SENTENCING IN THE CROWN COURT FOR ENVIRONMENTAL OFFENCES

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The statutory aims of sentencing

1. The Criminal Justice Act 2003, Part 12 contains general provisions for sentencing in criminal cases. Section 142(1) of the Act states the purposes of sentencing in these terms:

> "Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentences –
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> (a) the punishment of offenders,
> (b) the reduction of crime (including its reduction by deterrence),
> (c) the reform and rehabilitation of offenders,
> (d) the protection of the public, and
> (e) the making of reparation by offenders to persons affected by their offences."

2. Section 143 states:

> "(1) In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might forseeably have caused.
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> (2) In considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court consider that it can reasonably be so treated having regard, in particular to (a) the nature of the offence to which the conviction relates and its relevance to the current offence, and (b) the time that has elapsed since the conviction.
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> (5) Sub-section (2) [does] not prevent the court from treating a previous conviction by a court outside the United Kingdom as an aggravating factor in any case where the court considers it appropriate to do so."

[1] A Recorder of the Crown Court

3. Section 144(1) provides for reduction in sentences for a guilty plea, and states:

> "In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court must take into account –
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> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
> (b) the circumstances in which this indication was given."

4. Section 164 of the Criminal Justice Act 2003 provides:

> "Fixing of fines
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> (1) Before fixing the amount of any fine to be imposed on an offender who is an individual, a court must inquire into his financial circumstances.
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> (2) The amount of any fine fixed by a court must be such as, in the opinion of the court, reflects the seriousness of the offence.
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> (3) In fixing the amount of any fine to be imposed on an offender (whether an individual or other person) a court must take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known or appear to the court.
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> (4) Sub-section (3) above applies whether taking into account the financial circumstances of the offender or the effect of increasing or reducing the amount of the fine."

The criteria for sentencing

5. Guidance for sentencers is usefully set out in the following documents:

(i) Advice of the Sentencing Advisory Panel to the Court of Appeal on Environmental Offences dated March 2000;

(ii) *Costing the Earth*, Guidance for Sentencers, Magistrates' Association dated October 2003;

(iii) Sentencing Advisory Panel Consultation Paper on sentencing for Corporate Manslaughter dated November 2007.

6. In 2000, the Sentencing Advisory Panel proposed to the Court of Appeal that the Court should frame a sentencing guideline on environmental offences. The Panel

specifically considered offences of air or water pollution under the Environmental Protection Act 1990 and the Water Resources Act 1991; illegal deposit, recovery or disposal of waste (including fly-tipping) contrary to the Environmental Protection Act 1990, Section 33; illegal abstraction of water; and failing to meet packaging, recycling and recovery obligations contrary to the Environment Act 1995, Section 93 and the Producer Responsibility Obligations (Packaging Waste) Regulations 1997.

7. Whilst the Panel accepted that the appropriate sentence should be based on the particular circumstances of each case, and that it was particularly difficult to achieve consistency of sentencing in a category of offences involving such a wide-range of differently situated defendants and offences, the Panel's aim was to devise, so far as possible, an approach to sentencing which can be applied equally to all types of defendants in relation to aggravating and mitigating factors, although setting the appropriate level of fine was somewhat more problematic.

8. The Panel identified the following aggravating and mitigating factors:

Aggravating factors

Any of the following factors may be taken to enhance the *culpability* of a defendant, whether an individual or a company, and thereby to *aggravate the seriousness* of any of the offences on which the Panel were asked to advise:

(a) the offence is shown to have been a deliberate or reckless breach of the law, rather than the result of carelessness;

(b) the defendant has acted from a financial motive, whether of profit or of cost-saving, for example by neglecting to put in place the appropriate preventative measures or by avoiding payment for the relevant licence;

(c) the defendant has failed to respond to advice/caution/warning from the relevant regulatory authority;

(d) the defendant has ignored relevant concerns voiced by employees or others;

(e) the defendant is shown to have had knowledge of the specific risks involved, e.g. when he has knowingly dumped "special" waste;

(f) the defendant's attitude towards the environment authorities was dismissive or obstructive.

