

THE NEED FOR A GENERAL DUTY OF CARE

*Andrew Hopkins**

I. THE ALARP REQUIREMENT.....	842
A. <i>The Meaning of ALARP</i>	842
B. <i>The Value of ALARP</i>	844
II. GENERAL DUTIES IN THE UNITED STATES IN RELATION OF WORKER HEALTH AND SAFETY.....	845
A. <i>The General Duty Offshore</i>	847
III. CONCLUSION.....	848

Professor Weaver has done us a great service with her two-part article on offshore safety in the wake of the Macondo disaster.¹ There has been enormous and quite bewildering change since 2010, both on the part of governments and on the part of industry. Weaver summarises and analyses this change in a comprehensive and readable way. She concludes that the offshore regulator still has a long way to go if it is to match best practice in other countries, and she makes a number of recommendations.

Weaver draws on my book, *Disastrous Decisions: The Human and Organisational Causes of the Gulf of Mexico Blowout*.² One of my observations that she emphasises is that an effective regulatory regime cannot rely only on prescriptive rules, but

* Emeritus Professor of Sociology, Australian National University, Canberra. andrew.hopkins@anu.edu.au

1. See generally Jacqueline L. Weaver, *Offshore Safety in the Wake of the Macondo Disaster: Business as Usual or Sea Change?*, 36 HOUS. J. INT'L L. 147 (2014); Jacqueline L. Weaver, *Offshore Safety in the Wake of the Macondo Disaster: The Role of the Regulator*, 36 HOUS. J. INT'L L. 379 (2014) [hereinafter Weaver, *The Role of the Regulator*].

2. ANDREW HOPKINS, *DISASTROUS DECISIONS: THE HUMAN AND ORGANISATIONAL CAUSES OF THE GULF OF MEXICO BLOWOUT* (2012).

must be based ultimately on a general duty of care. In this comment I want to make some additional clarifying remarks about general duties. What is perhaps not sufficiently clear in my initial discussion in the book, is that there are at least three radically different general duties that need to be distinguished in the present context:

1. A duty to reduce risks to as low as reasonably practicable (“ALARP”), which can also be described as a duty of care.
2. A duty to provide a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm.
3. A duty to provide a workplace free from recognised hazards.

I deal with these in turn in what follows.

I. THE ALARP REQUIREMENT

Most safety case regimes³ are supported by legislation that imposes a general duty on the operator to reduce risks “as low as reasonably practicable,” or words to that effect.⁴ This amounts to a transfer of the common law duty of care into legislated requirement. In the UK the ultimate source of this obligation is to be found in the Health and Safety at Work Act of 1974 that states: “It shall be the duty of every employer to ensure, *so far as reasonably practicable*, the health, safety and welfare at work of all his employees.”⁵

For all practical purposes this is the same as saying that risks must be reduced to *as low as reasonably practicable*.

A. *The Meaning of ALARP*

The requirement to reduce risks “as low as reasonably practicable” is inherently vague. The leading legal interpretation is that it requires employees to adopt effective precautions, unless there is a “gross disproportion” between the cost of the

3. See Andrew Hopkins, *Explaining “Safety Case”* (Nat’l Research Centre for OHS Regulation, Working Paper No. 87, 2012), for discussion of safety cases.

4. *Id.* at 6.

5. Health & Safety At Work etc. Act, 1974, c. 37, § 2 (U.K.) (emphasis added).

precautions and the level of risk reduction achieved.⁶ This is equally vague. In these circumstances courts often turn to current good industry practice to determine what is reasonably practicable. This means that what is reasonably practicable will vary from industry to industry, and over time, as industry standards improve. It is not a concept that can ever be given a fixed meaning.

There is however a school of thought that regards this approach as unacceptably arbitrary and subjective and has sought to introduce a more rigorous cost-benefit analysis (“CBA”). This depends on quantifying the risks, calculating the benefit of some risk reduction measure, usually in terms of the number of lives saved and the value of each such life saved, and then comparing the benefit with the cost of the risk reduction measure. If the cost outweighs the benefit, (or in some interpretations, is grossly disproportionate to the benefit) then risk reduction measure is judged to be not reasonably practicable.

