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THE LAW COMMISSION

PUBLISHED WORKING PAPER

NO: 30

Second Programme - Item XVIII

CODIFICATION OF THE CRIMINAL LAW

STRICT LIABILITY AND THE ENFORCEMENT OF THE FACTORIES ACT 1961

(Report by members of the Sub-Faculty of Law of the University of Kent at Canterbury. December 1969)

2 June 1970

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LAW COMMISSION

WORKING PAPER No. 30

LAW COMMISSION'S SECOND PROGRAMME, ITEM XVIII

CODIFICATION OF THE CRIMINAL LAW

STRICT LIABILITY AND THE ENFORCEMENT OF THE FACTORIES ACT 1961

Introduction by the Law Commission to the Report by members of the Sub-Faculty of Law of the University of Kent at Canterbury

1. In accordance with Item XVIII of our Second Programme, the Law Commission, with the assistance of a Working Party, is engaged on an examination of the general principles of the criminal law with a view to its codification. In Working Paper No. 17, published in May 1968, we indicated the field of inquiry which this examination was designed to cover and in the section entitled "The Principles of Criminal Liability" we raised a number of questions concerning the problems of strict liability; in particular, we asked "Should there be a place in the criminal law for strict liability offences? Could the purposes for which such offences are enacted be achieved by other means than through the machinery of the criminal law?"[1]

2. We felt that there was little published material available as to the working of strict liability provisions under regulatory legislation.[2] Accordingly, in December 1968, with the agreement of the Department of Employment and Productivity, we invited Professor Fitzgerald and Dr. Hadden, of the Sub-Faculty of Law at the University of Kent, to undertake, with the assistance of their research workers, a study of the working of the enforcement procedures of the Factories Act 1961 in two selected districts of the Factory Inspectorate. This study was undertaken with the full co-operation of H.M. Chief Inspector of Factories and

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1. Working Paper No. 17, Subject 11, pp. 16 to 18.

2. See the results of a survey of enforcement officers' opinions concerning Food and Drugs legislation - "The Value of Strict Liability" by R.M. Smith and A.C.E. Pearson, [1969] Crim. L.R. p.5.

officers of his Inspectorate who gave the greatest assistance to the researchers.

3. We have now received the study which we regard as of such value as to demand publication, for we think that the conclusions reached and set out in Part IX of the Report, may, in a broad sense, be applicable to the whole country and extend beyond the scope of the particular subject matter. But it must be remembered that the investigators studied the working of the enforcement procedures under the 1961 Act in only two of the 101 districts of the inspectorate, and those two were in one division out of a total of 13.

4. Our Working Party on the General Principles of the Criminal Law has reached agreement that, subject to special legislative provision to the contrary effect, criminal sanctions should not be attracted to conduct which is blameless and that, except in special cases, negligence should be the minimum requirement for criminal liability, even in the area of regulatory legislation. Whilst under more modern statutes in this area there is a growing tendency for Parliament to provide defences (such as due diligence and/or fault of another) in relation to offences prima facie of strict liability and thus virtually to convert them into negligence offences,[3] there are other statutes (for example, the Licensing Act) which seem to adhere rigidly to the concept of strict liability.

5. The first important fact which the study discloses is that, on examination, there are few offences in the Act to which strict liability in its full rigour can truly be said to apply. For example, although section 14 requires simply that every dangerous part of machinery shall be securely fenced, in order to establish liability it must be shown that the part is dangerous, and it will only be held to be dangerous if it is a reasonably foreseeable cause of some injury (although not necessarily of the injuries in fact caused). This imports in most instances some degree of blameworthiness into the offence. There are also qualifications of certain duties by the use of such words as "where practicable" or "where reasonably practicable". Finally, there is the general statutory defence under section 161, discussed in paragraph 16 of the Report.

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3. A recent example is found in the Trade Descriptions Act 1968, s.24(1).

6. It is for these reasons that the Factories Act forms an interesting and important subject for a study such as this. We think that the study raises the pertinent question whether, for the reasons it discusses at length, strict liability should be the appropriate basis of enforcement in this field; and if this may be questioned in relation to the operation of this Act, may it not also be similarly questioned in other areas affected by legislation commonly regarded as imposing strict criminal liability? Indeed, our preliminary internal studies of such legislation as the Food and Drugs Act, the social security laws and the licensing laws, have led us to the conclusion that the place of strict liability requires to be considered even in these fields.

7. Although the published study raises the questions we have indicated, we ourselves have reached no conclusions either upon strict liability under the Factories Act 1961 or under any other regulatory legislation. We prefer, with regard to the former, to leave the authors of the study to express their own conclusions and recommendations, and to await the reactions of those to whom the Paper is circulated; for the Report expresses mainly the views of the authors and there may be other ways of looking at the problems and suggested solutions. With regard to the latter, as our examination of this type of legislation proceeds, we shall, according to our normal practice, consult with those interested with a view to defining the boundaries of strict liability, to providing possible alternative methods of enforcement and to considering the extent to which the concept of negligence as the minimum basis of criminal liability might be applied over the whole field of regulatory legislation.

8. We have, therefore, two main objects in publishing the present study. The first object is to canvass opinions as to the elimination, in whole or part, of strict criminal liability generally from areas of regulatory legislation and as to the extent to which such liability, where the sanctions of the criminal law require to be retained, should be replaced by liability based upon negligence. This raises for consideration the question how far the mere existence of strict criminal liability is in itself a deterrent which helps to secure compliance with legislation of this type. Our second object is to attract comments on certain of the specific suggestions

the study offers in relation to the Act of 1961.[4] The suggestions to which we refer are those contained in sub-paragraphs 3 to 7 (inclusive) of its paragraph 84. Summarising these in the form of questions:-

(1) Should the scope of court enforcement orders, divorced from criminal proceedings, be extended? If so, how far and by what methods?

(2) For what kind of breaches of the Act should criminal liability be retained? In such cases, or in which of them, should the basis of liability be negligence?[5] If negligence be made the basis of liability, should it be determined by absence of care in relation to a specific matter or should it also depend upon any previous history of non-observance of the general requirements of the Act?

(3) What range of penalties should be provided for offences?

(4) Should the criminal liability of employees or third parties be retained in any and, if so, what cases? How far should such liability be related to the criminal liability of occupiers and employers?

(5) Is there any and, if so, what place for the introduction of "spot fines" for minor contraventions of the Act? If so, to what matters should they be applied and how should they be operated and controlled?

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4. Much of this would also apply to such allied legislation as the Mines and Quarries Act 1954, the Agriculture (Poisonous Substances Act 1952), the Agriculture (Safety, Health and Welfare Provisions) Act 1956 and the Offices, Shops and Railway Premises Act 1963.

5. We regard the introduction of "due diligence" defences as effectively converting offences of strict liability into offences of negligence.

STRICT LIABILITY AND THE ENFORCEMENT OF THE FACTORIES ACT

A Report by members of the Sub-Faculty of Law at the University of Kent at Canterbury to the Law Commission, December 1969.

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I INTRODUCTION

1. The conception of strict criminal liability for certain regulatory offences is well established. It means briefly that, in order to justify a conviction for such offences, the prosecution need only prove that the relevant regulation has been broken and that the defendant had a duty to observe it; no element of wilful, reckless or negligent disregard need be established. Strict liability in its widest sense also includes an element of vicarious liability in that a firm or employer is normally held responsible for contraventions by employees. Criminal liability of this nature is frequently criticised on the grounds that to impose criminal sanctions without proof of fault on the part of the defendant is both morally unacceptable and also ineffective in that any deterrent effect is more than cancelled out by the resulting disrespect for the law. The Law Commission, in its preliminary Working Paper on the General Principles of the Criminal Law, has thus raised the question whether there is any place in the criminal law for strict liability offences, and whether the purposes for which such offences are enacted could or should be achieved by other means than through the machinery of the criminal law.[6]

2. To assist it in resolving this issue the Law Commission, with the full co-operation of H.M. Factory Inspectorate, asked the Law Sub-Faculty at the University of Kent at Canterbury to undertake a study of the current operation of the strict liability system under the Factories Act. The main objective of the project was to establish how far the question of fault was regarded as relevant in the decision to prosecute, but the Law Commission also wished for further information on the extent to which supervisors and employees might be held personally liable, and how far other methods than criminal prosecution, for example, court orders for compliance under threat of closure, were thought practicable.

3. We felt it important, in carrying out this survey, not to restrict ourselves to a study of prosecution cases from the standpoint of a traditional criminal lawyer. We were satisfied from our previous survey of the opinions of Public

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6. The Law Commission's Working Paper No. 17 on "Codification of the Criminal Law - General Principles - The Field of Enquiry", Subject 11, p.16.

Officers of Health on the enforcement of Food and Drugs legislation[7] that the traditional concepts of the criminal law were not fully adequate to describe and assess the work of official inspectors in enforcing the law. The prosecution of offenders represents a very small part of the work of such inspectors: a comprehensive survey of the work of the Factory Inspectorate over a number of years carried out by Mr Kit Carson of Bedford College, London, revealed that criminal proceedings were only instituted in 10 out of the 687 occasions on which 3800 contraventions of the law were formally recorded. The role of formal prosecution must be seen in the light of the system of enforcement as a whole. Much of this report will, therefore, be concerned with a general description of the work and policy of the Factory Inspectorate.

4. The practical aims of the field work which we carried out were thus to gain a thorough understanding of the existing system of enforcement, to assess the criteria on which enforcement action of all kinds was taken, and to assess as far as was possible the efficacy of the action which was taken, and, in particular, the impact of court proceedings. We made a detailed study of the case-histories of some 50 firms in two matched samples, in which cases where proceedings were formally recommended were paired with other similar cases where no such action was suggested;[8] in addition we attended some 15 actual prosecution cases heard during the summer of 1969.[9]

5. It will be clear from this that our conclusions are not based on a fully comprehensive and representative survey of the work of the Inspectorate. The cases studied were not selected on a strictly random basis, and none of the samples was as large as we should have liked, due to our limited resources and the fact that field work on the project had to be fitted into the ordinary working routine of the staff and students concerned. We must, accordingly, stress the essentially tentative nature of the comments and conclusions which follow in the body of this report. We would not claim to have done more than raise a number of issues which may be thought to merit a more thorough full-time investigation.

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7. R.M. Smith and A.C.E. Pearson. "The Value of Strict Liability". [1969] Crim. L.R. 5.

8. See sections IV and V.

9. See section VI.

II THE SCOPE OF THE FACTORIES ACT

6. The general object of the Factories Act is to promote the safety, health and welfare of all persons employed in factories, docks and construction sites of all kinds. The original legislation in the early nineteenth century was primarily concerned with the regulation of hours of employment for women and children in specific industries. The main focus of the current legislation and of the enforcement system, however, is the prevention of accidents and industrial diseases, if only because of their obvious social and economic importance. The figures for reportable accidents alone - those involving more than three days absence from work - show that in recent years some 300,000 have been recorded annually, and it has been estimated that some 20 million working days are lost each year as a result. To put the matter in perspective this figure should be compared with that of over 300 million days lost through sickness, and some 3 million as a result of industrial disputes. Increasing attention is now also paid to the general welfare provisions of the Act.

The promotion of safety at work

7. The promotion of industrial safety at work under the Act may be classed under five main heads:

(i) the fencing of dangerous machinery;

(ii) the proper maintenance of all fixed plant, especially lifting gear, boilers and pressure vessels;

(iii) the maintenance of a safe place of work;

(iv) the provision of adequate fire precautions;

(v) the protection of employees from noxious fumes and substances.

In each respect the Factories Act lays down certain general requirements, for example, that "every dangerous part of any machinery shall be securely fenced" (section 14) and that "there shall as far as is reasonably practicable be ... safe means of access to every workplace" (section 29). In certain instances statutory regulations have been made under the Act which set out in greater detail the standards which will be required in relation to particular processes or industries, for example, the Woodworking Machinery Regulations 1922 and

the Power Presses Regulations 1965. The statutory formulations in the Act and regulations have then been elaborated by the courts in a complex body of case law, most of it arising from civil litigation over damages for breach of statutory duty. The precise effect of this in relation to the standards enforceable by the Factory Inspectorate is not always entirely clear.

8. The Factories Act and the regulations under it also impose certain administrative requirements intended to ensure continued compliance with the basic standards of safety, for instance, that those setting power presses should be competent and properly trained in the guarding of presses and other safety matters, that all lifting gear should be regularly inspected by a competent person and certified as safe for use and that certain premises should not be used as a factory without a valid certificate from the local fire authority of proper means of escape in case of fire. Failure to comply with these secondary provisions is in itself an offence whether or not the basic standards of safety have been maintained. It has been found that strict enforcement of such administrative requirements, even where they may appear at first sight to be of a purely technical nature, as, for instance, the requirement that a safety inspection certificate should be attached to all power presses while in use, does tend to be associated with an appreciable decline in the accident rate: the number of power press accidents, for example, fell from a figure of some 500 in 1964 before the introduction of the Power Presses Regulations 1965 to less than 250 in 1967 and 1968.

Health and welfare at work

9. Factories legislation is also concerned with the health and welfare of employees. General standards for the adequate heating, lighting and ventilation of workplaces are laid down, and suitable facilities must be provided for washing and for changing clothes and the like. In some cases these overlap with and are not formally distinguished from the safety requirements, as for instance in the provisions for the cleaning of workplaces and the extraction of fumes. The maintenance of good general "housekeeping" standards in factories and on construction sites is, in fact, one of the most important factors in reducing the accident level. It should also be

noted in this context that the Factory Inspectorate is entrusted with the enforcement of much of the Offices, Shops and Railway Premises Act 1963, in so far as it relates to railways and to offices at factories or in Crown or local authority occupation. The most significant provisions are those relating to temperature, washing facilities and fire precautions.

