

Sentencing guidelines

– implications for motor fleet customers

The sentencing council has issued new definitive guidelines to all courts, in accordance with the Coroners and Justice Act 2009, which are applicable to all organisations, and individual offenders aged 18 or over, who are sentenced after 1 February 2016, regardless of when the offence took place. These guidelines cover all Health & Safety (H&S) Offences as well as Corporate Manslaughter.



What are the risks?

Prosecutions would be most likely following a serious collision, where there were one or more killed or seriously injured road users, and where the investigating police officers had a suspicion that the organisation contributed, in some way, to the employee being involved in the crash. The risk of getting prosecuted for a Corporate Manslaughter or H&S offence related to a work-related driving collision is, however, quite low, but the consequences, as highlighted in the following sections, are very serious, for both the organisation and, potentially, managers as well. As such, these risks should be highlighted to all board members and senior managers in the organisation, as well as any manager who has responsibility for any of the following:

- Line management of employees making work-related road journeys
- Journey planning
- Vehicle selection
- Vehicle maintenance

As you can see, this is likely to cover a significant number of managers in your organisation.

From a H&S perspective, a prosecution is likely to be pursued if there is suspicion or evidence of a **Breach of duty of employer towards employees and non-employees** or a **Breach of duty of self-employed to others**, according to the Health and Safety at Work Act 1974 (section 33(1)(a) for breaches of sections 2 and 3). Additionally, there might be a **Breach of Health and Safety regulations**, according to the Health and Safety at Work Act 1974 (section 33 (1)(c)).

The nine steps to sentencing

The following are the nine steps that a judge or magistrate will follow to determine what sentence is handed down to an organisation found guilty of one of the above H&S offences:

Step 1 – Determining the offence category

The court will determine the offence category by using a combination of the culpability factors and the harm factors that are shown below.

Culpability

Very High	Deliberate breach of or flagrant disregard for the law
High	Offender fell far short of the appropriate standard; for example, by: <ul style="list-style-type: none"> failing to put in place measures that are recognised standards in the industry ignoring concerns raised by employees or others failing to make appropriate changes following prior incident(s) exposing risks to health and safety allowing breaches to subsist over a long period of time Serious and/or systematic failure within the organisation to address risks to health and safety
Medium	Offender fell short of the appropriate standard in a manner that falls between descriptions in 'high' and 'low' culpability categories Systems were in place but these were not sufficiently adhered to or implemented
Low	Offender did not fall far short of the appropriate standard; for example, because: <ul style="list-style-type: none"> significant efforts were made to address the risk although they were inadequate on this occasion there was no warning/circumstance indicating a risk to health and safety Failings were minor and occurred as an isolated incident

From a motor fleet risk management perspective it is easy to see how bad practice could fall into the 'high' or even 'very high' categories. For example failure to maintain vehicles in roadworthy condition, especially if this was due to a deliberate act of delaying required maintenance, where a fault was known about, would probably fall in the 'very high' category. Perhaps something that would be more likely is failing to adopt industry best practice, such as the advice contained in the HSE/DfT 'Driving at work: Managing work-related road safety' guidelines (INDG382), or any of the standards promoted by the industry associations, such as the Fleet Transport Association's 'Van Excellence' scheme. This would fall into the 'high' category.

Harm

	Seriousness of harm		
	Level A	Level B	Level C
	<ul style="list-style-type: none"> Death Physical or mental impairment resulting in lifelong dependency on third party care for basic needs Significantly reduced life expectancy 	<ul style="list-style-type: none"> Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work A progressive, permanent or irreversible condition 	<ul style="list-style-type: none"> All cases not falling within Level A or Level B
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
Medium likelihood of harm	Harm category 2	Harm category 3	Harm category 4
Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

Given the amount of variables involved in determining the outcome of a road traffic collision, the seriousness is a matter of chance, although the court will not take this into consideration. In terms of the likelihood, this is where an organisation's management policies, procedures and practices is likely to influence how likely it was that the collision would occur in the first place.

Finally, in step 1, the court must decide if either of the following factors apply:

- Whether the offence exposed a number of workers or members of the public to the risk of harm.
- Whether the offence was a significant cause of actual harm.

