

# Sentencing: Culpability and Harm



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5 Paper Buildings

# The basis of sentence

- Court not bound by agreement as to sentencing category
- **R v Palmer Timber Limited** [2019] EWCA Crim 611 confirming -
- **R v ATE Truck and Trailer Sales** [2018] EWCA Crim 752  
“**There is much to be said in an area such as this – with a specialist prosecution agency – for sensible agreement between the parties...** Such sensible agreement is to be encouraged and it is to be expected will be weighed carefully by any Court before departing from it. **However and ultimately, no such agreement can bind the Court; as a matter of constitutional principle ...** the imposition of a sentence is a matter for the Judiciary... A private agreement between prosecution and defence will doubtless inform the Court but, helpful though it may well be, cannot be determinative of sentence”.



# Likelihood of Harm

The Guideline states –

“The assessment of harm requires a consideration of both:

- the seriousness of the harm risked (A, B or C) by the offender’s breach; and
- the likelihood of that harm arising (high, medium or low).”



# Likelihood of Harm

Older cases:

- **R v Tata Steel UK Ltd** [2017] EWCA Crim 704  
“By itself, the period of operation without incident is a powerfully persuasive pointer against the offence being one of high likelihood...”
- **R v Diamond Box Ltd** [2017] EWCA Crim 1904  
“Tata Steel does not establish a principle that a substantial period in which a risk did not in fact fruit into an accident means that the likelihood of the risk was not high... It all depends on the circumstances of the case.”



# Likelihood of Harm

2019 cases

- **R v Squibb Group Limited** [2019] EWCA Crim 227 (asbestos)
  - “The likelihood or otherwise that exposure to asbestos at a particular level for a particular period of time will ultimately cause a fatal disease is **not something which is rationally capable of being assessed simply on the basis of supposition, impression or imagination. It is a scientific question which should be answered, if possible, with the assistance of scientific evidence.**”
  - 90/100,000 likelihood of death = Low Likelihood of Level A Harm
- **Faltec Europe Ltd v HSE** [2019] EWCA Crim 520 (legionella bacteria)
  - 40/100,000 likelihood of death = Medium Likelihood of Level A Harm



# Likelihood of Harm

- **R v Palmer Timber Ltd** [2019] EWCA Crim 611
  - Industry data suggesting that only 50 people killed in accidents involving workplace transport each year.
  - Additional evidence relating to the particular workplace justified a finding that there was a high likelihood of Level A harm
- **R v Mick George Ltd** [2019] EWCA Crim 519
  - 422,000 tipper operations without incident
  - 0.04% chance of death in reported electoral incidents
  - ‘Once the regulations had been breached’ the likelihood of Level A harm was medium.



# Moving up at Step 1

The Guideline states –

“Next, the court must consider if the following factors apply. **These two factors should be considered in the round** in assigning the final harm category.

- i) Whether the offence exposed a number of workers or members of the public to the risk of harm...
- ii) Whether the offence was a significant cause of actual harm...

If one or both of these factors apply the court must consider either moving up a harm category or substantially moving up within the category range at step two overleaf. If already in harm category 1 and wishing to move higher, move up from the starting point at step two on the following pages. **The court should not move up a harm category if actual harm was caused but to a lesser degree than the harm that was risked, as identified on the scale of seriousness above.**”



# Moving Up at Step 1

- **Faltec Europe Ltd v HSE** [2019] EWCA Crim 520
  - Where harm caused is less than harm risked, the Court cannot move up a Harm Category even where a number of people are exposed to that risk.
  - Where a number of people are exposed to risk but harm caused is less than harm risked, there is ample scope to move up within the Category: **“the primary focus of the Guideline – and the gravamen of many Health and Safety offences – is exposure to risk, not actual harm”**



# Moving Up at Step 2

The Guideline states –

“Having determined the offence category, the court should identify the relevant table for the offender on the following pages...”



# Moving Up at Step 2

- **Bupa Care Homes (BNH) Ltd [2019] EWCA Crim 1691**
- *“Although Step One requires an assessment of culpability in the range very high to low according to the factors listed at page 4... we do not consider that that means that, in selecting a starting point within the appropriate range at Step Two, the judge must leave out of account, or not make, a quantitative assessment of the extent of the harm and culpability involved in the offending. For example, **it seems to us that an offender whose culpability is high because of the presence of a number of listed factors ought in principle to be punished more severely than an offender whose culpability is high because of the presence of just one factor...**”*