10. Finally there are a number of miscellaneous requirements. The objective of the original factories legislation in regulating the permitted hours of work for women and children has been continued. And there are a large number of general administrative requirements, from the posting of notices setting out the principal requirements of the various statutes and regulations to the maintenance of registers of accidents, medical inspections and the like. The requirements that the Factory Inspectorate should be notified of the occupation of any factory and of certain sites, and that all accidents resulting in more than three days absence from work should be reported are of special importance, since compliance is clearly essential to the operation of an efficient enforcement system.

The legal liability of employers: absolute and qualified duties

11. The duty to comply with the factories legislation is generally cast on the occupier of the relevant premises. In certain instances there is also a duty on the part of the owner, for example, in the case of jointly occupied premises, and on persons employed to carry out certain specific functions. Difficult questions of law can arise in relation to contractors operating on other firms' premises. But for practical purposes it may generally be taken that the primary duty is cast on the employer. As stated above, this duty is generally accepted to be absolute in the sense that proof of non-compliance is sufficient in itself to establish liability for breach of that duty. It is no defence to show that there was no negligence or that the breach was in some way inevitable. The provisions for the guarding of dangerous machinery, for example, state that all dangerous parts of any machinery shall be securely fenced. It is consequently irrelevant in any proceedings arising out of a breach of this provision to argue that the machinery could not be operated effectively, or at all, if it were securely fenced. The strict legal answer in such cases

must be that it is unlawful to carry out any operation which cannot be carried out on a machine which is securely fenced. As was stated by Lord Goddard, the statute "does not say that a dangerous machine is to be fenced as securely as possible, or only so far as will leave it commercially or mechanically useful".[10] The factories legislation thus imposes a serious limitation on the freedom of manufacturers and others to conduct their businesses on the most economic lines, and may make it more difficult for them to meet competition either from foreign suppliers not subject to such legislation or from those in this country who choose to ignore the law.

12. Though the duty to provide for the safety of employees is in general absolute, the legislature has recognised that this may render particular industrial processes practically impossible and has, therefore, granted a power to the Ministry responsible for the enforcement of the Act to relax the rigour of the absolute obligation.[11] Thus, where special regulations are made under section 180 laying down more detailed requirements in respect of particular machines or processes, compliance with the terms of the regulations is a valid defence to any charge or claim alleging failure to comply with the general provisions of the Act in respect of the particular matters dealt with in the regulations. In the case of a circular or band saw, for example, which cannot be operated while securely fenced and which is patently dangerous, compliance with the requirements of the Woodworking Machinery Regulations 1922 is sufficient.[12] To this extent, the duty to comply with any absolute standards laid down in the Act may be waived by Ministerial regulations, though it may equally be replaced by more exacting standards. In addition, there are a number of general statutory exemptions from the requirements of the Act, for example, the provision making lawful the removal of guards from otherwise dangerous machinery for the purposes of examination, lubrication or adjustment where the machine is necessarily in motion (section 16).

13. Furthermore, many of the requirements of the Factories Act are not absolute in any ordinary sense, though the duty

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10. Miller v. William Boothman & Sons Ltd. [1944] K.B. 337, 339.
11. See John Summers & Sons Ltd. v. Frost [1955] A.C. 740, 752 per Viscount Simonds.
12. Automatic Woodturning Co. Ltd. v. Stringer [1957] A.C. 544.

to comply with them may be. Some need be observed only where it is practicable to do so, for example the requirement that all practicable steps shall be taken to prevent the accumulation of dust, fumes and other impurities (section 63); others need be observed only where it is reasonably practicable to do so, for example the requirement that every place of work shall so far as is reasonably practicable be made and kept safe for any person working there (section 29). It is generally accepted in this context that the proviso of practicability means that the requirement shall be observed where it is possible to do so within the limits of existing technological invention, but regardless of inconvenience or expense;[13] on the other hand, where the proviso is of reasonable practicability, questions of inconvenience and expense in relation to the nature of the product or the size of the undertaking may be introduced, and it is for the courts to decide on the extent of the obligation in all the circumstances. There are also a large number of requirements of the form that suitable or adequate provision shall be made for certain purposes. Here, too, a degree of discretion is obviously cast on the Inspectorate and ultimately on the courts.

Vicarious liability and the duty of employees

14. The employer's duty also extends to securing compliance on the part of his employees. In ordinary cases this does not amount to vicarious liability in any strict sense. The duty imposed on the employer as such is simply interpreted as including a duty so to supervise his employees that they, too, comply with the statutory requirements, for example, in not operating machinery in such a way that dangerous parts are not securely fenced, or in following standard safety procedures. In the case of companies and firms vicarious liability is applied in a strict sense in respect of the acts or omissions of those persons who in law are held to represent it and to act for it, though it should be noted that the Act makes special provision for the concurrent liability both of the company and of any director or manager who consented to, connived at or was negligent in respect of the breach in question (section 155(5)). It is not entirely clear, however, how far the company or firm may be held vicariously responsible

13. See Adsett v. K. & L. Steelfounders and Engineers Ltd. [1953] 1 W.L.R. 773 & 137.

in criminal proceedings for the acts or omissions of ordinary employees in cases where it is not possible to show that the management of the firm or company has failed to take proper steps, by way of training or supervision, to ensure that the law is observed. It is generally stated that liability under regulatory legislation is vicarious in this strict sense, but in view of the current interpretation of the various statutory defences provided in the Factories Act[14] this may perhaps be questioned. In respect of civil liability the concept of vicarious liability is applied with considerably greater rigour, except in those cases where the employee deliberately disobeys instructions or fails to carry out his own duties and suffers injury as a result, as was decided under the Mines and Quarries Act 1954 in Imperial Chemical Industries Ltd. v. Shatwell.[15]

15. The Factories Act does, in fact, make independent provision in general terms for the liability of employees in certain circumstances. Under section 143 a duty is imposed on any person employed in a factory not wilfully to interfere with or misuse anything supplied or provided for the purposes of safety, health or welfare, and to make use of appliances provided for his safety and health; nor must he do anything wilfully and without reasonable cause which is likely to endanger himself or others. The general principle that the duty to secure compliance with the Act is cast on the employer, however, is maintained by a further provision to the effect that, as in the case of directors and managers of companies, the liability of an employee under section 143 should be concurrent with that of the employer (section 155(2)). This provision was in fact redrafted in the 1948 amending statute, now consolidated in the Factories Act 1961, with the express intention of nullifying a decision of the courts to the opposite effect. The new section is drafted in such a way, however, that the courts have recently felt able to hold that proof of a wilful or unreasonable iinterference or misuse by an employee is sufficient to exonerate the employer of all criminal liability in respect of the same matter, unless it is proved under the terms of section 155(2) that the employer failed to take all reasonable steps to prevent the contravention.[16] This applies whether or not the individual employee

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14. See para. 16.

15. [1965] A.C. 656.

16. Wright v. Ford Motor Co. Ltd. [1967] 1 Q.B. 230.

concerned can be identified: in the particular case it was held by the Divisional Court to be a good defence for the company to show that the guard which it had provided for a particular machine must have been removed by some unauthorised employee without the knowledge or connivance of the company or its officers.

Statutory defences

16. The position is further complicated by the provision of a general statutory defence under section 161. In any case where the occupier, or person primarily liable, can show that the breach of the statutory requirements was due to the act or default of some other person, and that, as occupier or otherwise, he used all due diligence to secure compliance with the law, criminal liability for the breach passes to that other person. Under this provision it is for the person originally charged to take steps by way of cross-summons to bring the actual offender before the court and to prove that he was the actual offender, though if at the time of the discovery of the offence he can convince the inspector that the terms of the section apply, it is the duty of the inspector to take proceedings against the actual offender in the first instance. It should be noted that the effect of this defence is not to relieve the employer of liability where he is blameless but only where, in addition, he is able to prove that some other specific person is liable. In theory, if not in practice, where there is a breach of the law, someone can always be convicted.

The employer's duty summarised

17. The full range of statutory defences and ancillary provisions, as they are now interpreted by the courts, thus represent a considerable inroad on the general principles of strict and vicarious liability. The resulting position in respect of the employer's liability in criminal proceedings may perhaps be summarised as follows:

> An employer is liable for any contravention of the Factories Act, subject to any provision as to reasonable practicability or the like, which is discovered on his premises except where he can prove both that he used all due diligence to secure compliance and that either (i) some other identifiable person or firm was the actual offender

in respect of that particular contravention, or

(ii) some employee, whether identifiable or not, had wilfully or unreasonably acted in such a way as to cause the contravention.

In simpler terms, the employer is strictly liable for all contraventions except those caused by someone else without his knowledge or connivance, in circumstances which he could not reasonably provide against.

Sanctions

18. To complete this essentially legal summary of liability, brief mention should be made of sanctions. First, every offender is liable to a criminal sanction by way of a fine, ranging, with the exception of employed persons for whom the maxima are less, from a nominal amount up to £60 or £300 per offence depending on whether or not the contravention was likely to cause bodily injury or death to any person. In addition, the courts have power to impose administrative sanctions as well as or instead of a simple fine: on the proof of any specific offence an order may be made against the offender to remedy the contravention within a given period, with the further sanction of a continuing fine of £10 for failure to comply (section 157); and, on the application of an inspector, the court may make an order prohibiting the use of the whole or any part of a factory, or the carrying out of any specific process, which would involve the contravention of any of the safety, health or welfare provisions of the Act (section 55), and must do so if it is satisfied that the premises cannot be used without risk of bodily injury (section 54). Failure to comply with such an order will presumably render those responsible liable to imprisonment for contempt of court. Finally, any person in breach of a statutory or common law duty which leads to personal injury or damage is liable to be sued by the injured party for a civil remedy by way of damages.

III CURRENT PRACTICE IN ENFORCEMENT

19. A purely legal analysis of the strictness of liability under the factories legislation from a study of the statutory provisions and their interpretation by the courts cannot in itself reveal the extent to which strict liability is applied

in practice. Nor, as we have suggested, can a detached lawyer's analysis of actual prosecution cases. The nature of liability in practice is dependent on the nature of the system of enforcement as a whole. We have attempted in this part, therefore, to give a brief account of the current practice of the Factory Inspectorate in their task of enforcing the law, through general inspections and follow-up visits, through the investigation of accidents and complaints and through formal legal proceedings.

The Factory Inspectorate

20. The enforcement of the factories legislation by an official inspectorate dates back to 1833, when the first Inspectors of Factories were appointed. Since that time the scope of the enforcement system has become immeasurably larger. In place of the initial four inspectors concerned primarily with securing compliance in some 3,000 textile factories with the law on the employment of women and children, there are now some 400 inspectors organised in more than 100 district offices covering some 200,000 factories as well as premises subject to the Offices, Shops and Railway Premises Act. During 1968 some 80,000 sites and factories were thoroughly inspected, and some 25,000 accidents and complaints were investigated. Legal proceedings were brought against more than 900 firms. Despite this massive increase in scale, however, the basic nature of the enforcement system does not by all accounts appear to have altered appreciably. The Inspectorate has always preferred to secure a progressive improvement in standards of safety, health and welfare under the terms of the legislation by encouragement and persuasion rather than by a rigid enforcement of the letter of the law in all cases. "Court proceedings", as is stated in the Annual Report of H.M. Chief Inspector of Factories 1968,[17] "take time and are only normally undertaken when reasonable persuasion to bring conditions to an acceptable standard has failed". The general approach is, perhaps, best described in the following longer quotation from the same source:

> "The enforcement and advisory work of the Inspectorate is not done with a starry-eyed and theoretical approach. The Inspector is fully aware that there may be three sides to a problem - the management's and the worker's as well as his own. The management has to run a successful

17. (1968) Cmnd. 4146, pp. 8 and 9.

> business in a competitive world and must constantly experiment with new processes and materials. The worker must be allowed to behave as a human being may reasonably be expected to behave, and not as an automaton. The Inspector has to continue the job that the Inspectorate has been doing for over 130 years, that of enforcing the standards laid down by the law, many of which are not in absolute and precise terms, but hedged about by such phrases as 'reasonably practicable' and 'adequate and suitable'. In these circumstances the Inspector's training in the uniform application of the law and his wide experience are important. More than this, he cooperates with the most forward looking managements and trade and union associations in achieving standards which will become the legislation of tomorrow."

It is in this general light that the individual aspects of the enforcement system must be seen.

The inspection procedure

21. It is the declared policy of the Inspectorate to make a "general inspection" of every factory not less than once every four years. An inspector will visit the factory without warning, make a wide-ranging tour of the premises in company with a representative of the firm, noting and discussing with him the various matters which appear to require attention. In the course of the visit he will peruse the various registers which the employer is required to maintain, and follow up any leads which the entries or lack of entries, may suggest. On his return to the district office a formal note of the inspection will be recorded in the firm's file, and shortly after the firm will be formally notified of the various matters which the inspector wishes the firm to attend to. This notification will normally be sent on a standard form (Form 119) which runs as follows:

> "I am writing to inform you that at a recent visit of H.M. Inspector to your premises it was observed that the matters mentioned below required your attention."

Where this does not seem to meet the requirements of the case an individual letter will be sent. And where the inspector feels that written notification alone will probably not be sufficient to induce the firm to act he will make plans for further action as described below. Otherwise the firm may not be visited in the normal course of events for a further period of four years.

