

HSE and Environment Agency Prosecution: The New Climate

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PREFACE

Corporate governance, the system of rules, practices and processes by which organisations are directed and controlled, has increasingly come under the media's spotlight. It has also risen up the Government's agenda.

Two highly critical reports were published in 2016 where Parliament found serious failings in corporate governance of two household names in the retail sector. The first was a joint report by the Work & Pensions and Business, Innovation and Skills Committees concerning the sale and acquisition of BHS and its treatment of its pension fund, and the second report, by the Business, Innovation and Skills Committee, regarding the employment practices of Sports Direct. The Government is now considering reform.

The last twenty years or so has seen a growth in the prominence of health and safety and environmental duties. There is now a public expectation that when investigating authorities find serious failings, criminal prosecution should follow.

It is not that long ago that convicted organisations would receive quite modest fines for health and safety and environmental offences. However this is no longer the case. There has been a sea change with the introduction in 2014 of the *Environmental Offences: Definitive Guideline* and in 2016 the *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline*.

In 2017 Thames Water was given a record fine of £20.3m after significant leaks of untreated sewage into the Thames and surrounding land. The leaks, which were over a long period of time, had a serious impact on residents, farmers, and wildlife. The previous year Thames Water had been fined £1m for repeated leaks into the Grand Union canal in Hertfordshire and £380,000 following a sewage leak in an area in the Chilterns.

£1m plus fines are no longer reserved for health and safety cases involving fatalities. The Sentencing Guideline points out these offences are concerned with failures to manage health and safety risk and do not require proof of harm, stating that the offence 'is in creating the risk of harm'. In 2016 Alton Towers operator Merlin Attractions was fined £5m for an admitted health and safety breach in relation to the 2015 crash on its Smiler rollercoaster. Sixteen people were injured including two teenage girls who had leg amputations.

The Court of Appeal has made clear that large fines are here to stay. In *R v Whirlpool*¹ the Court warned:

Large commercial entities in many areas of business are vulnerable to very substantial financial penalties for regulatory failings. The same is true for breaches of health and safety or environmental law in appropriate cases.

Just as significant as the substantial fines that can be imposed upon organisations is the increase in prosecutions of directors and senior managers for offences under section 37 of the Health and Safety at Work Act 1974 where it is alleged that corporate failure was due to the consent or connivance of the defendant or attributable to their neglect. If convicted in the crown court a custodial sentence of up to two years can be imposed. The Sentencing Guideline states that where culpability is medium and the seriousness of harm risked is death or physical or mental impairment resulting in lifelong care, the starting point for sentence is six months imprisonment. In addition there has also been an increase in the number of disqualification orders made against convicted directors under the Company Directors Disqualification Act 1986.

Although health and safety law and environmental law is covered by different legislation and investigated by different regulatory authorities, many of the issues involved are the same or at the very least similar. The aim of this book is to bring together, it is believed for the first time, a book that gives guidance in both areas. It is divided into four parts:

Part 1: Risk Management including corporate governance, directors' duties and business continuity (ie planning to deal with major disruption);

Part 2: An overview of the Offences – health and safety, manslaughter (individual and corporate), fire offences and environmental offences (including pollution and illegal waste disposal);

Part 3: Enforcement and Sentencing including responding to a criminal investigation and an introduction to the prosecution process; and

Part 4: Inquests (and public inquiries), civil claims and insurance.

The Appendix contains summaries of the cases referred to in the text.

¹ [2017] EWCA Crim 2186

This book is not just intended as a reference work for lawyers but is aimed at directors and those in senior and middle management of organisations that are responsible for managing health and safety and environmental risks.

The law is stated as at 1 February 2019

For further information or to buy the book: www.bloomsburyprofessional.com/environmental