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Health & Safety Sentencing Trends: A practical approach to advising clients

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1. Sentencing trends – Natural persons

a. Gross Negligence Manslaughter

R v Zaman [2018] 1 Cr App R (S) 26 (The first peanut case)

A restaurant owner was convicted of gross negligence manslaughter where he took a decision motivated by financial gain to swap flavouring powder to one containing peanuts where he knew what the consequences would be for someone suffering from a peanut allergy.

A customer was specifically assured that a takeaway meal did not contain peanuts. The customer suffered an allergic reaction and died.

The Court of Appeal upheld the original sentence of 6 years' imprisonment, observing that the defendant's conscious and deliberate decision to swap the powder and give false assurances was "undoubtedly based on cost", where procedures were appallingly lax.

The defendant "was completely and utterly indifferent at all stages to the lives of his customers". HIs negligence was not just gross, but was appalling.

R v Rashid, Kuddus and RS Takeaway Limited t/a The Royal Spice, Manchester Crown Court, 7 November 2018 (The second peanut case)

A 15 year old girl died following an allergic reaction to a takeaway meal containing peanuts. This was a case where the restaurant had simply no procedures in place to deal with allergies and where the defendants "quite simply never gave the risk of a customer dying because of an allergy a moment's thought".

Two men running the restaurant were convicted of gross negligence manslaughter. There was no evidence of the offences arising by greed or cost-cutting. There were simply no proper allergy-control measures in place.

In sentencing the two natural person defendants to 3 and 2 years imprisonment respectively, Mr Justice Yip commented:

> "It is important that the message is heard that those who fail to take proper care in the supply of food to the public will face significant custodial sentences if a death occurs".

Culpable Homicide (Scotland) Bill – Consultation until February 2019

On 8 November 2018, Claire Baker MSP launched a consultation on reform of the law of culpable homicide in Scotland, with a view to establishing a new statutory offences of "culpable homicide by recklessness or gross negligence", applicable to natural persons and organisations, to deal with

perceived inadequacies in CMCHA 2007, HSWA 1974 and culpable homicide at common law.

The consultation runs until 15 February 2019.

b. Partners

HSWA 1974, ss.36 and 37

Partnerships (Prosecution) (Scotland) Act 2013

The act allows for the prosecution of dissolved partnerships and former partners of dissolved partnerships in respect of offences alleged to have taken place prior to dissolution.

Prosecution must take place within 5 years of dissolution.

A fine imposed against the dissolved partnership may be pursued against the assets of the former partners of the dissolved partnership.

c. Directors

R v Thelwall [2016] CTLC 180

The appellant was the sole director of a warehousing company. A company employee died when a MEWP fell onto him whilst being unloaded from a lorry.

The appellant had a previous conviction for a previous health and safety offence involving a death where he had been fined £125,000.

The appellant pled guilty to a s.37 offence and was sentenced to 12 months' imprisonment. His appeal against sentence was dismissed.

Although the circumstances of the appellant's previous conviction were very different from the instant case, that conviction was still a relevant sentencing consideration. The "gravamen" of the previous incident was that it showed the importance that must be attached to health and safety matters and significantly undermined the argument that the appellant did not appreciate the serious consequences that could occur if proper health and safety procedures were not followed.[3]

R v Crute [2011] EWCA Crim 3233

The defendant pleaded guilty to allowing his employees to carry out gas-fitting work when not approved to do so under the applicable gas safety regulations. The company of which the defendant was director, UK Gas Oil Co Limited also pleaded guilty to associated charges on the same indictment. The basis of plea recognised that lives had been endangered by faulty workmanship, even although no accident had occurred.

In addition to a fine, Lincoln Crown Court imposed a company director disqualification order under Company Director Disqualification Act 1986 for a period of 7 years.

d. Employees

R v Jukes [2018] 2 Cr App R 9

[3] Paragraph [10]

The defendant worked for a waste management company. One of his fellow employees was fatally injured by a compacting machine. The defendant went to trial at Liverpool Crown Court in September 2016. At trial, he was convicted of failing to discharge the duty to take reasonable care of the health and safety of employees, contrary to HSWA section 7. He was sentenced to 9 months' imprisonment.

