

# Paying the price? Latest on approach to calculating fines in health and social care safety prosecutions

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## Summary

An NHS Trust has recently been fined £333,333 in an HSE prosecution relating to inpatient falls, which are a continuing challenge for health and social care providers.

The Judge has produced detailed [sentencing remarks](#) explaining how the level of fine was decided.

With prosecutions for health and social care safety breaches on the rise, we look at what this tells us about how the Courts might approach fining organisations in future cases.

## What was the case about?

The case involved an NHS Trust which was prosecuted by the HSE for failing to ensure, so far as reasonably practicable, that five of its inpatients were not exposed to health and safety risks associated with falls.

All the patients involved had died not long after they'd had falls, which were found to have been a significant cause or contributory factor of the deaths in four out of the five cases. A breach only needs to be more than a minimal or trivial cause to count as "significant".

The issues with the care included, for example, falls risk not being properly assessed, not providing enhanced/1:1 care when indicated, not positioning high risk patients visibly on the ward, not using high/low beds or mattresses on the floor where needed, inadequate handover and inappropriate use of bed rails.

The Trust pleaded guilty to the charges "on a basis" on 23 June 2016, however was only sentenced on 28 November 2017. The time lag may indicate that the prosecution did not accept the original basis of plea and this has been subject to legal argument in order to agree the basis on which the guilty plea would be entered.

## How did the Court approach level of fine?

The penalty for offences under both the HSE legislation and CQC Regulations is an unlimited fine. In deciding the level of fine for health and safety offences, the Court must follow the sentencing guidelines introduced in February last year.

This is a tariff-based system which takes account of the culpability of the provider, severity of the harm caused/risked and the size of the organisation based on turnover. The guidelines also set out a number of aggravating factors which could increase the level of fine (e.g. cost-cutting at the expense of safety) and mitigating factors which could reduce it (e.g. steps taken to remedy the problem). A guilty plea and whether or not the organisation is a public body may also be taken into account.

The key issues in deciding the appropriate level of fine in this case were:

- *Culpability*

The Court had to decide whether the culpability of the Trust was 'high' or 'medium' within the meaning of the sentencing guidelines.

Despite arguments from the prosecution that culpability was 'high', the Judge accepted the Trust's position that this should be 'medium'. In his view, the failures involved were individual instances rather than 'systemic' problems. Specifically, the Trust did have a falls risk system in place which adhered to recognised standards for falls mitigation in the NHS at the time. The Judge said the Trust also deserved credit for a positive culture of incident reporting and robust root cause analysis.

- *Risk of harm / Was offence significant cause of harm*

What level of harm category did the offending fall into? The Judge found that, although the nature of the risk was high (i.e. death or serious impairment), based on statistical information about falls in all hospital settings, the likelihood of that level of harm occurring was low. However, as the Judge found that the breaches were a significant cause in relation to all but one of the deaths, the harm categorisation moved up from low (Category 3) to medium (Category 2).

#### ○ *Aggravating and mitigating factors*

In terms of aggravating factors, the Judge had regard to the fact that vulnerable individuals had been put at risk (over and above the five patients in the case), plus the Trust had a previous conviction relating to a patient fall.

By way of mitigation, however, the Judge took into account the Trust's self-reporting, early guilty plea and acceptance of responsibility, plus the high level of cooperation shown by Trust staff with all the investigations and the steps taken voluntarily by the Trust to improve its systems.

#### ○ *Financial consequences*

The Judge reminded the Court that "*The objective of prosecutions for health and safety offences in the work place is to achieve a safe environment... A fine needs to be large enough to bring that message home*".

The sentencing guidelines say there should normally be a reduction in the level of fine to take account of the fact that a defendant is a public body, with the level of reduction being at the discretion of the sentencing judge.

With this in mind, the Judge started by considering what the fine would be if the case had involved a private company. For a 'medium' culpability, Category 2 case, the range would be £300,000 to £1.5 million. Taking into account the aggravating/mitigating factors, the starting level of fine if this was a private organisation would have been £1 million.

He then factored in a 1/3rd reduction for the Trust's early guilty plea, taking the figure down to £666,666.

Finally, the Judge further reduced that by 50% to reflect the Trust's financial circumstances and the fact that it is a public health care body, making the final figure £333,333 (to be paid within 18 months given the Trust's cash flow position), plus £130,000 prosecution costs.

## Impact

Whilst every case will turn on its own facts, these detailed sentencing remarks provide a helpful insight into how the Courts might approach sentencing health and social care providers in other HSE or CQC prosecutions going forward.

Based on this, a commitment to learning lessons, improving systems and a positive culture towards incident reporting, combined with an early guilty plea (where sufficient evidence has been disclosed and it is appropriate to do so), should go some way to help reduce levels of fine in such cases.

## How we can help

Our team combines specialist health and social care experience with criminal expertise to provide expert support to public and independent sector providers in the event of HSE or CQC enforcement action, including:

- Advising and supporting providers during criminal investigations by the HSE and CQC and during concurrent investigations by other enforcement authorities and the Coroner;
- Assistance with proactive risk management and compliance reviews;
- Providing 24/7 emergency advice and support following serious incidents, including attendance and advice at Police, HSE and CQC interviews;
- Management of stakeholder relationships during Police, CQC and HSE prosecutions;
- Board level briefing and support on dealing with adverse incidents, health and safety legislation, CQC prosecutions and corporate manslaughter;
- Strategic advice to reduce the risk of prosecution.

If you need advice relating to a CQC or HSE investigation or potential prosecution, please contact [Tracey Longfield](mailto:trlongfield@dacbeachcroft.com) on: +44(0)113 2514922 or [trlongfield@dacbeachcroft.com](mailto:trlongfield@dacbeachcroft.com).

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