Butterflies in the Supreme Court
Reasonable Practicability and more
Life after Baker v Quantum

In April 2011 I wrote,
"Make no mistake Baker v Quantum is not just "a deafness case", it is probably the most important industrial disease and indeed employer's liability case for many years"
I was not wrong! A low noise level, low value deafness case has had a dramatic effect on disease litigation not least asbestos litigation. It is now starting to impact upon employer's liability generally.
My main concern had been on the impact upon S29(1) of the Factories Act 1961 and that same phraseology where it appears elsewhere.
Section 29 was as follows
"There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there."
Baker v Quantum goes further than finally after over 50 years conclusively deciding what was meant by Section 29!
Where better to start than looking at the judgement itself. My summary is set out below but as always the judgment is the real place to go.

BAKER V QUANTUM CLOTHING GROUP LTD AND OTHERS
HL (Lords Mance, Kerr, Clarke, Dyson and Saville)
30th April 2011
[2011] UKSC499

As stated by Lord Mance in his introduction, the central issue was whether liability existed at common law and/or under Section 29(1) of the Factories Act 1961, towards an employee who can establish noise-induced hearing loss resulting from exposure to noise levels between 85 and 90 dB(A)lepd.

As ever the test for employer's liability for common law negligence as set out in Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd [1968] 1WLR 1776 was cited together with the development of that statement by Mustill J in Thompson v Smiths Ship Repairers (North Shields) Ltd [1984] QB405.
In summary Lord Mance stated:-
"An employer following generally accepted practice will not therefore necessarily be liable for common law negligence, even if the practice involves an identifiable risk of leading to noise-induced hearing loss. There is, as Hale LJ also said succinctly in Doherty v Rugby Joinery (UK) Ltd [2004] EWCA CIV147 further "a distinction between holding that a reasonable employer should have been aware of the risks and holding that certain steps should have been taken to meet that risk."

In his judgment Lord Mance sets out the history of noise induced hearing loss and the development of knowledge, which will be required reading for anyone dealing with these cases. He indicated that the trial judge and the Court of Appeal had accepted that the Code of Practice was the generally appropriate standard for employers with average knowledge during the 1970's and early 1980's differing only as to the date in the 1980's when it ceased to be so. He also indicated that the judge and ostensibly the Court of Appeal had distinguished between average employers and other employers. He then reviewed the common law position breaking it down under the following headings.

Analysis of common law position

a) Greater than average knowledge

Lord Mance referred again to the classic statements of Swanwick and Mustill JJ:-

"These statements identify two qualifications on the extent to which an employer can rely upon a recognised and established practice to exonerate itself from liability in negligence for failing to take further steps: one where the practice is "clearly bad", the other where, in the light of developing knowledge about the risks involved in some location or operation, a particular employer has acquired "greater than average knowledge of the risks". The question is not whether the employer owes any duty of care; that he (or it) certainly does. It is what performance discharges that duty of care."

Further he indicated:-

"The primary inquiry, when considering whether an employer has acted with due care to avoid injury from noise-induced hearing loss, is whether there is a recognised and established practice to that end; if there is, the next question is whether the employer knows or ought to know that the practice is "clearly bad", or, alternatively, if the area is one where there is developing knowledge about the risks involved in some location or operation, whether the employer has acquired "greater than average knowledge of the risks" ".

b) Was the Code of Conduct an acceptable standard for average employers?

He accepted that the real question was as to the sustainability of the judge's conclusion that the Code of Practice constituted an acceptable standard for average employers to adhere to during the 1970's and 1980's. In short he concluded that there was no basis for the court to disturb the judge's conclusion in paragraph 87 that the Code of Practice was an official and clear guidance which set an appropriate standard upon which a reasonable and prudent employer could legitimately rely in conducting his business until the late 1980's.

c) What period should be allowed for implementation of any different standard?

Here after considerable consideration he refused to interfere with the judge's initial conclusion as to there being a period of two years for the actual implementation of steps to provide full and effective protective measures.

Section 29 of the Factories Act 1961

Lord Mance indicated that several important issues arose relating to the section upon which there was no prior authority at the highest level, namely whether the section applied at all where the claim related not simply to the workplace but to activities carried on at it; whether it applied to risks of noise induced hearing loss arising from such activities in relation to long term employees working in the place; whether the safety of a place was an absolute and unchanging concept or a relative concept, practical implications of which might change with time and what was meant by so far as reasonably practicable and how this related to the concept of safety.

Lack of safety arising from activity

Lord Mance concluded that a workplace could be described as unsafe, if operations constantly and regularly carried on and it made it so. He gave by way of an example a shop floor being constantly crossed by fork-lift trucks passing from a store on one side to somewhere else on the other side of the shop floor.

Lack of safety arising from noise

The second issue Lord Mance indicated was whether Section 29 was directed to noise, which he indicated was more open to question. He concluded that Section 29(1) was part of the statutory provisions dealing with safety, and it was enacted without any appreciation that it could cover noise or noise

induced hearing loss. He then went on to say that the answer to this issue linked up with the next issue namely how far responsibility under Section 29(1) was absolute or relative. If Section 29(1) imposed absolute liability, irrespective in particular of current attitudes or standards from time to time, then noise induced hearing loss appeared so far outside the thinking behind and aim of Section 29(1) that he doubted whether it would be right to construe the sections covering it.

However if liability under Section 29(1) was relative, "depending in particular on knowledge about and attitude to safety from time to time, then, as thinking develops, the safety of a workplace may embrace matters which were previously disregarded, but have now become central or relevant to reasonable employers' and employees' safety."

The absolute or relative nature of safety

The third issue was whether requirements regarding safety under Section 29(1) were absolute or relative. Absolute was the respondent's position, that what is safe is objective, unchanging and independent of any foresight of injury; the only qualification on an employer's liability, where a workplace is unsafe because of employees' exposure to noise, is if the employer can show that it was not reasonably practicable to reduce or avoid the exposure e.g. by providing ear protectors.