9. The following factors, which relate to the actual or potential *extent of the damage*, may also be taken to *aggravate the seriousness* of the offence:

   (a) the pollutant was noxious, widespread or pervasive, or liable to spread widely or have long-lasting effects;

   (b) human health, animal health, or flora were adversely affected, especially where a protected species was affected, or where a site designated for nature conservation was affected;

   (c) extensive clean-up, site restoration or animal rehabilitation operations were required;

   (d) other lawful activities were prevented or significantly interfered with.

10. If the defendant has a previous conviction for similar offences, or has failed to respond to previous sentences, this should be treated as a factor that *increases the sentence*, but not to an extent that would be disproportionate to the facts of the case.

11. In addition, there are specific factors which should be taken into account in relation to fly-tipping and to illegal water abstraction. Offences of fly-tipping may be aggravated by:

   (a) tipping waste of a dangerous or offensive nature, such as hazardous chemicals or sharp objects;

   (b) tipping near housing, children's play areas or schools, livestock, or environmentally sensitive sites;

   (c) any escape of waste to streams or the atmosphere.

12. The following may be treated as further aggravating features in offences of illegal water abstraction:

   (a) over-abstraction of large quantities;

   (b) failure to fit a meter, where required;

   (c) environmental harm due to diminished water resources;

   (d) prevention of other lawful abstractions.

Mitigating factors

13. Among the factors that may be taken to *reduce the seriousness* of an offence under consideration are:

    (a) the fact that the individual defendant played a relatively minor role in the commission of the offence, or had relatively little personal responsibility for it;

    (b) the fact that the defendant genuinely and reasonably lacked awareness or understanding of the regulations specific to the activity in which he was engaged;

    (c) the fact that the offence was an isolated lapse.

14. Before arriving at the sentence, the court should take account of *personal mitigating factors*, including:

    (a) the defendant's prompt reporting of the offence and ready co-operation with the enforcement authorities;

    (b) the defendant's good environmental record;

    (c) the fact that the defendant took steps to remedy the problem as soon as possible; and

    (d) a timely plea of guilty.

15. It is, of course, the responsibility of the prosecution and defence to ensure that any relevant aggravating or mitigating factors are brought to the attention of the court.

16. In fixing the level of fine the Panel said that the court should consider the *culpability of the defendant* in bringing about, or risking, the relevant environmental harm; and the need for this to be balanced against *the extent of the damage which has actually occurred or has been risked.* The level of the fine should be high where the defendant's culpability was high, even if a smaller amount of environmental damage has resulted from the defendant's actions than might reasonably have been expected. The fine which is imposed should reflect the means of the individual or company concerned. In the case of a large company the fine should be substantial enough to have a real economic impact which, together with the attendant bad publicity resulting from the prosecution, will create sufficient pressure on management and shareholders to tighten regulatory compliance and change company policy. For smaller companies, the court should bear in mind that a very large fine may have a considerable adverse

impact. A crippling fine may close down the company altogether, with employees being thrown out of work, and with repercussions on the local economy. A large fine might make it more difficult for the company to improve its procedures in order to comply with the law. Similar considerations may apply to non-profit-making organisations.

17. The Panel recognised that "non-tangible" damage arising from bad publicity from a prosecution or conviction, such as a reduction of morale in the workforce, loss of confidence among customers or loss of confidence by neighbours or other stakeholders, can adversely affect a company, but it did not accept that this should affect the penalty imposed by the court. The court should determine the company's ability to pay. As a general principle, consistency in sentencing requires the fine should be devised to have an equal economic impact on companies of different sizes. The Panel suggested that it might be possible to express a fine as a percentage of turnover, or profitability, or liquidity.

18. *Costing the Earth*, Guidance for Sentencers, published by the Magistrates' Association identifies the following factors as relevant in sentencing:

    (i) The overall impact of the environmental offence such as its environmental, social or economic impact.

    (ii) The wider effects of the offence in environmental, social and economic terms including any long-term effects such as health impact from radiation or asbestos.

    (iii) The economic gain derived by the defendant by way of profit, cost savings, avoiding payment for licenses and taxes and so on.

