

Health and safety sentencing guidelines one year on



The rise in fines and the actions companies can take to prevent them



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Executive summary

Every employee in every industry has the right to expect that their employer will do all they can to prevent them being injured in an accident or exposed to something that could harm their health.

Unfortunately people are becoming ill, getting injured and even killed as a result of business operations – whether it's because they are at work, or through contact with businesses whose processes and operations fall short of necessary health and safety standards. When this occurs as a result of health and safety failures, it is of course important that those responsible are held accountable. Perhaps more importantly, taking action through the criminal courts is thought to be moving the issue up the corporate agenda in the UK and improving standards, which in turn protects the public.

Last year, the UK sat up and took notice as some of the largest fines ever were issued for health and safety cases, following the introduction of new guidelines on 01 February 2016. These provide, for the first time, clear guidance on how all health and safety cases should be sentenced.

The introduction of these guidelines and the increasing fine sizes that has come with them, as well as comments from the Court of Appeal (in the 2015 Thames Water environmental prosecution), appear finally to recognise through the UK courts that health and safety breaches should be treated as seriously as data breaches or financial irregularity issues. The judgements demonstrate that the UK wants to show its disapproval of serious corporate failures which lead to injury, illness and death, and a desire to deter such failures by other businesses.

The message from the courts about penalties, however, needs to be balanced with positive examples of what happens when a company manages its safety and health risks well. Businesses who successfully focus on health, safety and wellbeing are likely to find themselves better placed to attract and retain talent, and may also score extra points in procurement processes for valuable contracts and when seeking external investment.

The new guidelines are beginning to provide a measure of the impact that corporate manslaughter and health and safety offences can have on people and the economy. The levels of these fines is also starting to reflect the economic cost to the UK of workplace illness or injury, which is reported to have been £14.1 billion in 2016.¹ While fines last year regularly exceeded the million-pound mark, we expect to see even larger fines in the future for businesses failing to meet their health and safety duties.

Initial analysis of the types and levels of fines during 2016 also indicates that the individuals responsible are coming under even greater scrutiny, and that higher sentences are being imposed.

Under the new guidelines, courts are also starting to issue large fines for companies who have exposed workers or others to serious health and safety risks, even where an actual incident has been avoided.

Businesses looking for guidance on 'what good looks like', including identifying what their health and safety duties are and how to meet those duties, can access significant expertise and support from IOSH, its practitioner members and other organisations, including the Health and Safety Executive and specialist law firms.

¹ Health and Safety Executive report, *Health and safety at work: summary statistic for Great Britain 2016*.

Larger fines

On 01 February 2016, the Sentencing Council's Definitive Guideline for Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences (more commonly referred to as the 'Sentencing Guidelines') came into force in England and Wales. One year on, we look at what lessons can be drawn from these new guidelines and reflect on the impact they have already started to have on companies and individuals prosecuted under the Health and Safety at Work Act etc. 1974 and associated regulations.

Before the introduction of the 2016 guidelines, the only assistance available to courts sentencing health and safety cases was a set of guidelines in 2010 for sentencing cases involving a death. These specifically prohibited the courts from fixing a fine with reference to the turnover or profit of a company, but also gave little by way of practical assistance to the courts (or a potential defendant) on how a fine should be set. The only guidance was that where a company was being sentenced for corporate manslaughter, an "appropriate fine [would] seldom be less than £500,000 and may be measured in millions of pounds" and that for any other health and safety fatality case "the appropriate fine [would] seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or more". The reality, therefore, was

that criminal courts, often used to dealing with individual criminal defendants and low-level corporate offences, were left with little or no guidance. This was leading to a lack of consistency or predictability about the size of penalty that a defendant could receive from the court.

A year on, this position has changed fundamentally. The courts now have a document of more than 40 pages, setting out a step-by-step guide for sentencing both companies and individuals for health and safety and food safety offences (although it should be noted that fire safety offences still remain without any guidance).

The new guidelines have resulted in an escalation in the level of fines being handed down by the courts. With some of the largest and most well-known UK and global businesses receiving the largest fines last year, there has been increased public interest and media attention on health and safety cases. Steered by the new sentencing guidelines to determine the size of a fine based on company turnover (as well as factors around culpability and harm risks), the courts have sent a clear message to the boardrooms and CEOs of all businesses about the importance and value of protecting human lives, and the cost of failing to do so.

How the fines work

Using the 2016 Sentencing Guidelines, a court applies a formula to set the penalty, first deciding whether the defendant's culpability was very high, high, medium or low. The next factor is a matrix cross-referring the likelihood the safety failing would lead to harm and how bad that harm could have been – from minor injuries to lifelong disability or death. The judge must also consider how many people were exposed to the risk of harm and whether the safety failing was a significant cause of actual harm before setting a final harm rating of 1 to 4 (with 1 being the highest rating).

The harm rating and culpability assessment are then applied to a series of tables with fine ranges for organisations with different levels of annual turnover.

