

SSHE regulatory newsletter

CLYDE&CO

Safety, Security, Health & Environmental

June 2017

Overstretched public sector at risk on sentence

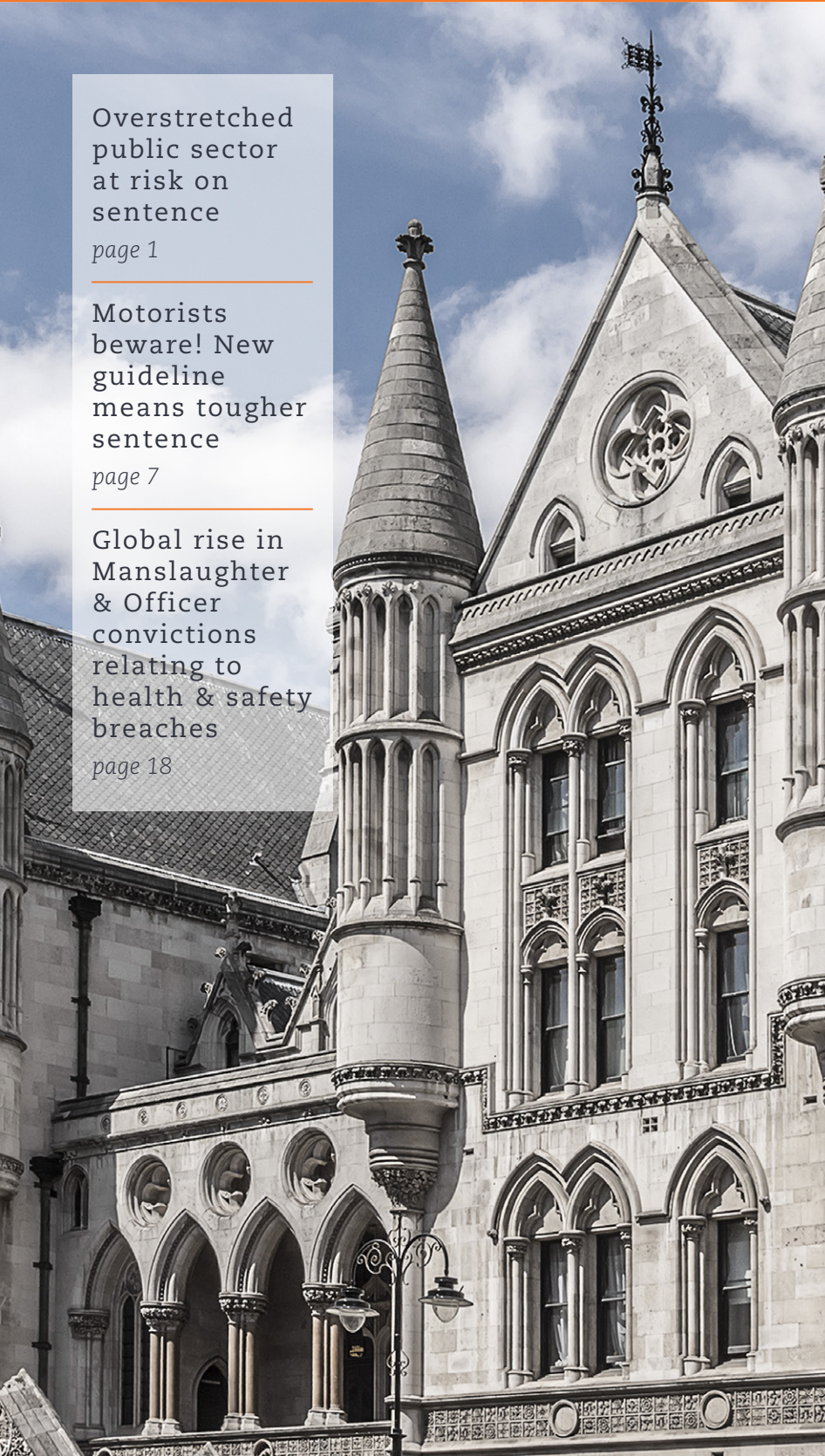
page 1

Motorists beware! New guideline means tougher sentence

page 7

Global rise in Manslaughter & Officer convictions relating to health & safety breaches

page 18



Introduction

Welcome to Clyde & Co's Summer Safety, Security, Health and Environmental (SSHE) Regulatory UK newsletter. In this issue we shine the spotlight on a host of sentencing related articles, assessing the impact of the Sentencing Council's Guidelines across our practice areas. We also looked at what was going on in our global network.

If there are any issues or topics you would like to hear more about, please contact us as we value your comments and feedback.

E: health&safetygroupuk@clydeco.com

You can also follow us on Twitter for a round-up of the latest developments across SSHE matters.



[@ClydeCo_SSHEReg](https://twitter.com/ClydeCo_SSHEReg)

Health & safety

Overstretched public sector at risk on sentence

page 1

Tick, tock.... Get your plea in early! New guidance published on reduction for guilty plea

page 3



Fire safety

Fire safety sentencing in the wake of Lakanal House

page 5



Road traffic & transport

Motorists beware! New guideline means tougher sentences

page 7

Driverless vehicles – a bumpy road ahead?

page 9



Food safety

A Taste for Change? Food Law Code of Practice updated

page 13



Trading standards

To vape or not to vape? New rules in force for e-cigarettes

page 14



Environmental

Spending money like water

page 15

Enforcement undertakings – an increasingly popular civil sanction?

page 17



News from our Global Network

Global rise in Manslaughter and Officer convictions relating to health and safety breaches

page 18



Overstretched public sector at risk on sentence

In dismissing an appeal against sentence by a public sector body the Court of Appeal recently gave further insight into their view and application of the Definitive Guideline for sentencing Health and Safety matters (the “Guideline”). The case makes difficult reading for defendants considering challenging a sentence (especially those in the public and charitable sectors) and further reinforces for lawyers the Court’s expected (unsympathetic) approach to such applications.