    (iv) The state of mind of the defendant and whether the defendant's actions were intentional (deliberate breach of the law), reckless (behaviour which might lead to an offence), or careless (lack of awareness).

    (v) The relationship between the defendant and the regulatory authorities including the history of any advice, warnings or abatement notices from the enforcing authority, or warnings from the workforce.

    (vi) The potential harm and risks taken by the defendant.

    (vii) The extent of any fatalities, serious injury or ill-health as a consequence of the defendant's actions.

(viii) Any animal health or flora health which has been adversely affected.

(ix) Any offending pattern such as a previous conviction for the same offence, or whether the offence was an isolated incident.

(x) The mitigating circumstances including the defendant's good past record, its awareness or understanding of the regulations specific to the activity in which it was engaged, a timely plea of guilt, co-operation with the enforcing authority, the role played by individual personnel in the offending activity, any genuine hardship or adverse social circumstances of the defendant, and the steps it has taken to remedy or tackle the problem as soon as possible.

19. The Corporate Manslaughter and Corporate Homicide Act 2007 ("CMA 2007"), which came into force on 6th April 2008, creates a new statutory offence of corporate manslaughter. When sentencing an organisation for this offence, a court will be able to impose an unlimited fine, a publicity order and/or a remedial order.

20. Section 8 of CMA 2007 provides factors for the jury to consider when determining whether an organisation is guilty of a gross breach of duty. Section 8 provides:

> "(2) The jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so –
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> (a) how serious that failure was;
> (b) how much of a risk of death it posed.
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> (3) The jury may also –
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> (a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in sub-section (2), or to have produced tolerance of it;
> (b) have regard to any health and safety guidance that relates to the alleged breach.
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> (4) This section does not prevent the jury from having regard to any other matters they consider relevant.
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> (5) In this section "health and safety guidance" means any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under a statutory

provision or otherwise) by an authority responsible for the enforcement of any health and safety legislation."

21. The Sentencing Advisory Panel in its consultation paper on sentencing for corporate manslaughter states that the primary factor in assessing the seriousness of an offence of corporate manslaughter, or an offence under the Health and Safety at Work etc. Act that has resulted in death is the extent to which the conduct of the offender has fallen below the appropriate standard of care. The Panel proposes the following aggravating or mitigating factors are relevant:

Aggravating factors increasing the level of harm

- more than one person killed
- serious injury to one or more person(s)

Aggravating factors affecting the degree of culpability

- failure to act upon advice, cautions or warning from regulatory authorities
- failure to heed relevant concerns of employees or others
- carrying out operations without an appropriate licence
- financial or other inappropriate motive
- corporate culture encouraging or producing tolerance of breach of duty

Mitigating factor

- employee acting outside authority or failing in duties

Offender mitigation

- ready co-operation with authorities
- good safety record

Some Guidance Remarks

22. In *R v. F Howe and Son (Engineers) Limited* [1999] 2 Cr App R (S) 37, Scott Baker J. giving the judgment of the Court of Appeal, Criminal Division, said:

> "There has been increasing recognition in recent years of the seriousness of health and safety offences. The circumstances of individual cases will, of course, vary almost infinitely. …we shall endeavour to outline some of the relevant factors that should be taken into account. In doing so we emphasise that it is impossible to lay down any tariffs or to say that the fine should bear any specific relationship to the turnover or net profit of the defendant. Each case must be dealt with according to its own particular circumstances. In assessing the gravity of the breach it is often helpful to look at how far short of the appropriate standard the defendant fell in failing to meet the reasonably practical test. Next, it is often a matter of chance whether death or serious injury results from even a serious breach. Generally where death is the consequence of a criminal act it is regarded as an aggravating feature of the offence. The penalty should reflect the public disquiet and the unnecessary loss of life. Financial profit can often be made at the expense of proper action to protect employees and the public. Cost cutting is a crucial tool in achieving a competitive edge. A deliberate breach of the health and safety legislation with a view to profit seriously aggravates the offence. …the size of a company and its financial strength or weakness cannot affect the degree of care that is required in matters of safety. Otherwise the employee of a small concern would be liable to find himself at greater risk than the employee of a large one. How an individual company discharges its health and safety obligations will depend on the particular circumstances. …matters that may be relevant to sentence are the degree of risk and extent of the danger created by the offence; the extent of the breach or breaches, for example, whether it was an isolated incident or continued over a period and, importantly, the defendant's resources and the effect of the fine on its business. Particular aggravating features include (1) a failure to heed warnings and (2) where the defendant has deliberately profited financially from a failure to take necessary health and safety steps or specifically run the risk to save money. Particular mitigating features will include (1) prompt admission of responsibility and a timely plea of guilty, (2) steps to remedy deficiencies after they are drawn to the defendant's attention and (3) a good safety record. Any fine should reflect not only the gravity of the offence but also the means of the offender, and this applies just as much to corporate defendants as to any other."