Lord Mance did not accept this approach stating:-

> "Whether a place is safe involves a judgment, one which is objectively assessed of course, but by reference to the knowledge and standards of the time. There is no such thing as an unchanging concept of safety."

He summarised stating safety must in his view be judged according to the general knowledge and standards of the times. "The onus is on the employee to show that the workplace was unsafe in this basic sense."

To the extent that previous authorities, including ***Larner v British Steel Plc [1993] ICR551*** stood for a proposition that safety was an eternal absolute independent of any judgment based upon current standards and attitudes, then they were incorrect.

Reasonably practicable

Lord Mance then indicated that since the Court of Appeal had taken the view that safety was absolute and unchanging, it had to consider whether the qualification "so far as is reasonably practicable" enabled the employers to exonerate themselves by showing that reasonable employers would not have considered that there was cause to reduce noise exposure in the workplace below 90 dB(A). He indicated that in view of his conclusion that safety was a relative concept, the correctness of the Court of Appeal's decision in this regard did not strictly arise for consideration. Had the issue arisen he would have regarded the qualifications wide enough to allow current general knowledge and standards to be taken into account.

He set out the relevant criteria as follows:-

> "The criteria relevant to reasonable practicability must on any view very largely reflect the criteria relevant to satisfaction of the common law duty to take care. Both require consideration of the nature, gravity and imminence of the risk and its consequences, as well as of the nature and proportionality of the steps by which it might be addressed, and a balancing of the one against the other. Respectable general practice is no more than a factor, having more or less weight according to the circumstances, which may, on any view at common law, guide the court when performing this balancing exercise"

He was critical of Smith LJ's suggestion in her judgment that "there must be at least a substantial disproportion" before the desirability of taking precautions could be outweighed by other considerations. He indicated that in his view

this represented an unjustified gloss on statutory wording which required the employer simply to show that he did all that was reasonably practicable. *(One might however consider further Edwards -v- National Coal Board [1949] 1KB 704 at page 712 referred to below by Lord Dyson)*

Lord Mance held that he would allow the appellant's appeals both at common law and under Section 29(1). At common law Quantum and other employers in a similar position such as Guy Warwick were not in breach of their duty of care or of their duty under Section 29(1) in not implementing measures to protect their employees in respect of noise exposure at levels below 90 dB(A) prior to 1st January 1990. As regard to Meridian and Pretty Polly, in reflection of the common ground between Lord Mance, Lord Dyson and Lord Saville, the appeal would be allowed by restoring the Judge's decision that they were in breach of duty in not having implemented such measures as from the 1st January 1985.

Lord Dyson

Common Law

Lord Dyson set himself a number of questions with regard to the common law.

Firstly he asked:-

> "Is compliance with the 1972 Code of Practice a defence for the average employer?

He agreed with Lord Mance that there was no basis for interfering with the Judge's findings that until the late 1980's, the Code of Practice set the standard for the reasonable and prudent employer without specialist knowledge.

> "On a fair reading of the Code, this blueprint for action provided that, although it was desirable to reduce levels where reasonably practicable to below the 90dB(A) level, continuous exposure for eight hours in any

> one day to a reasonably steady sound below 90dB(A) was acceptable and did not require the provision of ear protectors. It was made clear that, having regard to the large inherent variations of susceptibility between individuals, exposure below 90dB(A) could not *guarantee* to remove all risk of noise-induced hearing loss. But the clear message of the document, based on the latest scientific knowledge, was that ear protectors were not required if the noise levels were below 90dB(A) and that at levels below 90dB(A) the risk to particularly susceptible people was sufficiently small, both in terms of the numbers who might be affected and the seriousness of any damage that might result, to be acceptable."

He indicated that this is how he would interpret the code and how it was interpreted by those in industry.

The classic statement by Swanwick J and what they say about the relevance of the reasonable and prudent employer following a "recognised and general practice" applied equally to following a Code of Practice which sets out practice that is officially required or recommended.

The judge was entitled to accept the evidence which led him to conclude that the Code of Practice remained the "touchstone of reasonable standards" for the average reasonable and prudent employer at least until the publication of the consultation paper on the 1986 draft Directive.

Lord Dyson accepted that the judge was right to treat Courtaulds and Pretty Polly as different from the average employer. He disagreed with Lord Mance that the decision by the two companies that some action should probably be taken was a display of "greater than average social awareness". As responsible employers they understood that they owed a duty of care to their employees and were keeping the contents of that duty under review. Even if the decision that action was desirable was a display of social awareness he did not see how that would necessarily afford a defence.

He was additionally of the view that the Court of Appeal was not entitled to interfere with the judge's assessment that the employers should have provided ear protectors within two years of the publication in 1987 of the consultation paper of the draft second EEC Directive (the Court of Appeal held at 6 to 9 months).

Finally the judge had considered carefully all the evidence about the knowledge and understanding of Quantum and his conclusion that management were not shown to be in a position of knowledge and understanding that set them apart from the understanding of the great majority of employers ought not to have been interfered with by the Court of Appeal.

Section 29(1) of the Factories Act 1961

Lord Dyson agreed with Lord Mance that Section 29 applied to operations carried out within the place of work and that the section applied to noise.

Noise was clearly not in the contemplation of parliament when section 29 or its predecessors were enacted, but the language of the section was general and "always speaking". Thus it could accommodate working methods and technological developments that were not foreseeable (and attitudes to safety that were not held) at the time when the statute was enacted. He held:-

> "Section 29 applied to noise for the simple reason that excessive noise can cause injury by damaging a person's hearing thereby rendering a place of work unsafe for those who are working there."

As to the meaning of safe agreeing with Lord Mance what was "safe" was an objective question in the sense that safety must be judged by reference to what might reasonably be foreseen by a reasonable and prudent employer. The concept of what was safe was not absolute. Opinions as to what is safe may vary over time as, with developing knowledge, changes occur to the standards that are reasonably expected to be followed.

> "Standards of safety are influenced by the opinion of the reasonable person and foreseeability of risk plays a part in the forming of that opinion."

