involving *R v Lion Steel*, *R v Pyranha* and *R v Brown*.

In addition to excelling in our reactive offering to clients, we are one of only a handful of firms with true expertise in health and safety advisory work. We are experienced in assisting clients with:-

- Management system reviews;
- Corporate restructuring;
- Emergency incident response protocols;
- Crisis management; and
- Bespoke training programmes centring on the legal process

If you would like to talk to us about any of the issues raised in this report, please do not hesitate to contact us.

“
The firm 'is immediately responsive and provides pragmatic advice,' and praised the 'excellent team and wide network of supporting associates that, without exception, deliver for us.

Chambers & Partners

“
Clyde & Co LLP's 'first-class' health and safety practice is 'in the top flight of firms working in this area.

Legal 500

Step by step: how it works

Sentencing has long been approached using a small number of general principles, gleaned in the main from Court of Appeal authorities through the years. However, for the first time the Guideline leads the Court along a clear path to sentence dependent upon the offence committed and the status of the defendant before it.

There are separate guidelines for sentencing:-

- Organisations guilty of health and safety offences;
- Organisations guilty of corporate manslaughter;
- Individuals guilty of health and safety offences; and
- Corporate and individual defendants convicted of food safety and hygiene offences

This overview is based upon the Guideline most often implemented, that for sentencing an organisation convicted of a health and safety offence. Much of the emphasis has been on the use of turnover as the “blunt instrument” by which the size of a fine is determined. The reality however, is that it is the very first step in the process, identifying the offence category, which has been most contentious in practice.

Step 1: culpability + harm = offence category

This is the main battleground for pre-sentence discussions between prosecution and defence. Culpability can be very high, high, medium or low with the vast majority of cases falling within the “high” or “medium” categories. Fortunately cases where culpability is truly “very high” are rare and few cases properly meeting the description of “low” culpability are prosecuted. Once culpability is determined, the Court must look at the harm *risks* (not caused) and reach a conclusion as to how likely it was that the harm would eventuate. Only then can it consider whether the offence was a significant cause of actual harm and, if it is, an increase in penalty is likely.

Step 2: starting point and category range

At this point, the financial position of the organisation becomes part of the equation as the Court looks to the available accounts to identify the turnover or equivalent of the defendant. Organisations fall into one of the following categories:-

- **Micro:** turnover not exceeding GBP 2m
- **Small:** turnover between GBP 2m and GBP 10m
- **Medium:** turnover between GBP 10m and GBP 50m
- **Large:** turnover exceeding GBP 50m

Each size banding has a corresponding table setting out the possible offence categories, which are accompanied by a financial starting point and a category range between which the Court will generally sentence.

The Court retains the discretion to move outside of those ranges in the case of “very large” organisations (“VLOs”) where it is necessary to do so in order to achieve a proportionate penalty. VLOs are identifiable as having turnover that “very greatly” exceeds GBP 50m, albeit the Guideline does not prescribe a specific level at which this threshold will be passed.

Once a starting point has been identified, the court may adjust that figure upwards or downwards depending upon the presence of aggravating and mitigating features. In particular the presence of previous convictions will likely result in a substantial uplift in the fine.

Step 3: step back – consider proportionality

It is here that the Court looks to make adjustments to achieve a sentence proportionate to the overall means of the offender. This means looking beyond turnover to other financial indicators including profitability and any quantifiable economic benefit derived from the offence. It is also relevant to consider whether the fine will put the offender out of business, the Guideline noting that, “in some bad cases this may be an acceptable consequence”. The Court is assisted in setting a proportionate fine by the ability to order payment in instalments, sometimes over several years; a facility increasingly in use.



The fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation.

Step 4: factors indicating reduction

Here the Court must consider the wider impacts of the proposed fine both within the organisation and on innocent third parties. This will include the ability of the defendant to make restitution to victims and to achieve compliance going forwards. The effect on staff, service users, customers and the local economy is also relevant but *not* the impact on directors and shareholders.

Where the organisation is either charitable or public in nature, fines should “normally” be substantially reduced if a significant impact on the provision of services can be demonstrated.

Step 5: other factors warranting adjustment

Further adjustment is possible using the principles of criminal law, where an offender has pleaded guilty but has also entered into a written agreement with the prosecution to assist it in some way.

Step 6: credit for any guilty plea

Entering an early guilty plea presents a significant opportunity to achieve a substantial reduction in the level of fine. Done at the first stage of proceedings, the defendant will see a one third discount on sentence. After this point, the maximum available credit is one quarter, which reduces on a sliding scale the nearer a defendant gets to trial, with just one tenth available for the guilty plea at the door of the Court.

Step 7: compensation and ancillary orders

Health and safety prosecutions are typically accompanied by a civil process for compensating injured parties. Where that is absent, the Court may make an order for compensation. Other orders that can be made at this stage include one for remediation; to remedy the deficiencies highlighted by the offending. In most cases, defendants will have dealt with this prior to sentence.

Step 8: totality

Where there is more than one offence in consideration, the Court has to ensure the sentence is proportionate to *all* the offending behaviour.

Step 9: give reasons

Finally, the Court must give reasons for the sentence imposed and must explain the effect of it.

To date, Courts have stuck mechanistically to the task passing each and every staging post along the way. This is perhaps neither surprising nor unwelcome, bearing in mind the need for clarity, consistency and guidance that became so evident at the consultation stage.

The slavish adherence of the Courts has received support in the Court of Appeal, which has made it clear that the Guideline is now the only source of reference when setting the level of fine. The practice of drawing comparisons with other cases previously sentenced is now specifically discouraged as the judiciary place the Guideline front and centre of its deliberations on penalty.

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