Briefing

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Health and Safety reform - the (not very proportionate) Elephant in the room

Hazard versus risk approaches - the significance

In safety law there is a fundamental schism between a hazard based or a risk viewpoint. All practitioners agree on, and are driving for, more effective safety management. However, the philosophical difference is critical. A hazard based approach focuses on potential for harm and not its likelihood. However, risk has two elements - impact (hazard) and probability. A hazard (whether a cliff edge, a diving board, a road crossing - or even a conker) can always be ever more rigorously mitigated if looked at individually. Risk and probability should inform whether it needs to be.

Nonetheless, some prosecutions are still driven by a hazard based philosophy. A historic castle walkway that had seen many thousands of feet pass safely could - of course - be more cautiously guarded. A conviction and £350K fine followed in 2012 when it was not. Probability arguments rarely carry weight with prosecutors or courts.

Reform, proportionality and the Elephant

All current messaging in Health and Safety reform emphasises proportionality. That is welcome. However, a fundamental issue remains unspoken and unresolved. It underpins the differing philosophies. It shapes what is being done (and, critically, what is not being done). However, any attempted debate on it is avoided or swiftly shut down.

So what is that fundamental issue? Why is it not being debated? And what is its impact? The issue is the longstanding framing of reasonable practicability by reference to a "gross disproportion" test and its logical corollary - the artificial loading against the relevance of probability and reasonable foreseeability in safety management.

Despite being the keystone of UK Health and Safety law, reasonable practicability/ALARP/SFAIRP has no statutory definition. That gap has been filled by regulatory guidance. It is not logical or possible to have a genuinely proportionate approach to Health and Safety law and enforcement whilst maintaining that the legal test is one of requiring a duty holder to do everything except that which is grossly disproportionate. By definition that additional word "grossly" - if it were to be the law - would require a duty holder to go the extra step - the very step beyond that which is proportionate.

When was the Elephant born?

The gross disproportion test has since 1988 been (and remains) the mantra in regulatory guidance on reasonable practicability. It is a concept constructed upon a single passing sentence in one 1949 personal injury case (Edwards v the National Coal Board). The sentence was evolved and moulded into a precautionary safety doctrine when the HSE was asked by the Sizewell B nuclear reactor planning inquiry to give it some guidance on what the HSE thought "reasonable practicability" means. Faced with a clean sheet of paper and a decision on a nuclear reactor it is unsurprising - and arguably commendable - that the HSE looked for (as the core of its Tolerability of Risk model) a phrase that embodied a "default to safe" or precautionary approach. A phrase which confirmed that proportionate action of itself was not quite enough.

The concept once constructed was, however, subsequently rolled out into general HSE policy guidance applied beyond the nuclear or industrial context for which it was created. The HSWA and gross disproportion spread into every aspect of public safety and public life. Robens had made it clear in his report that it was not his intention that the HSWA should ever apply across society. It was industrial legislation.

The unintended consequence of that sequence of events is the root cause of uncertainty. That uncertainty sometimes drives over-reaction and over-compliance. That in turn spawns the risible "myths" that now need to be "busted" to restore the reputation of Health and Safety.

We do need to bust the myths. But let us acknowledge where they arose - if we are to stop them in the future.

The Elephant's walk

A regulatory gross disproportion test involves prosecutors contending - at the point when somebody may be fined or (since 2008) sent to prison - that merely good/proportionate action was not necessarily good enough. The law, it is argued, requires more. Further, the accused - uniquely in English law - also faces a reverse burden of proof. They must effectively prove that they went the extra mile, rather than the prosecutor proving that they did not.

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Clearly many defendants never even went the first mile - and are rightly convicted and punished. However, in some other cases reasonable precautions were in place - but a possible but rather unlikely event happened.

In that situation the tilting of the playing field then really matters. It matters to the person convicted and it matters in the resulting messages that it sends across society on what Health and Safety law requires.

Gross disproportion is the formulation which prosecutors put to judges, to magistrates and to juries. It is also the basis on which the UK defended in 2007 an attempt by the European Commission to hold the UK in breach of the EU Safety Framework Directive.

The European Commission (itself coming firmly from a hazard based starting point) argued that a reasonable practicability test was not permitted under EU law and safety must be absolute. The gross disproportion test, and the consequent argument that UK safety law was heavily loaded in order to default to all available preventative action, was the ground upon which the UK and the HSE stood and successfully defended that EU infraction challenge.

