"Reasonably practicable" clause flouts the framework directive

Introduction: a foreseeable "unforeseeability"

Mr Cook and Mr Crimmins worked for HTM, a subcontractor engaged in resurfacing work on the A66 trunk road. The roadworks were lit by mobile telescopic towers which extended to a height of 9.1 metres, higher than overhead power cables running 7.5 metres above ground. The two workers were instructed to move one of the towers. The tower came into contact with the cables, electrocuting and fatally injuring them. The Health and Safety Executive (HSE) argued that the employer was in breach of his duty to ensure safety. The case went to trial, then to appeal[1]. Each time, the employer was acquitted. It was found that the employer had done what was "reasonably practicable" and could not be held criminally liable under UK law. Looking at the facts of this case, as cited in other judgements acquitting employers, it is clear how far removed UK law is from the minimum rules laid down by the framework directive. The employer seemingly had no duty to organise his work site so as to avoid an obvious electrocution hazard. The cost of prevention does not even enter into the equation. The mere fact of employing a trained worker and putting instructions at the base of the telescopic tower made the risk "unforeseeable".

This was the unanimous verdict of the three Appeal Court judges given on 22 May 2006, nearly fifteen years after the framework directive came into force. It takes no collective preventive measure, like using telescopic towers of a height lower than the overhead power lines, a different worksite layout, or different working hours arrangements, into contemplation, on the assumption that there was no satisfactory technical means by which to eliminate the electrocution hazard. In fact, the courts' discretion to interpret duty to ensure safety in light of the "so far as is reasonably practicable" (SFAIRP) clause allows them to discount the risks inherent in work site organisation. The design of the work site itself, in the choice and practical siting of the towers, created a serious electrocution hazard. For reasons which the court did not seek to probe, the workers did not follow the work instructions given. This fact alone was sufficient to conclude that the employer did all that was "reasonably practicable" to avoid the accident because he could not foresee how the specific workers would act. This case illustrates the importance of the case before the European Court of Justice (ECJ) on the United Kingdom's implementation of the framework directive.

This article falls into four parts. The first reviews the main elements of the United Kingdom's case, which I argue are red herrings to avoid a fundamental debate on the connection between the SFAIRP clause and the framework directive. The second part looks for a main thread in the Advocate General's labyrinthine Opinion. Part three examines the SFAIRP clause, and the consequences of it that deny British workers some of the benefits of Community health and safety law. The fourth part shows that the debate does not stem from any puritanical zeal by the Commission to foist unworkable solutions on the United Kingdom. The UK's own courts are starting to glimpse the inconsistencies between national law and the framework directive.

A Byzantine case that disregards the facts

The United Kingdom's defence rests on various arguments[2], all of which sacrifice facts to speculative theorising about legal definitions. The British case fosters confusion by exploiting different terminological traditions. The employer's duty to ensure safety is defined as an "absolute duty", for example, which is the English law terminology. But, this absolute duty is "qualified" in practice. For a continental lawyer, it thereby ceases being absolute and becomes conditional as being dependent on an economic calculation. Many more examples could be given of how the UK case plays on words in a bid to sow wholesale confusion.

The aim of a Community directive is not to unify the language of the law, but to secure a number of substantive objectives by harmonizing national legal provisions which remain materially different. So, the real issue is not whether the terminologies used match up. Since the SFAIRP clause makes the courts responsible for delimiting the contents of the employer's duty to ensure safety, whether the framework directive's aims are being secured must be determined through an examination of the case law. The plain fact that a number of cases decided by the highest courts have diverged significantly from the framework directive's criteria is enough to see that the SFAIRP clause is creating uncertainty in the law. All hair-splitting over terminology aside, this in itself constitutes non-compliance.

Debate on the nature of the duty to ensure safety

The UK government argues that the framework directive cannot impose an absolute obligation, since that would not be realistic. While this does raise a real debate, it is not a clinching argument.

[1] R v HTM (2006).
[2] The currently available sources are the Advocate General's Opinion and the hearing report.

Statistics – "reasonably practicable" disinformation

Part of the United Kingdom's case in defence of the "reasonably practicable" clause is that it forms part of a legal system that delivers more effective prevention than in other EU countries. With figures to back up the claim.

Statistics are often the blunt instrument of political debate. Instead of building a rational case for a position, a graph curve, pie chart or table is flourished as the clinching argument, because of course mathematics is about facts and figures, and how can you argue against that? Happily, lawyers by and large eschew statistics. That said, the Advocate General of the European Court of Justice refers uncritically to the British claims (point 46 of the conclusions).

The statistics produced by the United Kingdom to the ECJ as evidence of how much better its preventive system is portray no more than the trend in total fatal work accidents and accidents resulting in at least three days' absence in EU States from 1994 to 2000. These figures are collected by Eurostat from the competent national organisations. They show that the United Kingdom had a per-worker accident rate below the EU average in each of the years concerned.

These statistics relate to only a tiny fraction of either work-related deaths or health damage. International Labour Organisation estimates are much more damning here. Work-related mortality in the United Kingdom is estimated at 20 000 deaths a year (Takala, 2005, p. 33). These figures do not argue in favour of a British preventive system that is overall more efficient than those of other EU States. Some UK authors argue that work-related mortality data is skewed by the failure to factor in the principal causes of mortality (Tombs, 1999). General accident data is fraught with uncertainty because of systematic under-reporting. In fact, a Health and Safety Executive report published in May 2006 stands in sharp contrast to the official optimism of the handful of figures produced to the ECJ (Hodgson *et al.*, 2006). Without going into the minutiae of the survey results, suffice it to say that it produces an estimated number of work accidents resulting in at least three days' incapacity three times higher than that derived from the employers' reports of such accidents (1300 accidents per 100 000 workers against 412 accidents per 100 000 workers, respectively).

The relation between the incomplete data sets put forward by the British government and the implementation of the framework directive could not be more moot. The framework directive is not just about preventing work accidents. It aims to establish planned, systematic prevention, one aspect of which is that all workers should be covered by preventive services and safety reps. In this respect, the UK situation is anything but Europe's finest. Also, a preventive system is a complex set of legal provisions, administrative machinery, actors and institutions. It would be disingenuous to claim a key role for the "reasonably practicable" clause in such a system, either for good, as the British government does, or for ill. The case before the ECJ is not about awarding prizes in a preventive system beauty contest, but determining compliance with Community law on a specific point of the framework directive.

The fundamental issue is the role of legal rules[3]. Are they a mere management tool by which to put realistic order into employer-employee relations? Can they take a purchase on values that are apt to change these relations by steering their development towards ideal objectives? Clearly, different approaches can be taken. One extreme is that the law should not be differentiated from other management techniques. It may be an instrument for reflecting economic and technical rules. At the other extreme, the law can be a delivery system for a blueprint of societal reform in line with ideals supported by the bodies responsible for defining and enforcing it. The history of labour law is one of steering a middle course. Since emerging from the industrial revolution, it has been at once an instrument for managing and controlling employer-employee relations, and a tool for transforming them. The emphasis has shifted one way or the other in different times and countries, in line with the issues addressed. For example, there is nothing to show that the rule requiring equal pay for men and women is most conducive to business competitiveness. It remains an open question. What is clear, by contrast, is that such a rule enunciates a demand for political change.

The same debate has always rumbled on in the health and safety arena. Should the rules be framed to be consonant with perpetuating existing employer-employee relations, or can they rather lay down new non-economic requirements that will force businesses to take up new methods of regulation and management?

This debate is not key to deciding where the framework directive and SFAIRP clause stand in relation to each other. The wording of article 5.1 of the framework directive is clear: the employer has a duty to ensure the safety and health of workers in every aspect related to the work. Article 5.4 allows States to limit the employers' responsibility to cases of "force majeure" (roughly equal to "act of God" or "cause beyond control"), and defines them precisely.

[3] The general context of this debate is analysed by Supiot (2006).

The characteristics of the duty defined in article 5.1 could be analysed at length. Is it an absolute duty? Does it demand that firms put in place an ideal organisation that provides a totally risk-free environment? Does it simply mean that where health damage occurs, the employer will be taken to be in breach of his duty to ensure safety, thereby incurring liability (subject to the "force majeure" provisions of article 5.4)? However characterised, the essential question nevertheless lies elsewhere. It is whether the SFAIRP clause as applied by the United Kingdom allows the directive's objectives to be secured. The plain fact is that this clause does not force the employer to do everything possible to ensure healthy and safe work. It inserts between what is physically possible and what is legally required a condition in the form of a cost-benefit calculation.

As Diana Kloss (2003, p. 180) sums it up, in defining what can reasonably be expected of an employer, "the standard is only that of average, not of pioneer". So, in Latimer[4], the employer had no duty to prevent his workers from entering premises whose floor had become slippery from being covered in a film of oil. In this case, the cost-benefit calculation enabled it to be argued that a simple fracture due to a fall "is not grossly disproportionate" to the economic loss which shutting down the works pending elimination of the risk would have entailed. The ruling specifies that this would not have been the case if instead of a fall injury, the premises had been endangered by fire.