When considering the meaning of safe consideration was to be given to Section 14(1) of the Act which provided:-

> "(1) Every dangerous part of any machinery…. shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced".

He observed that "the section did not include a reasonable practicability qualification. There was a line of authority to the effect that reasonable foreseeability was a component of the meaning of "dangerous". When considering safe in Section 29(1) the meaning of Section 14(1) was highly relevant and "as a matter of ordinary English, the word "dangerous" is an antonym of "safe"."

He went on to state that in the Section the contrast between "dangerous" and "safe" was striking, the meaning of Section 14(1) was long established and there could be no liability for dangerous parts of the machinery unless the danger was reasonably foreseeable.

He agreed with Smith LJ that reasonable foreseeability was relevant to reasonable practicability. He went on to state:-

> "But in my view, the foreseeability of a risk is distinct from the question whether it was "reasonably practicable" to avoid it. ..... It is only *if* a risk is reasonably foreseeable and it was reasonably foreseeable that an injury would be caused that it becomes necessary to consider whether it was reasonably practicable to avert the risk. Thus, for the

purpose of deciding the issue of reasonable practicability, it is *assumed* that the risk was reasonably foreseeable."

He went on to say that the importance of the Section 14(1) line of cases was that they recognize that the mere fact that a risk of injury is foreseeable as a *possibility* is not necessary sufficient to make the machinery "dangerous". It was dangerous only if the risk of injury was sufficiently likely to make it more than a minimal risk.

He further indicated that there was no principle of law but a statutory obligation cannot be interpreted as being co-terminous with a common law duty. There was a difference between common law and Section 29 in two important respects namely that if the Defendant wished to say that it was not reasonably practicable to make or keep a place of work safe, the burden was on him to do so and that it was not on the Claimant to prove that it was reasonably practicable. Furthermore the fact that breaches of the statute where offences was a very significant difference.

Safety must be judged by the understanding and standards of the times, in this case the Code of Practice. He saw no reason to disturb the judge's conclusions on the issue of safety and that the judge was entitled to conclude that the standard of safety was determined by the 1972 Code until the coming into force of the 1989 Regulations. Judged by the standard of the 1972 Code the Claimant's place of work was safe.

Reasonable practicability

If he had not concluded that reasonable foreseeability was not imported into the meaning of "safe" he would have agreed with the Court of Appeal that it was imported into reasonable practicability.

He agreed with Smith LJ that the "quantum of the risk" was relevant as to whether it was reasonably practicable to eliminate the risk. However if the quantum of the risk was relevant to that question, how could the fact that a

Code of Practice said that the risk was acceptable not be relevant. Agreeing with Smith LJ that the classic exposition of reasonable practicability was to be found in ***Edwards v National Coal Board [1949] 1KB704***, he stated that if a responsible or official body has suggested that a particular level of risk is "acceptable", that is likely to be cogent evidence that this level of risk is minimal and one can reasonably be disregarded. (One can see how that line of thinking might have affected the approach in ***Williams v. University of Birmingham & ANR*** below although reasonable practicability did not fall to be considered as such)

He concluded that there was no basis for the Court of Appeal to interfere with the Judge's assessment either in relation to the issue of reasonable practicability or the standard to be expected of the reasonable prudent employer.

For completeness Asquith LJ's test in *Edwards -v- National Coal Board* [1949] 1KB 704, page 712 ,which has been oft-quoted with approval over the years is set out in full

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"'Reasonably practicable' is a narrower term than 'physically impossible', and seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it is shown that there is a gross disproportion between them-the risk being insignificant in relation to the sacrifice-the defendants discharge the onus on them."

Lord Saville

He simply agreed with Lord Mance and Lord Dyson in one paragraph!

Lord Kerr

Lord Kerr provided the first of the two dissenting Judgments.

With regard to common law liability he considered what the reaction of a prudent and reasonable employer ought to have been to the Code of Practice.

> ".....it is, I believe, necessary to look at what a reasonable employer would have taken from the information contained not only in the Code but also in the earlier publications that I have discussed. True it is that 90 dBA was the stipulated danger level. But employers were not told that lower levels were safe. On the contrary, they were told that certain employees could well suffer a hearing loss if exposed to noise at lower levels. That risk had been clearly signalled. Employers had also been told that too little was known about the relationship of noise to hearing loss to say with certainty what amount of exposure was safe. What ought to have been the reaction of a prudent and reasonable employer to that information? It seems to me that adopting a passive, sanguine attitude to the risk of hearing loss in workers exposed to noise of less than 90 dBA was not an available option. The Code was described as "a blueprint for action". It was certainly not a blueprint for inaction.
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> In *Doherty v Rugby Joinery (UK) Ltd* [2004] ICR 1272 Hale LJ stressed that the duty on the employer was to consider those within the workforce who (although not identifiable in advance) would be particularly susceptible to vibration injury. This seems to me to be an important argument against passivity on the part of employers following the publication of the 1972 Code. A prudent employer should have concluded that the health of a minority was at risk when exposed to noise levels below 90dB(A). The law should not, and in other areas does not, deny protection to a minority simply because they are a minority. An employer's duty extends to the protection of those of his employees who are, by dint of their susceptibility to injury, more likely to sustain it."

In short Lord Kerr took the view that from 1977 onwards an employer in the knitting industry should have known that a percentage of his work force would suffer hearing loss if they were exposed to and remained unprotected from

noise levels of more than 85 dB(A). Such an employer should also have known that he could provide ear protection that would have reduced the risk of that hearing loss occurring at not inordinate cost.

Section 29 of the Factories Act

Lord Kerr agreed with Lord Mance that activities carried on in the workplace rendering it unsafe came clearly within the embrace of the Section. He also concluded that duties arising under the Factories Legislation were intended to be imposed on employers whether they were occupiers or not. (This does not appear to have been highlighted in the other Judgments as an issue.)

