Health and Safety Lawyers' Association

The Courts' approach to the Sentencing Council's Guideline on Harm and Risk of Harm

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‘Harm’ is the second part of step one (culpability being the first) Four points to be decided re harm:
First two go towards identifying the *initial harm category; second two towards the final harm category*

1 Seriousness of harm risked by the offender’s breach

2 Likelihood of that harm arising

3 Whether the offence exposed a number of workers or members of the public to the risk of harm.

4 Whether the offence was a significant cause of actual harm.

Point 1 - Seriousness of harm risked by the offender's breach rarely proves contentious

Level A	Level B	Level C
•Death •Physical or mental impairment resulting in lifelong dependency on third party care for basic needs •Significantly reduced life expectancy	•Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work •A progressive, permanent or irreversible condition	•All other cases not falling within Level A or Level B

Few if any of the appeal cases turn on point 1 although it is to be noted that this too is an exercise in speculation.

Point 2 has proved to be more problematic!

The question is 'the likelihood of that harm arising'

Is it a high, medium, or low likelihood?

What 'does the likelihood of that harm arising mean?' 'Harm arising' is an accident; so it can be translated as 'How likely is it that an accident will occur?'

BUT the problem is it has been acknowledged that whether death or serious injury results from even a serious breach – i.e. whether the threatened risk crystalises in an accident – is often a matter of chance (***R v Howe and Son***)

So if the Court is ultimately being asked to predict the chances of an event occurring; and this is prediction , not a 'scientific' calculation. It is arguably no more than 'supposition, impression and imagination' (which the COA warned against in R v Squibb). It is also probably affected by hindsight bias.

Phrases such as 'accident waiting to happen' are superficially attractive but probably spurious.

Some commentators have argued just this (see Mike Appleby and Dr Louise Smail in IOSH 2019 and also their most recent HSLA lecture). Moreover, they argued that judges are not really equipped to make the calculation without proper statistical training!

So why are Judges required to do it?

Mainly because the Sentencing Guideline Council wanted the HSE guideline to have the same format as other guidelines in conventional criminal cases – 1) culpability and 2) harm. But where an offence is all about risk, and not harm, is the 'harm' criterion inapt?

In most criminal cases you can directly evaluate harm: whether to a person or to property, whether primary or secondary. But offences which are all about the risk of harm – and where intent is not an issue - is not capable of such easy, empirical calculation.

NB. The general sentencing guideline which sets out overarching principles for all guidelines says this about cases which involve risk of harm:

'*Risk of harm is less serious than the same actual harm. Where the offence has caused risk of harm but no (or less) actual harm the normal approach is to move down to the next category of harm. This may not be appropriate if either the likelihood or extent of potential harm is particularly high*'

This is not the same as in HS guideline. You never go down an HC; you only go up or stay the same.

In the light of all this, it is probably unsurprising that the case law touching on the likelihood of harm has failed to produce any consistent approach; and often resorts to empty phrases such as 'an accident waiting to happen'.

Who determines the likelihood of harm?

- ***R v Diamond Box 2017 EWCA 1904*** : *"the assessment of the likelihood or chance of harm is quintessentially a matter for the sentencing judge on all the evidence before him"*
- It should be to the Criminal Standard (R v Faltec 2019 EWCA Crim 520 , below)
- BUT the parties have an obligation to put their heads together and work towards an agreed position; an obligation imposed on the parties by the CPR, among other things.
- The client needs certainty.
- But there have been a number of first instance cases where the judge has disagreed with the categorisation of harm and culpability agreed by counsel – which the Court of Appeal has said it can do.

Some Judges are more prone to intervene than others?

Name these cities....

Parties' agreement on harm/culpability not final

*In **R v ATE Truck and Trailer Sales Ltd 2018 EWCA 752** COA said*

'Such sensible agreement is to be encouraged and is to be expected and will be weighed carefully by any Court before departing from it. However and ultimately, no such agreement can bind the Court as a matter of constitutional principle…the imposition of a sentence is a matter for the judiciary…Principles of transparent and open justice point to the same principle. A private agreement between the prosecution and defence will doubtless inform the Court but helpful though it may (well) be it cannot be determinative of sentence'

They cited the case of *R v Innospec 2010 Crim LR 665 in support of the principle*

Cases where the judge has gone behind parties' harm assessment:

R v Tata Steel [2017] EWCA Crim 704 (Parties level B /medium likelihood; Judge found level B/ high likelihood; COA held Level B/ medium)

R v Diamond Box 2017 EWCA 1904 Parties agreed level B/medium; Judge found B/high; COA approved judge)

R v Palmer Timber Ltd 2019 EWCA Crim 611 (Parties agreed level A/medium; Judge found A/high; COA approved Judge)

R v ATE Truck and Trailer Sales Ltd 2018 EWCA 752 (Parties agreed level A/ pros medium; defence low. Judge, high. COA disagreed with Judge and found medium)

How should the Judge assess the likelihood of harm?

