Introduction

In January 2015, a full year before the new Sentencing Guideline for Food Safety and Hygiene Offences came into effect, the food and drinks giant, Mitchells & Butlers, was fined £1.5 million for causing a fatal outbreak of food-poisoning on Christmas Day in 2012, having served contaminated turkey lunches to 100+diners.

The fine was at the time, and remains, the largest fine ever imposed in this area of the criminal law. It could be argued therefore that the new Guideline has meant little change in sentencing practice, but figures alone tell only a small part of the story.

Historically, it was extremely difficult to predict with any degree of certainty the likely disposal in a food safety or hygiene prosecution. This was borne out by discussions between counsel in the M&B case, when before sentence the usual guesses were being made about the size of the fine. Most thought it would exceed £100,000, but no one thought it would be in excess of £500,000.

But what was significant at that time is that the consultation period for the new Guideline commenced just three months earlier, in November 2014, around the time the company was convicted.

The consultation followed a review of sentencing practice across the UK that revealed inconsistencies in the way sentencing decisions were being reached.

The Food Standards Agency had shared its concerns with the Sentencing Council that penalties being imposed were not reflecting the seriousness of the matters before the court, and that fines being passed on corporate offenders, in particular, were too low.

The Sentencing Council wished to ensure, following the publication of the definitive guideline for sentencing environmental offences (effective from 01/07/14), that there should be a consistency of approach in the way the courts sentenced comparable regulatory offences.

The fact of inconsistency was hardly surprising. Unlike the sentencing of health and safety offences which developed through a series of authorities, and in respect of fatalities by reference to predecessor guidelines, the sentencing of food safety and food hygiene offences has not been the subject matter of previous guidelines issued by the Sentencing Council.

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In that regard, the Guideline is to be welcomed. For big business, its effect may not be.

Following the period of consultation, the Definitive Guideline was published in November 2015 in accordance with s.120 of the Coroners and Justice Act 2009.

By s.125 CJA 2009, the courts must follow Sentencing Council guidelines in sentencing an offender unless ‘satisfied that it would be contrary to the interests of justice to do so’, meaning sentencing tribunals retain a residual discretion to do as they please!

Application

The Guideline applies to all organisations and individuals aged 18 and over sentenced after 1 February 2016, regardless of the date of the offence:

i) In England, for offences contrary to Regulation 19(1) of the Food Safety and Hygiene (England) Regulations 2013;

ii) In Wales, for offences contrary to Regulation 17(1) of the Food Hygiene (Wales) Regulations 2006 and Regulation 4 of the General Food Regulations 2004.

Whilst there are separate legislative provisions for England and Wales, the offences refer to the same Community provisions set out in EU legislation, meaning the Guideline applies to offences ranging from fatal food poisoning outbreaks to technical hygiene breaches.

The Guideline does not apply in Scotland, although in Scottish Power Generation Ltd v HMA, [2016] HCJAC 99, it was observed that Sentencing Council guidelines “will often provide a useful cross check, especially where the offences are regulated by a UK statute”.

There can be no doubt, despite the size of the M&B fine, that the effect of the Guideline is to impose significantly higher penalties on organisations than they might have faced previously, focusing the sentencing tribunal on the size of the organisation and the need for the effect of any financial penalty to be keenly felt.

This has been seen more frequently in health and safety offences and environmental offences than in food safety matters, almost certainty because of the greater number of prosecutions, and very often for more serious offences in the former areas.

The £20 million fine passed on Thames Water at Aylesbury Crown Court by HHJ Sheridan in April 2017 will take some beating, but then the defendant company had caused 1.8 billion litres of untreated sewage to be pumped into the Thames...

The highest level of fine stipulated by the Environmental Offences Guideline is in fact £3 million, being the same as in the Food Safety Offences Guideline, so it must be assumed that there is a possibility of fines greatly exceeding the ceiling in the Guideline being passed in particularly serious cases.

