

## British Legislation on Health and Safety at Work: A Reappraisal After Five Years

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### Résumé de l'article

Dans le contexte du débat suscité au Québec par le projet de *Loi sur la santé et la sécurité du travail* (P.L. no 17 de 1979), il est intéressant de prendre connaissance des expériences législatives étrangères dans ce domaine. Ce texte fait le point sur l'expérience britannique depuis l'entrée en vigueur, en 1975, d'une nouvelle législation de portée générale.

L'auteur évoque d'abord l'état du droit antérieur et les considérations qui ont guidé le législateur de Westminster dans cette réforme. Il met ensuite en relief cinq aspects principaux de la nouvelle législation. Pour chacun, il indique le sens et la portée du texte nouveau, ainsi que les suites qui lui ont été données dans la pratique.

Ces cinq aspects sont le remplacement progressif de la réglementation antérieure, d'origine étatique, par des « codes de pratique » élaborés à l'initiative des organisations patronales et ouvrières ou en consultation avec elles ; renonciation des responsabilités respectives de l'employeur, du fabricant d'équipement de production et de l'employé quant à l'hygiène et à la sécurité sur les lieux de travail ; les formes d'intervention de l'autorité administrative visant à prévenir les situations d'insalubrité ou d'insécurité ou à y mettre fin ; une structure administrative dualiste, comportant une commission chargée des fonctions de recherche, d'information, de consultation et d'élaboration des normes, et un office chargé de l'inspection ; et l'implantation dans les entreprises de délégués à la sécurité, désignés par les syndicats, et de comités de sécurité.

L'auteur insiste particulièrement sur les pouvoirs des inspecteurs de l'office, et notamment sur le régime des ordonnances rendues par les inspecteurs de l'office pour contraindre l'employeur à corriger une situation dangereuse dans son entreprise ou à interrompre les activités d'exploitation jugées dangereuses, et sur les recours ouverts contre ces ordonnances.

Il conclut, à la lumière des événements survenus depuis l'entrée en vigueur de la loi, que si les mesures d'inspection semblent efficaces — ni plus ni moins d'ailleurs que celles qui pouvaient être prises avant 1975 —, les aspects plus novateurs de la loi, notamment l'introduction des « codes de pratique » et celle des comités et délégués responsables de la sécurité dans les entreprises, n'ont pas encore produit les résultats escomptés.

# British Legislation on Health and Safety at Work : a Reappraisal After Five Years

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George APPLEBEY \*

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## Introduction

After five years in existence it would seem appropriate to review the working of the *Health and Safety at Work Act 1974* to evaluate its progress and see how well it has operated during that time. However, since this article is to be read by a Quebec and Anglo-Canadian audience who may be unfamiliar with the situation in the United Kingdom a large part of what follows will also be devoted to describing the changes in health and safety legislation effected since 1975. It is to be hoped that this will be of interest to those framing and administering similar laws in Canada and elsewhere.

## 1. The state of the law before 1975

Before the *Health and Safety at Work Act*, safety legislation in the United Kingdom worked on a piecemeal basis. The two principal Acts<sup>1</sup> protected different sections of the working population, and were based on the place of work. The *Factories Act 1961*, enforced mainly by the Factory Inspectorate, covered about 8½ million employees while the *Offices, Shops and Railway Premises Act 1963*, enforced by local authorities, covered about 8 million. Factory legislation as we now know it goes back to 1844 in fact and there have been factory inspectors since even earlier: 1833. The *Offices, Shops and Railway Premises Act 1963*, was the first piece of health and safety legislation specifically for office workers. There were also a number of Acts providing for regimes of control over certain specified industrial activities and substances, such as explosives, alkali, petroleum spirit, nuclear installations and radioactive substances, plus separate inspectorates for mines and quarries, and agriculture. All of this amounted to "a haphazard mass of law which is intricate in detail, unprogressive, often difficult to comprehend and difficult to amend and keep up to date"<sup>2</sup>.

Despite the volume of safety legislation, many people at work (the official figure was 5 million) were simply not covered at all. This difficulty was exacerbated by the fact that the *Factories Act* was interpreted by the courts as a penal statute, laying down criminal penalties, and subject to strict construction, which could restrict its application still further. For example, an engine driver employed by a water board was injured when his right hand was caught in the transmission machinery of a pump house at a pumping station<sup>3</sup>. The purpose of the pump house was to put the water under pressure after it had been through the filtration plant. He brought an action against the board alleging negligence at common law and breaches of statutory duty under the *Factories Act*. It was held that water was an "article" within the meaning of the Act, and that the premises as a whole were a factory, but that the putting of water under pressure in the pump house was not a factory process, but mere distribution, and therefore the pump house did not form part of the "factory"<sup>4</sup>. Accordingly his action

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1. The *Factories Act 1961* and associated regulations, and the *Offices, Shops and Railway Premises Act 1963*. Despite the long history of factory legislation, going back as far as 1802, the 1963 Act was preceded only by a private member's bill passed in 1960.

2. *Safety and Health at Work*, Report of the Committee on Safety and Health at Work (Robens Committee), London H.M.S.O., 1972 (Cmnd. 5034), p. 152.

3. *Longhurst v. Guildford, Godalming and District Water Board*, [1961] 3 All E.R. 545 (H.L.).

4. S. 175(6): Where there is a clearly demarcated area within the factory precincts which is not being used for the purposes of the factory processes, then it falls outside the factory area.

failed. A person who suffered an injury in the filtration plant could use the *Factories Act* for damages, whereas a person suffering the same injury in the pump house could not. The effect of cases such as this was to complicate and hinder efforts to achieve safety at work, quite apart from frustrating a reasonable desire to obtain compensation for an industrial injury.

It was a widespread dissatisfaction with the system of industrial safety that led to the setting up of the Robens Committee in 1970. After two years' deliberations they reported to Parliament in 1972.

According to Robens the main defects of the statutory system were three.

The first and most fundamental defect was that there was too much law. As already mentioned, nine main groups of statutes were supported by nearly 500 subordinate statutory instruments. The Committee took the view that the sheer mass of this law, far from advancing the cause of safety and health, may have reached the point of being counter-productive. Taking the view that apathy was the greatest single contributing factor to accidents at work, the Committee underlined that this would not be cured so long as people were encouraged to think that safety and health at work can be ensured by an ever-expanding body of legal regulations enforced by an ever-increasing army of inspectors:

*The primary responsibility for doing something about the present levels of occupational accidents and disease lies with those who create the risks and those who work with them. The point is quite crucial. Our present system encourages rather too much reliance on state regulation, and rather too little on personal responsibility and voluntary, self-generating effort. This imbalance must be redressed. A start should be made by reducing the sheer weight of the legislation*<sup>5</sup>.

The second main defect was that not only was there too much law, but too much of the existing law was intrinsically unsatisfactory. The legislation was badly structured, and the attempt to cover contingency after contingency had resulted in a degree of elaboration, detail and complexity that deterred even the most determined reader. It was written in a language and style that rendered it largely unintelligible to those whose actions it was intended to influence. Much of this legislation was irrelevant to the real underlying problems. According to the Committee, four fifths of all accidents reported in recent years under the *Factories Act* arose from "common accidents" i.e. handling materials, falling, striking against objects, being struck by falling objects and misuse of hand tools. Only about one in six of these involve a breach of a specific regulation. Most of the accidents were associated with habits of work, general site tidiness and human error.

