HSWA Act: Implications of “grossly disproportionate”

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Murray King

Introduction - HSWA's purpose

- Protecting workers and other parties against harm to their health, safety and welfare by eliminating or minimising risks arising from work
- Highest level of protection as is reasonably practicable

Introduction (2) –HSWA comprehensive scope

- Duties are on a PCBU (person in charge of a business or undertaking)
  - No contracting out; cannot insure against or indemnify
- Duties apply to officers such as partners, directors, CEOs
  - Anyone exercising a significant influence over management of business
  - Does not apply to Ministers of the Crown
  - Nor to advisors
- “Worker” widely defined incl contractors, subcontractors and their workers
- “Workplace” – where work is being carried out or customarily carried out
  - Or where worker goes or likely to go while at work
- Applies to all businesses in transport, including vehicles, ships, trains, and planes – but perhaps not roads

Primary duty

- S 36 (1) - To ensure health and safety, “so far as is reasonably practicable”
- Of workers for the PCBU
- Of workers influenced or directed by the business
- And any one else (s 36(2)): duty not to put their H&S “at risk”.
- And ensure that “anything arising” from the business is without risk to anyone (s 37(1))

What is reasonably practicable

HSWA s 22: Meaning of reasonably practicable

- In this Act, unless the context otherwise requires, *reasonably practicable*, in relation to a duty of a PCBU set out in subpart 2 of Part 2, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—
- **(a)** the likelihood of the hazard or the risk concerned occurring; and
- **(b)** the degree of harm that might result from the hazard or risk; and
- **(c)** what the person concerned knows, or ought reasonably to know, about—
- **(i)** the hazard or risk; and
- **(ii)** ways of eliminating or minimising the risk; and
- **(d)** the availability and suitability of ways to eliminate or minimise the risk; and
- **(e)** after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.
- Compare: Model Work Health and Safety Act (Aust) s 18

Paragraph (e) Translated

- Cost is only a factor after the others
- Benefit of spending the cost is eliminating or minimising the risk
- If not enough benefits of avoiding/reducing the risk, cost in excess of risk benefits might mean you can justifiably not spend the money
- But only if the burden of cost is grossly disproportionate to the benefits
- That is, a PCBU “must implement control measures unless the costs involved are grossly disproportionate to the safety benefits achieved”.
  - UK Office of Road and Rail
- Somewhat opaque formulation

Where does the phrase come from

- Origin: *Edwards v National Coal Board* 1949 (England)
  - Roof cave in in mine, man killed
  - Widow got GBP948 damages, equivalent to the benefits of dealing with the risk; 948 GBP is about $70,000 today
  - ""Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them." (Asquith LJ)
  - This test actually been part of interpreting law under previous HSE Act
    - *DOL v de Spa* (1993)
  - Often quoted, usually emphasising just the first line.

Does the HSWA formulation reflect this?

- Formulation – “including whether costs are grossly disproportionate”
  - Implication that this is the criterion, though not definitive
  - Leaves people working at this level to be conservative to avoid any issue
  - Use in *Edwards*: a remote cap that makes a payment beneath it reasonable; cf use since, and in Act, carries an implication that you have to spend up to it to be safe
- As long as the costs not grossly disproportionate, then should take the action to ameliorate risk

What does “grossly disproportionate” mean

- Not defined in the Act, nor by any judge
- Clearly more than proportionate – which would be where benefits match cost, a BC ratio of 1.
- And not just disproportionate, (maybe BC of 0.5) but grossly so
- Grossly not a word that admits of small differences.
- Any guidance on what it means?

Transport industry interpretations

- Office of National Rail Safety Regulator (Australia)
  - From a UK nuclear industry document
  - Costs should be 2X benefits, or up to 10 X
    - Costs 2 times benefits (BCR 0.5) for public low risk/consequence
    - 3x (BCR 0.33) for workers
    - 10x (BCR 0.1) for public high risk/consequence
- Risk rating influences choice – but good analysis should have taken account of the risk in calculating the benefits
- Andrew Evans in *Research in Transportation Economics* 43 (2013) 137
  - 6x (BCR 0.18) UK Train Protection & Warning System (costs GBP 550m, benefits GBP 99m)
  - 20x (BCR 0.05) for US Positive Train Control (costs $13,205m, benefits $674m)
- Also need take account of uncertainty in the estimates, "professional judgement" (risky for the analyst/firm, so conservative)
- Other industries: scaffolding? tunnels? runways? health? gas? electricity?

