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CONSTRUCTION SAFETY LAW

APPENDICES

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APPENDICES

Appendix A

Construction Act 1959

REPRINTED ACT

[WITH AMENDMENTS INCORPORATED]

CONSTRUCTION

REPRINTED AS AT 1 JANUARY 1973

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ANALYSIS

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THE CONSTRUCTION ACT 1959

1959, No. 32

An Act to consolidate certain enactments of the General Assembly and to make better provision for the safety and welfare of persons engaged in construction work.

[*15 October 1959*

1. Short Title and commencement—(1) This Act may be cited as the Construction Act 1959.

(2) This Act shall come into force on the 1st day of April 1960.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Construction work" means any work in connection with the construction, erection, installation, carrying out, repair, maintenance, cleaning, painting, renewal, removal, alteration, dismantling, or demolition of—

(a) Any building, erection, edifice, structure, wall, fence, or chimney, whether constructed wholly or partly above or below ground level:

(b) Any road, motorway, harbour works, railway, cableway, tramway, canal, or aerodrome:

(c) Any drainage, irrigation, or river control work:

(d) Any electricity, water, gas, telephone, or telegraph reticulation:

(e) Any bridge, viaduct, dam, reservoir, earthworks, pipeline, aqueduct, culvert, drive, shaft, tunnel, or reclamation:

(f) Any scaffolding;

and includes any work in connection with any excavation, site preparation, or preparatory work, carried out for the purpose of any construction work; and also includes the use of any plant, tools, gear, or materials for the purpose of any construction work:

"Department" means the Department of Labour:

"Employer", in relation to any construction work, means any person who is liable for the payment of wages of men employed on the work or who would be so liable if men were so employed [; and, in respect of the operation of mechanical plant, includes a bailee of the plant, notwithstanding that the bailee is not liable for the payment of the wages of the plant's operator]:

"Harbour works" has the same meaning as in the Harbours Act 1950:

"Mechanical plant" means plant or machinery, the motive power of which is supplied wholly or partly by mechanical means, used in construction work for the hoisting, lowering, carrying, or moving from place to place of material [or workmen] or for the digging or removal of earth or the sinking of piles; and includes any rope, blocks, pulley, sling, or attachment used in connection with any mechanical plant . . . :

"Minister" means the Minister of Labour:

"Notifiable work" means construction work from time to time prescribed as notifiable work by regulations under this Act:

"Road" includes a street and any other place to which the public have access, whether as of right or not; and also includes all bridges, culverts, and fords forming part of any road, street, or other place as aforesaid:

"Scaffolding" means any structure, framework, swinging stage, suspended scaffolding, or boatswain's chair, of a temporary nature, used or intended to be used for the support or protection of workmen engaged in or in connection with construction work for the purpose of carrying out that work or for the support of materials used in connection with any such work; and includes any scaffolding constructed as such and not dismantled, whether or not it is being used as scaffolding; and also includes any plank, coupling, fastening, fitting, or device used in connection with the construction, erection, or use of scaffolding:

["Safety Inspector" or "Inspector" means a Safety Inspector appointed under this Act; and, notwithstanding section 5 of this Act, includes, in respect of construction work carried on in or about—

(a) Any coal mine, an Inspector of Coal Mines within the meaning of the Coal Mines Act 1925:

(b) Any mine, an Inspector of Mines within the meaning of [[the Mining Act 1971]]:

(c) Any mining operations within the meaning of the Petroleum Act 1937, an Inspector within the meaning of that Act]:

"Site", in relation to construction work, means the place where the work is being carried out; and includes

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any area in the immediate vicinity of any such place used for the storage of materials or plant used or intended to be used for the purpose of the work:

[**"Workman"** means any person engaged in any capacity in construction work; and includes an apprentice and an employer when engaged in the performance of any such work.]

"Employer": The words in square brackets were added by s. 2 of the Construction Amendment Act 1970.

"Mechanical plant": The words in square brackets were inserted by s. 2 (1) (a) of the Construction Amendment Act 1969, and the words "but does not include a motorcar or motor truck" were omitted by s. 2 (1) (b) of that Act.

"Safety Inspector" or "Inspector": The definition of these terms was substituted for the original definition by s. 2 (2) of the Construction Amendment Act 1969, and in para. (b) of the definition the Mining Act 1971, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Mining Act 1926.

"Workman": The definition of this term was added by s. 2 (3) of the Construction Amendment Act 1969.

3. Application of Act—(1) The provisions of this Act are in addition to and not in substitution for the provisions of any other Act and nothing in this Act shall derogate from the provisions of any other enactment. Compliance with the provisions of this Act or any regulations under this Act shall not confer any relief or exemption from liability under any other enactment but no person shall be convicted of any offence under this Act in respect of the same matter for which he has been convicted of an offence under any other enactment.

(2) Any provision of this Act or of any regulations under this Act relating to the safety of workmen employed in construction work shall apply also to the safety of persons lawfully in the vicinity of the work, whether or not they are employed in the work.

(3) The provisions of this Act and of any regulations under this Act shall be deemed not to affect any workman if and so long as his presence in any place is not in the course of performing any work on behalf of his employer or is not expressly or impliedly authorised or permitted by his employer.

(4) This Act shall apply only to construction work carried out by an employer on the site of the work by way of his trade or business or in the exercise of his functions or for the purpose of any industrial or commercial undertaking.

[(5) This Act shall not apply to any work carried on in or about any mine or coal mine, except—

(a) Construction work that is carried on above ground and does not extend into the underground workings of the mine or coal mine; and

(b) Construction work that is carried on below ground and is incidental to such work above ground and does not extend into the underground workings of the mine or coal mine.

(6) This Act shall not apply to any work carried on in any quarry within the meaning of the Quarries Act 1944:

Provided that the Minister of Labour, acting with the concurrence of the Minister of Mines, may from time to time by notice in the *Gazette* declare any quarry, or any work to be or being carried on in a quarry, to be a construction work; and in any such case this Act and any regulations for the time being in force under this Act shall apply to the quarry or work, as the case may be.]

Subss. (5) and (6) were substituted for the original subs. (5) by s. 3 (1) of the Construction Amendment Act 1969.

4. Chief Safety Engineer (1) There may from time to time be appointed as an officer of the Department a fit person with suitable engineering experience and qualifications comparable with the standard required for registration under the Engineers Registration Act 1924 to be Chief Safety Engineer under this Act.

(2) The Chief Safety Engineer shall, under the general direction of the Secretary of Labour, be the officer of the Department having control of the administration of this Act and any regulations under this Act.

(3) The Chief Safety Engineer shall have all the powers and functions of a Safety Inspector.

5. Safety Inspectors—(1) There may from time to time be appointed as officers of the Department such number of fit persons to be Safety Inspectors under this Act as may be deemed necessary.

(2) No person shall be appointed under this section as an Inspector unless he has passed such examinations or has such qualifications as may be prescribed by regulations under this Act.

(3) Notwithstanding the provisions of subsection (2) of this section, a person may be appointed for a period not exceeding 12 months as an Inspector on probation without having passed the prescribed examinations or having the prescribed qualifications:

Provided that no person appointed on probation under this subsection shall exercise the powers of an Inspector except under the supervision of an Inspector appointed under subsection (1) of this section.

(4) Every Inspector shall be furnished with a certificate of his appointment in the prescribed form, and on entering any place or premises for the purposes of this Act he shall, if required, produce the certificate to the employer or person in charge.

(5) Every person who forges or counterfeits any such certificate, or makes use of any forged, counterfeited, or false certificate, or personates the Inspector named in any certificate, or falsely pretends to be an Inspector, commits an offence and shall be liable to imprisonment for a term not exceeding 3 months, or to a fine not exceeding [$200], or to both.

In subs. (5) the sum of $200 was substituted for £100 by s. 7 of the Decimal Currency Act 1964.

6. Principal functions of Inspectors—The principal functions of Inspectors under this Act shall be to promote the safety and welfare of workmen engaged in construction work, to advise employers and workmen as to safe practices recommended in respect of construction work, to ensure that the provisions of this Act and regulations thereunder are complied with, to investigate accidents occurring in respect of construction work, and generally to take all such steps as may be desirable to prevent or limit the occurrence or repetition of accidents in construction work.

7. General powers and duties of Inspectors—(1) Every Inspector may—

(a) At any reasonable hour by day or by night enter any place where any construction work is being carried out or where he has cause to believe that any construction work is being carried out and may inspect the work in order to ascertain whether or not the provisions of this Act or regulations thereunder have been or are being complied with:

(b) In making any such inspection, call to his aid any member of the Police or any person whom he may think competent to assist him in the execution of his duty:

(c) Require the production of any record, notice, or other document that any person is by this Act or regulations thereunder required to keep or exhibit in respect of the work and copy any such document or make extracts from it:

(d) Make such examination and inquiry as he deems necessary in order to ascertain whether or not the provisions of this Act or regulations thereunder have been or are being complied with:

(e) Take or remove for purposes of analysis samples of materials or substances used in construction work, subject to the employer or his representative being notified of the intention to take or remove any material or substance for that purpose:

(f) Exercise such other powers and authorities as may be necessary for carrying this Act and the regulations thereunder into effect.

(2) No person shall, on an examination or inquiry by an Inspector under this section, be required to answer any question tending to incriminate himself.

(3) Except for the purposes of this Act and the exercise of his functions under this Act, an Inspector shall not disclose to any person any information which in the exercise of those functions he acquires with respect to any construction work.

(4) Any person who wilfully impedes an Inspector in the execution of his duties under this Act commits an offence against this Act.

8. Notifiable construction work—(1) Where the Governor-General is of the opinion that the carrying out of any construction work or any class of construction work is likely to be dangerous to workmen employed in the work, he may, by regulations under this Act, prescribe that work or that class of work as notifiable work for the purposes of this Act.

(2) Subject to the provisions of subsection (6) of this section, no employer shall commence any notifiable work without having notified the Inspector of the nature of the work and the time when he intends to commence the work.

(3) The notification shall be in the prescribed form and shall contain such particulars as may be prescribed by regulations under this Act.

(4) The notification shall be given to the Inspector at least 24 hours before the time when it is intended to commence the work.

(5) Any employer who commences or carries on any notifiable work which has not been notified to the Inspector in accordance with this section commits an offence against this Act.

(6) Notwithstanding the provisions of this Act, in any case of emergency arising from damage caused by earthquake, storm, rain, flood, lightning, explosion, fire, slip, or washout, or from the blockage or breakdown of any drain or sewer, or any gas, water, or electric supply, or any telegraphic or telephonic communications, it shall not be necessary to comply with the provisions of section 9 of this Act relating to the appointment and notification of a safety supervisor or with the provisions of this section relating to notification of notifiable work before commencing any construction work necessary to deal with the emergency:

Provided that in any such case a safety supervisor shall be appointed and the required notifications shall be given as soon as practicable after the commencement of the work.

As to subs. (1), see S.R. 1968/67.

9. Safety supervisors—(1) Where an employer is unable to exercise personal supervision of any notifiable construction work or a material part of any such construction work, he shall appoint as his representative a suitable person (in this section referred to as a safety supervisor) experienced in the work to exercise that supervision and to carry out the duties and functions referred to in this section.

(2) Where an employer himself intends to carry out the functions of safety supervisor in respect of any work, the provisions of this Act relating to safety supervisors shall apply to the employer in all respects as if he had been appointed safety supervisor for the work under this section.

(3) An employer who appoints a person as a safety supervisor shall not assign such other duties to that person as will prevent him from discharging with reasonable efficiency the duties assigned to him under this section.

(4) An employer may from time to time replace any safety supervisor appointed by him under this section.

(5) The employer shall notify the Inspector in writing of the name and address of any person appointed, whether originally or otherwise, as safety supervisor in respect of the work or part thereof.

(6) The name of the safety supervisor shall be made known by the employer to all workmen employed on the work in respect of which any such supervisor is appointed.

(7) Subject to the provisions of this Act, it shall be the duty of each safety supervisor to ensure that the safety provisions of this Act and of any regulations under this Act are complied with in respect of the work for which he is appointed and, if he discovers any breach of any such provision or any defect in the carrying out of any construction work likely to be a source of danger to any person or property, to report the breach or defect to the employer.

(8) For the purpose of exercising his functions the safety supervisor shall remain on duty on the site of the construction work during such periods as may be necessary and the Inspector may, if he thinks fit, give directions to the employer that a safety supervisor shall be on duty during such hours and in such circumstances as may be specified in the directions. It shall be a ground for the replacement of a safety supervisor that he has not been on duty for sufficient periods to enable him to carry out his functions adequately or that any directions by an Inspector under this subsection have not been complied with.

(9) The liability of an employer under this Act shall not be affected by any failure of a safety supervisor to exercise his functions under this section.

(10) Subject to the provisions of subsection (6) of section 8 of this Act, if any notifiable construction work is carried on without a duly appointed safety supervisor for the time being holding office as such being on duty in accordance with this section, the employer commits an offence against this Act.

(11) Nothing in this section shall be construed as preventing 2 or more employers from jointly appointing the same safety supervisor in respect of any construction work on the same site.

