RED LION CHAMBERS

Health and Safety: a round up of health and safety law for defence lawyers

Speakers:

Sailesh Mehta – Red Lion Chambers
Richard Beynon – Red Lion Chambers
Tom Davies – Red Lion Chambers

Changes over the last 12 months

Statistics

Case law

Guidance

Effect of COVID-19 on health and safety cases

Enforcement

325

Cases prosecuted, or referred to COPFS for prosecution in Scotland, by HSE where a conviction was achieved in 2019/20

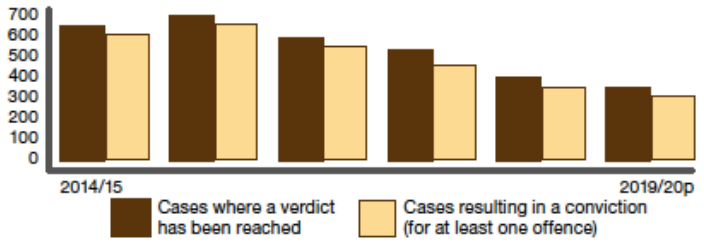
7,075

Notices issued by HSE in 2019/20

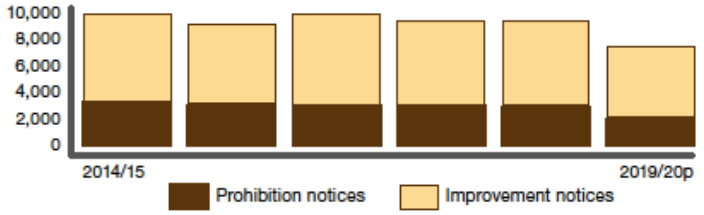
£35.8 million

In fines resulting from prosecutions taken, or referred to COPFS for prosecution in Scotland, by HSE where a conviction was achieved in 2019/20

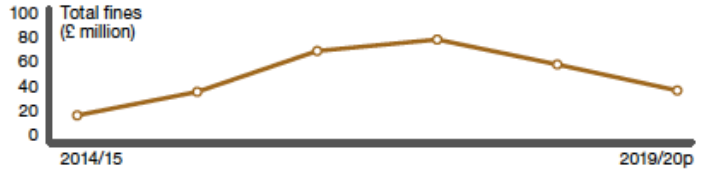
Prosecution cases brought by HSE and, in Scotland, COPFS



Enforcement notices issued by HSE



Total fines for health and safety offences prosecuted by HSE and, in Scotland, the Crown Office and Procurator Fiscal Service (COPFS) (£million)



This year has seen a fall in the number of cases prosecuted, continuing the trend from the previous year.

The number of notices issued by HSE showed a decrease compared to the previous year, continuing the long-term downward trend in notices issued.

The level of fine issued in 2019/20 has decreased compared to the previous year. The average fine per conviction is significantly lower as well. This was £110,000, compared to £150,000 in 2018/19.

Find out the story behind the key figures, visit http://www.hse.gov.uk/statistics/enforcement.htm

Effect of COVID-19 on health and safety cases

HSE assessment:

- Disruption of data collection.
- The picture is complex and entangled.
- Labour Force Survey (LFS).
- Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR).

Data: https://www.hse.gov.uk/statistics/adhoc-analysis/covid19-impact19-20.pdf

Are the sentencing guidelines working?

On 4th April 2019 the Sentencing Council published their assessment of the impact and implementation of the Sentencing Council's Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline.

The guideline was introduced 1 February 2016 and the study compared prosecution data covering a 16 month 'pre-guideline' period and 16 months 'post-guideline'. Looked at Companies House data to compare fines by company size. Conducted a content analysis of sentencing remarks to see how the guideline was being implemented, as well as looking at some CACD decisions to see the effect of the guidelines on appeals.

Findings:

Fines for large organisations sentenced for health and safety offences had increased substantially in health and safety cases. Fines increased (to a lesser degree) for smaller organisations.

Guideline was generally being applied in the manner intended.

Fewer appeals were successful after the guideline came into force.

Recent Cases

Ahmad v Health and Safety Executive [2020] EWCA Crim 1635

The appellant sought to convert the building which it owned, however no building regulation prior approval had been sought, no structural survey commissioned, no construction plans drawn, or risk assessment made. Shortly after a prohibition notice had been placed on the works at the site, by the council, the roof of the building collapsed.

The issue was whether the appellant was the person in "control" of the site, for the purposes of Regulation 19(1) of the Construction (Design and Management) Regulations 2015 (SI 2015/51), and was the relevant "employer" upon whom criminal liability would fall regarding offences under sections 2 and 3 of the Health and Safety at Work etc. Act 1974 (HSWA 1974)

Recent Cases

Ahmad v Health and Safety Executive [2020] EWCA Crim 1635

'12. The question whether the appellant was an "employer" within the meaning of the 1974 Act was not definitively determined by ascertaining whether the people working on site were working under contracts of employment. It depended on whether, on an examination of all the relevant facts and circumstances, the jury were sure that he was in control of the people working on the site, in the sense that he had the right to tell them what to do, how to do it, when to do it and where to do it. It also depended on whether there was a mutuality of obligations, in the sense that the appellant was obliged to give them work and pay them for doing it, and they were obliged to turn up for work and carry it out.'

The CA endorsed the trial judge's direction following a question from the jury seeking clarity on the definition of 'employer' and 'independent contractor'. The judge said that there was no definition in the Act; it was an exercise by them of judgment to the facts, the circumstances and the evidence. He added:

"An independent contractor of course can be an employee and the defendant can be their employer. It is the defendant's case that he did not employ them. It is the prosecution's case, so that you are sure, remember, that he did employ them, so that is the exercise that you have to undertake."

Recent Cases

R v Fireworks Direct and Doal (Mandeep Singh) [2020] EWCA 1747

On 1 August 2018 fire services responded to a serious fire in a garage workshop situated in a terraced row of industrial units at the estate. The severity of the fire caused the roof to collapse, there was concern about the safety and structural integrity of adjoining premises. The fire officers were informed that fireworks were being stored a unit two doors down from the unit that was ablaze . On inspection, it was discovered that the Appellants were storing some three times the permitted limit of explosive content. Their manner of storage was poor and in breach of regulations. Their own fire safety systems were ill-maintained.

The Appellants each pleaded guilty to three offences under the Health and Safety at Work Act 1974 and associated regulations, and to one offence contrary to The Regulatory Reform (Fire Safety) Order 2005 arising out of the unlawful storage of fireworks. The company was ordered to pay an £84,000 fine and Mr Doal was sentenced to 17 months imprisonment. Both appealed their sentence, the company did so on the basis that the fine was manifestly excessive, while Mr Doal argued that his sentence ought to have been suspended.

Permission was refused and the appellants renewed their application.

Recent Cases

R v Fireworks Direct and Doal (Mandeep Singh) [2020] EWCA Crim 1747

The Court of Appeal refused leave, hold that the sentencing judge gave very careful and thorough consideration to the factors bearing upon the appropriate size of the fine. The suggestion that the fine was manifestly excessive is unarguable and the company's application for permission to renew its appeal dismissed.

