

Employer's failure to discharge their statutory duty, in respect of section 25(1)(a) of the Health and Safety at Work (General) (Guernsey) Ordinance, 1987, as amended, specifically the Employer's failure to conduct their undertaking in such a way as to ensure, so far as is reasonably practicable, that persons who are not in their employment who may be affected thus, are not exposed to risks to their health and safety.

[2020]GRC060

**ROYAL COURT
FULL COURT**

13 October 2020

**Before: John Russell Finch, Esq., O.B.E., Lieutenant Bailiff and:
Stephen Murray Jones OBE, Claire Helen Le Pelley, Jonathan Grenfell Hooley,
Steven John Morris, David James Mortimer, Joanne Marie Wyatt,
Alan Stevenson Boyle, David John Robilliard, Marilyn Jasmine King, Jurats.**

THE LAW OFFICERS OF THE CROWN

- v -

STATES TRADING SUPERVISORY BOARD

**Advocate R J Calderwood appeared for the Crown
Advocate G S K Dawes appeared for the Defendant**

LIEUTENANT BAILIFF:

Background

The defendant faces one Count in the Indictment, under Section 25(1)(a) of the Health and Safety at Work (General) (Guernsey) Ordinance, 1987, as amended. This relates to the failure of an employer to discharge their statutory duty to conduct its undertaking in such a way as to ensure, so far as is reasonably practicable, so as to ensure persons who are not in their employment who may be affected thereby, are not exposed to risks to their health and safety. The particulars refer to a failure to provide safe access and egress from a marina pontoon, including suitable and sufficient edge protection. The punishment is a fine. The offence relates to the Victoria Marina and its pontoons where boats are moored and a charge is levied. The Prosecution state that the focus of the case is 'D Pontoon' and its gangway. The issue specified is a gap between the end of the railing at the top of the gangway and the edge protection used for this gap.

The Prosecution facts state that anyone walking near the top of the gangway was exposed to a risk to their health and safety. This was due to insufficient edge protection, especially the two chains, which created an unnecessary and unreasonable risk that someone might fall over them into the Harbour. At low tide, which is the case here, a 5 metre fall onto a granite berm, with an obvious risk of a serious impact injury, which is what took place of course. The offence, it is stressed, is concerned with risk. If someone lost their footing, slipped or stumbled, the chains would be the only barrier at the gap. We have seen all the relevant photographs and it is an aggravating factor that this failure resulted in serious injury to a member of the public.

Facts

The victim was a visiting yacht skipper. Once moored and having paid the fees he went ashore and enjoyed a good evening, including a meal and sufficient alcohol to be intoxicated. Any factual dispute here is not, in

our judgment, material, noting the details of the charge. The victim cannot recall the incident after he fell. He was about to descend the gangway and lost his footing, missed in an attempt to grab the low chain, went over 360° and woke-up in hospital. He was discharged in Southampton 12 days later. The injuries were considerable and serious, on any reasonable view, and the victim could have ended up much worse. Punctured left lung, blood around the right lung, multiple fractured ribs and fractures to the transverse processes of some of his vertebrae in his cervical and thoracic spine, which we are told is not a bony injury affecting the stability of the spine. He suffered considerable discomfort, and almost a year after discharge a further operation was needed. We have heard the distressing details in his victim impact statement.

Once the incident took place and the HSE Inspector visited, the chains were replaced four days after the incident for £899.09, and are now adequate. We note that, in essence, the defendant co-operated, as one would expect, apart from a failure to deliver a written risk assessment. We agree with the Prosecution's view that a competent risk assessment would have identified the risk of falls from gangways as a material risk. The defendant's representative's observations in interview about the risk only being foreseeable after the accident took place are rejected by the Prosecution, and for good reason. We note the formal recording of the defendant's inspections was absent, it had lapsed. The victim's state at the time is material to civil proceedings; the offence is inadequate edge protection to ensure the health and safety of members of the public. This was an ongoing matter.

We note the history of the case, the delay caused by the pandemic and the original 'not guilty' plea put forward. On 1 October it was changed to a 'guilty' plea. We note the conviction on the 3 July 2012 from St Peter Port harbour for a different type of incident, and the service of an Improvement Notice for a commercial area of the defendant's premises on 22 January 2018, which was promptly complied with.

Sentencing Considerations

These cases vary considerably on their facts. There is, understandably, as cases are fortunately infrequent, no local guideline case. In the Ferryspeed case (13 December 2019), the learned Deputy Bailiff referred to the English case of Howe (1999). This Ferryspeed case also alluded to the English Sentencing Council Guidelines and made the point, which we have frequently stated in all sorts of cases, that they are, of course, not binding upon us, but can be helpful in listing mitigating and aggravating factors. As the Deputy Bailiff carefully observed, and we accept: "*The finer detail, however, is in this Court's view inapplicable*". The significant and serious injuries occasioned to the unfortunate victim persisted in a bad way for around a year and he still suffers, as one would expect, from their effects.

As a general principle, a fine should be sufficiently substantial to have a real economic impact which will bring home to managers the need to comply with the legislation. Here we have a public body at fault.

In this case there is evidence of complacency, at least in the reporting of inspections. It is noteworthy that replacement by a safe mechanism took place quickly and cheaply. Each case is different, and, in the customary way, needs to be assessed on its own facts. The risk applied to all users, whether sober or not, users vary in their state and abilities. We note the 2012 case (on different facts) resulted in a fine of £10,000. There will no doubt be an award in any civil proceedings here, but that is for another day and different legal considerations apply. The offending here would suggest an initial penalty of around £30,000. Other cases we have heard about of course, also depend on their own facts, but we intend to proceed in a manner not inconsistent with them.

Mitigation

We give effective credit for the 'guilty' plea, which saved valuable court time. We note the defect was swiftly remedied, also to the defendant's credit. We have listened carefully to the words which have fallen from the lips of the very experienced Advocate for the defence and taken them, so far as just, on board. Noting all of this we give a one-third discount, erring, if at all, on the side of mercy. This takes into account all we have heard in mitigation, the ultimate 'guilty' plea and what we have read, including the defence report.

Sentence

This was a legal requirement “*so far as was reasonably practicable*”. Health and Safety does not exist as a bureaucratic imposition, but to protect people who might be affected. We stress again, “*so far as is reasonably practicable*”. The consequences here will last, it appears, for quite a while with the victim. We again stress that the accident caused the investigation, but that the duty was owed to, not just the victim, but to all persons not employed by the defendant. Taking everything fairly into account and noting that there should be an element of deterrence in Guernsey, and we sentence on local considerations, the fine is one of £20,000 to be paid within 7 days.

**John Russell Finch, Esq., O.B.E.,
Lieutenant Bailiff**

13 October 2020