(12) Where a safety supervisor is required by any provision of this Act or of regulations under this Act to exercise or carry out any powers, functions, or duties, the powers of an Inspector shall not be deemed to be affected or limited in any way by any such provision.

10. Replacement of safety supervisors—(1) Where in the opinion of an Inspector any person appointed under section

9 of this Act as a safety supervisor is unfit to hold the appointment by reason of incompetence, or gross negligence, or misconduct in the performance of his duties under this Act, the Inspector shall notify in writing the employer by whom the safety supervisor was appointed that the safety supervisor shall no longer hold office as such for the construction work in respect of which he was appointed and that a new safety supervisor be appointed in his stead.

(2) A duplicate of the notice given to the employer under subsection (1) of this section shall also be delivered to the safety supervisor to whom the notice relates.

(3) On the service of any duplicate notice under subsection (2) of this section the person to whom it relates shall be deemed to be no longer in office as a safety supervisor in respect of the construction work for which he was appointed.

(4) Any employer who employs any person in respect of whom a notice has been given under subsection (1) of this section as safety supervisor for the construction work to which the notice relates, and any person who acts as safety supervisor for that construction work after a duplicate of the notice has been given to him under subsection (2) of this section, commits an offence against this Act.

Safety Provisions

11. General rules—The following general rules shall be observed where any construction work is being carried out:

(a) Every employer shall exercise such supervision of the work as will ensure that the provisions of this Act and of regulations thereunder are complied with or, if he is unable to exercise sufficient personal supervision for that purpose, shall ensure that the work is adequately supervised on his behalf:

(b) All reasonable precautions shall be taken to ensure the safety of workmen employed in the work:

(c) All temporary works shall be constructed of suitable material and be of adequate strength for the purpose intended:

(d) All apparatus, plant, or gear used in connection with the work shall be operated by competent workmen:

(e) Where the work is being carried out on, under, or over a road, such notices or warning devices as may be necessary to warn persons using the road of any danger likely to arise from the use of the road,

and such screens, barricades, or other means as may be necessary to prevent workmen employed on the work and persons using the road from placing themselves in a position of danger in relation to the work, shall be provided by the employer:

[(f) The provisions of any enactment making provision for the safety of persons and applicable in respect of workmen engaged in any construction work shall be complied with by the employer and workmen engaged in that construction work.]

Para. (f) was substituted for the original para. (f) by s. 2 of the Construction Amendment Act 1966.

12. Safety of excavations—The following rules shall be observed in respect of excavations carried out in connection with construction work:

(a) Every such excavation shall, as far as practicable, be securely protected and made safe for workmen employed in or about the excavation:

(b) All side strutting of any excavated face, and all underpinning of any load superimposed above any excavated face, shall be properly designed, constructed of good materials, and of sound construction with a sufficient reserve of strength for the loads likely to be imposed on the strutting or underpinning:

(c) Every coffer dam or caisson or part thereof shall be properly designed, constructed of suitable and sound material of adequate strength, and properly maintained. Every such coffer dam or caisson shall, where necessary, be specially secured in position so as to prevent any movement which may endanger any workmen employed in the work. Adequate provision shall be made for safe working conditions when compressed air is used in any such work:

(d) Every employer before commencing any such excavation shall ascertain, as far as practicable, the location and nature of all underground services providing for sewerage, drainage, telephonic or telegraphic communications, or the reticulation of water, gas, or electricity likely to be affected by the excavation, and shall take such steps as may be necessary to prevent danger to workmen or unnecessary interruption to any such service:

(e) Work in connection with any excavation work of a kind prescribed in that behalf by regulations under this Act shall not be carried out except by competent workmen under the charge of a person having such qualifications as may be so prescribed.

13. Safety of scaffolding—The following rules shall be observed in respect of scaffolding used in connection with construction work:

(a) Suitable and sufficient scaffolding shall be provided where any such construction work cannot be carried out safely by other means:

(b) Scaffolding shall be of a kind suitable for the purpose for which it is used, properly constructed of sound material, and constructed with a sufficient reserve of strength having regard to the loads and stresses to which it may be subjected:

(c) Scaffolding of a height or kind prescribed in that behalf by regulations under this Act shall not be erected, altered, interfered with, or dismantled except by competent workmen under the charge of a person having such qualifications as may be so prescribed:

(d) Scaffolding to which paragraph (c) of this section applies shall be examined in accordance with and at such times as may be prescribed by regulations under this Act and a record of all such examinations shall be kept by the employer and the record shall be available for inspection by the Inspector at the site of the work.

14. Safety of mechanical plant—The following rules shall be observed in respect of mechanical plant used in connection with construction work:

(a) All such mechanical plant shall be constructed of suitable and sound materials, shall be maintained in good order and condition, and shall be of adequate strength having regard to the purpose for which it is to be used:

(b) Mechanical plant of a kind or class prescribed in that behalf by regulations under this Act shall not be erected, altered, interfered with, or dismantled except by competent workmen under the charge of a person having such qualifications as may be so prescribed:

(c) Mechanical plant to which paragraph (b) of this section applies shall be examined in accordance with and at such times as may be prescribed by regulations under this Act and a record of all such examinations shall be kept by the employer and the record shall be available for inspection by the Inspector at the site of the work:

(d) Mechanical plant of a kind or class prescribed in that behalf by regulations under this Act shall not be operated [by any person except under the supervision of a person] having such qualifications as may be so prescribed.

In para. (d) the words in square brackets were substituted for the words "or left in charge of any person except a person" by s. 2 of the Construction Amendment Act 1971.

15. Safety of plant, tools, and gear—The following rules shall be observed in respect of plant (other than mechanical plant), tools, and gear used in connection with construction work:

(a) Any such plant, tool, or gear shall be constructed of suitable and sound materials, shall be maintained in good order and condition, and shall be of adequate strength and suitable for the purpose for which it is used or intended to be used:

(b) Plant, tools, or gear of a class or kind prescribed in that behalf by regulations under this Act shall not be used in construction work except subject to such conditions as may be prescribed in the regulations and by persons having such qualifications as may be so prescribed.

16. Use of explosives—The use of explosives or the carrying out of blasting operations in connection with any construction work shall not take place except in accordance with such regulations as may be made in that behalf under this Act. Any such regulations may provide that any such use or operations shall be in charge of a person having such qualifications as may be prescribed in that behalf.

17. Health and welfare provisions—(1) Subject to regulations under this Act, every employer shall provide and maintain at places conveniently accessible to workmen employed by him in any construction work adequate and suitable—

(a) Supplies of drinking water;

(b) Accommodation for clothing;
(c) Accommodation for meals;
(d) Sanitary conveniences;
(e) First-aid facilities;
(f) Washing facilities; and
(g) Provision for the drying of clothes.

(2) Subject to regulations under this Act, every employer shall at all times, in respect of any construction work being carried out by him, make adequate and suitable provision for—

(a) Lighting and ventilation;
(b) Safe means of access and egress;
(c) The prevention of fire; and
(d) The dewatering of wet places.

(3) Regulations under this Act may prescribe measures to be taken to ensure compliance with subsections (1) and (2) of this section and may prescribe such other measures to be taken and safeguards to be provided to secure the health and welfare of workmen employed in construction work or of any class of those workmen as may be considered necessary by the Governor-General in Council.

(4) Without limiting the general power contained in subsection (3) of this section, it is hereby declared that regulations may be made under this Act providing, in respect of workmen engaged in construction work, for the supply and use of protective clothing and equipment, the protection of eyes, and the protection from harmful effects arising from such causes as dust, fumes, gases, noise, and shock from explosives.

[**17A. Protection from harmful noise**—(1) If, in the opinion of the Medical Officer of Health, any noise arising from the carrying out of any construction work is likely to cause impairment to the hearing of workmen, the employer shall take all such steps as may be practicable to prevent the workmen from being exposed to the noise.

(2) If, in the opinion of the Inspector, it is not practicable to prevent exposure to the noise by reducing the noise level, or by isolating or insulating the work, the employer shall cause every workman exposed to the noise to be provided with a personal ear protection device of a type approved by the Medical Officer of Health.]

This section was inserted by s. 2 of the Construction Amendment Act 1972.

18. Directions by Inspector to ensure safety—(1) Where it appears to an Inspector that any construction work is being carried out in such a manner as to be dangerous to any workman employed in the construction work, he shall give to the employer for the work such directions in writing as the Inspector thinks necessary to prevent accidents, and the employer shall forthwith carry out any such directions.

(2) Any directions under subsection (1) of this section may be given by the Inspector either to the employer or to any person apparently in charge of the work or acting as safety supervisor in respect of the work to which the notice relates and, if the notice is given to any such person, it shall be his duty forthwith to bring the directions to the notice of the employer and, within the limits of his functions as an employee, to give effect to the directions.

(3) Where an Inspector gives any directions under subsection (1) of this section, he may also, at the same time or subsequently, order any persons to cease forthwith such work in connection with the construction work as may be specified in the order until the directions are complied with, and the employer shall advise all workmen likely to be affected by the order.

(4) Every person who, without lawful excuse,—

(a) Being an employer, fails to comply with any direction or order of an Inspector under this section;

(b) Being a workman, and having knowledge in any manner of any direction or order of an Inspector under this section, does any act or thing which, if done by the person to whom the direction or order was given would constitute an offence,—

commits an offence against this Act.

[**18A. Codes of practice**—(1) In this section and in sections 18B and 18C of this Act, "code of practice" means a recommended practice; and includes a description of any commodity, process, or practice, by reference to its nature, quality, strength, purity, composition, quantity, dimensions, weight, grade, durability, origin, age, or other characteristics; and also includes a glossary of terms, definitions, or symbols.

(2) The Chief Safety Engineer may, for the purposes of this Act, from time to time issue codes of practice, and may from time to time amend or revoke any such code of practice.

[**18B. Codes of practice to be approved by Minister**—(1) No code of practice, and no amendment or revocation of a code

of practice, shall have any force or effect until it has been approved by the Minister.

(2) The Minister shall not approve any code of practice, or amendment or revocation of a code of practice, unless—

(a) Not less than 1 month's notice of the Chief Safety Engineer's intention to apply for approval has been published in the *Gazette*; and

(b) Such persons or representatives of persons as the Minister considers will be affected thereby have had an opportunity to consider it and to comment thereon to the Minister.

(3) Whenever the Minister has approved any code of practice, or any amendment or revocation of a code of practice, notification thereof shall be published in the *Gazette*. Every such code of practice, amendment, or revocation shall in addition be promulgated in such manner as the Minister directs.

(4) The fact that the Minister has approved any code of practice or amendment or revocation of a code of practice shall be conclusive evidence that the requirements of this section have been complied with.

[18c. **Citation and proof of codes of practice**—(1) In any regulations made under this Act any code of practice or amendment of a code of practice may, without prejudice to any other mode of citation, be cited by the title or reference given to it by the Chief Safety Engineer, and by its date of issue; and such citation shall be deemed to include and refer to the latest code of practice or amendment in existence when the regulations were made.

(2) Without affecting any other method of proof, the production in any proceedings of a copy of any code of practice or amendment of a code of practice purporting to be issued by the Chief Safety Engineer, shall, in the absence of proof to the contrary, be sufficient evidence that it has been issued under the authority of section 18A of this Act and that it has been approved by the Minister under section 18B of this Act.]

Ss. 18A–18C were inserted by s. 3 of the Construction Amendment Act 1970.

Accidents

19. Accidents in connection with construction work—(1) In every case where there occurs in connection with any construction work any accident causing death or serious . . . injury [or illness] to any person, written notice of the accident

shall, as soon as practicable but not later than 48 hours after the accident, be delivered or posted to the Inspector.

(2) The notice shall be in the prescribed form and shall be given by the employer for the work.

(3) Except for the purpose of saving life or preventing further injury [or illness] or of preventing serious danger to life or property, the part of the construction work where the accident occurred shall not, if a continuance of the work is likely to prevent discovery of the cause of the accident, be interfered with and no person shall do any act likely to prevent the discovery of the cause of the accident until authorised by an Inspector.

(4) For the purposes of this section the expression ["serious injury or illness" means an injury or illness] that is likely to incapacitate the sufferer from work for at least 48 hours.

In subs. (1) the word "bodily" was omitted by s. 2 of the Construction Amendment Act 1967, and the words "or illness" were inserted by s. 4 (1) of the Construction Amendment Act 1969.

In subs. (3) the words "or illness" were inserted by s. 4 (2) of the Construction Amendment Act 1969.

In subs. (4) the words in square brackets were substituted for the words "'serious injury' means an injury" by s. 4 (3) of the Construction Amendment Act 1969.

20. Inquiries into accidents—(1) Where any accident occurs in connection with any construction work, the Minister may direct that an inquiry shall be held before a Court of Inquiry consisting of a Magistrate and, if the Minister so directs, not more than 2 persons having a special knowledge of the particular class of construction work in respect of which the accident occurred.

(2) The members of the Court of Inquiry shall be appointed by the Minister.

