The rules and principles of applying sanctions and penalties for breaches of the Health and Safety at Work Act, 1974 and associated regulations

Essay

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Health and Safety at Work

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Declaration

This essay has been composed by myself and has not been submitted in any previous application for a degree. All quotations have been distinguished and sources of information acknowledged.

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Abstract:
This discourse is a critical review of the Health and Safety at Work Act, 1974 as an evolving law that dates back to 1775, when Dr Percival published his Treatise of the ‘Chimney Mine Sweepers Cancer’ to the Factories and Workshops Act of 1878, as well as all other ‘Acts’ that had to do with the relationship between employers, employees and the working environment.

Greater attention is given to the key duties and expectations of the various classes of people that are responsible for ensuring that statutory obligations of the Act are imposed under reasonable and practicable conditions, and that methods of enforcement and penalties applicable for breaches and contraventions are established against individuals and firms.

A critical view of the shortcomings of the ‘Act’ is also provided against the benefits derivable with a conclusion on the adequacy of the rules relating to fines and penalties as presently applicable.
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Introduction:
The supremacy of human life is undoubtedly sacrosanct to any legitimate and morally sound society. It is what differentiates human civilized society from that of the animal kingdom where ‘might is supreme’. Chapter 37 of the ‘Statute Book’ of the ‘Parliament of the United Kingdom’ as introduced by the Secretary of State for Employment, Michael Foot on March 22nd, 1974 describes the ‘Health and Safety at Work etc. Act 1974’ (also known as HASAW or HSW) in the following way:

“An Act to make further provision for securing the health, safety and welfare of persons at work, for protecting others against risks to health or safety in connection with the activities of persons at work, for controlling the keeping and use and preventing the unlawful acquisition, possession and use of dangerous substances, and for controlling certain emissions into the atmosphere; to make further provision with respect to the employment medical advisory service; to amend the law relating to building regulations, and the Building (Scotland) Act 1959; and for connected purposes.”

The Health and Safety Executive is saddled with the task of enforcing not only the Act but all other statutory instruments that affect the working environment.

Some Key Elements of the Act:

I. Security of the health, safety and welfare of workers.

II. Protection of citizens from the associated health and safety risks of those at work.

III. Prevention of unlawful acquisition and use of dangerous substances.

IV. Ensuring adequate control and protection of dangerous substances.

V. Control and curtailment of atmospheric pollution relating to the emission of certain classifications of gases during economic activities.


\[2^{\text{Hughes, P (2003) Introduction to Health and Safety at Work.}}\]
Generally, the Act covers every aspect of the working environment by critically integrating the responsibility of parties involved in such a way that it defines the employee, i.e. by covering employer safety responsibility, the contractors, or the suppliers of goods and services used in the working environment. It further integrates the responsibilities of those who are supposed to safeguard the working environment through either management or maintenance and the conduct of the general public in relation to the workplace as a whole.

**Relationship with other aspects of the Law:**

**Employment Law**

This aspect of English Law is perhaps one of the most important drivers of the relationship found in the productive sector of society. The workplace provides a delicate balance between employment and industrial relationships involving the owners of the capital, as expressed in the form of employers and employees. It is therefore not surprising to find that accidents in the workplace account for a significant number of absences from work annually.\(^3\)

**Civil Liability:**

This is also known as Employers’ Liability where a petitioner can claim for negligence and breach of statutory duty as enshrined under the Act, especially where accidents and risky workplaces are involved.

**Social Security Law:**

This used to be commonly part of a system known as ‘Workers’ Compensation’. It is more predominantly found in the United States where it consists of benefits as a result of issues surrounding injuries associated with sustained stress in the workplace.

**Health and Safety Regulations:**

Section 15, ss.1-10 of the Act, subject to the provision of Section 50, empowers the Secretary of the State to make regulations, among which are:

A. To repeal or modify existing statutory provisions.

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\(^3\) Ibid
B. To delegate enforcement of any relevant statutory provisions.
C. To provide exemptions from certain requirements of the applicable provisions.
D. To specify the relevant person or people held responsible in the event of contravention.
E. To exclude indictment proceedings or restrict the extent of punishment (except in cases of maximum fine on indictment).
F. To empower the Executive to issue and approve a suitable code of conduct, with consent in some cases.
G. As a statutory duty of the Executive and local authority, to establish best practices and enforcement through information sharing and cooperation.
H. To appoint inspectors, in writing, for the purpose of providing specialized skills in determination of issues, clearly specifying the extent of the powers of such inspectors.\(^4\)

**Procedure for Establishing a Breach of the Act:**
The Secretary of State, Executive, local authorities and appointed inspectors play a very important role in establishing breaches that could lead to the application of sanctions or penalties under the Health and Safety at Work Act, 1974.