The fines ranges for prosecutions under the Health and Safety at Work etc. Act 1974 are as follows:

- micro-organisations (turnover less than £2 million): £50 to £450,000
- small organisations (turnover between £2 million and £10 million): £100 to £1.6 million
- medium organisations (turnover between £10 million and £50 million): £1,000 to £4 million
- large organisations (turnover of £50 million and above): £3,000 to £10 million.

For each harm category at each culpability there is a suggested 'starting point' fine, ranging from £200 for low culpability, harm level four for a micro-organisation to £4 million for a large organisation with very high culpability and harm level one. Judges can move below these starting points for mitigating circumstances, such as a good safety record and an early guilty plea. Aggravating factors, such as obstructing an investigation or cost-cutting at the expense of safety, will push the penalty up the scale from the starting point.

A set of separate guidelines for corporate manslaughter offences sets fine ranges from £180,000 to £20 million.

Analysis of recent fines trends

The country sat up and took notice when the largest fine in 2016 in a health and safety case in the UK (£5 million) was imposed on Merlin Attractions Operations Limited following the Smiler crash at its Alton Towers theme park. 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. After sentencing, Merlin said health and safety had always been the number one priority at its venues, but said its focus on it was "sharper and more engrained than ever" following the incident.

After a number of other million-pound-plus fines in 2016 following the new guidelines, the case simply highlighted the reality that fines are significantly increasing and that the courts will not shy away from fines at this level.

The statistics show significant increases in fines

Analysis of the data, following a Freedom of Information Act request by Osborne Clarke LLP, has highlighted the increase in fines during 2016 as a result of the change in guidance:

- The largest fine in 2016 was two-and-a-half times the size of the largest fine in 2015 and almost ten times larger than the largest fine in 2014.
- Nineteen companies received fines of a million pounds or more in 2016 (the largest being £5 million), compared to only three in 2015 and none in 2014.

- Total income from the highest 20 fines in 2016 (£38.58 million) was higher than the total fine income for the 660 prosecutions successfully brought by the HSE in its reporting year of 2015/2016 (£38.3 million).
- In 2016, the 20th largest fine was £900,000. This amount was equalled or exceeded by only three cases in 2015 and was £300,000 more than the largest fine in 2014.

Large fines are no longer limited to cases involving a fatality

Prior to the 2016 guidelines being introduced, the largest fines imposed in the UK² had involved injuries and fatalities.³ Looking back at the 2010 guidelines in place at the time, this made sense. Those guidelines only applied to the most serious injury – fatal injuries – and therefore a logic followed that other cases should involve lesser sentences.

The case of R(HSE) v ConocoPhillips (UK) Limited involved a company that HSE described as a "corporate behemoth". In the year before the incident it had a turnover of £4.8 billion, and in the year before that, £8.9 billion. The case resulted in a £3 million fine following a gas leak on the Lincolnshire Offshore Gas Gathering System. The leak did not cause any actual injury but the court indicated that it felt this matter should be fined as 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 view of the size of the company's turnover, the starting point of £2.4 million for the fine (within a range of £1.6–6 million) was seen by the court to be too low. Accordingly, the court, which recognised that the firm did have procedures in place, imposed a fine of £3 million. This took account of the firm's early guilty plea.

² ie. the top 20 largest fines and/ or fines over £1 million.

³ The ten largest fines in 2014 all involved fatality cases and in 2015 only one involved a non-fatality, but still an injury.

Individuals are coming under even greater scrutiny and higher sentences are being imposed

It was reported that, in 2015–2016, 46 company directors and senior managers were prosecuted under health and safety law, compared to an annual average of 24 in the five previous years.⁴ The new guidelines make it increasingly likely that a director could go to prison, not only where breaches are intentional but also where there is a flagrant disregard or a ‘blind-eye’ mentality shown by directors.

Until the full set of 2016 data is available from the court system, it is difficult to say with certainty which group (blue chip company, SME, individual director or manager), if any, has been most greatly affected by the increase in penalties under the Sentencing Guidelines.

However, feedback from those involved in dealing with cases against individuals has picked up on a couple of significant cases, highlighting the practical impact on individual defendants facing allegations that their breach of health and safety law fell into the very high or high culpability brackets of the Sentencing Guidelines, regardless of the level of harm alleged.

Under the Sentencing Guidelines, an individual defendant facing a health and safety breach and being prosecuted for being “highly culpable” under the regulations is alleged to have had, at minimum, foresight of (or a wilful blindness to) the risk, but to have taken the risk nonetheless. At worst, it will be alleged that there is an intentional or flagrant disregard for the law. The courts then apply considerations of the likelihood of harm and seriousness of harm risked, as per the guidance on corporate failings. Individuals facing such allegations will almost certainly now face custodial sentences, with a range from 26 weeks to two years.⁵

⁴ Article by *Health and Safety at Work*: <https://www.healthandsafetyatwork.com/directors-duties/prosecutions-double-senior-managers-hse>

⁵ High culpability allegations alongside Harm Category 4 is the only bracket where there is no custodial option to the court.