First proper consideration by COA was in *R v Tata Steel [2017] EWCA Crim 704 (7/6/17)*

Where the COA said that the length of time that elapsed without an accident may be significant

Two offences:

1st workers in the habit of manipulating pipes to clear blockage in machine. Machine started by one worker while another manipulating pipes. Two fingers crushed but return to work. 2nd offence unguarded part of machine; worker's hand pulled in resulting in amputation of 2/3rds of little finger.

J said Offence 1 – level B/Medium likelihood, COA agreed. Offence 2 – level B/High likelihood, COA disagreed for Offence 2 and said Medium likelihood.

"That there had been a prior incident was indeed a matter of seriousness and amply supported the conclusion of high culpability; however, when assessing the degree of likelihood (of the harm materialising), it was fair to note that the prior incident was in 2000, some 15 years earlier. To that feature there must be added the fact that, as the judge himself recorded, the lathe in question had been operated for some 150,000-man hours without incident. By itself, the period of operation without incident was a powerfully persuasive pointer against the offence being one of high likelihood".

Persuasive but not determinative

R v Diamond Box Limited [2017] EWCA Crim 1904 *(17/11/17)*

"It is true that, on the facts of a particular case, an accident-free period may be a factor that weighs in the balance – and may weigh heavily. However, *Tata Steel* does not establish a principle that a substantial period in which a risk did not in fact fruit into an accident means that the likelihood of the risk was not high. It all depends on the circumstances of the case……..

….In *Tata Steel*, the source of the risk – a small part of a machine – although frequently used, was not often accessed by staff. In this case, the source of the risk was physically very large, and it was accessible to staff and in fact accessed by staff, notably service engineers, frequently. The cases on their facts are, we consider, significantly different."

R v ATE Truck and Trailer Sales Ltd 2018 EWCA 752 *(13/4/18)*

"Moreover, staying true to the indictment period and the small number of occasions on which ATE employees conducted this work, we cannot treat the "absence of accident" as persuasively telling in favour of a low likelihood. In this regard, we agree with Hickinbottom LJ's observation in *Diamond Box* , at [17] – [18], that an "accident-free" period did not, *of itself* , mean that the likelihood of the risk materialising was not high – and that *Tata Steel* did not hold otherwise; it all depends on the circumstances of the case."

What should the Court consider when assessing likelihood of harm?

Not possible to set out fixed criteria to be used in assessing likelihood. Courts have assessed each case according to their own particular facts and adopt what may be referred to as a 'broad evaluative' approach.

One of the more comprehensive statements was **R v Diamond Box** where the Court said:

"Other relevant factors may include the extent to which the source of the risk was physically isolated, accessible and in fact accessed; whether the risk was exposed or contingent upon an individual taking other unexpected steps; and the nature of any safety features that were overridden"

Therefore lack of certainty but it does mean that it will be possible (at least) to argue any case specific factors in support of an argument on likelihood.

Particular factors: warning of high-risk activities

R v Palmer Timber Ltd [2019] EWCA Crim 611 Case concerned a timber yard and mill where employees collected wooden products from shelves and transferred them via lifts to be loaded onto lorries. During this process, two individuals were struck by a specialist lift truck which had recently been introduced, suffering serious injuries.

Despite agreement between parties of Medium likelihood of harm - COA upheld Judge increasing likelihood of harm to High Likelihood.

"The Independent Consultant had identified as a high risk, the arrangements within the yard of vehicle and pedestrian accidents. The introduction of the quiet Combi-lifts with their blind spot, added not only to the likelihood of an accident or event, but also the likelihood of that event causing level A harm."

Of interest, Court made that finding despite the fact that it had heard industry data, which confirmed that only 50 people are killed and over 5,000 are injured in accidents involving workplace transport each year, which suggests that there is not a high likelihood of level A harm in such collisions.

Where the risk is well known or obvious

R v John Henry & Sons Ltd [2018] EWCA Crim 30

Serious injury caused when workman stepped outside a drag box whilst digging a trench which then collapsed. [A drag box is a reinforced, strutted box which sits inside the trench and can be moved along by dragging].