Artificial distinction between duty and liability

The UK government contends that the framework directive only gives the employer a duty to provide safe employment, and does not lay civil or criminal liability on him. The framework directive does not set out to harmonise the different national systems of civil and criminal liability for employers in health and safety at work matters. This is beyond doubt. But nor does it just involve an alternative of either full harmonization or the "silence" claimed by the UK government (quoted in paragraph 41 of the Advocate General's Opinion).

The framework directive affects the national rules on employers' liability in three ways:

1. It expressly addresses the matter in article 5.4, which relates to the employer's "responsibility", not just the duty to ensure safety. This article provides that Member States can limit the employers' responsibility only in cases of "force majeure". It is not readily obvious how the UK government can reconcile this provision with its claim that Community legislation is "silent" on the matter;
2. It spells out what the employer's duty to ensure safety consists in. Article 5 lays down a general duty. More detailed duties are spelled out in article 6. Other provisions also relate to the employer's duties. If the objectives of these provisions are to be achieved, the Member States must necessarily define employers' responsibility/liability in terms that are not at odds with the duties laid down. That does not require full harmonization, as the specific mechanisms may differ from one country to another. For example, a company as a legal entity may be liable to criminal prosecution in some countries, while in others, only individuals can be prosecuted. The framework directive does not impose a specific solution to these problems, provided its objectives can be secured by each legal system's own specific rules. It will be seen below that the SFAIRP clause not only limits the duty to ensure safety as formulated in article 5.1 of the framework directive, it also significantly affects the order of priority of preventive measures laid down in article 6;
3. Community case law is clear that the choice left to Member States in the means of implementing a directive does not leave them an absolutely free hand. Effective, dissuasive and proportional sanctions must be provided. Such sanctions can only be laid down by (civil and criminal) liability systems.

The UK's defence arguments imply that the directive's legal basis does not allow liability systems to be harmonised. The Advocate General seems to concur with this view (paragraph 93 of the Opinion). He offers no specific arguments on this point, and merely expresses an uncertainty couched in negative terms ("it is not clear whether …"). This is not really a new argument from the United Kingdom. It is seeking to curtail the scope of article 118A. In the ruling on the United Kingdom's action to have the Working Time Directive annulled, the ECJ had already clearly refused to entertain a narrow interpretation of article 118A. It held that, "where the principal aim of the measure in question is the protection of the health and safety of workers, Article 118a must be used, albeit such a measure may have ancillary effects on the establishment and functioning of the internal market"[5] (paragraph 22 of the judgement). The same reasoning should apply to the ancillary effects that the framework directive may have on civil and criminal liability. The ECJ also held that in environmental matters, the Community legislature could take "measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective"[6] (paragraph 48 of the judgement). The framework directive does not go that far: it merely draws the minimum consequences for liability from the duty to ensure safety without harmonising national provisions.

Misrepresentation of remedies

The UK government claims that the remedies offered by English law are more than adequate to secure the framework directive's objectives. It reviews the social security compensation scheme, and the civil and criminal liability systems. It emphasizes that the Health and Safety at Work Act 1974[7] enacts criminal

[4] Latimer v AEC Ltd (1953).
[5] Judgement of 12 November 1996, United Kingdom v Council.
[6] Judgement of 13 September 2005, Commission v Council.
[7] Referred to subsequently throughout as HSWA 1974.

penalties for breach of its provisions by an employer, and argues that the criminal liability imposed is "automatic" (paragraph 47 of the Opinion).

The system for compensating work accidents and a small number of work-related diseases has no direct connection to the framework directive. Arguably, a social security or insurance-based scheme of compensation is not necessary to the proper transposition of the directive[8]. A compensation scheme is no guarantee of compliance with the duty of prevention. It just grants limited financial compensation to some victims of a breach of that duty. Furthermore – but subsidiarily – the UK's recognised diseases scheme is among the most restrictive in the EU. It is grossly discriminatory: fewer than 10% of the victims compensated for work-related diseases are women, when the available data reveal no significant difference between the proportions of men and women with work-related medical conditions (Vogel, 2003). Not in any circumstances – either in legal principle or practice – can the compensation scheme be regarded as among the provisions that give effect to the framework directive's duties. Not only that, but the United Kingdom is among the very few countries in Europe where the introduction of a social security compensation scheme in no way affected the employers' civil liability rules (Parsons, 2002). It was acknowledged from the outset that social security would compensate only a small part of health damage, and that it was essential to maintain the scope for claiming compensation under ordinary tort law.

Some clarification is required of what is meant by "automatic" criminal liability. As a legal principle, it is limited by the SFAIRP clause, whose precise effect is to allow employers to evade any criminal penalty in a number of cases. Practically, breaches of the duty of prevention that result in prosecutions represent only a negligible proportion of all the breaches found by the enforcement authorities. Diana Kloss (1998, p. 121) notes that, "Research has shown that approximately one per cent of accident investigations by the factory inspectorate lead to prosecutions and, as might be expected, are more likely to follow from the investigation of an accident than from a routine inspection visit"[9]. What is more, the Health and Safety Executive (HSE) is very clear on this point: when inspectors find a contravention, they report it for prosecution only in extreme cases. The enforcement policy guidelines laid down for inspectors' discretionary action (HSC, 2002) show that prosecution is not automatic. This discretion is not necessarily incompatible with the framework directive, if other proportional, dissuasive and effective forms of enforcement exist.

It remains then to consider whether the rules on civil liability adequately supplement the criminal liability provisions. The answer is "no". The SFAIRP clause prevents workers from claiming damages if the employer can prove that the cost of the preventive measures outweighs the expected benefits. It also defines unforeseeable risks by reference to criteria that set the bar markedly above "force majeure". Scientific uncertainty[10] and following established industry practice[11] are factors that employers can adduce to limit or elude their civil liability. In many cases, the employer's liability is limited by factors related to the worker's conduct, like a mistake or carelessness, failure to volunteer information to the employer about a health condition[12], failure to plan his or her own work appropriately[13], acceptance that a certain type of work would inevitably entail a certain level of risk[14]. Each of these criteria is clearly incompatible with the framework directive.

The statistics reflect the failings of the legal provisions. They give the lie to the UK government's claims about the effectiveness of its schemes to compensate for health damage. According to a report put out by the UK's Trade Union Confederation (TUC) in July 2005, each year over 850 000 people are injured or made ill as a result of their job[15]. Over 25 000 people are forced to give up work every year as a result of work-related injuries or illness. Around 60 000 people a year gain compensation from their employer, according to the Association of British Insurers. A further 20 000 make a successful claim under the "no fault" industrial injuries benefit scheme. This means that 9 out of every 10 workers who are injured or made ill through work get no compensation (TUC, 2005, p. 2).

Is "reasonably practicable" the same as "force majeure"?

The UK government argues that, in any event, the SFAIRP clause adequately reflects the "force majeure" requirements of article 5.4. It is on shaky ground here, as is clear from the singular weakness of its defence arguments. It simply says that this is the case, without adducing one iota of evidence to back up its claims. Mindful of this failing, it presents it as an alternative argument to be availed of only as a fallback option should the case argued on civil and criminal liability fail. In point of fact, it is the only relevant argument by which to determine the system's compliance with the framework directive. In other words, only if the SFAIRP clause meets the Community requirements laid down in article 5.4 can it said that the United Kingdom possesses effective sanctions whose legal principles enable the framework directive's objectives to be achieved[16]. Far from being a purely incidental and alternative pleading, it is the linchpin of the liability/responsibility debate. The very catch-all nature of the "unforeseeable risk" concept that prevails in the United Kingdom is a country mile beyond the limits set by article 5.4. The HTM case confirms that an employer can rely on the careless act of a trained and informed worker as sufficient proof that a risk was unforeseeable.

[8] The Netherlands has no specific no-fault compensation scheme for work accidents and occupational diseases, other than a special fund for asbestos victims. This in not inconsistent with the framework directive's requirements.
[9] An assessment confirmed by Hawkins' systematic study (2003).
[10] Armstrong v British Coal Corporation (1996).
[11] Thompson v Smiths Shiprepairers (1984).
[12] Barber v Somerset Country Council (2004).
[13] Pickford v ICI (1998).
[14] Petch v Customs and Excise Commissioners (1992).
[15] Figures based on the official Health and Safety Commission statistics.
[16] Such, indeed, is the case of Irish law, where the SFAIRP clause was kept but defined in the legislation so as to meet the article 5.4 requirements.

The Advocate General's convoluted Opinion

Advocate General Mengozzi's Opinion[17] broadly concurs with the United Kingdom's case. His arguments are redolent of a particular kind of detective novel, but unfortunately without Agatha Christie's limpid prose style. Before the villain is unmasked, many other suspects are brought into play, whose only purpose is to take the reader from one false trail to another. When the denouement finally comes, the exhausted reader accepts the solution to the riddle as a blessed release, and may overlook the weaknesses of the storytelling.

The skill of making simple things complicated

Whatever views may be taken of the SFAIRP clause and the framework directive's provisions, the plain fact is that the clause is anything but straightforward. It does not spell out what makes something "reasonably practicable". Legal authorities in the United Kingdom are unanimous on this point. Proponents and opponents of the clause alike see it as a complex whole which is very difficult to construe. The former welcome this as contributing to flexibility and adaptation. The latter decry the uncertainty in the law that comes from leaving the courts too wide a discretion (see box p.21).