(3) The purpose of the inquiry shall be to establish the cause of the accident and the inquiry shall be conducted in such a manner as to afford any of the following persons the opportunity of attending the inquiry by himself, his counsel, or agent, and of being sworn and examined as an ordinary witness, and of cross-examining witnesses, that is to say:

(a) Any employer in respect of the work where the accident occurred:

(b) The personal representative of any person killed in the accident:

(c) Any person injured in the accident:

(d) Any Inspector concerned with the inspection of the work:

(e) Any person whose conduct in respect of the accident may be called in question:

(f) A representative of any industrial union of workers to which any workman involved in the accident belongs:

(g) A representative of any industrial union of employers to which any employer concerned with the accident belongs:

(h) Any other person authorised in that behalf by the Court of Inquiry.

(4) The Court of Inquiry shall not be concerned with the civil or the criminal liability of any person arising out of the accident in respect of which the inquiry is being held, and no evidence relating to any such liability shall be admitted by the Court for the purpose of the inquiry unless, in the opinion of the Court, the evidence is necessary for establishing the cause of the accident:

Provided that nothing in this subsection shall be so construed as to require any person to answer any question tending to incriminate himself.

(5) For the purposes of any inquiry under this section the Court of Inquiry shall have the powers of a Magistrate's Court in any case where jurisdiction is conferred on a Magistrate or 1 or more Justices in relation to any matter in respect of which proceedings may be commenced by an information under the Summary Proceedings Act 1957.

(6) Subject to the provisions of this Act and of any regulations thereunder, the Court of Inquiry may regulate its own procedure.

(7) The Court of Inquiry, after conducting an inquiry under this section, shall make to the Minister a full report containing a complete statement of all the circumstances relevant to the subject-matter of the investigation, and of the opinion of the Court thereon, accompanied by such reports of or extracts from the evidence and such observations as the Court thinks fit.

Appeals

21. Appeals from Inspector's decisions—(1) In any case where an Inspector requires the replacement of a safety supervisor under section 10 of this Act or has given a direction or order under subsection (8) of section 9 or section 18 of this Act, the employer in respect of the construction work

may, within 14 days after the date of notification of the decision, appeal to a Magistrate from the decision of the Inspector.

(2) On the hearing of any such appeal the Magistrate may either confirm, modify, or reverse the decision appealed against.

(3) The decision of the Magistrate on any appeal under this section shall be final and conclusive.

(4) Every appeal under this section shall be made and dealt with by way of originating application, on notice, under the rules of procedure for the time being in force under the Magistrates' Courts Act 1947, and the provisions of those rules shall apply accordingly.

(5) Pending the determination of any such appeal any requirement, direction, or order to which the appeal relates shall be deemed to be suspended:

Provided that no person shall be excused from complying with any order under section 18 of this Act to cease work on the ground that an appeal under this section against the order is pending.

Liabilities of Employers and Duties of Workmen

22. Liability of employers—In every case where under this Act any requirement, obligation, rule, or provision is imposed or enacted or required to be observed with respect to or in connection with any construction work the employer shall cause the requirement, obligation, rule, or provision to be duly and faithfully complied with or observed, and if the requirement, obligation, rule, or provision is not duly and faithfully complied with or observed the employer commits an offence against this Act.

23. Duties of workmen—Every workman employed by an employer who fails to comply with such requirement under this Act as relates to the performance of any act by him or [without reasonable cause] does any act or thing likely to endanger himself or others or wilfully or negligently disregards any instructions given to him by an authorised person for the purpose of securing the observance of this Act or any regulations thereunder, commits an offence against this Act.

The words in square brackets were substituted for the word "wilfully" by s. 3 of the Construction Amendment Act 1972.

Penalties and Proceedings

[24. General penalty—Every person who commits an offence against this Act [[or against any regulations for the time being in force under this Act]] for which no penalty is provided elsewhere than in this section is liable to a fine not exceeding [[$1,000]] and, if the offence is a continuing one, to a further fine not exceeding $10 for every day on which the offence has continued:

Provided that where the offence does not directly involve the safety of workmen employed in construction work, the fine shall not exceed $100, and if the offence is a continuing one, the further fine shall not exceed $2 for every day on which the offence has continued.]

This section was substituted for the original s. 24 by s. 3 of the Construction Amendment Act 1967.

The words in the first set of double square brackets were inserted by s. 2 (1) of the Construction Amendment Act 1968.

The expression "$1,000" was substituted for "$500" by s. 3 of the Construction Amendment Act 1971.

25. Employer may have actual offender charged—(1) Where an employer is charged with an offence against this Act, he shall be entitled upon information duly laid by him to have any other person whom he alleges to be the actual offender brought before the Magistrate on the same charge; and to enable both charges to be heard together, the charge against the employer may be adjourned for such time as the Magistrate thinks reasonable.

(2) In any such case, if the charges are heard together and the offence is proved, but the Magistrate finds that—

(a) The offence was committed in fact by the said other person, without the knowledge, consent, or connivance of the employer; and

(b) That the employer had done all that could reasonably be expected of him to prevent the offence,—

that other person shall be convicted of the offence, and the employer shall not be guilty of the offence.

(3) If, before the commencement of any proceedings against an employer in respect of any offence under this Act, the Inspector is satisfied that if any other person were charged with the offence under the foregoing provisions of this section that other person would be convicted of the offence, the Inspector shall proceed against the person whom he believes to be the actual offender without first proceeding against the employer.

26. Proceedings to be before Magistrate alone—(1) All proceedings in respect of offences or matters of complaint under this Act shall be taken in a summary manner and shall be heard before a Magistrate alone.

(2) Except as provided in section 25 of this Act, all such proceedings as aforesaid shall be taken only on the information or complaint of an Inspector who shall not be called upon to prove that he holds that office and all such proceedings may be continued and conducted by the same or any other Inspector or any person permitted by the Magistrate to conduct the same.

27. Provisions in respect of proceedings—(1) With respect to proceedings by an Inspector against any person for any offence against this Act or any regulations under this Act, the following provisions shall apply:

(a) The proceedings shall be commenced within 6 months after the offence was committed:

Provided that if the offence consists of non-compliance with an Inspector's direction and notice of appeal has been given, the proceedings shall not be commenced, nor shall the aforesaid limit of time begin to run, until the appeal has been disposed of or has lapsed:

(b) The proceedings shall be deemed to be commenced when the information or complaint is laid by the Inspector:

(c) For the purposes of the aforesaid limit of time a continuing offence shall be deemed to be committed on the latest day on which it is continued next preceding the commencement of the proceedings.

(d) It shall lie on the defendant to bring himself under exemption, proviso, excuse, or qualifications, and it shall not be necessary to negative the same in the information or complaint.

(2) The Inspector or any other party who may be dissatisfied with the judgment of the Court on any summary proceedings under this Act, other than an appeal under section 21 hereof, may appeal to the Supreme Court in the manner provided by the Summary Proceedings Act 1957.

28. Prevention of continued non-observance of Act or regulations—In any proceedings against any person in respect

of the non-observance of any of the provisions of this Act or of any regulations under this Act, the following provisions shall apply:

(a) The Magistrate, in addition to or instead of imposing a fine, may by order require the defendant to do any specified work or to adopt any specified means for the purpose of preventing further such non-observance, and may specify a time within which the order shall be obeyed:

(b) The time so specified may be extended by the Magistrate on the application of the defendant:

(c) If an order is made instead of imposing a fine, the Magistrate shall adjourn the proceedings until the expiry of the time specified in the order; and if the order is duly obeyed he may, if he thinks fit to do so, impose no penalty in respect of the offence:

(d) If default is made in duly obeying the order within the time or extended time specified in that behalf, the defendant commits an offence, and shall be liable to a fine not exceeding [$10] for every day during which the default continues:

(e) Any fine imposed under paragraph (d) of this section shall be in addition to any fine imposed in respect of the original offence.

In para. (d) the sum of $10 was substituted for £5 by s. 7 of the Decimal Currency Act 1964.

General

29. Notices—(1) Any notice required or authorised to be given by or under this Act to an Inspector shall be given by delivering it or sending it by post to the office of the Department nearest to the construction work to which the notice relates.

(2) Any notice or direction required or authorised to be given by or under this Act to an employer or other person shall be given by delivering it to the person concerned or by sending it by post in a letter addressed to his usual or last known address.

(3) Where any notice or direction is sent to any person by post as aforesaid, the notice shall be deemed to be given at the time when the letter containing it would have been delivered in the ordinary course of post.

30. Regulations—(1) The Governor-General may from time to time, by Order in Council, make regulations in regard to any matter or for any purpose for which regulations are prescribed or contemplated by this Act, and may make all such other regulations as may in his opinion be necessary or expedient for giving full effect to the provisions of this Act, and for the due administration thereof.

(2) Without limiting the general power conferred by subsection (1) of this section, it is hereby declared that regulations may be made for all or any of the following purposes:

(a) Prescribing fees payable under this Act:

(b) *Repealed by s. 2 (2) of the Construction Amendment Act 1968.*

(c) Prescribing qualifications to be held under this Act:

[(d) Requiring compliance with any code of practice or any part or parts of any code of practice (including any amendment thereof) that has been issued under section 18A of this Act.]

(3) All regulations made under this Act shall be laid before Parliament within 28 days after the date of the making thereof if Parliament is then in session and, if not, shall be laid before Parliament within 28 days after the date of the commencement of the next ensuing session.

In subs. (2), para. (d) was added by s. 4 of the Construction Amendment Act 1970.

As to regulations, see S.R. 1968/67.

31. Repeals and savings—(1) The enactments specified in the Schedule to this Act are hereby repealed.

(2) Without limiting the provisions of the Acts Interpretation Act 1924, it is hereby declared that the repeal of any provision by this Act shall not affect any document made or any thing whatsoever done under the provision so repealed or under any corresponding former provision, and every such document or thing, so far as it is subsisting or in force at the time of the repeal and could have been made or done under this Act, shall continue and have effect as if it had been made or done under the corresponding provision of this Act and as if that provision had been in force when the document was made or the thing was done.

32. Act to bind the Crown—This Act shall bind the Crown: Provided that nothing in this Act shall apply to any construction work carried out by members of any of the armed forces of New Zealand in the course of their duties.

33. Act to be administered by the Department of Labour—(1) This Act shall be administered by the Department of Labour established under the Labour Department Act 1954.

(2) *Repealed by s. 3 (2) of the Labour Department Amendment Act 1970.*

SCHEDULE

Section 31 (1) ENACTMENTS REPEALED

1922, No. 49—The Scaffolding and Excavation Act 1922. (1931 Reprint, Vol. VIII, p. 1241.)
1924, No. 35—The Scaffolding and Excavation Amendment Act 1924. (1931 Reprint, Vol. VIII, p. 1249.)
1948, No. 4—The Scaffolding and Excavation Amendment Act 1948.
1949, No. 51—The Statutes Amendment Act 1949: Section 51.
1951, No. 12—The Scaffolding and Excavation Amendment Act 1951.

THE CONSTRUCTION AMENDMENT ACT 1966

1966, No. 40

An Act to amend the Construction Act 1959

[*14 October 1966*

1. Short Title—This Act may be cited as the Construction Amendment Act 1966, and shall be read together with and deemed part of the Construction Act 1959 (hereinafter referred to as the principal Act).

2. *This section substituted a new paragraph for para. (f) of s. 11 of the principal Act.*

THE CONSTRUCTION AMENDMENT ACT 1967

1967, No. 64

An Act to amend the Construction Act 1959

[*23 November 1967*

1. Short Title—This Act may be cited as the Construction Amendment Act 1967, and shall be read together with and deemed part of the Construction Act 1959 (hereinafter referred to as the principal Act).

2. *This section amended s. 19 (1) of the principal Act.*

3. *This section substituted a new section for s. 24 of the principal Act.*

THE CONSTRUCTION AMENDMENT ACT 1968

1968, No. 74

An Act to amend the Construction Act 1959

[*13 December 1968*

1. Short Title—This Act may be cited as the Construction Amendment Act 1968, and shall be read together with and deemed part of the Construction Act 1959 (hereinafter referred to as the principal Act).

2. (1) *This subsection amended s. 24 of the principal Act.*

(2) Section 30 of the principal Act is hereby amended by repealing paragraph (b) of subsection (2).

(3) Regulation 84A of the Construction Regulations 1961 (as inserted by regulation 3 of the Construction Regulations 1961, Amendment No. 1) is hereby revoked.

(4) Regulation 3 of the Construction Regulations 1961, Amendment No. 1, is hereby consequentially revoked.

THE CONSTRUCTION AMENDMENT ACT 1969

1969, No. 11

An Act to amend the Construction Act 1959

[*22 August 1969*

1. Short Title—This Act may be cited as the Construction Amendment Act 1969, and shall be read together with and deemed part of the Construction Act 1959 (hereinafter referred to as the principal Act).

2. (1) (a) and (b) *These paragraphs amended the definition of the term "Mechanical plant" in s. 2 of the principal Act.*

(2) *This subsection substituted a new definition for the definition of the terms "Safety Inspector" or "Inspector" in s. 2 of the principal Act.*

(3) *This subsection added the definition of the term "Workman" in s. 2 of the principal Act.*

3. (1) *This subsection substituted new subss. (5) and (6) for subs. (5) of s. 3 of the principal Act.*

(2) Regulation 4 of the Construction Regulations 1961 is hereby consequentially revoked.