22. A full record of all inspections and resulting correspondence is maintained at the district office of the Inspectorate covering the area in which the factory is situated. In respect of construction sites, however, since work on the site by the contractor is a temporary matter, and since the head office of the firm concerned may not be situated in the same district as the various sites on which it is working, an independent system of inspection and filing is operated from a separate regional construction office. A number of inspectors work directly from this regional office and specialise in the inspection of construction sites. This new system has resulted in a much more effective coverage of construction sites than in the past, though the nature of construction work does make it difficult to maintain any regular system of periodic visiting, and a number of sites may still never be visited.

The investigation of accidents and complaints

23. The second major activity of the Inspectorate is the investigation of accidents and complaints. On the latest figures some 20,000 and 5,000 respectively of such investigations are made in a full year, in comparison with some 80,000 general inspections, though in many cases the two functions will be carried out at the same visit. Since, as has been stated above, some 300,000 reportable accidents are recorded each year, it is clear that only a small proportion of accidents are investigated. The policy of the Inspectorate in this respect is to make an investigation only where the formal report from the firm suggests "by the severity of the injuries, by some indication that a breach of the law was involved, by their recurrence in a particular factory or for some other reason" that further investigation is called for.[18] It should be noted, in this context, that recent surveys by the Inspectorate have shown that only 16% of reported accidents in factories and 19% of those on construction sites involved a clear breach of the law: the vast majority appeared to be the result of simple human failure and in at least half the factory cases surveyed it was estimated that no reasonably practicable precautions could have been taken to prevent the accident or mitigate the injury.[19] The selective investigation of accidents is to this extent readily justifiable.

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18. Annual Report of H.M. Chief Inspector of Factories (1968) Cmnd. 4146.

19. See Accidents in the Construction Industry, H.M.S.O. 1967, and Annual Report of H.M. Chief Inspector of Factories 1968, pp. 76-80.

24. It is the policy of the Inspectorate, on the other hand, to look into all bona fide complaints as a matter of priority. Many complaints are initiated directly or indirectly by trade union representatives, others by individuals with a sense of grievance. But even though an appreciable number of complaints reveal no significant breach of the law, so that the inspector is not in a position to insist on remedial action, it is felt to be important to maintain the image of an active Inspectorate by taking some overt steps, if only by way of mediation between the parties.

25. Where the investigation of an accident or complaint does reveal matters requiring attention, whether under the factories legislation or more generally to foster better working practices or better industrial relations, the inspector will normally write formally to the management setting out his requirements or suggestions. As in the case of inspections, the tone of the letter will vary, according to the seriousness and urgency of the matters raised, from a simple statement of the requirements of the legislation to a stiff letter perhaps ending with a statement to the effect that "a serious view is taken of this failure to comply with your obligations; you are advised to take immediate action to remedy the situation, and that H.M. Inspector will be making a further visit in the near future". The complainant may also be notified of the result of the investigation.

26. There are a number of other aspects of the routine work of the Inspectorate which should be mentioned. A good deal of time and energy is spent in persuading employers to appoint their own safety officers and in the encouragement of safety committees. A large number of special visits are made to premises at the request of the firm to give advice on matters raised by inspectors or by the firm's safety officer. In difficult cases the aid of the Engineering and Medical Inspectors of the central Inspectorate will be called in, for example, where new machinery is to be installed or new chemical processes initiated. Special spot visits will also be made where there is thought to be a possible breach of the legislation on overtime or the employment of women and young persons. Inspectors also follow up correspondence with employers arising out of legal requirements to carry out repairs to equipment, such as lifting gear or steam boilers,

which have been called for by insurance inspectors or other competent persons, or to make structural alterations stipulated by a fire authority as a condition of the issue of a certificate of safe means of escape. Finally, a good deal of time is spent on giving lectures and talks.

Enforcement procedures

27. It will already be apparent that the initial assumption of the Inspectorate is that, as a general rule, all employers are prepared, even anxious, to meet their legal obligations with respect to the safety, health and welfare of their employees. The main function of visits of inspection and investigation, therefore, is to draw the attention of employers to matters which, for one reason or another, perhaps ignorance of the statutory requirements or pressure of day to day administration, they have not attended to. A breach of the factories legislation is regarded initially at least as a matter for advice and persuasion rather than for formal legal action. It is widely recognised in fact that it is virtually impossible to run a business without at some time infringing the strict letter of the law. In carrying out an inspection the inspector accordingly concentrates on those breaches which seem to him in all the circumstances to require remedial action. His job is to interpret and apply the law in a reasonable and uniform manner subject to general policy directives and, in doing so, to seek to obtain a progressive improvement in conditions. The size and resources of the firm and the standards generally prevailing in the particular section of industry are important factors in selecting items for comment and advice. It is extremely rare for a general inspection not to result in the "discovery" and formal notification of a number of breaches of the law for which criminal proceedings could be instituted. But in the vast majority of cases such matters are not regarded as criminal offences in any ordinary sense either by the Inspectorate or by the employers concerned.

28. In some cases advice and persuasion are not sufficient and further measures must be taken to enforce the requirements of the Inspectorate. Where, from general experience or knowledge of the particular firm, there is reason to expect that matters raised following an inspection or an investigation will not be attended to, a "check visit" will be planned,

usually some three to six months later, but earlier if there is an immediate danger of accident or injury. And if no action has been taken when the second visit is made, the possibility of legal proceedings may be mentioned and perhaps confirmed in the usual letter to the firm stating the result of the follow-up visit. As in other cases, the tone and severity of the letter will reflect the inspector's estimation of the degree of explicit pressure which is necessary: mention may be made of further check visits, of legal proceedings, or of an intention to recommend an immediate prosecution if the matter is not swiftly attended to.

29. Where a series of visits and letters fail to produce the desired effect, or at least some evidence of a change of heart on the part of the employers, or where the investigation of an accident reveals a serious breach of the law, a formal prosecution report will be submitted by the inspector concerned setting out for his superiors the circumstances of the case and his reasons for recommending criminal proceedings. It is a standing rule that such a report should be submitted in respect of any major item left outstanding after a second check visit. The report is considered by the local district inspector and then forwarded for final approval or rejection to the regional superintending inspector. Where proceedings are authorised, as they were in somewhat less than half the cases submitted from the two survey districts, the case will then be prepared by the inspector or district inspector and conducted by him at the local magistrates' court as soon as a suitable date for the hearing can be arranged. Though it is no longer official policy, there is still a tendency for the old rule that no informal contact should be made with the firm in the interval between the submission of a prosecution report and the institution of proceedings to be applied in practice. In normal conditions the final hearing will be held within a period of one or two months. In the majority of cases the defendant pleads guilty to the charges brought against him unless he feels that this may have an adverse effect on subsequent civil litigation. Even where the case is contested in whole or in part acquittals are rare: of the 2,521 informations laid against 937 firms in 1968, 2,371 resulted in conviction. Of these cases, well over half (1,597) concerned failure to comply with safety requirements,

principally the fencing of machinery and the proper guarding of elevated workplaces; of the rest, 396 concerned the health and welfare provisions of the Act and 280 the failure to submit or display the requisite forms and notices. The sentences imposed for breaches of the Act vary from absolute discharge or a nominal fine up to the maximum of £300 for any one offence; the average fine in 1967 was £33 per offence, though it should be remembered that it is normal for at least two charges to be laid against each defendant.

30. The mere fact of prosecution and conviction does not in itself secure compliance with the provisions of the Act, though, as might be expected, it does spur the majority of recalcitrant employers into action. The courts are empowered under section 157 to make an order for the execution of any works necessary to effect compliance with the Act. But this will be of limited value in respect of some contraventions: it is more appropriate, for example, for cases involving the installation of ventilation or washing facilities than those concerned with less permanent matters such as the provision of guard rails on scaffolding or the fixing of a ladder. In addition it would be possible in some cases for the firm to apply for an order under section 157, in order to provide a legal defence in respect of the period of grace which the court will allow. In the result, little use is made of section 157 by the Inspectorate, if only because it is felt that the time which is inevitably spent in continual applications to the court where an order is made could be more profitably spent on other methods of enforcement. In normal cases, then, it is left to the Inspectorate to ensure that prosecution does secure the intended effect by means of further check visits and letters. This is also done where the inspector's request for a prosecution is not approved, whether on the grounds that the firm should be given more time or for some other reason.

31. This brief account of the current practice of the Inspectorate is not intended to do more than provide the background for the more detailed analysis which follows of the reasons behind the decision to take enforcement action, by prosecution or otherwise. But it should already be clear that such action is embarked on only when encouragement and persuasion have failed. The system as a whole has been aptly described as one of "extended cautioning", though some qualification of this is perhaps called for in the case of

serious accidents. It is, in a sense, a natural result of the role which the Inspectorate has assumed of the friendly and knowledgeable authority-figure, anxious to maintain the best possible relationship with any firm which shows any willingness to cooperate with its objectives. A stricter and more detached approach to criminal proceedings is felt to be incompatible with that role.

IV THE REASONS FOR ENFORCEMENT DECISIONS

32. The main object of a more detailed analysis of the reasons behind the decision to take enforcement action and eventually to prosecute is to assess the extent to which fault on the part of the offender is taken into account. For if formal legal action is in practice taken only against those employers who can be shown to have been at fault, it is clearly difficult to argue that any element of strict liability is necessary to the efficacy of the enforcement system. A closer look at individual enforcement decisions, however, is also relevant to the wider issues of the suitability of the existing legal framework, as it is operated by the Inspectorate, to the basic objectives of the factories legislation. It should be remembered that our sample was drawn from 2 only out of 101 district offices, and all our findings must be interpreted accordingly.

33. With the resources at our disposal, our study was necessarily limited to an analysis of the official records of individual firms as maintained by the Factories Inspectorate, occasionally supplemented by a brief discussion with a local inspector. We made a detailed study of two samples of case histories composed of (a) 22 firms in respect of which criminal proceedings had been seriously considered through the submission of a prosecution report, and (b) 21 other firms of similar size and nature in respect of which prosecution reports had not been made. The first group of case histories was selected from the register of prosecution reports in two district offices in the South-East region, and the pairing of the firms was made with the advice of the local District Inspectors, in order to show how what might outwardly appear to be similar situations were dealt with in different ways. Cases in which the prosecution report was submitted after the investigation of an accident, for

example, were paired with other cases in which a similar accident did not result in a prosecution report. An obvious limitation of this method of research is that, in the majority of cases, enforcement action is taken more or less as a matter of course within the tradition of the Inspectorate. Specific reasons are consequently rarely expressed on paper and, where they are, they will tend to be reasons for deviating from the course of action which would normally be expected in such a case. In addition, specific matters which are thought worthy of express comment may not always be the decisive factors in reaching a particular decision. A detailed quantitative analysis of factors mentioned in files could, therefore, be seriously misleading. However, it is possible to gain some insight into the kind of factors which may influence inspectors and their superiors in the decision-making process by setting down those matters which were specifically mentioned and grouping them under a number of main heads. We have done this for enforcement action short of prosecution and for prosecution itself separately since the reasons for and against prosecution tend to be much more fully expressed.

An analysis of stated reasons for enforcement action short of prosecution

34. The reasons explicitly mentioned in respect of action short of prosecution were almost exclusively reasons for taking less action than might have been expected. This is perhaps because the reasons in favour of such action, for instance, writing a stiff warning letter or planning a check visit, are built into the system of escalating pressures. The three factors actually mentioned in favour of strong action - the fact of previous advice, the number of items requiring attention and the seriousness of the injury from an accident - are precisely those which would naturally lead to enforcement action. The reasons explicitly given for not taking vigorous action, or any action at all, are more informative. They may perhaps be grouped under three main heads((A), (B) and (C) in the Table below) as follows:

Table 1 - Reasons given for not taking strong action against employers - a sample of 21 firms in respect of which no prosecution report was made

NATURE OF REASON	PARTICULAR EXAMPLES	FREQUENCY OF REASONS
(A) FAULT ON SPECIFIC ISSUE		
1. Lack of negligence	An unforeseeable accident	3
	Reasonable use of machinery though technically unfenced	2
	All reasonable steps taken and no real alternative	2
2. Other person at fault	Injured person to blame	12
	Fault of supplier	1
(B) GENERAL PERFORMANCE AND ATTITUDE OF FIRM		
3. Generally good firm	Good general standard of fencing	2
4. Some progress made	15 of 19 items attended to - Guards much better	4
5. Immediate action	New guard quickly made	2
6. Prospective action	Manager sincerely concerned	1
	Machine to be replaced soon	2
	Premises to be rebuilt	1
(C) EXTENUATING CIRCUMSTANCES		
7. Marginal breach	Accident technically reportable but only just over limit	1
	Technical failure to fence	4
8. No resources	Lack of money in small firm	1
9. Other	Injured person deaf, though system unsafe	1
	Not a formal visit of inspection	1
	Planning permission problems	1

It is clear from this that lack of blameworthiness on the part of the employer is the principal consideration in general terms, but that it may be assessed either in respect of lack of fault over the particular issue or incident, usually an accident, or else by reference to the firm's past record and the prospects of remedial action. In addition, minor breaches are leniently treated, and extenuating circumstances are taken into account, though they would not afford a defence in strict law. For instance, where the secure fencing of machinery is clearly impracticable, an agreement may be made with the industry concerned not to enforce the strict letter of the law as long as reasonable safety standards are maintained; hence the so-called "technical" failures to fence.