This approach was championed by the regulators in the UK when offshore safety cases were first introduced,⁷ but quantified CBA based on some assumed value of life that has never been endorsed by courts.⁸ Furthermore, there are insurmountable methodological and moral objections that have been raised against this kind of CBA. So much so that some commentators argue not just that CBA be treated as one among several matters to be given weight in decision-making, but that it be abandoned. According to Heinzerling and Ackerman:

Cost-benefit analysis cannot overcome its fatal flaw: it is completely reliant on the impossible attempt to price the priceless values of life, health, nature, and the future. Better public policy decisions can be made without cost-benefit analysis, by combining the successes of traditional regulation with the best of the innovative

6. Hopkins, *supra* note 3, at 9.

7. HEALTH & SAFETY EXEC., REDUCING RISKS, PROTECTING PEOPLE: HSE’S DECISION-MAKING PROCESS 62–63 (2001).

8. RICHARD M. ROBINSON ET AL., RISK & RELIABILITY: ENGINEERING DUE DILIGENCE 26 (8th ed. 2010).

and flexible approaches that have gained ground in recent years.⁹

As a result of the methodological difficulties involved, the UK safety case regulator has retreated from CBA in more recent years and increasingly relies on good industry practice as a demonstration of ALARP.¹⁰

It is important to highlight this retreat from CBA to U.S. audiences. One of the objections that is sometimes made to safety case regulation in the United States, is that it allows employers to determine their own risk acceptance criteria and to impose risks on employees that might not be acceptable under more prescriptive arrangements. Clearly, to the extent that ALARP has come to mean following good industry practice, this is not an issue.

Finally, although the general duty of care is in theory quite imprecise, there are numerous cases in which courts have had to decide whether the duty has been complied with. This case law gives fairly clear guidance as to what the general duty means in particular cases.

B. The Value of ALARP

The general duty to reduce risks to ALARP has important consequences. First, it provides leverage for regulators. If an operator wishes to adopt a procedure or a standard that falls short of good or best practice, the regulator can reject it on the grounds that it does not reduce the risk as low as reasonably practicable. This additional leverage is this reason the fire protection standards on rigs in UK waters are higher than for those in the Gulf of Mexico.¹¹

Second, the general duty is in effect a duty to do whatever is reasonably practicable to identify and control all hazards. An

9. LISA HEINZERLING & FRANK ACKERMAN, PRICING THE PRICELESS: COST-BENEFIT ANALYSIS OF ENVIRONMENTAL PROTECTION 33 (2002).

10. See Andrew Hopkins, *Risk-Management and Rule-Compliance: Decision-Making in Hazardous Industries*, 49 SAFETY SCI. 110, 117–18 (2011), for a more complete account of this retreat.

11. Weaver, *The Role of the Regulator*, *supra* note 1, at 451; Bill Campbell, *Delving into Deepwater—Tolerable Risks?*, MAR. ACCIDENT CASEBOOK (July 7, 2010), <http://maritimeaccident.org/2010/07/delving-into-deepwater-tolerable-risks>.

operator cannot claim to be in compliance just because it has gone through a hazard identification process, if that process is demonstrably inadequate and fails to identify and control hazards that a reasonable operator would have identified and controlled. This makes it relatively easy to prosecute companies for a violation of their general duty after a Macondo-style event.

Third, the general duty means that even if there is no directly applicable rule, operators still have a duty to manage risk. They must therefore maintain some reasonable level of risk awareness that goes beyond mere compliance. It is the general duty of care that raises a safety case regime above the blind compliance mentality that characterized the MMS regime and still characterizes the post-Macondo regulatory regime¹²

II. GENERAL DUTIES IN THE UNITED STATES IN RELATION OF WORKER HEALTH AND SAFETY

Moving to the United States, let us first consider the general duty under the U.S. Occupational Safety and Health Act (OSHA). Section 5(a)(1) of the Act specifies that each employer must provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”¹³

This is radically different for the general duty to ensure safety so far as reasonably practicable. It appears to impose a duty on employers only when the hazard is actually causing harm or is likely to cause harm. For example, if workers are currently experiencing repetitive strain injuries or health problems, this general duty is potentially enforceable. However there are insuperable difficulties in applying this provision in dealing with major hazard industries. Such industries typically rely on defence in depth, that is, they deploy a series of controls or defences against the hazards of greatest concern. If one of these defences is foregone, or is not maintained, the risk of a major accident increases, but it may still be very slight. Therein lies the regulatory problem. It is only if the absence or failure of the

12. Weaver, *The Role of the Regulator*, *supra* note 1, at 451.

13. Occupational Safety and Health Act of 1970 § 5(a)(1), 29 U.S.C. § 654(a)(1) (2012).

defence makes an accident *likely* that the OSHA general duty applies. To give an example, it would be difficult to demonstrate that failure to live up to some good industry practice, such as the installation of automatic cut-outs, was “*likely* to cause death or serious harm,” since with or without such automatic cut-outs, death or serious harm is unlikely, because of all the other defences that may be in place. However, if there is a general duty to reduce risks as low as reasonably practicable, and if automatic cut-outs are generally regarded as good industry practice, the regulator will have a strong case against an operator who fails to install them.¹⁴

As if in recognition of this problem, there is a second prong of the OSHA’s general duty clause, section 5(a)(2). This states that each employer “shall comply with occupational safety and health standards promulgated under this Act.”¹⁵ Accordingly, OSHA has developed an extensive array of regulations, which can be enforced under this clause.¹⁶ Much of OSHA’s enforcement activity relies on this aspect of the general duty.