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5. *Supra*, fn. 2, p. 7.

It is not to underrate the importance of physical safeguards to say that preoccupation with the physical environment has tended to dominate this field to the neglect of equally important human and organisational factors, such as the roles of training and joint consultation, the arrangements for monitoring safety performance, or the influence of work-systems and organisation upon attitudes and behaviour<sup>6</sup>.

The third major problem area was the fragmentation of administrative jurisdictions.

What disturbs us about industrial safety and health administration is that there are too many demarcation lines, and that they appear to have emerged more by historical accident than by design. The pattern of control is one of bewildering complexity. There are nine separate groups of health and safety statutes dealing respectively, with factories, commercial premises, mining and quarrying, agriculture, explosives, petroleum, nuclear installations, radioactive waste disposal and alkali emissions. In England alone responsibilities for administration and enforcement are divided between five government departments (Employment, Trade and Industry, Agriculture, Environment and the Home Office) and seven separate inspectorates (factories, mines, agriculture, explosives, nuclear installations, radiochemical and alkali). In addition there is extensive participation by local authorities<sup>7</sup>.

The jurisdictional boundary lines did not coincide to provide a clear and comprehensive system of official provision for safety and health at work. The statutes taken together covered nothing like the whole of the working population. The fragmentation of the legislation and its administration made the task of harmonising, servicing, and updating the various statutory provisions extremely difficult; and it diffused and compartmentalised the expertise and facilities that were available to deal with occupational hazards.

To cure these and other defects "a thorough going overhaul was needed."

This is what was attempted in the *Health and Safety at Work Act 1974*<sup>8</sup>.

## 2. The *Health and Safety at Work Act 1974*

The *Health and Safety at Work Act* came into force in stages on January 1st and April 1st 1975, but did not repeal the existing safety legislation. The *Factories Act 1961* and other statutes were to be progressively replaced by a

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6. *Id.*, p. 8.

7. *Id.*, p. 9.

8. 1974, c. 37.

new system of regulations and approved codes of practice issued by the Health and Safety Commission. In the meantime, the old and new systems were to continue to co-exist.

The most obvious achievement of the new legislation were the following:

- One comprehensive and integrated system of law dealing with the health and safety of virtually all people at work. We have already noted that many people were not previously covered. All employees are now protected, with the exception only of those in domestic employment in private residences. Therefore educational establishments, research laboratories, and hospitals, in fact everywhere there are people working is governed by the Act. Those now covered who were not previously are termed "new entrants".
- Protection for members of the public where they may be affected by the activities of people at work.
- The establishment of a Health and Safety Commission and Executive, responsible to Ministers for administering the legislation and providing a focus and centre of initiative for health and safety at work matters.

Obviously in an Act of this length only certain matters can be dealt with, so the author has selected what he considers the main innovations of the Act for comment.

First, the gradual replacement of the *Factories Act* by new regulations, with a reduction in the number of these, given greater use of voluntary codes of practice.

Second, the use of broad "general duties" as the basis for offences in the enforcement of the statute.

Third, a change-over to administrative enforcement by a system of notices, in conjunction with the previous method of enforcement through the criminal courts.

Fourth, unification of the inspectorates in the Health and Safety Executive, and the establishment of a Health and Safety Commission.

Fifth, worker involvement in health and safety, through trade union appointed representatives, and the introduction of safety committees.

We shall look at each of these in turn.

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9. A full list is set out in Schedule 1 of the *Health and Safety at Work Act*.

## 2.1. The new regulations and codes of practice

The *Factories Act*, as well as other pre-1975 legislation, was not repealed. It was to be progressively replaced by new regulations made under the *Health and Safety at Work Act*. Some saw the demise of the old legislation as more or less immediate, others did not. The latter group have proved correct. The *Factories Act* still remains substantially in force and is still being used occasionally in prosecutions, perhaps because of its more precise detail, and also in tort actions for employers' breach of statutory duty<sup>10</sup>.

In the *Health and Safety at Work Act*, the Secretary of State has, under section 15, a power to make health and safety regulations<sup>11</sup>, which progressively replace the existing regulations. Although quite a number of new regulations have been made, most were simple up-dating or improving in the light of new technological or scientific understanding of safety problems. In other words, in the opinion of the author, these changes would have happened anyway. There has been no largescale repeals or attempts to reduce the volume of law, perhaps slightly the reverse. Indeed at the present time over 50 new regulations are in the pipeline. So Robens's first criticism has not been dealt with. Whether or not that criticism was well founded could of course be argued about, but there is no doubt that wholesale changes in the substantive law of health and safety and a decrease in the volume of that law have not occurred.

Again, in the Act, these new regulations were supposed to operate in combination with approved codes of practice designed to maintain or improve standards of health, safety and welfare. The words "maintain or improve" were specifically added during the Bill's passage through the House of Lords. Codes of practice had not been given statutory force in this area before 1975. They were intended to give effect to the Robens Committee recommendation that "greater emphasis should be placed in future on standard-setting by means of non-statutory, voluntary codes of practice and standards"<sup>12</sup>.

By section 16, the Health and Safety Commission, for the purpose of providing practical guidance with respect to the duties of employers, can approve and issue such codes of practice either prepared by itself, after consultation, or else could give approval to codes prepared by others. The legal status of approved codes was made clear in section 17: failure to

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10. *Wearing v. Pirelli*, [1977] 2 All E.R. 339.

11. The subject-matter of Health and Safety at Work regulations is set out in Schedule 3 of the Act.

12. *Supra*, fn. 2, p. 46.



observe any provision of an approved code of practice "shall not of itself render a person liable to any civil or criminal proceedings." In criminal proceedings, however, any provision of a code of practice which appears to the court to be relevant is admissible in evidence: if the prosecution prove that there was a failure to observe a provision of an approved code and the court is satisfied that it is relevant to any matter which the prosecution must prove in order to establish a contravention, that matter must be taken as proved, unless the court is satisfied that statutory requirement was complied with in some other way<sup>13</sup>.

The British Standards Institute issues many such codes over a wide range of subjects. Here again the story is rather disappointing. Only two codes of practice have been approved by the Health and Safety Commission in five years, the most notable being on safety representatives and committees. This latter document went even further by including the previously unheard-of "guidance notes" into a code of practice. The reasons for this failure can only be guessed, but once again it has to be said that codes of practice in health and safety have not taken off.

## 2.2. General duties under the Act

### 2.2.1. The extent of the general duties

By far the most important part of the Act is that contained in sections 2 to 9, which sets out the general duties. The paramount duty is now placed on the employer rather than on the occupier as was the case under such legislation as the *Factories Act*. He is under a duty "to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees"<sup>14</sup>. This has been called a statutory enactment of the employer's common law duty of care, and is very wide. Failure to comply with these duties is a criminal offence<sup>15</sup>. The subsections which follow that statement of the employer's duty are merely illustrations.

The precise meaning of "reasonably practicable" has given rise to a considerable body of case law, when used in various statutes prior to the *Health and Safety at Work Act*:

Reasonably practicable is a narrower term than physically possible and seems to imply that a computation must be made by the employer on which the quantum of risk is placed in the one scale and the sacrifice involved in the measures necessary for avoiding the risk (whether in money, time or trouble) is placed in the other<sup>16</sup>.