An analysis of reasons for and against the institution of proceedings

35. The reasons for and against the institution of criminal proceedings are clearly stated in every prosecution report, and the various memoranda attached to it. A somewhat fuller account is, therefore, possible in respect of the cases in which prosecution was seriously considered. The majority of issues raised may be grouped under the same principal heads, as the accompanying analysis of all the factors mentioned, both in favour of and against the institution of proceedings, shows. Considerably more attention was paid to the question of previous advice or warning, however, and, in addition, factors of an entirely different nature were raised, principally concerning the likely effect on public opinion of instituting, or failing to institute, proceedings. The Inspectorate is understandably anxious to maintain its image as the impartial guarantor of proper standards of safety, health and welfare. Accordingly, any case in which the arguments put to the court might show the Inspectorate in an unfavourable light, for instance, in having failed in its duty of enforcement or in prosecuting an employer long after the required standards have been achieved, authorisation of proceedings is likely to be withheld. A number of other related issues were raised both for and against proceedings: in one case concerning a public corporation it was argued that the corporation had neglected its obligations for years and that at least 30 of its employees were waiting to see if the Inspectorate was as powerless as they suspected; but, in the event, it was apparently decided that the image of one public authority

pursuing another was one to be avoided and strenuous informal pressures were applied which eventually proved successful. Matters of this kind clearly assume considerable importance as soon as the possibility of publicly invoking the assistance of the courts in securing compliance with the Act is raised.

Table 2 - Reasons given for and against the institution of proceedings - a sample of 22 firms in respect of which a prosecution report was made

NATURE OF REASON	PARTICULAR EXAMPLES	FREQUENCY OF REASONS
(A) FAULT ON SPECIFIC ISSUE		
1. General negligence	For Inadequate system of work	5
	Against Mere error of judgment	2
2. Previous advice	For Management aware of previous advice	7
	Against No precise warning	2
3. Other person at fault	Against Fault of operator	2
	Meddling by 3rd party	1
	Goods received in dangerous state	1
	Misled by insurance inspector	1
(B) GENERAL PERFORMANCE AND ATTITUDE OF FIRM		
4. General standard	For Very poor record	2
	Against Good firm with interest in employees	1
	Conditions not as bad as in other similar firms	1

Table 2 contd...

NATURE OF REASON	PARTICULAR EXAMPLES	FREQUENCY OF REASONS
5. Past progress	For Time given to comply but no progress made	4
	Against Just enough progress to get off the hook	1
6. Immediate action	Against Acted on threat of prosecution	1
	Guard immediately fitted	1
7. Prospective action	Against Co-operative letter from firm	2
(C) SPECIAL CIRCUMSTANCES		
8. Size of firm	For A large concern which should do more	1
	Against Small firm with scant resources	2
	Limited number of employees	1
9. Nature of breach	For Blatant breaches	2
	Against Slight injury only	1
	Possibility of rebuilding	1
10. Other	Against Overtime breach close to Christmas	1
	Injured person had 30 years' experience and no previous accident	1

Table 2 contd...

NATURE OF REASON	PARTICULAR EXAMPLES	FREQUENCY OF REASONS
(D) OTHER CONSIDERATIONS		
11. Image of Inspectorate	For	
	Employees looking on to see if H.M.F.I. can do anything	1
	Request for factual statement on unreported accident	1
	Good luck only prevented serious accident	1
	Against	
	H.M.F.I. failed to follow up after previous warnings	1
	Not advised by H.M.F.I. at recent inspection	1
	200 such machines in use and no previous complaint	1
	No point in proceedings because objective now achieved	2
	Can't prove fault	2
	Court unsympathetic	1

The place of fault in enforcement decisions

36. An analysis of all stated reasons can do little more than illustrate the framework of considerations within which individual decisions are reached. It does not allow the decisive issues to be distinguished. But the analysis does show that the Inspectorate normally applies a broad conception of fault or blameworthiness in enforcing the Act. It is equally clear that this conception goes much further than the existing statutory defences, which, as we have seen, are more or less limited to cases in which some other person can be shown to have been at fault. To some extent, then, the argument that strict liability is unnecessary is borne out. On the other hand the conception of fault which emerges involves a consideration of much more than the individual

incident or breach with which legal proceedings may be involved. The overall attitude and performance of the firm is often of considerable importance. Simply to introduce a provision to the effect that there should be no liability in the absence of negligence in respect of the particular breach might not, therefore, be sufficient to bring the law into line with the reality of the enforcement process as it is currently operated. A much more precise formulation of the conception of fault inherent in current enforcement practice is necessary if that is to be achieved. For this reason a more detailed study of individual enforcement decisions is required.

V THE DECISION TO INSTITUTE PROCEEDINGS

37. The decision to prosecute involves the assessment and evaluation of a number of different and often conflicting considerations. As the analysis set out above shows, the past record of the firm and the nature of previous dealings with the Inspectorate may be as significant as the particular circumstances of the breach or breaches with which the prosecution report deals. The issues which tend to be raised in cases arising out of an accident and injury, however, are appreciably different from those raised in cases arising out of a series of inspections and check visits. The sample of 22 paired cases has, therefore, been split along these lines for the purposes of analysis. The resulting small numbers in each group make any attempt at detailed statistical tabulation impracticable. In any case, it is probably more informative to give a brief discursive account of each individual case along with its "pair" in which no prosecution report was submitted. In this way it will be possible to make some assessment of the factors which may have been crucial to the decision to submit a prosecution report and also of the relative efficacy of the different action taken. Judgments of this kind are, of course, essentially speculative. But the method adopted does, perhaps, give the best overall picture of the attitude of the Inspectorate to formal legal proceedings. It should be remembered once again that our sample was drawn from only 2 out of 101 district offices, and our findings must be interpreted accordingly.

Prosecution in improvement cases

38. As can be seen from the accompanying tabulation of the 11 prosecution reports submitted in respect of contraventions discovered in the course of inspections or as a result of complaints (commencing overleaf), five only were approved. In each of these, however, convictions were obtained and fines ranging from £10 to £150 in all were imposed. In addition, in one case an order was made by the court under section 157 for compliance within the space of two months.

39. It is difficult to be precise about the reasons for the submission of the reports or for the institution of proceedings in these cases. In almost every instance the fact of previous warning on the point in question was mentioned, if only because a special space is provided on the relevant form for information of this kind. Previous advice or warning is not an essential factor, however, since in two (associated) cases proceedings were instituted immediately on the discovery of the failure to register a branch works and other breaches of safety and welfare matters. More generally, the reason for suggesting prosecution appears to have been a belief by the inspector concerned, whether based on previous dealings with the firm or on the attitude of the management when faced with the requirements of the Inspectorate, that the usual methods of persuasion and veiled threats would not produce results. This is borne out by the fact that authorisation for proceedings was initially granted in a number of cases, only to be withdrawn when it became apparent that the employer was at last taking active and immediate steps to comply with the law. As was stated in a number of cases, the object of the exercise is to secure compliance and there is, therefore, little point in wasting the time of the Inspectorate in taking proceedings when that object has been achieved. In this sense the rationale of the institution of proceedings in cases of this kind is not to punish employers for proved failures in the past but to induce compliance for the present and the future. Some deterrent or punitive element, however, does occasionally appear as a subsidiary consideration, for instance, in the argument that blatant failures to comply must be dealt with.

40. Fault in respect of a particular contravention in the traditional legal sense is thus only partially a determining factor in cases of this kind. It is (continued on page36)

Table 3 - The decision to prosecute in improvement cases: cases in which prosecution report (PR) was submitted (Sample A) compared with those in which no such action was taken (Sample B)

No.	Nature of Issue	Sample A	Sample B
1.	Illegal overtime in plastics factories	Small firm of 30 found employing illegally; PR submitted on grounds of 3 previous warnings on this some 2-3 years before; works manager may not have known; proceedings not authorised because just before Christmas and all volunteers; letter only sent.	Large firm of 300 with a bad accident and fencing record; continuing series of warnings and one previous PR; illegal overtime discovered along with some 30 other matters; no special action taken on this particular issue beyond formal notification.
	Comment: Inspectorate clearly not particularly concerned about the breaches of this requirement; action taken unlikely to prove effective in either case?		
2.	General conditions in small garage	Small garage of 6; warned on failure to paint and other matters some 5 years before; given 6 months to comply, but contractor let him down; statements taken and PR submitted on grounds of complete failure to comply, but proceedings not authorised because work had by then actually started.	Small garage employing 3; large number of safety matters found wanting; given 6 months to attend to in course of rebuilding; first check visit showed some progress, but later, rebuilding ceased and 3 items undone; explicit threat of PR made, and check visit promised; 6 months later still not installed, but no further action planned because was on order.
	Comment: The open threat of immediate prosecution in the first case, backed up by the taking of statements from possible witnesses appears to have been more effective than the longer process of warnings and check visits in the second case.		
3.	Battery works - fumes and other welfare items	Small battery works in an awful state; after 5 visits over a period of almost 5 years, partly due to some rebuilding, a PR submitted following a second check visit; proceedings not authorised because some signs of steps to be taken at last; work completed 6 months later.	Small battery works with a good record, despite several cases of failure to report accidents; but letter only sent in view of firm's considerable interest in health of workers.
	Comment: The open threat of proceedings, though not actually taken, does seem to have produced effects after an excessive delay; trust in the management seems to have been the principle difference in the second case.		
4.	Poor staff accommodation in railway station	A series of visits made over 6 months following complaints; a PR finally submitted on grounds of "indefensible attitude" over prospective closure for almost 7 years; proceedings not authorised in order to give more time; work eventually completed 18 months later.	Conditions not as bad as in others; letters and two check visits produced no results; statements were then taken, though no PR made because conditions not entirely unsatisfactory; work completed 6 months later.
	Comment: The threat of prosecution against a public corporation does produce results in time, but rather slowly.		
5.	Poor conditions in unregistered garage	Unregistered small branch works discovered - PR submitted without delay or warning because of the serious neglect to comply; proceedings authorised on 3 charges; firm fined £65; work completed 6 months later.	Larger garage with some safety and welfare breaches; standard letter and check visit secured necessary action on most items within 3 months.
	Comment: Immediate prosecution despite lack of express warning appears to have paid off; the co-operative attitude in the second garage seems to have been the principal difference.		

Table 3 contd...

No.	Nature of Issue	Sample A	Sample B
6.	Poor conditions in modern garage	Small modern garage (8 men) but badly maintained; complaint by workers resulted in immediate submission of PR despite lack of previous advice; proceedings authorised and firm fined £10; check visit 6 months later showed considerable progress.	Similar garage; breaches of fire and welfare provisions; nothing done on check visit 5 months later but no further action as satisfied will be done.
	Comment:	Prosecution perhaps due to workers' complaint and lack of co-operative attitude, which distinguished it from the second case.	
7.	Heating in small sawmill	No improvement was made in 3 years following initial inspection and check visit; statements were taken without further delay at the next visit, and a PR submitted on ground of "serious neglect" to comply; initial authorisation of proceedings withdrawn following a promise by a director to comply forthwith; a later check after a complaint showed that something had been done, though not enough to comply fully.	Inspection revealed breaches of the welfare provisions; on the next visit some years later conditions were described as very good.
	Comment:	Overt action by taking statements and submitting report seems to have caused some change of heart, but progress was still slow after the withdrawal of threatened prosecution; in the second case the firm appeared to be thoroughly co-operative making any further action unnecessary.	
8.	Welfare facilities in small joinery	Initial inspection and warning produced no results on heating or washing facilities; PR submitted on grounds of failure to comply and opposition to providing washing facilities; proceedings not authorised because of very limited employment (part time man only); check visit 9 months later showed all provided.	Poor welfare facilities noticed while investigating accident; despite previous advice, no action taken since manager appeared sincere; after second check manager promised to comply and did so.
	Comment:	The only distinguishable feature appears to have been the attitude of the respective managers; in both the action taken eventually produced the desired result.	
9.	Fencing in light engineering works	Long history of poor fencing resulting in 3 convictions in 5 years; further check visit and a complaint investigation showed little improvement and a PR was submitted in view of the continuing poor standard; proceeding authorised and fines of £150 imposed; 6 further check visits in the next 2 years produced some improvement under an informal agreement to phase the necessary heavy expenditure over 2 years.	Inspection of newly occupied premises revealed poor standards, but good progress made at check visit; accident some months later due to lack of proper fencing, but firm misled by insurance inspector and no PR submitted, though possibility mentioned in letter; further check visit produced promise of replacement of machine.
	Comment:	Principal difference apparently the extenuating circumstances at the second factory, and possibly more co-operative attitude; the expense of fencing was a mjor factor in apparent leniency.	

Table 3 contd...