The wording of the framework directive, and especially the articles at issue in this dispute, by contrast, are extremely clear. One may take issue with the forms of words chosen by the Community legislature, but it cannot be denied that they pose few problems of interpretation.

The Advocate General's Opinion arguably works on the principle that the point is to complicate what is put in plain words, and preferably not try to analyse what is complicated. The most obvious failing of this Opinion is that nowhere does it plumb the precise scope of the SFAIRP clause. It erects tier upon tier of negatives in a bid to demonstrate what the framework directive is not. Nowhere does it specify the substantive extent of the employer's duty to ensure safety laid down in it, or how far it may or may not be compatible with the UK legislation.

When he finally does come to the key issue – is the SFAIRP clause compatible with the framework directive duty to ensure safety – the Advocate-General seems to be exhausted by his own digressions. He forgoes a close consideration of the case (paragraphs 138 to 140 of the Opinion), and makes do with contending that the Commission adduced no evidence on this point, but that should the Court rule that it must be considered, then it would have to conclude that a clause which brings a financial calculation into play was incompatible with the framework directive. I would argue that this latter answer is the right one, but should have been developed at more length.

Salami slicing

The Advocate General's method of interpretation could be described as a salami slicing technique. The starting point seems to be: the legislature systematically erected barriers to understanding. So, when a law defines an obligation in clear and unconditional terms, the interpretation must look beneath the surface to winkle out all the obscurities and ambiguities that lurk within it. This means prising out everything in what follows that might indirectly suggest that the legislature did not mean what it said. The Advocate General offers an interpretation whereby every article of the framework directive, other than article 5.1, is used to limit the extent of the employer's duty to ensure safety.

Article 5.1 defines the duty to ensure safety by requiring employers to ensure that working conditions do not affect workers' health and safety. The Advocate General manages to trim this obligation down in successive stages. He argues that the effect of article 5.4 is "to clarify the extent of the duty to ensure safety" (paragraph 96). In fact, all this article does is to allow Member States to choose to exclude precisely-circumscribed cases of "force majeure". This clearly signifies that article 5.4 as such is not calculated to affect or "clarify" the extent of the obligation laid down by the Community legislation. It simply accepts restrictions in the national civil and criminal liability systems.

The argument based on the legislative history is forgetful of the facts. In a Council of Ministers' vote, the United Kingdom and Ireland were in the minority and their arguments dismissed (DTI, 1993). Had the Community legislature wished to keep the SFAIRP clause which it regularly included pre-1988, why take such an unnecessarily roundabout way? Why reject British and Irish governments' proposal to include in an article of the framework directive a reference to the SFAIRP clause that would have allowed Member States whose legal system limits the discretionary interpretation of "absolute legal provisions specified by legislation"? The answer is to be found in the statement by one of the governments in the majority group. The Belgian delegation insisted that it was unacceptable to take the cost-benefit criterion into account[18].

After these first two cuts, the Advocate General reduces the duty to ensure safety to a vague and misshapen duty to "take positive action" (paragraph 102), a duty confined to adopting a set of preventive "measures" (paragraph 103).

Were that to be so, article 5.1 could not be concluded to be other than wholly superfluous. It would be utterly pointless compared to the more detailed rules of other provisions in the framework directive. In fact, the employer's duty to ensure safety stems from his control over work organisation. Positive action and preventive measures may clearly be

[17] Submitted on 18 January 2007. Available on the ECJ website: http://curia.europa.eu

[18] See the minutes of the Council of Ministers' Social Affairs Working Group meeting of 21 and 22 June 1988 (Document 7411/88, restricted, SOC 140).

"Everyone thinks they know what a unicorn looks like"

Lawyer Helen Walker opines that, "The indefinable task of ensuring health and safety 'so far as is reasonably practicable' is rather like trying to describe a unicorn. Everyone thinks they know what a unicorn looks like, and you can do what you like to create one, but who's to say that you've succeeded?" (Walker, 1999, p. 40). Her comments reflect employers' puzzlement about inconsistent court decisions. From another standpoint, that of defending workers' health, legal specialist Phil James writes, "the test of reasonable practicability ... is itself something of a moving beast given the cost-benefit calculation it incorporates" (James, 1992, p. 86).

The role played by the "so far as is reasonably practicable" clause in the United Kingdom is seen in very different ways. The division between supporters and opponents of the clause does not tally with a dividing line between proponents of a more active role by the authorities in more systematic prevention and the pro-deregulation camp.

Differing perceptions

Generally, many prevention professionals lean in favour of the clause. Three arguments are often advanced. It is flexible and adaptable to changing circumstances. It reflects specific characteristics of common law countries which, if the clause were to be repealed, would deprive the courts of all discretion. And thirdly, on a more defensive note: given the political context, scrapping it could result in even less pro-worker legislation. The argument that it corresponds to Community law, by contrast, is an invention of the British government, and few lawyers or preventive system experts give any credence to it.

TUC senior health and safety policy officer Hugh Robertson thinks it is the wrong target. He said, "For the TUC and the huge majority of UK trade unions, the SFAIRP case does not help to save the main problem: the lack of proper enforcement. In our view, the qualification SFAIRP is not a problem in itself. We consider that it has played a positive role since the new HSWA was adopted in 1974".

Steven Kay, an official with Prospect, the trade union for health and safety inspectors affiliated to the TUC, takes a similar line. "We see the argument over the words 'reasonably practicable' to be a bit of a distraction to be honest. The fact that the duty on employers to ensure safety in our primary legislation is qualified by these words has never in our experience limited our ability to take action against an employer. The same applies to legislation implementing European Directives in which the phrase is repeated. That applies to formal sanctions such as stopping work (prohibition notices), securing change (improvement notices) and prosecutions. We find the wording of the legislation itself to be a sufficiently tough standard. The real obstacle to enforcing the law in England, Wales and Scotland (I cannot speak for the Northern Ireland bit of the UK: they have a different regime) is lack of resources. We are being continually squeezed financially: there are nowhere near enough inspectors, there is a freeze on recruitment and we see no hope of improvement. Very serious accidents go unpunished and there is rarely any investigation of cases of occupational disease. Then when we do get companies into court, the level of fines is still very low: the median fine is somewhere around £7000: many offences carry a maximum fine of only £5000 in the lower courts (such as offences under regulations which implement the Framework Directive into UK law)".

Employers' organisations see the SFAIRP clause as underpinning a legal system that operates mainly on the basis of employer self-regulation of health and safety at work. Repealing it would have disastrous consequences.

The clause's opponents argue on two broad fronts. It creates uncertainty about the exact extent of the employer's duties. This may reflect the concerns of some employers faced with complex case law. It is also advanced by trade unionists from a very different approach. The super-union UNISON, for example, claims in written evidence to a House of Commons inquiry in 2004 that, "the use of the defence that an employer acted 'as far as it was reasonably practical' should be removed, as it is incompatible with the principles of the European framework directive. It has also served as an excuse for many employers to either take no action at all to remove or reduce risks or do as little as possible citing this qualifier as the reason for less or non-action" (WPC, 2004, vol. III, p. 365). Another argument is that the clause as applied denies British workers some of the benefits of Community rules. Hence the active part played by the Scottish TUC (STUC) in preparations for the Commission's infringement proceedings. The STUC wrote several letters to the Commission reporting practical instances where the clause was preventing full implementation of Community law.

Two tiers of self-regulation

Beyond the differing assessments, the evidence is that the clause was relatively little discussed before the Community directives came into force. It broadly reflects the general thrust of the Robens Report (1972) which inspired UK legislation passed in the early 1970s. The report argued that health and safety were not part of an objective conflict of interests between employers seeking to maximise profits, and workers determined to protect their health. It claimed that health damage was mainly the result of widespread apathy on the part of many employers and workers. So the focus was put on self-regulation. The health and safety enforcement authority and criminal penalties were mainly to be a safety net for the most serious situations. The clause effectively adds a second tier of self-regulation into the statutory provisions. The first tier comprises the relatively vague and general nature of many duties that allow employers to decide what preventive measures to adopt. The second tier, offered by the clause, subjects most of the statutory requirements to the test of what would be "reasonable" in the economic interests of an abstract average employer.

necessary, but that is not where his duty to ensure safety stops. If any aspect of the work (not just inadequate preventive measures) is apt to affect health or safety, the duty to ensure safety is not satisfied.

The Advocate General then cuts the duty back further, based on an original (suggested by the UK defence) interpretation of the scope of article 6. Article 6 is not incorporated in, any more than it curtails, article 5. Article 6 deals with the measures to be taken, whereas article 5.1 defines the employer's duty based on objective outcomes ("not affect health or safety"). The two provisions are complementary but quite distinct. One is about means, the other about results. However, even on the narrower basis of article 6, UK law remains incompatible with the framework directive to the extent that it does not wholly comply with the order of priority of preventive measures.

The Advocate General's reading of article 6 disregards its hierarchical structure (paragraphs 110 and 111). Indeed, it is the interpretation put forward in the British defence, and is very much in line with prevailing UK law[19], where the order of priority of preventive measures is qualified by two factors: the cost-benefit analysis, and the concept of unforeseeable risk as developed by the courts. The Community legislation, by contrast, is organized as an order of priorities, the highest of which is the obligation to eliminate risks. The Advocate General concludes from this further curtailment that the duty to ensure safety "does not extend so far as to require the employer to provide a totally risk-free working environment" (paragraph 110).

