

**RRC
Study Text
Sample**



NEBOSH

Level 6 International Diploma for
Occupational Health and Safety
Management Professionals

Unit DI1

Know - Workplace Health and Safety Principles (INT)

Socio-Legal Models

IN THIS SECTION...

- Outline how legislation can promote positive health and safety outcomes, 'goal-setting' and 'prescriptive' legislation, and possible compensatory mechanisms for loss events where there is a failure of the duty of care.
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Role, Function and Limitations of Legislation

It is not realistic to expect organisations to adopt good health and safety standards voluntarily, not least because the benefits of good (and costly) standards may not be immediately obvious to all employers. One way of making sure minimum standards are met, whether they relate to health and safety or other matters to do with the regulation of society, is for the government to introduce legislation.

Examples of legislation relating to occupational health and safety include:

- **Health and Safety at Work, etc. Act 1974 (HSWA)** (UK).
- **Occupational Safety and Health Act 1970** (USA).
- **Work Environment Act 1977** (Sweden).

By defining minimum acceptable standards, legislation at least partly forces organisations to adopt good practice, when otherwise they might be unlikely to do so voluntarily.

DEFINITION

LEGISLATION

The statutes and other legal instruments (documents) that have been enacted by the governing body.

Legislation may be introduced that leads to criminal and/or civil consequences. A **crime** is an offence against the state and the consequence of a criminal action is the prosecution of the offender, which may lead to punishment, perhaps a fine, or a prison sentence. What behaviour constitutes a criminal offence is largely dependent on the government and can therefore be influenced by political concerns. In contrast, a **civil action** is concerned with an individual who has suffered some loss, such as being injured following a workplace accident. The aim is for the claimant (the one who has suffered the loss) to seek (usually) financial compensation from the defendant as a result of the wrongdoing.

There are, however, limitations to the legislative approach. The first is that there is little incentive for organisations to go beyond the minimum legal requirements; they will comply with what the law says, but not with its spirit. In fact, since good standards often cost a lot of time and money, an organisation which embraces such high standards may be at a competitive disadvantage. If a government introduces legislation then there is a requirement for the legislation to be enforced. This requires a means of identifying those who do not comply with the law. Accordingly, enforcement officers who have defined powers of inspection and investigation (so that breaches of the law can be identified) must be employed and trained.

There must also be procedures for the prosecution and punishment of organisations and individuals who fail to meet the required standards, i.e. an effective court system. The governments of some countries do not appear to be able to enforce health and safety provisions. Even in wealthy countries with extensive resources, the enforcement of health and safety has to compete with other government priorities.

‘Goal-Setting’ and ‘Prescriptive’ Legal Models

Legislation is sometimes described as being ‘goal-setting’ or ‘prescriptive’. **Goal-setting legislation** sets an objective but leaves it to the dutyholder to decide on the best way of achieving the defined goal. (Note that a dutyholder is the person on whom the legal duty is placed: the employer in the case of most health and safety duties.)

You can see a good example of goal-setting legislation in the UK. The principal Act of Parliament governing health and safety is the **HSWA (Section 2)**. The key duty imposed on employers is:

“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 [their] employees.”

The goal to be achieved is to ensure (so far as is reasonably practicable) health and safety, but the Act does not define **how** this should be done. It is up to the employer to identify and evaluate different ways of meeting this requirement and then to choose what is appropriate in the given circumstances. Note that the phrase “so far as is reasonably practicable” is not only a feature of UK legislation, but also of other regions. It generally means that when deciding whether you need to take any action to control a risk, you must compare the risk against the effort, time and money that would be required to bring it under control. So, some judgment is needed.

In contrast, **prescriptive legislation**, as the name suggests, defines the standard to be achieved in far more explicit terms. One example, again from the UK, is in the **Provision and Use of Work Equipment Regulations 1998 (PUWER)**. **Regulation 26** is concerned with the provision of information and instruction to users of equipment for use at work preventing mobile work equipment (e.g. forklift trucks) from rolling over. This Regulation applies only to such equipment and makes explicit what a dutyholder should do to comply.