23. The Court of Appeal went on to address the question of obtaining timely and accurate information about a corporate defendant's means. The court stated that the starting point is its annual accounts. If a defendant company wishes to make any submission to the court about its ability to pay a fine it should supply copies of its accounts and any other financial information on which it intends to rely in good time before the hearing both to the court and to the prosecution. Where accounts

or other financial information are deliberately not supplied the court will be entitled to conclude that the company is in a position to pay any financial penalty it is minded to impose.

24. In *R v. Friskies Petcare Limited* [2000] 2 Cr App R (S) 401 the Court of Appeal recommended that the prosecution should list in writing the aggravating features of the case, and the defence should do likewise with the mitigating features, so as to assist the court in coming to the proper basis for sentence after a guilty plea. Problems can arise where there is a dispute about whether the court sentenced the defendant on the basis on which the case was presented. The prosecution should list in writing not merely the facts of the case but the aggravating features. This should be served and the defence should set out in writing the mitigating features. If there is an agreed basis for sentencing it should be in writing.

25. In *R v. Milford Haven Port Authority* [2000] 2 Cr App R (S) 423 the appellant authority pleaded guilty to causing polluting oil to enter controlled waters contrary to the Water Resources Act 1991, section 85(1). A tanker went aground and in excess of 70,000 tonnes of oil escaped and caused wide-spread pollution. The appellant was the port authority responsible for the management and control of maritime traffic and pleaded guilty to an offence of strict liability. It did not accept that it was at fault or had been negligent or reckless. It was sentenced to a fine of £4 million and an order to pay £825,000 towards the cost of the prosecution. On appeal (Lord Bingham CJ, Alliott and Newman JJ) reduced the fine to £750,000. Amongst the points taken into account were the relative lack of culpability, the port authority's early plea of guilty, and the status of the port authority as a public trust and "*the possible impact of a £4 million fine on the port authority's ability to perform its public functions.*" Counsel (Brian Leveson QC) argued that the court had to consider how any financial penalty would be paid. If a very substantial financial penalty will inhibit the proper performance by a statutory body of the public function that it has been set up to perform, that is not something to be disregarded. Material showed that the cost could not simply be recouped from customers by raising charges.

26. In *R v. Yorkshire Water Services Limited* [2002] 2 Cr App R (S) 13, the water company pleaded guilty to 17 offences of supplying water unfit for human consumption.

The plea was on the basis that although water was unfit for human consumption there was no bacteriological risk to health. Fines totalling £119,000 were reduced to £80,000. There were four different incidents leading to 17 offences. The incidents arose out of a mixture of bad planning, bad organisation, poor management engineering and, in the case of one of the incidents, disregard of the alarm system for the second time in 12 months. Rougier J. giving the judgment to the court said that the following facts were relevant:

(i) The degree of culpability involved;

(ii) The damage done;

(iii) The defendant's previous record, including any failure to heed specific warnings or recommendations;

(iv) A balance may have to be struck between censure, designed not only to punish but stimulate improved performance on the one hand, and the counterproductive effect of imposing too great a financial penalty on an already underfunded organisation on the other;

(v) The defendant's attitude and any plea; and

(vi) The overall penalty rather than topping up various manifestations as reflected in the counts in the indictment. There was an obvious analogy between the principle of concurrent sentences of custody and having determined the overall penalty it is then divided among the separate accounts.

