

		Railway Guidance Document		RIG-2016-03	
Sentencing Guidelines for Health and Safety Offences, Court Allocation & Unlimited Fines in the Magistrates' Courts					
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Keywords		Sentencing Guidelines for Health and Safety Offences, Court Allocation & Unlimited Fines in the Magistrates' Courts			
Summary		<p>This RIG provides guidance to inspectors on the sentencing guidelines, unlimited fines in the Magistrates' Court and the guidelines for the allocation of cases. It includes points for inspectors to consider when drafting their INV1 reports or for principal inspectors when completing their case approvals.</p> <p>NB: this RIG only applies to offences committed in England and Wales. Although in Scotland unlimited fines are already available for cases proceeding on indictment (solemn procedure), there are no sentencing guidelines for health and safety offences. However, the Scottish courts will "notice" the E&W sentencing guidelines and apply relevant case law. Scotland has also recently established a sentencing council so guidelines may follow in due course – we will keep Scottish colleagues updated.)</p>			
Original consultation		Sally Williams Regulatory Management			
Subsequent consultation (reviews only)					

INTRODUCTION

1. This RIG aims to provide inspectors with an overview of the sentencing guidelines for health and safety offences, court allocation and unlimited fines in the Magistrates' Court.
2. It also aims to provide advice to inspectors in their case preparation and in completing the "appropriate mode of venue" section of an INV1.

THE SENTENCING GUIDELINES

3. The sentencing guidelines, which were produced by the Sentencing Council, apply to all cases in England and Wales sentenced after the 1 February 2016 regardless of when the offence was committed.
4. The guidelines strictly only apply to HSWA s2, s3 and s7 offences and breaches of Health and Safety Regulations under HSWA s33(1)(c). Therefore, HSWA s6 and 8 etc. breaches are not subject to these guidelines. However, we anticipate that the courts will apply similar principles to all H&S cases.
5. The guidelines provide Judges with a starting point and range for sentencing based upon three core principles of culpability, seriousness of harm risked and the likelihood of the harm occurring. It also sets out other principles which could mitigate or aggravate the sentence.

Culpability

6. The culpability for companies and individuals range from "very high" to "low" and the guidelines set out the factors which will generally lead to the different levels of culpability. For example: in order for a culpability level of very high to be established for a company there would need to be a deliberate breach of or flagrant disregard for the law.
7. A low level of culpability could apply if the failings were minor and it was an isolated incident.

Levels of Culpability for Companies:

Culpability

Where there are factors present in the case that fall in different categories of culpability, the court should balance these factors to reach a fair assessment of the offender's culpability.

Very high

Deliberate breach of or flagrant disregard for the law

High

Offender fell far short of the appropriate standard; for example, by:

- 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 systemic 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:

- 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

Levels of Culpability for Individuals:

Culpability

Where there are factors present in the case that fall in different categories of culpability, the court should balance these factors to reach a fair assessment of the offender's culpability.

Very high

Where the offender intentionally breached, or flagrantly disregarded, the law

High

Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken

Medium

Offence committed through act or omission which a person exercising reasonable care would not commit

Low

Offence committed with little fault, for example, because:

- 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

Seriousness of harm risked

8. This is quite a straight forward element to determine. It asks that the Judge determines the level of harm that was risked by the breach, not the level of harm that actually occurred. For example, most cases involving work at height will attract a harm category level of A as a fall from a height could risk causing death.

Likelihood of the harm occurring

9. This is a more difficult principle to establish. It asks that the Judge determines how likely it was that the harm would occur due to the nature of the breach. This is an element which may lend itself to technical arguments in Court.
10. Once the seriousness and likelihood are established, a harm category starting point can be determined from the below chart.