A third question to be considered was did the Section apply to environmental conditions which may only have a deleterious effect over a long period of time. He stated that it could be assumed that parliament realised that it would be impossible, at the moment of its enactment, to prescribe comprehensibly all the ways in which a place of work might become dangerous. The Section was therefore a catch-all provision designed to ensure that workplaces be kept safe in any and all of the myriad ways that danger might arise in the future and he quoted from Bennion "Statutory Interpretation" 5th edition.

> "**Section 288. Presumption that updating construction to be given**
>
> (1) With regard to the question of an updating construction, Acts can be divided into two categories, namely the usual case of the Act that is intended to develop in meaning with developing circumstances (in this Code called an ongoing Act) and the comparatively rare case of the Act that is intended to be of unchanging effect (a fixed-time Act).
>
> (2) It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as *always speaking*. This means that in its application on any date, the language

of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.

(3) A fixed-time Act is intended to be applied in the same way whatever changes might occur after its passing. Updating construction is not therefore applied to it.

(4) Where, owing to developments occurring since the original passing of an enactment, a counter-mischief comes into existence or increases, it is presumed that Parliament intends the court so to construe the enactment as to minimise the adverse effects of the counter-mischief. …"

He concludes that this was a classic case of the "mischief" of noise induced hearing loss from exposure to 85 dB(A) becoming recognised during the lifetime of the relevant legislation. An updating construction was clearly called for and should be applied to the updated "mischief". He further indicated that the "always speaking" principle was well established.

As to the meaning of safe he indicated that there was nothing wrong in principle in recognising that a place of work was unsafe based upon contemporary knowledge. Foreseeability of risk based on current information was relevant to the judgment as to whether a place of work was in fact safe. He indicated by way of contrast however reasonable practicability did import consideration of what was known at the time that the injury was sustained. By definition it could not be reasonable to put in place measures that were not known to be necessary. It might be practicable to do so but it could not be said to be reasonably practicable.

He agreed that for the defence to succeed the employer must establish a gross disproportion between the risk and the measures necessary to eliminate it. Again **Edwards v National Coal Board [1949] 1KB704** was cited with approval.

Lord Clarke

In the second dissenting judgment, Lord Clarke dealt first of all with Section 29(1) of the Factories Act 1961. He agreed that it applied to activities carried on in the workplace and to risks of noise induced hearing loss arising from such activities. He also agreed with Lord Kerr and Lord Dyson that the language of the Section was "always speaking".

Like Lord Kerr he agreed that in this context safety could not connote absolute safety. Of the lines of authority considering the meaning about "safe" he preferred that including **Larner v British Steel Plc.** He agreed with the reasoning in **Mains v Englebert Tyres [1995] SC518** that effectively Section 29(1) stood on its own and authorities relating to Section 14 should be ignored. There was nothing in Section 29 to introduce the principle of reasonable foreseeability into the meaning of "safe". Much of the rest of his judgment deals with the authorities relied upon by Lord Mance and Lord Dyson.

He stated that:-

> "It seems contrary to the clear wording of the statute to exclude from the scope of Section 29 a category of hazard on the basis that the particular hazard was not in the mind of the draftsman. If noise can cause injury by damaging a person's hearing, then that workplace is unsafe for those who are working there. It does not matter that the hazard that renders a working environment unsafe was not contemplated at the time of the Act."

He also agreed that when considering the defence of reasonable practicability reasonable foreseeability was relevant.

He concluded agreeing with Lord Kerr with regard to Section 29 and also with regard to Lord Kerr's views with regard to the common law liability.

In Summary

For the average employer, there is no liability for exposing employees to levels of noise below 90 dB(A) $L_{EP,d}$ before the Noise at Work Regulations 1989 came to force.

Employers with above average knowledge may be liable for such noise levels before the 1st January 1990 if they knew of the risk of injury before that date. Meridian and Pretty Polly had such knowledge from the beginning of 1983 according to the findings of His Honour Judge Inglis.

The Court decided that once the employers had knowledge of the risk of injury then they had two years within which to offer hearing protection (as opposed to the 6 to 9 months determined by the Court of Appeal) with the effect that Meridian and Pretty Polly were liable from 1985 to the lower level.

In summary the position with regard to Section 29(1) of the Factories Act 1961 is that for the average employer exposure to noise below 90 dB(A) $L_{EP,d}$ did not constitute a breach in the 1970's and 1980's as these work places were safe according to the standards of the day notwithstanding that it was reasonably foreseeable in the 1970's that injury would be caused to a significant minority at between 85 and 90 dB(A) $L_{EP,d}$.

Finally insofar as Baker is concerned I quote from Robert O'Leary junior counsel for the Claimant writing in the New Law Journal (N.L.J. 2011, 161(7471), 872) as to where this leaves Section 29.

"Where does this leave s 29?

The majority held that s 29 is no more stringent than the common law. The only difference is the reversal of the burden of proof on the defence of reasonable practicability, along with the fact that breach of the statutory duty gives rise to potential or theoretical criminal liability.

For average employers, exposing workers to noise below 90dB(A)$L_{ep'd}$ did not constitute a breach of s 29 in the 1970s and 80s--the workplaces were safe according to the standards of the day, notwithstanding that it was, in fact, reasonably foreseeable by 1976 at the latest, that injury would be caused to a significant minority of workers at noise levels of 85-90dB(A)$L_{ep'd}$.

In terms of noise-induced hearing loss cases, then, the position now is as it was following the judgment of HHJ Inglis in Parkes v Meridian [2007] EWHC B1 (QB): for exposures at or above 90dB(A)$L_{ep'd}$, in the absence of above average knowledge, liability will run from 1963, the date when Noise and the Worker was first published by the Ministry of Labour (see Thompson v Smith Ship Repairers [1984] QB 405, [1984] 1 All ER 881); for exposures at or above 85dB(A)$L_{ep'd}$ and below 90dB(A)$L_{ep'd}$, in the absence of above average knowledge, liability will run from 1990.

Baker has been welcomed by employers and insurers, but in some ways it is, or may prove to be, unsatisfactory:

At common law, it treats the good employer who does more than the average to find out about the risks to his employees more harshly than the employer who does nothing.