Mr Doal's application was also dismissed as entirely without merit. The judge correctly considered all of the relevant factors that fall to be weighed when considering whether it is appropriate to suspend a sentence of imprisonment.

Recent Cases

R v Places for People Homes [2021] EWCA Crim 1747

The appellant provided and managed affordable and social housing. It also organised social initiatives to support vulnerable people. It was run on a not-for-profit basis with all surplus monies ploughed back into the organisation. The appellant failed to ensure the health, safety and welfare of its employees, including five named individuals, in relation to risks associated with the use of vibrating tools and equipment which resulted in them suffering Hand Arm Vibration Syndrome and/or Carpel Tunnel Syndrome.

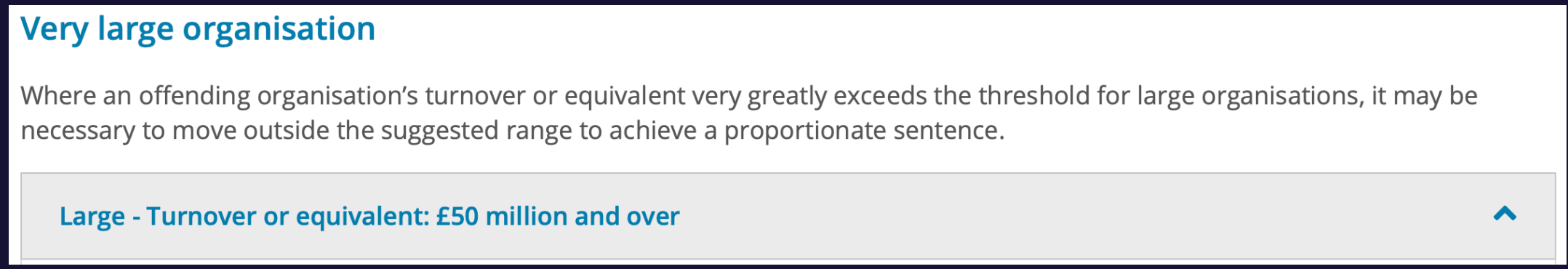
The appellant community benefit society appealed against a fine of £600,000 and an order to pay £13,995.06 towards prosecution costs following its guilty plea to an offence of failure to discharge the duty imposed by the Health and Safety at Work etc. Act 1974.

It was argued that the judge

1. Took the incorrect starting point
2. Failed to consider the organization's non-profit nature at 'step 3' of the sentencing exercise
3. Failed to make a sufficient downward adjustment to reflect the impact of the fine on the vulnerable beneficiaries of the society at steps 3 and 4.

Recent Cases

Did the judge take the wrong starting point? In short, ‘no’ (at paragraph 33 of the judgment).



R v Places for People Homes [2021] EWCA Crim 1747 applies of *R v Thames Water* [2015] EWCA Crim 960, [2015] 1 WLR 4411 and *R v Thames Water* [2019] EWCA Crim 1244, [2020] Env. L.R 8.

‘32. It is apparent, therefore, that there is not, and should not be, a bright dividing line between "large" and "very large" organisations. The size of the organisation lies on a spectrum and the sentencing objectives clearly identified in the steps set out in the Guideline and the above authorities, apply to both The larger the company the greater the fine may need to be in order for it to be proportionate to the organisation’s means, to constitute adequate punishment, and to bring home to management and shareholders the need for regulatory compliance. The extent to which any increase is required will depend upon the particular circumstances of each individual case and it is not something for mechanistic extrapolation’.

Recent Cases

Should the judge have considered the not-for-profit nature at step 3?

The court should finalise the appropriate level of fine in accordance with section 125 of the Sentencing Code, which requires that the fine must reflect the seriousness of the offence and requires the court to take into account the financial circumstances of the offender.

The level of fine should reflect the extent to which the offender fell below the required standard. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.

The fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation.**

Review of the fine based on turnover

The court should 'step back', review and, if necessary, adjust the initial fine reached at step two to **ensure that it fulfils the general principles** set out above. The court may adjust the fine upwards or downwards including outside of the range.

The court should examine the financial circumstances of the offender in the round to assess the economic realities of the organisation and the most efficacious way of giving effect to the purposes of sentencing.

In finalising the sentence, the court should have regard to the following factors:

- The profitability of an organisation will be relevant. If an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. If it has a large profit margin, upward adjustment may be needed.
- Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the fine arrived at in step two. Where this is not readily available, the court may draw on information available from enforcing authorities and others about the general costs of operating within the law.
- Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

Recent Cases

Should the judge have considered the not-for-profit nature at step 3?

'35…It is irrelevant at Step Three that the surplus made each year by the company is reinvested in its activities. What matters for present purposes is whether the company's surplus would adversely affect its ability to pay the proposed fine. There is plainly no justification for any conclusion that the surplus would have any adverse impact on this appellant's ability to pay the amounts which were under consideration. The fact that the surplus, if paid by way of fine, would become unavailable to be spent on an extension of the company's activities was a matter to be addressed at Step Four by reference to its effect on the beneficiaries of those activities. The judge addressed that question at Step Four in its proper place'.

36. Steps Three and Four are related in the sense that they are both aspects of reviewing whether the fine is just and proportionate and meets the sentencing principles, and the surplus made by the appellant's core activities engages both aspects. Step Three required the judge to address its effect on the appellant's means to pay the fine. Step Four required the judge to address the effect of the fine on the use of the surplus to benefit others.

Recent Cases

However:

’37.…insufficient allowance was made at Step Four to reflect the impact of the fine on the vulnerable beneficiaries of the company's activities. The appellant can properly be described, in our view, as in an equivalent position to a charity and it is inherent in its not for profit model that it will be the potential beneficiaries of its activities who will suffer more the greater the fine ’.

Recent Cases

R v AH Ltd and Mr SJ [2021] EWCA Crim 359

AH Ltd and Mr SJ, a director of the company, were due to stand trial in the Crown Court on 4 October 2021 on charges arising out of the death of a resident at a nursing home owned and operated by the company in 2015. The resident died as a result of serious burns to her legs caused by scalding hot water entering the bath whilst she was being bathed by two carers.

The prosecution case is that this death was entirely avoidable and would have been avoided if baths, showers and sinks in the care home had been fitted with Thermostatic Mixer Valves (TMVs) which were regularly checked, serviced and maintained . TMVs were installed but they were the incorrect type.

The parties made a joint application at the outset for that to be a preparatory hearing under s 29 of the Criminal Procedure and Investigations Act (CPIA) 1996 and for the judge to give a ruling as to where the burden lies of proving ”reasonable practicability” under s 40 of the 1974 Act.

The judge at first instance found in favour of the prosecution submission. The company and SJ sought leave to appeal against her ruling.