Facts

The Appellant was prosecuted when an employee suffered serious injuries whilst using a Stihl saw to cut overhead branches. The saw was designed solely for cutting kerbs and slabs and its manual expressly warned of the potentially fatal danger of using it to cut wood. There was also evidence that this had been done previously.

The Crown Court took account of the early guilty plea, along with other mitigating factors including a good previous safety record, a high level of co-operation with the investigation, the efficacy of existing health and safety procedures and the steps taken to remedy the deficiencies highlighted by the accident. The Judge also noted the absence of any of the usual aggravating features. He also recognised that a fine would have a significant impact on service delivery by the public body and therefore allowed for a substantial reduction in the penalty to be imposed. Despite that assessment, the Crown Court, imposed a fine of £500,000.

The public body decided to appeal with the application founded on the basis that the Judge had erred in his approach to sentence and had also imposed a penalty that was “manifestly excessive”.

Appeal

 Public body's submission	 Court of Appeal's determination
The Judge was wrong to use the seriousness of the injury sustained as an aggravating feature. In fact, the level of harm sustained was much lower than that risked and should therefore have mitigated the fine.	This reading of the Guideline was mistaken. Once the Judge had made an initial determination of culpability and harm category, it was open to him to move up inside the range chosen to reflect the fact of serious harm having actually been caused.
The Court should not have moved above its starting point to reflect the turnover of the body.	The annual revenue budget of the public body was £120m, which “put the [body] in the “large” category, but much higher than the base point of £50m. The Guideline envisages the need to adjust the sentence range to reflect much larger organisations”.
The Judge failed to have sufficient regard to the heavy balance in favour of mitigating features rather than aggravating ones.	It was clear from the Judge's sentencing remarks that the significant mitigation had been taken into account.
The public body was entitled to a “substantial” reduction in sentence under the Guideline. This should be at least 50%.	The Guideline does not specify the level of discount to be given. It states, “the fine should normally be substantially reduced”. The level of such reduction is left to the discretion of the sentencing Court.
£500,000 was manifestly excessive.	The Court was not persuaded.

What have we learnt?

- The Guideline is based on the premise of establishing the harm risked. If the actual harm caused is less serious, that does not equate to a mitigating factor and therefore a reduction in fine.
- The Court was not minded to interfere with the apparent treatment of the public body as a “very large organisation”. The implication therefore is that the Court of Appeal is unlikely to interfere where organisations with a turnover exceeding £100m are treated as such and fines outside the ranges envisaged by the Guideline are imposed.
- There is no specific percentage by which a fine on a public or charitable body should be reduced to reflect the impact upon the provision of services. It is a matter for the sentencing Court on a case by case basis. The recent £1m fine imposed on Nottingham County Council is testament to the Courts’ willingness to punish public bodies on a scale previously only seen in the private sector.
- As an aside, the Court also reinforced its view that appeal cases are now decided on their own merits and in light of the Guideline. They are not to be determined by reference to other fines previously imposed, whether pre or post Guideline.

The case demonstrates the Court’s lack of sympathy with defendants adjusting to the new sentencing regime. It is clear that whilst those in the public and charitable sectors can expect lower fines than their commercial counterparts, penalties will still be huge and will be determined in strict accordance with the Guideline.

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Tick tock...

Get your plea in early!

In yet more sentencing news, the Sentencing Council has published a new Definitive Guideline dealing with the reduction in sentence for a guilty plea. With an average of 95% of health and safety prosecutions resulting in conviction, entering a guilty plea looms large for the majority of defendants. So what does this new Guideline mean in practice and how can it potentially benefit those prosecuted?

The Guideline

Defendants pleading guilty at the earliest opportunity have long been afforded “credit” (i.e. a discount) of one third upon the sentence the Court would otherwise have imposed. However, inconsistency in application led to a need for clarification and a fresh impetus to influence offender behaviour.

The purpose of the new Guideline is to “encourage those who are going to plead guilty to do so as early in the court process as possible” to reduce the impact upon victims and witnesses, and to save public time and money on investigations and trials. In order to do this a clear distinction is drawn between the available credit/reduction at the first opportunity and following this point.

The Guideline will apply to all cases coming before the courts from 1 June 2017, regardless of the date the offence was committed.

One third, one fourth, one tenth...

The new guidance makes clear that unless “particular circumstances” apply the full 1/3 discount will only be available if the guilty plea is entered at the first hearing in the Magistrates’ Court. After this point the maximum available credit is 1/4 which reduces on a sliding scale the nearer a defendant gets to the trial date, with 1/10 being appropriate on the day of trial. This is to be decreased further potentially to zero, if the plea is entered after a trial has started.

Pleading at the “first stage of proceedings”

To ensure the maximum reduction, if a decision to plead guilty is made, the plea should be entered at the first stage in proceedings.

