EVERSHEDS SUTHERLAND

Maximising your mitigation

Actions which a duty-holder can take after a serious incident

In this article, Eversheds Sutherland EHS Partner and Solicitor-Advocate Paul Verrico considers the actions which a duty-holder can take following a serious incident in which failings have been identified to influence the size of penalty imposed upon it. The views of the top legal minds in the country are showcased to consider where a corporate entity can properly demonstrate to a court that it has considered any failures, learned from them and that any incident is an isolated occurrence.

"Never ruin an apology with an excuse."

Unknown

When the Sentencing Guideline was first mooted, practitioners up and down the land wondered aloud how there could be consistency in outcome; it is an often quoted (but true) maxim that each case turns on its own facts, the finances of each Defendant vary wildly and the gritty human tragedies which come before the courts have a huge range of root causes.

Analysing the final form Guideline, it became apparent that the ability of an advocate to set out cogent submissions on the two main sentencing principles of culpability and harm would very much depend on the attitude of the Defendant to safety culture and the maturity of systems in place both before and after an incident. By way of example, in a recent case a District Judge responded very favourably when Sentencing a Large Organisation after considering the extent to which a safety management system had been embedded across a number of sites, including the incident site, evidenced by training records and risk management documents in the years immediately preceding the incident.

When preparing an argument for Court, defence advocates have a weather eye on the extent to which the various factors reducing seriousness or reflecting mitigation which are listed in the Sentencing Guideline are present in the case. For those who have worked with a duty-holder from the time of an incident, there may have been opportunities to focus on achieving some of these to a greater extent than for advocates who are instructed immediately before a trial or a sentencing exercise.

By way of reminder, the mitigating factors listed in the Guideline which a Court should consider before finalising the penalty imposed include:

- evidence of steps taken voluntarily to remedy a problem;
- high level of co-operation with the investigation, beyond that which is reasonably expected;
- good health and safety record;
- effective health and safety procedures in place; and
- acceptance of responsibility.

The purpose of this article is to ask some of the leading safety lawyers in the country what they think a duty-holder can do in the aftermath of a serious or fatal incident in order to "do the right thing" and really emphasise those points of mitigation. Our panel of experts includes David Young, Partner at Eversheds Sutherland (ranked a star UK Safety lawyer in Chambers Legal Directory); Stephen Hockman QC, Head of Chambers at 6 Pump Court; Keith Morton QC, Head of Chambers at Temple Garden Chambers; John Cooper QC of Crown Office Chambers; Gerard Forlin QC of Cornerstone Barristers; Jason Pitter QC of New Park Court Chambers and Peter Smith of Deans Court Chambers.

Many companies are more concerned about the negative effect a conviction may have on publicity than they are on the size of a monetary fine. At the recent 2018 Eversheds Sutherland Health and Safety Summer School, Sarah O'Connor, an award winning investigative journalist from the Financial Times reminded delegates that the most interesting stories "are where there is a real human element, where the public need to know that a company isn't all it portrays itself to be. Those are the stories where we want to delve deeper and understand what's gone wrong."

Many advocates rely on industry awards and a good safety track record as reasons to reduce culpability – that the facts of the case for which the company is before the court for are "rare" – so we asked the panel:

How does the way in which a company is perceived before an incident impact on the extent of regulatory scrutiny? (i.e. if a company is perceived to be a "good" corporate citizen with a stellar reputation do they have a less rigorous external investigation?)

Hockman QC

I would say that whilst on the one hand it will of course help any business to be perceived as a good corporate citizen and to have a stellar reputation, I am doubtful whether, if an incident has occurred, that business can reasonably expect any external investigation to be less rigorous. I think the purpose of maintaining good health and safety practices, and a good relationship with any relevant regulator, is to minimise the risk of such an incident occurring, rather than to achieve any special treatment if and when it does. No doubt it can also be said however that if health and safety matters have been properly attended to, a rigorous external investigation is likely to lead to a much less stringent outcome.

Forlin QC

I do not think having a "good" reputation effects directly the commencement or extent of any external Investigation – but it tends to greatly assist when before a Court and can have a major impact on Sentencing. The opposite is of course true as a "Bad Character" in the form of previous convictions or enforcement action can massively influence any Trial or subsequent Sentencing process.

On a separate issue – I am aware that certain major Industry players feel that it is **more likely** that they will be investigated than if they were smaller in size and reputation as they perceive they will be exemplars and act as a deterrent for others in a similar Industry or sphere. They also think they are seen as "being good for the costs" in the event of conviction, guilty plea or Fees for Intervention.

Cooper QC

The Regulator will react to the nature of incident regardless of the reputation of a corporation. In my view a "*stellar reputation*" for a high level of safety management will help during the currency of on investigation in that there may be a less aggressive approach and an awareness that generic documentation is likely to be in order. However, the outcome of any investigation is unlikely to be influenced by an historic level of good safety management.