2. Sentencing Trends - Corporate Bodies

a. Companies – the impecunious corporation

R v RK Civil Engineers Ltd and RK District Heating Limited, Sheffield Crown Court, April 2018

Guilty plea to breaches of s.2 & s.3 HSWA respectively, when worker crushed under large pipes which were being unloaded from a trailer. Failures to have safe system of work.

Date of accident was 10 December 2015.

The defendant companies went into administration on 2 June 2016 and 29 March 2017 respectively.

In April 2018, each company was fined £1M plus costs.

R v George Hurst & Sons Limited, Leeds Crown Court, May 2018

Guilty plea to breach of s.2 HSWA when employee fell from height on a scaffold suffering broken ribs and internal injuries. Failure to have suitable edge protection.

August 2014 was the date of the accident.

Company had gone into administration on 13 April 2017 with loss of 65 jobs.

Company fined £1.

HMA v X Limited (anonymised pending Scottish prosecution)

Incorporated 5 April 2012

April 2013 (first, and only, Annual Return)

No accounts or further annual returns lodged

Date of accident: 27 January 2014

8 April 2014: Striking-Off Notice issued by Registrar (Companies Act 2006, s.1000)

13 May 2014: Temporary Suspension of Striking-off and dissolution as objection made (by COPFS).

4 July 2017: application by director for voluntary striking-off

20 July 2017: striking-off and dissolution suspended as objection received by the Registrar (from COPFS) (hence prosecution still possible).

R v RS Takeaway Limited Manchester Crown Court, 7 November 2018

(The second peanut case)

The restaurant company was no longer trading. Were it still trading, a substantial financial penalty would have been called for. However, the reality was that the company continued to exist in name only, with no assets to enforce a fine against. Mrs Justice Yip took the view that there was "really no sensible disposal available to the court". A nominal fine of £1000 in total was imposed, under explanation that it was recognised that

it bore no relation to the seriousness of the offence and even that nominal sum was unlikely to be enforceable.

The court also imposed a Hygiene Prohibition Order[4] against the company which was regarded as permanently barring the company from trading in the food industry; this was viewed as the real penalty.

b. Charitable or Public Bodies

R v Havering BC [2017] 2 Cr App R (S) 9 *(Public Body)*

The appellant was a local authority. It pled guilty to two contraventions of PUWER and was fined £500,000 in respect of provision of defective equipment and inadequate PPE, whereby a worker was injured.

The Court of Appeal considered how the 2016 Guideline ought to have been applied in respect of a local authority where the court was required to look at the annual revenue budget. The appellants ARB was £120M, which would place it in the large organisation category, the "base point" for that category being £50M.

A central issue in the appeal was what was meant by "substantial reduction" at STEP 4 when imposing a fine on a public body. It was argued that this should be a 50% reduction. The Court of Appeal noted that this contention was advanced without support from authority and without anything in the guideline to suggest such magnitude of discount. The court observed that it is deliberately left open to the sentence to make a

[4] Food Safety and Hygiene (England) Regulations 2013, Regulation 7

substantial reduction when fining public bodies or charitable organisations, but that this is plainly left to the discretion of the sentence when deciding the level of the reduction to give. STEP 4 provides for a discretion[5].

Further the Court of Appeal observed that it would have helped its consideration of the case had they known the final figure which the sentencing judge had reached before he applied the reduction to reflect the public-body status.[6]

R v University College London [2018] EWCA Crim 835 *(Charitable status)*

When imposing a fine for a HSWA s.3 breach on UCL (being a body established by Royal Charter and a registered charity), the CoA did not interfere with a reduction of 20% to reflect charitable status.

The CoA took the view that the case was not one where a reduction was required because of the likely impact on the provision of charitable services to the needy. Whilst the appellant had charitable status, there were commercial as well as academic aspects to the scientific work being undertaken where the accident (to a student) occurred.

R v Zoological Society of London, Westminster Magistrates Court, 22 October 2018 *(Charitable status)*

An employee of London Zoo fell from a faulty stepladder. The employee suffered soft tissue injuries and concussion.

[5] Paragraphs [10]-[11]
[6] Paragraph [12] – does this suggest a more mechanical or arithmetical approach may be required?

In applying the Definitive Guideline, the District Judge started at £300,000 fine, reduced by one-third to £200,000 to reflect the early guilty plea. That figure was then discounted by a further 50% to £100,000 to reflect the charitable status of the society.