This can cause difficulties for individuals and businesses prosecuted in complex areas of law like health and safety, environmental, food and fire safety or in some road traffic cases. Whether or not a defence is available may depend on prosecution disclosure which has not yet been forthcoming, input on technical matters from expert witnesses, or a myriad of other issues.

Strategic decisions

Previously, there was a tendency to avoid giving an indication on plea at the first Magistrates’ Court hearing, where the matter would inevitably proceed to the Crown Court. This would provide further time for the defendant to weigh up the evidence and would trigger further disclosure from the prosecution. However, this trend appeared to be on the decline as more cases were dealt with by the Magistrates’ Courts, following the decision to grant them unlimited sentencing powers.

In light of this Guideline we may see this practice reduce further still, with the likelihood of even more cases being sentenced in the Magistrates’ Court. For example, if a business convicted of a health and safety breach is expecting a fine with a starting point of £1.5m, the difference between pleading at the Magistrates’ Court and the Crown Court could now be significant:



With an average of 95% of health and safety prosecutions resulting in conviction, entering a guilty plea looms large for the majority of defendants. So what does this new Guideline mean in practice and how can it potentially benefit those prosecuted?

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- plead guilty before the Magistrates, the fine would be reduced by £500,000; but
- plead guilty before the Crown Court, it would be reduced by a maximum of £375,000.

However, the Guideline specifically makes reference to those cases where the “court is satisfied that there were particular circumstances which significantly reduced the defendant’s ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done”. The court should take care to distinguish cases where the delay is required to receive advice or have sight of the evidence, against those where a plea is delayed, merely to assess the strength of the evidence. This exception applies to all cases and will be made on a case by case basis. However, it looks especially apt to apply to many regulatory offences.

Practical tips

Defendants facing prosecution need to ensure they obtain an early assessment of their case. This helps form a strategy for dealing with the investigation, potentially opening up other fine-reducing mitigating features, and allows a swift decision on plea at the point of prosecution.

Where there are legitimate reasons why a plea cannot be entered at the first stage in proceedings, it is vital for defendants to ensure the court is fully aware of those reasons and to ensure any delay can be justified so as to potentially avail themselves of a significantly higher proportion of discount for the admission of liability.



Fire safety sentencing in the wake of Lakanal House

On 3 July 2009, there was a fire at Lakanal House in Camberwell, South London. The incident resulted in six fatalities. It has taken over seven and a half years for Southwark Council to be sentenced, following a guilty plea to four offences under the Regulatory Reform (Fire) Safety Order 2005 (**FSO**).

The scale and devastation of the fire at Lakanal House led to new guidance for those risk assessing multi-occupation residential buildings and the Coroner's Inquest process resulting in numerous "rule 43" letters designed to prevent future deaths.

In the aftermath of the criminal sentencing process, what changes could we expect to see to the enforcement framework in which offenders are punished for committing fire safety offences?

Increases in Fire Safety sentencing

Southwark Council received a fine of £270,000 (reduced from £400,000 on account of its guilty plea) and was also ordered to pay £300,000 in costs.

Interestingly, the definitive guideline for the sentencing of Health and Safety Offences (the "**Guideline**") does not apply to fire safety. During the Guideline's consultation period, the Sentencing Council considered "*that applying the factors in the guideline to offences involving risk of fire had the potential for distorting sentence levels*" (Sentencing Council – Response to Consultation, November 2015).

It is clear that, had the Guideline been applicable, the Council's fine could easily have exceeded a million pounds. This is on the basis that the Council would have been treated as, at least,

a "Large" company (based on the £1.9 billion turnover in its 2015/16 annual revenue budget), the seriousness and likelihood of harm, as evidenced by the six fatalities, would likely have fallen within Harm category 1 and, in the event the Council's culpability was found to be "High". The starting point for a fine in those circumstances is £2,400,000; an almost ten-fold increase on that which was ultimately imposed.

A key driver behind the introduction of the Guideline for regulatory offences was to ensure it is not cheaper for an offender to commit an offence rather than comply with the law in the first instance. In relation to fire safety offences, Bob Docherty (Institute of Fire Safety Managers) believes that "*it's the threat of being outside the law that forces people to carry out their 'duties'*"; however, despite the introduction of the FSO in 2005, the penalties imposed for breaches of fire safety legislation remain relatively low.

The Lakanal House case and the Courts' wider approach to regulatory sentencing may mean that the Government now seeks to take pro-active steps to make the financial risk of committing a fire safety offence equally as damaging as other regulatory offences or, indeed, consider the introduction of a fire safety specific sentencing guideline to provide clarity and transparency on how these cases are sentenced.

“

*Interestingly, the definitive guideline for the sentencing of Health and Safety Offences (the "**Guideline**") does not apply to fire safety.*

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On-the-spot fines

Even if fire safety offences are to receive tougher sentences in the future, the length of time it can take for an organisation to be prosecuted and fined creates a disconnect between the immediacy of the fire risk and the time taken for “justice” to be done.

It has been suggested that, as a way of circumventing the delay between transgression and fine, and to ensure that fire risks are effectively identified and mitigated against, the fire service should be given the power to impose on-the-spot fines on landlords found to be in breach of their duties under the FSO.

Simon Ince (BB7 Fire) has suggested that “By imposing an on-the-spot fine system there would be an effective deterrent which the fire service could use. The current system is too cumbersome, too slow and fire services don’t have the resources to go through the prosecution process unless they are certain of gaining a conviction”.