An inspector, either alone, or in company of other persons he considers capable of enabling him to carry out his duties, can at any reasonable point in time decide to pay a visit to a place of work, be it privately owned or a public agency (or wherever he feels necessary at any reasonable point in time) for the purpose of assessing a potential or an existing breach. He is also given the power to request a police escort, if he feels a personal threat exists that could prevent him from carrying out his legitimate function.

The inspector is also empowered to implement any equipment or tool that could assist him in carrying out his duties, and wherever he feels necessary, can restrict changes to settings for a reasonable time to enable him to carry out tests or analyses.

He is also allowed to collect samples, measure or photograph scenes, and authorize evacuation of substances or equipment for the purpose of prosecution (or immediate destruction if assessed as critical in some cases), providing he feels they endanger human health and safety. However, it is the responsibility of the Secretary of State to provide adequate regulations or guidelines on procedures for taking samples and the manner of dealing with different types of samples taken. The inspector is required to have a person he believes will be able to provide answers during his routine inspection and must also ensure that this person signs a declaration that these answers are truthful, although they cannot however be admitted as evidence against them.\(^5\) Employers or their agents are required to provide access to any information, books or records, which relevant statutory provisions require them to keep, and that are necessary in the course of an investigation.\(^6\)

The law requires inspectors to consult with appropriate responsible persons or their agents on the potential dangers that warrant exercising whatever power he intends to exercise. The inspector is also obliged to give a sample (where appropriate) to responsible persons for whom samples have been taken, or designated for destruction. These responsible persons are permitted to exercise or witness the inspectors'\(^7\) power unless such an action is deemed to be prejudicial to the safety of the state. If there is cause for a sample or an item to be moved from any premises in the absence of a person deemed responsible, the inspector is required to conspicuously display a notice to the responsible person describing the item moved and the appropriate powers listed under the Act being applied.\(^8\)

**Improvement Notice:**

It is a statutory responsibility of the inspector to bring to the notice of any person, existing or past contraventions following a routine inspection, especially due to the fear that such contraventions are likely to continue in future. This official notification is what is referred to as “an improvement notice”. Here, the inspector is expected to

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\(^5\) S.20 (7) of the act.

\(^6\) The Health and Safety Executive.

\(^7\) Ibid

\(^8\) Ibid
communicate his findings and the basis for his opinion, requiring that a remedy to the observed contravention be provided within a specified period of time⁹.

**Prohibition Notice (22):**

If, in the opinion of an inspector, a particular activity, process or function poses a threat to human health or safety, then the law empowers him to serve the person or company a prohibition notice stating his opinion and the basis for such an opinion. He is expected to clearly state the potential risks inherent in the existing process that could lead to applicable contraventions of provisions. The notice will state a given time frame within which it expects a remedy to be put in place or an immediate suspension if in the inspector’s opinion it is necessary.¹⁰

**Offences under the Act:**

The HASAW Act broadly classifies failure to observe the following as offences:

1. Obligation of Employers to Employees (reasonably practicable).
   A. To ensure employees’ welfare and safety at work.
   B. To provide and maintain a safe plant and systems that are not dangerous to workers’ health.
   C. To safely transport the handling and storage of articles and substances that do not pose risks to the health of workers.
   D. To provide necessary facilities, information, instructions, training and supervision to adequately provide a safe working environment.
   E. To provide a safe environment within the employer’s control by ensuring well maintained access and exit to the premises, without any risk to the health of employees.
   F. To bring to the notice of employees a periodically revised, written statement of the organization’s health and safety policy.
   G. To allow in some cases, under the Secretary of State’s provision, the appointment of safety representatives of a recognized trade union who

⁹ Ibid
¹⁰Penn, N C (2005) Local authority health & safety enforcement.
shall consult with the employers on matters relating to the health and safety of employees.