Seriousness of harm risked			
	Level A <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	Level B <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	Level C <ul style="list-style-type: none">• All other 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)

11. The Judge must then take into consideration whether the offence exposed a number of workers or members of the public to risk of harm and whether the offence was a significant cause of actual harm. If one or more of these elements are present then the Judge can consider raising the harm category. The actions of victims are unlikely to be considered contributory events. Offenders are required to protect workers or others who may be neglectful of their own safety in a way which is reasonably foreseeable.

NB: if the actual harm is lesser than the harm risked, the harm category level should not be raised. For example: an offence may give rise to a risk of death with a medium likelihood of that harm occurring inviting a harm category of 2. If the injured person only suffered bruising then the harm category should remain unaltered. If the person died due to the offence, then the Judge could raise the level to harm category 1.

Financial Information - Companies

12. Once the culpability and harm category have been determined, the guidelines set out the starting point for fines. These are divided into different groups (very large, large, medium, small and micro) depending upon the turnover of the company. It is therefore important to obtain the financial information of companies at an early stage. It is incumbent upon the company to provide up-to-date and full financial information for the last three years to the court.

13. A Judge should initially start a fine at the “starting point” – however the final level can move within the “category range” depending on other aggravating/mitigating features.

Example: Medium sized company (turnover between £10 - £50 million) where high culpability and harm category 1 or 2 has been determined. The starting point would be either £950k or £450k:

High culpability		
Harm category 1	£950,000	£600,000 – £2,500,000
Harm category 2	£450,000	£220,000 – £1,200,000

14. Where offences are committed by companies whose turnover far exceeds £50 million (the “very large” category) the guidelines state that Judges should consider whether it is necessary to exceed the suggested category range.

15. For individuals the above does not apply, but the Judge will still take into account their financial situation when determining the final level of a fine.

16. *Whirlpool UK Appliances Ltd v R* [2017] EWCA Crim 2186 gives helpful guidance on the Court of Appeal approach to ‘very large organisations.’

Other factors:

17. Once a starting point has been determined the Judge can adjust the final fine level by taking into account other factors. Firstly, the Judge will consider any aggravating or mitigating factors, for example previous convictions or lack of previous convictions, cost-cutting at the expense of safety, poor health and safety record, high level of co-operation, evidence of steps taken to remedy problems

18. The guidelines then ask Judges to “step back” and see if the fine level reflects how far the offender fell below the acceptable standard. It should not be cheaper to offend than to take the appropriate precautions. A fine should 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.”

19. The Judge should then consider other financial factors, such as the profit level of the company, whether a high fine would put them out of business etc. Where an offender is either a public or charitable company then a fine should be substantially reduced if they can show that the proposed fine would have a significant impact on the provision of its services. Guidance is available from the Legal Team regarding the status of Network Rail as a public body.

20. Finally, Judges should give the appropriate discount for a guilty plea, which

is currently set at a 1/3 if the offender has pleaded guilty at the earliest opportunity. The first stage will normally be the first hearing at which a plea or indication of plea is sought and recorded by the court. The reduction decreases after that first stage in accordance with the definitive guideline on Reduction in Sentences for a Guilty Plea:

https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-Guide_FINAL_WEB.pdf

Implications/actions for ORR cases:

21. Previously for sentencing, reliance was placed upon producing a Friskies schedule which sets out the general mitigating and aggravating features. Whilst these can still be completed, it is expected that they may become increasingly more redundant.
22. Judges, will be expecting our views on culpability, risk of harm and the likelihood of harm in conjunction with the general mitigating and aggravating features. It is therefore likely that dialogue on this issue with the defence will begin prior to cases reaching Court.

Inspectors should therefore consider these factors when drafting their INV1 reports in order to assist in the appropriate drafting of case summaries and determining the correct venue for trial.

UNLIMITED FINES IN THE MAGISTRATES' COURT

23. The Magistrates' Court now have the powers to impose fines of any amount, therefore they could sentence any of the new fines levels imposed by the sentencing guidelines.
24. These powers only extend to offences which occurred on or after the **12 March 2015**. If the offence pre-dates this date, then the normal Magistrates' Court fine level applies – namely £20k per offence for companies or the statutory maximum for individuals.