Recent Cases

R v AH Ltd and Mr SJ [2021] EWCA Crim 359

The company argued that the judge had erred in law on in relation to the reverse burden under s.40 HSWA 1974 and that *R v Davies* [2003] ICR 586 was wrongly decided. It was submitted that:

1. "Reasonable practicability" is an element of the offence, not a defence. Tuckey LJ in Davies erred by failing to conduct of the analyses found in *AG v Lee Kwong-Kut* [1993] AC 95 and *R v DPP ex p Kebilene* [2000] 2 AC 326. If he had done so, he would have concluded that s.40 of the 1974 Act inflexibly requires the defendant to prove an element of the offence and therefore violates the presumption of innocence'.
2. Tuckey LJ blurred the distinction between elements of the offence and a defence when assessing s.40 and its compatibility with the presumption of innocence.
3. The court erred by concluding that s.3 HSWA 1974 was a 'regulatory offence' rather than a 'truly criminal' one. This distinction is an arbitrary reason to undermine the presumption of innocence and placing the legal burden of proof on a defendant to prove the existence of an element of the offence comprising an objective state of affairs, is disproportionate.
4. The modern practicalities of investigating and prosecuting health and safety cases mean that a legal burden of proof on the defendant is disproportionate. S.40 should be read down to no more than an evidential burden.

Recent Cases

R v AH Ltd and Mr SJ [2021] EWCA Crim 359

On behalf of Mr SJ in addition it was argued that:
1. that when *Davies* was decided a custodial sentence could not be imposed in respect of an offence under ss 3 and 37 of the 1974 Act. Custodial sentences were introduced by the Health and Safety Offences Act 2008.

Recent Cases

R v AH Ltd and Mr SJ [2021] EWCA Crim 359

The Court held:

1. The approval of *Davies* in *Chargot* was clear and binding. There was nothing disproportionate in the reverse burden imposed on defendants by s 40 of the Health and Safety and Work Act 1974.

2. Regarding the director, the introduction of a maximum sentence of two years imprisonment by the 2008 Act had already occurred by the time that *Chargot* was before the House of Lords. Even if the case of *Chargot* had never reached the House of Lords, they would have had great difficulty in accepting that *Davies* was decided per incuriam.

Recent Cases

R v Connors Building and Restoration [2020] EWCA Crim 868

In June 2017, Graham Daley, an employee of the company, had been working on a rip saw when a piece of timber impaled his right leg, hitting a nerve and the main artery. He spent six days in hospital and underwent surgery. The employee had failed to lower the guard attached to the saw and to use a stand provided to catch timber as it emerged from the saw.

It was agreed by experts at the trial that the accident would not have occurred if the employee had used the stand and/or the guard.

At first instance the judge refused to stay the proceedings as an abuse of process, having rejected defence submissions that it was not in the public interest (by reference to the EPS/EMM of the HSE), nor was it proportionate to prosecute because a prosecution may mean that the company was not successful in a re-tendering process with its only client and would therefore become insolvent.

Recent Cases

R v Connors Building and Restoration [2020] EWCA Crim 868

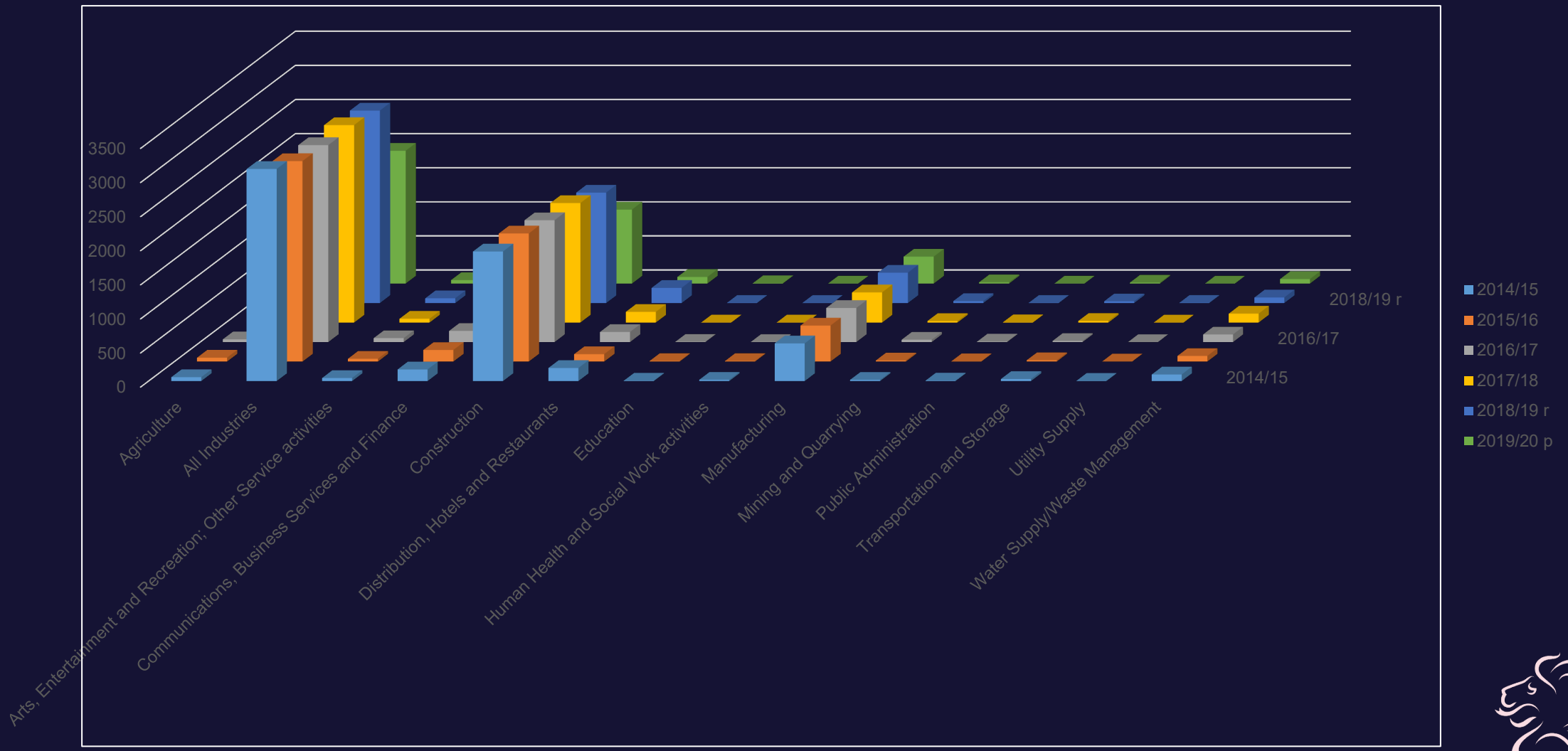
The Court of Appeal upheld the decision at first instance. The prosecution was not an abuse of process:

A different standard of review in HSE proceedings would be highly undesirable and anomalous (para 23).

There was no basis for concluding that the workforce would inevitably lose their jobs. The submissions that the HSE had failed to have regard to the economic consequences of prosecution were speculative. In the event, the company had won the re-tendering process concerned. Notwithstanding the fine imposed, they had remained solvent. There was evidence they could diversify (para 31-32).

The judge was correct to conclude that the decision to prosecute was not Wednesbury unreasonable and it did not breach the HSE's statutory duties or policies (para 42-43).

