Sensible Safety

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Sensible Risk Management

Political interest in the proportionality of risk control measures has re-surfaced in the UK after a long period where a precautionary approach was automatically assumed. Discussants seem to focus on the opportunity cost of excessive regulation. In our view, efforts to re-focus safety work on significant risks will depend very strongly on the lead set by the courts. To that extent, insurers will be involved in this policy initiative.

In our view, excessive risk aversion has the effect of de-skilling those who encounter risk and reduces the reliance on competence and experience when managing risk. There are circumstances where good judgement should not be relied upon but this should not be a general rule; if it was the general rule it may increase risk through risk incompetence.

Risk aversion also provides evidence, through absence, of failings in the duty of care. That is, if the regulator or industry norm provides a requirement/expectation for a certain degree of protection, or the appearance thereof, then any lack could be cited as evidence of a breach of duty. For example failure to offer eyesight tests for computer users could be used as evidence of breach of duty even though there is no evidence whatever that use of computers damages eyesight. Employer payment for such tests is standard practice. Fortunately UK courts usually require materiality of the alleged breach to be established but it seems this is not widely understood in society and occasionally the courts prefer hearsay to hard evidence e.g. fibromyalgia can be caused by repetitive hand movements.

In our view, HSC attempts to deal with the issue of proportionality could have an influence on liability risk exposures. Regulatory interventions should be proportionate and will influence the courts.

In the paper referred to here, HSC they set out their aims:

PRINCIPLES OF SENSIBLE RISK MANAGEMENT

1. Sensible risk management **IS** about:

   ✓ Ensuring that workers and citizens are properly protected
   ✓ Providing overall benefit to society by balancing benefits and risks, with a focus on controlling real risks – either those which arise most often or those with the most serious consequences
   ✓ Enabling innovation and learning not stifling them
   ✓ Ensuring that those who create risks manage them responsibly and understand that failure to manage serious risks responsibly is likely to lead to robust action
   ✓Enabling individuals to understand that as well as the right to protection, they also have to exercise responsibility

2. Sensible risk management **IS NOT** about:

   ☒ Creating a totally risk free society
   ☒ Generating useless paperwork mountains
   ☒ Scaring people by exaggerating or publicising trivial risks
   ☒ Stopping important recreational and learning activities for individuals where the risks are managed
   ☒ Reducing protection of people from risks that cause real harm and suffering

Comment
HSC are still awaiting feedback from Council; they don't want adoption of these principles to lead to unforeseen problems.

It is a pity that the word 'reasonable' doesn't appear in any of these statements. The statement about balancing benefits and risks may be an attempt to define 'reasonable'. [The EU has taken steps to see if they can help the UK regulator not to rely on the phrase 'reasonably practicable' in their work towards managing risks.]

To recast health and safety work as being about enabling, as suggested above, might be helpful. If it succeeds, health and safety work would be perceived very differently from its current position; obstructive and politicised. As an enabler, health and safety work may be absorbed into regular management as part of achieving business objectives, this position would help ensure that it remains reasonable in the context of local decision-making. The question then is whether or not a Judge would recognise and support decisions made in full conscience and in response to local factors as reasonable or would prefer instead a generic test, or even, one prescribed by the regulator. In principle, and from precedents, both options are available.

The courts will be hugely influential in the success of this HSC initiative.

If there is a genuine interest in risk management proportionality it should be expected that politicians would find a way to encourage insurers to defend cases where the alleged breach of duty was clearly immaterial to the harm done or where the action taken was clearly reasonable and proportionate.

The new Workplace Exposure Limits (WEL) will provide a test of the interpretation of the word 'reasonable'. The WEL approach aims to get risk generators to adopt [8 generic and well described practices] good practice and yet also sets out clear objective limits on what would be regarded as acceptable exposures.

> *In addition to the need to control substances according to good practice, it is also a legal requirement that the WEL should not be exceeded.* *CD208 (2006)*

Which of these standards would actually be applied in testing whether or not a breach of duty had occurred remains to be seen. Civil courts may choose another method of assessing breach but eventually they will be faced with a choice like the one referred to here. In our view it will be quite common to find that exposures were actually below WEL objective standards and yet the generic guidance would not be applied in full.

The proposed introduction of new WEL values (CD 208 (2006)) cannot be assessed against the principles listed above as no-one has any idea of the harm currently being caused by exposures at the current MEL and OES standards. The hope is that given there is no quantifiable benefit of this change in regulations there will also be no additional costs and no need to ask about proportionality.

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