What substantive content can be given to this negative? Something must be done to reconcile the article 5.1 requirement "to ensure safety and health in every aspect related to the work" with the idea that this does not necessarily require the provision of "a totally risk-free working environment". The Commission's answer to this was: if a risk is not eliminated, occurs and affects health, the employer must assume responsibility for it (subject to Member States' option to limit the liability by cases of "force majeure"). A risk means there is a certain probability of health and safety being affected. The "best efforts" obligations laid down by the framework directive aim to eliminate risks as far as possible. If, notwithstanding the employer's efforts, risks remain, liability attaches to the employer under the absolute obligation laid down in article 5.1. Such an approach may find support both in a legal analysis of employer-employee relations and a sociological and economic analysis.

The Advocate General offers a very different response in paragraph 113, which he manages to frame only in negative terms: "the occurrence of risks that were unforeseeable and/or inevitable and the consequences of events which constitute the realisation of such risks will not be attributable to the employer on that same basis". This interpretation is couched in terms that are vaguely akin in wording to article 5.4, but different in substance. Article 5.4 is confined to occurrences that are beyond the employers' control, due to unusual and unforeseeable circumstances, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care.

Where article 5.4 requires a combination of a series of conditions, the Advocate General very liberally extends the exceptions in four directions:

1. The circumstances need not necessarily be beyond the employers' control;
2. It is enough if they are unforeseeable and/or inevitable, without necessarily being unusual;
3. Any occurrence of such risks will not be attributable to the employer, even though in article 5.4, the only defence against this is proof of having exercised all due care;
4. The Community rule is claimed to be "will not be attributable to the employer", when the framework directive provides only that the Member States may choose not to attribute certain facts to the employer.

It is clear that under such a flexible interpretation of "force majeure", UK law can be regarded as all-points compliant with the framework directive, albeit the Advocate General is not clear on this.

Abstract as the discussion of these legal principles may appear, the issue is a very practical one. If the particular way in which work is organised (e.g., overwork, working hours incompatible with human needs, too fast-paced) entails risks, some of those risks may be classified as unforeseeable and/or inevitable. In the framework directive's approach, the lack of certainty that the work organisation entails risks is not enough to abstract these risks from the employer's duty to ensure safety. It is not unforeseeability that is the decisive criterion here, but the simple fact that these risks arise out of particular aspects of the work and so cannot be regarded as circumstances beyond the employer's control. They clearly amount to what article 5.1 describes as "aspects related to the work". Conversely, the liability rules enacted by Member States may quite legitimately exclude circumstances like an earthquake, terrorist attack or exceptional climatic event from the employer's civil or criminal liability system.

Alice in Wonderland

Up to paragraph 125, the Advocate General does not stray too far from the British case, whose line of argument he more or less follows. It was not enough to hack away at the framework directive. Some words had to be said about UK law. From paragraph 126 onwards, Agatha Christie gives way to Alice in Wonderland. As Angus Stewart (2007) puts it, "With no disrespect to the learned Advocate General, a distinguished Euro-jurist, his Opinion

[19] It was not until 1999 that the United Kingdom implemented the order of priority of preventive measures in binding legislation to prevent the infringement proceedings extending to this point. They are found tucked away in a schedule to the regulations, which the courts tend to ignore when defining what is reasonably practicable.

gives you a sense that truly there is no place more unfamiliar than your own country described by a continental lawyer who gets his information from HM Government".

Paragraph 126 argues that the SFAIRP clause could impose a lesser criminal liability on the employer than is envisaged by the framework directive. Here, the Advocate General seems to refute the British case, but his arguments are not clearly worded. Having so concluded, he goes on that, "while ... United Kingdom legislation provides for a form of civil liability for employers the extent of which is entirely commensurate with the liability regime which the framework directive seeks to achieve". The use of the term "while" after a string of negatives suggests that the Advocate General considers that UK law applies more restrictive criminal liability criteria than those of the framework directive, but that those criteria completely match those of the framework directive when it comes to civil liability. While on the face of it, this line of argument takes its cue from the British defence, it is actually the mirror-image opposite. The British case is that the criteria are more restrictive when applied in civil liability matters, but where criminal liability is concerned, the directive's objectives are secured. In factual terms, the British case is closer to the truth, but introduces some confusion. The scope of civil liability under the 1974 Act is more restricted than that of criminal liability. But this restriction has nothing to do with the SFAIRP clause. It stems from s. 47 which excludes any civil proceedings for breach of s. 2, which imposes a general duty to ensure safety. The real issue is not whether it is civil liability or criminal liability that enables the directive's objectives to be achieved. On all the evidence, the SFAIRP clause limits all forms of liability and lets infringements of the directive's provisions go unpunished.

Nowhere in his Opinion is the Advocate General's assessment substantiated. It is literally plucked out of thin air. At no time does the Advocate General analyse the SFAIRP clause either in terms of civil or criminal liability. Consult any legal textbook and you will find that the clause is based on identical criteria in whichever field it is applied. The criminal courts tend to rely on civil court findings to define what is reasonably practicable[20]. Nowhere is there any reference to discrete criteria. What there is, by contrast, is a clear attempt to bring consistency and uniformity to the application of the SFAIRP clause in criminal and civil proceedings, but also in judicial oversight of the administrative decisions of the enforcement authorities. It is a surprising voyage of discovery to find that the SFAIRP clause is three in one. The discovery of this new Holy Trinity is an original contribution by the Advocate General to UK law. So, in paragraphs 136 to 140, the Advocate General finally comes to the influence of the SFAIRP clause on the extent of the duty to ensure safety and duty of prevention. And, this time, he rightly points out that it involves "an evaluation which goes beyond establishing whether it is possible to prevent a risk arising or to reduce the extent of that risk on the basis of the technical possibilities available".

It is readily understandable that a continental European lawyer should hypothesize three different meanings for the "reasonably practicable clause" according to the contexts. But the logical thing would have been to check that hypothesis against the cases. The most frequently cited reference is Edward v NBC (1949), a case dealing with the civil liability issue. This ruling is used in exactly the same way as a basis for judgements on criminal liability for contraventions of specific health and safety enactments. In Gibson v British Insulated, Lord Diplock argued that the statutory duty to keep the workplace safe so far as reasonably practicable in substance "does no more than provide a penal sanction for a breach of what would have been the employer's duty at common law"[21]. Likewise, common law tort liability does not involve criteria substantially different from the civil liability related to breach of a statutory duty (Ford and de Navarro, 2001, p. 250).

If the SFAIRP clause does restrict the duty of prevention, how can it be concluded that the Commission's application should fail? Sensing that he is on shifting sands, the Advocate General accuses the Commission of failing to put a proper case. He salami-slices the Commission's arguments in the same way as he did the framework directive. It takes some insouciance to affirm that, "it is clear from the content of the Commission's written submissions and all of the exchanges that took place during the written procedure and at the hearing that the Commission is not challenging the legitimacy of the clause at issue in terms of its ability to affect the extent of the employer's duty to ensure safety, but rather in terms of its capacity to operate as a limit on the employer's liability in relation to events detrimental to workers' health which occur in his undertaking" (paragraph 59 of the Opinion). Although apparently, it is not as clear as all that, since the judge rapporteur concludes exactly the opposite in his report for the hearing (paragraph 12 of the report).

Infringement proceeding applications are not a report for an academic conference. They must say specifically how a Member State has failed to fulfil its obligations and give sufficient grounds to support the complaint. They do not need to analyse all the subtleties of the case law, nor expound on the theory of legal principles. It is hard to see from the wording of the application[22], or the Commission's arguments at the hearing, how the Advocate General can unilaterally reduce the Commission's arguments to the liability issue alone. The Commission argues that the SFAIRP clause breaches both the duty to ensure safety and the liability/responsibility provisions of Community law. It offers arguments drawn both from an analysis of the framework directive and

[20] R v HTM refers to ten legal precedents on civil liability.
[21] Cited in Gilles (2002), p. 584.
[22] *Official Journal*, C 143, 11 June 2005, p. 18.

an analysis of UK law. The emphasis on the responsibility/liability issue probably stems from the lack of case law on the duty to ensure safety in any other context than that of civil or criminal liability. Since no-one (other than the Advocate General) denies that the SFAIRP clause applies consistently to all aspects of health and safety at work, it is hard to see where the Commission's line of argument lacks relevance. The limits of an employer's liability as traced in R v HTM are also limits to his duty to ensure safety. The framework directive's objective cannot be secured, if only because there is no penalty provided for certain actions that are at odds with that objective.

Analysis of the SFAIRP clause

Origin

The SFAIRP clause originates in the determination of an employer's civil liability for a work related injury. Throughout much of the 19th century, the British courts considered that in general no liability attached to an employer. Workers were deemed freely to accept their working conditions and the risks they entailed. UK law differed little from the law in other European countries on this point[23]. Only in exceptional circumstances were workers awarded damages after an accident.

