271.19a ***Factoring in periods company made a loss***

R v Whirlpool Appliances Ltd 2017 EWCA Crim 2186, 2018 1 Cr App R (S) 44 (p 325) LCJ D pleaded to breaching their section 3 Health and Safety duties. The turnover of the company was about £700m. In 2014, there was a profit of about £25m. In 2015, there was a loss of about £165m. para 13 The defence submitted that in addition to turnover, the broader financial health of the organisation could [be taken] into account at Step 2 of the guideline. Held. We do not agree. [That] factor comes into play at Step 3, where the court 'checks whether the proposed fine based on turnover is proportionate to the overall means of the offender'. The Judge did not expressly consider Step 3. That step requires the court to consider the financial circumstances of the offender and the Judge decided not to do so. There is a significant difference between an organisation trading on wafer-thin margins and another, perhaps a professional services company where the profits shared between partners or shareholders is a substantial percentage of turnover. An organisation with a consistent recent history of losses is likely to be treated differently from one with consistent profitability. So too, an organisation where the directors and senior management are very handsomely paid when compared to turnover is likely to attract a higher penalty than one where the converse is the case. In any event, the loss here was due to special items [and did not reflect the financial health of the company].

271.22a ***Death is caused***

R v Whirlpool Appliances Ltd 2017 EWCA Crim 2186, 2018 1 Cr App R (S) 44 (p 325) LCJ D pleaded to breaching their section 3 Health and Safety duties. V, a fire alarm contractor, visited the Indesit factory in Bristol. He was due to work on an elevated working platform near an overhead conveyor system. Two days before the incident, V and a company official discussed the work and they 'walked through it'1. On the day, V began work and then left the site for a cup of coffee. He returned and operatives elsewhere on the site who were doing maintenance work, were unaware of that. They activated the overhead conveyor system which had baskets on it. One of them hit V's platform and V fell. He died 10 days later. D co-operated fully with the investigation process. The turnover of the company was about £700m. In 2014, there was a profit of about £25m. In 2015, there was a loss of about £165m. The Judge found that: a) there were lookout policies, b) policies for working contractors, c) the risk to V had not been properly assessed and in particular there was no line of sight between the maintenance workers and V, d) D had a culture of a commitment to safe systems and the employees were engaged in it, e) D had an exemplary health and safety record, f) none of the guideline aggravating factors were present, g) every guideline mitigating factor was present and h) there was low culpability. He found it was a Category 3A case. The Judge started at £1.2m and reduced that by £150,000 because of D's good character and remorse. With plea, he fined D £700,000. Held. It was a Category 3 case. para 30 There was no question of exposing other workers or members of the public to harm, but the systemic failings were a significant cause of harm, indeed the most serious harm imaginable, namely death. That would justify an upward movement within the category range or into the next harm category. Were the appellant a £50 million organisation the guideline recognises that the fact of death would justify a substantial move away from the £35,000 starting point to the top of the category range (£140,000) or beyond. A consistent feature of sentencing policy in recent years, reflected both in statute and judgments of this court, has been to treat the fact of death as something that substantially increases a sentence, as required by the second stage of the assessment of harm at Step 1. Without more, we consider that the fact of death would justify a move not only into the next category but to the top of the next category range, suggesting a starting point of perhaps £250,000. With the turnover we move to

1 Perhaps the Court meant either 'walked the route' or 'worked the plans out'.

£½m and with the strong mitigation to £450,000. We then step back and consider that will have a real economic impact. Next, we give a full plea discount, so **£300,000**.

Note: There were very few personnel on site. It seems that the dangers were obvious and as the maintenance staff could not see the alarm contractor, the conveyor system should not have been moved whilst the contractor was on site. The fine was piffling for a company with assets of over £546m. It was significantly less than the annual pay for the highest paid director. Had there been a typical regulatory failure rather than a death, the fine would have been higher. Clearly the need for sentences to reflect the taking of a life by significant fines is stated by the Court of Appeal but not applied here. After considering the turnover of D, the Judge's £1.2m figure looks right. Fines are meant to make the shareholders notice, not laugh. Ed.

271.24b ***Loss-making companies***

R v Tata Steel 2017 EWCA Crim 704, 2 Cr App R (S) 29 (p 233) The defendant company, T, appealed their fines for breaches of Health and Safety offences in one of which, offence 2, a worker lost part of their finger. For that offence the culpability was high and the Judge made it Category 2B. In 2015, T had a turnover of £4.17m and made a loss of £851m with restructuring and impairment costs of £14m. It was part of an even larger company. The Judge took a starting point of £1.1m which is set for companies with turnovers of £50m+. To achieve a proportionate starting point, he moved to £2.4m. Next, he moved to £2.75 to reflect the aggravating factors. With the plea he arrived at £1.8m. Held. The guideline marked a new dawn. para 32 The fine had to have a 'real economic impact' and bring home to the management and shareholders the need to comply with Health and Safety legislation. If it was Category 2B the Judge's approach at arriving at £2.4m could not be criticised. However, a small profit margin relative to turnover or a loss-making business may warrant a downward adjustment. Financial circumstances should be examined in the round to assess the economic realities of the organisation. The Judge was entitled to take into account the fact that the losses would be borne by the parent company. Yet, we cannot fault the decision not to make a downward adjustment because of T's losses. However, it was a Category 3 offence. From that starting point we move to Category 2 [presumably because of the size of the company] and then move up to £2m [presumably for the aggravating factors] and with the full discount and rounding the figure down we arrive for offence 2 at £1.315m. [The details of the other appeal points are not listed as they are fact-specific.]

271.25a ***Large companies with a turnover of £50m+***

R v Tata Steel 2017 EWCA Crim 704, 2 Cr App R (S) 29 (p 233) The defendant company, T, appealed their fines for breaches of Health and Safety offences in one of which, offence 2, a worker lost part of their finger. For that offence the culpability was high and the Judge made it Category 2B. In 2015, T had a turnover of £4.17m and made a loss of £851m with restructuring and impairment costs of £14m. It was part of an even larger company. The Judge took a starting point of £1.1m which the guideline sets for companies with turnovers of £50m+. To achieve a proportionate starting point, he moved to £2.4m. Next, he moved to £2.75m to reflect the aggravating factors. With the plea he arrived at £1.8m. Held. The guideline marked a new dawn. para 32 The fine had to have a 'real economic impact' and bring home to the management and shareholders the need to comply with Health and Safety legislation. If it was Category 2B, the Judge's approach at arriving at £2.4m could not be criticised. However, a small profit margin relative to turnover or a loss-making business may warrant a downward adjustment. Financial circumstances should be examined in the round to assess the economic realities of the organisation. The Judge was entitled to take into account the fact that the losses would be borne by the parent company. Yet, we cannot fault the decision not to make a downward adjustment because of T's losses. However, it was a Category 3 offence. From that starting point we move to Category 2 [presumably because of the size of the company] and then move up to £2m [presumably for the aggravating factors] and with the full discount and rounding the figure down we arrive for offence 2 at £1.315m.