

London Health and Safety Group

HEALTH & SAFETY LEGAL UPDATE - 2016

Kizzy Augustin, Pinsent Masons LLP

18 April 2016



Pinsent Masons

Overview

- Sentencing Guidelines 2016 – what do the fines look like?
 - Case Studies – *fines before and after the guidelines*
- Sentencing Guidelines consultation on Guilty Pleas
 - *Why change the approach?*
 - *Key Principles*
 - *The approach*
 - *Exceptions*
 - *Impact on H&S Prosecutions*
- Corporate Manslaughter Update

Sentencing trends



Sentencing Guidelines – Feb 2016

- Sentencing Council consultation on draft guidelines for health and safety offences, corporate manslaughter, food safety and hygiene offences
- Consultation began on 13 November 2014 and ended on 18 February 2015
- Definitive guidelines published in November 2015, with implementation on 1 Feb 2016



Recap on the Guidelines

Thames Water (June 2015)

- There must not be a “*mechanistic extrapolation*” of tariff fines
- Court not bound by starting point and ranges for “Large organisations”
- Fines for environmental and H&S breaches have often not been adequate to bring home the appropriate message to directors and shareholders

“This may well result in a fine equal to a substantial percentage, up to 100%, of the company’s pre-tax net profit ... even if this results in fines in excess of £100m. Fines of such magnitude are imposed in the financial services market for breach of regulations.”

First case? ConocoPhillips (UK) Limited

- Turnover of £4.8 billion
- G plea to 3 breaches of “Contravention of a Requirement Imposed Under a Regulation” for uncontrolled and unexpected gas releases
- No one injured / workers sent to investigate with gas present
- Judge – failure to properly identify and control risks
- **Medium** culpability – starting point £1.3million with mitigation
- Fine= £3 million (£1m for each offence)

Case Study - R v Costain Ltd (July 2014)

- HSE V Costain Ltd
- Telehandler overturned - restricted space & poor segregation
- “someone will be killed”
- 4 offences
- T/o of £960m
- PBT of £31m
- Fine = £525,000 (after trial)
- What do you think?



R v Costain Ltd (July 2014)

- Fine in 2016??
- Turnover of £1billion
 - For a Large Company:
 - *High culpability/Harm cat 1* - starting point £2.4m – range £1.5m - £6m
 - *Medium culpability/Harm cat 1* - starting point £1.3m – range £800k - £3.25m
 - For V Large company:
 - Pre tax profit of £31million??

Case Study – Hugo Boss



- Fined £1.2m following the death of a four year old boy at one of their stores (turnover £193M)
- Judge – company failed to have suitable arrangements in place to ensure people not exposed to risk: 18 stone, 7ft mirror left balanced on the floor / previous warnings ignored / lack of H&S management at Board level
- Mitigation – G plea, high level of cooperation with authorities, start to establish strong H&S culture “from the top down”

Hugo Boss UK Limited

- Sentenced in 2015:
 - Turnover £192.8 million
 - Pre-tax profit was £23.8 million
 - Fined £1.1 million for HSWA and £100,000 for MHSWR (guilty plea)

What would the fine be post February 2016?

Balfour Beatty Civil Engineering Ltd

- Team repairing barriers on the central reservation on the A2 - worker hit on the head and killed when a crane slipped
3 tonne vehicle wasn't available for the work so employees had to improvise with a 1.5 tonne machine
- HSE discovered no safe method of work
- Guilty plea to both s.2(1) and s.3(1) HSWA
- Dormant company – group turnover: £8.8bn with pre-tax loss of £304m
- Fine: £1million with £14,977 costs

C.RO Ports London Limited

- Worker's arm was dragged into a capstan while mooring a boat and sustained serious injuries
- Company failed to identify and control risk, and ignored warnings from staff
- Guilty plea to 2.3(1) HSWA
- Turnover - £25m, pre tax profit - £7.7m
- Fine: £1.8 million with £14,328 costs