No.	Nature of Issue	Sample A	Sample B
10.	Fumes in small foundry	Small foundry (10 men) with poor conditions; 5 visits in 2 years produced very little improvement in either fencing or ventilation; a PR was then submitted on grounds of continuing poor standards, in spite of the firm's obvious lack of finance; proceedings authorised and fines of £75 imposed on 7 charges; the firm then changed hands and a subsequent inspection revealed no improvement.	Similar foundry (6 men) with similar problem of fumes; 5 visits and a series of stiff letters over period of 2 years produced sporadic improvement; continued informal pressure applied in view of firm's poor financial state; final success doubtful.
	Comment:	In both cases the lack of resources, and the possibility of forcing the firm out of business were major factors; in the event prosecution of one appears to have achieved little in view of the immediate transfer of the business into new hands. The sporadic improvements in the second firm probably protected it from similar treatment.	
11.	Fumes in chemical works and fencing	4 inspections in 2 years produced only marginal progress in respect of extraction; PR then submitted in view of continued neglect of legal obligations; proceedings authorised and fines of £150 imposed on 5 charges and an order for compliance within 2 months was made; further check visits showed that the work done was ineffective, but improvements were eventually made.	Similar firm with more co-operative attitude; visits following accidents showed little progress being made, but takeover of firm by another with a good record delayed matters; the problem of fumes was eventually dealt with though other safety and welfare items were outstanding.
	Comment:	In both cases the issues were affected by rebuilding schemes; the significant difference appeared to be in the apparently more co-operative attitude in the second.	

clearly reflected in the normal requirement that the firm should have been warned in explicit terms of its obligations under the particular provisions in issue, and also in the reluctance of the Inspectorate to bring formal proceedings in cases where the circumstances show that the firm did its best to comply but was held up by delay or inefficiency on the part of suppliers or contractors. But fault in this sense is not regarded as sufficient reason for prosecution. Sometimes proceedings may not be taken on the ground that a firm's failure to comply is reasonable in the circumstances, for instance, in view of prospective rebuilding, or in order to give more time. The decisive issue would appear to be the inspector's estimation of whether the firm is likely to comply within a reasonable period if no formal proceedings are instituted. Previous warnings and extenuating circumstances are relevant in that they affect the estimation of what is a reasonable period in all the circumstances, and also of the overall willingness of the firm to co-operate. But fault is not the crucial issue.

Prosecution in accident cases

41. Of the 11 cases studied in which a prosecution report was submitted following the investigation of an accident, 8 concerned the failure to fence dangerous machinery, though it should be remembered that the sample of cases studied was restricted to factories, so that accidents on construction sites were excluded. In 5 of the 8 cases the institution of proceedings was approved and convictions obtained, in respect of which fines of from £15 to £100 were imposed. Of the remaining three cases, two involved accidents in the operation of lifting gear and one a gassing incident. Proceedings were instituted in only one of the former, in which the victim was killed; liability was strenously contested, but a conviction was obtained and a fine of £225 imposed. The matching sample for this group was made up of firms in which similar processes were carried out on a similar scale, and in which a similar accident had not led to a prosecution report. It was not always possible to find a "pair" which fulfilled all these conditions; in one case both accidents led to prosecution reports, and in another no suitable comparison of any kind could be found. The details of each pair of cases are set out in Table 4 (commencing on page 37).

Table 4 - The decision to prosecute in accident cases: cases in which a prosecution report (PR) was submitted (Sample A) compared with those in which no such action was taken (Sample B)

No.	Nature of Issue	Sample A	Sample B
1.	Dangerous lifting gear	Due to interference with the electrical switch the controls reversing the operator of a hoist failed to stop it and the cable snapped inflicting severe bruises on an employee. A similar incident had occurred a month before, A PR was submitted for failing to maintain the hoist in a safe state and for failing to report the first accident; a series of misunderstandings was noted as mitigation. Proceedings were not authorised on the grounds that the electrician was primarily at fault, that the management could not have foreseen his action and that it was not worth taking the second charge on its own.	A piece of piping fell on and killed an employee due to its being lifted while insecurely gripped; the pipe was much heavier than anticipated. No action was taken since the deceased had no reason to be where he was, and the accident was not therefore foreseeable. In a later case 9 months later, 2 men were killed due to the use of a tackle bolt of insufficient strength; though the case revealed an "unbelievable lack of supervision" no PR was submitted since bolts were not within the definition of lifting tackle; letter sent.
	Comment:	The first firm was generally co-operative and it did not seem possible to prove fault against them; in the second there had been a series of fencing and lifting accidents in 2 years, and, though the firm was outwardly co-operative, action was not taken only because of what were taken to be legal arguments against liability.	
2.	Misuse of lifting gear	A load of timber fell and killed a man due to the use of a defective piece of rope. A PR was submitted on the grounds of lack of organisation and the fatality. Proceedings authorised and firm convicted of using a defective rope and not posting a safe working load chart; fined £225, despite a vigorous defence that the defect was not patent but latent.	A load of goods was lifted in order to insert a sling, and the binding used by the supplier gave way. No PR was submitted on grounds that the fault was clearly in the supplier; there was no other way to deal with the load as received. Letters were sent both to the suppliers and to the firm.
	Comment:	The first firm appeared generally slipshod and went into liquidation soon after; fault was clearly proved. In the second case though there was a poor accident record (7 cases investigated in 4 years) the fault in the particular case clearly lay elsewhere; the series of accidents continued.	
3.	Insecure fencing	Man lost fingers in guillotine which was not and had never been fenced, despite previous warning. PR submitted for a clear breach of s.14, but proceedings not authorised due to administrative delays and minor nature of injury, and because new guards fitted immediately. Strong letter of caution sent.	A youth's hand slipped into a guillotine, the guard had been removed by someone that morning; no PR submitted since it was not possible to prove fault against the firm; a strong letter of caution sent.
	Comment:	The first firm appeared very co-operative and this may have swung the balance; in the second case the possibility of a cross-summons following Wright v. Ford Motor Co. Ltd. (para. 15) seemed decisive.	

Table 4 contd...

No.	Nature of Issue	Sample A	Sample B
4.	Insufficient precaution against gassing	Man collapsed while cleaning out boiler due to lack of oxygen; PR submitted for failing to provide proper breathing apparatus and to have such available, on the grounds that management was seriously at fault in not foreseeing the danger and in not having proper apparatus; proceedings not authorised on ground that gas was introduced by contractor and was not really foreseeable; a strong letter sent.	A fitter looking into a leakage of fumes collapsed when the strap of his breathing apparatus broke; a PR was submitted for failure to maintain the apparatus. but a case on foresight of danger not thought possible since would result in a cross-summons against employee, who had clearly endangered his own and others lives by entering without authorisation; proceedings not authorised since could only prove the minor failure to maintain, despite the complete lack of a proper system; no one wished to proceed against the man.

Comment: In the first case the firm seemed generally slack, the second a little more co-operative; the main reason for not prosecuting in both seemed to be the difficulty in proving fault against the management and the possibility of a cross-summons; there was no desire to bring minor charges in such circumstances.

5.	Failure to report accident	Accident came to light as a result of a solicitor's request for information; the grinding machine in question was poorly fenced and the man lost an eye, but as the accident was time barred, PR submitted for failure to report only; proceedings authorised; there was no real defence but the firm had a good record and was very apologetic; a fine of £15 imposed.	A similar request from a solicitor was received about an unreported accident, but a report was received a week later; no action taken.

Comment: The first firm was well thought of, but the need to inform the solicitor that no investigation had been made as the accident was not reported seemed decisive. The second firm was much less effective on safety in general, and the incident was a very minor issue among more serious items.

6.	Fencing of machines	Man caught hand in moving belt when attempting to slip it off; the guard was adequate in normal circumstances but the man had not been properly instructed not to act as he did; PR submitted on grounds of ample previous warning, and lack of enforcement of safe procedure; proceedings authorised for breach of s.14 and fine of £100 imposed.	No real comparative incident, but firm in similar business with much better standard of fencing; in one case a fire broke out on a machine and spread due to slow reaction of operator, but no action taken.

Comment: The first firm seemed rather slipshod, and despite the conviction a similar accident occurred a year later; the second firm was well thought of and co-operative.

7.	Fencing of machines	Man caught hand on unfenced power press; PR submitted on grounds of 3 previous warnings and blatant breach; proceedings against firm authorised, but possible case against manager for general failure to comply not authorised because seemed repentent; firm fined £50 for breach of s.14.	Insufficient detail in similar firm to make genuine comparison.

Comment: The prosecution in the first case seemed to pay off, in that action was taken to remedy immediately, and firm was more co-operative on fencing in subsequent visits.

Table 4 contd...

No.	Nature of Issue	Sample A	Sample B
8.	Fencing of machine	Man caught finger in dough machine while cleaning it; PR submitted on grounds of previous warning on similar machine, yet nothing done; firm replied that 200 similar machines were in use, and safety had never been questioned; proceedings under s.14 not authorised as this could be embarrassing, and injury slight; strongish letter sent.	Man caught finger in dough divider; no PR submitted despite previous advice, since man had 30 years experience and no previous accident, and management very concerned; mild letter sent.
	Comment:	The first firm had a poor accident record which continued and also a poor standard of fencing which took up a good deal of time in subsequent months; the second firm seemed generally more active on safety.	
9.	Overload of crane	Crane driver tested a heavy load without putting out riggers despite advice to do so from foreman; the crane overturned though no one was injured; PR submitted against crane driver for endangering himself and others, but not against employers since they were not and could not be effectively in control; proceedings against driver not authorised due to personal circumstances of driver and fact that he had disappeared.	No relevant comparison available.
	Comment:	This was a single incident within a very large firm; there were fairly frequent accidents but no action usually taken in view of the active safety officer and general co-operative attitude.	
10.	Fencing in woodworks	Man caught up in transmission belt while taking short cut round back of machine; PR submitted as felt firm knew of practice and was foreseeable in all circumstances; proceedings not authorised because fencing had not been asked for here, so was "not foreseeable to H.M.I."	Youth caugh hand in machine; no PR submitted since it was impossible to fence more closely and the firm was very co-operative.
	Comment:	In second case the co-operative attitude of the firm seemed decisive; in the first case the image of H.M.I. and problems of proving foresight were relevant though the firm was also highly rated as a whole.	
11.	Fencing of machine	Man crushed fingers on machine; PR submitted as guard not in position; position had been discussed with firm and interlocks advised; proceedings authorised despite co-operative attitude; firm pleaded guilty and fined £20; interlocks were fitted soon after.	Man caught hand in moulder; accident due to screws having been removed from interlocked guard; no PR submitted as satisfied out of control of firm, and could not in any event prove otherwise.
	Comment:	Prosecution against first firm led to immediate action; in the second case the accident which occurred seemed mainly due to bad luck.	

42. The primary factors in the decision to prosecute in these cases would appear to be the nature of the breach and the fact that an accident occurred as a result. It has already been pointed out that the Inspectorate investigate only a very small proportion of the total number of accidents which are reported, and that the cases for investigation are selected mainly on the basis of the severity of the injury and the likelihood that it was due to a breach of the Factories Act. In the case of factory accidents there is a heavy concentration as a matter of tradition and of policy on those accidents which appear to have been due to the inadequate fencing of machinery. This traditional policy is clearly reflected in the range of accident cases in which prosecution reports were made, as described above. In a general sense it would probably be fair to say that, in accident cases, proceedings are seriously considered in any case in which substantial injury results from a clear breach of the safety provisions of the relevant legislation. This underlying rationale is not always made explicit in prosecution reports, but it appears in such comments as that the investigation revealed a flagrant breach of the fencing provisions resulting in a serious injury. In one case the fact that by good chance or good luck no injury at all resulted from such a flagrant breach was mentioned as an <u>insufficient</u> reason for <u>not</u> taking proceedings, but in the event no proceedings were in fact instituted; in others the slightness of the injury from similar clear breaches was clearly an important factor in the rejection of possible proceedings. In one sense, then, the employer is held responsible and punished as much for the seriousness of the accident as for the seriousness of the breach which led to it. This is probably less so than in the past: the increased statutory maximum penalty for cases where death resulted was omitted from the 1961 consolidation of the factories legislation, and there is a trend of opinion towards concentration on the breach rather than on the accident. But there is still the practical consideration that it is rather more easy to convince a court of the seriousness of a breach if a serious accident has resulted. As one inspector put it: "Blood increases the fine without doubt."

43. Within this broader rationale, however, the question of fault in relation to the particular accident and breach is clearly relevant to the eventual decision. The form of the

prosecution report, as in the case of improvement cases, makes some consideration of previous advice or warning unavoidable. It is general practice in machinery cases, for instance, to require as a precondition to prosecution some form of advice in relation to the proper fencing of the particular machine in question, or at least of one similar in all relevant respects. In one case permission to prosecute was withheld on the ground that the inspector on a recent visit had not drawn the firm's attention to the particular dangerous "nip" where the accident subsequently occurred; to take a strong line in such circumstances would have been "being wise after the event". In another, proceedings were dropped when the firm objected that some 200 machines of the kind in question had been in operation throughout the country without previous accident or injury, and without any demand from the Inspectorate for better fencing; it was thought that quite apart from the fault issue, the production of evidence to this effect in court would damage the image of the Inspectorate as a whole.

44. An even more important factor is the conduct of the injured person, or possible interference by some third party. Where the accident is wholly due to the stupidity or negligence of the injured person, in deliberately operating machinery without guards in position or more generally in disregarding the proper procedures for safe operation, proceedings against the employer will not normally be considered appropriate. This does not apply where the management of the firm acquiesced in the improper practice or failed to impress on operatives the full importance of safety procedures, or more generally should have foreseen and made provision against the employee's action. But in practical terms, as was apparent from a number of the cases studied, it is often difficult to produce satisfactory evidence to this effect, even if the inspector himself is convinced that the firm's standards of supervision on safety matters was wholly inadequate. In addition, since the decision in Wright v. Ford Motor Co. Ltd.[20] it is now extremely difficult to establish legal liability on the part of the firm in respect of a particular contravention where it can be shown that a third party, whether identifiable or not, deliberately interfered with the safety devices provided. This particular legal development was specifically mentioned in a number of

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20. [1967] 1 Q.B. 230. See para. 15.

cases as a ground for not taking formal action against the firm. The possibility of a defence by way of a cross-summons against the employee or other individual at fault is in itself taken as a reason for withholding proceedings, since, as will be seen below, the Inspectorate is generally reluctant to embark on proceedings against individual employees.