"it was accepted that there was a foreseeable risk of Mr Talbot stepping outside the drag box and that trench collapses were not infrequent events, which is why drag boxes are used. The use of a single drag box created a temptation and opportunity for Mr Talbot to do what he did. The Judge rightly distinguished between equating foreseeability of harm with high likelihood of it occurring. In the particular circumstances of this accident, where the risks of working in unsupported or inadequately supported trenches are well known, a finding of medium likelihood of harm cannot be criticised".

Temporal factors

R v Wessexmoor [2018] EWCA Crim 288 – Serious injury caused to contractor who was replacing slates on roof and putting lead on a parapet wall.

"We do not consider the mere fact that the particular job in question … only took two hours is sufficient to reduce the risk of very serious injury occurring to medium (likelihood of harm) as opposed to high (likelihood of harm)."

R v Mick George [2019] EWCA Crim 519 - Tipper truck struck overhead power cables – causing no injury. Judge found medium likelihood of level A harm arising. COA agreed. COA referred to Diamond box Case and said " the assessment of the likelihood of the harm risked eventuating was quintessentially a matter for the sentencing judge on all the available evidence…. the fact the accident occurred within hours of the relevant work beginning, the Judge was entitled to conclude that … the risk of eventuation was medium"

R v Palmer [2019] EWCA Crim 611

The court confirmed that the fact that an accident occurred within six weeks of the introduction of a new vehicle system pointed towards the high likelihood of a risk of harm.

Use of scientific data where available

R v Squibb 2019 EWCA Crim 227 26/2/19

Demolition contractor working at a school where asbestos present. Asbestos encountered during demolition with risk that workers and non-employees exposed to risk of inhaling asbestos. Appeal against conviction on inconsistent verdicts; misdirection. Appeal against sentence also.

At first instance it was agreed that level A harm was threatened, judge held medium likelihood. COA held low likelihood of level A harm.

COA held:

'The likelihood or otherwise that exposure to asbestos at a particular level for a particular period of time will ultimately cause a fatal disease is not something which is rationally capable of being assessed simply on the basis of supposition, impression or imagination. It is a scientific question which should be answered if possible with the assistance of scientific data'.

First instance the Court was provided with a defence report which estimated the risk to Squibb's employees of contracting an asbestos related disease. Prosecution did not adduce any expert evidence or criticise the defence expert's methodology.

"The expert's best estimate was that, if 100,000 people were exposed to asbestos to a similar extent to Squibb's employees, about 90 deaths would result. To put this estimated risk in context, the risk of dying from smoking cigarettes is around 1 in 5 (i.e. 20,000 cases per 100,000) and the risk of dying from working in the construction industry for 40 years or from an accident on the roads is around 500-600 chances per 100,000. On this basis, the likelihood that one of Squibb's employees will die as a result of their employer's breach of duty in this case is on any view extremely small."

Use of scientific data where available.

COA held further:

"Undoubtedly, as Squibb's expert acknowledged, any estimate of the kind which he made can only be very rough. Long-term risks of this nature are inherently difficult to assess and quantify, the relevant scientific knowledge is very far from perfect and any estimate must be subject to a wide margin of error. But that is not a reason to reject or disregard whatever scientific evidence is available. The rational approach for a court to adopt in these circumstances is to rely on the best evidence that it has."

Use scientific data but it still needs to be 'characterised'!

- *R v Faltec* – Faltec was a manufacturer of car parts. Case concerned exposure to legionella bacteria and outbreaks of Legionnaire's disease. 5 (people (4 worked for F; 1 nearby resident) over less than a year were infected and diagnosed with Legionnaire's disease.
- Parties agreed that Level A harm was risked
- COA held that "Court's characterisation ought not to be divorced from the reality of the scientific evidence before it"
- It was not in dispute that in a human population with a normal spectrum of characteristics, including age and disease, the recorded proportion of those exposed to outbreaks of legionella pneumophilia from cooling towers who would be expected to sustain fatal injuries would be between 0 and 0.04% (i.e., up to 4 in 10,000).
- Judge at first instance held that this represented a high likelihood of harm when considering an urban area, saying it was more a result of good fortune that when 5 people got legionnaire's disease none died, as statistical evidence was that of those who contract Legionnaire's disease, 10-15% of those persons might die.

Use scientific data but it still needs to be 'characterised'!