The court was told that although the society had an annual turnover of £50M, any profit made was used to fund animal conservation work. The judge "very much recognised the nature of the Zoological Society".

3. Sentencing Trends – Financial Information

a. The general position

The Scottish position is regulated at common law whereby the court expects relevant financial information to be provided to the Crown prior to the relevant hearing[23]. Limited companies require to lodge annual accounts with Companies House in accordance with the relevant statutory period. Failure to do so is an offence (Companies Act 2006, s.441).

b. Importance of up-to-date financial information

R v John Henry & Sons Limited [2018] EWCA Crim 30

The appellant company was convicted of a s.3 HSWA offence concerning severe injury caused to a ground worker when a section of trench which he was excavating collapsed on to him fracturing his leg. The three-week trial

[23] HM Advocate v Discovery Homes (Scotland) Limited 2010 SLT 1096 at [16]

was “hotly contested”. A fine of £550,000 with further award of costs of £166,217 was imposed.

The fine and costs awards were appealed on the basis that these were too high, as taken together they were more than double the annual profit before tax. Having considered the application of the 2016 Guidelines by the trial judge, the Court of Appeal noted that it would be very slow to interfere with challenges to decisions made by a well-informed first instance judge in such circumstances where that judge had a feel for the case.[24]

The Court of Appeal considered that the case had taken “a slightly unusual turn”. During the appeal process, the Crown produced the annual accounts for the appellant for y/e 31 January 2016, which showed increased turnover and increased profit. Those accounts had been approved by the Board on 25 April 2016 and were lodged with Companies House on 6 November 2016, 10 days prior to the sentencing hearing. The Court of Appeal recorded “with some surprise” that they were not placed before the sentencing judge, especially because the increase in turnover would have moved the company from being medium-sized to large-sized in the Guidelines.

Defence counsel apologised to the Court of Appeal. Clearly the Court was unhappy, noting that it would not have been unduly cynical to observe that had the 2016 accounts shown a significant downturn in the company’s

[24] Paragraph [15]

position, this would have been likely to have been drawn to the attention of the sentencing judge by the appellant company[26].

The Court of Appeal reiterated that Page 6 of the Guideline places the primary obligation in producing comprehensive accounts on the offender. However, that does not discharge the prosecutor from "an obligation of scrutiny" of those materials. In this case, the Court of Appeal stated that as the last set of accounts were well out of date by the time the judge came to sentence, it behoved the prosecutor at the very least to have drawn the judge's attention to the fact that the deadline for filing private company accounts 9 months after its year-end had passed as at 31 October 2016, with no accounts having been filed. Had this been done, the judge and/or the defendant would have been spurred into providing the latest accounts in accordance with their duty. [27]

c. Group Companies

R v Tata Steel UK Limited [2017] 2 Cr App R (S) 29

In 2015, TSUK recorded a post-tax loss of £851M. That loss was borne by the ultimate parent company Tata Steel Limited (TSL).

On appeal in respect of a fine of £1.985M for two offences under HSWA s.2, it was argued that the sentencing judge ought-not to have taken into account the financial position of TSL as it was irrational to penalise TSL for

[26] Paragraph [30]
[27] Paragraph [31]-[32]

managing its own affairs so as to enable the loss-making TSUK to continue trading and to continue to employ many people.

The CoA noted that in applying the Guidelines, the financial circumstances of the offender are to be examined in the round to assess the economic realities of the organisation. In this regard, Step Two provides that normally only information relating to the organisation before the court will be relevant, unless exceptionally it is demonstrated that the resources of a linked organisation are available and can properly be taken into account.

The CoA stated that it kept well in mind the separate corporate personalities of TSUK and TSL in approaching the matter. However, the CoA had regard to a passage in TSUK's accounts which recorded that TSUK had adequate resources including the support of TSL to continue in operational existence for the foreseeable future. On that footing, CoA concluded that this was one of those exceptional cases where the resources of the ultimate parent company could properly be taken into account.

The CoA noted that as the support of the ultimate parent company was of the first importance to ensuring that the appellant company could continue as a going concern, it seemed wrong not to take the position of the ultimate parent company into account. This was to recognise the economic realities of the situation.[28]

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[28] Paragraphs [52]-[59]