(4) (1) *This subsection amended s. 19 (1) of the principal Act.*

(2) *This subsection amended s. 19 (3) of the principal Act.*

(3) *This subsection amended s. 19 (4) of the principal Act.*

THE CONSTRUCTION AMENDMENT ACT 1970

1970, No. 32

An Act to amend the Construction Act 1959

[*17 October 1970*

1. **Short Title**—This Act may be cited as the Construction Amendment Act 1970, and shall be read together with and deemed part of the Construction Act 1959 (hereinafter referred to as the principal Act).

2. *This section amended the definition of the term "Employer" in s. 2 of the principal Act.*

3. *This section inserted subss. 18A–18C in the principal Act.*

4. *This section added para. (d) to s. 30 (2) of the principal Act.*

THE CONSTRUCTION AMENDMENT ACT 1971

1971, No. 90

An Act to amend the Construction Act 1959

[*8 December 1971*

1. **Short Title**—This Act may be cited as the Construction Amendment Act 1971, and shall be read together with and deemed part of the Construction Act 1959 (hereinafter referred to as the principal Act).

2. *This section amended s. 14 (d) of the principal Act.*

3. *This section amended s. 24 of the principal Act.*

THE CONSTRUCTION AMENDMENT ACT 1972

1972, No. 51

An Act to amend the Construction Act 1959

[*20 October 1972*

1. Short Title—This Act may be cited as the Construction Amendment Act 1972, and shall be read together with and deemed part of the Construction Act 1959 (hereinafter referred to as the principal Act).

2. *This section inserted s. 17A in the principal Act.*

3. *This section amended s. 23 of the principal Act.*

The Construction Act 1959 is administered in the Department of Labour.

WELLINGTON, NEW ZEALAND: Printed under the authority of the New Zealand Government, by A. R. SHEARER, Government Printer—1972

1115/F—72 G

ANALYSIS

1973, No. 53

An Act to amend the Construction Act 1959

[*21 November 1973*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Construction Amendment Act 1973, and shall be read together with and deemed part of the Construction Act 1959 (hereinafter referred to as the principal Act).

2. Delegation of powers by Chief Safety Engineer—The principal Act is hereby amended by inserting, after section 4, the following section:

"4A. (1) The Chief Safety Engineer may from time to time, by writing under his hand, either generally or particularly, delegate to such officer or officers of the Department (possessing suitable engineering experience and qualifications comparable with the standard required for registration under the Engineers Registration Act 1924) as he thinks fit all or any of the powers and functions conferred on him by this Act or by any regulations for the time being in force under this Act, other than the power to delegate under this section.

Price 5c

"(2) Subject to any general or special directions given or attached by the Chief Safety Engineer, any officer to whom any powers are delegated under this section may exercise them in the same manner and with the same effect as if they had been conferred on him directly by this section and not by delegation.

"(3) Every person purporting to act pursuant to any delegation under this section shall be presumed to be acting in accordance with the terms of the delegation in the absence of proof to the contrary.

"(4) Any delegation under this section may be made to a specified officer or to officers of a specified class, or may be made to the holder or holders for the time being of a specified office or class of office.

"(5) Every delegation under this section shall be revocable at will, and no such delegation shall prevent the exercise of any power by the Chief Safety Engineer.

"(6) Every such delegation shall, until it is revoked, continue in force according to its tenor, notwithstanding the fact that the Chief Safety Engineer by whom it was made may have ceased to hold office, and shall continue to have effect as if made by the successor in office of that Chief Safety Engineer.

"(7) Notwithstanding anything in section 5 of this Act but subject to subsection (4) of that section, every person to whom such powers and functions have been so delegated shall, while the delegation continues in force, have all the powers and functions of a Safety Inspector."

3. Regulations—Section 30 of the principal Act is hereby amended by adding to subsection (2) (as amended by section 4 of the Construction Amendment Act 1970) the following paragraph:

"(e) Prescribing fire-protection precautions to be taken in respect of construction work, requiring compliance with such precautions, and requiring the provision of fire-fighting equipment and materials."

This Act is administered in the Department of Labour.

WELLINGTON, NEW ZEALAND: Printed under the authority of the New Zealand Government, by A. R. SHEARER, Government Printer—1973

37464A—73 G

ANALYSIS

1975, No. 64

An Act to amend the Construction Act 1959

[*9 October 1975*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Construction Amendment Act 1975, and shall be read together with and deemed part of the Construction Act 1959 (hereinafter referred to as the principal Act).

2. Interpretation—Section 2 of the principal Act is hereby amended by adding to the definition of the term "construction work" the words "; and also includes any such work carried out underwater, including work on ships, wrecks, buoys, rafts, and obstructions to navigation; and also includes any inspection or other work carried out for the purpose of ascertaining whether construction work should be carried out:".

3. General penalty—(1) Section 24 of the principal Act (as substituted by section 3 of the Construction Amendment Act 1967) is hereby amended—

(a) By omitting the expression "$1,000" (as substituted by section 3 of the Construction Amendment Act 1971), and substituting the expression "$2,000":

(b) By omitting the expression "$10", and substituting the expression "$20".

(2) Section 3 of the Construction Amendment Act 1971 is hereby consequentially repealed.

This Act is administered in the Department of Labour.

WELLINGTON, NEW ZEALAND: Printed under the authority of the New Zealand Government, by A. R. SHEARER, Government Printer—1975

70703A—75 G

ANALYSIS

1976, No. 81

An Act to amend the Construction Act 1959

[*10 December 1976*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Construction Amendment Act 1976, and shall be read together with and deemed part of the Construction Act 1959 (hereinafter referred to as the principal Act).

2. Excavations dangerous to children—(1) The principal Act is hereby amended by inserting, after section 12, the following section:

"12A. (1) Where in the course of construction work any excavation is made that is likely to collect or retain water of such a depth as will constitute a hazard to children, the excavation shall be covered or otherwise fenced off during times when workmen are not in the immediate vicinity in order to prevent ready access to the excavation by children.

"(2) No employer, on the completion of any construction work, shall leave uncovered, unfenced, or unfilled any hole or excavation made during the course of the construction work if the hole or excavation is likely to collect or retain water of such a depth as will constitute a hazard to children."

(2) Section 24 of the principal Act (as substituted by section 3 of the Construction Amendment Act 1967) is hereby amended by repealing the proviso.

(3) Regulation 28A of the Construction Regulations 1961 is hereby revoked.

(4) Regulation 2 of the Construction Regulations 1961, Amendment No. 3, is hereby consequentially revoked.

3. Liability of employers—Section 22 of the principal Act is hereby amended by inserting, after the word "Act" where it first occurs, the words "or under any regulations for the time being in force under this Act".

This Act is administered in the Department of Labour.

WELLINGTON, NEW ZEALAND: Printed under the authority of the New Zealand Government, by E. C. KEATING, Government Printer—1977

88937H—76G

ANALYSIS

1977, No. 147

An Act to amend the Construction Act 1959

[*23 December 1977*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Construction Amendment Act 1977, and shall be read together with and deemed part of the Construction Act 1959 (hereinafter referred to as the principal Act).

2. Notifiable construction work—Section 8 of the principal Act is hereby amended by repealing subsection (2), and substituting the following subsection:

"(2) Subject to subsection (6) of this section, an employer shall not commence any construction work which is a notifiable work or which will at any time include notifiable work unless he has first notified the Inspector of the nature of the construction work, the nature of the notifiable work, and the time when he intends to commence the construction work."

3. Duties of workmen—Section 23 of the principal Act is hereby amended by inserting, after the word "Act" where it first occurs, the words "or under any regulations for the time being in force under this Act".

This Act is administered in the Department of Labour.

Public—147 *Price 10c*

WELLINGTON, NEW ZEALAND: Printed under the authority of the New Zealand Government, by E. C. KEATING, Government Printer—1978

7202C—78G

ANALYSIS

1978, No. 90

An Act to amend the Construction Act 1959

[*20 October 1978*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Construction Amendment Act 1978, and shall be read together with and deemed part of the Construction Act 1959 (hereinafter referred to as the principal Act).

2. Construction Safety Engineers and Inspectors—(1) Section 2 of the principal Act is hereby amended by inserting, before the definition of the term "construction work", the following definition:

" 'Construction Safety Inspector' or 'Inspector' means a Construction Safety Inspector appointed under this Act; and, notwithstanding section 5 of this Act, includes, in respect of construction work carried on in or about—

"(a) Any coal mine, an Inspector of Coal Mines within the meaning of the Coal Mines Act 1925:

"(b) Any mine, an Inspector of Mines within the meaning of the Mining Act 1971:

"(c) Any mining operations within the meaning of the Petroleum Act 1937, an Inspector within the meaning of that Act:".

(2) The said section 2 is hereby further amended by repealing the definition of the term "Safety Inspector" (as substituted by section 2 (2) of the Construction Amendment Act 1969).

(3) Section 2 (2) of the Construction Amendment Act 1969 is hereby consequentially repealed.

(4) Section 4 of the principal Act is hereby amended by inserting in subsection (1), and also in subsection (2), after the word "Chief", the word "Construction".

(5) The said section 4 is hereby further amended by repealing subsection (3), and substituting the following subsections:

"(3) There may also from time to time be appointed as officers of the Department fit persons with suitable engineering experience and qualifications comparable with the standard required for registration under the Engineers Registration Act 1924 to be Construction Safety Engineers.

"(4) The Chief Construction Safety Engineer and every Construction Safety Engineer shall have all the powers and functions of a Construction Safety Inspector."

(6) Section 4A of the principal Act (as inserted by section 2 of the Construction Amendment Act 1973) is hereby amended—

(a) By inserting, after the word "Chief" wherever it occurs, the word "Construction":

(b) By omitting from subsection (1) the words "such officer or officers of the Department (possessing suitable engineering experience and qualifications comparable with the standard required for registration under the Engineers Registration Act 1924) as he thinks fit", and substituting the words "any Construction Safety Engineer":

(c) By repealing subsection (7).

(7) Section 5 (1) of the principal Act is hereby amended by inserting, after the words "persons to be", the word "Construction".

(8) Section 5 (4) of the principal Act is hereby amended by omitting the words "Every Inspector", and substituting the words "The Chief Construction Safety Engineer, every Construction Safety Engineer, and every Inspector".

(9) Section 5 (5) of the principal Act is hereby amended—

(a) By inserting, before the word "Inspector" where it first occurs, the words "Construction Safety Engineer or":

(b) By inserting, before the words "an Inspector", the words "a Construction Safety Engineer or".

3. Powers and duties of Inspectors—(1) Section 7 (1) (d) of the principal Act is hereby amended by omitting the words "examination and inquiry as he deems", and substituting the words "examinations, inquiries, and tests, and take such photographs as are,".

(2) The said section 7 is hereby further amended by repealing subsection (3), and substituting the following subsection:

"(3) Except for the purposes of this Act and of the exercise of his functions under this Act, or with the consent of the Minister, an Inspector shall not disclose to any person any information that he acquires in the exercise of those functions:

"Provided that if so requested by a Coroner, an Inspector shall provide him with a written report relating to the circumstances of any fatal accident."

This Act is administered in the Department of Labour.

WELLINGTON, NEW ZEALAND: Printed under the authority of the New Zealand Government by E. C. KEATING, Government Printer—1978

20935P—78G

Appendix B

Inspection of Building Appliances Bill 1892

Hon. Mr. Seddon.

INSPECTION OF BUILDING APPLIANCES.

ANALYSIS.

A BILL INTITULED

AN ACT to provide for the Inspection of Scaffolding and other Gear used for the Construction of Works of any Kind. Title.

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

1. The Short Title of this Act is "The Inspection of Building Appliances Act, 1892." Short Title.

2. In this Act, if not inconsistent with the context,— Interpretation.

"Building appliances" mean and include all scaffolding, staging, hoarding, fencing, poles, planks, timber, posts, rails, ladders, ropes, pullies, hoists, hauls, winches and their respective fittings, fixtures, or fastenings of every sort, and all gear whatsoever used in or about the construction, demolition, or repair of any structure as herein defined, and whether such appliances are placed in or upon the ground, or attached to or depending from any part of such structure:

"Construction" means and includes the erection, addition, alteration, extension, or reduction of any structure as herein defined, and also includes the ventilation or drainage thereof:

"Inspector" means any Inspector appointed under this Act, or under "The Inspection of Machinery Act, 1882," or "The Factories Act, 1891:"

"Owner" means the contractor, builder, painter, or other tradesman or person undertaking the construction, demolition, or repair of any structure as herein defined, and erecting building appliances for such purpose, and includes any overseer of works or other person in charge of such appliances:

"Repair" means repairing, improving, decorating, ornamenting, lettering, painting, or cleaning any structure or any part thereof either inside or outside:

"Structure" means and includes a construction of every sort and of any material, whether on the ground, or underground, or above ground, and includes every portion of such construction, whether inside or outside its outer walls.

Liability of contractors, &c., for efficiency of building appliances.

3. Every builder, contractor, painter, or other tradesman or person is responsible for the efficiency and security of all building appliances set up by him for use in or in connection with the construction, demolition, or repair of any structure, and for the maintenance in efficient and secure working order of all parts of such appliances, and shall be liable in damages for every accident happening to any person whomsoever through the inefficiency or insecurity of any part or portion of the said appliances.