Regulation 26, Rolling over of mobile work equipment states:

- (1) *Every employer shall ensure that where there is a risk to an employee riding on mobile work equipment from its rolling over, it is minimised by:*
 - (a) *stabilising the work equipment;*
 - (b) *a structure which ensures that the work equipment does not fall on its side;*
 - (c) *a structure giving sufficient clearance to anyone being carried if it overturns further than that; or*
 - (d) *a device giving comparable protection.*

In practice, legislation should not be thought of as being entirely goal-setting or entirely prescriptive – it more often has the characteristics of both models. One example is **Regulation 8 of PUWER**.

This states:

- (1) *Every employer shall ensure that all persons who use work equipment have available to them adequate health and safety information and, where appropriate, written instructions pertaining to the use of the work equipment.*

This requires that employers provide adequate information for users of work equipment – it has an element of prescription in that there is a duty to provide information; however, what constitutes ‘adequate’ needs to be decided by the employer, which effectively sets a goal.



Common law is the body of rules based on the decisions of the courts over many years

Advantages and Limitations

TOPIC FOCUS

Prescriptive legislation has clearly defined requirements which are more easily understood by the dutyholder and enforced by the regulator. It does not need a higher level of expertise to understand what action is required, and provides a uniform standard to be met by all dutyholders.

The **limitations** are that it is inflexible and so, depending on the circumstances, may lead to an excessively high or low standard. Also prescriptive legislation does not take account of the circumstances of the dutyholder and may require frequent revision to allow for advances in knowledge and technology.

Goal-setting legislation allows more flexibility in compliance because it is related to the actual risk present in the individual workplace. It is less likely to need frequent revision and can apply to a much wider range of workplaces.

The **limitations** are that it is more difficult to enforce because what is 'adequate' or 'reasonably practicable' is much more subjective and so open to argument, possibly requiring the intervention of a court to provide a judicial interpretation. Dutyholders will also need a higher level of competence in order to interpret such requirements.

Legal Hierarchy of State and Federal Laws

DEFINITIONS

FEDERAL LAW

Law created by the federal government of a nation.

FEDERAL GOVERNMENT

Formed when a group of political units, such as states or provinces, merge together in a federation, surrendering their individual sovereignty and many powers to the central government while retaining or reserving other limited powers. Examples: USA, Canada, Australia and India.

One of the difficulties in federal systems is to ensure uniform standards and regulations throughout the country. If each state can set their own standards, there will inevitably be inconsistencies.

In the USA, the **Occupational Safety and Health Act 1970** was enacted at federal rather than state level, and so the USA does not have significant problems with harmonisation of standards. However, although the Act applies to all states, its enforcement is delegated to the individual states, which leads to inconsistencies in enforcement standards.

There have been many attempts to harmonise occupational health and safety standards in Australia. In 1990, the Ministers of Labour Advisory Committee, which comprises state, territory and Commonwealth labour ministers, agreed that:

"...as far as practicable, any standards endorsed by the [National Occupational Health and Safety Commission] NOHSC will be accepted as minimum standards and implemented in the State/Territory jurisdiction as soon as possible after endorsement".

Source: Review of Occupational Health and Safety in Australia, Report by the Review Committee to the Minister for Industrial Relations, Department of Industrial Relations, Parliament of Australia, (1990) 25

In 1991, the NOHSC set up a task force to develop a strategy for harmonisation and by 1996 a number of priority areas had been identified (e.g. hazardous substances) and adopted by the states and territories. More recently, states and territories agreed to work with the Commonwealth to implement a model **Occupational Health and Safety Act**.

Within Europe there have been moves to harmonise standards in different countries. This started with the creation of the European Economic Community (EEC), or the Common Market, which was established by the Treaty of Rome in 1957. This initially applied to six states: France, West Germany, Italy, Belgium, the Netherlands and Luxembourg. The Common Market then grew substantially and became the European Union (EU) in 1993. There are currently 27 member states. In terms of health and safety integration, the **Framework Directive of 1989 (89/391/EEC)** established measures to encourage improvements in the safety and health of workers at work. On joining the EU, member states become subject to EU law and, where applicable, European law supersedes any existing contrary domestic law.