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13. *Health and Safety at Work Act 1974*, s. 17(2).

14. *Id.*, s. 2(1).

15. *Id.*, s. 47(1).

16. *Edwards v. National Coal Board*, [1949] 1 K.B. 704, 712.6.

On the one side one must put any expense, delays or other disadvantages involved in adopting the preventive system, balanced against the nature and extent of the risk involved<sup>17</sup>.

In other words, employers should first investigate their premises to see what measures are necessary to prevent accidents, and then decide whether these measures are reasonably practicable taking into account cost and inconvenience, etc. As we shall see in looking at some of the cases and at tribunal decisions, arguments based on wider economic considerations such as the financial state of the company do not have much success with the courts.

Normally in criminal prosecutions it is for the prosecution to prove their case beyond reasonable doubt. The Act reverses this onus of proof<sup>18</sup>. It is for the defendant to show that precautions to avoid the accident were not reasonably practicable. However, he will satisfy this test, if he proves the point on the lower civil standard of balance of probabilities.

Under section 3 the employer's duty extends beyond his employees, to persons not in his employment who may be affected by the way he conducts his undertaking<sup>19</sup>, and to those who are not his employees, but use nondomestic premises made available to them as a place of work. The employer's liability is greatly extended to cover contractors, the self-employed, visitors, and even members of the public. Of these, contractors are the most important. It is repeated that this section does not impose civil liability<sup>20</sup>, only the possibility of criminal (or administrative) enforcement by the proper authorities, who may decide, in the case of contractors, that it is the employer's system of work that is at fault and proceed accordingly<sup>21</sup>.

The normal test of liability is to decide to what extent the employer has control of the operations, a point discussed by the Robens Report:

As a matter of principle the legislation should not have the effect of imposing obligations on employers concerning circumstances over which they have no control<sup>22</sup>.

Section 4 requires that all persons who have control of premises shall make them safe, including all means of access and egress, and any plant or substances on the premises must be safe and free from risks to health.

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17. *Jenkins v. Allied Ironfounders*, [1970] 1 W.L.R. 304, 307.

18. *Health and Safety at Work Act 1974*, s. 40.

19. *Id.*, s. 3(1).

20. None of the general duty sections do.

21. A notice may be cancelled if issued to the wrong person.

22. *Supra*, fn. 2, p. 56.

Section 5 which deals with noxious emissions into the atmosphere has not been brought into force, though it is believed that it may soon be made law.

Of all the general duty sections the one which has caused the most problems is section 6. Anyone who designs, manufactures, imports or supplies any article or substance for use at work must, under this section:

- ensure the article or substance is so designed and constructed as to be safe and without risks to health when properly used,
- carry out or arrange for such testing and examination as may be necessary,
- provide adequate information about use, and
- carry out research with a view to the discovery and elimination or minimisation of any risks to health or safety.

Legislation dealing with the safe construction of industrial machinery goes back to section 17 of the *Factories Act 1937*, which made it an offence for any person to sell or let on hire a power-driven machine for use in the factory on which specified parts were not encased or otherwise effectively guarded. The purpose of section 6 of the *Health and Safety at Work Act* is to lay duties on all who are involved in the chain of supplying goods for use at work, to ensure generally that those goods are and continue to be safe when put to their intended use, and in particular that any health and safety requirements relating to the goods are complied with before they come to the point of use. The whole aim and intention of the section is to get safety designed and built into the products rather than placing the full onus of ensuring that articles and substances are safe to use, on the employer<sup>23</sup>.

The wording of this section left much to be desired, leaving as it did the meaning of the expression "safe... when properly used" to be decided by the courts. Previous legislation containing the same phraseology had led to considerable confusion. Some decisions seemed to say the words simply meant "not dangerous" whereas others took the view that it meant "potentially unsafe, but no liability to the manufacturer if advised precautions are taken". On the civil side, liability of manufacturers who supply

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23. Since the *Employer's Liability (Defective Equipment) Act 1969*, if an employee can show that a tool he was using was defective in such a way that there must have been negligence in its manufacture, and that his injury was caused by that defect, then the employer as well as the manufacturer is liable to him whether or not the employer was in any way to blame. The principal advantage of this from the employee's point of view is that he is relieved of any need to identify and sue the manufacturer of defective equipment provided by his employer.

equipment and goods is further affected by the coming into force of the *Unfair Contract Terms Act 1977*. The Health and Safety Commission issued Guidance Notes on this topic, but this merely repeated the difficulties. There is a feeling at the Health and Safety Executive that statutory clarification is required.

Finally in order to bring home to workers the importance of workplace safety, the Act places two of the general duty sections on employees themselves. By section 7 it is the duty of every employee while at work (i.e. in the course of his employment) to take reasonable care for the health and safety of himself and other persons who may be affected by his acts or omissions at work, and to co-operate, so far as is necessary<sup>24</sup>, with his employer in carrying out the latter's statutory duties. This is a statutory declaration that safety policy should be based on co-operation and advice among all members of the workforce rather than on coercion.

In addition it is an offence for any person "to intentionally or recklessly interfere with or misuse anything provided in the interests of health, safety or welfare in pursuance of any of the relevant statutory provisions"<sup>25</sup>. This more or less re-enacts section 143 of the *Factories Act* which, however, required "wilful interference".

Initially it was thought that proceedings against individuals would be rare, but these have occurred in greater numbers than was expected. In the first three years 73 individuals, of whom 47 were employees, were prosecuted, mainly under section 7. Convictions were obtained in 68 of these cases. It is surprising to note that convictions were also obtained in two prosecutions of employees under section 2, which only applies to employers.

The Act also attached personal liability to managers, directors or other such officers of the body corporate under section 37. Ten such prosecutions have taken place, the most notable being the conviction of the Director of Roads of Strathclyde Regional Authority<sup>26</sup>. He was fined £125 for failure to "fulfill the responsibilities for health and safety placed on those in his position by the Council, including having a sound safety policy for his department, informing employees of the implications and requirements of the Act, and training and instructing employees in safe working practices"<sup>27</sup>. It is interesting to note that an internal memorandum assigning responsibility to him was given great weight in attaching liability to the individual concerned under this section.

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24. This is a higher standard than the "reasonably practicable" requirement on employers.

25. *Health and Safety at Work Act 1974*, s. 8.

26. *Armour v. Skeen*, [1977] I.R.L.R. 310.

27. *Ibid.*

The penalties under section 37, which may be prosecuted on indictment, are severe: unlimited fine or up to 2 years' imprisonment. The section requires "consent, connivance or neglect" on the part of the individual concerned.

Section 36 enables the firm or company to utilise a "third party defence" where an offence is due to the "act or default of some other person". This section has resulted in a number of individuals, such as safety officers, being prosecuted and convicted.

### 2.2.2. Offences against the general duties

Offences are dealt with in section 33. Among the most important are:

- contravening sections 2 to 9, i.e. employers' and employees' duties,
- obstructing inspectors in the exercise of their powers,
- contravening any requirement of an improvement or prohibition notice,
- disclosure of information in contravention of section 28 (i.e. limits to disclosure of trade secrets.), and
- failing to comply with a court order made under section 42 (i.e. time given to remedy defect in safety provision).

