

# Tangerines and Bakers – Judicial clarification of Gross Disproportion

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Every employer needs to know whether a step is **Reasonably Practicable** in order to avoid potential criminal liability under s2 and s3 of HSWA (and various other sections/regulations). Since the Health and Safety at Work Act (HSWA) was introduced in 1974, the question of what steps are reasonably practicable has consequently been under scrutiny.

The perceptions of safety professionals and regulators (although not the law) have overwhelmingly sought a **Gross Disproportion** between the risk and the costs of avoiding that risk. This logically requires employers to take **objectively disproportionate steps** to be sure they have been reasonably practicable. The resulting uncertainty as to how far to go (or not) in risk control has arguably driven inefficiencies and risk aversion in societal attitudes.

The distinction is unlikely to be material for catastrophic risks/hazards but is relevant for lesser risks in and outside the workplace.

However the concept of Gross Disproportion has never appeared in any relevant statute or regulation.

The Supreme Court and Court of Appeal have recently underlined this fact in two cases – *Baker v Quantum* (April 2011) and *R v Tangerine Confectionary* (August 2011).

The cases also remind employers and practitioners that **foreseeability of danger** is both:

- (a) a part of whether s2 or s3 HSWA is applicable; and
- (b) to be taken into account in assessing reasonable practicability.

## The standard of safety

Reasonable practicability is a concept with a history extending well beyond 1974 and HSWA. The judicial test for what is reasonably practicable most commonly cited in regulatory guidance has (for six decades) been a comment of Asquith J in *Edwards v National Coal Board* (1949):

*“a computation must be made by the owner in which the quantum of risk is placed on the one scale and the sacrifice involved in the measures necessary for averting the risk... is placed on the other and if there is a **gross disproportion** between them – the risk being insignificant in relation the sacrifice – the defendants discharge the onus on them.”*

From this, the HSE in regulatory guidance (and consequently safety practitioners) have recommended that a step is reasonably practicable **if the cost is not grossly disproportionate to the risk**.

*Edwards* was, however, a civil claim prior to the HSWA where employers were considered effectively to be acting as insurers for their employees. The better (historical) guidance comes from the House of Lords in *Marshall v Gotham* (1954):

*“the test of what is reasonably practicable is not simply what is practicable as a matter of engineering but depends on consideration in the light of the whole circumstances at the time of the accident, whether the time, trouble and expense of the precautions suggested are or are not **disproportionate to the risks involved...**”*

The correct legal test has since before HSWA was enacted therefore been **an assessment of what is disproportionate** not *grossly* disproportionate.

Nonetheless, HSE guidance and professional advice to employers has often been based around a cautious analysis relating to gross disproportion i.e. potentially extending to steps that may be objectively disproportionate. This has arguably led to risk aversion and some high profile perceptions/examples (some real, some apocryphal); such as on school trips, the infamous “safety goggles to play conkers”, bans on Christmas decorations and on carrying paint on buses, which have helped those who seek to attack health and safety law. A legal test that is perceived to go beyond that recognised as reasonable may undermine respect for the law.

## Baker v Quantum

The Supreme Court has now firmly reaffirmed the correct legal approach in *Baker v Quantum*. Lords Mance and Dyson directly dismissed an argument that the term reasonably practicable requires disproportionate<sup>1</sup> steps:

*“...the suggestion that “there must be at least a substantial disproportion” before the desirability of taking precautions can be outweighed by other considerations... represents, in my view, an unjustified gloss on statutory wording **which requires the employer simply to show that he did all that was reasonably practicable.**”*

<sup>1</sup> Or even substantially disproportionate. In coming to this conclusion Lord Mance looked at and rejected the argument that the “grossly disproportionate” words of Asquith LJ in *Edwards* had legal effect.

## R v Tangerine Confectionary

This judgment has now been reinforced and considered in the Tangerine Confectionary and R v Veolia cases in August 2011. The Court of Appeal was principally concerned with confirming that foreseeability of danger is relevant both in assessing the scope of activities to which s2 and s3 HSWA may apply and in the consideration of the steps which are reasonably practicable. In passing they noted:

*"We note that this defence [reasonable practicability] does not impose on an employer the duty to take every feasible precaution, or even every practicable one; it imposes a duty to take every reasonably practicable one. What is reasonably practicable no doubt depends on all the circumstances of the case, including principally the degree of foreseeable risk of injury, the gravity of injury if it occurs, and the implications of suggested methods of avoiding it."*

Assessing what is reasonably practicable is clearly therefore a matter of **establishing what is disproportionate in light of a range of matters including what dangers can be foreseen.**

Tangerine Confectionary also (and predominantly) deals with whether the Crown must establish causation between an injury and the underlying risk when prosecuting. It reiterates the established law that offences derive from risks not consequences and therefore an injury need not be shown to establish causation. However, where the prosecution relies on an injury as evidence of the existence of a risk or to establish the seriousness of that risk, then it is obliged to plead and establish the link accordingly.

## The law and behaviours - and implications for employers and others

Although at law this puts to rest the ongoing debate about whether HSWA requires disproportionate actions, it may take some time to percolate through to day-to-day behaviours of employers, professional safety advisers and, perhaps more critically, HSE inspectors. A change in embedded perceptions may take time.

The law continues - rightly - to require the highest levels of safety in any situation where there is a foreseeable risk of serious injury or death. *Baker* reinforces this not undermines it, and the very highest standards will still rightly be demanded for major risks and hazards e.g. the risks of explosion or leakage in chemical factories, oil refineries and power stations or the dangers of suffocation in confined spaces. However, for normal low to medium risk business and societal activities, good safety management and behaviours should no longer carry the lingering doubt as to whether that is enough.

*Baker* is a ruling that helps duty holders that have done all that they sensibly can to identify risk **and** implement risk controls. It does not protect those falling short of good standards of safety management on risks that are known about – or should be.

These matters are also being addressed at a policy level. In 2006 and 2008 two different Select Committees concluded respectively that (a) terms such as Gross Disproportion were imprecise and unless clarified should be discarded and that (b) the question should be looked at by the Law Commission.

Those recommendations were rejected by the previous Government. However the Lofstedt Review set up by the present Government is now revisiting safety law including reasonable practicability at the policy level. Its conclusions are expected later in 2011.

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