Appointment of Inspectors.

4. The Governor may from time to time appoint or remove such fit persons as he shall think fit to be Inspectors of Building Appliances under and for the purposes of this Act, and may assign districts or parts of the colony respectively wherein they shall exercise their powers; but

(1.) Every Inspector of Machinery appointed under "The Inspection of Machinery Act, 1882," and

(2.) Every Inspector of Factories and Workrooms appointed under "The Factories Act, 1891," and

(3.) Every Engineer appointed under "The Public Works Act, 1882," whom the Minister for Public Works shall name from time to time to exercise the functions of an Inspector under this Act,

shall, within the districts for which they were appointed under the Acts last aforesaid, be respectively, without further appointment, Inspectors of Building Appliances under this Act.

Powers and duties of Inspectors.

5. Every Inspector is hereby empowered to enter, at any hour in the day-time, into any place, premises, or building within his district where any structure is being constructed, demolished, or repaired, and then and there to inspect and examine all parts of any building appliances used in or in connection with such construction, demolition, or repairs; and, in making such inspection as aforesaid, an Inspector may call to his aid any constable, or any person he may think competent to assist therein, and he may examine the owner or person in charge of any such building appliances as aforesaid, as to the efficiency or security of all parts thereof.

Penalty for obstructing Inspectors.

6. If any person wilfully impedes any Inspector in the execution of any part of his duty under this Act, or if any owner or person in charge of any such building appliances as last aforesaid refuses to give such information or explanation as to the efficiency or security thereof as aforesaid, every such person, and all persons aiding or assisting therein, is liable for each separate offence to a penalty of not less than *five* pounds nor exceeding *twenty* pounds.

Inspector to give notice of dangerous appliances.

7. Whenever an Inspector shall be of opinion that any building appliance is not sufficiently effective or secure, or is dangerous, so that the use thereof by any person is likely to result in an accident to such

person or any other person whomsoever, he shall give a written notice to the owner or person in charge of such building appliance, requiring him, within a certain time to be mentioned in the said notice, either wholly to desist from using such appliance, or to have the arrangement of such appliance so altered, or the faulty or defective part thereof so placed or repaired, as that the same shall be sufficiently effective and secure.

Penalty for non-compliance.

Every owner or other person as last aforesaid who fails or neglects to comply with such notice of the Inspector shall be liable to a penalty of not less than *five* pounds nor more than *fifty* pounds for every day during which such failure, neglect, or refusal is continued.

Workman may complain to Inspector.

8. Any workman or other person employed in or about the construction, demolition, or repair of any structure, who may think that any building appliance which he has to use in or in connection with his employment as aforesaid is dangerous, and not sufficiently effective or secure, may report the matter to any Inspector under this Act, so as to have the defect remedied.

Every Inspector receiving a report from any workman as last aforesaid shall receive the same as confidential, and shall be liable to a penalty not exceeding *five* pounds if he reveal the name of such workman without his consent unless so required to do by law.

Penalty not to bar other proceedings.

9. The liability to or recovery of any penalty under this Act shall not be a bar to any action or proceeding by or at the suit of any person killed or injured by any faulty or defective building appliances in any case where such person or his personal representatives would have a right to recover compensation in respect of such death or injury.

Nor shall the owner or other person in charge of any building appliances be exempted from any criminal liability which is or may be attached to him by reason of any such neglect or default as aforesaid.

Recovery of penalties.

10. All penalties under this Act may be recovered in a summary manner under "The Justices of the Peace Act, 1882," before a Resident Magistrate or any two Justices of the Peace.

By Authority: GEORGE DIDSBURY, Government Printer, Wellington.—1892.

Appendix C

Scaffolding Inspection Act 1906

New Zealand.

ANALYSIS.

1906, No. 48.

AN ACT to provide for the Inspection of Scaffolding. Title.

[*29th October, 1906.*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

1. The Short Title of this Act is "The Scaffolding Inspection Act, 1906." Short Title.

2. In this Act, if not inconsistent with the context,— Interpretation.

"Gear" includes ladder, plank, rope, fastening, hoist, block, pulley, hanger, sling, brace, and other movable contrivance of a like kind:

"Inspector" means an Inspector appointed under this Act:

"Minister" means the Minister of Labour:

"Scaffolding" means any structure or framework exceeding sixteen feet in height from the ground, and used or intended to be used for the support of workmen in erecting, demolishing, altering, repairing, cleaning, painting, or carrying on any other kind of work in connection with any building, structure, ship, or boat; and includes any swinging stage used or intended to be used for any of the purposes aforesaid.

3. The Governor may from time to time appoint Inspectors to carry out the provisions of this Act and define the district within which each Inspector shall exercise his functions: Inspectors and districts.

Provided that no person shall be appointed an Inspector unless he has had at least four years' experience in the erection of scaffolding.

4. (1.) No person shall set up or erect any scaffolding in any district wherein an Inspector has been appointed without having first notified such Inspector of his intention so to do. Notice to be given before scaffolding erected.

(2.) Such notification shall be in writing, and shall be delivered at the office of the Inspector at least twenty-four hours before the time fixed for the setting-up or erection of the scaffolding, and such notice shall be deemed to cover all scaffolding erected on or about the building or buildings for which such notice has been given:

Provided that no notice shall be required to be given for the erection of any scaffolding on any ship or boat.

(3.) Every person who commences to set up or erect any scaffolding without having first given such notification, or until such period of twenty-four hours has elapsed, is liable to a fine not exceeding twenty pounds.

(4.) In any case of emergency arising from damage caused by lightning, explosion, fire, rain, or storm it shall not be necessary to allow any period to elapse after giving the notice required by this section.

Scaffolding and gear to be in accordance with regulations.

5. (1.) The Governor may from time to time, by Order in Council gazetted, make regulations relating to scaffolding and gear used in connection therewith.

(2.) All scaffolding, and all gear used in connection therewith, shall comply with the requirements of such regulations, and shall be set up, erected, maintained, and used in accordance therewith.

Powers of Inspector.

6. (1.) Whenever it appears to an Inspector—

(*a.*) That the use of any scaffolding, or any gear used in connection therewith, would be dangerous to life or limb; or

(*b.*) That with regard to any scaffolding, or any gear used in connection therewith, erected or used, or in course of erection, the requirements of the regulations are not being complied with—

he may give such directions in writing to the owner or person in charge of the scaffolding or gear as he deems necessary to prevent accidents, or to insure a compliance with the regulations, and such owner or person shall forthwith carry out such directions.

(2.) Whenever any Inspector gives any directions as aforesaid, he may also, at the same time or subsequently, order any persons forthwith to cease to use or work in connection with any scaffolding or gear until such directions have been complied with.

Appeal to Minister.

(3.) There shall be an appeal to the Minister against the directions of any Inspector under this section, and notice in writing of such appeal shall be lodged at the office of the Inspector within twenty-four hours from the receipt of such directions.

(4.) The Minister may hear such appeal, or appoint some person to do so, and such Minister or person appointed by him shall make such order as may be deemed right and proper, and such order when made shall be final.

Penalties.

(5.) Every person is liable to a fine not exceeding twenty pounds who—

(*a.*) Fails to comply with any direction given to him by an Inspector in pursuance of this section; or

(*b.*) Fails to comply with any order given to him by an Inspector to cease to use or work in connection with any scaffolding or gear; or

(*c*.) Fails to comply with any order made by the Minister or person appointed by him as aforesaid.

Penalty for interfering with Inspector.

7. Every person who interferes with or obstructs any Inspector in the execution of any power or duty conferred or imposed on him by this Act is liable to a fine not exceeding five pounds.

How proceedings may be taken.

8. Proceedings may be taken for a breach of this Act, and the case heard and determined in a summary way by any Court of competent jurisdiction, and all fines inflicted shall be paid into and form part of the Consolidated Fund.

Expenses of Act to be appropriated.

9. The salaries or remuneration of Inspectors, and all other expenses of carrying out the provisions of this Act by the Minister, shall be paid out of moneys from time to time appropriated by Parliament for that purpose.

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Appendix D

Tasmania

Industrial Safety, Health & Welfare Act 1977

TASMANIA

INDUSTRIAL SAFETY, HEALTH, AND WELFARE ACT 1977

ANALYSIS

Price 70c

TASMANIA

INDUSTRIAL SAFETY, HEALTH, AND WELFARE

No. 60 of 1977

AN ACT to provide for the safety, health, and welfare of persons employed, engaged in, or affected by industry, and to provide for the safety of persons using amusement devices and public stands, and to repeal certain enactments.

[21 September 1977]

BE it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:—

PART I

PRELIMINARY

Short title and commencement.

1—(1) This Act may be cited as the *Industrial Safety, Health, and Welfare Act* 1977.

(2) This Act shall commence on a day to be fixed by proclamation.

Repeal.

2 Each enactment that is specified in Schedule I is repealed from the day fixed by proclamation in respect of that enactment.

Interpretation.

3—(1) In this Act, unless the contrary intention appears—

" amusement device " means a structure that is used, or designed or intended for use, or capable of being used, for amusement, games, recreation, sightseeing, or entertainment on which persons are or may be carried, raised, lowered, or supported—

(*a*) by the structure while it is in motion; or

(*b*) by a part of the structure or by any car, carriage, platform, cage, boat, plank, chair, seat, device, or thing while that part, car, carriage, platform, cage, boat, plank, chair, seat, device, or thing is in motion,

and includes the supporting structure and the access structures and machinery, equipment, and gear used, or designed or intended to be used, or capable of being used, in connection with an amusement device;

" appeal tribunal " means the Industrial Safety, Health, and Welfare Appeal Tribunal constituted under section 44;

" Assistant Secretary " means the Assistant Secretary for Labour;

" authorized officer " means a person who is appointed as, or who is entitled to perform the duties of, an authorized officer pursuant to sections 9 and 10;

" Board " means the Industrial Safety, Health, and Welfare Board established under section 16;

" compressed air work " means the carrying out of work in an industry by a person while breathing any gas or mixture of gases at a pressure greater than the atmospheric pressure;

" construction work " has the meaning assigned to that expression in section 4;

" employee "—

(*a*) in relation to an industry includes any person employed or engaged in that industry, whether or not the person is so employed or engaged under a contract of employment; and

(*b*) in relation to any educational or other training establishment includes any person who uses machinery in that establishment.

" employees' safety representative " means any person who is an employees' safety representative by virtue of section 34;

" factory " has the meaning assigned to that expression in section 5;

" gear " includes a ladder, plank, rope, chain, coupling, fastening, fitting, hoist-block, pulley, hanger, sling, brace, or other movable contrivance used or intended to be used on or in connection with construction work, scaffolding, an amusement device, or a public stand;

" hoisting appliance " means any crane or hoist or other appliance or contrivance used or capable of being used for raising, lowering, handling, or transporting loads;

" industry " means any industry, trade, business, undertaking, profession, calling, function, process, or work in which persons are employed or engaged, and includes the use of machinery in an educational or training establishment;

" machinery " means any arrangement of parts the combined action of which applies mechanical force to a purpose, and includes any mechanical means for driving or motivating parts so arranged;

" occupier " in relation to a work place means the person employing or causing persons to be engaged in any industry carried on in or on that work place and includes a manager, foreman, agent, or other person acting in the general management or control of that work place;

" outworker " means a person who, outside a factory, but for and on behalf of the occupier of a factory, wholly or partly prepares or manufactures an article for trade or for sale or for purposes of gain;

" owner " means in relation to a work place the person who—

(*a*) has the estate of freehold in possession of; or

(*b*) is entitled to erect, alter, or pull down buildings on, the site thereof;

"pressure vessel" means—

(*a*) any vessel in which—

(i) steam is generated under a pressure greater than atmospheric pressure; or

(ii) water is heated under a pressure greater than atmospheric pressure to a temperature exceeding 99 degrees Celsius; or

(*b*) any other vessel in which liquid or gas is subjected to a pressure greater than atmospheric pressure for application in any engineering, industrial, or commercial process or purpose;

"public stand" means a stand that is temporarily erected or temporarily set up to support members of the public attending any activity, function, meeting, or other gathering, and includes the supporting structure and access structures;

"scaffolding" means any structure used or intended to be used for the support or protection of employees engaged in or in connection with—

(*a*) any construction work; or

(*b*) the erection or dismantling of—

(i) machinery;

(ii) plant or equipment; or

(iii) stacks of goods or materials,

and includes the materials used or intended to be used in the erection of that structure;

"Secretary" means the Secretary for Labour;

"shop" means any premises where the industry of—

(*a*) selling goods by retail to the public;

(*b*) hairdressing;

(*c*) pawnbroking; or

(*d*) an eating house,

is carried on;

" shoring " means any material or equipment used for temporary support—

(*a*) of any building or structure or any part of a building or structure; or

(*b*) in connexion with excavating, shaft sinking, or tunnelling;

" work place " means any premises in which persons are employed or engaged in industry.

Construction work.

4—(1) Subject to subsection (2), for the purposes of this Act " construction work " means work in respect of or in connection with—

(*a*) building work;

(*b*) excavation, shaft sinking, or tunnelling;

(*c*) the construction or maintenance of a road or the permanent way of a railway or tramway;

(*d*) dredging;

(*e*) the placing, laying, or maintenance of pipes or cables; and

(*f*) earth moving by power driven equipment.