It leaves the thousands of employees damaged by noise levels which presented a reasonably foreseeable risk of injury to a significant minority of the workforce from 1976 to 1990 without redress.

It denudes s 29 of all but academic value. The reversal of the burden of proof on reasonable practicability is unlikely to have any relevance in practice.

In placing the onus on the claimant to prove that his or her workplace was unsafe according to the standards of the day, the court will now require lay or expert evidence in many cases to establish what were the standards of the day.

It may re-open what were thought to be settled areas of personal injury and health and safety law."

Baker v Quantum in practice?

There follows short summaries of what will no doubt be an increasing number of decisions in which **Baker v Quantum** will be cited.

TANGERINE CONFECTIONARY LTD AND VEOLIA ES (UK) LTD V THE QUEEN
CA (Hughes LJ, Andrew Smith J and Walker J)
[2011] EWCA C rim 2015
19th August 2011

This was a conjoined appeal relating to two health and safety prosecutions under Sections 2 and/or 3 of the Health and Safety at Work Act 1974. The appeal related to prosecutions under Sections 2 and/or 3 of the Health and Safety at Work Act 1974.

Section 2(1) HSWA 1974 provides:-

> "It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees."

Section 3(1) HSWA 1974 provides:-

> "It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety."

In summary the Court stated that the Supreme Court had held by majority that foreseeability does play a part in assessing risk, or lack of safety. There was no absolute and unchanging concept of lack of safety. It was wrong to apply

retrospectively whatever happened to be the view of safety at the time of trial, rather than what was responsibly thought to be the position at the time of alleged breach. The Court quoted from the dicta of Lord Mance and Lord Dyson in that they rejected the argument that foreseeability of danger was irrelevant to risk, or safety, and relevant only to reasonable practicability.

In the Tangerine and Veolia appeals, the Crown argued that as the majority in the Supreme Court in Baker v Quantum had relied upon a line of authority upon Section 14(1) of the Factories Act 1961 (the duty to defence dangerous machinery) in which it had long been established that a machine is dangerous only where some foreseeable risk from lack of fencing exists, that Baker was confined to the Factories Act and did not extend to Sections 2 and 3 of the Health and Safety at Work Act.

The Court of Appeal gave this argument short shrift stating that the wording of Sections 2 and 3 of HSWA was in material terms identical to that of Section 29(1) of the Factories Act and that the terms of majority judgments from the Supreme Court apply equally to the Health and Safety at Work Act 1974 and to the Factories Act.

The conclusion that the Court drew was that Baker v Quantum does apply to Sections 2 and 3 of the Health and Safety at Work Act.

> "Foreseeability of risk (strictly foreseeability of danger) is indeed relevant to the question whether a risk to safety exists."

That accords with the ordinary meaning of risk, as is demonstrated by the concept of a risk assessment, which is itself an exercise in foresight. Whether a material risk exists or does not is, in these cases a jury question and the foreseeability (or lack of it) of some danger or injury is part of the inquiry.

The Court went on to say however that in most cases absent of the sort of time factor which was present in Baker v Quantum, it was likely that

consideration of foreseeability would add little to the question of whether there was a risk.

> "In most cases, we think, the principle relevance of foreseeability will be to go to the defence of all reasonable practicable precautions having been taken. We note that this defence does not impose on an employer the duty to take every feasible precaution, or even every practicable one; it imposes a duty to take every reasonably practicable one. What is reasonably practicable no doubt depends on all the circumstances of the case, including principally the degree of foreseeable risk of injury, the gravity of injury if it occurs, and the implications of suggested methods of avoiding it."

Baker v Quantum is now being cited in liability terms in asbestos cases. The force of previous s29 arguments has now vanished. Whilst the detail of the cases will be left to others, suffice to say that it will be increasingly difficult to prove foreeseeablity of risk in low level exposure cases of mesothelioma. There have been 2 low exposure asbestos cases so far where **Baker v Quantum** has been cited.

Firstly **Asmussen v. Filtrona UK Limited** [2011] EWHC 1734 (QB) where inter alia Simon J stated when considering s2(3) of the Asbestos Regulations 1969

The words 'liable to cause danger' in Regulation 2(3) similarly involve a degree of foresight, and for the same reason, the use of the qualifying words 'liable to'. This construction is consistent with the observations of Lord Mance (albeit in a different context) in *Baker v. Quantum Clothing Group Ltd* [2011] UKSC 17 at [80], where he noted that the statutory duties which refer to safety, injury and danger must,

> ... be judged according to the general knowledge and standards of the times.

As Cooke J observed in *Reynolds v. Secretary of State for Energy and Climate Change* [2010] EWHC 1191 (QB) at [97-98] the Court looks at what was considered safe at the time by the prevailing standards and criteria of the time. I do not accept that the Defendant should have recognised at the relevant time that the proximity of asbestos lagging in the work place and the disturbance and replacement of it might injure those working there.

Court of Appeal approval of Simon J's approach was provided in

WILLIAMS v. UNIVERSITY of BIRMINGHAM & ANR
CA (MAURICE KAY LJ, VICE PRESIDENT CA-CIVIL DIVISION
AIKENS LJ and PATTEN LJ)
28th October 2011
[2011] EWCA Civ 1242

The Court set out what is required to be proved by the claimant to establish liability in an asbestos case

1. "that the defendant owed the victim a duty of care not unreasonably to expose him to asbestos fibres and the consequent risk of asbestos related injury, including mesothelioma."
2. "that the defendant was in breach of that duty by being negligent in exposing the victim to asbestos fibres and consequent asbestos related injury that was **the reasonably foreseeable** result of that negligence."
3. "on a balance of probabilities, that the defendant's negligent breach of duty caused a material increase in the risk that the victim would develop mesothelioma."
4. "loss and damage suffered in consequence of the injury and that it is within the usual "remoteness" rules."