In the Thames Water case, HHJ Sheridan made clear that he wanted to send a message to the shareholders that pollution is not acceptable. In sending this message, HHJ Sheridan was merely tapping in to the beating heart of the Guideline’s raison d’etre – making recalcitrant companies sit up and take notice.

Status of Case Law

Save in unusual or exceptional cases, the Guideline should be treated as a self-contained code for the purposes of sentence. In R v Thelwall [2016] EWCA Crim 1755, Thomas, LCJ observed that ‘the citation of decisions of the Court of Appeal Criminal Division in the application and interpretation of guidelines is generally of no assistance’.

He went on to warn that ‘it is important that practitioners appreciate that our system now proceeds on the basis of guidelines, not case law’.

Practitioners could perhaps be forgiven for citing authorities, given that just three months earlier counsel had been chastised by Hamblen, LJ in R v Ernest Doe & Sons Ltd [2016] EWCA Crim 1110 for not providing assistance to the court at first instance by way of reference to other cases. Hamblen, LJ observed that ‘[w]hilst there is a huge range of culpability and indeed means of various companies…valuable guidance is to be found in other cases before this court’. But now the value of such guidance will be of extreme rarity.

It was also said in Thelwall that R v Friskies Pet Care UK Ltd [2000] 2 Cr App R(S) 401 is no longer of any materiality, meaning the practice of supplying ‘Friskies Schedules’ is over. However, practitioners should not assume this removes the requirement to serve a form of sentencing schedule, as is made clear by Parts 24.11 and 25.16 of the CPR and Criminal Practice Direction 7Q3-7.
The Steps in the Guideline

The Guideline requires the sentencing tribunal to follow a nine-step process.

For a company this means starting from determining the offence category by assessing levels of culpability and harm, to examining the size of the organisation to be sentenced, making adjustments on the basis of proportionality, allowing for discounts for guilty pleas and assistance given, taking account of ancillary orders and the principle of totality, to explaining its reasons for passing the sentence imposed.

For individuals, there is also a nine-step process, but the steps are slightly different - from determining the offence category by assessing levels of culpability and harm, to examining the financial circumstances of the individual to be sentenced, making adjustments on the basis of proportionality, allowing for discounts for guilty pleas and assistance given, taking account of ancillary orders and the principle of totality, to explaining its reasons for passing the sentence imposed and deciding whether to give credit for time spent on bail.

What this process has thrown up are inevitable disputes concerning quite how culpable the defendant might be or quite how harmful their conduct was or might have been. The findings the court makes in this regard have the capacity for stark differences of outcome. Ordinarily, such a dispute would lead inevitably to a Newton Hearing, which a judge is obliged to hold, but the canniest defence practitioners will invite a judge to resolve these matters informally during the sentencing process to ensure no loss of credit for their client.

If a very high level of culpability is established, the defendant can expect to receive a substantial penalty, relative to their means, even if the level of harm is low, but the converse is not true, meaning the focus of the Guideline is on how far below acceptable standards the conduct in question fell. As to be expected, the Guideline reserves the highest penalties for cases where there has been a deliberate breach or flagrant disregard for the law causing, or risking, serious harm.

Once culpability and harm has been established, the next two steps in the Guideline makes all the difference for companies – their size. Whilst for an individual it is a question of how much of their weekly income they are at risk of paying, or whether they might be at risk of custody. There are four bands of company size, from large, with a turnover of £50 million and over, down to Micro, with a turnover or equivalent of not more than £2 million.

Where the offending organisation’s turnover ‘very greatly exceeds’ £50 million, the Guideline recognises that it may be appropriate to move outside the stipulated range.

No further guidance is provided, which might be seen as unhelpful given the number of very large organisations who operate in the food and drink sector.

However, the issue of how to sentence a ‘very large’ company was addressed in R v Thames Water Utilities [2015] 2 Cr. App. R. (S.) 63 when Thomas, LCJ made clear that ‘the aim of the sentence [is] to bring home the appropriate message to the directors and shareholders of the company in question’.