(2) The Governor may by order declare work or work of a class or kind—

(*a*) to be construction work; or

(*b*) not to be construction work.

(3) In this section " building work " means work in respect of or in connection with constructing, erecting, adding to, repairing equipping, finishing, painting, cleaning, sign-writing, or demolishing which, when carried out in relation to a building or structure, is carried out at or adjacent to the site of the building or structure.

Factory.

5—(1) For the purposes of this Act " factory " means premises in or on which persons, including the occupier of those premises, are employed or engaged, directly or indirectly, in a handicraft, or in making, preparing, altering, repairing, ornamenting, finishing, cleaning, sorting, or adapting articles for trade or for sale or for purposes of gain, and includes—

(*a*) premises in or on which the sorting or packing of articles or the washing or filling of bottles or containers is carried on preliminary, or incidentally, to the work carried on in a factory;

(*b*) a laundry or dye works or any other premises in or on which articles of clothing are cleaned, pressed, dyed, or repaired, whether or not the work carried on therein is carried on—

(i) as an ancillary to another business;

(ii) incidentally to the purposes of a public or charitable institution; or

(iii) wholly or partly by the customer;

(*c*) premises in or on which bread, biscuits, cakes, cereal foods for human consumption, pastry, muffins, crumpets, sweetmeats, confectionery, sugar goods, or such other articles or goods as may be prescribed are baked or made for trade or sale, and premises used in connection with, or as ancillary to, those premises for the purpose of storing articles or goods when baked or made or that are proposed to be baked or made, or any ingredients or materials used for or in connection with the baking or making thereof;

(*d*) premises in or on which electricity is generated or transformed as an illuminant or a motive power for trade or sale or for purposes of gain, or in which any kind of gas is produced for those purposes;

(*e*) a yard or dry dock including the precincts of a yard or dry dock in which ships are constructed, reconstructed, repaired, refitted, or broken up;

(*f*) premises in or on which the construction, reconstruction, maintenance, or repair of locomotives, vehicles, or plant for use for transport purposes is carried on;

(*g*) premises used for the storage of gas in gasholders;

(*h*) premises in or on which articles are made or prepared incidentally to the carrying on of construction work, not being the premises in which that work is carried on;

(*i*) a warehouse; and

(*j*) premises other than a warehouse in or on which goods are kept by a transport operator—

(i) after receipt of the goods for carriage by him;

(ii) in transit;

(iii) awaiting delivery; or

(iv) for safe keeping for reward, other than in a bank or safety deposit.

(2) Notwithstanding subsection (1) a factory does not include—

(*a*) premises used exclusively for the manufacture of dairy produce;

(*b*) a ship;

(*c*) premises, in or on which goods are kept while in transit, that are on a wharf as defined by the *Marine Act* 1976; or

(*d*) any part of a factory that is a shop or an office.

Exemption of machinery, industry, &c.

6 The Governor may by order exempt—

(*a*) any machinery or machinery of a class or kind; or

(*b*) any industry or industry of a class or kind,

from any of the requirements of this Act.

Saving.

7 The provisions of this Act, except those relating to pressure vessels, do not apply to mines within the meaning of the *Mines Inspection Act* 1968.

Act binds Crown.

8 This Act binds the Crown.

PART II

ADMINISTRATION

Division I—Officers

Appointment of Secretary, Assistant Secretary for Labour, and officers.

9—(1) The Governor may, under and subject to the provisions of the *Public Service Act* 1973, appoint, for the purposes of this Act—

(*a*) a person to be the Secretary for Labour;

(*b*) a person to be the Assistant Secretary for Labour; and

(*c*) such other officers as the Governor thinks necessary.

(2) The Secretary, the Assistant Secretary, and other officers holding offices under the *Factories, Shops, and Offices Act* 1965 at the commencement of this Act shall be deemed to have been appointed under the authority of this section.

(3) The Secretary and the Assistant Secretary are, by virtue of their offices, authorized officers for the purposes of this Act.

(4) The Assistant Secretary, in the event of the illness or absence of the Secretary, has, and may exercise and perform, the powers, authorities, duties, and functions of the Secretary under this Act or any other Act, and has such other powers, and shall perform such

other duties, as the Secretary, subject to the provisions of the *Public Service Act* 1973, may direct, and a reference in this Act to the Secretary shall be construed as including a reference to the Assistant Secretary when acting during the illness or absence of the Secretary.

Authorized officers.

10—(1) The Secretary may—

(*a*) appoint an officer of the Department of Labour and Industry; or

(*b*) appoint, subject to subsection (2)—

(i) an officer of any other department of the Public Service; or

(ii) an officer of any statutory authority,

to be an authorized officer for the purposes of this Act or such of the purposes as may be specified in the certificate of his appointment.

(2) No officer shall be appointed as an authorized officer pursuant to subsection (1) (*b*) except—

(*a*) where the officer is employed in a department, with the approval of—

(i) the head of the department; and

(ii) in the case of an officer who is subject to the *Public Service Act* 1973, the Public Service Board; or

(*b*) where the officer is employed by a statutory authority, with the approval of that authority.

(3) Where the Secretary appoints an officer as an authorized officer pursuant to subsection (1) he shall furnish the officer with a certificate of appointment.

(4) Where, pursuant to an agreement between the Governor and the Governor-General of the Commonwealth, an officer of the Commonwealth for the purposes of this Act is appointed—

(*a*) as an authorized officer; or

(*b*) to perform the duties of an authorized officer,

the Minister shall furnish to that officer a certificate of his appointment.

(5) On applying for admission to a work place, proposed work place, premises or place that he has reason to believe to be a work place, an authorized officer shall, if required to do so by the occupier of that work place, proposed work place, premises, or place, produce to him the certificate furnished to the authorized officer pursuant to this section.

Division II—Powers and duties of officers

Powers of authorized officers.

11—(1) An authorized officer may at any time inspect and examine any place if he has reasonable cause to believe that an industry is or is intended to be carried on, or an amusement device or public stand is located, in or on that place and may—

(*a*) make such examination and inquiry and conduct such tests as may be necessary to ascertain whether the provisions of this Act are being complied with;

(*b*) require the production of any record, book, list, or document required to be kept by a person under this Act; and

(*c*) exercise such other powers and authorities as may be prescribed or as may reasonably be necessary for carrying this Act into effect.

(2) For the purposes of the exercise of his powers under this section an authorized officer may enter a place referred to in subsection (1).

(3) No person shall be required, in respect of the powers and authorities conferred on an authorized officer referred to in subsection (1), to answer any questions or give any information tending to incriminate him.

(4) An authorized officer may, in the exercise of any powers conferred on him in respect of entering, inspecting, and examining a place referred to in subsection (1), take with him an interpreter appointed under subsection (5) and where an interpreter is so taken by an authorized officer—

(*a*) any question put or requirement made by the interpreter on behalf of the authorized officer shall be deemed to have been put or made by the authorized officer; and

(*b*) a reply to a question or requirement, made to the interpreter, shall be deemed to have been made to the authorized officer.

(5) The Minister may, after consultation with the appropriate officer of the Commonwealth, appoint, by a notice in the *Gazette*, any person who, in his opinion, is qualified by his knowledge of any language to be an interpreter for the purposes of this Act.

(6) No person shall—

(*a*) obstruct or wilfully delay an authorized officer or interpreter in the execution of his functions under this section;

(*b*) fail to comply with any requirements made by an authorized officer under this section;

(*c*) fail to answer truly, or to reply to, any question that an authorized officer is authorized to ask under this section;

(*d*) directly or indirectly, prevent any person from appearing before or being questioned by an authorized officer.

Taking of samples for analysis.

12—(1) Subject to subsection (2), an authorized officer may take for analysis a sample of a substance that is in use or intended to be used in or in connection with any process or work carried on or intended to be carried on in a work place, being a substance in respect of which he suspects a contravention of any of the provisions of this Act or that, in his opinion, is likely to, or may prove on analysis to be likely to, cause bodily injury to, or injury to the health of, persons employed in the work place.

(2) Before taking a sample pursuant to subsection (1), an authorized officer shall notify his intention to do so to the occupier, or, if the occupier is not readily available, to another person who, in his opinion, is responsible for the carrying out of work in the work place.

(3) The occupier of a work place, or the person to whom an authorized officer notifies his intention to take a sample, at the time when a sample is taken under this section may, on providing the authorized officer with the necessary appliances, require the authorized officer to divide the sample into 3 parts and to mark and seal or fasten up each part in such a manner as its nature permits and, except as provided by subsection (4), the authorized officer shall comply with that requirement.

(4) Where, in the opinion of an authorized officer, a sample cannot be divided without damage to the whole sample, or the division of the sample, by reason of the nature of the substance from which the sample is taken, is impracticable, the authorized officer may refuse to divide the sample as required by subsection (3).

(5) Where an authorized officer has refused under subsection (4) to divide the sample, he shall mark and seal or fasten up the whole sample in such a manner as its nature permits and submit the sample to the Government Analyst for analysis by him.

(6) Where a sample is divided as provided by subsection (3), the authorized officer—

(*a*) shall deliver one part to the occupier of the work place or the person whom he has notified under subsection (2);

(*b*) shall submit one part to the Government Analyst for analysis by him; and

(*c*) shall retain one part.

(7) The occupier of a work place, or, in the absence of the occupier, the person to whom the authorized officer notifies his intention to take a sample, shall allow the authorized officer to take such quantity of the substance as the authorized officer may reasonably require for the purpose of its analysis.

(8) Notwithstanding any other provision of this section, an authorized officer shall not, unless he is an inspector under the *Public Health Act* 1962, exercise any of the powers conferred on authorized officers by this section in relation to any substance that is a food or a drug within the meaning of Part VIII of that Act.

Power of authorized officer in respect of safety and health risks.

13—(1) Where, by reason of circumstances existing at any work place or at any place used or intended to be used for amusement purposes or as a public stand, an authorized officer is of the opinion that the safety or health of persons is endangered, he may by notice in writing served on the occupier of the work place or place require that occupier to take such steps as the authorized officer thinks fit and as are specified in the notice to remedy or alleviate those circumstances.

(2) Without limiting the generality of subsection (1) a notice under that subsection may, where the circumstances referred to in that subsection constitute the carrying on of any activity, require that activity to cease forthwith and the occupier of the work place or place to whom the notice is directed shall give effect to that requirement.

(3) A notice referred to in subsection (2) shall specify the reasons for requiring the activity to cease.

(4) Any notice issued under this section may be revoked—

(*a*) by another notice of the authorized officer issuing the notice; or

(*b*) by a notice of the Secretary.

(5) The occupier of a work place or place may within 14 days after a notice under this section is served on him appeal to the appeal tribunal if within that period the occupier has requested the Secretary to revoke the notice.

(6) On an appeal under this section, unless the appeal tribunal dismisses the appeal, it may revoke or vary the notice.

(7) Subject to subsection (8), where an appeal is instituted under this section the notice is of no effect pending the final determination or the withdrawal of the appeal.

(8) Where an appeal is instituted against a notice under sub-section (2) the notice shall cease to have effect if the appeal tribunal, in its discretion, so directs.

(9) Where the appeal tribunal makes a direction under subsection (8) that direction shall take effect from the day on which it is made.

Authorized officer not to divulge information.

14—(1) No person who—

(*a*) is, or has at any time been, an authorized officer; or

(*b*) has exercised any power or function under this Act,

shall divulge, otherwise than in the course of his official duties, any manufacturing or commercial secrets or working processes that come to that person's knowledge—

(*c*) as an authorized officer; or

(*d*) in the exercise of those powers or functions.

(2) No person who is an authorized officer shall have any direct or indirect financial interest, other than an interest which he has disclosed in writing to the Secretary, in any premises or place which is subject to the exercise by him of his powers and functions as an authorized officer.

Protection from liability.

15 Where an action is brought against an authorized officer in respect of an Act done in the exercise or purported exercise of a power or function under this Act the Minister may indemnify him against the whole or part of any damages and costs or expenses which he may have been ordered to pay or may have incurred, if the Minister is satisfied that he honestly believed that the act complained of was within his powers and that his duty as an authorized officer required or entitled him to do it.

Division III—Industrial Safety, Health, and Welfare Board

The Industrial Safety, Health, and Welfare Board.

16—(1) There shall be established a board to be known as the Industrial Safety, Health, and Welfare Board which shall consist of 5 members appointed by the Governor, of whom one shall be the Secretary who shall be the chairman of the Board, and, of the remainder—

(*a*) one shall be the Director of Public Health;

(*b*) one shall be the Director of Mines;

(*c*) one shall be a representative of the occupiers of work places; and

(*d*) one shall be a representative of the employees in work places.

(2) A member of the Board referred to in subsection (1) (*c*) or (*d*), unless he sooner resigns or otherwise ceases to hold office, continues in office for a period of 5 years, except that, when a member of the Board dies, or ceases to hold office otherwise than by reason of effluxion of time, the member appointed to fill the vacancy ceases to hold office at the expiration of the unexpired term of office of the member in whose place he is appointed.