Morton QC

Almost every company I have ever represented is "*good*". I rather doubt that the general perception of a company has any significant bearing on the extent of an investigation. Certainly, it does not prevent investigation and prosecution of large companies which are objectively good and at the leading edge of devising and implementing safe working practices (large construction companies come to mind). That is so even where the immediate cause of an accident is acts or omissions of an individual contrary to training and established methods of working (on the basis, for example, that it is foreseeable people will act contrary to instructions). However, I am confident that judges and juries may be more easily swayed in favour of organisations that people in general are well disposed to because they are perceived to be "good" companies in the public consciousness, even though they are very large commercial organisations.

Young

In my experience there is no correlation between an organisation with a "*good*" reputation and the rigour of an external investigation, nor should there be. The place for a good reputation to be considered is as part of the public interest test once the regulator has satisfied the evidential test. Usually, however, good reputation ends up as part of the mitigation and is only a factor in sentencing.

Pitter QC

Whether or not a failing is truly "*isolated*", whether as against general reputation, previous health and safety history or current working practices is one of the main considerations at each of the key stages of investigation, prosecution and sentence. However, it will always be secondary to the nature and seriousness of any breach, particularly in the eyes of investigators. That does not erode its significance. Therefore, whilst a "*good*" corporate citizen, perceived generally in a positive light, may attract a degree of "*goodwill*", particularly during sentence, that is limited unless it is allied with a good reputation so far as health and safety is concerned.

Smith

In terms of how an organisation is regarded before an incident can cut both ways. Simply because an organisation is regarded as having a corporate moral compass, and a positive character does not deter a full and detailed investigation into all potential "*risk*" bearing aspects of a business. Indeed, much can depend on the particular inspector and ultimately those who are instructed to represent them. Unfortunately, a form of "grandstanding" and scalp taking is still present, though less obvious today.

Having said that, with a "*good corporate citizen*" there may be other reasons as to why a more thorough investigation is required. Hitherto, sound practices and procedures can lead to complacency. We know that not only has there to be devised a safe system of work, and all which that entails, but the responsible organisation has to ensure that the system is being adhered to in every respect. This is a feature which we have all witnessed where a reputable company lets itself down. The corporate reputation pre-incident is vital however, as the thread to run through any mitigation.

We next turn to the question of victim support; in an age in which all stakeholders have a voice in the criminal process, we asked:

How does the manner in which an employer deals with the victim or, in the worst cases, the family of the deceased impact on the way a case is disposed of by the Court?

Forlin QC

Being genuine, sensitive, timely and pragmatic is crucial for legal, reputational and some would say moral reasons. The immediate approach taken by a Defendant in the aftermath of an incident or near miss often dictates the tone of all future proceedings including Civil, Criminal and the Inquest.

Further, in my experience, Defendants often want to do the "*right*" thing but are uncertain what and when to do something and how it will be perceived by others. This issue needs to be very carefully thought through by both the Defendants and their legal advisors. The bereaved and injured also have the opportunity to produce impact statements before the court. These Statements are taken by the Regulators.

Hockman QC

I have found that these issues undoubtedly do make a difference in the sentencing process, even though they may not be decisive. In my experience, judges, especially High Court judges, who deal with these cases are extremely sensitive to the feelings of the victim's family, who are likely to be present in court. I remember one "fatal" case before a High Court judge in which I embarked upon a line of mitigation, comparing the case under consideration with another case which I suggested (on valid grounds) was more serious, but rapidly abandoned this line of argument on noticing the judge's reaction (which I inferred from her facial expression even before she said anything)! No doubt she could see how the family were reacting to this which I from my vantage point could not.

Cooper QC

This is a critical area. A good corporation will, in any event, wish to treat the victim/family with the greatest respect and understanding. A good relationship with the victim/family can restrain an otherwise more vocal prosecutor and will reflect well with the way the case is run and the judge's awareness of the company's approach. In rare cases it may impact on whether there is a prosecution at all. The converse of the above is also true. A poor or unnecessarily challenging approach to a victim/family can have serious consequences following a conviction.

Young

If the employer engages as much and as positively as it is allowed by the victim or the family it does seem to weigh in the balance positively upon sentencing. Why would you not, as an employer, try to behave well after a workplace accident? In my experience employers do sometimes trip up here and "*freeze*". Most explain it by reference to their insurers who will be dealing with any compensation claim but that is a misapprehension (that the employer cannot engage). In some cases, too, the use of Victim Personal Statements seems to encourage criticism of an employer and the HSE can appear complicit in that.