Prohibition notices



Prohibition notices

Shiva Ltd v Sharon Boyd (One of Her Majesty's Inspectors of Health and Safety) [2021] EWHC 371 (Admin)

The Appellant was carrying on refurbishment works at its building, 55 Bermondsey St. Two Prohibition Notices were issued on 25 February 2019 on the basis that refurbishment works involved a 'risk of serious personal injury'. The first notice related to a suspended cradle used to work on the exterior façade. It was said there was a risk the structure would collapse and that someone may fall from it. The second notice related the raising and lowering of the platform and the assembly and disassembly of the support structure from the roof. It was said that 'working close to an unprotected edge and on or about a cantilevered support frame may result in death or serious injury'.

The company appealed to the Employment Tribunal against the imposition of Prohibition Notices. Before the appeal was heard, the HSE notified that it intended to bring criminal proceedings against it and the Managing Director.

The defence applied to stay the Tribunal proceedings to prevent any prejudice to the Appellant in the criminal proceedings. The judge refused. The defence appealed.

Recent Cases

The appellant argued that any further steps in its appeals, including disclosure of any evidence that it might wish to adduce to show that there had in fact been no risk of serious personal injury, would prejudice it in relation to the potential criminal proceedings and that, in the circumstances, given the extent of such prejudice and the absence of any prejudice to the Respondent, a stay was justified.
There were two central submissions. 1) that the Appellant would be prejudiced by disclosing its defence. 2) that the prosecution would have the opportunity to rehearse its case.

In relation to 1) the court held that the right not to incriminate oneself in civil proceedings was not infringed. There was no *compulsion* to incriminate in these circumstances (para 44-46). There was no prejudice caused by removing the forensic advantage of surprise. *'Litigation by ambush is no more fair in criminal, than in civil, proceedings. It is no part of a fair criminal trial…'* (para 55).

In relation to 2), the court applied *Mote v Secretary of State for Work and Pensions* [2007] EWCA Civ 1324 – there was nothing prejudicial in principle about the prosecution rehearsing its case. Further, it was not likely that the appeal process would assist the criminal prosecution partly due to its nature but also because the Respondent had statutory powers to require any documentation necessary etc. Whether the appellant adduced any evidence which may be cross-examined, that was a matter for it (para 50-52).

Recent Cases

R v Broughton (Ceon) [2021] 1 WLR 543

The defendant supplied his girlfriend, Louella Fletcher Michie, with a 'bumped up' variety of 2C-P at Bestival. On the Sunday of the festival, at around 4:30 in the afternoon, the pair ventured into a forest around 85m outside of the festival. Over the course of the evening her condition deteriorated. Her hallucinations grew more intense and eventually by the late evening she was in serious difficulties. The defendant had filmed her deteriorating condition at various points in the evening. Throughout the evening, Louella's family members and friends had pleaded with the defendant by text and phone to get help for Louella but he did not. Ultimately, Louella died at around 23:25. Her body was discovered shortly after midnight the next day when the defendant emerged from the woods to get help.

The prosecution case was that, having supplied the drugs and remained with her, the defendant owed Louella a duty of care to secure medical assistance as her condition deteriorated to the point where her life was obviously in danger. He was grossly negligent in failing to obtain timely medical assistance, which failure was a substantial cause of her death.

Recent Cases

R v Broughton (Ceon) [2021] 1 WLR 543 at paragraph 5

Six elements to prove gross negligence manslaughter:
(i) The defendant owed an existing duty of care to the victim.
(ii) The defendant negligently breached that duty of care.
(iii) At the time of the breach there was a serious and obvious risk of death. Serious, in this context, qualifies the nature of the risk of death as something much more than minimal or remote. Risk of injury or illness, even serious injury or illness, is not enough. An obvious risk is one that is present, clear, and unambiguous. It is immediately apparent, striking and glaring rather than something that might become apparent on further investigation.
(iv) It was reasonably foreseeable at the time of the breach of the duty that the breach gave rise to a serious and obvious risk of death.
(v) The breach of the duty caused or made a significant (i e more than minimal) contribution to the death of the victim.
(vi) In the view of the jury, the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.

Recent Cases

R v Broughton (Ceon) [2021] 1 WLR 543

23. The prosecution must prove to the criminal standard that the gross negligence was at least a substantial contributory cause of death. That means that the prosecution must prove that the deceased would have lived in the sense that life would have been significantly prolonged. It is well established that being sure is not the same as scientific certainty. See, for example, the discussion in R v Gian [2009] EWCA Crim 2553 at [22]—[24]. That case concerned a suggestion that there were theoretical or hypothetical possible causes of death which could not be excluded as a matter of theory but were entirely unrealistic. The jury must make judgments on realistic not fanciful possibilities. To be sure that the gross negligence caused the death the prosecution must exclude realistic or plausible possibilities that the deceased would anyway have died.

100. In the context of causation in this very sad case the task of the jury was to ask whether the evidence established to the criminal standard that, with medical intervention as soon as possible after Louellas condition presented a serious and obvious risk of death, she would have lived. In short, had the prosecution excluded the realistic possibility that, despite such treatment, Louella would have died?
101. In our judgment none of Professor Deakins descriptive language achieved that. Even his description of a 90% chance of survival at 21.10, were medical help available, leaves a realistic possibility that she would not have lived.

Recent Cases

R v Wood Treatment Ltd and George Boden [2021] EWCA Crim 618

Dorothy Lorraine Bailey, Derek William Barks, Derek Moore and Jason Roy Shingler, died on 17 July 2015 in an explosion at their place of work, Bosley Mill, Cheshire which was owned and operated by the appellant company. Mr Boden was the Managing Director. The explosion was caused by the ignition of a cloud of wood dust in air. The company was charged with counts of corporate manslaughter. Mr Boden was charged with counts of gross negligence manslaughter. It was said that they had failed to properly manage the wood dust being produced in the Mill.

In evidence, it became clear that a scenario existed whereby the explosion could have been caused by a machine failure, which was not necessarily due to the negligence of Mr Boden or WTL.

The Judge ruled as part a submission of no case to answer that on the evidence the explosion may well have happened if WTL and Mr. Boden had not been negligent in the manner alleged; there was no or no sufficient evidence to prove that the negligent acts or omissions alleged against WTL and Mr. Boden played any substantial part in causing the explosion which actually happened. The prosecution appealed against the terminatory ruling.

Recent Cases

R v Wood Treatment Ltd and George Boden [2021] EWCA Crim 618

‘37. We accept the defence submission that on this state of the evidence it was necessary for the prosecution to address scenario 3 in terms, understanding that it did not require a contribution to the explosion from the negligently accumulated wood dust which permeated the Mill. It meant that the prosecution evidence about those accumulations of dust could not prove the necessary causal link between the fault and the explosion. Therefore, it was necessary to examine scenario 3 and to evidence, if possible, the extent to which it must inevitably have involved negligence which could be proved against WTL and also personally attributed to Mr. Boden. That exercise was simply not carried out, and no evidence on this issue was adduced’.