(3) A member of the Board is not, as such, subject to the *Public Service Act* 1973, but an officer of the Public Service may hold office as a member of the Board in conjunction with his office as an officer of the Public Service.

(4) A member of the Board may be paid such remuneration and allowances as the Minister approves.

Proceedings of the Board.

17—(1) The chairman of the Board, or if he is absent, such one of the other members present as they may choose, shall preside at each meeting of the Board.

(2) Three members of the Board constitute a quorum at any meeting of the Board.

(3) A member of the Board may be represented at meetings of the Board by a deputy appointed by him by notice in writing to the chairman of the Board.

(4) Subject to this Act the Board may regulate its own proceedings.

Powers of the Board.

18—(1) The Board shall—

(*a*) investigate and make recommendations to the Minister with respect to measures necessary for securing the safety, health and welfare of employees;

(*b*) collaborate with—

(i) organizations of employers and employees; and

(ii) authorities and bodies that are engaged in technical research,

in relation to any of the matters specified in paragraph (*a*); and

(*c*) investigate and report on any questions referred to it by the Minister in relation to any of the matters referred to in this section.

(2) A member of the Board may, if he is authorized in writing by the chairman, enter, at any reasonable time, a work place and inspect any work being carried on or performed in or at that place.

(3) No member of the Board shall divulge to a person other than the Minister or an officer of the Department of Labour and Industry any information relating to any matter that comes to his knowledge in consequence of his position as a member of the Board, or make use of any information that so comes to his knowledge except for the purpose of the performance of his duties as a member of the Board.

Division IV—Advisory committees

Advisory committees.

19—(1) The Board may establish committees to advise the Secretary on matters affecting industrial safety, health, or welfare.

(2) An advisory committee may, with the consent of the Minister, be comprised wholly or partly of persons who are not members of the Board, and may, with the approval of the Public Service Board, include officers of the Public Service.

(3) A member of an advisory committee may, subject to the *Public Service Act* 1973, be paid such remuneration and allowances as the Minister approves.

(4) For the purposes of subsection (1) an advisory committee shall, at the request of the Secretary or of its own motion, undertake inquiries, seek and consider representations, or do such other things as are necessary or desirable in order to be able to advise the Secretary in accordance with that subsection.

(5) The appointment of a committee shall lapse at the end of each term of 5 years for which a member appointed to the Board under section 16 (1) (*c*) or (*d*) is ordinarily appointed.

PART III

NOTIFICATIONS, REGISTRATIONS, &C.

Division I.—Factories and shops

Prohibition on use of unregistered premises.

20—(1) No person shall carry on, or cause or allow to be carried on, the industry of a factory or shop on any premises unless those premises are registered for the carrying on of that industry.

(2) This section does not prohibit the carrying on of the industry of a factory or shop on any premises in accordance with a permit in force in respect of those premises under section 22.

Registration of premises.

21—(1) An application for the registration of any premises under this Part shall be made to the Secretary in the prescribed form and shall—

(*a*) specify the full name of the person making the application;

(*b*) specify the premises to which the application relates;

(*c*) specify the type of industry for which the registration is sought;

(*d*) specify the maximum number of persons that it is intended to employ at the premises;

(*e*) specify the name, if it is different from that of the applicant, under which the industry is to be carried on on the premises; and

(*f*) contain such other particulars as are prescribed.

(2) Where an application is made under this section, the Secretary shall register the premises to which the application relates for the carrying on of the industry specified in that application, but shall not do so unless he is satisfied that—

(*a*) the premises are suitable for carrying on that industry; and

(*b*) the industry could be carried on on those premises in compliance with this Act.

Temporary permits pending registration.

22—(1) If the Secretary refuses to register any premises he may issue a permit authorizing the carrying on on those premises of such industry as is specified in the permit subject to such conditions as may be specified in that permit.

(2) A permit issued under this section remains in force for such period as may be specified in the permit, but the Secretary may, from time to time, extend that period by endorsement of the permit.

(3) Where—

(*a*) on an application under section 21, the Secretary issues a permit under this section he shall notify the applicant of the requirements that must be complied with before the

premises to which the application relates can be used for the carrying on of the industry specified in the application; and

(*b*) if those requirements are complied with while the permit remains in force, the Secretary, on a fresh application being made to him, shall, if he is satisfied that those requirements have substantially been fulfilled, register those premises for the carrying on of that industry.

Appeals in respect of registration or permits.

23—(1) Where the Secretary—

(*a*) refuses to register premises pursuant to section 21 (2); or

(*b*) refuses to issue a permit pursuant to section 22, or to extend the period for which that permit was issued under that section,

he shall serve on the applicant a notice of his refusal specifying the reasons for such refusal.

(2) A person who is aggrieved by a refusal of the Secretary under section 21 or section 22 may, within 14 days after a notice of his refusal under this section is served on him, appeal to the appeal tribunal.

(3) On an appeal under this section, unless the appeal tribunal dismisses the appeal it may revoke or vary the notice and may direct the Secretary to—

(*a*) register the premises;

(*b*) issue a permit; or

(*c*) extend the period for which a permit was issued under section 22.

Periodical renewal of registrations.

24—(1) The registration of any premises, unless it is renewed or further renewed, ceases to have effect—

(*a*) in the case of premises registered as a shop, on 31st March; or

(*b*) in the case of premises registered as a factory, on 31st December,

next following the day on which the premises were registered or their registration was last renewed.

(2) Notwithstanding subsection (1) the Secretary may, on application by the occupier of any premises, register those premises for a period of 3 years and the registration thereof, unless it is renewed

or further renewed, ceases to have effect on the triennial of the relevant date therein referred to next following the day on which the premises were registered or their registration was last renewed.

(3) On application made to the Secretary in the prescribed manner and on payment of the prescribed fee the registration of the premises in relation to which the application relates shall be renewed.

Revocation of registration.

25—(1) Where any premises have ceased to be used for the carrying on of the industry in respect of which they are registered the Secretary may, by notice in writing served on the owner of those premises, revoke the registration of those premises.

(2) Where an owner referred to in subsection (1) is aggrieved by the decision of the Secretary to revoke the registration of premises in accordance with that subsection he may appeal to the appeal tribunal within 14 days after the day on which the notice of revocation is served on him.

(3) On an appeal under this section unless the appeal tribunal dismisses the appeal it may revoke or vary the notice and may direct the Secretary to re-register the premises.

Fees in respect of registration.

26—(1) On the application for the registration of any premises there shall be paid to the Secretary the prescribed fee, and he shall not register those premises unless that fee has been paid to him.

(2) If the registration of any premises is refused the Secretary shall within 30 days of such refusal refund the fee paid on the application for the registration of those premises.

(3) For the purposes of this section—

(*a*) the occupier of a factory or shop shall be deemed to be a person who is employed in the factory or shop; and

(*b*) the number of persons employed in a factory or shop shall be deemed to be—

(i) in respect of the year in which the factory or shop is first registered, the maximum number to be employed therein at any one time during that year; and

(ii) in respect of a later year, the maximum number employed therein at any one time during the last preceding year.

(4) Notwithstanding subsection (3) (*b*), for the purposes of the calculation of the fee in respect of the registration or the renewal or

further renewal of the registration of any premises for a period of 3 years, the number of persons employed in a factory or shop shall be deemed to be—

(*a*) in respect of the period of the first registration of a factory or shop, the maximum number to be employed therein at any one time during that period; and

(*b*) in respect of the period of any renewal or further renewal of that registration, the maximum number employed therein at any one time during the year preceding that period.

(5) Such fee as may be prescribed is payable on the renewal of the registration of any premises, and, if that fee is not paid within one month after the registration becomes due for renewal, the registration ceases to be of any further effect.

(6) Where, at any time, the number of persons employed on any premises exceeds the number by reference to which the fee last required to be paid in respect of those premises under this section was calculated, the occupier shall pay to the Secretary the difference between that fee and the fee that would have been required to have been so paid if it had been calculated by reference to the actual number of persons so employed at that time.

(7) This section does not apply in respect of the registration of premises for use for the carrying on of—

(*a*) a workshop for handicapped persons; or

(*b*) a shop conducted by an organization carried on for charitable or religious purposes.

Notice of closures.

27 Where any premises cease to be used for the purposes of the industry in respect of which they are registered the person who was the occupier of those premises when they ceased to be so used shall, within 7 days after their ceasing to be so used, give notice of the fact in writing to the Secretary.

Notices by new occupier.

28 Any person who becomes the occupier of any premises registered as a factory or shop shall, as soon as possible after becoming occupier of those premises, give notice of the fact to the Secretary in the prescribed manner together with such particulars as may be prescribed.

Division II—Construction work

Notice of commencement of construction work.

29—(1) A person who intends to undertake construction work shall, in such cases as may be prescribed—

(*a*) give notice of his intention in writing to the Secretary at least 24 hours before commencing that work;

(*b*) state the place at which, and the date on which, it is intended to commence the work and such other particulars as the Secretary may require; and

(*c*) pay to the Secretary the prescribed fee.

(2) In proceedings for an offence under this section it is a defence to prove that the construction work was urgently necessary in the interests of safety or health, or as a consequence of an accident or unforeseen events, and that the notice and fee referred to in subsection (1) were given and paid to the Secretary as soon as practicable.

(3) On conviction for an offence under this section involving a failure to pay the prescribed fee the court shall, in addition to any penalty it may impose, order the payment of that fee to the Secretary.

Division III—Work injuries and accidents

Notice of work injuries.

30—(1) This section applies to every work injury that occurs in or about any work place.

(2) Where a work injury occurs to which this section applies, the employer of the person suffering the work injury shall keep for a period of not less than 3 years a record of the work injury containing such of the particulars referred to in subsection (3) as are relevant, and in the case of a work injury which incapacitates a person for 3 clear days or more, or causes loss of life, the employer shall in accordance with subsection (3) give written notice thereof to the Secretary.

(3) A notice under subsection (2) shall—

(*a*) where a death occurs as a result of the work injury, be given immediately after the death occurs;

(*b*) where the work injury incapacitates a person for 3 clear days or more, be given within 24 hours after the person responsible for giving the notice might be reasonably expected to have become aware of the fact that the incapacitated person has been or will be incapacitated for 3 clear days or more,

and state—

(*c*) in the case of a notice under paragraph (*a*), the cause of death and the name and address of the person killed; and

(*d*) in the case of a notice under paragraph (*b*), the cause, nature, and the extent of injuries sustained by the person and the name and address of that person,

and such other particulars as may be prescribed.

Notice of accidents in connection with amusement devices, &c., and scaffolding, &c.

31 Where an accident occurs—

(*a*) in a work place in which any load-bearing part of any scaffolding, gear, hoisting appliance, or shoring is broken, distorted, or damaged;

(*b*) at any place where there is an amusement device, public stand, or pressure vessel, which causes damage to the amusement device, public stand, or pressure vessel; or

(*c*) in any premises where a lift is damaged,

the person who at the time of the accident was controlling the use of the scaffolding, gear, hoisting appliance, shoring, amusement device, public stand, pressure vessel, or the lift in connection with which the accident occurs shall, whether or not a work injury arises from that accident, as soon as practicable within 24 hours after the occurrence of the accident—

(*d*) advise an authorized officer; and

(*e*) give notice to the Secretary in writing,

of the occurrence of the accident.

PART IV

DUTIES AND OBLIGATIONS

Occupier to comply with Act and to safeguard health and safety of employees.

32 Every occupier of a work place and every person carrying on an industry shall take reasonable precautions to ensure the health and safety of persons employed or engaged at that work place or in that industry.

Obligation of employees.

33—(1) No employee shall by any act or omission render less effective any action taken by a person for the purposes of giving effect to section 32.

(2) Without limiting the generality of subsection (1), where—

(*a*) an employee is required to carry out any procedure for the purposes of his safety or the safety of any other person on the plant; or

(*b*) an employee is issued with any form of protective clothing or equipment,

that procedure or use of protective clothing or equipment shall be carried out or used in such manner as to achieve the purposes of section 32.

(3) An employee who refuses or fails to comply with subsection (2) commits an offence against this Act.

Employees' safety representative.

34—(1) Subject to subsection (2), where 10 or more employees are employed or engaged in any work place they may elect from time to time one of their number to be an employees' safety representative for the purposes of this Act and the occupier of their work place shall permit them to do so.

(2) The Secretary may, by his certificate, exempt any work place from the requirement of subsection (1) if he is satisfied that there is established in relation to that work place a safety committee consisting wholly or partly of representatives of employees.

(3) The Secretary may at any time revoke a certificate exempting a work place from the requirements of subsection (1) and thereupon the certificate shall have no further force or effect.

(4) For the purposes of ensuring compliance with the provisions of this Act, the occupier of a work place shall confer with the employees' safety representative, elected in that work place in accordance with this section, whenever reasonably requested to do so by that representative.

(5) Except as provided in subsection (4) or as may be prescribed the terms of employment or engagement of a safety representative for the purposes of this section remain subject to the control of the person by whom he is employed or engaged.

Duties of owners.

35—(1) In respect of premises—

(*a*) used in connection with a work place by the employees therein, including land over which they pass to enter or leave; and

(*b*) not within the occupancy of the occupier of the work place,

the duties of the occupier shall be performed by the owner of those premises.