45. The resulting position, as the system is currently operated, is that liability in respect of accident prosecutions may occasionally be somewhat stricter than for improvement cases, in so far as it is meaningful to talk in these terms. Specific previous warning or advice will not always be required in cases of blatant contravention if the requirements of the law are clear and well known, as in the case of the secure fencing of machinery. A prior general discussion of the dangers of unfenced machinery, for example, was regarded as quite sufficient in one sample case to justify prosecution in respect of a subsequent accident. The unlucky chance of a serious accident rather than the degree of fault of the firm in question may thus become a decisive factor. In addition, in contrast to improvement cases, immediate remedial action on the part of the firm after a serious accident is unlikely to prevent the institution of proceedings, though it should perhaps be added that, where the Inspectorate has embarked on a deterrent policy in respect of particular issues, as in the case of the fencing of power presses, this difference in approach to accident and improvement cases may disappear. The statutory defences in cases where the fault lies in the employee or a third party, on the other hand, considerably reduce the practical range of strict liability, and may even result in a number of firms escaping liability which they might otherwise incur by threatening to enter a cross summons against an employee.

Proceedings against individuals

46. Though the Factories Act makes special provisions for the conviction of individual employees (section 143) or directors (section 155) where they can be shown to have been at fault in respect of a contravention, the Inspectorate is reluctant to take action which would have this effect. In the sample of cases studied the possibility of proceedings against employees for deliberate disregard of their own or others' safety was raised in four instances only, despite the

large number of cases in which the fault of the employee was raised as a reason for not proceeding against the employer. In three of the cases involving the failure to use breathing apparatus, the "scotching" of an electrically interlocked guard and the simple removal of a guard respectively, no formal prosecution report was made and in the remaining one, the overloading of a crane, though a report was submitted, proceedings were not authorised. The possibility of proceedings against a factory manager under section 155 for failing to secure compliance with the requirements of the Act was also raised in one case, but, again, no formal prosecution report was made.

47. Though it is not possible to come to any definitive conclusions on such a small sample of cases, it seems clear that the principal reason for the failure to take action in these cases was the feeling that no useful purpose would be served in doing so. Where the employee was the injured person it was felt that he had suffered enough as it was, and there was no reason to add to that suffering by taking further action. In addition, in two of the cases the employee concerned had disappeared, in one instance as a result of his dismissal and, in the other, due to domestic troubles which eventually drove him to go off with his neighbour's wife to another part of the country. In all such cases, to institute proceedings would in practical terms be quite pointless and there was clearly no desire on the part of the Inspectorate to be seen to be persecuting the offender. This reasoning was explicitly set down in the case involving the factory manager, who was felt to be "carrying the can" for others: prosecution, it was stated, should be "restricted to the sort of individual who would do the same the moment our back is turned", and since the man seemed contrite it would in the circumstances be "purely punitive and not deterrent".

48. In cases of this kind, then, the Inspectorate's self-conception as an agency of enforcement rather than of punishment operates as a virtual bar on the institution of proceedings against employees. For it is clearly arguable that there is no point at all in taking action against those who are not in a position to secure compliance with the statutory requirements. It is, perhaps, significant that the only case in which a prosecution report was actually submitted was that of

the crane driver, an experienced man who was a free agent in the operation of the crane and to whom no one was in a position to give orders: since it had been entirely his own decision to try lifting the load without waiting to put out the outriggers, as had been suggested to him, it was reasonable to argue that the duty to comply rested on him alone and that there was no other means of enforcing the law than to take action against him. The general reluctance of the Inspectorate to become involved in proceedings against individual employees in normal circumstances in fact extends to any case in which there is a danger of a cross-summons being entered by the employer against one of their employees, in that this possibility in itself, as we have seen, is generally accepted as a decisive reason for not proceeding even against the employer. The liability of employees and other individuals under the Act, as it is currently administered, would appear to be restricted to cases in which the employee, as well as being seriously at fault, was the only person in a position to see that the legal requirements were observed.

The use of administrative sanctions

49. Finally, as explained above,[21] the Inspectorate is able under the terms of the Factories Act to apply to the courts for an enforcement order for compliance within a given period in addition to any criminal penalty imposed as a result of a prosecution (section 157); and where the continued operation of a particular process or section of a factory can be shown to be positively dangerous, a closure order independent of any formal criminal proceedings may be applied for (sections 54-55). But very little use is, in practice, made of these powers. In the sample of cases studied the question of an order for compliance under section 157 was raised only once, in the case of a chemical plant, where, in the opinion of the inspector, prosecution and conviction in itself was unlikely to induce the firm to take the necessary steps.[22] There was no case in which the possibility of an order under sections 54-55 was raised. It was obvious from discussion with various inspectors on the point that action of this kind was considered appropriate only in the last resort, where all other methods of encouragement,

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21. See para. 18.

22. See Table 3, Case 11.

persuasion, threat and prosecution failed to produce results. The further implications of this aspect of the current policy and practice of the Inspectorate will be dealt with below.

VI THE TRIAL OF CASES UNDER THE FACTORIES ACT

Preliminary

50. The culmination of all these methods of enforcement is the day in court. But the court's view of the particular issue and of the process through which it came to light as presented in court is not necessarily the same as that obtained from a study of case files or from discussion with the inspectors concerned. In order, therefore, to gain an impression of the way in which factory cases appear to magistrates, we attended some 15 cases heard during the summer of 1969 in the South-East region. The cases attended were selected out of a possible total of some 50 hearings during the period simply on the grounds of the availability of the staff and students concerned. They do not, therefore, form a random sample in any strict sense. Since, however, we had no advance knowledge of the circumstances of the case, other than the name of the defendant and the date of the hearing, conscious pre-selection of the sample was not possible. In addition, the inspectors concerned had no advance notice of the presence of an observer other than their general knowledge that some research was being undertaken, though arrangements were made for us to have a brief discussion on the case at the end of the hearing. It should be noted that the sample included a number of construction cases, since the method of selection, unlike that of the sample of case histories, was not tied to any particular district office.

51. Of the cases attended, all but two arose directly or indirectly from the investigation of an accident and five of these involved fatalities. The principal charge in almost every case was thus for the contravention of the safety requirements imposed in the Act or the regulations under it: six cases involved breaches of the duty to fence machinery and five the failure to provide a safe place or system of work on construction sites. The remainder of the charges, often combined with the above, concerned the failure to have young workers medically inspected (3 cases), the failure to

provide adequate fire precautions (1 case) and various administrative items, principally the failure to report accidents (5 cases). Pleas of guilty were entered in all but four of the total of 27 charges, but in two of the not guilty pleas the defendant did secure an acquittal, though in no case did the defendant successfully defend all the charges against him. The penalties imposed, including costs ordered to be paid, in respect of the 25 charges which resulted in conviction or conditional discharge, were as follows:-

Failure to fence dangerous machinery	£5 £100	£250 £100	£40 £100	£200 £100
Unsafe place or system of work on construction site	£25 £25	£25 £100	£65	£30
Inadequate fire precautions	£20			
Failure to have young workers medically inspected	£20 £2½	£20	£10	£2½
Failure to report accidents	£10	£10		
Breach of Power Press Regulations	£2½	£2½	£25	

52. These figures are not intended to give more than a rough picture of the nature of the cases in the sample and of the results of the hearings. But they show that the sample is much more heavily slanted towards accident cases (13) as opposed to improvement cases (2) than the sample of prosecution reports analysed above. This may be due in part to the inclusion of construction cases, but the sample does, nonetheless, appear to be somewhat unrepresentative in this respect. The analysis which follows, however, is based more on general impressions of the process of prosecution itself than on the nature of the individual cases.

Current prosecution practice: the inspector in court

53. It is the policy of the Inspectorate that all proceedings at the magistrates' court level, with which this analysis is exclusively concerned, should be conducted by the inspectors themselves. In a typical case where the defendant firm pleads guilty, the inspector will give the court a brief summary of the events leading up to the proceedings, of the way in which the firm has contravened the Act and of any past record of proceedings; the defendant's lawyer will then put in a plea

in mitigation, explaining how anxious the firm is to comply with the law, what a good past record it has on safety matters and how sorry it is about this isolated contravention; the magistrates then retire briefly and decide on a sentence. The whole affair takes about 15 minutes. Where the firm pleads not guilty to any or all of the charges against it, on the other hand, the proceedings may take considerably longer. The prosecution will probably be conducted by the district inspector who will call as witnesses both the employees from whom relevant statements have been taken and any other persons concerned in the case, often including the inspector involved in the inspection or investigation or a qualified expert from the central Inspectorate. There may be considerable argument both on the precise course of events and on the interpretation which is to be put on the relevant provisions of the Act or regulation, so that the inspector will be involved both in examining and cross-examining witnesses and in the citation of any previously decided cases, copies of which will normally be supplied by the central Inspectorate. In some of the contested cases, where the inspector is pitted against a professional barrister or solicitor skilled in the procedures of court work and perhaps also more familiar with the particular practices and foibles of the magistrates before whom the case is heard, there is a tendency for the less forensically able inspectors to incur the displeasure of the court or of the clerk, perhaps by minor infringements of the law of hearsay evidence, perhaps by the unnecessary labouring of points which are not in issue. In extreme cases this lack of legal expertise may even result in an unjustified acquittal, where, for example, the inspector is temporarily thrown off his step by a clever if rather specious legal point or procedural manoeuvre. Things of this kind were the exception rather than the rule, and, except in the case of evidence as to the previous record of the firm, to which we shall return, were restricted to the very few contested cases. But, since the Inspectorate quite rightly regards it as important on general grounds to win the cases which it initiates and to gain the sympathy and understanding of the local magistrates, it is a matter of some importance.

Divergence between magistrates' and inspectors' views of cases

54. The most significant feature of the prosecution process, however, is undoubtedly the difference between the inspector's view of the case and that which in the event he is able to give to the magistrates. The inspector's view of the case is obviously coloured by his involvement in what may have been a lengthy series of visits and discussions with the firm and by his knowledge of the past history of the Inspectorate's dealing with that firm over the previous five or six years. The magistrates, on the other hand, are only permitted to hear the details of the particular incident with which the proceedings are concerned and, in addition, they must pay some attention at least to the mitigating circumstances which defence counsel will put before them. The resulting picture for the magistrate in a typical case will be of a firm with a good safety record which, for one reason or another, has failed to comply with one or two of the statutory requirements. Yet, in the eyes of the Inspectorate, in improvement cases at least, the firm is likely to be regarded as slipshod or unco-operative, since, as we have seen, proceedings are only instituted as a last resort when all other methods of persuasion have been tried and failed. And even in accident cases the Inspectorate will know the previous accident history of the firm, while to the magistrates the contravention arising out of a particular injury necessarily appears as an isolated incident. This general divergence of views may help to explain the general dissatisfaction expressed to us by some Inspectors as to the level of fines imposed by magistrates.

55. It is difficult to give a full account of the difference between the magistrate's and the inspector's views of particular cases without giving an extended description of each. In one case, for example, arising out of a fatal accident on a construction site, the magistrates were informed that the firm had no previous convictions and a good accident record, though it was known to the Inspectorate that in the space of a year there had been three other fatal accidents on the firm's sites one of which led to the submission of a prosecution report, though no proceedings were taken. But a general impression can perhaps be obtained from the accompanying analysis of the extent to which the magistrates were made aware of whether the

firm had received previous advice or warning on the point in issue.

Table 5	Inspector's view	Magistrate's view
No previous advice or record	4*	10
Some advice or warning	10	4
Previous conviction	1	1
	15	15

* Including 3 cases in which information on this was not available.

The figures show clearly that in the majority of cases the court was unaware of a consideration which, as we have seen, is one of the principal factors taken into account by the Inspectorate in the decision to prosecute. This fact in itself is clearly of considerable importance, since the previous record of the firm is likely to weigh heavily with the magistrates in deciding on the proper sentence to impose. For this reason alone it is worth looking somewhat more closely into the law and practice as to evidence on the previous dealings between a firm and the Inspectorate.

Evidence as to previous dealings

56. Proceedings under the Factories Act are subject to the same rules on the admissibility of evidence as any other criminal case. It follows that only that evidence which is directly relevant to the proof of the particular charges in issue may be introduced, and it is settled law that the fact that an accused person has previous convictions or has been warned or cautioned is strictly irrelevant to the question of his guilt on the charges before the court. The only exception to this rule likely to be relevant in Factories Act cases is that, where the defendant brings general evidence as to his good character, the prosecution may bring evidence in rebuttal. After conviction, on the other hand, it is open to the judge or magistrates to receive what evidence they wish as to the previous history and convictions of the defendant in order to assist them in imposing a proper sentence. In ordinary criminal cases it is usual for the court to receive reports from the police or the probation service on the defendant's previous convictions and on his background and current circumstances.