H. To consult and maintain a cooperative relationship with safety representatives for an effective arrangement to ensure the promotion and development of a safe working environment.

I. To establish within the Secretary of State’s regulation, under advice from the above safety representatives, a safety committee with the task of reviewing measures taken for a healthy and safe working environment.¹¹

2. Obligation of Employers and the Self-Employed to Non-employees:

A. It is expected that employers should ensure that the health and safety of people not in their employment are not subject to risk.

B. It is also expected that every self-employed person will ensure that his and other people’s health and safety are not put to risk within the area under his control.

C. As may be necessarily prescribed, employers and all self-employed persons will be expected to provide information under peculiar circumstances and in a specified manner to non-employees likely to be affected by the working environment concerning issues that could well affect their health and safety.¹²

3. The obligation to others of the persons concerned with the premises.

The law imposes duties on people that relate to others who are not their employees, but who use the given non-domestic premises as a working environment:

A. It will be the responsibility of people who have control over premises to provide a safe means of access and exit and to ensure the safety of plants and substances available for use within the premises without exposing people to health and safety risks.

¹¹ Ibid
¹² Ibid
B. This responsibility also extends in the same capacity to those that have contract or tenancy relations to maintain, or else the responsibility to repair premises which, in general, could be either for, or not for profit.

4. The control of certain premises with harmful emissions into the atmosphere.\textsuperscript{13}

A. It will be the responsibility of the persons identified above to ensure that all activities in premises under their control which are concerned with emissions into the atmosphere, are carried out in a reasonable way so that the substances emitted are neither offensive nor noxious. They must also ensure that such substances are rendered harmless in instances where they are inevitably released into the atmosphere.

B. There must be an appropriate use of plants that emit into the atmosphere by ensuring adequate supervision of their operation.

5. The obligation of manufacturers of articles or substances used in the working environment represents the duty of designers, manufacturers, importers or suppliers of materials used at workplaces involving the public:\textsuperscript{14}

A. It is obligatory to ensure that articles designed and fabricated will be safe and without health and safety risks when setting up, maintained or cleaned by a person at a work place.

B. It is a duty to ensure that appropriate tests necessary to ascertain the above obligation are carried out.

C. Persons supplying articles must be adequately informed of the purpose of the designed article and necessary tests carried out, as well as any other information that could guarantee safe installation, dismantling or disposal.

D. It must be accepted that the persons being supplied articles are kept informed of issues that are likely to lead to risk hazards after the revision of the information provided earlier.

E. It is the duty of persons to ensure that articles erected or installed for use by the public at workplaces or for entertainment are established in such a way that they do not pose a risk to the health and safety of their users.

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\textsuperscript{13} The Health and Safety Executive.

\textsuperscript{14} Ibid.
F. Manufacturers, importers or suppliers of materials are expected to ensure that substances can be safely handled, transported, stored or processed without jeopardizing the safety of persons involved.

G. It is also their duty to ensure that adequate satisfactory research, tests and examinations required for the safe use of articles as well as the elimination or minimization of risks are carried out, including disclosure of information about the nature of any properties used that could affect the safety and health of users.

H. The importers of articles manufactured outside the United Kingdom will be held responsible for meeting all the requirements necessary to ensure the safety of articles regarding various categories of users, with reference to handling, transportation, processing, storage etc.

I. If a person supplies materials to a user from a specific source on the basis of conditional sales, hire–purchase, or credit sales agreements, it will be the duty of the user to ensure compliance with all safety requirements pertaining to the manufacturer.

J. Obligations will however be waived in instances where it is shown that there has been risk to safety and health, not as a result of negligence, but as an outcome of unforeseen occurrences which could not have been reasonably ascertained prior to materialization.

6. Obligation of employees at work.

   A. Every employee is expected to take reasonable care of himself while at work and also to be mindful of the health and safety of others that are likely to be affected by his activities at the same workplace.

   B. He is also expected to cooperate with his employer to meet any requirements of the statutory provisions.

7. Misuse of, or interference with, items provided in pursuance of meeting statutory provisions:

   No one is expected to deliberately or recklessly misuse or interfere with items or facilities provided to safeguard and protect the health of others or other statutory provisions.
8. Employers must not charge employees for tasks performed pursuant to certain requirements.

