

The stakes are high for anyone involved in corporate manslaughter or health and safety law prosecutions – and this has just been made all the clearer by the Sentencing Council's Definitive Guideline for sentencing in these cases, which took effect from 1<sup>st</sup> February 2016.

The Guideline document sets-out the process of determining sentence in a logical, step-by-step sequence that provides an objective, transparent method of calculating the level of sentence imposed. It is an insight into how the case for the defence might be presented so as to reduce the sentence following a guilty verdict.

#### How serious is the offence?

The first step in determining sentence upon organizations and individuals convicted of breaching health and safety law looks at the attitude of the organization, the state of mind of the individual, to decide upon the "offence category". This is arrived at through a consideration of the level of culpability, categorized from "very high" (intentional, flagrant disregard of the law) to "low", with "high" and "medium" in between.

The second element in the seriousness of the offence is the risk of harm it created. Using a 3x3 matrix, similar to risk assessment methodology, the combination of the likelihood of harm occurring and the seriousness of the harm is evaluated and classified into harm categories from category 1 (the highest level of harm) to category 4 (the lowest).

If several people were exposed to the risk of harm and the offence was a significant cause of actual harm, then the court must consider moving up a harm category or raising the starting point of the fine or custodial sentence considered at the next step in the process.

In corporate manslaughter cases, which only involve organizations, the seriousness of the offence is gauged through considering the level of harm, determined by the number of people killed, seriously injured or put at risk of harm and the culpability of the offending organization by reference to its culture and how far its conduct fell short of acceptable standards. Offences are classified as "Category A" or "Category B", the higher levels of harm and culpability being in Category A.

#### What should the punishment be?

The level of a fine imposed upon an offender generally depends upon their ability to pay. For organizations, this is determined by size, initially measured through turnover and then by reference to profitability.

Starting points and ranges of fines and custodial sentences are tabulated in the guidance. Where organizations are concerned, the starting points for fines are determined through reference to tables covering four sizes of organization: large (over £50 million turnover), medium (turnover between £10 and £50 million), small (turnover between £2 and £10 million) and micro (under £2 million). Very large organizations whose turnover figures greatly exceed £50 million may face fines calculated from a higher starting point than those in the table covering large organizations.

For breaches of health and safety law, the punishment tables are divided into sections, according to culpability (very high, high, medium, low) and these sections are further sub-divided into harm categories (1, 2, 3 and 4), as determined in the first step.

In the corporate manslaughter tables, these categorizations are telescoped into the two Category A and B offences, which combine the harm and culpability variables. The table for individual offenders includes custodial sentences and community orders.

The punishment starting points and ranges operate through consideration of aggravating and mitigating factors, allowing upward or downward adjustment from the starting point within the offence category range. Aggravating factors must include previous convictions and can also include any aspect of the offender's conduct, such as cost-cutting at the expense of safety. Mitigating factors can include,

amongst other things, no previous relevant convictions and evidence that steps have been taken voluntarily to rectify the problem.

The court must also consider whether the fine is proportionate to the overall means of the offender, having regard to the principles of fairness and proportionality. This must take account of the economic benefit derived from the offence and whether the offender will be put out of business by the fine.

The sentence may be reduced by up to one third if a guilty plea is entered at the first reasonable opportunity, declining to a quarter where the guilty plea is entered after the trial date is set, down to one tenth reduction if the plea is entered just before or after the trial has commenced.

The Sentencing Council say that any fine imposed should fairly and proportionately serve to punish, deter and remove the benefit of any gain made out of committing the offence: "it should not be cheaper to offend than to take the appropriate precautions". Fines imposed upon organizations must be "...sufficiently substantial to have a real economic impact", so as to "bring home to...management and shareholders the need to comply with health and safety legislation".

Under previous guidance, the highest corporate manslaughter fine to be imposed was £700,000, plus costs of £200,000, upon a medium-sized organization. The new guidance range of fines for a medium-sized organization convicted of a corporate manslaughter offence in Category B, is between £1.2 and £5 million.

#### [Arguing your case](#)

As the revised sentencing guidance is likely to have the effect of increasing punishments following health and safety and corporate manslaughter convictions, it is essential for defendants to obtain good legal advice and have available robust, credible evidence of good risk management practice so as to support a not guilty plea.

If entering a guilty plea, defendants should carefully consider the advantages of doing so at the first reasonable opportunity and how any mitigating factors can be presented in the most favourable light, including how their actions might be seen as reducing their culpability to a medium or low order.

If defendants successfully argue that their culpability is of a lower order, for example, "medium", rather than "high", the fine starting point for a large organization that has committed a harm category 1 offence reduces from £2.4 million (high culpability) to £1.3 million (medium culpability).