57. These matters are ordered rather differently in cases under the Factories Act. The standard rules are, quite properly, applied in cases where there is a plea of not guilty, but, as we have seen, the large majority of firms plead guilty. When they do so, or when a verdict of guilty has been reached in a contested case, it is normal for the prosecuting inspector to seek to introduce evidence as to previous convictions and as to any previous advice or warnings. It is accepted practice, however, for evidence on advice and warnings to be strictly limited to the issues raised in the charges before the court. Defence counsel will normally object to any statement, or to the introduction of any letter, referring to other issues. And in some cases the court is induced to refuse to admit evidence of previous advice except that relating to the specific machine or process in respect of which the prosecution has been brought. Prosecuting inspectors are not usually well briefed on such matters. The central Inspectorate has issued general instructions to the effect that where objections are raised the case of R. v. Butterwasser[23] should be cited. This case, however, does no more than state the very general rules which have been set out in the previous paragraph in relation to a case of violent assault. It gives no indication of the way in which the rules should be applied in cases dealing with regulatory legislation. The inspectors are, therefore, at the mercy of defence counsel and ultimately of the magistrates in this matter. In a number of the cases attended they allowed themselves to be outmanoeuvred either on the extent of the evidence which could be introduced or on the procedure for introducing it. In one instance the defence succeeded in preventing the introduction of such evidence by initially pleading not guilty, and subsequently changing that plea in such a way that it was not easy for the prosecuting inspector to find an opportunity to raise the matter. There can be little doubt that an authoritative statement on the proper extent to which evidence on the previous record of the firm and its dealings with the Inspectorate could be introduced would be of the greatest assistance to prosecuting inspectors. Nor can there be any doubt that the freer introduction of such evidence would go a long way to reduce the divergence between the inspector's and the magistrate's views of individual cases and thus to allow a more realistic approach to sentencing.

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23. [1947] T.L.R. 463.

The attitude of magistrates

58. One of our initial objectives in attending a sample of prosecutions was to attempt to gauge the attitude of magistrates to proceedings under the factories legislation. In the event, it was not practicable to do so since in the majority of cases the magistrates took so little active part in the proceedings, beyond the actual decision on guilt or on sentence. Most of the interventions, where there were any, were made by the magistrates' clerk, and were concerned with matters of procedure or evidence. However, two general comments may be made in this context. In the first place, there is general dissatisfaction among inspectors about the level of fines imposed by magistrates, on the grounds that the sums of £10 or £20 which are often fixed do not constitute an effective deterrent for any but the very smallest firms. The figure for the average fine imposed in all charges covered by the sample was approximately £50, compared with the latest national figure of £33 in 1967, which in itself was a considerable increase on earlier years. Despite this apparent increase, however, there are still a number of cases in which the fines imposed on large firms, for example, in the construction cases covered in the sample, are more or less nominal. To some extent this may be attributable to a tendency in some magistrates to sympathise with defendant firms against the ever increasing demands of officialdom. It is also perhaps due to the rather low maximum fines of £300 and £60 set by the Act for contraventions which are and are not likely respectively to cause personal injury. An increase in these figures is already under consideration, and is clearly necessary if the courts are to be able both to increase the general level of fines and also to differentiate effectively between serious and less serious contraventions.

59. The second general point which follows naturally from this is that it is of the utmost importance for the Inspectorate to gain the sympathy and understanding of local magistrates. It is already the practice of prosecuting inspectors to give a brief account of the importance of the particular requirement which they seek to enforce and to cite any relevant statistics, for instance, on the efficacy of the recent Power Press Regulations in reducing accidents. But there were, nonetheless, a number of cases in which it was apparent that the bench did

not fully appreciate the way in which the Inspectorate carries out its duties and, consequently, tended to favour the defendant's rather than the inspector's account of events. This is clearly very closely connected with the extent to which the Inspectorate is able to give a full account of its previous dealings with the firm.[24] But there can be no doubt that, since the Inspectorate is legally bound to operate the enforcement process through local courts, every effort should be made to gain the sympathy and understanding of local magistrates, perhaps by arranging for the work of the Inspectorate to be explained to all magistrates as part of their ordinary training procedure, or by organising less formal meetings and discussions on a local level. The fact that in one of the cases which we studied one of the reasons stated for not taking proceedings against a particular firm was the general lack of sympathy to be expected from local magistrates shows that, in some areas at least, there is a place for action of this kind. It should clearly not be accepted as in any way natural or to be expected that magistrates should be less than fully sympathetic with the work of the Inspectorate.

The place of fault in trial proceedings

60. The extent to which fault or mens rea is relevant in the actual trial of factory cases should by now be relatively clear. As we have seen,[25] the extent of an occupier's blameworthiness in all the circumstances is an important factor for the Inspectorate in deciding whether to prosecute, though their concept of blameworthiness for this purpose is rather different from the traditional lawyers' idea of lack of intention or negligence. But we have also seen that the Inspectorate's view of the case, and of the extent of the employer's fault, does not necessarily come out in court.[26] The concept of strict liability is thus applied in practice to the extent that the Inspectorate is not required to give evidence and is occasionally prevented from doing so as to the particular sort of blame which to them seems relevant. On the other hand, it is clearly in the interests of the Inspectorate to show in court that the circumstances of the case did justify the institution of

24. See para. 57.

25. See para. 42 et seq.

26. Para. 54 et seq.

proceedings. The Inspectorate is understandably unwilling to bring cases which may result in the appearance of a futile and vindictive application of the strict liability concept, if only because it will inevitably reduce the general sympathy of magistrates for the department's work. In addition, where magistrates do feel that the defendant is without real fault or is being prosecuted on a mere technicality, they are more likely than not to impose a purely nominal penalty or a conditional discharge. There is little doubt, therefore, that both lawyers and factory inspectors would agree that to impose liability without fault is a rather pointless exercise. The real question, on which lawyers and inspectors may well not agree, is on what is meant by fault and how it may properly be proved in court. The evidence of both parts of our survey suggests that what is necessary is a much clearer definition of fault for all purposes within the factories legislation. We shall return to this point in the concluding section.

VII PENAL SANCTIONS AND ENFORCEMENT

The efficacy of penal sanctions in general

61. The argument over strict liability and fault in cases under the Factories Act is conducted exclusively by lawyers. The primary concern of the Inspectorate, as should by now be abundantly clear, is with enforcement. In arriving at a decision whether to institute proceedings in a particular case, therefore, the Inspectorate is more interested in the likely efficacy of a prosecution than in theoretical disputes about the limits of criminal liability, though the two are not wholly independent. The decision-making process can probably only be fully understood in this light. It is for this reason that in setting out the samples of improvement and accident cases, some brief comment was made on the apparent relative efficacy of the different course of action taken in the various paired cases, as well as on the apparent reasons for the differing decision. No firm judgments can be made on matters of this kind in the absence of some form of experimental enquiry, but it would not be right for that reason to ignore them entirely. For the efficacy of the existing enforcement system is perhaps the most important issue of all, both for the Inspectorate and indirectly for all those concerned with the merits and demerits of criminal liability for regulatory offences.

62. From a comparison of the improvement cases in which proceedings were taken with those in which a prosecution report was made but rejected or in which no formal measures were initiated,[27] it seems reasonable to conclude that it is not so much the appearance in court and the imposition of a penalty which induces a greater readiness to comply as the realisation that the inspector means business. In a number of cases, the mere taking of statements with a view to possible proceedings was sufficient to induce the employer to act and similarly with the submission of a prosecution report where that was known to the employer concerned. The effect of implied threats of this kind is, of course, dependent on the belief that prosecution will follow if nothing is done, but there is little doubt that they do carry more weight than the more usual oral or written warnings. There is equally little doubt that the best way for the employer to avoid the initiation of formal measures by the inspector is to cultivate an outwardly co-operative attitude and to make a point of making a little progress between each visit of inspection. There were a number of cases in which implied threats by the inspector of the kind described above against unco-operative employers appeared to have achieved more speedy results than the longer process of advice and encouragement, linked with oral and written threats, used with apparently more co-operative employers.

63. On the other hand, with the more recalcitrant employers the mere fact of conviction was not always sufficient to secure compliance. In many, indeed in most, instances the amount of the fine imposed and even the amount of the maximum imposable is considerably less than the cost of compliance. The expenditure involved in complete repainting or in the provision of washing facilities in a small workshop, for example, is unlikely to be much less than £100, while the fine for non-compliance is unlikely to be more than £25 on current sentencing practice. The amounts involved in the improvement of ventilation or heating or in the fencing of machinery can be very much higher: in one of the sample cases involving a medium sized firm the estimated net cost was so high in relation to the firm's resources that the Inspector informally agreed to a phased improvement scheme involving the expenditure of some £2,000 per year. It cannot be seriously argued, therefore, that it is the fear of financial penalties which induces

27. See Table 3.

action on the part of the employer. Little has yet been done to establish what does cause firms to comply with their obligations or in what way they perceive the activities of the Inspectorate. In most cases it is probably simply an accepted legal or social duty. Where the possibility of legal proceedings does arise, however, it is generally assumed that the mere fact of appearance in court and the inevitable local publicity is the main deterrent. The vague knowledge that the Inspectorate can enforce its requirements is perhaps more significant than the fact that what is technically a criminal conviction may result.

The role of administrative sanctions

64. The natural implication from this analysis is that in improvement cases the criminal aspects of the proceedings are overshadowed by questions of enforcement and compliance. Yet, as we have seen,[28] very little use appears to be made by the Inspectorate of the provisions in the Factories Act which allows the courts to impose administrative orders for compliance or closure. There does not appear to be any evidence that the procedures are ineffective. In the single sample case the firm concerned did eventually complete the required works some three months after the making of the order, which itself was the culmination of more than four years' pressure by the Inspectorate. On the other hand, there is little hard evidence by which to assess the likely efficacy of an increased use of such powers, though there is some reason to believe that the central Inspectorate in London is encouraging local offices to make more use of the enforcement provisions, presumably on the grounds of proven or anticipated efficacy. The accounts of cases of special interest circulated internally to all local offices do now include a number of examples of the successful use of sections 54-55; and 6 of the 14 cases set out in the latest annual report of the Chief Inspector described such cases. But no general figures are currently published to show the extent to which enforcement orders are applied for or granted.

65. It should also be mentioned that the first consultative draft of the proposed new safety, health and welfare legislation makes further provision for the use of administrative orders of

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28. See para. 49.

this kind. It is suggested that, in addition to the existing provisions in a slightly amended form, individual inspectors should have statutory power to make their own enforcement orders in situations where there is no immediate danger of injury or sickness, as is required under sections 54-55, but where the premises cannot be used with due regard to the well-being of the employed persons: in such circumstances the inspector would be able, subject to appeal to the courts, to make an order either that specific works should be carried out within a certain period, or that the use of the premises should be discontinued (paragraphs 206-207). Any suggestions for the amendment of the existing law must clearly be made with these proposals in mind. But if the draft is adopted in this form there will be all the greater need for a detailed consideration of the type of defence which should be available to employers faced with administrative orders. And it is not clear that the proposed general defence of "all due diligence to comply" will always be satisfactory in this context. The emphasis in proceedings involving enforcement orders is naturally directed towards the future rather than the past.

Prosecution and deterrence

66. Current prosecution practice in accident cases cannot be dealt with in exactly similar terms. The objective in such cases is not merely to induce the firm to take remedial action, for in many cases in which proceedings are taken the accident itself is sufficient for this purpose. The firm is being punished for its failure to take action before the accident, rather than for its subsequent failure to comply with the requests of the Inspectorate. The purpose of such prosecutions from the enforcement angle is thus to make it clear to the individual employer and to employers at large that, where a firm has failed to protect the life and limbs of employees in accordance with the requirements of the factories legislation, a penal sanction will be imposed. The rationale is that of special and general deterrence rather than of administrative enforcement.

67. It is notoriously difficult to make an assessment of the efficacy of prosecutions taken by way of deterrence in any field of the criminal law. Many of the inspectors we spoke to clearly believed in the value of prosecutions and convictions and the attendant local publicity in securing

co-operation and eventual compliance from employers in the district as a whole. And we have no evidence that their belief is unfounded. The point to be stressed is simply that, from the point of view of enforcement policy, there is a distinction to be made between deterrent action of this kind and the use of legal sanctions to induce an employer to take specific remedial measures, whether by means of a simple prosecution or through a formal order for compliance.

VIII CONCLUSIONS

68. Conclusions from this study may be drawn on two levels: (i) on the essentially legal issues of strict and vicarious liability and the related question of the proper extent of legal defences; and (ii) on the more general question of the efficacy of the existing system of enforcement and of possible developments or reforms. This division should not detract in any way from the basic rule that the legal aspects of liability and the administrative arrangements for enforcement are to be regarded as a single composite whole, but since the former are primarily the concern of the Law Commission and the latter of the Factory Inspectorate there are practical reasons for making the separation in so far as is reasonably practicable.

Legal liability and fault

69. The principal finding of the study is, perhaps, that while the employer's duty to comply with the factories legislation is generally strict or absolute in purely legal terms, despite a number of statutory qualifications and exceptions, the enforcement system is operated in such a way that liability in practical terms is almost always fault-based. In addition, though it may be thought that in strict law the employer is vicariously liable for the acts and omissions of his employees, the statutory provisions for liability on the part of individual employees and others and for a defence by way of cross-summons, as they are currently interpreted and applied, have resulted in a position where the employer will normally be able to escape criminal liability for the acts of any employee who is not in a managerial or supervisory position. In simple terms, the firm as such is held responsible only for those contraventions of the statutory requirements for which the management of the firm may reasonably be held to blame.

70. The nature of the fault or blame which is considered relevant in this context by the Factory Inspectorate, however, is rather different from the traditional legal conceptions of intention or negligence. Nor is the same conception of fault or blame applied in all cases. It is important to distinguish clearly between cases in which the aim of the Inspectorate is to induce a firm to take action to improve its standards of compliance and those in which the firm is to be punished for a past failure to comply, normally in circumstances which have given rise to an accident or injury. The extent of legal liability and of statutory defences should be dealt with separately for these two forms of enforcement.