However, whilst a system of on-the-spot fines may create a culture of pro-active compliance with the FSO by landlords, there would undoubtedly be an administrative burden attached and there would remain the challenge of effective regulation of those falling outside of such a scheme.

Motorists beware! New guideline means tougher sentence

Following the introduction earlier in the year of stricter penalties for using hand held mobile phones whilst driving, recent changes to the sentencing guidelines for more serious road traffic offences (the “Guideline”) show there is no let up in the trend towards increasingly harsher punishments for drivers who fall foul of their legal duties.

What are the changes?

The changes apply to all those who are sentenced on or after 24 April 2017, regardless of the date of the offence.

The Guideline now requires the Court to categorise the offence before deciding the most appropriate sentence. To do so, the Court must first consider the culpability of the offender before going on to consider the degree of harm caused. The offences are categorised as follows:

Category 1

offences are those cases which include both higher culpability and greater harm;

Category 2

offences include either higher culpability or greater harm, but not both; and

Category 3

offences are cases that include neither.

The Guideline aims to assist the Court in determining the level of culpability and harm by providing a list of factors to be considered at each stage.

Once the Court has decided on the category of the offence, the Guideline then provides a further, non-exhaustive list with the aim of assisting the Court in determining whether any adjustment to the sentence can be made on the basis of aggravating or mitigating features, including previous convictions and remorse shown.

What effect will these changes have?

So how will sentencing of the most common road traffic offences be affected by these changes?

Driving whilst disqualified: in determining the offence category, the Court will now take into account any evidence of associated bad driving on behalf of the defendant.

Driving without insurance: there are now three brackets for sentencing. Category 1 offences will be dealt with by the imposition of 6 to 8 penalty points, a category 2 offence will be dealt with by way of a disqualification of up to 6 months or 8 points, and category 3 offences will be dealt with by way of a disqualification of between 6-12 months.

Speeding: there is now no limit to the top bracket of the Guideline. The most serious offences of speeding will now attract a band C fine. Band C fines amount to 175% of a defendant's weekly income. Prior to the changes this was capped at 125%. For those offences falling within the middle bracket of the Guideline, the court will now consider a disqualification first, as opposed to penalty points.

“ Gary Rae, campaigns director for road safety charity Brake, said: “Toughening the fines and penalties for speeding is long overdue. As a charity that offers a support service to families bereaved and injured in road crashes, we see every day the consequences of speeding on our roads. I hope that magistrates ensure the new sentences are consistently applied.”



Driving without due care and attention: the Court will now take into account the extent of the injuries sustained/ damage caused when deciding on the category of the offence.

Tougher penalties are expected as the Courts continue to clamp down on those who breach road traffic legislation. Watch this space...

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Driverless vehicles: a bumpy road ahead?

“Automated vehicle technology will profoundly change the way we travel, making road transport safer, smoother, and smarter. We are on the pathway to driverless cars, where fully automated vehicles will transport people and goods to their destination without any need for a driver”.¹

Such confident words came from the Government during the consultation on automated vehicles. But do they live up to the reality and what happens if something goes wrong? As the Vehicle Technology and Aviation Bill continues to progress through Parliament, we examine the potential enforcement implications of driverless cars on our roads.

Hard reality or science fiction?

Driver error accounts for over 90% of road traffic deaths. Autonomous vehicles clearly have the potential to reduce this tragic statistic. However, is the possibility of completely autonomous vehicles a reality or does it remain within the realms of science fiction?

The full details as to how driverless vehicles will be operated have yet to be confirmed.

The Government aims to have self-driving vehicles on our roads by 2020 and has given the go ahead for testing on motorways and A-roads. Lorries may be the first autonomous vehicles subject to the trial on UK motorways and would be tested as “platoons” so that they move in a group. The “road train” will be controlled by a driver in the front vehicle, although the other cabs will also have drivers as a precaution.

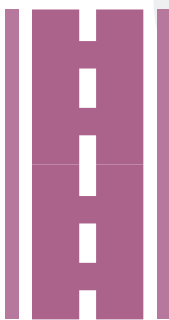
Most recently, a consortium of British companies has unveiled a plan to test driverless cars on UK roads and motorways in 2019. The cars will communicate with each other about any hazards and should operate with almost full autonomy.

However, importantly the Department for Transport has confirmed that such tests will be restricted to vehicles with a human driver present, should the need to take control arise.

¹ Government response to Consultation on proposals to support Advanced Driver Assistance Systems and Automated Vehicles



Is the possibility of completely autonomous vehicles a reality or does it remain within the realms of science fiction?



In 2015, we travelled **317 BILLION** vehicle miles in the UK

In 2013, **3,064 PEOPLE** were **killed** or seriously injured in crashes where speed was a factor



121,000 cars seized in 2015 being driven without **insurance**



The risk of death is approximately **4 TIMES HIGHER** when a pedestrian is hit at 40mph than at 30mph



Who is the driver?

Under road traffic legislation, namely the Road Traffic Act 1988, the key issue when determining issues of criminal liability is who the driver is, i.e. “who was in control of the vehicle”?