Recent Cases

R (Maughan) v Oxfordshire Senior Coroner (Chief Coroner of England and Wales and another intervening) [2020] UKSC 46

By a majority of three to two the Supreme Court ruled that all conclusions in coronial inquests, whether short form or narrative, are to be determined on the civil standard of proof: the balance of probabilities.

At an inquest the standard of proof to be applied to the question of whether the deceased had died by suicide should be the civil standard, not the criminal standard, regardless of whether the conclusion was expressed by way of a short form conclusion or by way of a narrative conclusion; that, In particular,

- nothing in the common law or the Coroners and Justice Act 2009 demonstrated any cogent reason for not applying the general principle that the civil standard of proof should apply in civil proceedings,
- application of the criminal standard might lead to suicides being under-recorded and to lessons not being learnt,
- the changing role of inquests and changing societal attitudes and expectations confirmed the need to review the standard of proof in cases of suicide and
- leading Commonwealth jurisdictions had taken the same course;

Recent Cases

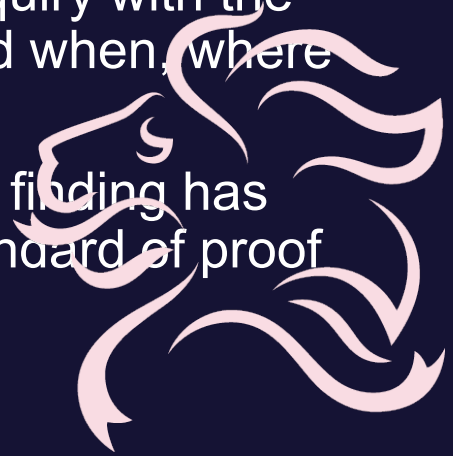
R (Maughan) v Oxfordshire Senior Coroner (Chief Coroner of England and Wales and another intervening) [2020] UKSC 46

The civil standard of proof should also be applied at an inquest to the question of whether the deceased had been unlawfully killed, regardless of whether the conclusion was expressed by way of a short form or narrative conclusion; and that, accordingly, the jury in the present case had applied the correct standard of proof in reaching their narrative conclusion.

CHIEF CORONER
Law Sheet No. 6

UNLAWFUL KILLING

- There were many judicial statements to the effect that inquests are inquisitorial proceedings and so are fundamentally distinct from criminal or civil trials. The decision in Maughan serves to emphasise that an inquest is a fact-finding exercise and not a method of apportioning guilt
- At any inquest where unlawful killing may be in issue, it will now be particularly important for the coroner to explain the distinction between criminal proceedings and inquests. The explanation should set out the nature of the inquest process as a fact-finding inquiry with the objective of answering the four statutory questions (who the deceased was; and when, where and how the deceased came by his or her death
- Where a coroner or coroner's jury comes to a conclusion of unlawful killing, that finding has no bearing on criminal proceedings, which are subject to a materially higher standard of proof (as well as entirely different procedural rules).



CHIEF CORONER
Law Sheet No. 6

UNLAWFUL KILLING

- To be viewed in its wider context

➢ In 2019 there were fewer than 166 conclusions of unlawful killing made by coroners or juries in inquests4 out of a total number of 31,284 inquest conclusions, or approximately 0.5%.

- IMPACT

➢ Maughan will probably have some continuing impact on the figures, the issue of unlawful killing was likely to feature in relatively few cases. In those cases where it does arise, the Chief Coroner would expect coroners to take a well-reasoned and fact-specific approach when faced with submissions and / or decisions as to the conclusions that are open to consideration

CHIEF CORONER
Law Sheet No. 6

UNLAWFUL KILLING

- Where a conclusion of unlawful killing is one that on the facts is open to the coroner or the jury, then the coroner will need to

➢ direct himself (or the jury) as to what elements need to be established for the offence(s) that may be in play

➢ then to apply the civil standard to the facts as they relate to each element of the offence

➢ See Law Sheet No.1 on 'Unlawful Killing' which sets out the elements of the offences to which it applies e.g. gross negligence manslaughter. The judgment in Maughan has not altered this aspect of the relevant case law. (*R v Adomako* [1995] 1 AC 171)

➢ Each of the six elements of the offence must be established on the balance of probabilities before a coroner or jury may return a conclusion of unlawful killing based upon the offence of gross negligence manslaughter

CHIEF CORONER
Law Sheet No. 6

Resumption : As before the decision in Maughan, and Unchanged

- an acquittal of a defendant following a criminal trial does not automatically mean that a coroner will need to resume the inquest.
- By the same token, a conviction by plea or trial does not automatically mean that there need be no resumption of the inquest.
- In either scenario, there may be issues requiring further public investigation that necessitate a resumption.
- Older and more recent decisions assist:

➢ e.g. *R (on the application of Grice) v. HM Senior Coroner of Brighton and Hove* [2020] EWHC 3581 Admin : Coroner correct to refuse to re-open the inquest into the murder of a woman by her former partner after her complaints of stalking were mishandled by police. Whether to resume an inquest after criminal proceedings was a decision for the coroner and was one of a highly discretionary character and here not irrational nor inconsistent with Art 2. While the criminal trial by itself had not satisfied the art.2 investigative obligation, collectively a number of further investigations into police failings had met the art.2 obligation

CHIEF CORONER
Law Sheet No. 6

Consistency – unchanged

- Para. 8(5) of Schedule 1 to the Coroners and Justice Act 2009. If the inquest is resumed following a criminal trial of a homicide offence in relation to the death, the inquest determination may not be inconsistent with the outcome of the criminal proceedings:
- If in such an inquest the coroner or inquest jury find that the requisite elements of murder, manslaughter or infanticide are established on the balance of probabilities then a conclusion of unlawful killing will be permissible even though there has already been an acquittal of the offence following a homicide trial. Such an inquest conclusion would not be inconsistent with a criminal jury having already found that they were not satisfied of the very same matters beyond reasonable doubt
- However, if there has been a criminal trial at which a person has been convicted of a homicide offence, then the coroner or jury at a subsequent inquest could not reach a conclusion to the effect that the offence had not been committed

CHIEF CORONER
Law Sheet No. 6

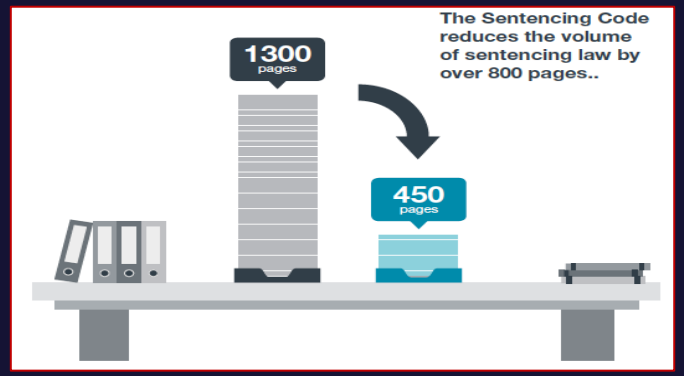
Short-form and narrative conclusions

Are the use of the words “unlawful killing” necessary?