The largest 20 fines: 2014–16

The following table shows the scale of the 20 largest fines handed to organisations convicted of health and safety offences in 2014, 2015 and 2016.

Fine range	Number of fines		
	2014	2015	2016
£3m +	0	0	4
£2.5m–£2,999,999	0	0	1
£2m–£2,499,999	0	1	3
£1.5m–£1,999,999	0	0	4
£1m–£1,499,999	0	2	7
£500,000–£999,999	1	11	1
£250,000–£499,999	4	6	0
£0–£249,999	15	0	0

Advice and guidance on how to ensure your organisation is health and safety compliant

Companies who focus on putting in place good health and safety policies and preventing accidents can avoid these huge fines, and can reap the rewards of having a safer and more secure working environment for their employees, as well as enjoy greater productivity and a stronger reputation. There is a huge range of information and advice available to organisations on the health and safety measures they could put in place.

The following are some key areas to focus on:

- 1 Lead health and safety from the top and ensure a suitable health and safety governance structure is in place within your business.
 - Health and safety needs to be managed like any other area of the business, with buy-in and leadership as well as overall accountability at the top, to ensure that the tone is set appropriately for the organisation.
 - Have in place a clear structure chart (perhaps included within a health and safety policy) indicating how health and safety will be managed from the bottom to the top of the organisation.
 - Line and team managers are likely to be best placed to ensure policies are followed, but will be assisted by health and safety forums and specialist health and safety managers or advisors who can provide technical information to help manage risk. HSE and Institute of Directors guide INDG417 *Leading health and safety at work* provides more guidance alongside HSE guidance HSG65 *Managing for health and safety*.
- 2 Check whether your 'competent person' in the business has health and safety competencies that are fit for purpose for your organisation.
 - Regulation 7 of the Management of Health and Safety at Work Regulations 1999 requires businesses to appoint someone to assist in complying with health and safety law.
 - Does someone within your organisation have the necessary health and safety competencies (through training, experience and knowledge) to be deemed a 'competent person'?
 - IOSH Blueprint can help you understand the competencies required and evaluate whether you need additional support or training for employees. This is a global model for defining competency in occupational safety and health that was developed by IOSH. For more information visit www.iosh.co.uk/IOSH-Blueprint
- 3 Ensure all health and safety risks are properly identified and assessed in written risk assessments. Consider using a risk register to manage timely reviews.
 - Certain generic risks for a business may apply across the board (eg. manual handling or risks from asbestos in a building) but others may be specific to the work you do or the way in which you do it.
 - Legislation requires that businesses must identify and assess health and safety risks if the business has more than five employees, and that the risk assessment must be recorded in writing.
 - Risk assessments also help a business to carry out a gap analysis of areas to focus on and ways to prioritise resources and expenditure on health and safety. The use of a risk register can support the coordination and preparation of your policy and approach to risk.

4 Review how health and safety risks and safe working procedures are managed operationally.

- Policies and paperwork are no good sitting on a shelf getting dusty. A business needs to ensure they are being followed in practice.
- Businesses should think about how they can enforce safe working practices within their organisation, and make sure policy is something that happens.
- Get inventive, use technology and bring policies and safe working procedures to life – reward schemes, interactive challenges, videos and mentoring or coaching are all ways that businesses can send clear messages to employees and non-employees about safe working procedures.

5 Check that procedures are being followed and risks managed, and act to make changes as needed.

- Policies and procedures should remain flexible and under constant review.
- There is no right timescale for reviewing risk assessments. Businesses should check that they are fit for purpose, particularly following an incident or an identification that a procedure is not fit for purpose.

For further information or help on health and safety, IOSH provides a range of free advice, training and support. Please contact IOSH on +44 (0)116 257 3199, techinfo@iosh.co.uk or www.iosh.co.uk

Conclusion

The introduction of new and very clear step-by-step Sentencing Guidelines for courts has increased the size of fines for health and safety breaches, and linked them to the size of the company, sending a very clear signal to businesses and organisations that they must give the highest priority to protecting human lives, or face severe consequences for failing to do so.

While you cannot put a value on human life, the level of fines now being handed out by UK courts recognises government and society's disapproval of serious corporate failures that lead to injury, illness and death and its desire to deter such failures by other businesses.

Assuring the health and safety of employees and others affected will not only eliminate a business's risk of a large financial penalty but can also be key to sustaining its good reputation and contributing to success. Organisations can be better placed to attract and retain talent and may also score points in procurement processes for valuable contracts.





Ultimately, health and safety should be managed practically within a business, just like any other risk. Serious risks need to be identified and reduced through sensible procedures and practices. A large amount of support and advice is available for organisations, both from IOSH and other organisations including the HSE, on what 'good' looks like within a business.

IOSH

The Grange
Highfield Drive
Wigston
Leicestershire
LE18 1NN
UK

t +44 (0)116 257 3100

www.iosh.co.uk

-  twitter.com/IOSH_tweets
-  facebook.com/IOSHofficial
-  tinyurl.com/IOSH-linkedin
-  youtube.com/IOSHchannel

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