This deceptively simple question is made infinitely more complicated in the case of driverless vehicles, which raise a myriad of tough legal issues, including:

- Will road traffic legislation be amended to incorporate corporate offences? Unless the legislation is revisited to clarify the question of “driver” control, then under current legislation the physical human driver will remain responsible.
- As yet, there is no indication from the manufacturers of such vehicles that they are willing to assume criminal responsibility when an incident occurs. Indeed, it seems unlikely that Google, Uber and other manufacturers would willingly open themselves up to potential criminal responsibility but in reality can they avoid this?
- Will it be possible to truly distinguish between those cases where the vehicle is driving itself and where the driver retains some element of control? Should a “driver” of an autonomous car be guilty of something that was ultimately being controlled by the software and mechanics of that vehicle? What if the human driver cannot intervene effectively if something goes wrong, for example, because they are over the drink-drive limit or have fallen unconscious?
- Compare, for example, a common situation where a car is engaged in “automatic” cruise control, allowing the driver to maintain a constant speed, for example 70mph on a motorway. In scenarios where the driver is subsequently caught speeding, it is currently

no defence for them to point to the cruise control and blame that. Will this have to change for automated vehicles?

- Public ownership or private fleet ownership by manufacturers or specialist corporates is likely to become the norm and this has a series of consequences. Who will take over responsibility for repair and maintenance? Who is responsible when an accident arises as a result of a mechanical fault?

At this stage, the plethora of questions that arise remain unanswered but clear direction will be needed if this potentially revolutionary development is to succeed.

False sense of security

Supporters of driverless vehicles say such concerns may actually be groundless. The sophisticated, in-built technology of an autonomous vehicle will mean that such vehicles will know where they are, what is around them and which hazards to plan for, better than any human driver could ever hope to accomplish.

But technology is only as good as the person programming or operating it and it is not difficult to envisage potential flaws in the system or issues which have not been accounted for. It will also never be possible to completely eliminate risks generated by third parties, such as cyclists undertaking vehicles, pedestrians stepping out onto the road, etc.

Motorists should not be lulled into a false sense of security believing they can hand over control of a vehicle to a “robot” and absolve themselves of criminal liability if something goes wrong.

At such an early stage in development, the technology currently raises more questions than it answers. With the challenge of vehicle automation now upon us, will the criminal law be able to rise to that challenge?

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The average driver in England spends **235 HOURS** driving every year

Department for Transport – Pathway to Driverless Cars report



Driver error accounts for **over 90%** of road traffic deaths

Department for Transport – Pathway to Driverless Cars report

Number of accidents will fall by **25,000 A YEAR**

over the next 16 years due to improvements in technology

statistics issued by the Society of Motor Manufacturers and Traders



Humans have had to take the wheel of driverless cars **341 TIMES** over 14 months to avoid accidents and software failures

Google figures filed with California’s Department of Motor Vehicles



Google’s self-driving cars have clocked up more than **1.3 MILLION** miles in California and Texas since testing began in 2012

Google figures filed with California’s Department of Motor Vehicles



Crash rate for self-driving cars was **3.2 crashes** per million miles, compared to the US national average of 4.2 accidents per million miles

study commissioned by Google and conducted by the Virginia Tech Transportation Institute

Driverless cars will add **£51 billion** to the UK economy

statistics issued by the Society of Motor Manufacturers and Traders

More than half of consumers feel either **“UNSAFE”** or **“VERY UNSAFE”** travelling in a fully autonomous vehicle

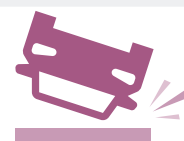
What Car? survey



BIGGEST CONCERN

among drivers (34%) was that an autonomous car would not be able to avoid an incident

What Car? survey



A Taste for Change? Food Law Code of Practice updated



The Food Standards Agency (FSA) has implemented new revisions to the Food Law Code of Practice (the Code) in an attempt to improve the way they regulate businesses. The Code gives statutory guidance to local authorities which they must have regard to when engaged in the enforcement of food law.

The FSA is attempting through these amendments to harmonise the way food safety is regulated and improve consistency across local authorities.

So what are the significant changes?

The FSA has provided further information within the Code on the communication of food safety incidents between regulators, giving clearer guidance on when referrals should be made between regulators and to the FSA.

The main updates include:

1. A section focused on food crime, introducing a subjective “seriousness dishonesty” test which will be applied by regulators in each individual scenario. “Seriousness” will be assessed on the likely level of detriment, for instance to the general public, and will be judged on the geographic scope and scale which is not a high threshold to meet. The Code also focuses on food crime and food fraud, with the FSA’s National Food Crime Unit working to encourage regulators to share any suspicions they may have.
2. Revisions to what qualifications and competencies are required of officers who carry out controls and interventions. Tiered roles of officers now clearly distinguish the requisite skills and qualifications necessary for each role, as well as a comprehensive list of competencies which must be met.
3. The Code now includes a food establishment intervention rating scheme which determines the frequency a business should be visited. This is

determined using risk assessment criteria where the regulators will assess hazards, risks, level of compliance by the business to date and their confidence in the management structure. Each of these criteria is “scored” and used to come to a rating which determines the minimum frequency the FSA will intervene. Previously, it was up to the local authority to determine the intervention frequency, however the Code provides for a consistent benchmark in the approach to be taken by local authority officers.

What will the impact be on businesses?