Liability and defences in improvement actions

71. Employers are not really expected to comply with the letter of the law in all circumstances. But they are expected to comply with the reasonable requests of factory inspectors who put into effect the general policy directives, express or implied, of the central Inspectorate on the standards to be applied on the various aspects of the legislation. In this context, fault is more or less co-extensive with delay in compliance with the various items which are picked out by inspectors in the periodic visits of inspection. Mitigating factors are not so much lack of intention or negligence as the extent of the dislocation and expense which would be involved and the prospects of future compliance in the course of rebuilding or replacement. We do not feel that there is anything wrong or improper about this approach. But it is clearly not fully reflected in the existing law. A more direct formulation of the actual obligation of employers in this context would perhaps be that they should comply with the reasonable requirements of the Inspectorate within a reasonable period. The main defence would then be that the employer had done all that could reasonably be expected in the circumstances and the main evidential issues would be not so much the extent of the failure to comply as the nature of the steps which had been taken to remedy the situation and any mitigating factors which went to explain the delay.

72. If this formulation were adopted and formally incorporated in the factories legislation, the nature of legal proceedings under the relevant sections would clearly be rather different from those under the existing system. The

main aim would be to secure compliance with the law for the future rather than to punish for past failures to comply. Both the Inspectorate and the courts would inevitably assume a general dispensing power to refuse to enforce any particular legal requirement, either by granting additional time or by deciding that compliance might reasonably be waived in all the circumstances. The principal concern of the legislator would thus be to define the limits of this dispensing power, rather than to provide specific "defences" for the employer. Some progress along these lines is already foreshadowed in the first consultative draft of the proposed new safety, health and welfare legislation, under which individual inspectors would be authorised to issue orders for compliance on specific issues subject to appeal to the courts (paragraph 207).

73. We agree in principle that enforcement proceedings of this kind should be extended and more widely used. We would suggest, therefore, that the Law Commission should devote its attention to the preparation of a standard form procedure to govern enforcement or improvement orders in all areas of regulatory legislation rather than attempt to deal with the problem in the context of the criminal law. There are in existence a number of statutes in which enforcement provisions of this kind are specified in some detail, for example, the Public Health Act 1936 or the River Pollution Acts 1951 and 1961. But there is a need for greater simplicity as well as uniformity and precision. It is felt that the existing procedures under the Factories Act are unnecessarily time-consuming and they are, therefore, reserved for the most recalcitrant employers. If enforcement orders are to be more widely used, they must be readily understandable both to the courts and to the inspectors. The particular matters to be taken into account at each stage of the enforcement process, from the making of an initial order for compliance and the hearing of an appeal against that order, to proceedings for non-compliance with the order, should be clearly specified so that the real issues may be quickly laid before the court. The ultimate sanctions of closure or contempt of court and the conditions under which they are to be imposed must also be clearly specified. The rigid concepts of the criminal law are not wholly appropriate in this area and may only serve to mask the true situation.

Liability and defences for criminal contraventions

74. It does not follow from the suggestion that more attention should be paid to the formulation and implementation of administrative procedures that there is no place for criminal sanctions in the enforcement of regulatory legislation. In cases where an employer deliberately or negligently fails to comply with statutory requirements of which he knows or must be taken to know, and where his failure is likely to or does result in injury or detriment to employees or others, there is no reason why his failure should not be regarded as a crime against society in the same sense as any other criminal activity. The arguments from deterrence and stigmatisation apply equally in these cases as they do in respect of criminals engaged in crimes against the person or against property.

75. The value of deterrence and stigmatisation, however, is probably dependent on the presupposition that the offender was in some way at fault. This is perhaps the most important practical aspect of the traditional mens rea doctrine. Consequently, if criminal sanctions are to be applied in a real sense in the field of regulatory legislation, the ordinary requirements of criminal liability should also be insisted on. The accused person must always be entitled to the defence that he was in no way at fault. In the context of the factories legislation this would normally be covered by a general defence that all due diligence had been used to secure compliance with the law, as is proposed in the first consultative draft of the new safety, health and welfare legislation (paragraph 11).

76. Special attention should be paid in this context, however, to the question of interference by employees or third parties. Under the existing law the employer is generally vicariously liable for the acts or defaults of his employees, but specific provision has been made for him to escape liability if he can show that some other person is wholly responsible and that he has not been in any way at fault (section 161). In addition, an employee is personally liable for any wilful interference with any safety device (section 143). As we have seen,[29] these provisions have gone a long way to destroy the general principle of vicarious criminal liability. The Factory Inspectorate does not readily institute proceedings against individual employees, except where there

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29. See paras. 15 and 16.

is evidence of horseplay or of malice, and it has, therefore, been understandably reluctant to institute proceedings against the employer which may under the provisions of section 161 result in a cross-summons and possible conviction against the employee. If full liability on the part of the employer is to be maintained, then the question of liability on the part of the employee or third person should be detached from that of the employer, by the repeal of section 161 and the reinstatement of the rule originally introduced in section 155(2) that the conviction of an employee or third party should not free the employer from any liability which he would normally incur as employer. This would not be vicarious criminal liability in its strict sense but would help to ensure that the duty to secure compliance with the statutory requirements was squarely placed on the employer, including the duty to see that his employees do not contravene those requirements.

A continuing absolute duty to comply

77. We should stress that our support for the principle of criminal liability only in those cases in which fault can be proved does not mean that the duty to comply with the statutory requirements should be similarly limited. From our discussions with inspectors and others we are convinced that the concept of an absolute duty to comply is of the greatest assistance to inspectors in their dealings with employers, in that the threat of court action is more real and immediate when there is no genuine prospect of mounting a successful legal defence. In addition, the existence of a duty which is not hedged around with qualifications puts the representatives of trade unions or works safety committees in a much stronger position in their dealings with management to insist that the law shall be complied with irrespective of the general collective bargaining situation. For this reason we feel that any general defences should be strictly limited to criminal proceedings and should not be permitted to detract from the general extent of the employer's duty for the purposes of other enforcement actions and of civil liability.

Automatic liability for minor offences

78. One of the arguments which is occasionally produced in favour of maintaining the principle of strict liability is that the introduction of a fault-based trial system would

inevitably increase the length of cases in court. It will be clear from what has already been stated that we would reject this argument, if only on the grounds that, in order to foster an acceptable working relationship between the courts and the Inspectorate, it is essential that the court should be put in full possession of all the relevant facts and, in particular, those relating to the question of fault and blame. There is no doubt that this could lead to an increase in the length of some cases, but, since in the vast majority of cases there is no dispute as to the facts and the defendant firm pleads guilty, this is unlikely to be a serious practical problem. The time spent on legal proceedings is, in any case, mostly spent on the preparation of the case and on travelling to and waiting for the hearing rather than on the hearing itself. It is just possible that the extension of a formally fault-based system for criminal proceedings would encourage more defendants to plead not guilty, but experience in other areas of the law would not suggest that this is a real danger.

79. On the other hand, there is no doubt at all that all forms of legal proceedings are excessively time-consuming. From the experience of the cases which we attended we would estimate that, on average, the institution of legal proceedings of any kind against a firm took two full inspector days, the equivalent of the inspection of some eight or ten factory premises. It is thus totally unrealistic to expect the Inspectorate to attempt to enforce all the minor provisions of the factories legislation, for example, the posting of notices, the maintenance of registers and the like. Nor are the courts likely to be sympathetic to the use of their time for such purposes. We would, therefore, suggest that serious attention be devoted to the possibility of introducing a system of automatic liability for such minor offences, whereby inspectors would be entitled to impose on-the-spot fines of up to £5 or £10, subject to appeal to the courts, for any failure to comply with regulations of this kind which they encounter in the course of their inspections. We are aware that it may be argued that this might jeopardise the good relationships which the Inspectorate tries to foster with co-operative firms, but are not convinced that this need necessarily be the case. Inspectors are inevitably cast in the role of authority-figures and the application of minor sanctions of this kind should not in any way detract from the positive aspects of that role.

The importance of statutory drafting

80. It is important to remember, however, that the prime issue in legal proceedings of any type in respect of regulatory legislation is not the general nature of liability and of possible defences, but the precise form of the specific section of the statute or regulation concerned. The relevance and extent of fault or blame, both in criminal proceedings and in respect of enforcement orders, is determined by the words of the section rather than by general provisions. In some instances a general defence of no negligence may not really be operable. To take an illustration from motoring law, it is not at all clear that the duty to provide rear lights at night can be otherwise than absolute, since the concept of negligence is not readily applicable to the case of a bulb which eventually wears out. We have also referred to the importance of such words as "reasonable", "reasonably practicable" and "suitable" in fixing the extent of liability under the factories legislation. If the Law Commission is concerned with the proper extent of strict liability in its most general application, it is to these individual statutory formulae that attention should be paid, so that consistent differentiation may be made between sections requiring absolute compliance, sections requiring reasonable compliance, sections giving rise to criminal liability and sections involving automatic liability.[30]

The admissibility of evidence

81. A second important finding of the present study was the extent to which the Inspectorate's view of a particular case differed from that which was eventually presented to the magistrates in court. Under the existing system, as we have seen,[31] it is possible for the prosecuting inspector to produce any relevant document in court, as long as he gives prior notice of his intention to the defendant, but the power is restrictively interpreted in some areas. We feel that if a fault-based system of liability, both for improvement actions and for criminal proceedings, is to be maintained, steps should be taken to ensure that the Inspectorate is able to present a fuller picture of the case in court. One way of achieving this would be to make express provision for the

30. See para. 79 as to automatic liability.

31. See paras. 56 and 57.

admissibility of all correspondence between the firm and the Inspectorate, regardless of any special relevance to the issues before the court. Objection might properly be made to this, however, especially in criminal proceedings, on the ground that the court is only entitled to information relevant to the charge before it and that the defendant should not be forced to account to the court for his dealings with the Inspectorate on other matters. We would not feel justified in pressing this suggestion in respect of criminal proceedings, therefore, except in the light of a more general relaxation of the rules of evidence for all purposes. It might be possible, however, to provide for a formal inspector's report to be put before the court on the analogy of a police or probation report in ordinary criminal proceedings, and we feel that it would be quite proper for details of matters raised in previous formal notifications on Form 119 to be included. In the case of criminal proceedings, any such report would, of course, be excluded until a conviction had been recorded, unless it was relevant to the proof of the charge, as, for example, proof of previous warnings or advice for the purpose of proving fault over the particular issue before the court.

82. We feel that the question of admissibility is of more immediate importance than that of the burden of proof. It is arguable that the burden of proving fault should be placed on the prosecution if only to ensure that the full facts are placed before the court, but in view of the undoubted difficulty of proving knowledge or connivance on the part of management we are convinced that the burden of proving due diligence should, as at present, rest with the defendant for the purposes of any statutory defence. The duty of the prosecution, as we envisage it, is to give a factual account of its previous dealings with the firm in question rather than to establish any particular form of fault or blame.

Prosecution policy

83. It is clear from the conclusions we have already drawn that we would support the policy, which we believe to be under consideration, of making greater use of the existing provisions for enforcement orders under sections 54-55 and section 157. This would be in line with our suggestion that a greater differentiation should be made between improvement actions

and criminal proceedings. We also feel that a more general increase in the number of legal proceedings instituted would have a beneficial effect on overall standards of compliance, especially in the case of construction sites where the ordinary inspection and follow-up system is less appropriate than in permanent premises. Though the evidence which we obtained on this point was necessarily of an impressionistic nature, we are reasonably confident that what we have called implied rather than verbal or written threats were marginally more effective in securing compliance in improvement cases. In addition, we feel that the only way to obtain a real increase in the level of fines imposed on persistent offenders is to pursue a policy of more frequent prosecution against such firms, so that magistrates may be presented in court with compelling evidence of past failures on the part of the firm in question. It is very difficult under the present system to convey to the court that the failure from which the proceedings arise is more than an exceptional and isolated instance and the natural reaction of courts is to be lenient on first offenders.

IX SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

84. The following sub-paragraphs summarise the conclusions and recommendations of this Report:-

(1) Proceedings under the factories legislation are generally instituted only where the firm is thought by the Inspectorate to have been at fault, but the conception of fault involved is rather wider than standard legal conceptions (paragraphs 69-70).

(2) There is an important practical difference between proceedings instituted with a view to inducing a firm to improve existing conditions (improvement cases) and those instituted with a view to punishing firms for past failures to comply resulting in accidents or serious risk of injury (accident cases) (paragraph 70).

(3) For improvement cases, the existing provisions for enforcement orders through the courts

should be more widely used and more detailed provision should be included in any new legislation for enforcement orders of this kind divorced from ordinary criminal proceedings. The duty of employers to comply with the law for this purpose should remain absolute (paragraphs 71-73).

(4) For accident cases and other serious breaches of the law, criminal proceedings are appropriate but liability to criminal sanctions should be subject to a general defence of due diligence. Penalties for such offences should be increased (paragraphs 74-75).

(5) Consideration should be given to the possibility of a system of automatic on-the-spot fines for minor contraventions of the law (paragraph 79).

(6) The liability of employees and other individuals for breaches of the law should be regarded as entirely separate from that of employers and the procedure for cross-summons should be amended accordingly (paragraph 76).

(7) Clearer provision should be made for the introduction of evidence on the previous dealings between the Inspectorate and the defendant firm in respect both of improvement and accident cases. In criminal proceedings a report of the firm's previous history of dealings with the Inspectorate should be made available to the bench before the imposition of sentence (paragraphs 81-83).