For breach of these and all the other offences listed, the fine on summary conviction is up to £1000<sup>28</sup>. Where the contravention continues after conviction, a further fine of £50 per day may be imposed. Proceedings must be taken within 6 months of coming to the responsible enforcing authority. Prosecution must be by an inspector, authorised by the enforcing authority which appointed him or with the consent of the D.P.P. This will normally be in the magistrate's court. Prosecutions may also be taken on indictment, where conviction may result in unlimited fine or two years' imprisonment.

While dealing with offences, one rather surprising aspect of the 1974 Act should be noted. The Crown and its properties may not be prosecuted under the statute<sup>29</sup>. This means that Health Authorities, for instance, can be inspected and individuals — "persons in the public service of the Crown" — may be prosecuted or issued with a notice, but not the Crown itself. It is suggested that this is quite an important omission.

On the subject of penalties generally, it has been true up to now that only a fraction (about 1%) of known contraventions of safety regulations were prosecuted. The object was to secure compliance by persuasion rather

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28. The average fine imposed, over three years, was only £136.

29. *Health and Safety at Work Act 1974*, s. 48.

than prosecution. This is still the Executive's policy. In the five years since the Act prosecutions have in fact decreased. This does not mean a slowing down in enforcement but in fact the opposite. Since January 1975, the inspectorates have had the power to issue notices in specified circumstances. The creation of novel administrative sanctions and the way in which they operate constitute the most important change instituted by the 1974 Act and will be dealt with next.

### **2.3. Enforcement notices**

Notices come in two kinds: improvement notices and prohibition notices. The latter may be either "immediate" or "deferred", as will be explained later.

It should be noted at the outset that notices are not an alternative to prosecution, they can be issued on occasions when the recipient is also prosecuted over the same matter. In the first three years, 29 641 notices were issued, approximately two thirds of which were improvement notices. The figure for 1978 alone is over 15 000, showing that their use is gradually increasing from 7 599 in the first year (1975).

#### **2.3.1. Improvement notices**

These are dealt with in section 21:

21. If an inspector is of the opinion that a person —

- (a) is contravening one or more of the relevant statutory provisions; or
- (b) has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated, he may serve on him a notice stating that he is of that opinion, specifying the provision or provisions as to which he is of that opinion, giving particulars of the reasons why he is of that opinion, and requiring that person to remedy the contravention or, as the case may be, the matters occasioning it within such period (...) as may be specified in the notice.

There must be some statutory contravention in the case of an improvement notice, and usually the likelihood that it will continue or be repeated, though this is not essential. The time given to remedy the situation is entirely at the discretion of the inspector (though it must be more than 21 days). Also noteworthy is section 23 of the Act:

- 23. (2) A notice may (but need not) include directions as to the measures to be taken to remedy any contravention or matter to which the notice relates; and any such directions —
  - (a) may be framed to any extent by reference to any approved code of practice; and

- (b) may be framed so as to afford the person on whom the notice is served a choice between different ways of remedying the contravention or matter.

Measures to be taken are usually contained in the schedule to the notice, though there is no requirement that particular remedial measures must be specified. Where a notice contains a schedule which is unclear or imprecise, it may nevertheless be affirmed on appeal, and the Industrial Tribunal has power to redraft or clarify the language used<sup>30</sup>. Use of the wrong section in a notice has been a ground for cancellation on appeal<sup>31</sup>.

### 2.3.2. Prohibition notices

Section 22 reads:

- (2) If (...) an inspector is of the opinion that, (...) the activities involve or, as the case may be, will involve a risk of serious personal injury, the inspector may serve on that person a notice (in this Part referred to as "a prohibition notice").
- (3) A prohibition notice shall —
  - (a) state that the inspector is of the said opinion;
  - (b) specify the matters which in his opinion give or, as the case may be, will give rise to the said risk;
  - (c) where in his opinion any of those matters involves or, as the case may be, will involve a contravention of any of the relevant statutory provisions, state that he is of that opinion, specify the provision or provisions as to which he is of that opinion, and give particulars of the reasons why he is of that opinion; and
  - (d) direct that the activities to which the notice relates shall not be carried on by or under the control of the person on whom the notice is served unless the matters specified in the notice (...) have been remedied.
- (4) A direction given in pursuance of subsection (3) (d) above shall take immediate effect if the inspector is of the opinion, and states it, that the risk of serious personal injury is or, as the case may be, will be imminent, and shall have effect at the end of a period specified in the notice in any other case.

No statutory contravention is required in the case of an immediate prohibition notice. The only requirement is the inspector's opinion that there is an imminent risk of serious personal injury. The effect of an immediate prohibition notice is to suspend the dangerous operation or activities on receipt of the notice. A deferred prohibition notice has the same effect at the expiry of the time allowed for the modifications.

30. *Id.*, s. 24(2). See *Chrysler (U.K.) Ltd. v. McCarthy*, [1978] I.C.R. 939, also [1977] *Crim. L.R.* 351.

31. *Naylis v. Manners*, Newcastle Industrial Tribunal, March 13, 1978 (unrep.).

The result of a prohibition notice can be fairly dramatic as the case of *Greenlees v. Rushworth*<sup>32</sup> illustrates. In this case, a prohibition notice under the *Health and Safety at Work Act* was served in respect of premises used as a covered market on the second floor of a building because it was considered that there was an imminent risk of serious personal injury arising from activities carried on there. On appeal to an Industrial Tribunal against the notice the tribunal held that there was a high degree of risk to the safety of persons using the premises from fire and affirmed the notice. As a result the market had to close down, and went out of business.

Extensive powers are also given by section 25 to deal with the cause of imminent danger:

25. (1) Where, in the case of any article or substance found by him in any premises which he has power to enter, an inspector has reasonable cause to believe that, in the circumstances in which he finds it, the article or substance is a cause of imminent danger of serious personal injury, he may seize it and cause it to be rendered harmless (whether by destruction or otherwise).

Finally, on the subject of notices generally, not merely inspectors, but the Commission itself can serve notices (though not enforcement notices), as explained by section 27 of the Act:

27. (1) For the purpose of obtaining —
- (a) any information which the Commission needs for the discharge of its functions; or
  - (b) any information which an enforcing authority needs for the discharge of authority's functions,
- the Commission may, with the consent of the Secretary of State, serve on any person a notice requiring that person to furnish to the Commission or, as the case may be, the enforcing authority in question such information about such matters as may be specified in the notice, and to do so in such form and manner and within such time as may be so specified.

### 2.3.3. Appeals against enforcement notices

As a safeguard against the abuse of the notice system, the Act provides for an appeal to an Industrial Tribunal under section 24;

- (2) A person on whom a notice is served may within such period from the date of its service as may be prescribed appeal to an industrial tribunal; and on such an appeal the tribunal may either cancel or affirm the notice and, if it affirms it, may do so either in its original form or with such modifications as the tribunal may in the circumstances think fit.
- (3) Where an appeal under this section is brought against a notice within the period allowed under the preceding subsection, then —

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32. (1975) 10 I.T.R. 129.