The late 19th century saw a gradual development in the case law. Leaving aside the specific characteristics of each legal system, the changes in Britain basically differed little from those observed in most European countries. Civil case law moved on only after the state had intervened. The common law began to seek remedies for the carnage wrought by the first industrial revolution only after decades of legislation forced developments in case law[24]. From 1891, the courts began to reduce the scope of workers' putative consent to the injuries caused by their work[25] (the courts had relied on the Latin maxim *volenti non fit injuria* to find that workers could waive protection for their lives and health in the employment contract). Civil liability was attached to an employer on the basis of the duty of care owed by him. This concept is not specific to employer-employee relations, and is fairly akin in legal and sociological terms to the continental European obligation to act "*en bon père de famille*" (literally, a responsible householder). It is a duty to take reasonable care to see that no foreseeable damage is caused by fault or negligence. The duty of care applies equally to contractual (e.g., employer-employee, doctor-patient, etc.) and non-contractual relations (e.g., business owner/manager and local residents in the case of industrial pollution, golfer and driver of a car in the path of the golf ball).

The SFAIRP clause was used to clarify the precise extent of the duty of care. It is referred to in the case law of the 1930s and 1940s. The earliest decisions appear to be concerned with breaches of statutory health and safety duties (Gilles, 2002, p. 491). While many 20th century safety statutes define employers' duties by reference to this clause, others set stricter standards which employers must meet: practicable duties. The case law is very clear on the difference between these two concepts: a practicable duty must be fulfilled regardless of the cost entailed. It is enough that the measure is physically possible[26].

The SFAIRP clause provides a defence by which for an employer (or any other person with a duty of care) to justify conduct that has caused harm. While the reference to a duty of care was undeniable historical progress, it has an equally great drawback. It is a jurisprudential construct which is not specific to, and is apt to disregard the singular characteristics of, employer-employee relations. Such a construct does not encompass all the ramifications of subordination, and is apt to disregard the health damage caused by the ordinary course of work. Wear, psychological pressures, workload, the organisation of working time are all factors that the duty of care generally fails to encompass.

The SFAIRP clause was then applied by the Health and Safety at Work Act 1974 to specify the extent of almost all the employer's duties. The clause works in the same way to define civil liability, criminal liability and delimit the enforcement authorities' activities under the Act. It must be pointed out, however, that civil liability for a breach of statutory duties is limited on two counts. First, by the SFAIRP clause on the same conditions as for civil liability on the basis of the common law duty of care. Second, by the impossibility of bringing civil proceedings for a breach of the general duty to ensure safety (s. 2 HSWA). Only breaches of more specific duties can give rise to proceedings (e.g., failure to provide personal protective equipment). From this point of view, civil liability for a breach of statutory duties has a narrower basis than criminal liability or the content of the duty to ensure safety.

Content of the clause

The cost-benefit calculation is the fundamental criterion of the reasonably practicable clause. But how that calculation is carried out can only be gleaned from an analysis of the case law. A detailed examination of the case law is beyond the scope of this article, but the main trends can be summarized around four constituents: foreseeability of risk, cost-benefit calculation, gross disproportion, the benchmark of an abstract average employer. The discretion left to the courts on each of these points is vast.

■ Risk-foreseeability

The role of risk-foreseeability is open to discussion. Some legal theorists do not see it as a standalone criterion discrete from that of the economically calculated benefit. An unforeseeable risk would by nature be a risk whose elimination brings no benefit. Therefore, no preventive measure would be required. Quite apart from this issue, the courts have

[23] For an overview, see Ramm, 1986.
[24] With the Employers' Liability Act 1880, Parliament forced the courts to revisit the common law principles which gave employers almost total immunity from civil liability. New legislation passed in 1945 forced a development in another means of limiting employers' civil liability – the Law Reform (Contributory Negligence) Act 1945.
[25] Smith v Baker (1891).
[26] Summers & Sons Ltd v Frost (1955).

a discernible tendency to use the unforeseeability of risks as a litmus test for concluding, without any other test, that an employer was not obliged to apply preventive measures. Fifteen years after the entry into force of the framework directive, such unforeseeability is generally defined without regard to the duty to conduct a risk assessment.

Unforeseeability is a very broadly construed concept. In some cases, it refers to circumstances external to the work organisation, when it very closely approaches "force majeure". At other times, it refers to aspects of the work whose consequences for the individual were impossible to foresee. Such an interpretation jettisons the collective risk assessment in favour of a simple duty of care to the individual. In such cases, the courts may take prior information given to the employer by an individual worker as a decisive criterion.

In some cases, the judiciary have put support for a control relationship before a consideration of the actual facts. In HTM, the risk of electrocution was anything but unforeseeable, given that a power line was in the potential path of telescopic towers. A mere glance through the literature on the causes of work accidents is enough to show that there is nothing unforeseeable in what is classed as human error. Even someone who has never seen a building site run by a sub-contractor should not have too much difficulty conceiving that the work is often done at a rush, working against the clock, and may involve problems of interacting with other subcontractors. All these are conditions conducive to not following instructions. In some cases, there is no other option than to ignore safety requirements. That is well and truly a risk inherent to a particular work organisation. The control relationship may give rise to a conflict of demands between safety requirements and production requirements. Both empirical observation and more detailed analyses yield evidence that an experienced and trained worker may not always obey safety instructions. To class such a situation as an "unforeseeable risk" is tantamount to saying that a worker's mistake can scale down or invalidate his employer's duty to ensure safety.

■ Cost-benefit calculation

The cost-benefit calculation is the main feature of the SFAIRP clause. Whether an employer must eliminate a risk is determined by an equation between the cost factors and the expected benefits of preventing it.

This criterion is beset with difficulties. It involves "comparing apples with oranges". The costs of a particular preventive measure can be estimated with reasonable accuracy. Less so, the costs of completely reorganizing the work. Changing technology choices, replacing dangerous substances with less dangerous ones, increasing workers' control over how they perform their work are complex changes that cannot be easily costed-out. Then, there are two uncertainties surrounding the expected benefits of a preventive measure. One is the difficulty of putting a cash price on a human life, physical and mental well-being. The other is related to externalising the costs towards society, which remains the general tendency in health and safety at work.

Significantly, the decided cases hardly ever refer to a mathematical calculation. Actual money is never mentioned in judgements, which are entirely built around an implicit monetary reasoning. There is a sense of judicial embarrassment about having to reason in practical financial details. Mostly, they talk in terms of a very approximate overall assessment, and do not go into a detailed valuation. Whenever possible, they bring in other factors (like risk-unforeseeability) to side-step a detailed cost-benefit calculation. Perversely, one of the very few judgements that does explicitly refer to a financial amount considers that, based on the Community directives, a cost-benefit calculation is not relevant[27].

The HSE has tried to construct economic models. While these have never been referred to directly in court judgements, they have had an indirect effect in informing HSE activity. This means that in some cases, the guidance drawn up by the HSE reflects these models, and can be used as yardsticks by the courts. Also, the HSE plays a key role in prosecutions, and its economic models can inform its choices in this area.

Technically neutral on the face of it, the cost-benefit calculation gives the courts very wide discretion in deciding what is expected from a "reasonable employer". This is a factor of uncertainty in the law, which can be seen from an analysis of inconsistencies between cases.

Gross disproportion

The cost of preventive measures must be grossly disproportionate to the expected results if they are to be considered not reasonably practicable. That obviously limits the damage. Preventive measures whose cost would slightly outweigh the expected benefits must still be taken. This "gross disproportion" criterion adds some safety margin to the cost-benefit calculation, but does not alter its nature. Because the calculation is never spelled out in detail, the difference between a gross disproportion and a simple overshoot tends to be blurred. The finding of one of the most comprehensive studies of the case law is that, "given that the balancing is being done intuitively and qualitatively, the difference may not be all that significant (Gilles, 2002, p. 585).

The courts have never specified how gross disproportion is to be determined. The only quantitative benchmark I have found relates to the nuclear industry (HSE, 2007-b). Based on a proposal drawn

[27] Skinner v Scottish Ambulance Service (2004), see paragraphs 18 and 33.

up by the HSE in 1987, there may be a gross disproportion where the costs of protecting workers are more than three times the expected benefits. Where members of the public are concerned, the calculation distinguishes minor risks and major risks. For major risks, the costs may be ten times higher than the expected benefits. For minor risks, there would be gross disproportion once the costs were more than double the expected benefits. Behind the ostensible neutrality of the calculation technique lie values that express relationships of control in the workplace. Minor health damage is played down, while workers enjoy significantly less protection than the general population against the possibility of serious health damage.

The abstract average employer

The calculation is not tied to the specific economic circumstances of the individual employer, but to an assessment of how a reasonable employer, taken in the abstract, would behave. It is what many commentators describe as an objective test. In fact, it leaves wide discretion with the courts. Rather than an objective test – which cannot be done when comparing apples with oranges – it is a test in which the subjectivity of individual employers is replaced by a subjectivity about the workplace expressed by the judiciary or enforcement authorities. The reference to an abstract reasonable employer also has a drawback: it enables the level of prevention to be lowered in firms which, for various reasons, would have implemented more effective but more costly measures than what will be accepted as "reasonably practicable". So, for the HSE, good practice is not necessarily best practice if the cost outweighs the expected benefits: "Some organisations implement standards of risk control that are more stringent than good practice. They may do this for a number of reasons, such as meeting corporate social responsibility goals, or because they strive to be the best at all they do, or because they have reached an agreement with their staff to provide additional controls. It does not follow that these risk control standards are reasonably practicable, just because a few organisations have adopted them" (HSE, 2007-a).