National Grid Gas Plc (Dec 2015)

- 11 year old boy, fell from an exposed pipeline over canal into the water below and drowned
- Company's records incorrect, crossing not subject to inspections and no access prevention measures fitted
- Failed to protect the exposed pipeline
- Guilty plea
- Turnover **£3billion** and pre-tax profit was **£1billion**
- Judge described pipe as "*an accident waiting to happen*" and National Grid did nothing to prevent or deter access
- Fine £2,000,000

National Grid Gas Plc – Feb 2016

- Worker suffered a broken leg when gas pipe burst during repair works
- Company did not comply with its own safety procedures or carry out sufficient risk assessments
- Convicted of breach of s3 HSWA
- Turnover: £3bn, pre tax profit of £1bn
- Fine: £1 million with £26,296 costs



Cemex UK Operations Limited & Cape Industrial Services Limited

- Cape worker fell to his death struck by falling concrete
- Co-worker suffered wrist and arm fractures
- Cemex site
- Both criticised for failing to co-ordinate & plan high risk work
- Cemex pleaded Guilty to S3 HSWA
- Turnover £772.7 million / pre-tax profit £143.6 million
- Fined **£700,000**
- Cape pleaded Guilty to S2 HSWA
- Turnover £310 million / pre-tax profit £2.8 million
- Fined **£600,000 = £1.3million!**

What would the fine be post February 2016?



Mid Staffordshire NHS Foundation Trust

- Deaths of four patients between 2005 and 2014
- Trust placed into special administration - no longer provide services
- Pleaded guilty to breaching HSWA
- Mr Justice Haddon-Cave said widespread **systemic failures** within the organisation had “**become the norm**” at the time of the deaths
- Income of the Trust was £90.8 million, but operated at a £150 million loss.
- Fined: **£500,000**
- *What would the fine be post February 2016?*

Sentencing Guidelines: New Consultation on Guilty Pleas



Pinsent Masons

Why change the current approach?

Sentencing Council published proposals for a new guideline on how reductions in sentence should be applied if an offender pleads guilty:

Why?

- Current guidelines not consistent
- Reductions are currently than those recommended
- “transforming summary justice” – need better case management / parties to engage early / identify issues etc (*guidelines to complement this*)