- But COA acknowledged that scientific data still had to be "characterised" – in other words, statistics – even ones which are produced using the best evidence available – are not the answer without interpretation.
- COA held that the risk of 4 in 10,000 people dying was not a high likelihood but a medium one
- "On the evidence, the relevant figure for deaths in the present case from an exposure to legionella would be 4 in 10,000. In an urban area (where the Faltec site was located), over a short period of time (unlike the asbestosis, smoking or construction industry examples set out in Squibb, relating to periods of years), we are unable to accept that this figure involves a low risk of harm arising." as had been contended by the defence but a medium one.

Use scientific data but it still needs to be 'characterised'!

'Moreover, although there is no precise evidence as to Level A harm risked other than death, it is logically inescapable that if the risk of death is 4 in 10,000, there must be a risk of other Level A harm in an additional percentage. As the Respondent's Opening before the Judge indicated, there was evidence that, if untreated, Legionnaires' disease "will lead to life threatening problems including organ failure or septic shock leading to coma and possibly death" . Thus, as logic alone must dictate, Legionnaires' disease may well result in catastrophic illness coming within Level A harm other than death.

Against this background, we are satisfied that the correct categorisation for the likelihood of Level A harm arising from these outbreaks of legionella in a densely populated urban area is "Medium". We reject the Faltec submission of "Low" likelihood and, equally, we are unable to agree with the Judge's categorisation of "High" likelihood. We do not think that the Judge's categorisation can be sustained in the light of the statistical evidence before the Court'

Industry data not necessarily conclusive

R v Palmer Timber Ltd [2019] EWCA Crim 611 At first instance, Judge had been provided with industry data which said that only 50 people are killed and over 5,000 are injured in accidents involving workplace transport each year; it was suggested that there was not a high likelihood of level A harm in such collisions.

COA held that Judge entitled to conclude there was a high likelihood of level A harm despite this data; especially in light of recent warning about risks of collisions. Despite industry data COA held '*Collisions between forklifts and similar vehicles and pedestrians are highly likely to cause the most serious injuries and death.*'

Worker's contribution to the risk

Reliance on contributory negligence as evidence of a lower risk of harm under SCG is unlikely to be successful.

The Guideline states: "Actions of victims are unlikely to be considered contributory events for sentencing purposes. Offenders are required to protect workers or others who may be neglectful of their own safety in a way which is reasonably foreseeable"

R v Diamond Box Limited [2017] EWCA Crim 1904

[As was submitted] "there was a constellation of failures by the Applicant. This was, in lay parlance, a serious accident waiting to happen. We accept that the fact that the engineers were experienced and had themselves been parties to the circumvention of various safety features may well have meant that the accident occurred later than it might otherwise have done. But we do not consider that affects the inevitability of an accident occurring sooner or later….. Despite concerns being expressed by staff about the health and safety procedures, the Applicant showed no inclination to change those procedures until an accident had in fact occurred. In any event, in our view the Judge was unarguably entitled to conclude that the likelihood of the risk was high."

Points 3 and 4:
Two factors to consider when assigning the final harm category

i) Whether the offence exposed a number of workers or members of the public to the risk of harm
ii)Whether the offence was a significant cause of actual harm

Guideline says:

If one or both of these factors apply the court must consider either moving up a harm category or substantially moving up within the category range

And then this caveat.

The court should not move up a harm category if actual harm was caused but to a lesser degree than the harm that was risked….

In **Faltec**, it was held by the COA that the caveat applied to both factor one and factor two, so that whenever harm was caused but was lower than the harm risked, even if a number of workers were exposed to the risk of harm, the court could not move up a harm category, only move up within the category range.

Two factors:

It seems arguable that this leads to an illogical result:

Why should it be that a company gets a lesser fine when it exposes a large number of people to the risk of level A harm and in addition one person suffers minor injuries, than when it exposes a large number of people to level A harm but no one is injured?

Respectfully suggested that COA got this wrong. The caveat - *"The court should not move up a harm category if actual harm was caused but to a lesser degree than the harm that was risked….'*

Can only logically refer to the second factor and not the first and second.

Two factors:

'The parties disagree starkly on whether this course was open to the Judge. Mr Hockman submitted that it was not. The paragraph applies to both factor i) and factor ii). Actual harm was caused but not amounting to Level A harm, even though Level A harm was risked; accordingly, the Court was not entitled to move up a harm category. Mr Mills submitted that it was. The "caveat" in the paragraph applied only to factor ii) and did not "fetter" the Court from moving up a harm category in factor i) cases, where many people were exposed to risk.