27. In *R v. Fresha Bakeries Limited and Harvestine Limited* [2003] 1 Cr App R (S) 44 the two appellant companies pleaded guilty to offences under the Health and Safety at Work Act etc 1974. The companies formed part of a corporate group which carried on the business of making bread and related products. Bread was made at two locations, one of which was owned by the first appellant company and the other by the second appellant company. It was agreed between the prosecution, the trial judge and the defence that the judge should fix an overall financial penalty in fines and costs as if a single defendant company were involved and then apportion the fine and costs element between the companies. The Crown identified five principal aggravating features. These were:

(i) The system devised fell far below a reasonably safe system of work. Death or really serious bodily harm was inevitable;

(ii) The loss of two lives;

(iii) No risk assessment. An assessment would have revealed the very many inadequacies which were built into the system proposed;

(iv) Lack of appropriate training, planning, monitoring and supervision at all levels; and

(v) Health and safety not given sufficiently high priority.

The Court of Appeal agreed that these were indeed aggravating features. The companies had pre-tax profits of £650,000. Fines totalling £350,000 held not to be excessive.

28. In *R v. Anglian Water Services Limited* [2004] 1 Cr App R (S) 374 the Court of Appeal said that the environment in which we live is a precious heritage and it is incumbent on the present generation to preserve it for the future. Rivers and watercourses are an important part of that environment and there is an increasing awareness of the necessity to preserve them from pollution. There is a heavy burden on (water companies) to do everything possible to ensure that they do not cause pollution.

29. In *R v. Thames Trains*, 6th April 2004 the defendant train operator pleaded guilty to two charges relating to the Paddington rail crash in which 31 people died and 400 others were injured, many very seriously. The driver had gone through a red signal at danger and his train crashed into an express train travelling in the opposite direction. The signal had a very poor record of drivers passing it at red. However the company had no convictions for health and safety breaches, the signal was designed, created and maintained by others who should have taken steps to eliminate the dangers, and the train operator fully cooperated with the HSE and the public inquiry, and entered an early plea. A fine of £2 million was imposed together with £75,000 prosecution costs. In *R v. Great Western Trains Co Limited* [2000] 2 Cr App R (S) 431, where 7 died and there were 150 casualties arising out of the Southall train crash, and there was a serious fault of senior management, the sentence was a fine of £1.5 million.

30. In *R v. Armana Limited* [2005] 1 Cr App R (S) 7 the appellant company pleaded guilty before a magistrates' court to being the owner of a fishing vessel which entered a safety zone and struck a glancing blow to an offshore installation,

contrary to section 23(2) of the Petroleum Act 1987. The company was committed to the Crown Court for sentence. The company had employed an experienced crew and deck officers, and organised and operated their vessels in such a way as to reduce the risk of safety procedures occurring. It had suffered significant financial losses due to the breach of the safety zone. In fixing the fine in cases such as this the Court of Appeal stated that the features that the Court has to have regard to are the level of culpability, the financial circumstances of the defendant, and the consequences and potential consequences to others of the breach of safety which the court was examining. In the instant case the level of culpability was at the bottom of the scale. An appropriate level of sentence was £15,000 and costs.

31. In *R v. Wilson and Mainprize* [2005] 1 Cr App R (S) 64 the appellants were concerned in providing a recreational diving course at an island diving site. They pleaded guilty for failing to conduct the undertaking in such a way as to ensure the safety of persons involved. There was no connection between the death of a lady diver and shortcomings of the defendants. However, the diving operations jeopardised what one might describe as the general safety aspects of a hazardous occupation. In the absence of there being a cavalier attitude or total disregard of safety the Court of Appeal fined both appellants £1,500 each, and ordered them to pay costs.

32. In *R v. P&O European Ferries (Irish Sea Limited)* [2005] 2 Cr App R (S) 21 the Court of Appeal, Criminal Division said that for companies of this substance a fine had to be of sufficient significance not only to reflect the seriousness of the offence and the defendant's culpability but also to include an appropriate sting, in financial terms, so as to send a message both to managers and shareholders and indeed other employers in this field.