Morton QC

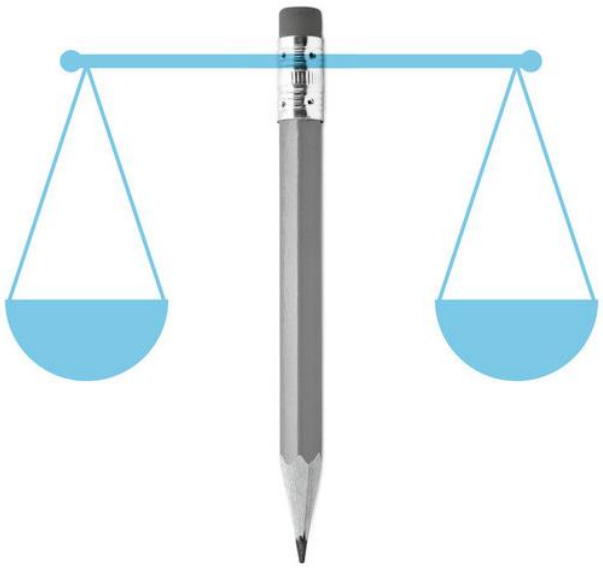
Most prosecutors recognise the sensitivity faced by a defendant company in dealing with victims and families. Some want no contact with the defendant. Where the victim or family reject approaches or otherwise make clear an approach is not welcome, this should be recorded in case it is later sought to present the defendant in a poor and uncaring light. Where, however, a company behaves badly this will be reflected in way the case is presented or may well be raised by the judge. In a recent case of mine the family's victim statements set out a series of criticisms about the way they had been treated and the Judge began the hearing by asking me to address him on each allegation made. In that case there were good answers, but I have no doubt that had there not been that would have been reflected in both the sentence and the sentencing remarks.

Pitter QC

A word on the approach to victims and their families. It is often not given due consideration. A compassionate approach is demonstrative of the appropriate attitude to health and safety and protecting those affected by a Company's activities and can only assist when consideration is given to the approach to take it.

Smith

Dealing with victims and their families can be a delicate matter. Of course, the organisation who assist the victim and the family will benefit. The prosecution cannot go behind facts such as maintaining full pay, offering rehabilitation, keeping in contact with the victim and working with the Occupational Health Team if there is one. A real feature of mitigation which is linked concerns an admission of primary liability in any civil litigation to ease family concerns as to damages under various heads. Being proactive can prove positive and be reflected in reducing a starting point.



One of the places where a Defendant can potentially influence the size of a fine imposed is to demonstrate that appropriate measures have been taken post incident to stop the same thing happening again. If therefore seemed appropriate to ask the panel:

What have you seen as the best mitigation under the heading in the Guideline of "steps taken voluntarily to remedy a problem"?

Cooper QC

This is a tricky area. Prosecutors regularly rely on steps taken after an accident as assumed proof of the fact that the same steps should have been taken before the accident. Many corporations conduct extensive reviews post accident and put in place steps that are not necessary and are unrelated to the underlying cause of the accident so as to be seen to be reacting to the accident. I regard this as an error. The explanation to a jury or a judge that these superfluous steps should only be seen in the context of the accident is often disregarded. If the steps are not required why bother with them? The best mitigation for voluntary steps is to address obvious accident related problems before any notice is served, if that is possible. Another means is to engage the views of a trade body and to engage in a wider debate as to what the industry should be doing.

Hockman QC

I recall a recent case in which I acted for an energy company following an incident on-site. The company had always liaised effectively with the regulator and did so immediately after the incident, introducing a range of additional measures/system changes in order to eliminate the risk of recurrence. This proved to have been a wise course, since I was then able to persuade a District Judge to deal with the case at his level (contrary to the Prosecution argument that the case should be transferred to the Crown Court) and to impose a fine which was approximately 50% of the figure which I had advised was likely!

Young

Sometimes it can be pretty obvious – replace some equipment, improve traffic routes, add protective measures. Nor does it follow that identifying improvements that can be made before the HSE has finished its investigation is evidence in itself of a prior breach (it will depend upon the facts). For me, examples that speak to an organisation's culture might include communicating about what happened with all staff, championing an issue within that particular industry or to a trade body, introducing new or renewed training and – critically – better monitoring. Too many organisations are not good enough at record keeping about these things, whether in minutes or registers or online. Too often time is spent communicating about the wrong things and emails provide a rich source of evidence which dilutes the very conduct the organisation wishes to rely on in mitigation.