75 Attractive though we find the course contemplated by the Judge and the submission of Mr Mills, we are not persuaded that it was open to the Judge (or to us). First, though the Guideline is not to be construed as a statute, on a natural reading, the paragraph applies to both factor i) and factor ii), as its opening words make clear. Secondly, the primary focus of the Guideline - and the gravamen of many Health and Safety offences - is exposure to risk, not actual harm. There is, accordingly, ample scope for an upwards adjustment in Harm category in cases where numbers of people have been exposed to the risk of harm - but no actual harm has been caused. Thirdly, it is only where actual harm has been caused, but to a lesser degree than the harm risked, that the language of the Guideline does prevent the Court from moving up a Harm category. Fourthly, that is the position here - given that Level A harm was risked but not caused. It follows that the concluding caveat in the paragraph is applicable - all the more so, it would appear, given that the offence was a significant cause of actual harm (with regard to the five victims) and thus within factor ii) as well as factor i).

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CONCLUSION?

Mike Appleby mentioned at the recent HSLA lecture a report by Inns of Court School of Advocacy and the Royal Statistical Society which was contributed to by Professor David Spiegelhalter, who was the President of the Royal Statistical Society between 2017-2018 –

3 short clips from a lecture on you tube entitled ”If you calculate risk you can make better judgments” [2012]

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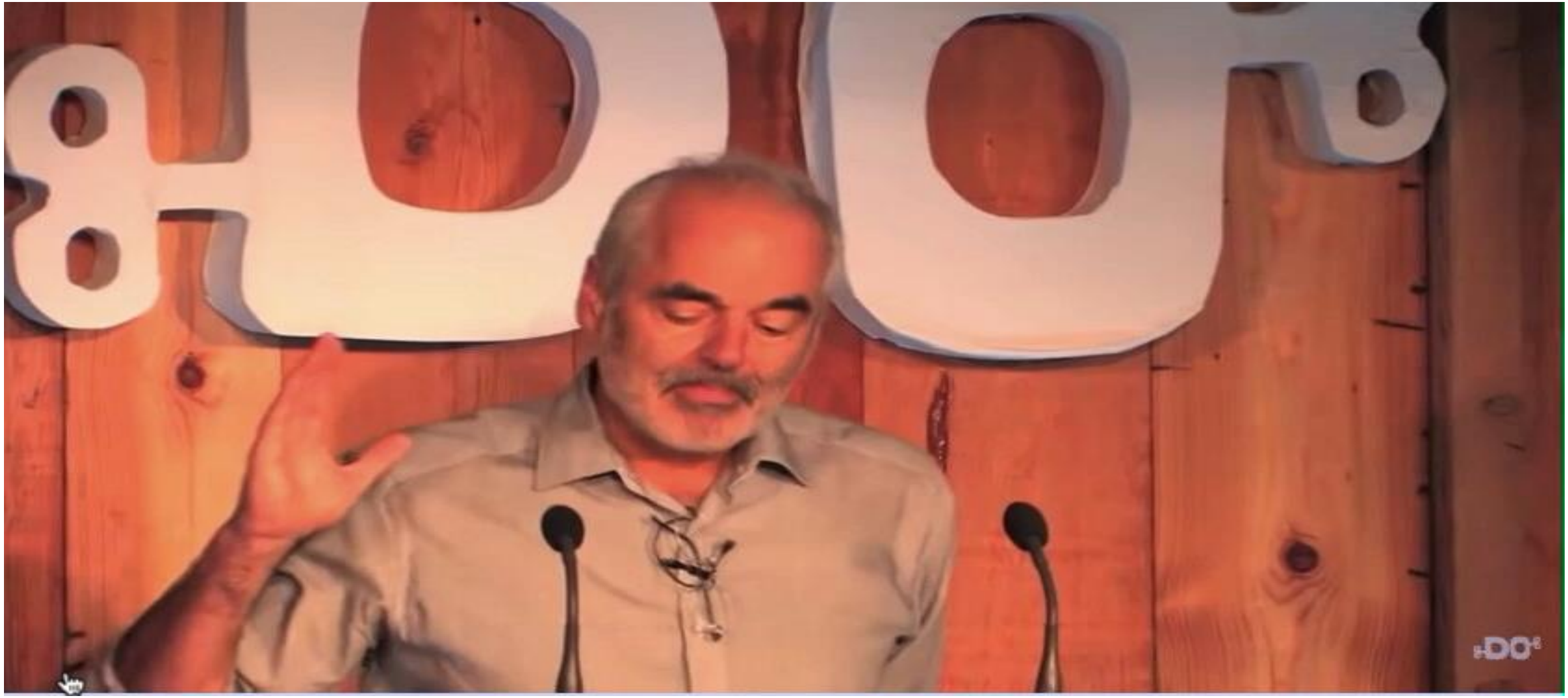

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