



Compass Chambers

HEALTH & SAFETY

Aspects of sentencing

Glasgow

26 May 2017

Aspects of Sentencing

- The previous Scottish approach
- HMA v Scottish Power Generation Ltd
- The new Guideline
- Strategic approach
- The future



The Scottish approach

- *HMA v Munro & Sons (Highland) Ltd*, 2009 SCCR 265

First case to consider in detail the principles to be applied in sentencing in H&S cases

Per Lord Nimmo-Smith, the approach in *R v Balfour Beatty Rail Infrastructure Services Ltd* [2007] 1 Cr. App. R. (S.) 65 and *R v F Howe & Son (Engineers) Ltd*, [1999] 2 Cr. App. R. (S.) 37 approved

2010 Guideline will “be noticed” in future cases

- *HMA v Discovery Homes Ltd* 2010 SCCR 765

“That Guideline has statutory effect only for England and Wales but it will, no doubt, in the future be noticed for the purposes of sentencing on like offences in Scotland.”



- *HMA v Scottish Sea Farms Ltd* 2012 SLT 299

“The relevant considerations in sentencing in a case of this kind were considered in *HMA v Munro* in which the court endorsed the approach taken by the Court of Appeal in England in *R v Balfour Beatty Infrastructure Services Ltd*. [...] This approach is reflected in the Definitive Guideline of the Sentencing Guidelines Council in England...”

“The Guidelines have statutory effect only for England and Wales but may be noticed for the purposes of sentencing similar cases in Scotland.”



- *Geddes v HM Advocate*, 2015 SCCR 230 per LJC (Carloway):

“while the court has encouraged sentencing judges to ‘have regard’ to the English Guideline in death by driving cases, it has not said that it should be interpreted and applied in a mechanistic way...”

“[...] in order to ensure a degree of consistency in this jurisdiction, albeit paying due regard to local circumstances, it may be equally important to have regard to existing precedent.”





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HMA v SPG Ltd

- *HMA v Scottish Power Generation Ltd*
- Facts:
 - Longannet Power Station
 - Faulty valve
 - Valve passing steam
 - Valve turned by employee
 - High temperature steam under pressure



- Plea on Indictment before Sheriff McNair at Dunfermline
- HSWA section 2 re failure to maintain plant & system of work that was safe
- Sheriff rejected argument not to apply 2016 Guideline
- SPG Holdings Ltd turnover of £1.3 Billion
- Fine of £1.75M (reduced from £2.5M)



SPG Ltd v HMA

- Appeal against sentence:
 - Sheriff erred in applying Guideline
 - Guideline mechanistic & formulaic, inconsistent with sentencing practice in Scotland; apt to interfere with judicial discretion
 - *Esto*, the Sheriff was entitled to apply the Guideline he did so erroneously



- *Scottish Power Generation Ltd v HMA*, [2016] HCJAC 99, 2016 S.L.T.1296 [Carloway, Brodie, Bracadale]

“[Guidelines from the Sentencing Council will often provide a useful cross check, especially where the offences are regulated by a UK statute.]”

“In relation to the 2015 Guideline, there is no need to use it in a mechanistic or formulaic fashion.”



“As was pointed out in *Geddes (supra)*, it is important to look at existing Scottish precedent to discover what levels of penalty are appropriate, albeit that this task may involve a cross check with any relevant guidelines.”

- Appeal allowed
- Fine of £1.2M substituted (reduced from £1.5M)
- Impact of case



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The 2016 Guideline

Purpose

- To extend guideline to non-fatal cases
- “To increase the level of fines imposed so as to achieve the objective of imposing a fine which would be felt by directors and shareholders”



- **Step One:** Identify offence category by assessing culpability and harm
 - 4 Culpability categories “Very high” (deliberate breach)
 - “Low” (not falling far short of standard)
 - Harm categories 1 – 4
 - Categorisation achieved by considering seriousness (death, serious injury etc...) and likelihood of harm (high, medium or remote)
 - Once done move on to step 2 – the Financial Matrix



- **Step Two:** identify starting point and range for relevant offence category and size of organisation
 - Micro organisations (turnover of not more than £2million)
 - Small organisations (£2million – £10million)
 - Medium organisations (£10million – £50million)
 - Large organisations (£50million +)



- Very large organisations (where a defendant organisation's turnover very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence)



- **Step Three:** “step back” from the starting point – consider the aims of sentencing in light of the wide circumstances of the offender, and adjust from the starting point if necessary
 - Examine financial circumstances of the offender in the round – incl. profit
 - Add any quantifiable benefit (of the breach) to the fine



Step Four: “step back” again: consider the wider implications of the fine and adjust if appropriate

- If the fine falls on public or charitable bodies and will significantly impact services, substantially reduce the fine
- In all cases consider the impact of the fine on innocent third parties and on the offender’s ability to improve conditions

Steps Five – Nine: standard steps incl. discount for plea

Strategic approach

- Advising accused
- Agreed narrative (Crown's comments on sentence; if too high, leave out? If too low, is Judge bound?)
- Shaping the plea-in-mitigation
- Predicting outcomes
- Boardroom interest (provision in accounts)
- Effect on court business



2014 – No companies were fined $> \text{£}1,000,000$

2015 – Three companies were fined $> \text{£}1,000,000$

2016 – Nineteen companies were fined $> \text{£}1,000,000$

More trials? What is there to lose? (consideration of reputational damage etc)



New benchmarks?

R (HSE) V Conoco

Facts – A gas leak on the Lincolnshire Offshore Gas Gathering System which did not cause any actual injury but, the court considered it a ‘[harm] category 1’ case, because there was “a high likelihood of serious injury or death being caused and a large number of workers were exposed to that risk”.

In light of the company’s turnover (£4.8 billion) the starting point was much too low –

Ultimately, fined £3,000,000



R(HSE) v Merlin Attractions Operations Ltd

Prosecuted following the crash of its Smiler 'attraction' at its Alton Towers theme park.

Facts- Five people were seriously injured in the crash, two of them requiring leg amputations.

The company's guilty plea resulted in a one-third fine reduction. The fine fell within the range in the Sentencing Guidelines (£1.5–6 million) for a company with a turnover in excess of £50 million facing allegations of high culpability and the highest level of harm risked.

But – despite a 1/3 reduction for early plea – fined £5,000,000

Tougher H&S regime

Increase in scrutiny of key individuals

2010 – 2015, average of 24 company directors/senior managers prosecuted annually

2016 – number rose sharply to 46



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Contact

**Compass Chambers
Parliament House
Edinburgh
EH1 1RF**

DX 549302, Edinburgh 36

LP 3, Edinburgh 10

www.compasschambers.com

Barry Smith

Advocate

M: 07962 142 549

E: barry.smith@compasschambers.com

Gavin Herd

Practice Manager

Phone: 0131 260 5648

Fax: 0131 225 3642

gavin.herd@compasschambers.com