Health and safety revolution?

Ross Whalley considers the Health and Safety Executive's new sentencing guidelines nine months on from their implementation

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In her last article for *Solicitors Journal* in March 2016, my colleague Zahra Nanji considered the new sentencing guidelines for health and safety offences, corporate manslaughter, and food safety and hygiene offences published by the Sentencing Council, which came into force in February 2016.

The guidelines introduced higher fines for organisations in breach of health and safety law, with a range of factors to be taken into account when the courts are considering the appropriate level of penalty, including the size of the organisation and the risk of harm created by the breach.

Zahra anticipated the guidelines would increase fines for large organisations, tackle the inconsistency in how various factors were applied, make fines more proportionate to the actual harm caused, and give more weight to the culpability of the offender. Now, nine months on, it is worthwhile taking stock and considering what the impact has been. Have the new sentencing guidelines been put to good use and what deterrent, if any, do they serve?

The examples below all relate to incidents that took place prior to February 2016, However the new guidelines are applicable in all matters heard after 1 February 2016, as opposed to the date of the concerned event

In May this year, Travis Perkins was fined £2m and ordered to pay costs of £114,000 for two health and safety offences following the death of a customer at its Milton Keynes store in 2012. While loading planks of wood onto the roof rack of his vehicle, the customer fell backwards into the path of a company vehicle operating in the yard and was crushed.

McCains were fined £800,000 for safety failings after an engineer almost lost his arm when inspecting a conveyor belt of a machine in one of its frozen food factories in August 2014. The Health and Safety Executive found the machine did not have a suitable guard fitted.

Balfour Beatty Utilities Solutions Limited was fined £2.6m and ordered to pay costs of £54,000. The company had breached section 3 of the Health and Safety at Work etc Act 1974, regulation 31 of the Construction (Design and Management) Regulations 2007, and regulation 3 of the Management of Health and Safety at Work Regulations 1999. The matter concerned an accident in 2010 when an employee of a subcontractor was killed after a trench collapsed.

In May 2016, multinational energy company Scottish Power was fined £1.75m for a breach of section 2 of the 1974 Act for an incident in which an employee was seriously scalded at a power station in 2013. The worker sustained the injuries when they opened a faulty valve which emitted high temperature steam. According to HSE, Scottish Power was aware of the defective valve but failed to repair or replace it.

The above fines imposed by the courts demonstrate the significant impact the guidelines have had and that large companies are now facing substantially higher fines than ever before for safety failings. In clear contrast to the above cases, Network Rail was found guilty of serious breaches following the Hatfield rail crash in 2004, but was ordered to pay just £3.5m in 2004 despite the incident claiming the lives of four people and injuring a further 70.

But by far the most notable case of 2016 so far was that of Merlin Attractions, the owner of Alton Towers. In April, the company admitted charges of health and safety breaches following the incident in June 2015 in which a carriage of the Smiler rollercoaster crashed into a stationary carriage leaving five people seriously injured, and in once case led to the amputation of a limb.

The accident was a result of the Merlin's failure to assess risk and have a structured system in place. Merlin was committed to Stafford Crown Court for sentencing for an offence contrary to section 3(1) of the Health and Safety at Work Act.

The court graded Merlin's breaches as a category 1, with the company's culpability and the harm caused described as 'high'. Taken into consideration was Merlin's previous conviction concerning a failure to carry out a proper risk assessment, in addition to their compliance throughout the investigation, a generally good health and safety record and the guilty plea.

The devastating injuries caused to a significant number of people resulted in a move beyond the category range and up the offence range and Merlin was fined £5m. But for the guilty plea, had a trial been required the appropriate fine would have been £7.5m. Merlin was also ordered to pay the HSE's costs of £70,000.

Since guidance from February 2016, the purpose of sentencing has been to reflect the economic impact on a company's board and shareholders with higher fines based on turnover. This is to ensure that a similar event does not happen again and seeking to ensure that businesses properly manage health and safety by means of proper investment.

The costs of poor health and safety management are brought into sharp focus by the introduction of the new guidelines and the potentially severe penalties that can be imposed. However, during the consultation for the new sentencing, one response highlighted that the vast majority of firms were already doing all they could to ensure the health and safety of their staff, and that increasing the fines was very unlikely to reduce the number of incidents that occur.

The former head of the Financial Conduct Authority, Martin Wheatley, warned that increasing fines for large organisations was unlikely to change behaviour unless individuals were also held to account. For the most serious offences, the new guidance allows for fines of up to 700 per cent of an individual's weekly income and up to two years in custody. While it remains to be seen whether the deterrent of a combination of penalties for both individuals and organisations will result in improved health and safety compliance, it is obvious that prevention is better than post-incident redress.

In this respect, the guidelines also offer sentencing powers regardless of whether any harm was actually caused. The courts are required to assess the overall seriousness of the offence based on the offender's culpability and the risk of serious harm. For me, this is the largest deterrent, evidenced well by the case of ConocoPhillips (UK) Limited which admitted serious safety failings following two uncontrolled gas releases and a further controlled but unexpected gas release that occurred on the Lincolnshire Offshore Gas Gathering System.

It was fortunate that there were no fatalities on the site but the court found that the lives of 66 workers were in danger had an ignition occurred. ConocoPhillips was found guilty of three breaches of the Offshore Installations (Prevention of Fire and Explosion, and Emergency Response) Regulation 1995 and was fined £3m in total and ordered to pay costs of £159,000. No harm needs proving, the offence is made out in simply creating a risk of harm as occurred in this instance.

It is clear the new sentencing is biting and continues to do so. But more notable is that the guidelines have been introduced in a climate which appeared previously to have little appetite for increasing health and safety legislation. In recent years, the government has embarked upon several legislative reforms to the law. Against a background of a perceived 'compensation culture', apparent over-compliance by business, and a desire to reduce red tape, legal rights for workers have been substantially eroded.

The Deregulation Bill, enacted on 1 October 2015, now means that only self-employed people who conduct certain work will have a duty under health and safety legislation to protect themselves and others from risks. The Enterprise and Regulatory Reform Act 2013 repealed another section of the Health and Safety at Work Act 1974. Previously if a worker could prove injury as a result of defective workplace equipment there would be an assumption that liability rested with the employer. The 2013 legislation removed this presumption, creating extra hurdles for an employee to bring a successful claim.

The erosion of workers' legal rights shows no sign of abating in the future, as evidenced by the chancellor's 2015 the Autumn statement, in which George Osborne dealt a potentially devastating blow to the legal rights of the UK's 31 million workers by pledging to raise the small claims limit for personal injury claims up to £5,000. A plan that the Ministry of Justice has now promised to follow through on (SJ160/44).

But for the MoJ's latest consultation, it could be said that the introduction of the HSE's stricter sentences might be the start of a UK health and safety revolution. **SJ**

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