The drawback of section 5(a)(2) is that it is always open to the employer to argue that the regulation does not apply in the particular situation. Attempts to enforce particular rules can therefore lead to endless legal disputes. For example, in late 2009 the U.S. Occupational Safety and Health Administration proposed that BP be fined \$87 million, over and above the initial \$21 million arising out of the Texas City refinery disaster.¹⁷ The new fines were for BP’s failure to implement certain risk reduction strategies at Texas City. BP’s lawyers contested the new fines on various grounds. One of these concerned the issue of whether existing relief valves should be required to meet a certain performance standard.¹⁸ The American Petroleum Institute had formulated the performance standard as “a recommended

14. See generally M. Baram, *Generic Strategies for Protecting Worker Health and Safety: OSHA’s General Duty Clause and Hazard Communication Standard*, in 11 LAW AND THE WORKPLACE: OCCUPATIONAL MEDICINE 69 (Jack W. Snyder & Julia E. Klees eds., 1996), for a more detailed and very useful discussion on OSHA’s general duty clause.

15. 29 U.S.C. § 654(a)(2).

16. See Hopkins, *supra* note 10, at 118 & n.29 (discussing OSHA and section 5(a)(2)).

17. *Id.* at 115–16.

18. *Id.* at 116.

practice” (RP 520).¹⁹ BP stated that “as a recommended practice API RP 520 was not a mandatory standard in the refining industry.”²⁰ It agreed to comply with the standard for new installations but not for existing ones. OSHA insisted that existing relief valves at Texas City should comply with the standard, on the grounds that it is “recognized and generally accepted good engineering practice” (RAGAGEP).²¹ BP countered that existing relief valves at most refineries across the United States do not in fact comply and therefore, this cannot constitute RAGAGEP.²² In short, BP resisted OSHA’s attempts to force Texas City to adopt the performance standard in question on the basis that there was not a rule that unequivocally required it to do so.

On the other hand, where there is a general duty to reduce the risk as low as reasonably practical, the ultimate issue for a court or decision-maker is no longer whether the rule technically applies, but whether the defendant has done all that it reasonably can to reduce risk. In such circumstances the defendant will not be helped by arguing about a legal technicality.

A. *The General Duty Offshore*

The Outer Continental Shelf Lands Act (OCSLA) under which the U.S. offshore regulator operates, also contains a general duty provision, section 1348(b)(1), which states: “It shall be the duty of any holder of a lease or permit under this Act to maintain all places of employment . . . in compliance with occupational safety and health standards and, in addition, free from recognized hazards to employees”²³

This seems to combine both duties under OSHA, except that the requirement is to maintain the workplace free from recognised hazards, *regardless of whether they are likely to cause harm*. This would seem to be an absolute duty, which would make it impossible to escape liability after an event like Macondo. However there was no suggestion after the Macondo

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Outer Continental Shelf Lands Act § 22, 43 U.S.C. § 1348(b)(1) (2012).

accident that BP would be prosecuted under this provision; the Act appears to be a dead letter in this respect.

On the face of it, section 1348(b)(1) seems ill-considered. It is impossible to maintain workplaces free from all recognised hazards. For example, blowout is a recognised hazard, which can certainly be managed. Moreover the risk of blowout can be reduced to as low as reasonably practicable. But it would be impossible to ensure that a manned drilling rig was *free* from this hazard. Unless there are legal defences not mentioned in the section, or unless there is case law that limits the applicability of the section, this would seem to be a requirement that no employer can possibly comply with. It is hard to imagine what would happen if the regulator began enforcing this requirement.

III. CONCLUSION

In view of what seems to me to be the ill-considered nature of this general duty under the OCSLA, I would not advocate that the regulator begin implementing it. Instead the real need is for a general duty to reduce risks as low as reasonably practicable. Ideally this might be embedded in the over-arching legislation (in this case the OCSLA). But given the virtual impossibility of getting such reform through the legislature in the United States, one wonders if an agency like BSEE could simply create this as a rule, which would then sit alongside or over the top of other relevant rules, such as SEMS II. The question of precisely how a general duty of care (that is, an ALARP requirement) might be imposed on offshore operators, without legislative change, is one to which lawyers in the United States could usefully turn their minds.