

# A safer conversation

Chaired by Belinda Liversedge

Two experts in their fields discuss the concept of reasonable practicability in the age of coronavirus.



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**BL: Perhaps by way of introduction, what is it, do you think, that most defines this moment in time in terms of our approach as a country towards health and safety?**

**SAQC:** For me, it is an appreciation of the concept of ‘tolerable risk’. We are, of course, so used to applying a formulaic ‘five steps’ process for risk assessment that works very well for minimising or eliminating workplace risks that are the by-product of the business enterprise. The employer creates those risks, or chooses to operate within such risks, and is therefore able to anticipate and control them. But Covid-19 presents an entirely different situation. The virus risk is introduced invisibly into the workplace from the surrounding community, its prevalence is less related to the business activity itself and is more

related to the rate of infection within that wider community. It is uncontrollable to that extent. Therefore, to describe a business that simply follows social distancing guidance as being Covid ‘secure’ or ‘safe’ is frankly a nonsense. I find this language unhelpful as it breeds a false expectation that the workplace guidance can remove the virus from the workplace, and any outbreak is therefore indicative of a failure to follow that guidance properly. The reality is that the risk is always going to be there, there is no security against it for now until effective vaccination or screening/testing becomes universally available.

The ‘new normal’ should be an appreciation that the return to work is so necessary for our economic survival, and wellbeing, that we are involved in a damage limitation exercise, whereby we seek to find a tolerable level of Covid risk.

**MW:** I think I agree with that. The country needs to react to an entirely novel situation and for that matter, virus. As such, it is a one-off exception to traditional health and safety law and practice. Covid-19 is invisible to the eye and there is good evidence that people who are pre-symptomatic and asymptomatic can spread the virus. I am reminded of the seminal HSE analysis of risk in their document *Reducing Risks, Protecting People*, in which they define ‘tolerable’: “‘Tolerable’ does not mean ‘acceptable’. It refers instead to a willingness by society... to live with a risk so as to secure certain benefits in the confidence that the risk is one that is worth taking and that it is being properly controlled. However, it does not imply that the risk will be acceptable to everyone, i.e. that everyone would agree without reservation to take the risk or have it imposed on them.”



Social distancing does not mean a business is 'Covid-secure' it is simply a mitigating measure that reduces the risk of the spread of the disease to a tolerable level. Photograph: iStock/georgeclerk

**BL:** Well, if we are now having to accept that there will always be a residual or as you have suggested 'tolerable' level of risk, where does this leave safety concepts that we have traditionally used, such as reducing risk 'as low as reasonably practicable' otherwise known as ALARP?

**SAQC:** This concept has already developed quite significantly over the past few years, ever since the seminal decision of the majority of the Supreme Court in *Baker v. Quantum Clothing Group Ltd*, to become pretty much synonymous with the taking of reasonable care. Legally, we have long since moved away from the view of reasonable practicability as being simply a cost/benefit analysis in which everything has to be done to reduce the risk unless an employer can show the cost to be 'grossly' disproportionate to the scale of the risk (which is rarely ever capable of being the case). That being so, I see it as being easily adaptable to the residual risk now facing employers and businesses. This seems borne out by the guidance which speaks throughout

of what is 'reasonable' and 'possible', and now introduces the concept of 'viability', by which I read as meaning 'financially viable', in order to determine whether physical distancing of two metres or more is required. Where the difference arises with Covid-19, in my view, is with the end point. The objective cannot be one of elimination of the risk, it is confined simply to arriving at a tolerable level of risk.

**MW:** My concern with 'reasonable practicability' as a safety practitioner is that we are so used to it relating to the taking of all necessary and reasonable risk control measures that are typically aimed at 'stopping something happening'. For instance, guard rails on roofs are aimed at stopping people falling off. However, in the case of Covid, that 'something' has already happened – people are already exposed to Covid. As such, it becomes a question of mitigation, not control. Employers need to mitigate the consequences of Covid through their conduct at workplaces. The situation with Covid is more akin to the use of fall arrest systems where we are trying to mitigate the consequences





of a fall, and I am not so sure that is now adequately described within our conventional approach towards reasonable practicability, irrespective of the way the legal definition is evolving.

**BL:** You mention guidance that has been provided for workplaces. But there seems to be quite a lot of it, and from different sources. How should employers address their safety obligations, is there a priority order or are they free to approach it how they see fit?

**SAQC:** The guidance, either from the government or HSE is not legally binding, and is designed to afford flexibility to employers. However, the underlying reality is that the guidance is much more prescriptive in nature than its title suggests. As noted above, the law requires employers to prove they have done all that is reasonably practicable, and the courts tend to judge that according to the regulatory or industry guidance as to what amounts to 'acceptable practice'. This imposes a very substantial burden on any employer to justify departure from generic guidance such as this, and in most cases makes it effectively mandatory, unless there is a state-of-the-art alternative.

The difference here, however, is that the guidance is now so overtaken by the more detailed analyses emanating from the government's scientific advisors; that it is becoming more difficult to identify just a single set of guidelines. From a legal perspective you are right: what is 'acceptable

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**No business is going to be 'Covid secure'. HSE should be careful with their language too so as not to create a false impression to the contrary.**

Photograph: iStock/  
Vladimir Vladimirov

practice' is becoming a moving feast and there is no discernible priority order anymore.