9. Health and safety regulations must not be contravened, but rather include other requirements or prohibitions.

10. An inspector must not be deliberately obstructed from performing his duties.

11. An inspector’s requirement or prohibition notice must not be contravened.

12. Any requirement of the Commission to investigate, make inquiries, or intentionally obstruct any person from performing or exercising his duties as mandated by the Commission is prohibited.

13. It is not permitted to attempt or prevent any person from appearing or answering an inspector’s enquiries.

14. There must be no obstruction to a customs officer exercising his powers.

15. Requirements imposed through notice must not be contravened.

16. Unlawful use and disclosure of any information as contained in the Statistics of Trade Act, 1947 is prohibited.

17. It is not permitted to make false or reckless statements in dubious compliance to statutory provisions.

18. It is unlawful to deliberately falsify a notice, document or entry in any register as required by the relevant statutory provisions, with the intention of deceiving or using similar documents for the purpose of deceit.

19. It is prohibited to falsely pretend to be an inspector.

20. It is unlawful to fail to comply with a court order after conviction for an offence.

21. It is unlawful to fail to comply with a court order to forfeit or destroy substances.

22. Contravention of a conviction will be taken as a further offence and will be liable on summary conviction for a fine not exceeding £100 daily from the day a contravention is prolonged.\footnote{Compendious Abstract of the public general Acts of the UK.}
Penalties for Offences:

**Limited Fines**

**£5,000 maximum**
Failure of an employee to take care of his health and safety and other duties of the employee to the employer, together with a breach of health and safety regulations incurs a fine of up to £5,000.\textsuperscript{16}

**£20,000 maximum**
Summary convictions could attract up to £20,000. These are mostly cases involving giving false information to inspectors, or preventing persons from appearing to answer questions from an inspector. Other misdemeanors include falsely claiming to be an inspector or preventing him from discharging his duties.\textsuperscript{17}

**Unlimited Fines**
This mostly involves issues relating to the contravention of general duties, health and safety regulations, orders to seize or destroy articles, or requirements of notice. Others consist of a failure to comply with remedial orders or individual connivance.

**Guidelines for Sanctions and Penalties**

**A General Principles:**
Level of risk, the extent of potential danger, and the likely depth of breach of statutory obligations and general regulations are key determinants of the gravity of an offence. Others are an effective assessment of the dependant’s resources in view of likely consequences on his business, together with the defendant’s conduct prior to the application of sanctions or penalties.

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\textsuperscript{16} Health and Safety (Offences) Act 2008.
\textsuperscript{17} Ibid
B  Aggravating Factors
These are obvious signs of carelessness and laxity on the part of some people that could result in stiffer penalties. They include accidents resulting in loss of life or a vital component of the body, refusal to heed to previous warnings and deliberate flouting of safety regulations for financial gains.

C  Mitigating Reasons
These are indications that show regret on the part of the defendant for offences committed, such as prompt admission of liability, and a guilty plea. The defendant with a good safety record and willingness to remedy observed deficiencies is also likely to draw sympathy on the extent of the sanction.

Use of approved codes of practice to criminal proceedings:
The inability to observe part of any approved code of practice does not render the person or people liable to either criminal or civil proceedings, except where an allegation arises in the course of another proceeding connected with the alleged contravention.

Alternatives for Law Enforcement:
1.  Disqualification of Directors.
   This is a possible option for sanctioning company directors operating in error by refusing to comply with statutory requirements of the Act in accordance with the Company Directors Disqualification Act, 1986.

2.  Naming and Shaming Register.
   This is a strategy that aims at depicting irresponsibility on the part of those companies or individuals that fail to meet their corporate responsibilities relating to health and safety at work. It is likely to create a negative image in the public perception of an organization, with potentially negative consequences, as business partners would not necessarily want to expose any of their interests to association with stiffer penalties, as in cases of custodial sentencing.
3. **Special Licensing Scheme.**
   This identifies certain levels of activity that require special skills and are extremely hazardous to humans. The use of explosives and clearing of asbestos sites are prominent among these.\(^{18}\)

4. **Moral Suasion.**
   Another strategy for obtaining compliance is through intensive persuasion, advice and enlightenment rather than through force.