- (a) In the case of an improvement notice, the bringing of an the appeal shall have the effect of suspending the operation of the notice until the appeal is finally disposed of, or, if the appeal is withdrawn, until the withdrawal of the appeal;
- (b) in the case of a prohibition notice, the bringing of the appeal shall have the effect if, but only if, on the application of the appellant the tribunal so directs (and then only from the giving of the direction).
- (4) One or more assessors may be appointed for the purposes of any proceedings brought before an industrial tribunal under this section.

If the appellant wishes to take his case further he may ask the tribunal, within 7 days to review its own decisions on the following grounds:

- error on the part of the tribunal staff,
- party did not receive notice of proceedings,
- absence of party entitled to be heard,
- new evidence which could not have been discovered before, or
- the interests of justice require a review.

Thereafter the appeal must go by case stated to the Divisional Court. So far only one health and safety appeal has reached the courts, namely *Chrysler (U.K.) Ltd. v. McCarthy*<sup>33</sup>.

The choice of Industrial Tribunals to hear such appeals surprised many people. Originally set up to deal with claims under the *Industrial Training Act 1964*, they now deal with unfair dismissals and redundancy payment claims in vast numbers, but had no experience of health and safety matters. For this reason provision was made for the appointment of assessors, with some expertise. In fact the chief advantage of Industrial Tribunals was seen as speed, allied with a certain absence of legal formality. At present appeals against improvement notices are heard on average within 4 months, against prohibition notices within about one month. So the objective of expeditious disposal of appeals has not been entirely achieved.

The Tribunal may affirm or cancel the notice or make such modifications "as it may in the circumstances think fit"<sup>34</sup>. This gives the Tribunal a wide discretion to modify notices. As an example of this, in the case of *Tesco Stores v. Edwards*<sup>35</sup>, the Tribunal added extra requirements to the improvement notice. The grounds of appeal are, of course, not limited to points of law. Where the appeal is to cancel the notice, the main grounds seem to have been:

33. *Supra*, fn. 30.

34. *Health and Safety at Work Act 1974*, s. 24(2).

35. (1977) I.R.L.R. 120.

- notice did not specify clearly enough the steps to be taken, and the tribunal may decide to provide specific guidance;
- time provided for in the notice was not sufficient;
- the inspector misunderstood or abused his powers under the Act;
- the inspector was wrong in his interpretation of the law;
- the breach is admitted but the remedy proposed is not feasible, or not practicable, or needs more time, or is too costly;
- the breach is admitted, but is so trivial that the notice should be cancelled.

It is difficult to be precise but probably no more than 100 appeals have been heard so far. A large number of appeals are withdrawn after further consultation. In the reported cases, quite a number of appellants have been successful<sup>36</sup>. It is not possible here to go into all the cases, so I will mention only three.

In *Stephensons (Crane Hire) Ltd. v. Gordon*<sup>37</sup> a prohibition notice was cancelled because it had been served on the wrong person. The tribunal said:

Inspectors gain their power from the statute and must work within the statute, and so far as s. 22 is concerned the Prohibition Notice must be on the person who has control of the activities.

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36. Appeals against notices, under s. 24:

*Associated Dairies Ltd. v. Hartley*, (1979) I.R.L.R. 171;  
*Otterburn Mill v. Bulman*, (1975) I.R.L.R. 223;  
*Belhaven Brewery v. McClean*, (1975) I.R.L.R. 370;  
*T.C. Harrison v. Ramsey*, (1976) I.R.L.R. 135;  
*Campion and Campion v. Hughes*, (1975) I.R.L.R. 291;  
*Nico Manuf. v. Hendry*, (1975) I.R.L.R. 225;  
*Tesco Stores v. Edwards*, *supra*, fn. 35;  
*South Suburban Co-op v. Wilcox*, (1975) I.R.L.R. 310;  
*Bressingham Steam Preservation Co. Ltd. v. Sincock* (unrep.);  
*Stephensons (Crane Hire) Ltd. v. Gordon* (unrep.);  
*Mrs. Susan Roberts v. Day* (unrep.);  
*A.C. Davis v. Environmental Health Department of Leeds City Council*, (1976) I.R.L.R. 282;  
*Moorhouse v. Effer* (unrep.);  
*Deeley v. Effer* (unrep.);  
*Murray v. Rochford D.C.* (unrep.);  
*Greenlees v. Rushworth*, *supra*, fn. 32;  
*Hi-fi Centre (Chelmsford) Ltd. v. Evershed* (unrep.);  
*Naylis v. Manners*, *supra*, fn. 31;  
*British Airways Board v. Henderson*, [1979] 1 C.R. 77;  
*Aldis Travel Agency Ltd. v. Surtees*, (1978) 24 *The Inspector* 39;  
*Roadline (U.K.) Ltd. v. T.R. Mainwaring* (unrep.).

37. *Supra*, fn. 36.

The appellants in this case merely hired out equipment and were not thereafter involved in the activities of the hirer.

As we have seen under section 22 the inspector must form two opinions before serving a prohibition notice to take immediate effect: first, that the activities complained of give rise to risk of serious personal injury; and second, the risk of serious personal injury is imminent.

In *Bressingham Steam Preservation Co. Ltd. v. Sincock*<sup>38</sup> the Tribunal decided that “the respondent could not properly or reasonably form the two opinions required of him under s. 22 on the information which was available to him.” The case concerned a museum of steam trains which were maintained by the appellant and open to the general public for rides. The inspector, who unknown to the appellant, visited the premises on a Sunday, formed the view that the transportation of passengers on the footplate was dangerous. He served a prohibition notice specifying contravention of section 3 of the *Health and Safety at Work Act*, which sets out an employer’s duty to persons other than employees — and which therefore includes the general public.

The Tribunal recorded their disapproval of the manner in which the inspector had obtained his information and cancelled the notice on the ground noted above, that the paucity of the information amounted to noncompliance with section 22.

The Tribunal proceeded to consider the merits of the case, even though it held the notice invalid. It was clear, they said, that there was some danger to passengers travelling on the footplate, but the words of the Act require an employer to do only what is reasonably practicable. The danger here was not sufficient “to lead a reasonable man to anticipate the risk of injury”. So even if the notice were valid in itself the Tribunal may disagree with the inspector’s opinion as to the degree of danger which exists, but in this case the Tribunal went considerably further.

On the question of “reasonable practicability”, the Tribunal in *Roadline (U.K.) Ltd. v. T. R. Mainwaring*<sup>39</sup> cancelled an improvement notice which required the employer to provide heating in a transit shed. This notice was brought under section 2 of the Act, which lays down the employer’s general duty to ensure so far as is reasonably practicable the health, safety and welfare at work of all his employees. The Tribunal were of the view that the cost of heating improvements was excessive in relation to the marginal improvement which might result.

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38. *Id.*

39. *Id.*

In 1975 there were 113 prosecutions for non-compliance with enforcement notices. Since then inspectors and industry have got used to the new system which has expanded considerably. Clearly, from the efficiency point of view, the use of notices is much preferred by inspectors who never relished having to make court appearances. Whether the system sufficiently safeguards recipients of notices is another matter. It does get round the problem of the scandalously low level of fines imposed by magistrate's courts — the average was estimated at £142 last year — and is therefore a much more effective sanction for enforcing the law.