- There is no Legal requirement in law for a coroner or inquest jury to use any particular form of words when recording a conclusion on the Record of Inquest. The notes on the current prescribed form of the Record of Inquest (Form 2), which set out suggested short form conclusions that may be adopted, do not ‘codify the law’ as to standards of proof (see Maughan at paras. 15 to 57.
- A short form conclusion (of which unlawful killing is one) is not required to be returned as a matter of law, whether as part of a longer narrative or standing alone. Rather it is for the coroner (or for the coroner’s jury subject to the coroner’s directions) to choose the appropriate form of words to reflect the findings of fact on the critical issues relating to the death in the case in question

THE SENTENCING ACT 2020

- In force from 1st December 2020
- The Code applies only to convictions on or after commencement date
- Clean Sweep -applies to all convictions on or after that date irrespective of the date of the commission of the offence
- The Act creates the Sentencing Code, which consolidates existing sentencing procedure law.
- Bringing together over 50 pieces of primary legislation relating to sentencing procedure into a single Act.



THE SENTENCING ACT 2020

- Removes ambiguities in drafting
- Aims to assist judges and legal professionals in identifying and applying the law, reduce the risk of error and enhance the transparency of the sentencing process for the general public.
- Any sentencing exercise should be capable of being resolved by reference to the Code, Sentencing Council Guideline(s) and the CrimPR/ CrimPD

THE SENTENCING ACT 2020

Does not change any maximum sentence for any offence.

Does not alter any mandatory minimums.

Does not alter (by increasing or decreasing) the severity of penalty an offender will receive for an offence.

Does not introduce or repeal any type of sentencing order.

Is not designed to have any impact on the prison population or indeed the applicability, or likelihood of application, of any type of sentence.

THE SENTENCING ACT 2020

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- Does not introduce or repeal any type of sentencing order.
- Is not designed to have any impact on the prison population or indeed the applicability, or likelihood of application, of any type of sentence.
- NO HARSHER PENALTIES

THE SENTENCING ACT 2020

- It was not possible to consolidate every type of disposal that might be applied in a criminal case. E.g. the Code does not restate or replace the legislative material in the Road Traffic Acts
- Nor does it deal with confiscation

THE SENTENCING ACT 2020

OVERVIEW

- Parts 2 to 13 of the Act together make up the Sentencing Code. It is organised in a way which follows the chronology of a sentencing hearing
- **Before sentencing**:

➢Part 2 is about powers exercisable by a court before passing sentence.

- **Sentencing**

➢Part 3 is about court procedure when sentencing.

➢Part 4 is about the discretion a court has when sentencing.

THE SENTENCING ACT 2020

OVERVIEW

- Sentences

➢ Part 5 is about absolute and conditional discharges.

➢ Part 6 is about orders relating to conduct.

➢ Part 7 is about fines and other orders relating to property.

➢ Part 8 is about disqualification.

➢ Part 9 is about community sentences.

➢ Part 10 is about custodial sentences.

➢ Part 11 is about behaviour orders

General

➢ Part 12 contains miscellaneous and general provision about sentencing.

➢ Part 13 deals with interpretation

THE SENTENCING ACT 2020

Useful links

- Sentencing Act 2020: https://www.legislation.gov.uk/ukpga/2020/17/contents/enacted

- Table of Origins (shows the origins of the provisions of the Sentencing Act 2020):
https://www.legislation.gov.uk/ukpga/2020/17/pdfs/ukpgatoo_20200017_en.pdf

- Table of Destinations (shows how enactments proposed to be repealed are dealt with by the Sentencing Act 2020): https://www.legislation.gov.uk/ukpga/2020/17/pdfs/ukpgatod_20200017_en.pdf

- The Sentencing Act 2020 (Commencement No. 1) Regulations 2020: https://www.legislation.gov.uk/uksi/2020/1236/contents/made

- Sentencing (Pre-consolidation Amendments) Act 2020:
- https://www.legislation.gov.uk/ukpga/2020/9/contents/enacted

- The Law Commission's Sentencing Code Project: https://www.lawcom.gov.uk/project/sentencing-code/

Attorney General's Guidelines on Disclosure 2020

- 2020 AG Rt Hon Suella Braverman QC MP launched a consultation seeking views on a revised version of her Disclosure Guidelines and the Criminal Procedure and Investigations Act (CPIA) Code of Practice.
- Revised Code (Here) and AG Guidelines (Here) Effective from 31st December 2020. Criminal Procedure and Investigations Act 1996 (Code of Practice) Order 2020 (SI 2020/1330)

➢ Delay due to resourcing concerns and defence remuneration. "In order to support operational partners."

- Replaces and updates 2013 Guidelines including Digital Material Supplement.

➢ Updated to better reflect the realities and challenges of the current context

➢ Restructured as a more "user friendly" guide for prosecutors, investigators and defence practitioners and so follows the chronological order of a criminal case

Attorney General's Guidelines on Disclosure 2020
Structure – IMPORTANT PRINCIPLES

INCLUDES

- The right to a fair trial and the balance between the right to a fair trial (Article 6 ECHR) and the right to private and family life (Article 8 ECHR) (Paras 11 -13. See examples p 6).
- The disclosure exercise to be conducted in a "thinking manner"
- Retention, Recording, Review and Revelation (For retention of data, see paragraphs 21-25 of Annex A on Digital Material and paragraph 5(a) and (b) of the Code)
- Central role of the reviewing lawyer
- Deployment of Disclosure officers commensurate with skills and experience

Attorney General's Guidelines on Disclosure 2020
Structure – IMPORTANT PRINCIPLES

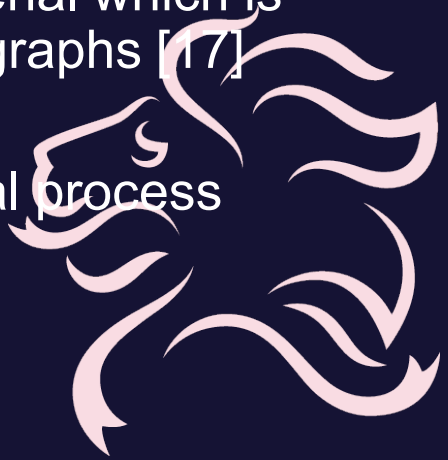
THE RIGHT TO A FAIR TRIAL

- The CPIA 1996 is an important part of the system that ensures criminal investigations and trials are conducted in a fair, objective and thorough manner
- A fair trial DOES NOT

➢ require consideration of irrelevant material

➢ require the prosecutor to make available to the accused neutral material or material which is adverse to the accused R v H and others [2004] UKHL 3, [2004] 2 AC 134 paragraphs [17] and [35]

- Should not involve spurious applications or arguments aimed at diverting the trial process from examining the real issues



Attorney General's Guidelines on Disclosure 2020
Structure – IMPORTANT PRINCIPLES

THE BALANCE : RIGHT TO A FAIR TRIAL / PROTECTING INDIVIDUALS' PRIVATE RIGHTS

- Complex
- Government recognition that criminal investigation "extremely difficult" for victims / witnesses
- Before collecting or processing any personal information from a victim / witness Investigators and prosecutors must have already satisfied themselves they are pursuing a specific and identifiable line of inquiry that is reasonable in the context of the case.
- Intrusions into privacy should only be carried out, however, where

➢ necessary to secure a fair trial

➢ lines of inquiry being pursued were reasonable

- Such intrusions carefully approached and targeted. Proportionate not excessive where possible.