If one or both of these factors apply then the court must consider either moving up a category or substantially moving up the category range in step 2.

Step 2 – Starting point and category range

Once the offence category has been determined (see Step 1) the court then focuses on the annual turnover (or equivalent) of the organisation in order to reach a starting point for the fine.

The following information will be used by the courts:

- For companies and partnerships – annual accounts
- For local authorities, fire authorities and similar public bodies – the Annual Revenue Budget
- For health trusts – financial data from Monitor (the independent regulator of NHS Foundation Trusts)
- For charities – annual audited accounts

The following table is then used to determine the starting points:

Size of organisation Turnover or equivalent	Starting point			
	Large £50M +	Medium £10-50M	Small £2-10M	Micro < £2M
Very high culpability				
Harm category 1	£4,000,000	£1,600,000	£450,000	£250,000
Harm category 2	£2,000,000	£800,000	£200,000	£100,000
Harm category 3	£1,000,000	£400,000	£100,000	£50,000
Harm category 4	£500,000	£190,000	£50,000	£24,000
High culpability				
Harm category 1	£2,400,000	£950,000	£250,000	£160,000
Harm category 2	£1,100,000	£450,000	£100,000	£54,000
Harm category 3	£540,000	£210,000	£54,000	£30,000
Harm category 4	£240,000	£100,000	£24,000	£12,000
Medium culpability				
Harm category 1	£1,300,000	£540,000	£160,000	£100,000
Harm category 2	£600,000	£240,000	£54,000	£30,000
Harm category 3	£300,000	£100,000	£24,000	£14,000
Harm category 4	£130,000	£50,000	£12,000	£6,000
Low culpability				
Harm category 1	£300,000	£130,000	£45,000	£30,000
Harm category 2	£100,000	£40,000	£9,000	£5,000
Harm category 3	£35,000	£14,000	£3,000	£1,200
Harm category 4	£10,000	£3,000	£700	£200

In addition the court has a category range associated with each of these starting points which they can apply.

Note – for very large organisations, where the turnover (or equivalent) ‘very greatly exceeds’ the threshold for large organisations, it may be necessary for the court to move outside the suggested ranges to achieve a proportionate sentence.

Adjustments can then be made from the starting point, both upwards and downwards, depending on some of the factors that are listed below.

Factors increasing seriousness include:

- Previous convictions
- Cost cutting at the expense of safety
- Obstruction of justice
- Poor H&S record
- Falsification of documents or licences
- Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by the authorities.

Factors reducing seriousness or reflecting mitigation include:

- No previous convictions or no relevant/recent convictions
- Evidence of steps taken voluntarily to remedy problem
- High level of cooperation with the investigation, beyond that which will always be expected
- Effective H&S procedures in place
- Self-reporting, co-operation and acceptance of responsibility.

Step 3 – Check whether the proposed fine based on turnover is proportionate to the overall means of the offender

There are a number of general principles that the court will then take into consideration, including:

“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.”

In finalising the sentence the court will also consider a number of things, including:

- Profitability – if this is small relative to the turnover, a downward adjustment may be necessary. Conversely, if it is large relative to turnover, an upward adjustment may be necessary.
- Whether the fine will have the effect of putting the offender out of business; in some bad cases this may be an acceptable consequence.

Step 4 – Consider other factors that may warrant adjustment to the proposed fine

The court will then consider any wider impacts of the fine, for example:

- Impact of the fine on offender’s ability to improve conditions in the organisation to comply with the law
- Impact of the fine on employment of staff, service users, customers and the local economy (but NOT shareholders or directors).

In the case of public service or charitable organisations the fine should normally be substantially reduced if the offending organisation is able to demonstrate the proposed fine would have a significant impact on the provision of its services.

Step 5 – Consider any factors which indicate a reduction, such as assistance to the prosecution

The offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step 6 – Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the Guilty Plea guideline.

Step 7 – Compensation and ancillary orders

The court will then consider whether to make ancillary orders. These could include:

Remediation

The court may impose a remedial order in addition to or instead of imposing a fine.

If, at the time of sentencing, the offender has not rectified any specific failings then they will be deprived of any significant mitigation.