## **2.4. The new administrative structure**

### **2.4.1. The Health and Safety Commission**

The Health and Safety Commission is an independent Government agency created by Act of Parliament. Of its nine members, three must be drawn from each side of industry and the rest from local authorities or other professional bodies concerned with the general purposes of the Act<sup>40</sup>. The statutory powers and duties described are, as usual, widely worded. More specifically, the Commission carries out the following functions:

- The making of arrangements for the carrying out of research, the publication of the results of research and the provision of training and information in connection with health and safety.  
The Commission has played a role in encouragement and co-ordination of research projects.
- The making of arrangements for ensuring that government departments, employers, employees, organisations representing employers and employees respectively, and other persons concerned with any matters relevant to the general functions of the Commission, are provided with an information and advisory service and are kept informed of and adequately advised on, such matters as may be significant to them. This provision has great practical significance. One of the Commission's primary functions is to advise the Secretary of State on the content of statutory regulations made under the new law. This consultative requirement, valuable in itself, has greatly slowed down the making of new health and safety regulations.

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40. These general purposes are important in identifying the areas of jurisdiction or authority possessed by bodies established by the Act. The Health and Safety Commission has a duty to do such things and make such arrangements as it considers appropriate "for the general purposes". Similarly the Secretary of State has power to make regulations for any of the "general purposes".

- The submission, from time to time, of such proposals as it considers appropriate for the making of regulations under any of the statutory provisions. In addition the Commission is responsible for approving and issuing codes of practice. We have noted already the Commission's poor record in this respect.

The Secretary of State does retain some control. He may approve, with or without modifications, any proposals submitted to him and he may give the Commission directions with respect to its functions, directions modifying its functions and any further directions which appear to him requisite or expedient to give. However, the Secretary of State cannot by direction extend the powers of the Commission beyond that given by the Act itself.

A comprehensive power is given to the Commission by section 14 which allows it to direct investigations and inquiries. The section applies to any accident, occurrence, situation or other matter which the Commission thinks is necessary or expedient to investigate in order to further any of the general purposes of the *Health and Safety at Work Act* or with a view to the making of regulations. Such investigation may, in accordance with the provisions of section 14 (1), be carried out by the Health and Safety Executive — described in the next section — or by any other person authorised to carry out the investigation. In such circumstances a special report will be submitted to the Executive. A fuller inquiry may also be held into any such matter with the consent of the Secretary of State. The latter will make regulations as to how the inquiry will be held ; proceedings will take place in public except where or to the extent that the regulations provide otherwise.

Section 14(4) gives to the Secretary of State, when making regulations establishing an inquiry, extensive authority to confer on the person holding an inquiry the powers needed for the effective conduct of the inquiry. In particular, the regulations may :

- confer powers of entry and inspection,
- empower the summoning of witnesses to give evidence or produce documents,
- entitle the taking of evidence on oath and the administration of oaths, and
- require the making of declarations.

Where a report is made, either as a result of full inquiry or following an investigation by a person or persons appointed less formally by the Commission, the Commission is empowered to make the report public at such time and in such manner as it thinks fit. This wide power was criticised when the proposals passed through Parliamentary Committee but it appears that, unless an element of national security is involved, reports are made

public. The Commission has published in the last five years a number of such reports relating to particular industries, or to incidents which have occurred.

The best indication of the Health and Safety Commission's work is given by its annual Report, the last available being for 1977/78.

The review of action taken by the important, policy making advisory committees includes:

- *Advisory committee on dangerous substances*: consultative document on tanker labelling; working party report on carriage of dangerous goods by road and in port; preparation for replacement of *Explosives Act* regulations.
- *Advisory committee on toxic substances*: discussion document on the notification of toxic properties of substances; draft regulations on the use at work of lead, carcinogenic substances and fumigants; amendment of draft code of practice on vinyl chloride monomer; working party report on health risks of manmade mineral fibres.
- *Medical advisory committee*: subcommittees set up on mental health at work; discussion document on occupational health services; review of first aid legislation.
- *Advisory committee on asbestos*: publication of first report on insulation, dismantling and demolition, and second report on measurement and monitoring of asbestos in air; preparation of third report (due in early 1979) on new hygiene standards and legislation on use.
- *Advisory committee on major hazards*: consultative document on notification of hazardous installations legislation; preparation of second report; setting up of fifth working party on research into major hazards; completion of research into release of heavy vapours.

Reviewing progress on legislation the report refers to the "mammoth and complex task of creating the regulations envisaged under section 1(2) of the HSWA". In this context the report states that the HSC is "mindful of the cost factors" and "the need to relate controls of the proven and anticipated risks to health and safety."

Therefore, the HSC will press, during negotiations in Brussels, for the identification of a "limited number of priority subjects for attention within the recently approved EEC Commission programme of action on health and safety at work", according to the report. The commission hopes, for example, to reduce the number of proposed directives and replace with more flexible measures some parts of the ambitious programme which would "overstretch the resources not only of the Executive but also of industry."

On the International Labour Organisation's convention and recommendation on protection of workers against air pollution, noise and

vibration, the report notes the publication of a consultative document and the pending decision by the minister on whether the convention should be ratified and on the extent to which the recommendation should be accepted.

Specific legislative progress is also reported on packaging and labelling of dangerous substances, genetic manipulation, pressurised systems, lifting gear, freight containers, safety signs, audiometry, mining and homeworkers.

The report lays out how the commission plans to proceed over the next five years. The programme of action up to March 1983 includes the following objectives:

- on major hazards: the development of hazard appraisal techniques and research on release of toxic or inflammable gases and vapours for use in assessment of risks of installations; participation in preparation of EEC directive on electrical equipment for use in explosive atmospheres; preparation of action on dust explosion hazards, explosives and pyrotechnics, conveyance of explosives in ports; preparation of action involving the replacement or modification of sections of the *Petroleum (Consolidation) Act 1928* and *Highly Flammable Liquids and Liquefied Petroleum Gases Regulations 1972*; preparation of guidance notes on flammable liquids in the paint and construction industries; preparation of action on hazardous substances at airports, ports, inland waterways and by rail; participation in preparation of EEC directives on reinforced plastic tanks for road transport and on the notification scheme;
- on toxic substances; the consideration of new standards, establishment of a notification scheme for toxic properties of substances and the carrying out of medical research; to propose action on carcinogenic substances, pesticides (non-agricultural uses), nitrogen fertilisers, dangerous pathogens, anthrax, fumigation, lead and vinyl chloride monomer;
- on noise and vibration: to publish report of working group on audiometry and prepare action to reduce exposure to noise;
- on machinery and equipment; to prepare action on machinery guarding detection and monitoring of malfunctions in mechanical systems, and carry out research into safe operation of process plant;
- additional proposals on dust, electricity, fire diving and nuclear safety.

#### **2.4.2. The Health and Safety Executive**

Until 1975 there were no less than nine different inspectorates enforcing different pieces of health and safety legislation. These were to be unified under the Health and Safety Executive. In fact this unification of all inspectorates was never a serious consideration. The old major dichotomy of

factory inspectorate and local authority environmental health (formerly public health) inspectorates had to remain. The local authorities now inspect on delegation from the HSE all "commercial premises" and in fact took over certain functions, such as inspection of certain machinery in shops for example, and responsibility for many of the "new entrants". Although there are signs that these two inspectorates are beginning to co-operate, they have remained both in ethos, and in practice, separate organisations. Furthermore there are still doubts about their respective jurisdictions, even since the new regulations were issued.

