

# Health and Safety Bulletin

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- Making health and safety decisions

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## Making health and safety decisions

One of the things most organisations find difficult in managing health and safety is making decisions. How do you decide what is a legal requirement or what is just best practice? When you identify a significant risk during a risk assessment, how do you decide which is the best way to tackle it – do you follow the gold-plated option or do the minimum necessary?

Unfortunately there are no easy answers. It may depend on the way the requirement is described in the legislation or the level of risk involved!

### *So far as is reasonably practicable (SFARP)*

The Health and Safety at Work etc. Act was 40 years old on the 1st August 2014 and provides the legal foundation that has seen the number of work related fatal accidents fall from about 700 in 1974, when it was first introduced, to 150 in 2012-2013.

For employers, section 2 of the Act that explains their overall responsibility to their employees – stating that “employers shall, so far as is reasonably practicable, protect their employees’ health, safety and welfare at work.”

So what does this phrase mean? The clearest definition came from a Court of Appeal decision in 1948, which the HSE have interpreted on their website as “balancing the level of risk against the measures needed to control the real risk in terms of money, time or trouble. However, you do not need to take action if it would be grossly disproportionate to the level of risk.”

What does this mean in the real world? Basically, if you decide you are not going to take a particular action to reduce risk, make sure you can justify it (morally, legally and financially) – and for more difficult decisions, it may be worthwhile recording how the decision was made and it is important to make sure that employees understand how you came to your conclusion.

### *Strict liability*

You might expect to have to make fewer decisions when the legal requirement is prefaced with a “must” or “shall” – these terms seems to suggest there is no room for manoeuvre.

For example, Regulation 11 of the Provision and Use of Work Equipment Regulations (PUWER) states that the employer shall ensure that measures are taken to prevent access to any dangerous part of machinery. However, commonly this type of duty also incorporates a statutory defence that allows the employer to demonstrate that they took all reasonable steps and exercised all due diligence to avoid the offence.

So if an employer, whose activities involve the use of moving machinery, can show that not only was the machinery they bought suitably guarded, but that they have also maintained the safety devices and that they have adequately supervised those using the machinery to ensure they followed their training – they may be able to show all reasonable steps were taken, if an incident occurs.

### *Foreseeability*

The two phrases above are central to criminal liability, but what is reasonably foreseeable tends to be an issue argued in civil cases – for example claims for negligence.

Foreseeability is decided on how

- likely it was that the accident was going to happen
- severe the consequences of the accident were likely to be
- practical it is for the employer to reduce the risk

It is pretty obvious that there is a huge overlap between SFARP and foreseeability. The systematic use of risk assessment (with special focus on identifying hazards associated with tasks, both in normal and abnormal situations), and application of a justifiable decision making process, reduces both the risk of negligence cases (i.e. fewer people getting hurt) and the risk of liability (if the worst happens).

### *Summary*

Health and safety is not about eliminating risk, but managing it effectively.

Explanations of these legal terms may not help to make health and safety decisions easier, but at least they help to explain why answers about how to manage specific risks are not always a clear yes or no. Being systematic in your decision making (using risk assessment) and applying good management principles to improving health and safety can reduce an organisation's liability – both in the criminal or civil courts, because it reduces risk.

Naturally, the responsibility for providing effective decision making in health and safety lies with senior managers, who develop and drive strategy within the organisation. A recent case, heard in the Court of Appeal, clarified that any senior manager who connives or is negligent (where negligence includes ignorance in cases where the manager should have known about the issue creating the health and safety risk), can be successfully prosecuted – often alongside his or her employer.

It goes without saying that if you or your organisation's senior managers need greater understanding of their health and safety responsibilities and/or liabilities, Clwyd Associates can help! We run courses, both in-house and public (see below), that explain these and other relevant health and safety issues – contact us for more details.



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