It then dealt in greater detail with the second element stating when considering whether the defendant was in breach of its duty of care to the claimant, the court's approach must be to compare "what steps the defendant took to prevent the victim from being exposed to asbestos fibres with an objective standard of what reasonable steps should have been taken to avoid reasonably foreseeable injury in the factual circumstances prevailing at the time. The "reasonably foreseeable injury" in this case must be that of contracting mesothelioma.

The test was,
“Ought the University reasonably to have foreseen the risk of contracting mesothelioma arising from Mr Williams’ exposure to asbestos fibres by undertaking the speed of light experiments in the tunnel in the manner contemplated - and done in fact - to the extent that the University should (acting reasonably) have refused to allow the tests to be done there, or taken further precautions or at the least sought advice.”

This brought the court to the second point against a background of the growing understanding of the risks associated with asbestos namely,

“The question of what the University ought reasonably to have foreseen about the consequences of any exposure to asbestos fibres in the course of experiments in the tunnel and the reasonable conduct that the University ought to have adopted must be judged by reference to the state of knowledge and practice as at 1974. In ***Baker v Quantum Clothing Group Ltd*** the majority of the Supreme Court reaffirmed that, in relation to the common law duty of care of employers, the standard of conduct to be expected is that of a reasonable and prudent employer at the time, but taking account of developing knowledge about the particular danger concerned. In the context of the statutory duty imposed on employers by section 29(1) of the Factories Act 1961, the majority of the Supreme Court held that safety must be judged according to the general knowledge and standards of the time. Whether working conditions are “safe” within the 1961 Act involves asking the questions: was a risk reasonably foreseeable and was it reasonably foreseeable that an injury would be caused by some risk or other, bearing in mind that some degree of risk to employees may be acceptable.”

The court adopted the same approach as to standards in Williams v University of Birmingham .
What is not acceptable now may have been regarded as acceptable in 1974. As Simon J summarized the position in ***Lilian Rose Asmussen v Filtrona***

United Kingdom Limited (but substituting "the University" for "the employer" to apply to this case):

"*…the foreseeability of injury has to be tested against the standard of the well-informed [University] who keeps abreast of the developing knowledge and applies [its] understanding without delay, and not by the standard of omniscient hindsight. [A University] can rely upon a recognised and established practice to exonerate itself from liability in negligence for failing to take precautionary steps unless (a) the practice is clearly bad practice, or (b) in the light of developing knowledge about the risks involved in some location or operation a particular [University] acquired greater than average knowledge of the risks".*

In short, to adapt Denning LJ's graphic phrase in ***Roe v Ministry of Health,40*** we must not look at what happened in the tunnel in 1974 through 2009 or 2011 spectacles."

I suspect we will see these arguments continuing to be refined in future cases and in particular those involving asbestos injury.

Reasonable Practicability

There is one final and even more important effect of **Baker v Quantum** both in the Supreme Court and in the Court of Appeal. This concerns the phrase which peppers health and safety law, namely, **"so far as is reasonably practicable."**

In the Court of Appeal in ***Baker v Quantum,*** [2009] EWCA Civ 499, Smith LJ gave the leading judgment. Clearly much of the Court of Appeal's decision was overturned by the Supreme Court. However it seems to me that Smith LJ's findings as to reasonable practicability, are in part at least still very much applicable. Details of the balancing exercise to be carried out are set out above and it seems arguable that Lord Mance's criticisms of Smith LJ regarding "substantial disproportion" are obiter, noting also the different position adopted by Lord Dyson, and that ***Edwards v NCB*** remains good law.

When considering the issue of reasonable practicability, the Court of Appeal held that it was not reasonably practicable for employers to take any steps to eliminate risks of which they were not and could not be expected to be aware. In other words therefore whilst foresight was not relevant with regard to the issue of safety, it was relevant when considering reasonable practicability. In the Supreme Court Lord Dyson, Lord Kerr and Lord Clarke agreed.

Smith LJ held considering **Edwards v NCB** that it was "clear that Asquith LJ was considering risks of which the employer was actually aware and was able to quantify" and

"As a matter of common sense, if the employer does not know of the risk and cannot reasonably have been expected to know of it, it cannot be reasonably practicable for him to take any steps at all. If, on the other hand the employer ought to have known of the risk but did not and therefore never applied his mind to it, the burden on the employer, seeking to make out the defence, would be to show that it would not have been reasonably practicable for him to avoid or reduce the risk even if he had thought about it."

In other words foreseeability does come into play when the court comes to assess the employer's duty to take reasonably practicable steps when the qualification arises. As indicated above this has not been contradicted in the Supreme Court but rather agreed by 3 of the 5 law lords (Lord Mance who appears critical of Smith LJ on the subject of reasonable practicability does not seem to comment on this aspect) and therefore it would appear to remain as good law.

That does seem however to be at odds with the approach of the Court of Appeal in

DUGMORE v SWANSEA NHS TRUST, MORRISTON NHS TRUST
CA (TUCKEY LJ, HALE LJ & SIR DENIS HENRY) 21/11/02
[2002] EWCA Civ 1689

Hale LJ gave the lead judgment in a latex allergy case concerning Regulation 7(1) of the Control of Substances Hazardous to Health Regulations 1988 and 1994 namely,

"Every employer shall ensure that the exposure of his employees to a substance hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled."

One wonders in passing whether the courts will import a **Baker v Quantum** approach when construing in future what is a "substance **hazardous** to health". One can see how an argument might be put that this means foreseeably hazardous in the same way as one now has "foreseeably" safe! The authorities considered in Dugmore were very much those considered in **Baker v Quantum.** For the moment however **Dugmore** remains good law and the difference may relate to the fact that the "hazard" and "substance hazardous to health" are both defined with the COSHH Regulations.

Was **Dugmore** a high water mark for Claimants? When considering the following passages one might fear this to be the case!

"These regulations implement European Directives, in particular Council Directive 80/1107/EEC and 88/364/EEC. Neither of these directives has anything to say about the civil liability of employers towards their employees, nor do they impose obligations directly comparable to regulation 7. Their purpose is expressly preventive……...