33. In *R v. ESB Hotels Limited* [2005] 2 Cr App R (S) 332 the defendant company pleaded guilty to two counts of contravening the requirements of a fire certificate. The defendant was the occupier of a modern 7-storey hotel. The Court of Appeal, Criminal Division, held that it was important in determining the level of penalty to take account of the degree of risk and the scope of risk as well as the particular culpability.

34. In *R v. B&Q*, 3rd November 2005, the defendant company was fined £550,000 plus £250,000 costs when a shopper was killed at a retail store. The judge gave 28 days to pay. The Court of Appeal held that time to pay was an indulgence. Where a fine was imposed on a company of anything approaching the size of the defendants', the seriousness of the offending and the impact of a penalty can be brought home to them by their being required to pay the fine within a much shorter period of time than 28 days. Such fines ought as a matter of course to be paid either immediately or in a period to be measured in single figure days, unless very cogent evidence is provided that more time is needed. In contra-distinction, the principles may be different for a small company but even here the first instalment should be made payable at a very early date so the effects of the criminality are brought home.

35. In *R v. Transco Plc* [2006] 2 Cr App R (S) 740, the defendant company pleaded guilty to failure to discharge a duty of care under the 1974 Act. In 2001 there was a gas leak. Transco evacuated the residents but on returning to the flats one of the residents lit a cigarette and an explosion was caused by gas leaking from one of the voids into one of the flats. There were a number of casualties and one resident died. The company had two previous convictions: one in 2001 involved a failure to investigate a gas leak at domestic premises when the defendant was fined £51,000 and the other, which was recent, involved a major explosion which killed four people and the defendant was fined £15 million. Otherwise there was a good safety record and an exemplary training record. In giving the judgment of the Court of Appeal, Criminal Division, when the court quashed the fine imposed of £1 million and substituted for it a fine of £250,000 Lord Phillips CJ said that the case was unusual in that it involved no systematic fault, but merely a mistake on the part of an individual or individuals managing an emergency situation on the ground. The court after referring to Section 164 of the Criminal Justice Act 2003 on fixing of fines said that it hesitated to endorse the proposition that it was necessary for the court to have detailed particulars of the financial position of a company where those acting for the company made it plain to the court that the means of the company were very substantial. The defendant was dealing with an emergency situation in darkness, there was increasing (and in some cases angry) pressure from the inhabitants to return to their homes, there was no question of cost-cutting or profit motives, and the defendant provided funding for food for the inhabitants and

acted swiftly in paying ample compensation to those affected. Its general safety record was good, its training was exemplary. Lord Phillips CJ said that "all those circumstances mean that the culpability part of the evaluation is at the lower end of the spectrum." As against those factors, the court recognised that the offence related in the tragic consequence of the death of one man and the injury of other people.

36. In *R v. Environmental Tyre Limited* [2006] 1 Cr App R (S) 675 a supervisor overturned a loader and was trapped and killed. The defendant company pleaded guilty to failing to discharge a duty as an employer contrary to section 2(1) of the Health and Safety at Work etc Act 1974. The allegation against the company was a failure to supervise and instruct the deceased appropriately. The defendant had a turnover of £2 million. It had no previous convictions. The judge in the Crown Court imposed a fine of £70,000 with £5,000 compensation and £15,000 prosecution costs. The Court of Appeal considered there was no grounds for interfering with the sentence.

37. *R v. Jarvis Facilities Limited* [2006] 1 Cr App R (S) 247 was another railway accident case. A freight train was diverted into a section of track and was derailed, but remained upright and there was no death or serious injury. There was a failure to lay down a proper method of system for the procedure, a failure to carry out such procedures reasonably and a failure to carry out elementary cross checks. The court said that when assessing the penalty the most important factor would have been the element of risk. Given the way the particular stretch of track was used there was unlikely to be a really bad accident there. The court was entitled to take a more severe view of breaches of Health and Safety at Work where there is a significant public element. Public safety is entrusted to companies in the work they do. The Court of Appeal substituted the original fine of £400,000 for the sum of £275,000.