Other elements of uncertainty

The case law shows that there are many other elements of uncertainty that may act to exclude or scale down the employer's duty to ensure safety without even having to perform a cost-benefit analysis.

One of these is the nature of the company's business. The criterion – under a variety of names – is used to find that some risks are inherent in a business or a certain type of work[28]. In some instances, the worker is presumed to possess particular abilities that enable him to contend with the risks. In some cases, the judges' reasoning leads to the conclusion that workers must make the choice between keeping a job which involves a health risk, or repudiating the employment contract[29].

Another element of uncertainty, acknowledged by the HSE, lies in the differential social value attached to risks. The deaths of 150 people in an oil rig fire stirs a greater public outcry than the 2 000-odd killed each year in the United Kingdom just by mesothelioma – the most specific asbestos-related cancer. This differential perception is reflected in the case law. In some cases, very substantial and immediately visible damage may require preventive measures that cost more than less spectacular damage, regardless of the level of risk defined by a formula that ties damage to probability of occurrence. But this language of emotion is also a social construct: it operates to justify inequalities. More than a common "societal" culture, it is a set of values of particular social groups. The UK's *Hazards* magazine compared the situation of Italian and British workers who had developed cancer from exposure to vinyl chloride monomer. While in Italy, executives of the Montedison chemical company were tried and found criminally liable, for the workers at Vinatex in Derbyshire, who suffered similar exposures and developed cancer and other diseases, "any thought of compensation or justice remains a distant hope"[30].

The wide discretion which the SFAIRP clause leaves the courts to formulate assessment criteria in fact makes it impossible to list all the elements of uncertainty. In cases of post-traumatic stress disorder, for instance, the courts have distinguished "primary victims" from "secondary victims". The former would have been involved as "active participants" in a traumatising event, while the latter would have been involuntary, passive bystanders. The employer's liability would not extend to the latter category. For example, a worker who witnesses a workmate's death in a work accident caused by his employer's negligence cannot claim to be within the ambit of the employer's duty of care, and will not be entitled to compensation for the harm suffered[31]. Once again, the judiciary call into question the framework directive's principle that health and safety must be guaranteed in "all aspects related to the work". It matters not whether the worker was a "bystander" to or an "active participant" in any of these aspects, his presence and activity form part of a collective process. The rationale of this body of case law is to deny the specific characteristics of employer-employee relations, and to seek to apply to it rules that generally result from precedents in fields where there is no control relationship between individuals. Which is why most of the precedents cited to justify the distinction between "primary victims" and "secondary victims" involve bystanders at road accidents.

Differing scopes

The SFAIRP clause has implications in three areas: criminal liability, civil liability in terms of the employer's common law and statutory duties, and in determining the practical extent of the duty to ensure safety.

[28] Langridge, Canterbury City Council v Howletts and Port Lympne Estates (1996) refers to "the idiosyncrasy" of a particular business.
[29] Sutherland v Hatton (2002).
[30] *Hazards*, October-December 1998, p. 10.
[31] Robertson and Rough v Forth Bridge Joint Board (1995).

The civil and criminal liability consequences of the clause can be seen in the case law cited in this article. It shows that the criteria used in the United Kingdom go well beyond the terms of article 5.4, which only allows Member States to limit the employer's liability to cases of "force majeure".

It remains to be seen how far the clause also effectively curtails the employer's duty to ensure safety irrespective of its consequences for liability. Such an analysis can be based on two types of information:

1. Empirical data on the operation of the enforcement authorities (the Health and Safety Executive). The enforcement authorities are a crucial institutional interface between employers and the law. Their activities are guided by whatever limits the law set on the employers' duties;
2. The administrative case law on decisions taken by the enforcement authorities. Any employer can appeal HSE decisions to specialized tribunals, and these decided cases enable his duties to be circumscribed in a context which involves neither criminal penalties nor compensation in a civil liability claim.

The empirical data on the enforcement authorities' operations are inevitably piecemeal. They can be supplemented by a comparative analysis of different national enforcement systems.

Hawkins (2002) gives a detailed analysis of HSE decisions about whether to prosecute. The study highlights the uncertainties with which the SFAIRP clause shrouds inspectors' activities, forcing them to second-guess how the tribunals will exercise their discretion. It points out that, "If the general principle of reasonably practicability requires a balancing by the court of the risks and costs involved, for inspectors it implies a loss of control over the outcome, since in shifting from absolute to general duties matters are moved from questions of fact to questions of value" (Hawkins, 2002, p. 394). The same author quotes personal testimony from several inspectors that they would rather have to deal with specific obligations unqualified by the SFAIRP clause. A principal inspector for the construction industry recounts his experience, "it's nice to be able to get a case where there's an absolute duty. There's no doubt about that ... At one time the words 'reasonably practicable' filled me with dread" (ibid., p. 397-398).

Comparative studies of enforcement authorities' operations are thin on the ground. One of the most detailed studies is of enforcement activities concerned with chemical hazards. It analyses enforcement action on reducing exposure to styrene in chemical firms. It covers six countries: four Scandinavian countries, Great Britain and Italy. On the plus side, it investigates what level of requirements the enforcement authorities make in comparatively similar economic and technical conditions. On the UK inspectorate, the author observes that, "inspectors could plan for the difficulties of having to argue about the 'reasonably practicable' nature of precautions and investments in prosecution proceedings. Both the qualifications of HSE inspectors – who are usually not specialists- and the lack of backing in terms of a national assessment of the dangers of exposure to styrene prevent HSE inspectors from calling for more than 10 to 20% of the amounts spent by Italian or Scandinavian companies" (Olsen, 1992, p. 54-55).

While the incomplete empirical data tends to show that the SFAIRP clause does hold back enforcement activity, the case law clearly confirms that it gives the duty to ensure safety a content that is not commensurate with the framework directive criteria. An analysis of Langridge, Canterbury City Council v Howletts and Port Lympne Estates is extremely enlightening on this point (see box p. 29).

The consequences

■ Inherent bias

The most outrageous consequence is probably the inherent bias. If life and health are not to be bargaining chips in the work relationship, it must be recognized that there is a fundamental right – the same for all – to protection of that life and health independently of the situation of financial need that

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might induce a person to "accept" health damage in exchange for pay. The duty to ensure safety imposed on employers stems directly from that fundamental right. A business's financial objectives are therefore subservient to the duty to ensure safety. In other words, if for objective economic reasons, a business cannot secure the duty to ensure safety, it becomes an unlawful economic activity.

The SFAIRP clause establishes an inverse relationship of subordination. It makes the protection of life and health dependent on a financial calculation. The levels of risk and the cost of effective preventive measures vary from industry to industry. It is less costly to secure an optimum level of protection for a senior executive than for a building labourer, for the Health Minister than for a nurse. There is nothing random in this variation. It tends to concentrate the risks on those occupational groups with less bargaining power over working conditions. The SFAIRP clause in fact enshrines and legitimises this unequal distribution of work hazards. So much is very clear from an official HSE document, according to which, "Duty-holders should review what is available from time to time and consider whether they need to implement new controls. But that doesn't mean that the best risk controls available are necessarily reasonably practicable. It is only if the cost of implementing these new methods of control is not grossly disproportionate to the reduction in risk they achieve that their implementation is reasonably practicable. For that reason, we accept that it may not be reasonably practicable to upgrade older plant and equipment to modern standards" (HSE, 2007-a).

What is more, economic research into health and safety at work confirms that the inequality is on both sides of the equation: the costs of prevention, and the cash valuation of the benefits secured. To put it baldly, human lives are worth very different amounts. British research found that, "Results from a recent study of the retrospective value of life implied by safety investment decisions in various sectors find that implied values of life range from £200 000 to £400 million" (Soby *et al.*, 1993, p. 366).

A case decided after the framework directive was already in force[32] moves away from the traditional abstract reasonable employer test, making the dominance of economic considerations even clearer. Among the general criteria that determine an employer's duties in relation to work stress-related mental disorders, Hale LJ specifically mentions that, "the size and scope of its operation will be relevant [to determine what can be reasonably expected of an employer – *ed.*], as will its resources, whether in the public or private sector, and the other demands placed upon it" (paragraph 33). The mention of the particular employer's resources is obviously apt to shroud the extent of the duty of prevention in yet further uncertainty. In one of the cases covered by this judgement on appeal in the House of Lords[33], Lord Walker also applied a cost-benefit calculation to specify the extent of the employer's duty, "supply teachers cost money, but not as much as the cost of the permanent loss through psychiatric illness of a valued member of the school staff" (paragraph 68). This argument would suggest that, in the particular case, the school head could have considered trying to reduce the workload of the "valued member of staff" in question. The suspicion lurks that such an investment might not have been required for a cleaner or canteen lady (assuming these jobs had not yet been outsourced by the school management).

■ Undermining the order of priority of preventive measures

The second thing affected is the order of priority of preventive measures. The framework directive lays down a clear order of priority. The overriding priority is eliminating the risks, then evaluating those risks that could not be eliminated, and giving priority to collective preventive activities concerning work organisation, the choice of equipment, substances and work processes. These collective measures, which often come down to business strategy choices, take priority over individual measures like training, information, wearing personal protective equipment, etc. The SFAIRP clause heavily qualifies this order of priority of preventive measures by allowing a priority measure to be regarded as disproportionate to a less costly and possibly less effective one.