This all reinforces the view taken by Lord Nimmo Smith that the purpose of the regulations is protective and preventive: they do not rely simply on criminal sanctions or civil liability after the event to induce good practice. They involve positive obligations to seek out the risks and take precautions against them. It is by no means incompatible with their purpose that an employer who fails to discover a risk or rates it so low that he takes no precautions against it should nevertheless be liable to the employee who suffers as a result."

However returning to the issue of foreseeability and reasonable practicability Hale LJ in Dugmore stated as follows:-

"But that does not end the matter. Until the claimant became sensitised to

latex protein, the substance hazardous to her health was contained in the powdered latex gloves. As Mr Marshall points out, it would have been a simple matter to replace those gloves with vinyl gloves: this was not rocket science waiting to be invented. It was for the hospital to prove that it was not reasonably practicable for them to do this. With a simple step like this questions of the degree and magnitude of the risk do not arise. But even if they did, the onus was on the employer to go out and find out about them: in this particular case, to say that they could not have done so is contrary to the evidence of Dr White and Mr Finch. The material was there from which an employer with the absolute duty of preventing exposure to health hazards could have discovered what needed to be done. To import into the defence of reasonable practicability the same approach to foreseeability of risk as is contained in the common law of negligence would be to reduce the absolute duty to something much closer to the common law, albeit with a different burden of proof."

The whole passage is included for context however it seems that Hale LJ is saying something quite different to Smith LJ when she says "To import into the defence of reasonable practicability the same approach to foreseeability of risk as is contained in the common law of negligence would be to reduce the absolute duty to something much closer to the common law, albeit with a different burden of proof."

The courts may seek to distinguish **Dugmore** from **Baker** in the Court of Appeal. If however it is felt necessary to decide between the two then in the present climate there seems little doubt that the dictum of Smith LJ (as agreed by a majority in the Supreme Court) will prevail.

As for the "butterflies" in the Supreme Court, it may be some time before we see the full effects. Liability in mesothelioma cases appears to be the next major battleground. Dugmore v Swansea NHS Trust seems unlikely to stand at least in whole in the long run. The defence of reasonable practicability seems to include foreseeability.

Further developments with regard to reasonable practicability

There have been 2 recent cases where the observations of the Supreme Court regarding reasonable practicability have been considered.

DONALD BERRY v ASHTEAD PLANT HIRE CO. LIMITED & ORS
CA (LONGMORE LJ, RIMER LJ and WARREN J)
10th November/2011
[2011] EWCA Civ 1304

The claimant Mr Berry suffered appalling injuries when delivering accommodation units for a music festival in the Lake District when operating a Hiab crane using hand operated controls. Either the crane or an accommodation unit came into contact
with a live overhead power cable electrocuting Mr Berry. He suffered severe brain injuries and was left unable to communicate, he was immobile and needed 24 hours care . The appeal concerned the issue of whether the claimant was entitled to an interim award. The Court of Appeal looked at the issue of liability when considering the prospects of success including looking at the only pleaded statutory breach namely a breach of the **Electricity at Work Regulations 1989.**

I don't intend to look at the case in depth although I do question the Court of Appeal's conclusions regarding liability generally. My concern is the comment of Longmore LJ in the sole judgment regarding the "reasonable practicability defence"

The Court considered briefly Regulation 4(3) which is as follows:-

"Every work activity, including operation, use and maintenance of a system and work near a system, shall be carried out in such a manner as not to give rise, so far as is reasonably practicable, to danger."

Longmore LJ commented
"….. the presence of the words "so far as is reasonably practicable" in the regulation brings in considerations comparable to common law negligence.

This was recently held by the Supreme Court in **Baker v Quantum Clothing Group [2011] 1 WLR 1003** albeit in connection with the domestic legislation of the Factories Act 1961 rather than the EU inspired Electricity at Work Regulations. But it is arguable that the words should receive the same construction in both domestic and EU inspired legislation….."

You will recall the majority judgments where from Lord Mance and Lord Dyson, with Lord Saville adding little. Whilst their comments clearly appear to be *obiter* I have set them out again at slightly greater length for completeness.

82. "In the light of my conclusion that safety is a relative concept, the correctness of these passages does not strictly arise for consideration in this case. Had it arisen, I would have regarded the qualification as wide enough to allow current general knowledge and standards to be taken into account. Even the Court of Appeal in its formulation acknowledged the quantum of risk involved as material in the balancing exercise. But this can only mean that some degree of risk may be acceptable, and what degree can only depend on current standards. The criteria relevant to reasonable practicability must on any view very largely reflect the criteria relevant to satisfaction of the common law duty to take care. Both require consideration of the nature, gravity and imminence of the risk and its consequences, as well as of the nature and proportionality of the steps by which it might be addressed, and a balancing of the one against the other. Respectable general practice is no more than a factor, having more or less weight according to the circumstances, which may, on any view at common law, guide the court when performing this balancing exercise: see Swanwick and Mustill JJ's statements of principle, set out earlier in this judgment, and also *Charlesworth on Negligence* (12th ed) (2010), chapter 7, *The Standard of Care*, both generally and especially at para 7.38. It would be strange if the Court of Appeal was right in suggesting that, under the statutory formulation, this one factor is irrelevant, when the whole aim

of the balancing exercise must, in reality, be to identify what is or is not acceptable at a particular time.

83. That the qualification "so far as may be reasonably practicable" may, if necessary, receive a broad interpretation is also indicated by the reasoning of the House in *Marshall v Gotham Co Ltd* [1954] AC 360……"

Additionally Lord Dyson stated

128. In view of the conclusion I have reached on the meaning of "safe" the question of reasonable practicability does not arise. But as I have said, if reasonable foreseeability is not imported into the meaning of "safe", I would agree with the Court of Appeal that it is imported into reasonable practicability.