Undoubtedly, this was ringing in HHJ Sheridan’s ears when he sentenced the same company in April, and one can only assume, given the Company’s experience of the criminal justice system in the last two years alone, that the shareholders are receiving the message loud and clear. Following the enactment of section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which gives the power to the magistrates’ court to pass an unlimited fine (provided the offences being sentenced were committed after 12 March 2015), more cases are being resolved in the magistrates’ court, but the more serious are still being committed to the crown court, as they should be. For individuals at risk of even a community order, their case has to be committed to the crown court.

It is, however, worth noting the emphasis in the Guideline that a financial penalty is likely to be the most appropriate disposal even when the threshold for imposing a community order has been passed.

Paradoxically, whilst for large companies the most significant aspect of the Guideline is the prospect of massively enhanced financial penalties, for smaller companies and individuals the penalties might be significantly less severe than before the implementation of the Guideline. In one fatal food-poisoning case prosecuted by Cornwall County Council in February 2017, the manageress (and food business operator) of a pub that caused the death of a pensioner by serving undercooked or inadequately re-heated lamb was sentenced to a fine of just £750. This was a consequence of a faithful application of the Guideline, but such a sentence would have been unthinkable a year or two earlier.
The defendant company was fined £20,000.

At Step Three of the Guideline, the court is required to consider issues of proportionality, meaning that it must ensure that the proposed fine based on turnover is proportionate to the overall means of the offender.

This part of the Guideline adopts s.164 of the Criminal Justice Act 2003, which requires the court to take account of a defendant’s means (which in the case of a corporate defendant cannot readily be equated with turnover) and to reflect the seriousness of the offence when passing sentence.

However, at Step Two, the Guideline stipulates that only the financial material relating to the organisation before the court should be taken into account ‘unless it is demonstrated to the court that the resources of a linked company are available and can properly be taken into account’. The Guideline is silent on how this should be demonstrated (although presumably it would have to be proved by the prosecution if the defendant were pleading impecuniosity) or when it would be proper to take such matters into account.

This issue was considered in general terms in R v Ineos Chlorovinyls Ltd. [2016] EWCA Crim 607, a reading of which will repay those acting for or against corporate defendants.

The Guideline emphasises that any 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’, and again reflecting the tone of one of the stated reasons for the consultation leading to the publication of the Guideline, that ‘the fine should be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to operate within the law’.

The court is, however, entitled to have regard to the profitability of the offending organisation, and should look at their financial circumstances in the round. The court should ‘step back’ and if necessary make adjustments to the fine to ensure it fulfills the general principles set out in the Guideline. Traditionally judges have been reluctant to sentence on the basis of small net profit figures when the turnover is substantial.

The remainder of the Guideline reflects recognised sentencing practice – taking account of credit for guilty pleas, assistance a defendant might have given, the making of any ancillary orders, such as compensation or disqualification from acting as a company director, and having regard to the principle of totality.

The effect

There can be no doubt that the Guideline has seen an uplift in the size of fines imposed on larger companies. Fines running to the hundreds of thousands are now commonplace, when once they were the exception. It should be assumed this will make responsible food businesses pay even greater scrutiny to their food safety management systems, or the shareholders, who Thomas LCJ and HHJ Sheridan have issued clear warnings to, can expect to see a sharp decrease in their dividends.

The position in respect of individuals is rather more nuanced, as penalties are not merely an exercise of elementary mathematics. As stated above, individuals may in fact be the beneficiaries of this Guideline. Carelessness in the workplace might not be punished in such an effective way, but a deliberate flouting of the law almost certainly will.

Richard Heller has been recommended by Chambers & Partners for the last seven years as one of London’s leading barristers in Consumer Law, reflecting his expertise in Trading Standards and Food Safety. He has advised both regulators and businesses for many years and has appeared in a number of high profile cases and appellate decisions, including the last three fatal food-poisoning outbreaks prosecuted in England.

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