However, in 2011 the UK Supreme Court (in Baker v Quantum) confirmed that gross disproportion has never in fact been the legal test under the HSWA. The Supreme Court Judge giving the lead judgment said (overruling the Court of Appeal who had supported the gross disproportion approach):

"A further aspect… is the suggestion that "there must be at least a substantial disproportion" before the desirability of taking precautions can be outweighed by other considerations. This theme was developed… on the basis of two cases prior to Marshall v Gotham [one of those cases was Edwards v NCB - the source of the sentence used as the keystone of regulatory ALARP guidance]. ***But it represents, in my view, an unjustified gloss on the statutory wording which requires the employer simply to show that he did all that was reasonably practicable"***

Why does this matter?

This question - the fundamental issues of "how safe is safe enough" and "what exactly does reasonable practicability require" were excluded from the terms of reference of the Young and Lofstedt reviews.

Separate heavyweight Select Committees of the Commons and the Lords had previously looked at this issue before and each concluded that there was a problem with gross disproportion. They each firmly recommended that it be analysed and corrected. Each recommendation was refused.

HSE's current proportionality initiatives focus on the hazard component of risk (correctly encouraging duty holders not to fixate on minor impacts) and on the need for sensible enforcement. Both are right and welcome. However there is little or no policy stance on probability, nor on the legal test used to prosecute people.

Some prosecutions are still brought based on hazard. HSE and other prosecutors still rely upon "gross disproportion" in persuading courts to convict, fine and potentially imprison.

Looking at it another way, Health and Safety prosecutors argue that an action that is not necessarily negligent in civil law can still be a criminal offence.

That approach is inconsistent with a policy agenda to promote proportionality.

Why is the Elephant not being discussed?

No one is saying explicitly. The evidence and quiet feedback indicates two reasons.

The first is Europe. For all of its ambiguities an approach based on reasonable practicability is a more flexible and effective approach than a prescriptive/absolutist approach that reacts flexibly only at enforcement stage.

The massive strides in safety made by the UK over the last 50 years are a testament to the power of the Robens concept. The philosophy is not, however, one that is universally shared by the European Commission or across many EU member states.

Following the 2007 infraction Judgment, there is an apparent concern that bringing the issue into the light risks undermining a successful European Court ruling based on gross disproportion. The fear is of the UK losing the ground that we have secured and at worst being forced into a more restrictive legal approach.

Therefore, say the quiet words of caution, it is better to keep heads down and instead change the mood music on Health and Safety by focusing proportionality initiatives on enforcement and scale of hazard. Try to apply them - as would be logical - to probability as well and we will chance our arm too far. We may not win the debate and who then knows where that might lead.

The second unspoken problem is how a safety regulator can reposition on the legal test without confirming that each piece of regulatory ALARP guidance since 1988 has not been ideal.

Lord Robens himself quoted Bagehot at the Introduction to his report:

"There is no greater pain to human nature than the pain of a new idea".

He may or may not have appreciated the current irony.

Options - do we acknowledge the Elephant?

One option is indeed to continue to pretend that the Elephant does not exist. The voices of diplomacy and realpolitik may be right - might we end up with a fully blown hazard based philosophy imposed through EU legal mechanisms if we try to win acceptance of a genuinely risk based approach?

However, before we accept that proposition we need to weigh it against the impact that will continue by maintaining a fundamental inconsistency at the heart of our health and safety system.

That inconsistency undermines safety as well as economic and business efficiency. Lack of clarity inevitably means that some will over-comply or become risk averse. Some others will see the law as confusing or unreasonable and so under-comply. That can generate bad safety outcomes and bad economic outcomes.

It also creates unfairness. All those who are reckless or neglect the safety of others rightly deserve punishment - under any legal test. However the current "fudge" manifests itself at the point of prosecution. If a particular prosecution does involve an unlikely event and a defendant whose actions sit in the "grey zone" between what is proportionate and that which is grossly disproportionate, we potentially criminalise the conscientious but unlucky. That has an impact - upon the person we convict, upon society and upon perceptions of the law.

Uniquely in history we have a current proposal for a renegotiation on EU issues to precede a national referendum. There is an agenda to discuss with the European Commission and our European partners many different points of importance - financial, regulatory, Social Chapter, free movement and benefits, economic migration and many others.

If we do have divergent views between risk and hazard based philosophies now is the time to address those. If we choose not to do so because of fear of what may result from the discussion (possibly tinged with a reluctance to admit that the established approach was lore rather than law) then that is one policy and political choice. It is, however, not a choice to be made without debate nor without acknowledging the serious negative safety and economic impacts that result from that choice.

It is time to name the Elephant.

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