129. On this hypothesis, however, I do not agree with the Court of Appeal that the acceptability of risk is irrelevant to reasonable practicability. I would adopt what Lord Mance says at paras 82 and 83. Smith LJ refers to the "quantum of the risk" as being relevant to whether it is reasonably practicable to eliminate it. I agree. But if the quantum of the risk is relevant to that question, how can the fact that a Code of Practice says that a risk is acceptable not be relevant? As Smith LJ said, the classic exposition of reasonable practicability is to be found in *Edwards v National Coal Board* [1949] 1 KB 704. Tucker LJ said at p 710: "in every case it is the risk that has to be weighed against the measures necessary to eliminate the risk. The greater the risk, no doubt, the less will be the weight to be given to the factor of cost." If, to use the words of Smith LJ, a responsible or official body has suggested that a particular level of risk is "acceptable", that is likely to be cogent evidence that this level of risk is minimal and one that can reasonably be disregarded.

130. Smith LJ acknowledged that an official view as to the acceptability of a risk might well have a role to play in the determination of common law liability. Having said at paras 89 and 100 that it had no

> part to play in the determination of whether it was reasonably practicable to make a place of work safe, she acknowledged at para 101 (rightly in my view) that the 1972 Code was relevant to the employer's assessment of the quantum of the risk, although it was inadequate as an assessment tool.

It would appear that Longmore LJ's summary that "the presence of the words "so far as is reasonably practicable" in the regulation brings in considerations comparable to common law negligence" (whilst possibly unhelpfully brief) does summarise the majority view in the Supreme Court in *Baker v Quantum.* It is clear that the Lord Mance and Lord Dyson are saying that the degree of risk is relevant to considerations of whether it is reasonably practicable to guard against a risk and the degree of risk is measureable by reference to current standards and as per Lord Mance "the criteria relevant to reasonable practicability must on any view very largely reflect the criteria relevant to satisfaction of the common law duty to take care." Lord Dyson agreed

In *Berry* perhaps little turns upon this but one can see how this may develop.

We go to Scotland for a second consideration of "reasonable practicability" post *Baker v Quantum*.

STRANGE v WINCANTON LOGISTICS LTD
IHCS (Extra Division) (Lord Eassie; Lord Brodie; Lord Wheatley) 26/10/2011
2011 G.W.D. 39-807

The case arose from a consideration of the Manual Handling Operations Regulations 1992 after Mr Strange the pursuer was injured moving pallets from under racking and piling them one on top of another on the forks of a pallet truck. He was placing a fifth pallet on top of four which he had already stacked on the pallet truck when he experienced pain in his back.

I don’t intend to discuss the case at length and in particular the approach to the Manual Handling Operations Regulations which one might consider a little confused.

The judgment was given by Lord Brodie who stated that the parties agreed that "reasonably practicable" was authoritatively defined by Asquith LJ in *Edwards* v *NCB supra* at 712 where he said this:

> "The construction placed by Lord Atkin on the words 'reasonably practicable' in *Coltness Iron Co* v *Sharp* [1938] AC 90, 94 [1937 SC (HL) 68] seems to me, with respect, right. 'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in that measures necessary for averting the risk (whether in money, time or trouble) is placed in the other;' and that if it be shown that there is a gross disproportion between them - the risk being insignificant in relation to the sacrifice - the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at the point of time anterior to the accident."

Whilst the court proceeded on the basis that the formulation adopted by Asquith LJ was the one to which they should have regard, it noted that its correctness appeared to be put in question by Lord Mance in *Baker* v *Quantum Clothing Group*. At para 84 of his opinion Lord Mance said this:

> "A further aspect of ... [the leading judgment appealed against] ... is the suggestion that 'there must be at least a substantial disproportion' before the desirability of taking precautions can be outweighed by other considerations. This theme was developed ... But it represents, in my view, an unjustified gloss on statutory wording which requires the employer simply to show that he did all that was reasonably practicable."

The court held that the fact that the employer had carried out a risk assessment was of relevance and might assist the court in determining whether the employer had discharged his onus, the balancing exercise was ultimately a forensic one.

“It is for the court to carry out after the event, not the employer before the event, albeit that the court must put itself in the position of the employer before the event, informed by such evidence as to risk and sacrifice as the court considers relevant.”

The court held that there was sufficient evidence before the sheriff to allow him to conclude that there was, in the language of *Edwards* v *NCB*, a gross disproportion between the quantum of risk and the sacrifices involved or, as it was put rather more accessibly in *Hawkes* v *London Borough of Southwark*, that "the risk was insignificant in relation to [any] cost and inconvenience".

Lord Brodie set out much from Lord Mance’s judgment concerning the analysis of s29(1) of the Factories Act 1961, much of which does not seem particularly relevant to an analysis of the Regulations in issue, which possibly raises further concerns about the broadening effect of Baker v Quantum.
The court overlooked the fact that whilst Lord Mance did indeed cast doubt upon the oft cited dictum of Lord Atkin in *Edwards v NCB* when criticising the Court of Appeal for using the term “substantial disproportion” Lord Mance’s comments were clearly obiter. Furthermore the court failed to note that Lord Dyson approved this Edwards v NCB.
Lord Brodie when indicating that it was for the court to carry out a forensic balancing exercise overlooks that it is clearly stated in *Edwards* “Moreover, this computation falls to be made by the owner at the point of time anterior to the accident.”
In my view therefore the Inner House was wrong in both respects to disregard arguably the most often quoted British legal authority and rely in part on what amounts to a minority obiter dictum. The analysis of the Regulations before it may not stand up to scrutiny either!

So where are we after *Baker v Quantum*?

A safe place of work is a foreseeably safe place of work. What is not foreseeable is what meaning or wording the courts might import when interpreting statute or regulation.

When considering reasonable practicability and carrying out the balancing exercise when assessing the degree of risk the Courts are likely to have regard to the prevailing standards broadly reflecting what is required to satisfy the common law duty to take care.

The argument may relate to whether a Defendant to establish that prevention was not reasonably practicable needs merely to establish disproportion as opposed to “gross” or “substantial” disproportion.

A low value industrial deafness claim may have struck a significant blow against the fight for justice and compensation for mesothelioma victims. It may well lead to a review of more than 60 years of jurisprudence!

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