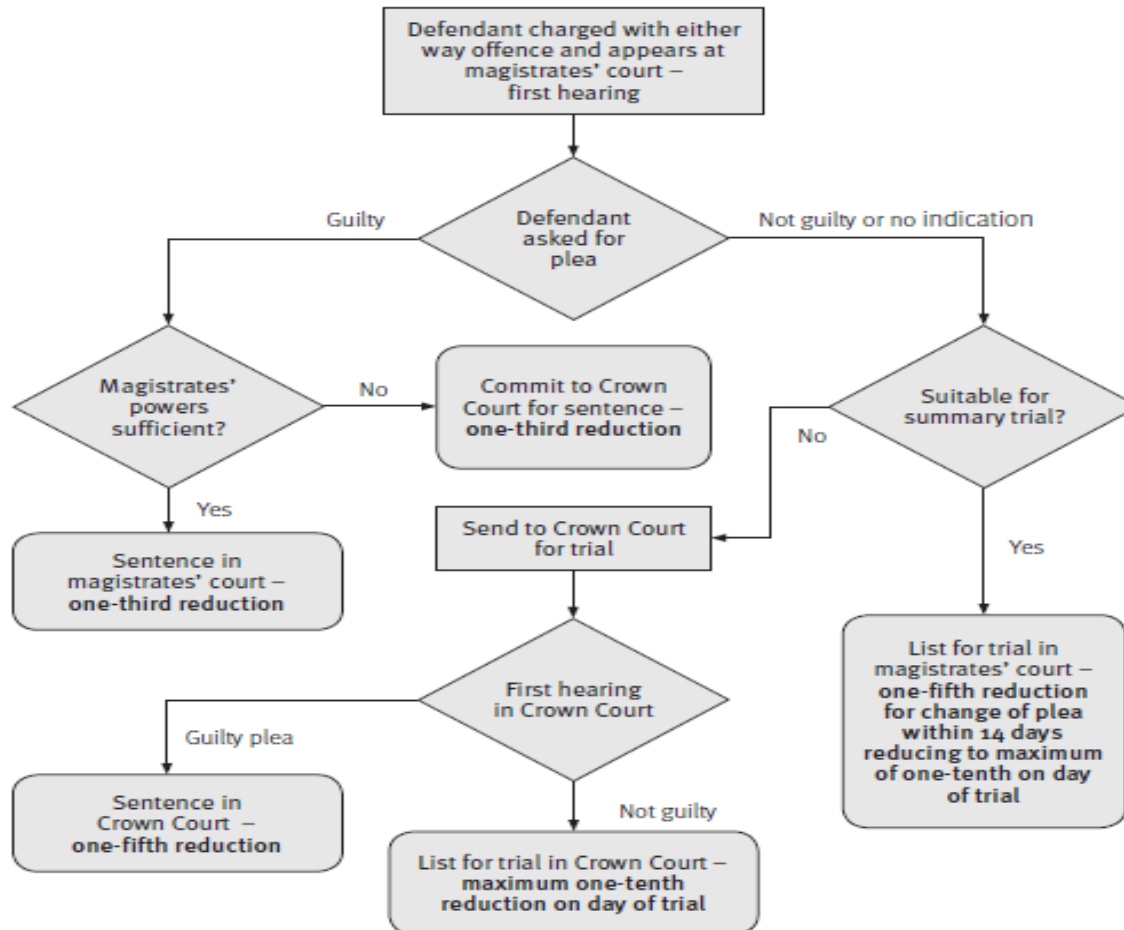
Key Principles

- Can put the prosecution to proof but an acceptance of guilt:
 - a) normally reduces the impact of the crime upon victims;*
 - b) saves victims and witnesses from having to testify;*
 - c) is in the public interest in that it saves public time and money on investigations and trials*
- The stage at which an offender can benefit from the maximum one-third reduction will be much more tightly defined. Must plead guilty the first time they are asked for their plea in court.
- After that, maximum reduction will be reduced to one-fifth and then a sliding scale to one-tenth on the first day of trial (none thereafter).