5. **Improvement and Prohibition Notices.**
   This kind of enforcement is now the most widely used method of enforcing the law. Contraventions and likely repeats of violations are handled by issuing improvement notices. While those related to likely risks of serious injury are issued prohibition notices, irrespective of whether they manifest immediately or in the future, as in *Smallwood v Railtrack plc* [2001]\(^{19}\) EWHC Admin 78. Generally, the issuance of notice has a big impact because a breach of it amounts to a criminal offence, in addition to the original violation. Appealing an improvement notice automatically suspends such notice until the case is determined, unlike the case of a prohibition notice.

**Criticisms of the Act:**

I. “So far as is reasonably practicable” is a common phrase associated with the doctrine of the Health and Safety at Work Act, which revolves around the issue of subjectivity on interpretation of what is reasonable or practicable.

II. A claim of negligence needs proof that a dependant has breached a duty of care, resulting in actionable harm to the claimant. This is sometimes difficult to ascertain, as seen in asbestos mesothelioma.

III. Key conflict areas in the administration of the Act that have been a source of worry for public lawyers involve the adoption of administrative notices in the enforcement of the law.

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\(^{19}\)
IV. Legislative integrity over judicial integrity is another contentious area that keeps arising within the subjectivity of most underlying principles in the Act, as Ronald Dworkin thus notes: “the technique of examining a claim of right for speculative consistency is a technique far more developed in judges than in legislators or in the bulk of the citizens who elect legislators”.

V. Too much power in the hands of the Safety Executive Commission.

VI. Use of non-governmental outfits to advise on law-making.

VII. Marmor identifies the three main reasons for the failure of legislative integrity, namely “division of legislative power in the age of devolution; logrolling and compromise; and partisan realignment and continuity of law.”

VIII. A lack of individual liability for directors.

IX. Too much flexibility in the form of exemptions to certain functionaries of the government.

X. Duplication in Scotland due to the existence of similar legislation (The Scotland Act, 1998 is used by the government in defence of its extension to Scotland, as it covers both health and safety and business organizations).

XI. The prosecution of death related cases requires identification of a ‘directing mind’, or a person responsible for the lapses that result in loss or impairment of life, through what is referred to as the ‘Directing Principle’. This has been a major setback to successful prosecutions occurring as a result of a series of failures in public transport disasters.

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22 Ibid
Conclusion:
The Health and Safety at work Act, 1974, as Tuckey notes in Davies v. Health and Safety Executive, “is regulatory rather than prescriptive.” Its main focus is the protection of human life, irrespective of the relationship, as long as there is an established contact with a working environment. This could be physical or environmentally driven as can be established through the emission of obnoxious gases.

The law has extensively covered all identifiable risk-related association at different levels of contact, primarily between employers and employees, manufactures, suppliers, importers, and those responsible for protecting the working place. Different degrees of sanctions and penalties, as seen in addition to the flexibility given to the enforcement agencies, is adequate to provide a good reason for compliance.

According to Lee,^23^ Section 3 of the Compensation Act, 2006 may be viewed as an example of legislative affirmation in reference to Nicholas McBride’s description as “drafted by the ‘Ministry for Stating the Bleedin’ Obvious’ and enacted in order that the Government could claim to be doing something about the UK’s bourgeoning compensation culture. Neither section has any effect whatsoever on the current law, which already acknowledges the points made in each section”.^24^ Unfortunately it is this same analogy that a number of critics of the Health and Safety at Work Act are using in terms of the greater influence of the legislative functions over that of the judiciary. Dialogue is, however, seen to play a critical role in softening this looming differential perception, a classic example is in the case of Chapman v. Chapman.

Therefore, with the door of dialogue and discretion given to enforcement through the principle of “reasonable practicability” and robust general guidelines on sanctions and penalties for breaches or contraventions, it is fair to say that the Health and Safety at Work Act, 1974 is another milestone towards the fulfillment of objectives that date back to 1775.

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^24^ Ibid, p 5
References:


Compendious Abstract of the public general Acts of the UK.

Health and Safety Executive Health and safety regulation, a short guide.


The Health and Safety Executive. Local Authorities Enforcement.