Pitter QC

Where there is that combination, there can be greater traction especially in the consideration of the less significant breaches that may be capable of being managed without the need for prosecution or other enforcement action. In those cases, the need for such action may be unnecessary, eg where there are no lessons to be learned or the breach is not such that a message needs to be sent out. Therefore, having relevant records and material readily available and updated to demonstrate such good working practices at the inception of an investigation can have a positive knock effect for the future approach of the investigator and the attitude to any potential prosecution (and of course future prosecutions). Even in those cases where there is a prosecution this may impact on the attitude taken to any pleas, bases of plea, mitigation and subsequent positioning within the Sentencing Guidelines. The financial implications can therefore be significant. Similar considerations apply where significant steps are taken to remediate a failing, especially where that is undertaken voluntarily. The best examples are where a Company has taken steps to not only improve its own safety but is active within the industry to improve safety standards or taken action beyond what is required. That is all the more so where the efforts are not mere reaction to an identified failing.

Morton QC

A short bulleted list:

- Going beyond rectifying the immediate cause.
- Undertaking root cause analysis and actioning findings.
- Reflecting learning across the whole company.
- Taking steps to enable learning to be shared across the industry as a whole.

Forlin QC

Depending on the facts, in most cases the earlier that voluntary steps are taken (and evidenced) in the aftermath of an Incident – particularly if undertaken before any prompting or direction by the Regulators – the more powerful the influence on the Sentencing Judge:

- Also full scale root cause investigation and, if necessary changes to be made
- Re risk assessments
- Real attempts to positively influence the whole sector/Industry.

Smith

The best outcomes involve a wholesale reappraisal of all practices and procedures including training, retraining and amendments where necessary. Involving the shop floor so to speak and any representatives as well as any necessary outside expertise can also go a long way. This is best undertaken ahead of, or in conjunction with any Notices which may be served. It is more difficult to do so ahead of a Prohibition Notice for example. Further, disclosing the time and money spent on such steps can add to the force of mitigation in this regard.

In my view, demonstrating that a risk(s) has been identified and steps taken to deal with it shows that thought has gone into health and safety. Needless to say, certain industries are more heavily regulated than others, and dedicated teams in the large or very large organisations tend to keep on top, though as is often expressed: accidents can happen even in the very best run homes.

A final question:

How does a company's reputation assist it in demonstrating a good health and safety record?

Young

Put simply, not at all. A good health and safety record speaks for itself though it may of course contribute to an organisation's reputation, and I would always argue that health and safety performance and commitment should be a key test when it comes to reputation. The courts are by now well-used to interrogating company accounts and more to get under the skin of what the organisation is really like. So it is the health and safety record that contributes to the reputation, not the other way around.

Smith

Reputation is important, and even with the most respected organisations enforcement is inevitable. The human face, human factors, and the concatenation of circumstances applicable, are sometimes such as to make the task of maintaining reputation difficult, but the "*good corporate citizen*" character can still be maintained.

Hockman QC

I am not sure that "*reputation*" in itself helps to demonstrate a good health and safety record, though it may assist the company in obtaining testimonials from customers and others which can be used to some purpose in litigation.

Cooper QC

In a sense these two aspects are mutually related. The reputation for mitigation purposes is forged on a good safety record. This is demonstrated not only the quality of the RAMS/SOPS and paperwork but awards from ROSPA and industry. Increasingly an ability to demonstrate a good relationship with the community by charity works and support of local initiatives appears to find significant favour with local courts.

Forlin QC

A "good" safety and general Corporate Governance record capable of being evidenced and put into some sort of context with regard to the norm in the sector – for example lost time injuries in the construction sector. Further, the Safety and Management improvements made across the entire Organisation – and not just the specific activity sphere in which the incident occurred.

Previous and current awards play a part as does other general Mitigation.

Morton QC

I don't really think it does. It would certainly not be safe to assume a Judge will accept a good health and safety record simply on the basis of reputation and impression. I always advise seeking to demonstrate a good health and safety record objectively. This can be done by reference to, for example, safety related awards and statistics such as lost time incidents, RIDDOR reports, near miss reports. Where possible these should ideally be presented favourably in the context of industry averages. Presentationally, this aspect of mitigation should flow naturally after establishing a good system for the management of health and safety generally.

What does the practitioner learn from this extensive consideration of the appropriate way to express contrition in the Sentencing exercise? It is wise to reflect on the quote with which this article opens – when apologising, it is important not to try and excuse any failures. An organisation is judged not by any stellar reputation it may have held before an incident but rather by the human response it makes to accepting responsibility, dealing properly with victims and taking appropriate steps to ensure that a similar event will not happen again. Talking to industry bodies and working to improve safety performance across a wider spectrum are encouraged by our panel. In all instances, it is important to find specialised, experienced lawyers to help you navigate the post incident landscape to protect your brand and minimise financial exposure whilst always doing the right thing by your people. A difficult balancing act…

Paul Verrico and David Young are both partners in the Eversheds Sutherland health and safety team, independently ranked in the legal directories as a leading practice.

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