However, it is recognised that there are a number of different legal systems within the EU. The EU issues directives which are:

"...binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

Source: © European Union, <http://eur-lex.europa.eu> 1998-2017

This allows each member state to introduce its own legislation, providing it achieves the broad objectives contained within the directive.

Loss Events in Terms of Failures in the Duty of Care to Protect Individuals and Compensatory Mechanisms That May Be Available

If a worker has a work-related accident or contracts a disease as a result of their work, this may result in loss that may include pain and suffering, as well as loss of future income. The accident or ill health may lead to death, which may result in the worker's dependents suffering major financial loss. There are a number of mechanisms that have evolved to provide compensation to the injured worker, or to their dependants. Some require the person making the claim to prove that their accident or ill health was a result of the fault of another, such as their employer. This invariably means having to resort to litigation in the courts. Others do not require proof of fault (no-fault liability).

Compensatory Schemes

These can be conveniently divided into those schemes where it is **not necessary** to prove that the employer was at fault, and those in which the claimant (the injured person) **has to prove** that the defendant was at fault, e.g. negligence.

- **No-Fault Compensation Schemes**

Although there is no need to prove fault, it is necessary to establish that the harm was caused as a result of the person's employment.

Most No-Fault Workers' Compensation Schemes fall into one of two main categories:

- Employers provide the benefits; they pay premiums to insurance companies, who in turn pay compensation to the injured worker.
- The government or a government agency provides the benefits. This system consists of social insurance operated by the government or an agency of the government.

Under both models the worker is required to report the injury or ill health to their respective employer. Most countries require the claim to be made within a specified time, although this is often extended in cases of occupational disease, when the time between exposure to the hazard and the onset of the disease may be considerable.

- **Employers' Schemes**

Here, the obligation to provide benefits is imposed on employers. The scheme is operated by insurance companies who are paid premiums by employers, and in many jurisdictions, this is compulsory. The insurance companies are subject to regulation, usually by an agency of the government. It is usual for all workers in that industry to be covered by the scheme and in some jurisdictions this includes the self-employed. When a claim



Monetary compensation

has been made, by the worker or dependants, the initial response is usually made by the insurance company or sometimes by the employer. The decision may be to accept or to reject the worker's claim, although it is common for there to be some negotiation by the two parties concerned. Such schemes are found in the USA and Australia.

- **Social Insurance Schemes**

These schemes are administered by governments and funded by compulsory contributions made by employers, workers or both, with possible further contributions made from general taxation. These contributions may be at a fixed rate or may be earnings-related. The scheme invariably requires medical examinations to establish the nature of the loss and whether any recovery is likely. Following the decision by the administering government department, the claimant can accept the decision or challenge it. The employer usually has little interest, if any, in the process. If the disability is permanent (e.g. hearing loss), then a pension is usually paid, rather than a lump sum.

The UK operates an Industrial Injuries Disablement Benefit Scheme. This is funded by National Insurance contributions which are paid by employees and employers and from taxation. The benefit is paid to someone who has suffered a loss of faculty because of an accident at work, or has a prescribed industrial disease associated with the person's occupation. It is paid only to employees and not to the self-employed. An 'accident' is an incident or series of identifiable incidents which has resulted in personal injury; a 'prescribed disease' is one from a defined list of approximately 70 diseases.

The claimant completes a claim form that is evaluated to establish whether the injury was an accident, or in the case of an occupational disease, to check that the claimant has worked in the prescribed occupation. If this is established, a medical examination is required to identify the loss of faculty and the level of disablement. Normally a person's disablement has to be 14% or more to receive benefit, except for certain respiratory diseases, which require a 1% assessment and occupational deafness, which requires a 20% assessment.

- **Fault Compensation Scheme – Employers' Liability**

Most jurisdictions (including the USA, Australia and the UK) have legislation that makes an employer liable for injury or illness to a worker as a result of their occupation. This requires the injured worker (or dependants following a fatal outcome) to bring a civil action against the employer and the need to establish fault on the part of the employer, or one of their workers. The claimant usually has to prove that the harm or illness was caused by the negligence of the employer, or one of their employees, or that there has been a breach of health and safety legislation.