The cost of compliance with any order should not ordinarily be taken into account when fixing the fine; the order requires only what should already have been done.

Compensation

If compensation is awarded (although in most cases involving death and serious injury this will be covered by insurance or subject to a claim in the civil court), priority should be given to the payment of compensation over payment of any other financial penalty where the means of the offender are limited.

Step 8 – Totality principle

In case where the offender is being sentenced for more than one offence, the court will consider whether the total sentence is just and proportionate to the offending behaviour.

Step 9 – Reasons

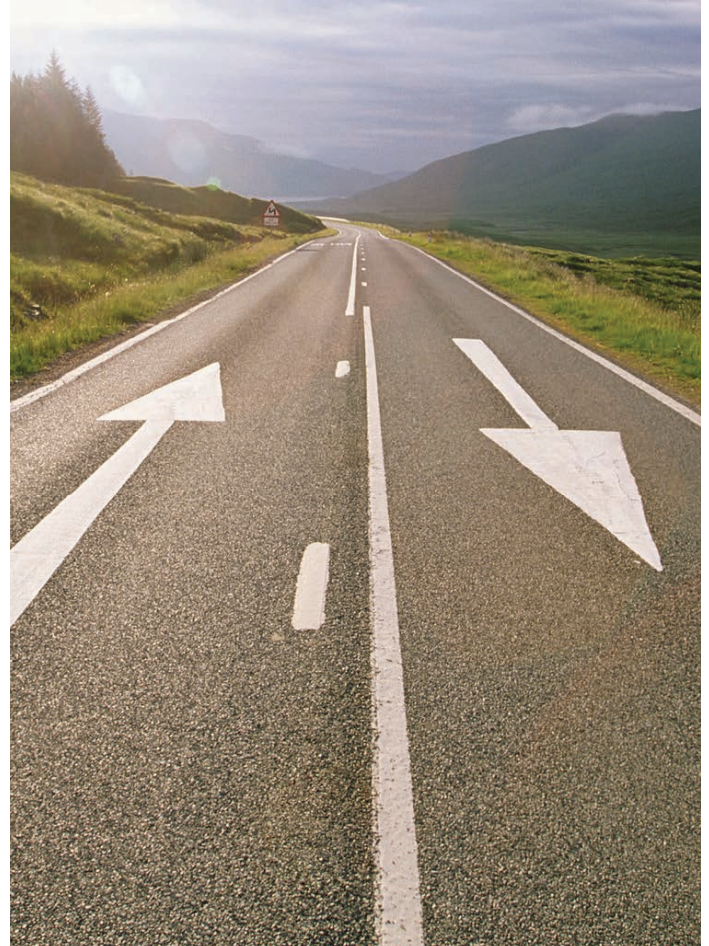
Finally, Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

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Driving is one of the most dangerous activities employees undertake for work. Employers have too often regarded driving as an individual driver’s risk rather than a corporate risk, overlooking the duty of care they owe to employees and other road users. Following the implementation of new sentencing guidelines for Health and Safety and Corporate Manslaughter offences employers who fail to manage driving risks effectively, now face financial penalties of potentially £millions. Individuals convicted also face an increased likelihood of custody.”

Sally Roff

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Effective risk management

It will be clear from the previous section that the financial consequences, in fines alone, following a serious collision in which a successful H&S prosecution results are very significant, before any impacts from the resulting reputational damage are taken into account.

The best way to avoid being prosecuted is to have some comprehensive and robust work-related road risk management policies and procedures in place, and that operational policies, procedures and practices do not conflict with any of the risk management policies or the ability of employees to be able to drive safely and within the law.

Good policies, procedures and practices are not enough, however. It is vital that a robust audit trail is in place so that you are able to demonstrate to any investigating authority that you are actively managing employees making work-related road journeys, that policies and procedures are being followed and that in instances of non-conformance there are remedial actions in place to ensure future compliance.



Having a comprehensive work-related road risk management programme in place, together with a robust audit trail, is likely to minimise the chance that a serious collision will occur, and if one does, it will minimise the chance that the police or HSE will pursue a prosecution.

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