■ Widening the net of "acceptable risks"

The third consequence is the emerging concept of acceptable risks, which is inseparable from the SFAIRP clause. Where risks exist that it would be relatively costly to prevent, using a cost-benefit calculation means that some of these risks with a low probability of occurrence and "low cost" possible consequences can be classed as "acceptable risks". The HSE documents published to explain the scope of the SFAIRP clause are clear on this (HSE, 2001). They distinguish three categories: unacceptable risks, whatever the possible benefits attached to an activity; tolerable risks, which must be kept at the lowest level reasonably practicable; and acceptable risks. The intermediate category of "tolerable risks" is defined by a quantitative model as lying between an upper limit of annual deaths of 1 in 1000 people exposed and a lower limit of 1 in 1 million people exposed. A risk below the latter limit falls into the "acceptable risk" category.

In practice, the "acceptable risks" category tends to harbour risks with low social visibility. These are usually long-term risks whose health impacts can be partially blamed on non-work factors. This is a frequent head of complaint for trade unionists in the United Kingdom. Some argue that the SFAIRP clause has no serious consequences for the most serious and most immediate physical risks, but that it is fairly systematically raised by employers against

[32] Sutherland v Hatton (2002).
[33] Barber v Somerset County Council (2004).

ergonomic risks in particular related to work on VDUs or psychosocial risks[34]. It may also include immediate and serious risks to specific groups of workers who are deemed to know of and "accept" a high level of risk. Former Director General of the HSE John Rimington contends that an occupational risk of death in excess of 1 in 1000 a year may be accepted in certain occupations like helicopter piloting or deep sea fishing "where people venture upon the risks with a clear understanding, and where extra precautions cannot abate the risk considerably" (Rimington *et al.*, 2003, p. 14).

[34] Interview with Hilda Palmer of the Greater Manchester Hazards Centre, February 2007.

Crouching tiger, reasonably practicable judges

Trevor Smith worked as a keeper at Howletts Wild Animal Park, near Canterbury. The zoo's work practices were meant to encourage social contact between animals and keepers. On 13 November 1994, Trevor Smith went into the enclosure housing two tigers in order to clean it. He was alone, equipped with a shovel and a bucket. One of the tigers put its front paws on Mr Smith's shoulders. He fell to the ground and was bitten at the base of the neck, dying instantaneously. It was the zoo's third fatal accident in ten years.

In the months following Mr Smith's death, a senior environmental health officer[a] tried to negotiate new work practices with the zoo owner to avoid keepers coming into direct contact with dangerous animals. The zoo owner point blank refused. Negotiations broke down and a prohibition notice was served on 6 June 1995 forbidding any direct contact between keepers and tigers (except for animals that were too young to present a serious risk).

The zoo owner applied to an industrial tribunal[b] to cancel the prohibition notice and allow him to maintain operating practices that put employees in direct contact with dangerous animals. The zoo management mounted a high-profile campaign around the appeal. A dozen witnesses were brought in to attest to the importance to animal welfare of the "fundamental rights of wild animals to social contact". The zoo management even went so far as to claim that the prohibition notice "interfered with the freedom of any individual to accept a greater than normal risk to his personal safety for the better practice of his occupation or calling", and could be in breach of the European Convention on Human Rights!

The industrial tribunal found in the employer's favour in January 1996[c], ruling that the prohibition notice forbidding the employer to put its employees in direct contact with tigers was not reasonably practicable.

In finding the prohibition notice to be unlawful, the tribunal argued that the Health and Safety at Work Act did not allow activities to be prohibited which were inherently risky by nature. It argued that prohibiting direct contact between tigers and staff would undermine the nature and ethos of this type of zoo.

The ruling was greeted with some unease in Britain. The European Safety Newsletter (ESN) devoted much of its April 1996 issue to it. An editorial comment observed that, "Perhaps Britain's EU partners were right to be sceptical about the concept of reasonably practicability and to insist that the term be excluded from 118A directives".

The ESN was able to reassure its readers on two counts, however:
- the ruling was not unanimous. The only legally trained member of the tribunal had given a dissenting view;
- an industrial tribunal ruling does not constitute binding precedent in UK law.

The case was appealed to the High Court. Its judgement[d] given in November 1996 confirmed that UK law favoured the employer and that the health and safety enforcement authority had no right to ban inherently dangerous practices if they were found to be of the "essential nature of the business" (paragraph 42). UK law's incompatibility with the framework directive was denied with arguments of doubtful cogency. Mr Justice Turner argued that the issue was resolved by the provision of article 6.2 of the directive which requires the employer to take planned prevention measures "taking into account the nature of the activities of the enterprise" (paragraph 47). He construed this phrase as meaning that the employer has free choice of the enterprise's activities, and that the framework directive cannot have intended "to outlaw certain activities merely on the basis that they were dangerous" (paragraph 47).

This interpretation significantly curtails the employer's duty to ensure safety. It is readily clear from an overall analysis of the framework directive that the phrase quoted is not intended to limit the duty to ensure safety, but merely to indicate that effective prevention is based on the specific characteristics of each enterprise. There is no doubt that the framework directive allows inherently dangerous working practices like putting workers into contact with dangerous animals to be prohibited. It is a great moral and intellectual stretch to argue that having keepers enter an enclosure but not having direct contact with tigers would be tantamount to an attack on the very nature of a zoo like Howletts.

This judgement makes it possible to assess the extent of the employer's duty to ensure safety in a context where what is at issue is not his civil or criminal liability, but his primary obligation to take preventive measures, and how that is limited in UK law.

In the five years since this judgement, two other keepers have been killed in similar circumstances. Darren Cockrill, in Port Lympne, Howletts' twin animal park, in 2000, and Richard Hughes in Chester Zoo in February 2001. Both keepers were crushed by female elephants when working in their enclosure with no physical barrier to separate them from the animals. These "reasonably practicable" deaths could have been avoided had the framework directive's principles been followed in the United Kingdom.

[a] Health and safety enforcement in the United Kingdom is handled for industrial plants and big companies by the HSE, and for smaller service firms by environmental health officers exercising the same powers as HSE inspectors.
[b] Industrial tribunals are quasi-judicial panels formed of a legally-qualified chairman, an individual appointed by the trade unions and an individual by an employers' association. They have jurisdiction over various employment rights-related matters.
[c] Howletts & Port Lympne Estates Ltd v Langridge HS/32450/95 IT.
[d] Langridge, Canterbury City Council v Howletts and Port Lympne Estates (1996).

Questions may be asked about how the limits of "risk tolerability" are set. It is a situation in which the legal rule has an economic function – that of ensuring a level playing field for competition between firms. This overrides the protection of life and health, which is not seen as an unqualified imperative. This is what probably explains an apparent anomaly noted by many observers. Even the most virulent deregulation drives under a Conservative government have always left health and safety legislation relatively unscathed (see Rimington *et al.*, 2003). The other explanatory factor obviously lies in the limits set by the existence of Community directives that prevent all-out deregulation of safety and health.

The upper limit of risk "tolerability" was set at 1 death in 1000 exposed workers a year. This is approximately the death rate of the early 1980s in sectors with the highest fatal accident frequencies: sea fishing, ore mining, and the oil industry. It is as if the upper limit had been set so as to entrench a tolerance to the particularly high levels of fatal accident risks in these sectors. The lower limit of 1 death in 1 million people a year, by contrast, represents the most favourable scenario of what the HSE judges an acceptable risk to the public. Acceptable risks for which preventive measures need not be adopted do not today correspond to real fatal accident risks (which probably exceed the limit set in all sectors). Their scope can only be assessed by being translated into monetary terms. The value of a human life has been calculated at an equivalent of one million pounds, so an acceptable one millionth death risk is tantamount to saying that any risk is acceptable if the estimated annual cost does not exceed 1 pound per person. This shift from an evaluation in deaths to a monetary equivalent valuation obviously creates added problems. In the real world, most deferred risks cannot be precisely costed in cash terms. What is the annualised cost of joint pain until it results in sickness absence? What is the annualised cost of male or female fertility decline? Does the adoption of a child divided by a probability factor have to be included?

The trend towards widening the net of "acceptable risks" has risen sharply in recent years under the effect of campaigns directed against "risk aversion". The Blair government has been particularly active on this front. The courts seem to be receptive to this kind of argument. The Court of Appeal gave a landmark decision in 2002 on four joined cases on work stress and mental health[35]. The ruling, based on the precedent in civil liability, lays down sixteen criteria that flatly contradict the principles of the framework directive. As Brenda Barrett comments, "this decision left the impression that it would be very hard for a claimant to adduce conclusive evidence that the employer's negligent conduct had caused psychiatric injury" (Barrett, 2004, p. 344). The employer's duty to prevent harm to mental health is limited by the costs that such prevention would involve (paragraph 32), with the possible justification of risks intrinsic to the business activity (see paragraphs 12 and 32). The judgement disregards the order of priority of preventive measures in finding that confidential psychological support for the individual worker may be enough to exhaust the employer's duties. No clear priority is given to collective measures on work organisation (see, in particular, paragraphs 17 and 33). The employers were held not to be in breach of duty in three of the four appeals heard. It is significant here that neither the risk assessment nor the adoption of preventive measures based on it are included anywhere in the elements determinative of a "reasonable" employer's duty.