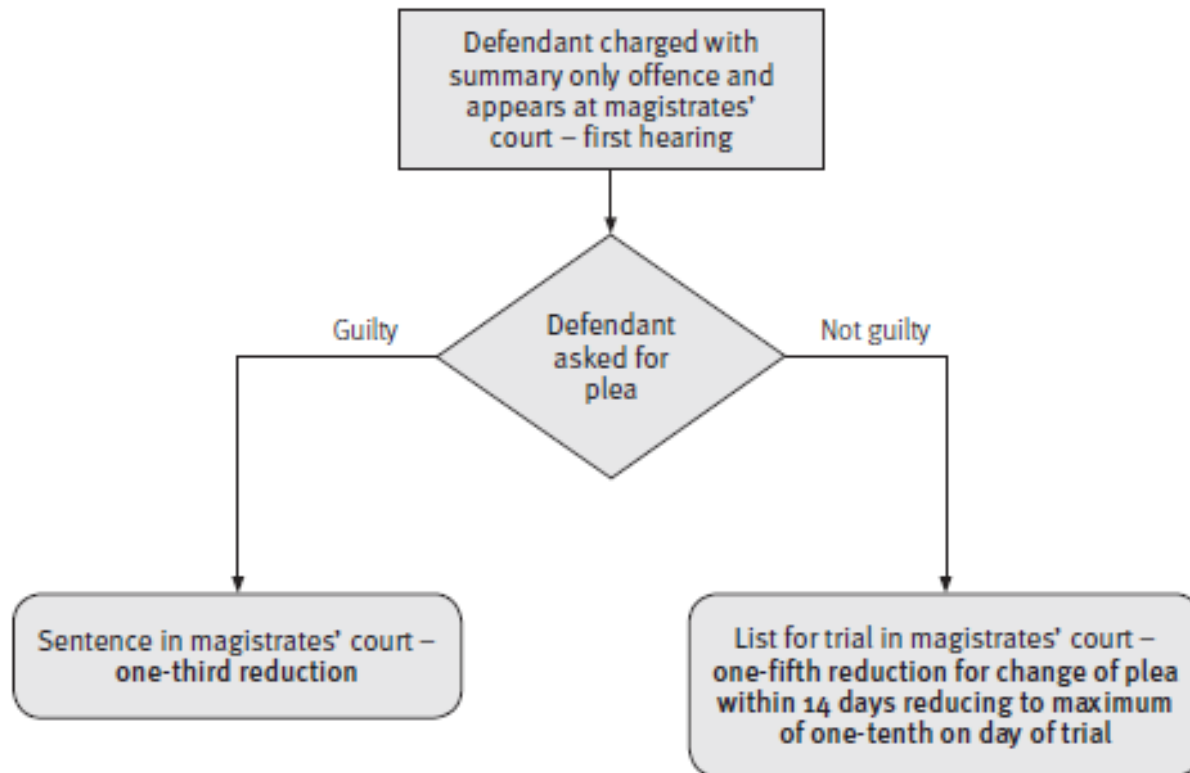
The Approach

- **Stage 1:** Determine the appropriate sentence for the offence(s) in accordance with any offence specific sentencing guideline.
- **Stage 2:** Determine the level of reduction for a guilty plea in accordance with this guideline.
- **Stage 3:** State the amount of that reduction.
- **Stage 4:** Apply the reduction to the appropriate sentence.
- **Stage 5:** Follow any further steps in the offence specific guideline to determine the final sentence.