**MW:** It is that last point, as a safety practitioner, that is interesting me the most. When an employer or legal team approach me for advice as to 'the guidance' I am increasingly directing them away from the single set of guidelines to sectors of industry produced by the government to the more detailed papers explaining the underlying rationale for that, as they provide employers with a greater understanding as to the logic of what they are doing.

**BL:** In which case, in practical terms how should organisations identify the risks they need to manage?

**SAQC:** I think that is for Mike to tackle first!

**MW:** My starting point is to consider the source of the risk. The Scientific Advisory Group for Emergencies (SAGE) Environmental and Modelling Group has identified the three main forms of transmission as:

- **Close-range direct person-to-person transmission** – when someone is directly exposed to the (large) respiratory droplets emitted by another person
- **Indirect surface contact transmission** – when someone touches a surface that has been contaminated with the virus
- **Aerosol transmission** – when small virus-containing respiratory droplets evaporate to less than 10 micron diameter particles and are carried by the air.

Scientists have not yet reached consensus on the relative importance of each of these transmission mechanisms; in particular that of aerosol transmission. It is my opinion that employers should adopt the precautionary principle and assess the risk of all three given that new evidence is emerging all the time.

**SAQC:** From the legal perspective, it is a case of proving the analysis has been undertaken. The risk assessment is the vital evidence of that. If the employer has sought to approach the above routes of transmission in a rational and orderly fashion then that should be a suitable and sufficient risk assessment at law, that will then enable the business to put in place such measures as are reasonably practicable. This is not a once and for all exercise, it needs regular review, and it is not something you can pull off the shelf, it has to be bespoke to your business or organisation. Employers that genuinely try to follow those parts of the Governmental Guidance, HSE risk assessment, and the 39 steps advocated by SAGE so far as they appear reasonable within the economic constraints of their business are, in my view, doing that which is reasonably practicable to address a risk that they have not themselves created.

**BL: If an organisation is seeking to do all that is reasonably practicable to protect the safety of its staff and customers, should it make the wearing of face coverings mandatory in workplaces? As we have seen done for public transport, shops and other indoor places?**

**SAQC:** Nobody is saying that wearing a cloth face covering or even a surgical mask is a panacea or stands as a substitute for other measures of sanitisation, ventilation and physical distancing.

However, the dismissive approach adopted thus far, principally by HSE, by maintaining the traditional workplace safety approach that personal protective equipment (PPE) is a last resort, at the very bottom of the 'hierarchy of measures', is wrong in my opinion. This is an invisible virus, it is not a traditional workplace hazard, and aside from elimination (by vaccination or screening or isolation) there is no realistic hierarchy. There is simply a mixed bag of mitigating measures that if they are all taken, so far as is reasonable to do, it will reduce the risk of the spread of the disease towards a level we view as tolerable in order to permit people to return to work. Masks and face coverings are simply one part of that mixed bag, they are not at the bottom or a last resort. That is, however, just my view.

As the law stands, outside of public transport, shops, other relevant indoor places and the healthcare sector, there is no legal obligation upon employers to require their staff or customers to wear masks. In fact, in the risk assessment template described above, HSE categorically state

'face coverings are not PPE and are not required to be worn in the workplace'.

In those circumstances, it is difficult to see that any employer (outside of the sectors mentioned above) could be taken to task for failing to require the usage of face coverings, but this needs to be kept under constant review as guidance is changing almost daily.

**MW:** There is growing evidence that wearing a face covering in an enclosed space helps protect individuals and those around them from Covid. Indeed, from 24 July, the government has mandated the use of face coverings for people entering shop-type premises in England. This has been extended to other relevant indoor places during August, but not offices. If both workers and customers are wearing face coverings, this is likely to reduce the transmission. When employers, particularly those in close contact services, undertake their risk assessments they may conclude that PPE or face coverings represent the most effective mitigation measures that they can adopt in relation to the close-range and aerosol transmission routes. There may be tensions between following the government guidance and doing what is reasonably practicable.

**BL: You have touched there on the issue of enforcement, Simon. Are we to expect a hard-line approach from HSE and local authorities if there is evidence a firm did not do all that was 'reasonably practicable' to manage the risk of infection?**

**SAQC:** I have stuck my neck out thus far and commended HSE for their cautious and measured words on enforcement, and I hope it continues. In front of the Work and Pensions Select Committee, Sarah Albon, Chief Executive of HSE, indicated that the lack of hard evidence of enforcement (such as prohibition notices) was because employers were taking this risk seriously, and responding to informal advice. I would add that it is just as important to recognise that a cluster of cases within a business does not of itself mean that the guidance has not been followed or that business has broken the law. No business is going to be Covid 'secure' and HSE should be careful with their language too so as not to create a false impression to the contrary.

**MW:** Legal enforcement is a stage I hope to enable my clients to avoid! But it comes back to something Simon referred to earlier, being able to show the regulators your reasoning process. Employers will need to demonstrate that they have undertaken a risk assessment then implemented the mitigation measures that they identified.

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**All information is correct as of 25 August at the time of publication.**