

# BRIEF UPDATE

FROM THE HEALTH AND SAFETY DIVISION



## New Health and Safety Sentencing Guidelines

**The Sentencing Guidelines Council has this month issued new guidelines for judges imposing sentences in health and safety cases. The Guidelines apply to the sentencing of companies in cases where a death has occurred but similar considerations are likely to be applied by the courts in all cases.**

Compliance with the Guidelines is only compulsory for Courts in England and Wales but unless separate guidance is produced for Scotland, the Scottish Courts are also likely to follow the new Guidelines.

### Turnover and profit

Despite an earlier proposal that the level of any fine should be linked to turnover, the Guidelines now specify that **“there should be no fixed correlation between a fine and either turnover or profit”** on the basis that the circumstances will vary too much from

case to case. The Court is however directed to look carefully at both turnover and profit, and also the assets of an organisation, in order to assess its resources. In assessing ability to pay the Court is directed to consider that payment of a fine may be spread over a period, which may be up to a number of years.

In assessing the financial consequences of a fine on a company the court may consider the effect on the employment of innocent employees but the effect upon shareholders and directors is not normally to be taken into account. Whether the fine would have the effect of putting an organisation out of business is a relevant factor although the Guidelines observe that in some serious cases this may be an acceptable consequence.

### Level of fines

The Guidelines state that fines must be punitive and sufficient to have an impact on the organisation. In a case of corporate manslaughter, it is suggested that the minimum fine should not be less than £500,000. There is no maximum level of fine stipulated although the Guidelines state that an appropriate fine “may be measured in millions of pounds”.

Where a case results in a conviction for a health and safety offence (other than corporate manslaughter) and the offence is shown to have caused a death, the minimum fine is expected to be £100,000 with fines being “measured in hundreds of thousands of pounds or more”.

### Provision of financial information

The Guidelines state that financial information should be sought for a three year period including the year of the offence. The primary obligation to provide the information lies with the convicted organisation. If the organisation fails to provide relevant information, the Court is entitled to make adverse assumptions as to its means and may assume an ability to pay any fine imposed.

The information to be provided for a company will normally be its published audited accounts and the Court is directed to pay particular attention to turnover, profit before tax, directors remuneration including loans and pension provision, and the company’s assets as

disclosed by the balance sheet.

### **Factors likely to affect the seriousness of an offence**

The Guidelines state that a wide range of factors may affect the seriousness of any offence. In general however, the more foreseeable the risk of serious injury, the graver the offence. The Court should consider how far short of the required standard the organisation has fallen and whether any failure was an isolated one or indicative of a widespread departure from good practice across the company's operations. The higher up the responsibility for the breach, the more serious the offence.

### **Aggravating factors**

The following are identified as aggravating factors which would generally increase the level of fine which would otherwise be imposed:

- More than one death or additional cases of serious injury
- Failure to heed warnings or advice, from the HSE, employees (especially health and safety reps) or a failure to respond appropriately to previous incidents or near misses
- Cost cutting at the expense of safety
- A deliberate failure to obtain or comply with a licence
- Injury to individuals whose personal circumstances make them more susceptible to exploitation.

### **Mitigating factors**

The following are identified as mitigating factors which would generally reduce the level of fine which would otherwise be imposed:

- A prompt acceptance of responsibility
- A particularly high level of co-operation with an HSE or police investigation (beyond that which will always be expected)
- Genuine efforts to remedy the defect
- A good health and safety record
- A responsible attitude to health and safety (demonstrated by factors such as the commissioning of expert advice or consultation with employees).

### **Unauthorised acts of employees**

The Guidelines state that since corporate manslaughter requires substantial failures by senior management, the unauthorised act of an employee is unlikely to significantly reduce the culpability of an organisation. In relation to a breach of other health and safety laws, the responsibility of the organisation in allowing the unauthorised act, for example through inadequate supervision or training, requires to be assessed. The Guidance appears to recognise that in some cases the level of culpability of the organisation itself may be very little where an employee has acted in an unauthorised way.

### **Publicity orders**

The Guidelines state that in a case of corporate manslaughter, a publicity order should ordinarily be imposed in order to obtain the objective of deterrence and punishment. Any publicity order should contain a provision designed to ensure that the conviction becomes known to a company's shareholders and consideration should be given to requiring a statement on the company's website.