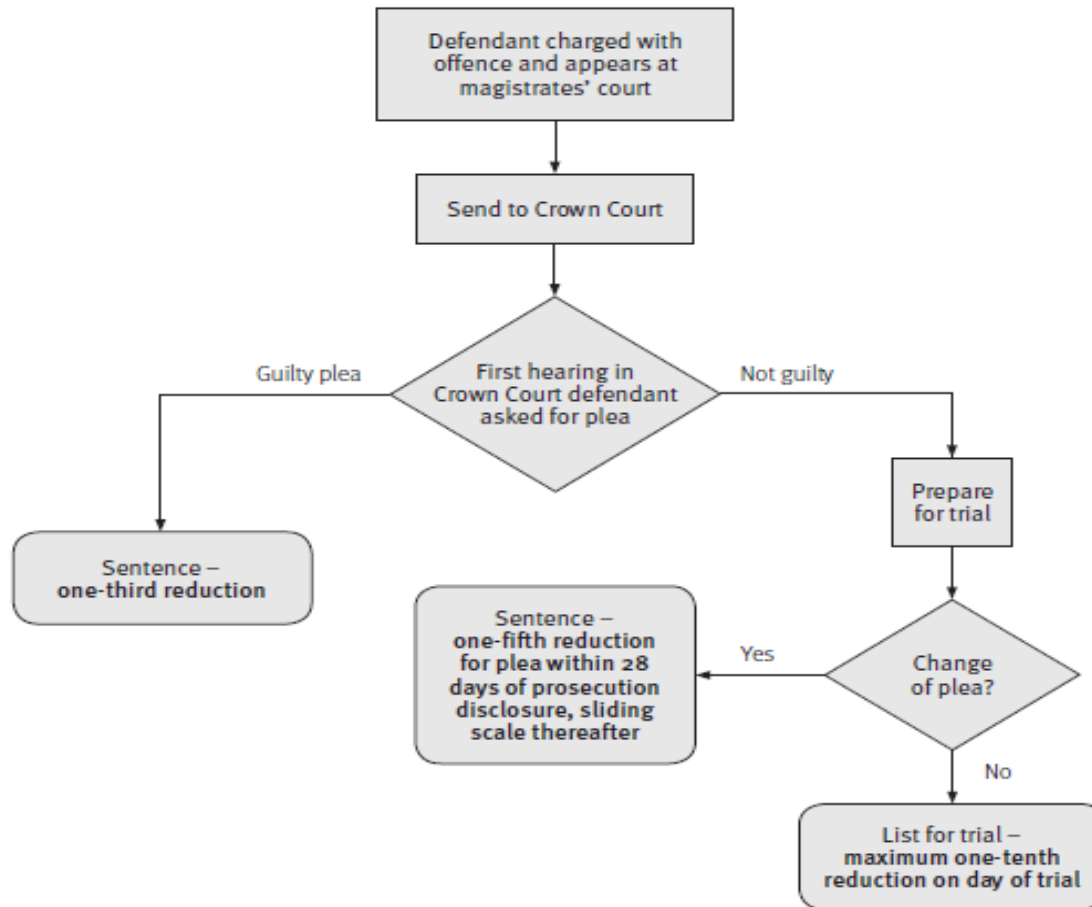
Either Way Offences



Summary Offences



Indictable Only Offences



Exceptions?

All three conditions must apply:

- 1. At or before the first stage of the proceedings (see D1 above) the offender – although he has not indicated a guilty plea – has identified to the court and/or the prosecutor the conduct which he admits; and
- 2. had insufficient information about the allegations to know whether he was guilty of the offence; and
- 3. it was necessary for him to receive advice and/or to see evidence in order for him to decide whether he should plead guilty,

a reduction of 1/3 should be made where G plea is indicated immediately after he receives the advice and/or sees the evidence.

Effect on H&S prosecutions?

- Meant for traditional “dirty crime” cases
- Doesn’t take enough account of the overwhelming objective (Crim PR)
- Not always easy for defendants to decide on plea at the first ‘allocation’ hearing
- Importance of G plea discount in light of 2016 sentencing guidelines
- Don’t often get full prosecution papers by allocation hearing
- Reverse burden of proof – hard to prepare in short timescale



Corporate Manslaughter - Update



Pinsent Masons

Corporate Manslaughter and Corporate Homicide Act 2007

- Prosecution must prove the way in which activities were managed or organised:
 - Caused a person's death;
 - Amounts to a **gross breach** of a relevant duty of care owed to the deceased; and
 - **Senior management's** role was a substantial element in the breach

Corporate Manslaughter and Corporate Homicide Act 2007

- Introduced “new” manslaughter offence for organisations
- In force – **6 April 2008** (nearly 8 years!)
- 24 cases to date:
 - 20 convictions to date (5 trials; 15 guilty pleas)
 - 19 in E&W/ 5 in NI / 0 in Scotland
 - 4 acquittals

Corporate Manslaughter - guidelines

- Triable only on indictment – crown court
- Maximum fine is unlimited
- Offence range - £180K to £20million
- Step 1 – Determine the seriousness of the offence
- Step 2 – Starting Point and category range
- Steps 3 and 4 – is the fine proportionate / wider impact
- Steps 5 to 9 – guilty pleas and other orders etc

Corporate Manslaughter – 2015 convictions

- **CAV Aerospace Ltd**

- Date of incident: 26 January 2013
- Paul Bowers, an employee, was crushed by several tonnes of heavy metal while working at CAV Cambridge, a subsidiary of CAV Aerospace.
- Date of conviction: 24 July 2015
- CAV Aerospace found guilty of corporate manslaughter and under section 2 HSWA.
- Fined: **£600,000** for Corporate Manslaughter (plus £400,000 for section 2 offence, but this will run concurrently i.e. an effective fine of £600,000).