COURT ALLOCATION GUIDELINES

25. New allocation guidelines have also been published to help Judges determine the appropriate venue for cases – these apply to all cases heard after 1 March 2016 regardless of when the offence occurred.
26. In general, offences should be dealt with in the Magistrates' Court unless:
 - a) The sentence would clearly be in excess of the Court's sentencing powers, after taking into account the personal mitigation and any reduction

for a guilty plea; and/or

b) For reasons of unusual legal, procedural or factual complexity, the case should be tried in the Crown Court. This exemption may also apply where a **very substantial fine** is the likely sentence.

27. Where cases stay in the Magistrates' Courts and the unlimited fines apply, the more serious cases will only be heard by an authorised District Judge (DJ). It is our responsibility to notify the parties if we believe that a DJ is required, not less than 7 days before the first hearing.

28. An authorised DJ will be needed for:

a) Cases involving death or significant life changing injury or a high risk of death or significant life changing injury;

b) Cases where the defendant has a turnover in excess of £10 million but does not exceed £250 million and has acted in a deliberate, reckless or negligent manner;

c) Cases where the defendant has a turnover in excess of £250 million; or

d) High profile cases or ones of an exceptionally sensitive nature.

Implications for ORR cases

29. For offences which occurred prior to 12 March 2015, due to the new sentencing guidelines which set substantially higher fine levels, there will be very few cases which may stay in the Magistrates' Court. It is expected that only cases involving small to micro sized companies and individuals will stay in the Magistrates' Court.

30. For offences which occurred after 12 March 2015, due to the Magistrates' Court unlimited fine powers none of these cases will meet the criteria under point 26 a) above. Therefore, only cases which come under point 26 b) will be sent to the Crown Court, namely where the case involves particularly complex elements or where a substantial fine is likely – which could apply for large to very large companies. We can make representations at the Magistrates' Court if we consider that a case should be sent to the Crown Court. Inspectors should be aware that now that Magistrates do have unlimited sentencing powers cases that in the past we may have expected to go to the Crown Court may remain in the Magistrates.

31. It is therefore important that when inspectors are determining appropriate venue, they have consideration to the following:

- **When the offence occurred** – NB: some offences can span across a period of time, in these instances it is the start date of the offence which must be considered. For example: an offence which was ongoing between the 1 January 2015 to the 30 March 2015 will come under the old rules.
- **Whether the case involves particularly complex matters of law** – this may include cases which involve substantial technical expert evidence, or large quantities of complex evidence etc.
- **Whether the case will likely attract a very substantial fine** – reference will need to be made to the sentencing guidelines. For cases involving large companies, where death or substantial injury is involved or risked, then there is likely to be a very substantial fine.

32. If the case can stay in the Magistrates' Courts we should consider the criteria that require a DJ to hear the case. The Legal Services Team can advise and will notify the parties where necessary.

33. NB: Regardless of when the offence occurred, the defence maintain the right to elect to have their trial at the Crown Court. The Allocation Guideline can be found here: https://www.sentencingcouncil.org.uk/wp-content/uploads/Allocation_Guideline_2015.pdf

SUMMARY OF APPLICATION OF GUIDELINES

	Sentencing guidelines apply	Unlimited fines in the Magistrates' Court apply	Allocation guidelines apply
Offence Committed <u>prior</u> to 12 March 2015	x		x
Offence Committed <u>after</u> the 12 March 2015	x	x	x

Action by inspectors

34. When writing investigation reports for cases that are to be recommended for prosecution:

- a) Obtain financial information about potential defendants from Companies House. This is arranged on request by ORR's Information Manager. See para.

12 above.

- b) Prepare our views on culpability, risk of harm and the likelihood of harm in conjunction with the general mitigating and aggravating features. Include in the INV1. See para. 22 above
- c) Make a recommendation for allocation of venue. See paras. 28, 31 and 32 above.