In the UK, the basis of the employer's duty towards the employees stems from the existence of a contract of employment. However, virtually all cases are brought under the law of torts (civil wrongs), in particular the tort of negligence and the tort of breach of statutory duty.

The liability of the employer may come about in two ways:

- The employer is responsible for their own acts of negligence – often called **primary liability**.
- The employer may be **vicariously liable** for the negligent acts of their workers that are committed in the course of their employment.

In an action for **breach of statutory duty**, the claimant has to prove:

- The statute places the obligation on the defendant.
- The statutory duty was owed to that claimant (i.e. the claimant must show they are within the class of persons whom the statute was intended to protect).
- The injury was of a type contemplated by the statute.
- The defendant was in breach of that duty.
- The breach of statutory duty caused the injury.

In an action for **negligence**, the claimant must prove:

- The defendant owed the claimant a duty of care; it is well established that an employer owes a duty of care to their workers, and so if the defendant is an employer, this element is unlikely to be contested.
- The defendant was in breach of that duty – most negligence cases hinge on this point. The important point to note is that the standard required of the defendant is an objective one, i.e. it depends on the standard of care which would have been adopted by a reasonable person in the circumstances.
- The claimant suffered damage as a result of the breach.
- The harm was foreseeable.

A claim will often be presented under both headings (negligence and breach of statutory duty) at the same time, although success under both results in only one award of compensation. One of the key features of employer's liability is the extent of the compensation (often called **damages**) awarded in a successful action. The compensation awarded is meant to put the person back into the same position they were in before they suffered the loss. This can amount to considerable sums of money.

Damages

Damages may be classified as **economic** or **non-economic**. Economic damages represent actual monetary loss, whereas non-economic damages are those which represent pain, suffering, and loss of companionship or amenity.

Damages may also be categorised as **compensatory** and **punitive**. As the name suggests, compensatory damages compensate the claimant, whereas punitive damages are meant to punish the wrongdoer.



An accident can result in a claim for considerable damages

TOPIC FOCUS

Compensatory Damages

The amount of compensatory damages is meant to reflect the losses the claimant has suffered. The level of award is determined by the court having received evidence as to the extent of the losses.

Such damages can be classified as **special damages** and **general damages**:

- **Special Damages**

The key feature of special damages is that they can be relatively easily quantified because they relate to known expenditure up until the trial, such as:

- Loss of earnings due to the accident or ill health before the trial.
- Legal costs.
- Medical costs to date.
- Building costs, if property has had to be adapted to meet the needs of the injured person.
- Necessary travel costs associated with the case.

The feature here is that invoices and receipts can be presented to the court.

- **General Damages**

These include future expenditure and issues which cannot be precisely quantified, such as:

- Loss of future earnings as a result of the incapacity.
- Future medical costs.
- Pain and suffering before and after the trial.
- Loss of quality of life (e.g. loss of mobility, inability to engage in sports which had been pursued before the loss).

Loss of future opportunity (e.g. reduced likelihood of being able to secure suitable employment) requirements.

Punitive Damages

Punitive damages are awarded to punish, to signify disapproval, and to deter the defendant and others from carrying out similar conduct to that which harmed the claimant in the future. It is recognised that in certain circumstances, punitive damages (or 'exemplary damages' in the UK) may be awarded where the compensatory damages are considered to be inadequate and are awarded by reference to the defendant's behaviour. Since they normally compensate the claimant's losses beyond provable losses, they are usually only awarded when the conduct of the defendant was particularly oppressive, or where the defendant made a profit from the behaviour.

In the USA, punitive damages are a matter for state law and so there is no consistent application across the country. In some states they are based on statute and in others on case law.

MORE...

The ILO Encyclopedia is an additional resource highlighted by NEBOSH which covers many broader areas of international health and safety and is relevant throughout the DI1 unit.

For additional resources on workers compensation schemes, access *Part III: Workers Compensation* of the ILO Encyclopedia which provides a great deal of material on the topic:

<https://www.iloencyclopaedia.org/part-iii-48230/workers-compensation-systems>

STUDY QUESTIONS

1. What are the limitations of using legislation as a means of ensuring acceptable occupational health and safety standards?
2. Describe the advantages and limitations of prescriptive and goal-setting legislation.
3. Identify and outline the two main no-fault compensation schemes.
4. Describe the two categories of compensatory damages.
5. What is meant by "punitive damages"?

