

Risky Business
Rachel Barnes, March 2007

What are the standards required of professionals and others, whether they work in the construction industry or elsewhere? Is the test for negligence or breach of statutory duty in certain cases becoming less onerous, while that for breach of health and safety legislation becomes tougher? A comparison of the provisions of the Compensation Act 2006 and recent developments in the health and safety field could indicate that the law on negligence and that on safety are pulling in different directions.

Section 1 of the Compensation Act 2006 spells out what may be taken into account by a court in considering a claim in negligence or breach of statutory duty. It says the court may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way; or (b) discourage persons from undertaking functions relating to such an activity.

The government did not apparently think that it was making any difference to the existing law. The purpose seems to have been, in the words of the Department for Constitutional Affairs, to improve awareness of this aspect of the law and help to ensure that normal activities are not prevented because of a fear of litigation and excessively risk-averse behaviour. The section is headed 'Deterrent effect of potential liability'.

Compare this with health and safety legislation, the object of which is to require people to eliminate risks wherever possible. The general principles of prevention enshrined in the Management of Health and Safety at Work Regulations state that the priority is to avoid all risks and then to evaluate those that 'cannot' be avoided. All duty holders under the new CDM regulations will be required to take these principles into account when performing their duties.

The Health and Safety at Work Act imposes a duty on every employer to ensure, so far as is reasonably practicable, the health, safety and welfare of its employees, which, coupled with the fact that the burden is on the employer to prove that it has taken all reasonably practicable measures, amounts to a considerably higher duty than the ordinary one. There is then a similar duty to conduct its undertaking so as not to expose anyone else to risks to their health or safety.

The Court of Appeal has held that the qualifying words, 'so far as is reasonably practicable', mean that the cost of taking measures to remove a risk in relation to the likelihood of the risk eventuating can legitimately be taken into consideration in deciding whether to take those measures (see my article from 13 October 2006).

The Health and Safety Executive is not happy with this. Further, the European commission has applied for a declaration that, in restricting the duty on employers to ensure the safety of workers only to the extent that it is reasonably practicable to do so, the UK is not giving effect to the relevant directive. It argues that the intention of the directive is to make employers subject to a regime of no-fault liability.

In January this year the advocate-general provided an opinion for the European Court of Justice that rejected the commission's argument on no-fault liability. However, he also expressed the view that the duty on employers should be to take whatever steps are 'technically feasible' to eliminate or reduce a risk. He said the concept of what was reasonably practicable, being less rigorous than technical feasibility, was incompatible with the duty laid down by the directive. He also said that the test approved by the English courts involving a cost-benefit analysis, was not permissible under the community rules.

It remains to be seen how matters progress. The directive in question is concerned with employers' duties to their employees. However, safety legislation in the UK has tended to have a broader sweep.

If the UK is obliged to amend the Health and Safety at Work Act to tighten the duty on employers to ensure the health and safety of employees, would it do the same with the duty not to expose any one else to risks to their health and safety? Or will it make a distinction between the duty owed to employees and the duty owed to the public, by having a less demanding standard for the latter?

Any attempt to compartmentalise standards of care would be difficult. If we want a risk-averse culture in one area, we are likely to get it everywhere.

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