Agriculture, originally outside the unified scheme, was brought in in 1976. On the other hand alkali may soon go back to having its own inspectors. To add to the confusion, responsibility has recently been rationalised, though again the situation remains complex.

One may say the enforcement side of health and safety, though better than it was, is still full of demarcation lines. Of course, to be fair there must always be divisions in jurisdictional questions, and drawing the lines between environmental health and, say, consumer protection can be difficult, let alone within health and safety matters.

One problem to have affected the Health and Safety Executive, particularly in recent years, is finance. Without question this must be their biggest concern at present.

Powers of inspectors were extended by the Act and may be summarised thus:

- An inspector is entitled to enter any premises at any reasonable time. If he is of the opinion that the situation in the premises may constitute a danger he may enter at any time. He has a right of access to all places subject to the 1974 Act.
- He is entitled to take with him a constable if he has reasonable cause to apprehend serious obstruction in the breach of his duty.
- He may bring with him any equipment or materials required for any purpose for which power of entry was exercised and may make such examination or investigation as may be necessary.
- He may direct that any premises or part of premises he has entered be left undisturbed for as long as is reasonably necessary for the purposes of any examination or investigation.
- He may take measurements, photographs and recordings and a sample of any article or substances found on the premises.
- He may, if he identifies any article or substance as being likely to cause danger to health or safety, have it subjected to any process or test or cause it to be dismantled.



- Any person whom an inspector has reasonable cause to believe to be able to give any information relevant to an examination or investigation may be obliged by an inspector to answer such questions as the inspector thinks fit, and to sign a declaration of the truth of his answers.
- He may require the production of any books or documents which are required to be kept under any of the relevant statutory provisions. It is stressed that there are important limitations on his power of disclosure of such information.
- He is empowered to require any person to afford him such facilities and assistance with respect to any matters or things within that person's control as may be necessary to enable him effectively to exercise his powers.

In the light of the very extensive investigatory powers accorded to inspectors by section 20, it is hardly surprising that the Act incorporates certain measures to protect against information discovered in the course of inquiries being misused:

A person shall not disclose any information obtained by him as the result of the exercise of any power conferred by section 14(4) (a) or 20 (including, in particular, any information with respect to any trade secret obtained by him in any premises entered by him by virtue of any such power) except —

- (a) for the purposes of his functions; or
- (b) for the purposes of any legal proceedings or any investigation or inquiry held by virtue of section 14(2) or for the purposes of a report of any such proceedings or inquiry or a special report made by virtue of section 14(2) or;
- (c) with the relevant consent. (...) <sup>41</sup>

It should be noted that an inspector may be civilly liable for exceeding his powers in which case section 26 may apply:

Where an action has been brought against an inspector in respect of an act done in the execution or purported execution of any of the relevant statutory provisions and the circumstances are such that he is not legally entitled to require the enforcing authority which appointed him to indemnify him, that authority may, nevertheless, indemnify him against the whole or part of any damages and costs or expenses which he may have been ordered to pay or may have incurred, if the authority is satisfied that he honestly believed that the act complained of was within his powers and that his duty as an inspector required or entitled him to do it.

The powers of an inspector were challenged successfully in a Scottish case in 1977. In *Skinner v. John G. McGregor* <sup>42</sup>, a question arose as to the admissibility of evidence of samples taken for analysis by an inspector. The

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41. *Health and Safety at Work Act 1974*, s. 17(2).

42. (1977) S.L.T. 83.

taking of samples is regulated by sections 20(2) and 20(6), providing *inter alia* for a general power "to take samples of any articles or substances found in any premises which (the inspector) has power to enter, and of the atmosphere in or in the vicinity of any such premises", but also for a specific power take possession of, and detain "any article or substance which appears to have caused or to be likely to cause danger to health or safety" for purposes of examination, dismantling, processing or testing, or in order to preserve it for use as evidence in proceedings under the Act. When the taking is purported to be made under the specific power, notice of it must be left with a responsible person or, if that is impracticable, posted on the premises. No such requirement as to notice applies to the taking of samples under the general power.

In that case, the inspector had left no notice. The examination of the substances taken by him disclosed that they would undoubtedly have created a danger to health in the absence of appropriate precautions. The prosecutor argued that when exercising his general power, the inspector was not required to leave notice. It was argued for the accused that the inspector had in fact exercised his specific power to take samples for purposes of examination, and that his failure to leave notice accordingly rendered the evidence based on the results of that examination inadmissible.

The Court upheld the objection by the accused, stating that the general power merely covers the taking of samples. Where an inspector, for purposes of examination, takes possession of a sample of a substance that is likely to cause danger to health, he is bound to comply with the notice requirement.

The competence of an inspector of the Health and Safety Executive to bring proceedings under the *Health and Safety at Work Act* was challenged in a number of cases in 1977, and only finally settled in the case of *Campbell v. Wallsend Slipway and Engineering Co. Ltd.*<sup>43</sup>. Justices at Wallsend on Tyne had dismissed information against Wallsend Slipway & Engineering Co. Ltd. on the ground that the inspector was incompetent to prosecute.

The Divisional Court allowed an appeal by the inspector, Mr. John Campbell, by way of case stated, from the dismissal of informations that the company had failed to keep the air conditioning plant of a ship they were servicing free from asbestos dust and had given no advance notice of their intention to handle blue asbestos, and sent the matter back to the justices to continue the hearing.

The prosecuting inspector gave evidence himself, stating that he was an inspector. He also produced two documents, one a certificate, bearing his photograph, which stated that he was an inspector appointed under section

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43. *Campbell v. Wallsend Slipway and Engineering Co. Ltd.*, [1978] 1 C.R. 1015.

19, authorized to enter premises and exercise all other powers conferred on inspectors by section 20, and authorized to prosecute by section 39. There was no mention of section 38.

The certificate and a warrant were signed on behalf of the Health and Safety Executive by Mr. John Locke, director. A further document was produced bearing the seal of the Health and Safety Commission and signed by Mr. V. G. Munns, secretary, which stated that on December 5<sup>th</sup>, 1974, various persons had been appointed to the Executive, among them Mr. John Locke.

In those circumstances it was submitted that the appointment of the Executive had not been proved to be in accordance with the requirement of the Act. It was said that a written instrument was necessary, reliance being placed in particular on subsection 20(3). It was also contended that the written instrument appointing Mr. Campbell did not include a reference to section 38, and in consequence under section 19(2) he was not empowered to lay the informations.

As to the contention that there was no power under section 38, it could be seen from its wording that the section did not purport to grant any power that did not otherwise exist. Any individual was entitled to lay an information for a breach of statutory provision in the absence of any provisions to the contrary. Section 38 was one such provision to the contrary. It was, therefore, a limiting and not an empowering section, and therefore, Mr. Campbell did not need to be specifically empowered in that respect.

It was submitted that although Mr. Campbell had said that he was an inspector and produced what he said were his written appointment and certificate, he had not proved the validity of his appointment. In section 53 "inspector" was defined as "an inspector appointed under section 19", and it was said therefore that there must be evidence of appointment in accordance with section 19; that an instrument of appointment was required; that the evidence must include evidence of the existence of the instrument (preferably by production of the instrument itself or a copy) and its terms.