(Suggested Answers are at the end.)

Enforcement

IN THIS SECTION...

- Outline the purpose of enforcement (including the principles of the enforcement policy statement).

Purpose of Enforcement

The regulation of criminal law on health and safety at work requires an enforcement agency. Its broad role is likely to be to protect people against risks to health or safety arising out of work activities.

In order to achieve this, legal compliance must be enforced. The ultimate aim is always prevention, but action is needed where there is deliberate flouting of health and safety law.

Enforcement ensures that dutyholders:

- Deal immediately with serious risks.
- Comply with the law.
- Are held to account if they fail in their responsibilities.

To enforce compliance with legal requirements, there are several approaches that can be taken, ranging from:

- provision of advice on what changes need to be introduced and how these may be achieved; to,
- prosecution under relevant health and safety law that might be imposed on employers.

Following a successful prosecution, the penalty could be a fine or possibly imprisonment. The aim is some form of punishment with the purpose of deterring any future non-compliance.

Principles of Enforcement with Reference to the UK's HSE Enforcement Policy Statement (HSE41)

The UK's HSE aims for firm but fair enforcement of health and safety law and applies the following principles, which are described in its Enforcement Policy Statement (*HSE41*):

- **Proportionality of Enforcement**

Enforcement action should be in proportion to any risks to health and safety, or to the seriousness of any breach of law. Enforcing authorities should take into consideration how far the dutyholder has fallen short of what the law requires and the extent of the risks to people arising from the breach.

Some health and safety duties are absolute but others require action 'so far as is reasonably practicable' which involves judgment. This means taking into account the degree of risk on the one hand, and the sacrifice (money, time or trouble) involved in dealing with the risk on the other. Unless it can be shown that there is gross disproportion between these factors and that the risk is insignificant in relation to the cost, the dutyholder must take measures to reduce the risk.

The HSE expects relevant good practice to be followed, but in circumstances where such standards are not clearly established, UK law requires dutyholders to determine what action needs to be taken to adequately reduce the risks. However, what is reasonably practicable in particular cases is ultimately determined by the courts.

- **Consistency of Approach**

Dutyholders managing similar risks expect a consistent approach about advice given, the use of enforcement notices, decisions on whether to prosecute, and the response to incidents. Consequently a similar approach needs to be taken in similar circumstances to achieve similar ends.



Legal compliance must be enforced

The HSE recognises that, in practice, consistency is not a simple matter, due to a number of factors, including:

- The degree of risk.
- The attitude and competence of management.
- History of incidents.
- Previous enforcement action.

It is recognised that decisions on enforcement action involve judgment by the enforcer, but enforcing authorities should have arrangements in place to promote consistency.

- **Transparency**

Dutyholders need to understand what is expected of them and what they should expect from the enforcing authorities. They should also be clear about what they have to do and what they don't – this means being clear about statutory requirements that **legally apply**, and **advice or guidance** that is desirable but not compulsory. Transparency also involves ensuring that employees and their representatives are kept informed about any decisions made and actions taken.

Dutyholders, employees, their representatives and others also need to know what to expect when an inspector calls and what rights of complaint are open to them. In the UK, all enforcing authority inspectors are required to issue the HSE leaflet *What to expect when a health and safety inspector calls* to those they visit. When inspectors offer dutyholders information or advice, face to face or in writing, they will explain what has to be done to comply with the law and why. If asked, they will write to confirm any advice and to distinguish legal requirements from best practice. If a notice is served, the inspector will try to:

1. Resolve points of difference before serving it.
2. Make sure it is clear what needs to be done, why and by when.
3. Determine the breach of the law that has been committed, or why any prohibition is necessary.



Inspectors will offer dutyholders information or advice about legal compliance

STUDY QUESTIONS

6. Outline the purposes of enforcement.
7. What factors might affect consistency in the enforcement of health and safety legislation?

(Suggested Answers are at the end.)