A conflict increasingly hard to conceal

The United Kingdom defence skates over a real debate among British lawyers. There is a broad consensus among legal authority that the SFAIRP clause is at odds with Community law. It is increasingly evident from an uncertain and divided body of case law. Most of the decisions are on specific regulations rather than the framework directive's general duty to ensure safety.

There are three reasons for this:
1. The general duty to ensure safety (s. 2 Health and Safety at Work Act) does not enable a tort action to be brought;
2. Up to 2003, the "best efforts" obligations of article 6 of the framework directive were implemented with similar limitations;
3. The specific regulations do not refer to the SFAIRP clause as systematically as the Health and Safety at Work Act. This leaves greater scope for interpretation of the provisions not expressly qualified by that clause.

A substantial body of case law gets around the difficulty by arguing that the legislature could not have intended to call into question a time-honoured tradition enshrined in precedent. It is an approach particularly found in the Court of Appeal ruling in Hawkes on the manual handling regulations[36]. Aldous LJ evinces the reluctance to take account of Community law: "The Manual Handling Operations Regulations 1992 were intended to implement the Manual Handling Directive 90/269. Even so, I believe it proper to conclude that Parliament had in mind, when they enacted the Regulations, the construction of the words 'reasonably practicable' which had been accepted by the Courts since 1938. It therefore is right to give them the same meaning in the Regulations as was explained by Asquith LJ".

In HTM[37], Latham LJ disposes of the issue of what effect transposition of the framework directive may have in two sentences. The regulations transposing the framework directive also transposed article 5.3,

[35] Sutherland v Hatton (2002), commented on by Barrett, 2002.
[36] Hawkes v London Borough of Southwark (1998).
[37] R v HTM (2006).

which provides that "the workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer". This provision is enacted in Regulation 21 of the Management of Health and Safety at Work Regulations 1999. Latham LJ argues that these are secondary legislation and do not affect the rule laid down by the 1974 Act (which was not amended when transposing the framework directive). He goes on, "Regulation 21 would appear to be an attempt to transpose Article 5.3 of the directive into domestic law. Whether it has succeeded in that regard is not a question that we have to decide in this case" (paragraph 31 of the judgement). It is a reasoning that relies on the order of priority of sources of domestic law to dismiss the primacy of Community law. In Langridge[38], Mr Justice Turner has no hesitation in referring to the framework directive to uphold an interpretation that flatly contradicts the directive's articles 5.1 and 6 (paragraphs 47 and 49 in particular).

The case law on psychiatric and stress-induced problems is not clear on this point, but the courts are manifestly unwilling to take account of the order of priority of preventive measures and obligation to evaluate the risks. In 2004, the House of Lords upheld an appeal in one of the four cases heard by the Court of Appeal in 2002[39]. The Lords broadly confirmed the criteria defined by Hale LJ, recommending that they be given a flexible interpretation. Whether these criteria are consistent with the duty of prevention resulting from the transposition of the framework directive was not considered, even though it formed part of Mr Barber's defence. Lord Rodger cited a judgement in the 1961 case of Withers v Perry Chain Co Ltd to argue that where there was a "slight" health risk, it is for the worker to decide whether to run that risk or face losing his/her job, noting in passing that, "I do not pause to consider how far, if at all, the reasoning in this passage is affected by the current requirements on employers to carry out risk assessments" (paragraph 30). The framework directive is seemingly just a minor irritation…

In other cases, the courts have acknowledged the impact of the Community directives and offered solutions that break with the traditional interpretation. The Scottish courts have often led the way here. In English v North Lanarkshire Council[40], Lord Reed interpreted the UK work equipment regulations[41] in the light of the framework directive, and specifically the order of priority of preventive measures. He found that the concept of suitable work equipment had to be construed subject to the priority requirement to eliminate the risks. Elimination of risks takes precedence over training. That was one ground for rejecting the employer's defence that the worker who suffered the accident was sufficiently trained and experienced. The employer argued that this meant he had done all that was reasonably practicable to avoid the accident by drawing the worker's attention to the need to be careful and to concentrate. Lord Reed expressly refers to the case law of the ECJ, followed by the House of Lords, which requires that national transposing legislation should be interpreted in light of the Community directives. Lord Reed notes that the precedent cited by the defence relies on an interpretation of the Factories Acts[42]. "An approach based on the Factories Acts is fundamentally misconceived. It is also potentially misleading, since the European directives on health and safety at work differ materially from the Factories Acts in important respects. For example, obligations under the Factories Acts tend to be qualified by reference to what is reasonably practicable, whereas the directives generally impose obligations which are expressed in unqualified terms; and the structure of the directives tends to follow a sequential analysis of any hazard and the ways in which it may cause an injury, so that some obligations may be secondary to others".

The judgement in McGhee applies the same principles to interpret the Work (Health, Safety and Welfare) Regulations 1992 which transpose Community Workplace Directive 89/654. Lord Hamilton argued against an interpretation based on "the terms (as domestically interpreted) of previous and now repealed UK health and safety provisions". He said that the proper approach to interpreting new provisions transposing Community directives was to approach them "untrammelled" by superseded legislation and any interpretation of it[43]. Skinner, also on the Work Equipment Regulations, takes the same approach and dismisses any consideration of the cost of preventive measures that should have been taken[44].

A recent House of Lords ruling goes further, and expressly addresses the conflict between the framework directive and the UK Provision and Use of Work Equipment Regulations[45]. In this case, Mr Robb sustained an injury in 1999 in a fall while working on an offshore production platform. He claimed damages for his employer's breach of safety of work equipment provisions. The resulting incapacity permanently prevented Mr Robb from resuming his work as a scaffolder. The trial court's finding of fact was that the fall was due to an improperly fixed ladder. The trial judge refused to award the injured worker damages on the grounds that the employer could not reasonably foresee that the ladder would be improperly fixed as the result of carelessness by another worker. He therefore held that it was not reasonably practicable for an employer to implement more effective preventive measures which did not depend on a worker's conduct. He nevertheless noted that another system had been introduced nine months after this accident: the ladders were now fixed by means of screws so that they could not be moved. Mr Robb had brought a series of cases over the years to secure compensation. All had failed. His lawyer, Mr Angus Stewart, went to the House of Lords to argue that the provisions in

[38] Langridge v Howletts & Port Lympne Estates (1996).
[39] Barber v Somerset County Council (2004).
[40] English v North Lanarkshire Council (1999).
[41] Provision and Use of Work Equipment Regulations 1998.
[42] The Factories Acts are the different forerunner enactments to the Health and Safety at Work Act 1974. Both make extensive use of the SFAIRP clause.
[43] McGhee v Strathclyde Fire Brigade (2002).
[44] Skinner v Scottish Ambulance Service (2004).
[45] Robb v Salamis (M & I) Ltd (2007). For a detailed account, see Stewart, 2007.

force should be interpreted on the basis of the Community directives. His doggedness paid off, and the case was decided in his favour in December 2006.

In Robb, Lord Clyde expresses misgivings about whether the Work Equipment Regulations are compliant with the framework directive's provisions (paragraphs 45 to 48 of the judgement). He notes that article 5.4 of the framework directive is "significantly different", and that it "may be difficult to construe the words of the Regulation to equate with this language" (paragraph 47).

This judgement exemplifies the potential influence of Community law in moving the case law on. But that in no way detracts from the importance of the infringement proceedings brought by the Commission. The UK precedent is uncertain and divided. The traditional approach restricting the duty to ensure safety has never been called into question where criminal liability is concerned. The HSE is reluctant for political reasons to push the issue of non-compliance with Community law. In HTM, although it brought the prosecution of the employer, the HSE declined to rely on the framework directive, notwithstanding the glaring discrepancy involved between UK law and the Community provisions. A reference to the ECJ for a preliminary ruling could have brought this to the fore. Given the excellence of the lawyers instructed by the HSE, the obstacle is probably political. Raising this issue would have called into question the government's commitment to minimising the impact of directives on UK law. The HSE cut the ground from under its own feet in the case rather than advance a very uncomfortable argument. The administrative case law is limited in the same way for the same reasons. Where civil liability is concerned, the movement started with English, McGhee, Skinner and Robb is far from being the dominant trend. Only a ruling that the government has failed to fulfill its obligations will pave the way for this case law to be unified on a basis of compliance with the framework directive.

Conclusions

The most scathing criticism of the UK defence and the Advocate General's Opinion comes from an English judge. Uttered more than fifty years ago, his words come as a pithy rebuttal of their analyses.

"First, it appears to be an illegitimate method of interpretation of a statute, whose dominant purpose is to protect the workman, to introduce by implication words of which the effect must to be reduce that protection.
Second, where it has been thought desirable to introduce such qualifying words, the legislature has found no difficulty in doing so..."[46]

These two sentences marry an ethical approach to the judicial function with rigorous principles of statutory interpretation. The ruling that the ECJ will hand down before the end of this year will tell how far this lesson remains a living source of the law for the Community judiciary. ■

[46] Summers v Frost (1955).

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