So the question arose whether there must be an instrument. Section 10, which was entitled "Establishment of the Commission and the Executive", made no mention of an instrument, but section 19, dealing with the appointment of inspectors, in striking contrast, specifically provided that the appointment of an inspector should be made by an instrument in writing.

Schedule 2 contained provisions regulating the terms of service of Executive members, and subsection 20(3) simply said how those terms were to be determined by the Commission. In his Lordship's opinion, although the schedule did envisage that an instrument would come into existence for the purpose of effecting or notifying the terms of an appointment and that it

would contain the terms of the member's service, it was not required as a condition precedent to an effective appointment. Nor was such an instrument to be regarded as the appointment in itself.

However, the company would still be entitled to say that the steps envisaged by section 10(5) — approval by the Secretary of State and consultation with the director — should be proved. Mr. Campbell, relying on *Ross v. Helm*<sup>44</sup>, contended that it was sufficient in the circumstances of the present case to say: "I am an inspector". But in the relevant Act in that case there was no definition of "inspector", and his Lordship would not decide the case on the basis of *Ross v. Helm*.

Mr. Campbell further said that even if writing was necessary and even if it was necessary to prove that section 10(5) had been complied with, there was a presumption that the inspector had been validly appointed, and that the Executive that purported to appoint him had been itself validly appointed. He relied upon the presumption *omnia praesumuntur rite esse acta*.

In answer, the company submitted that if a party challenged such a presumption, then the presumption did not apply, in any event, it did not apply in a case of this kind, which was a criminal case.

The court dismissed that contention, holding that the presumption was a presumption of law, which meant that if a basic fact was proved a compulsory inference arose. Merely to say "I challenge it" could in no way weaken such a presumption until evidence had been given.

Did the presumption apply to crime? A presumption of law was a factual inference to be drawn according to the evidence. Inferences were permissible in criminal cases where an ingredient of the offence was to be established. The case, however, did not bear on an ingredient of the offence but with a procedural matter upon which the court had to satisfy itself before the case could be adjudicated upon. That such a matter was to be regarded as procedural was shown by *Price v. Humphries*<sup>45</sup>. The issue was really a situation which had been before the courts time and time again, namely, how an appointment to a public office was to be proved.

The court adopted what was said in *Cross on Evidence*<sup>46</sup> and also in *Phipson on Evidence*<sup>47</sup>, and concluded that the presumption was applicable to the present case. Where witness, saying that he was an inspector, produced his written appointment and certificate with his photograph — the certificate

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44. [1913] 3 K.B. 462.

45. [1958] 2 Q.B. 353.

46. 4th ed. 1974, pp. 39, 112.

47. 12th ed. 1976, para. 328.

itself having some statutory effect under section 19(4) —, such evidence was amply sufficient to prove that he was a person appointed under section 10 (5). Producing his certificate was enough to establish his entitlement to lay the information under section 38. It might be wise for him to be armed further with the document which appointed him, but in the court's view the certificate alone, properly vouched for, would be enough to establish his power under section 38.

## 2.5. Safety committees and safety representatives

Lastly, mention must be made of what industry regards as the most far-reaching innovation of the Act, namely the introduction of safety representatives and safety committees. This is a subject of great interest to labour lawyers and those concerned with industrial relations,<sup>48</sup> though it is likely to have considerable influence on the development of safety, particularly in large organisations. The regulations and code of practice only came into force on 1<sup>st</sup> October 1978, so it is difficult to say how they are really working, after only a relatively short time.

In order to secure greater co-operation among the workforce, the Act requires that safety representatives be appointed by recognised trade unions, to represent the employees in consultation with the employers on health and safety matters. If requested to do so by safety representatives the employer must set up a safety committee. It is also the employer's duty to consult with safety representatives with a view to the making and maintenance of arrangements which will enable him and his employees to ensure health and safety. The issuing (and revising) of a safety policy is but one aspect of this general duty. It is an offence not to have a safety policy.

The importance of this subject is emphasised by the Health and Safety Commission's Consultative Document on the matter issued in November 1975, as a prelude to the regulations on representatives:

The Commission believe that the proposals they are now putting forward for safety representatives and safety committees are the most important they have developed since their inception.

The regulations set out the function of safety representatives. These are:

- to represent the employees in consultation with the employer;
- to make representations to the employer on any general or specific matter affecting the health and safety of employees;
- to carry out inspections of the workplace;
- to receive information from inspectors;

48. See (1977) *Industrial Law Journal* 165.

- to attend meetings of safety committees, given time off with pay;
- to inspect documents which the employer is required to keep by virtue of the relevant statutory provisions.

It requires little knowledge of labour relations to see the importance such representatives can quickly gain. The regulations expressly exclude civil liability of safety representatives.

The code of practice also illuminates the duty of employers under section 2(2) (c) to provide information to all employees about matters affecting their safety at work. They should make available to safety representatives information within the employer's knowledge, necessary to enable safety representatives to fulfil their functions. In particular this should include:

- information about plans and performance of the undertaking and any changes proposed insofar as they affect the health and safety at work of their employees;
- information of a technical nature about hazards in respect of machinery, plant, equipment, processes, systems of work and substances in use at work;
- information relating to occurrence of any accident or notifiable industrial disease;
- results of any measures taken by the employer in the course of checking the effectiveness of his health and safety policy.

The code also includes guidance on the functions of safety committees. Among others:

- consideration of the circumstances of individual accidents, and the study of accident statistics and trends, so that reports can be made to management on unsafe and unhealthy conditions and practices, together with recommendations for corrective action;
- examination of safety audit reports on a similar basis;
- consideration of reports and factual information provided by inspectors;
- consideration of reports which safety representatives may wish to submit;
- assistance in the development of works safety rules and safe systems of work;
- periodic inspection of the workplace, its plant, equipment, and amenities;

- a watch on the effectiveness of the safety content of employee training, and on the adequacy of safety and health communication and publicity in the workplace ;
- provision of a link with the appropriate inspectorates of the enforcing authority.

Although the committee may come to its own decisions as to what course of action to recommend to management, it is the responsibility of management, not the committee, to take any executive action which might be necessary.

Safety committees have in fact existed in many of the large factories for a long time, so the Act merely formalised their existence. On the other hand they were a major innovation for many firms, the new element being the involvement of both the local trade union and the T.U.C. in the working of these committees. The T.U.C. has in fact its own courses for training safety representatives. Without question, in many cases safety committees, rather than being consultative bodies, may have become involved in bargaining for health and safety, with all that involves. This may be one continuing factor in a continuing disenchantment with the *Health and Safety at Work Act* from some parts of the employers' side of industry.

### Conclusion

The first five years of the Act would have to be given a mixed report. There has been successful use of notices as a means of enforcement, certainly from the point of view of inspectors and also efficiency. Less happiness, perhaps, from the recipients, although under this system as with the one it replaced, usually consultation or negotiation takes place before any notice is served. There have been no major shifts in enforcement.

The Commission, a useful body, has not in fact achieved as much as it might have wished, and the inspectorate continues to be divided, as it always will be, between the Health and Safety Executive and local authorities, though with increasing signs of co-operation between them.

Safety committees and trade union involvement, which could be the most far reaching change, have not had time to sink in so it is rather too early to say whether this really will help in what is, after all, the main point in the exercise, the reduction of accidents at work.