

Claims

## Sentencing uncertainty in certain times?



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0 Comments



- The 2015 guidelines aim unabashedly to increase unsatisfactory penalties to a level that "would be felt by directors and shareholders"
- The Appeal Court is to be commended in its attempts to avoid being overly prescriptive
- There may well be more cases running to trial, as there is always the possibility of acquittal

**In May, Scottish Power Generation pleaded guilty to a non-fatal breach of Section 2(1) of the Health and Safety at Work Act 1974.**

In sentencing the company the Court applied, for the first time in Scotland, the 2015 Sentencing Council's Definitive Guidelines on Health and Safety Offences, binding only in England and Wales.

Using the guidelines the sheriff imposed a fine of £1.75m, reduced by 30% from £2.5m to take account of the early plea. The company appealed against sentence and since then health and safety practitioners and duty holders facing prosecution in **Scotland** have been waiting anxiously to find out whether the Appeal Court would determine that the guidelines ought to apply.

That wait is now over with the judgment issued on 3 November.

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Those familiar with the **2015 guidelines** will note that they extend in their application to non-fatal health and safety offences and propose a matrix by which fines are to be calculated. The aim, unabashedly stated, is to increase unsatisfactory penalties to a level that "would be felt by directors and shareholders" in order to improve compliance.

#### The decision

In its decision, **the Appeal Court stated:** "In relation to the 2015 guideline, there is no need to use it in a mechanistic or formulaic fashion" but that the sentencing court could instead use the guideline as "a cross check to the 'starting point' selected".

Ultimately, the fine was reduced on appeal to £1.2m, the starting point being £1.5m, reflecting a 20% discount. The Appeal Court thus ratified recent judicial trends seen in non-health and safety cases of lowering the discount applied to early pleas.

The implications of the Appeal Court's determination for sentencing courts hearing such cases are that they should follow 'traditional' Scottish sentencing practices when arriving at a 'starting point' and then have regard to the guidelines as a "cross check".

While the Appeal Court is to be commended in its attempts to avoid being overly prescriptive and to preserve the sentencing court's discretion, what its decision does not do is address what action should be taken if the figure reached in the 'traditional' way and the figure recommended in the guidelines are wildly different.

What is the sheriff then to do? Substitute the figure stated in the guidelines? Retain their own initial assessment and dismiss the guidelines or perhaps split the difference? The Appeal Court's decision is silent on this.

#### **Practical uncertainty**

This uncertainty presents practical difficulties when advising clients who are subject to health and safety prosecutions in Scotland. The Crown plays no role in sentencing, offering no view on culpability and harm in terms of the categories provided for in the guidelines, and this is unlikely to change.

There may well be more cases running to trial, as there is always the possibility of acquittal, but more so as a trial in mitigation, which at the end of the day could see the harm and culpability factors reduced, having a massive impact on the level of fine that the sheriff might take as a starting point. With a reduction in discount for early pleas of guilty, a client may feel it is better to take their chances at trial.

In times of uncertainty, it is more important than ever to seek expert legal advice immediately following an incident.