Attorney General's Guidelines on Disclosure 2020
Structure – IMPORTANT PRINCIPLES

THE BALANCE : RIGHT TO A FAIR TRIAL / PROTECTING INDIVIDUALS' PRIVATE RIGHTS

Cont.:

Consultation

- 70% of consultation respondents agreed the revised drafting provided sufficient clarity around competing rights
- Consultation Respondents : "necessary" and "reasonable" were laudable principles but no practical guidance

Attorney General's Guidelines on Disclosure 2020
Structure – IMPORTANT PRINCIPLES

THE BALANCE : RIGHT TO A FAIR TRIAL / PROTECTING INDIVIDUALS' PRIVATE RIGHTS

Cont.:

Consultation

- Government response : since the consultation was launched, the Court of Appeal had handed down its judgment in R v Bater-James and Mohammed [2020] EWCA Crim 790, and that the Information Commissioner's Office (ICO) released its Investigation Report into mobile phone extraction by police forces
- The Guidelines were not intended to replicate or paraphrase this statement of the law or the report's findings, nor to pre-empt the response to them, nor can the Guidelines (as some respondents invited) set out a definitive account of all applicable law in this area.
- Instead, the Guidelines set out key principles and how they should inform the approach of investigators, prosecutors and others

Attorney General's Guidelines on Disclosure 2020

Structure – IMPORTANT PRINCIPLES

THE BALANCE : RIGHT TO A FAIR TRIAL / PROTECTING INDIVIDUALS' PRIVATE RIGHTS

Cont.:

Consultation

- The Guidelines now placed an emphasis on articulation and the role of an investigator: a key check and balance is the ability of an investigator – who has responsibility for reasonable lines of inquiry – to articulate the approach taken. It is through this that there can be meaningful discussion with prosecutors, meaningful engagement with the defence, and meaningful provision of information to witnesses

Attorney General's Guidelines on Disclosure 2020
Structure – IMPORTANT PRINCIPLES

"THINKING MANNER"

- Disclosure should be completed in a thinking manner, in light of the issues in the case, and not simply as a schedule completing exercise
- R v Olu, Wilson and Brooks [2010] EWCA Crim 2975, [2011] 1 Cr. App. R. 33 [42] – [44]. "Not undertaking the process in a mechanical manner…keeping the issues in mind…being alive to the countervailing points of view…considering the impact of disclosure decisions…keeping disclosure decisions under review
- Prosecutors need to think about what the case is about, what the likely issues for trial are going to be and how this affects the reasonable lines of inquiry, what material is relevant, and whether material meets the test for disclosure

Attorney General's Guidelines on Disclosure 2020 Structure

- INVESTIGATION

➢ Investigators approach : establish what actually happened. Fairly and objectively

➢ All reasonable lines of inquiry investigated – "reasonable" case specific. Fairness not endless.

➢ Defining, and articulating scope . Parameters and methodology.

➢ Relevant Material. Some bearing on offence, and suspect and/or on the surrounding circumstances of the case, unless incapable of any impact. An exercise of judgment.

➢ Recording all relevant material – examination of all may be disproportionate – e.g. Computer data. Annex A

➢ Mindful of potential change of status of borderline relevant material

➢ Prosecutors to advise and probe.

Attorney General's Guidelines on Disclosure 2020

Structure : Pre Charge Engagement

INVESTIGATION Cont.:

ANNEX B : PRE CHARGE ENGAGEMENT (PROCEDURE)

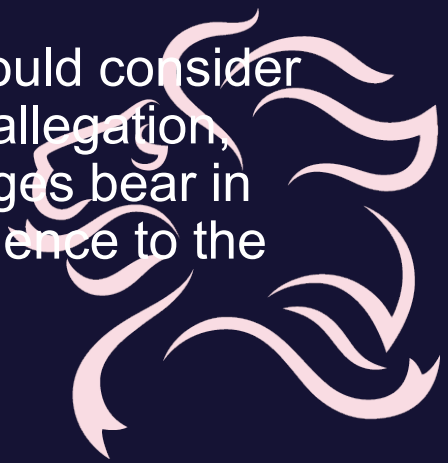
- N/A to plea discussions re serious or complex fraud nor informant agreements
- Voluntary and any time between 1st 'PACE' interview and charge Should a defendant choose not to engage at this stage, that decision should not be held against him at a later stage in the proceedings.
- Generally Informal; face to face or correspondence –although more formal arrangements are recognised
- Can be Initiated by Investigator / Prosecutor /Suspects representative / Unrep Suspect
- Info on process (Oral or written – but simple) to be provided either before or after interview
- Explains in what way the engagement may assist the investigation. The prosecutor or investigator may wish to include the information sought, or sought to be discussed and may include the aim and benefits of the process, any relevant timescales and a police point of contact

Attorney General's Guidelines on Disclosure 2020
Structure : Pre Charge Engagement

INVESTIGATION Cont.:

ANNEX B : PRE CHARGE ENGAGEMENT (DISCLOSURE)

- Statutory disclosure rules not engaged as prior to the institution of any proceedings
- However, disclosure of unused material must be considered as part of the pre-charge engagement process, to ensure that the discussions are fair and that the suspect is not misled as to the strength of the prosecution case
- before, during and after pre-charge engagement, the investigator/prosecutor should consider whether any further material, additional to that contained in the summary of the allegation, falls to be disclosed to the suspect. The investigator/prosecutor should at all stages bear in mind the potential need to cease pre-charge engagement and to put further evidence to the suspect in a PACE interview

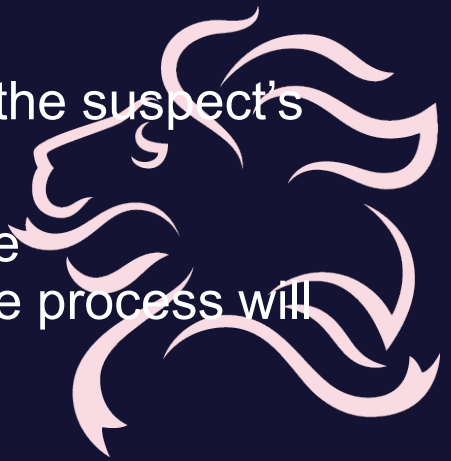


Attorney General's Guidelines on Disclosure 2020
Structure : Pre Charge Engagement

INVESTIGATION Cont.:

ANNEX B : PRE CHARGE ENGAGEMENT (RECORDING)

- Full written, signed record of pre-charge engagement discussions and every key action in process including informal discussions by Prosecutor / Investigator
- Record to be made of all information provided to and by the suspect's representative, e.g. potential lines of inquiry, suggested key word searches of digital material and any witness details
- NB The law may require the prosecutor to disclose any information provided by the suspect's representative to another party, including a defendant in criminal proceedings
- The prosecutor and investigator should ensure that the records of the pre-charge engagement are provided to each other. Information or material generated by the process will need to be assessed for evidential and disclosure purposes



Attorney General's Guidelines on Disclosure 2020
Structure : Pre Charge Engagement

INVESTIGATION Cont.:

- PRE CHARGE ENGAGEMENT MAY INVOLVE

➢ Giving the suspect the opportunity to comment on any proposed further lines of inquiry.