- As the Code now welcomes inter-communication between regulators, they will likely now be better informed and have a greater collective knowledge of the businesses they are regulating.
- Given the changes in intervention, some businesses may well see an increase in intervention following the revision of the Code, especially if they are falling as high risk within the new “scoring” criteria.
- The Code focuses regulators’ attention on businesses that have fallen under their radar before, whilst low scoring business that have longstanding compliance may find less frequent local authority visits.
- The Code attempts to facilitate consistency across local authorities when it comes to compliance and intervention; this would be welcomed to provide businesses with predictability when it comes to intervention and provides some comfort that a fair approach is being taken across the board.

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To vape or not to vape?

New rules in force for e-cigarettes

New laws around selling e-cigarettes came into force on 20 May. With a massive shake-up of the industry expected, what do businesses need to be aware of?

2015 saw e-cigarettes hit the mainstream as consumers took up vaping in droves. It is estimated that 2.6 million adults in the UK currently use e-cigarettes and the figure is rising. Yet, as their popularity increases, so too have calls for greater regulation. Highlighted text to be a pull out quote

The Tobacco Products Directive has been updated so that e-cigarettes will be classified as a tobacco related product. Manufacturers and retailers that make/sell e-cigarettes or refills for e-cigarettes will be much more tightly regulated as a result.

The new rules include:

“

It is estimated that 2.6 million adults in the UK currently use e-cigarettes and the figure is rising.

1

SMALLER REFILL CONTAINERS: there are currently no limitations on the size of refill containers; however, a new maximum size of 10ml will be enforced. This means users will no longer be able to bulk buy to save money, resulting in a possible overall price increase.

2

WEAKER POTENCY: the current maximum strength of 24mg will drop to 20mg.

3

SMALLER TANKS AND CARTRIDGES: cartridges will be reduced to 2ml.

4

CHILD PROOF: due to the sudden popularity of vaping, there have been concerns that it could become popular with school children as smoking begins to appear “cool” again. Under the new position, all e-cigarettes and related packaging must be “child resistant”.

5

GREATER GOVERNMENT SCRUTINY: manufacturers in the industry will be asked to submit to the government open, detailed and transparent information about what the products they sell contain.

6

APPROVED PRODUCTS: all e-cigarettes must be registered with the Medicines and Healthcare Products Regulatory Agency (MHRA) before they can be sold. The MHRA will then issue a list of approved products.

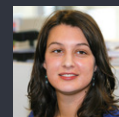
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LABELLING: all ingredients in the product should be listed on the label where they are used in quantities of 0.1% or more.

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Trading standards are now trying to raise awareness about the changes for manufacturers and retailers ahead of the new rules coming in. Further guidance can be found at - <http://tinyurl.com/jqdhf2y> and businesses are advised to familiarise themselves with the changes.



Spending money like water



In fining Thames Water £20.3m for a catalogue of environmental offences, Judge Francis Sheridan smashed the previous record fine by more than 10 times. In doing so, he undoubtedly loosened the judicial shackles when sentencing our largest organisations, warning that “it should not be cheaper to offend than to take appropriate precautions”. With sentencing in health and safety cases subject to an almost identical guideline, what happens now?

Proportional fines

The Courts apply Definitive Guidelines for sentencing both environmental and health and safety cases (the “Guidelines”). The Guidelines require Courts to classify organisations principally by reference to turnover. Having done so, there are identifiable starting points and financial ranges for Judges to apply when sentencing.

A large organisation is one with a turnover exceeding £50m. But had the Judge treated Thames Water as simply “large”, the Guideline range available was a mere £100,000-£650,000.

However, the Guidelines also recognise that there will be “very large organisations” (“VLOs”), where turnover “very greatly exceeds” £50m. In those cases, the Guidelines state that, “it may be necessary to move outside the suggested [sentencing] range in order to achieve a proportionate sentence”. And move outside Judge Sheridan did.

The case was significant in many ways; the Environment Agency described it as the biggest freshwater pollution case it had ever dealt with. The sewage release was unprecedented with 1.4 billion litres of sewage entering the watercourses causing lasting damage.

“Wicked” actions

The Judge described the offending as “wicked” and referenced a “history of non-compliance”. Clearly influenced by Thames Water’s daily profits of £2m, the Judge determined that £20.3m was the appropriate penalty, “to get the message across to shareholders that the environment is to be treasured and protected, and not poisoned”.

Of course Thames Water had been involved in an earlier appeal case, which was a stark warning of what is to come. In that case, the Court of Appeal said “...starting with turnover but having regard to all the financial circumstances, including profitability...the objectives of punishment, deterrence and the removal of gain must be achieved...this may well result in a fine equal to a substantial percentage, up to 100%, of the company’s pre-tax net profit... even if this results in fines of £100m”.

The Guidelines were introduced to bring proportionality to the sentencing process, particularly in the case of VLOs. This case demonstrates the Courts’ willingness to use their new found muscle. There is no specific threshold upon which a business becomes a VLO. Certainly organisations with turnover exceeding £1bn will be a VLO but beyond that, there is little clarity.

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Simply being “very large” does not automatically equate to a sentence being imposed beyond the ranges set out for “large” organisations. The Guidelines are clear; this is at the Courts’ discretion when it is necessary to achieve a proportionate sentence.

Ofcom fined BT £42m for late line installations just a few days later showing that the Courts still have some way to go to keep pace with the penalties imposed by non-judicial regulators.

Fines have tended to be within the Guidelines’ ranges so far but this case provides a clear signal that the Courts are becoming more comfortable with their new found sentencing might and are ready to exercise their discretion, where appropriate, in the case of VLOs.