38. In *R v. Balfour Beatty Rail Infrastructure Limited* [2007] 1 Cr App R (S) 370 the Court of Appeal was concerned by the disparity between the fine imposed on Balfour Beatty and that imposed on Railtrack arising from the Hatfield crash. Lord Phillips CJ said that disparity between the sentences of two defendants is not an automatic reason for reducing a sentence. In 1983 Lawton LJ, giving the judgment of the Court of

Appeal in *R v. Fawcett* 5 Cr App R (S) 158 at 161 approved the following test: "Would right-thinking members of the public, with knowledge of the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?" That test continues to be applied today, and in *Balfour Beatty* the court held that the disparity in the two fines was so great that the test was satisfied on the facts. The company had received £368 million for a 7 year contract to inspect the track. It was hard to say that a £10 million fine was wrong in principle. Reduced to £7.5 million because of disparity.

39. In *R v. Clifton Steel Limited* [2007] EWCA Crim 1537, [2008] 1 Cr App R (S) 298 the appellant company carried on trade as steel stockholders and processors in Birmingham. On 17.1.02 as a steel coil was being lowered to the ground using an overhead crane, a tragic accident occurred and an employee received injuries which led to his death. The company pleaded guilty in the Magistrates' Court to a breach of sections 2(1) and 33 of the Health and Safety at Work etc Act 1974, was committed to the Crown Court for sentence, and in May 2006 was fined £150,000 and ordered to pay £20,000 prosecution costs. The Court of Appeal, Criminal Division reduced the fine to £100,000 and left the order for costs in place. The appellant had been fined on a previous occasion for a breach of health and safety legislation. Walker J. in giving the judgment in the Court of Appeal referred to the decision in *Yorkshire Water Services Limited* (see paragraph 26 above) about the need to strike a balance between a fitting expression of censure from a design not only to punish but to stimulate improved performance on the one hand, and the counter-productive effect of imposing too great a financial penalty on an already under-funded organisation on the other. Although the fine was reduced the court did not think it appropriate to make an order for costs.

40. In *R v. Cemex Cement Limited* [2007] EWCA Crim 1759, the defendant company pleaded guilty to failing to comply with a condition of a permit granted by the Environmental Agency under the Pollution Prevention Control Regulations 2000. The offence was based on a failure to ensure an external door at the top of a reject clinker silo at a cement works was properly maintained. The cement works was very large and had the capacity to produce 1.3 million tonnes of cement a year. Dust escaped through the door and caused a sticky substance on cars etc. The dust

was reported to the company at 1.10 p.m. and a 2 foot piece of cladding was found to be missing. A temporary repair was completed between 2.30 – 2.45 p.m. and the door was fully repaired the next day. A substantial quantity of dust escaped. No one was harmed. The offence was of strict liability. The company had very substantial financial resources. The Court of Appeal, Criminal Division reduced the fine from £400,000 to £50,000.

41. In *R v. Farrel and Hough Green Garage Limited*, [2007] EWCA Crim 1896, the managing director, Mr Farrel and his garage company were convicted on two counts. An employee died after a broken down bus collapsed on him when the bus' air suspension bag failed. The victim was inadequately trained and inexperienced. It was not an isolated breach. The court said that a fine of £160,000 would be the appropriate starting point for a company with unlimited means. Because of the means of the company in the instant case the fine was £80,000 (not £96,000 imposed by the judge), and Mr Farrel was fined £10,000 (not £14,000).

42. In *R v. Switchgear Engineering Limited* [2007] EWCA Crim 2758, one of the defendant's employees was involved in a fatal accident at the steel premises of Corus UK Limited in Scunthorpe when carrying out work for Alstom T & D Limited, who were manufacturers of heavy electrical equipment which they maintained and serviced on the site. In the Crown Court, the judge apportioned liability as to 40% against Corus, 40% against Alstom and 20% against Switchgear on the basis that they had failed to obtain a method statement to review the proposed method of work. The grounds of appeal were that the way that the learned judge approached penalty was wrong in principle, and the judge should not have analysed fault on a percentage basis and then assess the financial penalty in the same way. Alstom's and Corus's turnover and profit were measured in millions compared to Switchgear which had only 13 employees. Reliance was placed on *R v. Yorkshire Sheeting and Insulation Co Limited* [2003] EWCA Crim 5458 where at para 23 the Court of Appeal said that the judge placed too much emphasis on apportioning liability and not enough on assessing the appellant's own culpability. In the instant case the Court of Appeal said that whilst the judge was, of course, well placed to assess culpability, he had placed too much emphasis on apportionment rather than