➢ Ascertaining whether the suspect can identify any other lines of inquiry.

➢ Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation.

➢ Discussing ways to overcome barriers to obtaining potential evidence, such as revealing encryption keys.

➢ Agreeing any key word searches of digital material that the suspect would like carried out.

➢ Obtaining a suspect's consent to access medical records.

➢ The suspect identifying and providing contact details of any potential witnesses.

➢ Clarifying whether any expert or forensic evidence is agreed and, if not, whether the suspect's representatives intend to instruct their own expert, including timescales for this.

Attorney General's Guidelines on Disclosure 2020
Structure : Pre Charge Engagement

INVESTIGATION Cont.:

- It may impact decisions as to charge
- Take place whenever it is agreed between the parties
- Investigator to take care to ensure that an unrepresented suspect understands their right to legal advice before the pre charge process commences. Sufficient time should be given to enable a suspect to access this advice if they wish.
- It is not a replacement to a further interview. Prosecutions / Investigators should bear in mind s.34 CJPOA 1994 N/A to such failures when asked about matters during Pre Charge Agmt.
- investigators and prosecutors should be aware of the advantages of holding a further formal interview, including the fact that suspects will have been appropriately cautioned and that any answers given will be recorded

Attorney General's Guidelines on Disclosure 2020
Structure : Pre Charge Engagement

INVESTIGATION Cont.:

- Investigators /prosecutors **should not** seek to initiate, or agree to, pre-charge engagement re matters where they are likely to seek to rely on the contents of the suspect's answers as evidence at trial.
- Pre-charge engagement **should not** be used for putting new summaries of the case to the defence. Where deemed necessary such accounts should be put to the suspect in a further interview.
- A no comment interview does not preclude the possibility of Pre Charge engagement. While a no comment interview may limit the scope of any such discussions, pre-charge engagement may still be pursued where appropriate, but consideration should be given to a further PACE interview with the suspect before there is any agreement to engage in pre-charge engagement.

Attorney General's Guidelines on Disclosure 2020
Structure : Pre Charge Engagement

INVESTIGATION Cont.:

PRE CHARGE ENGAGEMENT : ADVANTAGES

- Suspects who maintain their innocence will be aided by early identification of lines of inquiry which may lead to evidence or material that points away from the suspect or points towards another suspect.
- Pre-charge engagement can help inform a prosecutor's charging decision. It might avoid a case being charged that would otherwise be stopped later in proceedings, when further information becomes available.
- The issues in dispute may be narrowed, so that unnecessary inquiries are not pursued, and if a case is charged and proceeds to trial, it can be managed more efficiently.
- Early resolution of a case may reduce anxiety and uncertainty for suspects and complainants.
- The cost of the matter to the criminal justice system may be reduced, including potentially avoiding or mitigating the cost of criminal proceedings.

Attorney General's Guidelines on Disclosure 2020
Structure : Pre Charge Engagement

INVESTIGATION Cont.: INVESTIGATIVE CAUTION

- Prosecutors and investigators to be alert to use process to frustrate or delay investigation unnecessarily.
- It should not be initiated or continued where this is apparent.
- In particular, it is not intended to provide an opportunity for the suspect to make unfounded allegations against the complainant, so that the complainant becomes unjustly subject to investigation.
- Prosecutors and investigators are not obliged to follow any line of inquiry suggested by a suspect's representative. A line of inquiry should be reasonable in the circumstances of the case. What is reasonable is a matter for an investigator to decide, with the assistance of a prosecutor if required.
- Annex A and paragraphs 11-13 give guidance on reasonable lines of inquiry, particularly in relation to the obtaining of a complainant's mobile or other personal devices

Attorney General's Guidelines on Disclosure 2020
Structure : Pre Charge Engagement

INVESTIGATION Cont.:

- 84% of respondents agreed the proposed guidance in Annex B as helpful. Some had caveats.
- 16% disagreed helpful.

Looking ahead…

HSE's Business Plan priorities for 2020/21:

- lead and engage with others to improve workplace health and safety;
- **provide an effective regulatory framework focusing on the BSR** and to prepare for the outcome of the transition period with the EU;
- **secure effective management and control of risk including risks from COVID-19**;
- **reduce the likelihood of low-frequency, high-impact catastrophic incidents**;
- enable improvement through efficient and effective delivery.

Looking ahead…

Providing an effective regulatory framework – establishing the BSR. Looking towards Q3/Q4 completion.

Bill is currently in draft form - the Building Safety Bill 2019 (CP 264). Ahead of the legislation, the BSR will initially be in shadow form.
Clause 2 establishes that “the regulator” means the Health and Safety Executive.

Clause 3 provides for the regulator’s objectives
The regulator must exercise its building functions with a view to—
(a) securing the safety of people in or about buildings in relation to risks arising from buildings, and
(b) improving the standard of buildings.

Clause 4 - duty to facilitate building safety: higher-risk buildings
The regulator must provide such assistance and encouragement to relevant persons as it considers appropriate with a view to facilitating their securing the safety of people in or about higher-risk buildings in relation to building safety risks as regards those buildings.

Clause 16(1) ‘building safety risk means a risk to the safety of persons in or about a building arising from the occurrence as regards the building of any of the following—
(a) fire;
(b) structural failure;
(c) any other prescribed matter.

Looking ahead…

Secure effective management and control of risk – COVID response

Industries and sectors that were previously considered low risk from a worker protection or public safety perspective, are now considered high risk.

Continuation of a ‘blended approach’, including virtual inspections (using IT platforms), spot checks carried out by telephone call, and traditional on-site visits. HSE carried out 110,000 compliance spot checks in relation to COVID. Given re-prioritisation of resources to COVID, over 2020/21, they consider it is appropriate to carry out around 8,000 inspections in relation to small inspection programmes of the specific core initiatives (e.g. re welding fumes, flour dust, wood dust). They aim to investigate 100% of COVID concerns.

Where businesses are not managing risks to people’s safety or health, HSE will employ their enforcement policy and enforcement management model and prosecute if necessary.

Looking ahead…

Reduce the likelihood of low-frequency, high-impact catastrophic incidents

Plan to deliver around 650 offshore and onshore major hazard interventions.

Promote effective leadership across high hazard industries and gain commitments to sustained improvement, so that ownership of risks is taken by those with the responsibility to reduce them.

Specific focus on decommissioning of oil rigs and cyber security of major hazard industries.

Sailesh Mehta
Red Lion Chambers

Richard Beynon
Red Lion Chambers

Tom Davies
Red Lion Chambers