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Tasked with achieving proportionality, the judge determined that £20.3m was the appropriate penalty ‘to get the message across to shareholders that the environment is to be treasured and protected, and not poisoned’

Enforcement undertakings – an increasingly popular civil sanction?

The Environment Agency (EA) has published its [list](#) of all enforcement undertakings settled during the period 1 August 2016 – 27 January 2017, revealing their popularity as a civil sanction continues to grow.

What is an enforcement undertaking?

An enforcement undertaking is a civil sanction agreed between the EA and a company (or individual), where the EA has reasonable grounds to suspect non-compliance.

From a company's (or individual) perspective this sanction offers an alternative to prosecution and can be a more flexible, efficient and pro-active way of managing a company's (or individual) non-compliance.

From the EA's perspective, as set out within their own guidance, their use of an enforcement undertaking should "*encourage legitimate business operators to make amends, come into compliance and prevent recurrence*".

EA's application of enforcement undertakings

The most frequent application of this civil sanction has, historically, been in cases involving packaging waste offences. As of 6 April 2015 the EA's powers, in agreeing enforcement undertakings, were extended to include environmental permitting offences.

Key statistics from the EA's recent figures are as follows:

26 COMPANIES / INDIVIDUALS received enforcement undertaking;

The **TOTAL FINANCIAL CONTRIBUTION** to environmental charities was **£1,564.761**;

5 of the enforcement undertakings related to environmental permitting offences;

The **LARGEST FINANCIAL CONTRIBUTION** was made by Northumbrian Water for **£375,000** in relation to an environmental permitting offence; and

Out of the 26 enforcement undertakings accepted, **ONLY 9** were pro-actively offered by the company / individual, with the remaining 17 all being reactive offers

A review of the EA's publication confirms that:

- Enforcement undertakings remain an ever popular civil sanction;
- There has been an increase in their application to a wider range of offences; and
- With a total of 7 six-figure fines within this period alone, it is clear that agreed financial contributions are on the rise.

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Global rise in Manslaughter & Officer convictions relating to health & safety breaches

In recent months we have written about the growing trend of prosecuting individuals for health and safety breaches in Australia, particularly in relation to manslaughter charges.

This development is not just limited to Australia. Globally, we are witnessing an increase in the number of convictions of officers and workers for serious breaches of health and safety. The recent convictions of Kelvin Adsett in the United Kingdom and Don Blankenship in the United States, evidence a trend by regulators to focus on holding leaders of organisations to account as a means of achieving corporate compliance. Further, regulators are not confining themselves to prosecuting offenders for breaches of health and safety laws, but are instead widening their ambit to pursuing manslaughter and conspiracy charges.

Key takeaways include:

1. The number of manslaughter charges arising out of workplaces incidents, or following breaches of health and safety is on the rise, globally;
2. Officers and workers are being personally prosecuted. These charges are not confined to health and safety legislation, but include manslaughter and conspiracy charges; and
3. Regulators are pursuing offenders using a two-pronged approach of both general criminal laws and health and safety laws.

United Kingdom

On 23 March 2017, Kelvin Adsett was convicted at the Central Criminal Court (Old Bailey) of manslaughter by gross negligence and offences contrary to section 7a of the *Health and Safety at Work Act 1974* (UK). The charges arose out of an incident which occurred on 30 August 2012, when a member of the public, Amanda Telfer, aged 43, was crushed to death by wooden

window frames weighing 655kg which were blown over in London's Hanover Square. She was pronounced dead at the scene. Mr Adsett was the on-site project manager of the window installer, IS Europe Ltd.

In the lead up to the tragedy, a host of issues aligned. The wooden frames arrived earlier than anticipated, they were unable to be installed, and the principal contractor refused to allow them to be stored indoors. Consequently, the frames were left outside overnight, on the footpath, leaning against a wall unrestrained. Passers-by noted that they witnessed the frames 'swaying in the wind' prior to the accident. Given the weight and size of the frames, the prosecutor argued the frames posed a clear and serious risk to health and safety.

The court heard that the incident could easily have been ameliorated with a series of obvious and straightforward steps which included "cancellation, delay, refusal of delivery on the one hand, to the storage, use of straps and barriers". Unfortunately, these control mechanisms were never utilised. Instead, Mr Adsett and his colleagues were filmed on closed circuit television discussing where to place the frames after the principal contractor refused to allow them to be stored indoors. When asked by the prosecutor whether it was his decision to place the frames on the footpath, Mr Adsett responded "I put them there. It wasn't the first time. The first time [they were stored there] was on 22 August – about a week before".

The incident was investigated by the Metropolitan Police's Homicide and Major

Crime Command, with the assistance of the Health and Safety Executive (HSE). Four people (including the senior project manager responsible for health and safety and two project managers) and three companies (including the principal contractor, the manufacturer and the installer of the frames) were charged with a total of 13 charges following Ms Telfer's death. The incident was characterised by the Metropolitan Police detective chief inspectors Andrew Chalmers as a 'tragic case' and the Mr Adsett was said to have had a 'laissez-faire attitude to health and safety'.

The conviction of Mr Adsett is one of many in the past year. Recent figures from the HSE, obtained by our Manchester office, show a threefold rise in the number of health and safety prosecutions in the UK against officers in the past year, reaching a five year high. Conversely, the number of employees prosecuted had fallen to just one. Of the successful prosecutions, 12 individuals were given prison sentences with the longest gaol term imposed being 2 years.