Criticism of “grossly disproportionate”

- Evans in evidence to House of Lords Select Committee 2006
  - Agreed with Railway Safety and Standards Board that “if we have correctly weighed the safety benefits … there can be no justification for demanding that [PCBUs] take action disproportionate to the benefits, and even less for the much-quoted requirement that it should be ‘grossly disproportionate’”
- *Edwards* decided in days before sophisticated benefit calculations
  - Reasonable at that time to have BCR less than 1 because then no formal valuations of prevention of fatalities and injury [VPF] and the only financial information was from [low]compensation payments (Evans).
- But that position no longer obtains – no need for “grossly disproportionate” as VPFs adequately count the benefits. VPFs much higher now than then, but the law still requires BCRs much less than 1 (Evans).
- House of Lords committee said that the phrase was “decidedly ambiguous”. There was a danger that ill-defined and ambiguous terms could induce “an excessively cautious attitude to risk.”
- Maybe we need it because we don’t value life highly enough
- Value of Statistical Life (=VPF)
  - Standard NZ way of valuing death and injury (and so risk avoided)
  - Set in 1991 at $2m and only inflated (by average hourly earnings) since. 2015: $4.06m
  - MoT project to review it, but not high priority
  - Political implications? Might change the weighting for safety? Too much spending on safety? View that safety is priceless?

Does it matter?

- Does “grossly disproportionate” in fact reflect society’s value of life, or an adjustment for the undercounting of it?
- No such justification advanced – and in any case better to fix VoSL
- We are valuing safety much higher than any other resource – without any analysis.
- Does this not distort resource allocation on an economy wide basis? If BCR<1, then by definition it distorts.

Competition between transport modes

- Also distorts as between transport modes
- Rail, sea, and air are subject to the HSWA, and thus need to factor in "grossly disproportionate" into their decision making, for investment and operations.
- Commercial use of a vehicle (including a car) is also covered, though apparently not much used in enforcement of HSWA
- But are the roads themselves covered?
- They still make their investment decisions on standard CBA basis, with BC of 1 (or better).
- And also policy decisions – mass and dimension rules

Only a recent development

- In 1990s all modes had to meet requirement of “safety at reasonable cost” where benefits to nation exceeded cost to nation; Land Transport Act 1998
- Was applied to rail making it clear that its safety, created under transport legislation, was subject to this rule rather than HSEA
- The LTA definition was repealed in 2004 and replaced with a much mushier definition (“integrated, safe, responsive, sustainable” system)
- And rail exemption removed by Railways Act 2005 and HSEA applied with full force. Same with HSWA now.
- Road’s safety obligations now even softer (“effective, efficient, and safe system”), and only “target” obligations. *Larner v Solihull MBC* (2001); *Gorringe v Calderdale MBC* (2004)

Are roads subject to HSWA

- Not clear: since rest of economy is largely covered, you might think roads are too.
- They are a product of work
- *DOL v Berryman* 1996: bridge failure, owner not liable. Only transitory use
- *Worksafe v Dept of Corrections* 2016 – *Berryman* doubted: no longer any dependence on how frequently an employee is at a place.
- New Act – very present tense focussed eg workplace, “work is being carried out”.
  - NZ Select Committee: wanted to “make it clear that a workplace does not remain indefinitely, once work has been carried out there.”
  - But “is being” could support a “too transitory” defence
- Road issue may develop many years after construction, too long for a legal nexus?
- Cf manhole and shearing shed – always a place of work even though not ongoing

On the other hand

- Farmers' exemption – not a workplace unless work is taking place, suggests the normal position is that a workplace is always a workplace
- Upstream duties, manufacturers, importers, suppliers, installers
- Especially designers - designers are covered by obligation to ensure what they design is without risks to health and safety
  - can only be forward looking, beyond the design process
  - But confined to the use of their design in a workplace, so question is still is road a workplace
- Johnstone and Tooma on tobacco industry

Overall

- Only weak likelihood that roads are subject to HSWA
  - Protection for non-workers (‘others”) could include road users
  - But definition of workplace is in present tense
  - Still possibility of roading deficiencies contributing to vehicle workplace casualty
  - Capable of supporting a prosecution with respect to a work-use vehicle
  - Ministerial exemption from HSWA as officers.
- But would depend on Worksafe’s willingness to prosecute
  - Although private prosecutions possible in Worksafe’s absence

What should we do?

- Fix the distortion for the whole economy?
- Or define “grossly disproportionate” in terms of a BC ratio well less than 1
  - And expose that to debate
- At least for transport, make roads clearly subject to HSWA
  - Different standards for road and rail potentially a serious misallocation
  - Only a small amendment needed
  - Very large roading budget so it is a question of priorities


The Chartered Institute of Logistics and Transport
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James Cook Hotel, Wellington – 9 November 2016, 9am to 5pm
The Health and Safety at Work Act 2015 (HSWA) has important implications for owners and operators of land transport businesses, from infrastructure providers to owners of all vehicles used for work.
This seminar will be valuable to all road transport companies (passenger and freight), roading and regulatory authorities, lawyers with transport clients, and those who operate cars and light vehicles
Registration fee: $200 + GST (including lunch)
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Questions?