the individual culpability of Switchgear. And the penalty was too high when the respective financial position of the three companies was taken into account. For the fine of £35,000 the Court of Appeal substituted a fine of £10,000.

43. In *R v. Southampton University Hospital Trust* [2007] 2 Cr App R (S) 37, the appellant pleaded guilty under section 33(1) of the Health and Safety at Work etc Act 1974 to a patient in hospital who had been admitted for minor surgery. Two senior house officers were subsequently convicted of manslaughter by gross negligence. The allegation against the hospital trust was that the supervision, training and appraisal of the senior house officer was not formalised or supervised by consultants. The hospital trust was fined £100,000. On appeal, Gage LJ said that the judge was right to describe the failures of the appellant as serious. He was also entirely justified in his observations that the care of a patient is a solemn duty on which all members of the public from time to time depend. That factor marked the gravity of the offence. However the failures related to one department in a hospital whose general record for care was not impugned, and the failures were rapidly corrected and long before the prosecution was instituted. The Court of Appeal bore in mind the observations of Lord Bingham CJ in the *Milford Haven Dock Board* case (see paragraph 25 above), and said that serious as this offence undoubtedly was, the fine imposed by the judge was greater than it ought to have been. Accordingly the fine was quashed and for it the court substituted a fine of £40,000.

44. In *R v. AGC Automotive UK Limited* [2008] 2 Cr App R (S) 26, a fine of £150,000 imposed on a company for a breach of duty under the Health and Safety at Work Act was reduced to £60,000. The company pleaded guilty following an accident resulting in leg injuries to a visitor to its premises as a result of a failure to institute safety precautions following a temporary rearrangement of the company's activities. The sentencing judge found that the company was operating an unsafe system on the day of the accident and that the situation had been created by the temporary stacking of stillages without a system to enforce segregation between vehicles and pedestrians. The company pleaded guilty on the basis that there had been a temporary breach of duty as a result of the temporary use of part of the site for the storage or stillages without putting in place a diverted pedestrian walkway. The Court of Appeal held that there was a serious failure of risk assessment and

planning, but the case did not merit a penalty at or near the top of the scale. This was a one-off failure to build into temporary arrangements safety procedures which were properly observed in the company's normal arrangements. There was no suggestion of a culture of disregarding health and safety or of ignoring safety procedures to cut costs.

45. In giving the judgment of the Court (Gage LJ, Underhill and Curtis JJ), Underhill J said that as to what the normal scale of penalties is, it is right that the court has consistently declined to set any kind of tariff because of the very wide variety of circumstances attending prosecutions. Nevertheless, levels of fine should not be wholly arbitrary, and it is possible by looking at a range of recent cases in the Court of Appeal to get a broad feel for the levels of fine imposed in cases of different levels of gravity. It is important in doing so to bear in mind that in some cases the court would be influenced by considerations of affordability or means, particularly where the defendant is a small business or is in the public sector.

46. In *R v. John Pointon and Sons Limited* [2008] EWCA Crim the Court of Appeal on 21st February 2008 reduced fines totalling £620,000 to £460,000 for offences against the Health & Safety at Work Act 1974, which resulted in the death of an employee, where the company have made no risk assessment had no adequate safety procedure.

47. In *R. FJ Chalfont Construction Limited* [2008] EWCA Crim 770 the Court of Appeal on 12th March 2008 dismissed an appeal by the company and upheld fines totalling £260,000, with an order to pay £80,000 towards the costs of the prosecution, for breaches of the Health & Safety at Work Act 1974 as a result of which an employee of a sub-contractor was killed.

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