Rhian Greaves (Legal Director of our Manchester Safety, Health and Environment team) notes that the HSE uses the pursuit of senior personnel as a way to draw attention to the need to manage risks appropriately. However, it was also noted that prosecutions (of any type) against individuals are still the minority of cases, with the overwhelming majority of all prosecutions still being brought against the corporate entities.

The HSE's policy for prosecuting officers is dependent on two factors: sufficient evidence to prove the occurrence of a breach; and public interest considerations. Such considerations include when officers are personally responsible for the offence.

In the UK, all breaches of health and safety laws are criminal matters and manslaughter offences take precedence in the investigation stage as they are considered to be more serious offences. However, the HSE also has the power to investigate and can bring charges concurrently. This can, and often does, result in two-pronged approaches, as is exemplified by the case of Mr Adsett. In Australia there appears to be a precedent of utilising general criminal laws to prosecute smaller companies, and health and safety laws to prosecute larger organisations. Last week, on 5 April 2017, the Queensland State Industrial Relations Minister, Grace Grace, stated that Queensland had begun auditing its work health and safety laws to determine whether an offence of gross negligence causing death should be introduced and whether the maximum penalties for workplace related injuries and deaths should be increased.¹

United States of America

On 3 December 2015, the Chief Executive Officer of Massey Energy Company, Don Blankenship was found guilty by the Federal District Court of conspiracy to willfully violate mine health and safety standards in relation to the 2010 explosion at the Upper Big Branch mine which resulted in the death of 29 miners.² On 6 April 2016, Mr Blankenship was sentenced to a year in prison and fined USD250,000. He is due for release next month on 10 May 2017.

The investigation into the explosion found that the mine had begun to collect large quantities of coal dust due to poor ventilation. This, coupled with a small methane ignition resulted in the massive explosion.³ The previous year, US federal regulators had found that the mine failed to follow methane-related safety precautions and required the ventilation to be corrected. This is timely reminder for Australia on the importance of compliance

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“putting profits over the safety of workers is reprehensible... the jury acknowledged that with the guilty verdict and the sentence imposed today recognises that disregarding safety laws has real consequences. From the beginning, the objective of this investigation and this prosecution was to not only show that those who violate safety laws will be held responsible, but also to deter these violations in the future to make everyone's workplace safer”.

with dust disease obligations given the current reforms in the mine safety and health sphere. The Mining Safety and Health Legislation (Coal Workers' Pneumoconiosis and Other Matters) Amendment Regulation 2016 now requires Queensland employers to notify safety inspectors whenever dust concentrations exceed prescribed thresholds. This follows the re-emergence of black lung disease in 2015.⁴

The Upper Big Branch mine incident was investigated by the FBI and the US Department of Labor's Office of Inspector General and resulted in a total of five criminal convictions, including Mr Blankenship's and a resolution of over USD200 million to be invested into mine safety. The other convictions included: the former mine supervisor, Gary May, who was sentenced to 21 months in gaol after pleading guilty to disabling the methane gas monitor, falsifying mine records and obstruction safety inspectors; and a former Massey Energy executive, David Hughart, who was sentenced to 42 months imprisonment on conspiracy charges for pre-warning officials at Massey's mines before safety inspections. Witnessed called to testify at the jury trial provided evidence on the unsafe working conditions at the mine and the extent to which mine safety and health regulations were subverted, including organised efforts to obstruct inspectors and tactics to ignore and defraud the Mine Safety and Health Administration.

Mr Blankenship's sentence was lauded as a victory for workers and workplace safety, reinforcing the severity of breaches of health and safety laws to executives and the personal consequences of failing to adhere to those standards. The Acting US Attorney Carol Casto stated:

"putting profits over the safety of workers is reprehensible... the jury acknowledged that with

the guilty verdict and the sentence imposed today recognises that disregarding safety laws has real consequences. From the beginning, the objective of this investigation and this prosecution was to not only show that those who violate safety laws will be held responsible, but also to deter these violations in the future to make everyone's workplace safer".

Comments

What is remarkable in the cases of Mr Adsett in the UK and Mr Blankenship in the US is the common element that the directors or officers had, or should have had, actual knowledge of the safety risks and nonetheless acted in defiance of it. This is not dissimilar to some of the recent manslaughter convictions in Australia, for example the conviction of Peter Francis Colbert in South Australia in October 2016 who was found to have knowledge of a truck's dilapidated brakes prior to one of his workers being killed when the brakes of the truck failed.

These convictions emphasise a global trend of assigning greater accountability to officers and workers for serious breaches of health and safety. The current state of play around the world is clear – regulators have a repertoire of provisions available to them following a health and safety incident and officers should consider themselves forewarned.

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¹ <http://statements.qld.gov.au/Statement/2017/4/5/expert-panel-to-put-work-health-and-safety-laws-under-the-spotlight>

² <https://www.justice.gov/opa/pr/former-massey-energy-ceo-sentenced-year-federal-prison>

³ <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg81653/pdf/CHRG-112shrg81653.pdf>

⁴ A recent interim report released by the Queensland Parliamentary Inquiry Committee has stated that black lung was never in fact eradicated. Instead, Queensland authorities failed to correctly identify it for 30 years. The NSW Resources Regulator has also announced that it plans to take enforcement actions if its investigation into the first case of black lung in NSW since the 1970s reveals breaches of work health and safety laws



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