Corporate Manslaughter – 2015 convictions

- **Linley Developments Limited**

- Date of incident: 30 January 2013
- Gareth Jones died when a structurally unsound wall collapsed on him on site at Mile House Lane, St Albans.
- G pleas on 7 September 2015 - Linley Developments Limited (Corporate Manslaughter); Trevor Hyatt, Managing Director and Alfred Barker, Project Manager (Reg 28 & 31 CDM).
- Company Fined: £200,000 to be paid over six years.
- Trevor Hyatt and Alfred Barker - 6 mths imprisonment, suspended for 2 years plus £25,000 (TH) plus costs. Considered disqualification as a director, but deemed unnecessary and disproportionate.
- Publicity order made – company ordered to take out an advert in the Construction Enquirer.

Corporate Manslaughter – 2015 convictions

- **Sherwood Rise Ltd**

- Ivy Atkin, 86, died shortly after being moved from Autumn Grange Care Home in Sherwood Rise, Nottingham.
- Convicted on 3 December 2015 (G pleas) Corporate Manslaughter for the company; Gross negligence manslaughter (x3) - Managing Director, the Acting Managing Director and the Deputy Manager
- 5 February 2016 :
 - **Sherwood Rise Limited** - £30,000 fine or CM;
 - **Managing Director** – 3 yrs 2 months imprisonment / disqualified from being a company director for eight years
 - **Deputy Manager** – 1 yr imprisonment (suspended for 2 yrs) for breach of HSWA; disqualified from being a company director for 5 years.

Corporate Manslaughter – on going cases

- **McGoldrick Enterprises Limited (Northern Ireland) –**
 - Date of Incident – 8 April 2013
 - A patient, Mary Dowds, died suddenly at a private nursing home
 - 1 Charge of Corporate Manslaughter and 1 under the Health and Safety at Work (Northern Ireland) Order 1978
 - Feb 2016 – G plea to HSWA charge, CM charge to lie on file
- **Maidstone and Tunbridge Wells NHS Trust -**
 - Nov 2012 - Frances Cappuccini, 30, a primary school teacher, died at Pembury hospital in Tunbridge Wells after giving birth on 9 October 2012. As a result of a caesarean, Mrs Cappuccini suffered heavy bleeding which resulted in a cardiac arrest.
 - Trial in January 2016 – case collapsed against anesthetist and NHS Trust

So.....

.....what should we expect during the next year?

LARGER FINES!



MORE PROSECUTIONS!



**MORE INVESTMENT
IN HEALTH & SAFETY!**



ANY QUESTIONS?



Kizzy Augustin, Senior Associate,
Pinsent Masons LLP

- kizzy.augustin@pinsentmasons.com



Pinsent Masons

*Combining the experience, resources and international reach
of McGrigors and Pinsent Masons*

Pinsent Masons LLP is a limited liability partnership registered in England & Wales (registered number: OC333653) authorised and regulated by the Solicitors Regulation Authority, and by the appropriate regulatory body in the other jurisdictions in which it operates. The word 'partner', used in relation to the LLP, refers to a member of the LLP or an employee or consultant of the LLP or any affiliated firm who is a lawyer with equivalent standing and qualifications. A list of the members of the LLP, and of those non-members who are designated as partners, is displayed at the LLP's registered office: 30 Crown Place, London EC2A 4ES, United Kingdom. We use 'Pinsent Masons' to refer to Pinsent Masons LLP and affiliated entities that practise under the name 'Pinsent Masons' or a name that incorporates those words. Reference to 'Pinsent Masons' is to Pinsent Masons LLP and/or one or more of those affiliated entities as the context requires. © Pinsent Masons LLP 2012

For a full list of our locations around the globe please visit our websites:



www.pinsentmasons.com



www.Out-Law.com