(2) Where the occupier of a work place is not able to perform a duty imposed on him by or under this Act because he is not the owner of the work place that duty shall be performed by the owner of that work place.

(3) In relation to any duties which are required by this Act to be performed by the owner, the owner shall for the purposes of this Act be deemed to be the occupier and any proceedings under this Act necessary to enforce that duty shall be taken and had accordingly.

(4) Where the occupier of a work place is not able to perform a duty imposed on him by or under this Act because he is not the owner of the work place, he shall give notice in writing of the fact to the Secretary.

(5) Where the owner of a work place incurs any expenses by reason of this section, he may, subject to any contract between him and the occupier, recover those expenses from the occupier by action in a court of competent jurisdiction or by distress as for rent.

Certain machinery for sale, &c., to comply with the prescribed requirements.

36 No person shall sell or let on hire or offer to sell or let on hire or advertise for sale or letting on hire, either as principal or agent, any machinery, gear, hoisting appliance, or scaffolding unless it complies with the prescribed requirements.

PART V

MISCELLANEOUS

Prevention of accidents, &c.

37—(1) The Secretary may, by notice in writing—

(*a*) direct the occupier of a specified work place, or the occupiers of work places generally or of all work places included in a specified class of work places, to take such steps as the Secretary may deem necessary and as may be specified in the notice to prevent accidents therein; or

(*b*) direct that any specified plant, equipment, or appliance shall not be used in or in connection with a specified work place.

(2) A notice under this section—

(*a*) shall, in the case of a specified work place, be served on the occupier thereof; and

(*b*) shall, in any other case, be published in the *Gazette* and in at least 3 newspapers published in this State.

(3) A notice under this section is not a statutory rule within the meaning of the *Rules Publication Act* 1953.

Notice to remedy defects, &c.

38—(1) Subject to subsection (2), where it appears to the Secretary that a work place, or a part thereof, is defective by reason of being—

(*a*) dilapidated;

(*b*) unsafe;

(*c*) unfit for use;

(*d*) injurious to health; or

(*e*) not provided with, or insufficiently provided with—

(i) the sanitary conveniences and facilities for washing required under this Act;

(ii) proper fire-escapes, and proper appliances and equipment for the extinguishment of fire;

(iii) proper heating appliances; or

(iv) effective means for securing and maintaining suitable lighting (whether natural or artificial),

the Secretary shall serve notice on the occupier of the work place requiring him to remedy the defect.

(2) Where a building forms part of a work place or the work place is situated within a building, the Secretary may, instead of serving notice on the occupier under subsection (1), serve notice on the owner of the building or the person receiving the rent in respect of the building, whether on his account or on account of any other person, and thereupon that owner or person shall be deemed to be the occupier of the work place for the purposes of this section.

(3) Where it appears to the Secretary that a provision of this Act is not being complied with or is being insufficiently complied with in a work place, or in a part thereof, the Secretary shall serve notice in accordance with subsection (4) on the occupier of that work place requiring that provision be complied with.

(4) A notice under this section shall specify—

(*a*) in the case of a notice under subsection (1)—

(i) the nature of the defect;

(ii) the repairs, alterations, or improvements required to be made; and

(iii) the time within which those repairs, alterations, or improvements are to be completed; and

(*b*) in the case of a notice under subsection (3)—

(i) the provision that is not being complied with, or that is being insufficiently complied with;

(ii) the steps to be taken to secure compliance with that provision; and

(iii) the time within which those steps are to be taken.

(5) Where a person is guilty of an offence against this section, the Minister may, in the case of a factory or shop, direct the Secretary to cancel the registration of that factory or shop.

(6) Where the registration of a factory or shop is cancelled in accordance with subsection (5) the factory or shop shall not be re-registered unless the Secretary is satisfied that all the requirements of the Act have been complied with.

(7) Where, pursuant to a notice served on him under this section, an occupier installs or provides a device for securing the safety of employees who work in the work place or any part thereof, an employee who, without lawful excuse, removes or tampers with that device is guilty of an offence against this Act.

Appeals against notices in respect of prevention of accidents, &c. notices to remedy defects, &c.

39—(1) A person who is aggrieved by a notice of the Secretary under section 37 or section 38 may, within 14 days after a notice under section 37 or section 38 is served on him, appeal to the appeal tribunal.

(2) Where an appeal is instituted under this section against a notice of the Secretary under section 37 or section 38 the notice is of no effect pending the final determination or withdrawal of the appeal.

(3) On an appeal under section 38 unless the appeal tribunal dismisses the appeal it may revoke or vary the notice.

(4) On an appeal under section 37 in respect of a particular work place the appeal tribunal may direct that the application of a notice under that section be modified or varied in its application to that work place.

Service of notices.

40—(1) A notice required or authorized by this Act to be served on a person may be so served—

(*a*) by delivering it to him personally;

(*b*) by leaving it addressed to him at his usual or last known place of abode or business; or

(*c*) by sending it by certified mail addressed to him at his usual or last known place of abode or business.

(2) Where a person has notified the authority by which a notice is required or authorized to be served on him under this Act of an address for service that notice may be so served—

(*a*) by leaving it at the place of that address with some person apparently over the age of 16 years and apparently employed or residing at that address; or

(*b*) by sending it by certified mail addressed to him at that address.

(3) Where a notice is required or authorized to be served on a person as the owner or as the occupier of premises the notice shall be taken to be duly served if—

(*a*) being addressed to him either by name, or by the description of "the occupier" or "the owner", of the premises (describing them) it is delivered or sent in the manner specified in subsection (1); or

(*b*) being so addressed it—

(i) is sent by certified mail addressed to these premises and is not returned to the authority by whom it is sent;

(ii) is delivered to some person on the premises: or

(iii) is affixed conspicuously to some object on the premises.

(4) A notice served in accordance with subsection (3) binds every person coming within the definition of the expression " occupier ".

Contracting out prohibited.

41 Notwithstanding any Act or law to the contrary, no person by any contract or agreement shall—

(*a*) preclude or exempt himself or any other person from doing any act or thing that he or that other person is required to do for complying with the provisions of this Act; or

(*b*) make any other person liable to any penalty or forfeiture for doing any act or thing that that other person is so required to do.

Annual report.

42—(1) The Secretary shall prepare and submit to the Minister annually a report on the administration of this Act.

(2) The report shall be prepared in general terms and shall not disclose, except in the form of general statistical information, the contents of any record of any person employed for the purposes of this Act or of any work done by him in the course of that employment.

(3) The Minister shall cause a copy of the report submitted to him under subsection (1) to be laid on the table of each House of Parliament within 14 days of the receipt thereof if Parliament is then in session or if Parliament is not then in session within 14 days after the commencement of the next session of Parliament.

Offences against Act to be disposed of summarily.

43 Proceedings in respect of offences against this Act shall be instituted and heard and determined summarily.

Appeal tribunal.

44—(1) For the purposes of this Act there shall be an appeal tribunal to be known as the Industrial Safety, Health, and Welfare Appeal Tribunal.

(2) The appeal tribunal shall be constituted by one person, who shall be such one of the magistrates as the Governor may, by notice in the *Gazette*, appoint as the person constituting the appeal tribunal.

(3) In the event of the sickness or absence of the person appointed to constitute the appeal tribunal or in a case where that person deems it improper or undesirable that he should adjudicate on the hearing of a particular appeal, the Governor may appoint some other magistrate to act in the place of the person appointed to constitute the appeal tribunal, and, subject to the conditions or limitations, and for the period, specified in his appointment the magistrate so appointed has all the powers and shall perform all the duties of the person appointed to constitute the appeal tribunal, and any reference in this Act to the person appointed to constitute the appeal tribunal shall be construed accordingly as including a reference to a person appointed to act in the place of that person.

(4) The appeal tribunal has jurisdiction to hear and determine all appeals made to the appeal tribunal pursuant to this Act and has power to make such orders as to costs of, or incidental to, any proceedings before the appeal tribunal as the person appointed to constitute the appeal tribunal thinks fit.

Appeals.

45 An appeal shall be instituted, heard, and determined as prescribed, and the decision of the appeal tribunal on the hearing of an appeal is final.

Offences.

46—(1) A person who—

(*a*) fails to comply with any direction given or requirement made by an authorized officer pursuant to this Act; or

(*b*) contravenes, or fails to comply with, any provision of this Act,

is guilty of an offence against this Act and is liable to a penalty of $500 and a further daily penalty of $200.

(2) Where a person—

(*a*) fails to comply with any direction or requisition of an authorized officer; or

(*b*) contravenes, or fails to comply with, any provision of this Act,

and as a consequence of the failure or contravention, death or serious bodily injury occurs that person is guilty of an offence and is liable to a penalty of $5 000 and a further daily penalty of $200.

(3) Where the act or omission of a person in respect of which he is convicted continues after the conviction, that person is guilty of a further offence against this Act and is liable to a penalty of $1 000.

(4) Where any offence committed by any person under this Act is a continuing one, that person is liable, in addition to any other penalty to which he is liable under this Act, to a penalty of $20 for every day on which the offence is continued.

Proof of certain matters.

47 In any proceedings for an offence against this Act an averment in a complaint—

(*a*) that a person is an authorized officer; and

(*b*) that a building, structure, or place is a work place,

shall be deemed to be proved in the absence of proof to the contrary.

Exemption, &c., from application of requirements of regulations in certain circumstances.

48—(1) Where the Secretary is satisfied that—

(*a*) in any case it is not practicable or necessary for the occupier of any work place to comply with any requirement of any regulation; and

(*b*) the application of the requirement in a modified or varied form would not adversely affect the safety, health, or welfare of the employees in the work place,

he may, in that case, by notice in writing served on the occupier of the work place modify or vary the requirement and the requirement so modified or varied shall apply to that work place until the notice is cancelled in accordance with subsection (2).

(2) The Secretary may by a further notice served on the occupier cancel a notice issued under subsection (1).

Regulations.

49—(1) The Governor may make regulations for the purposes of this Act.

(2) Without prejudice to the generality of subsection (1), the Governor may make such regulations as he may consider necessary for the purpose of securing the health, safety, or welfare of employees in work places.

(3) Without prejudice to the generality of subsection (2), the matters in respect of which the Governor may make regulations shall be all or any of the matters specified in Schedule II.

(4) The regulations made under this Act may apply to—

(*a*) the State generally or any part thereof; or

(*b*) industry or work places generally or to a specified industry or work place or to an industry or work place of a class or kind.

(5) The regulations may provide for a penalty of $500 for a breach of or failure to comply with a regulation.

(6) The regulations made under this Act may—

(*a*) adopt, either wholly or in part, and either specifically or by reference, any of the standard rules, codes, or specifications of the bodies known as the Standards Association of Australia and the British Standards Institution or of any other like authority specified in the regulations relating to any matter as to which the Governor is empowered by this Act to prescribe standards to be observed for the purposes of this Act;

(*b*) incorporate by reference a provision of the Building Regulations including the application to the buildings existing at the time of the making of the regulations of the specified requirements in respect of new buildings;

(*c*) exempt, either unconditionally or subject to prescribed conditions, any industry or work place or any class of industry or work place from any specified provisions of the regulations;

(*d*) regulate the institution and the hearing and determination of appeals under this Act by the appeal tribunal;

(*e*) authorize the Secretary to modify the application of any provision of the regulations to a particular case, so that compliance with the provision as modified shall be deemed to be compliance with the provision; and

(*f*) require the notification of prescribed classes of accidents and cases of disease occurring in any industry or work place.

(7) Nothing in the regulations under this Act shall prejudice or affect the application of the Building Regulations or the General Fire Regulations.

SCHEDULE I

(Section 2)

ACTS REPEALED

Year and number of Act	Short title of Act
No. 52 of 1960	*Scaffolding Act* 1960
No. 68 of 1960	*Inspection of Machinery Act* 1960
No. 14 of 1965	*Factories, Shops, and Offices Act* 1965
No. 17 of 1966	*Factories, Shops, and Offices Act* 1966
No. 49 of 1966	*Inspection of Machinery Act* 1966
No. 79 of 1967	*Factories, Shops, and Offices Act* 1967
No. 7 of 1973	*Inspection of Machinery Act* 1973
No. 63 of 1973	*Inspection of Machinery Act (No. 2)* 1973
No. 64 of 1973	*Factories, Shops, and Offices Act* 1973

SCHEDULE II

(Section 49)

Matters in respect of which regulations may be made under section 49

1. The prevention or reduction of work injuries and the action to be taken on the occurrence of any work injury.
2. The construction, maintenance, access to, care and use of, any building structure or place comprised in any work place.
3. Certificates of competency for persons engaged in prescribed work.
4. Compressed air work.
5. The handling, prohibition of use, use and storage of dangerous, flammable and harmful substances.
6. Demolition work.
7. Electrical distribution and wiring.
8. Examination and testing of equipment.
9. Fire precautions and fire protection equipment.
10. The safety of employees engaged in isolated situations.
11. Machinery, power-driven equipment, and explosive-powered tools including—

    (*a*) safety standards to be complied with in respect of machinery, whether portable, movable, or fixed, power-driven equipment, and explosive-powered tools intended for use in or in connection with industry;

(*b*) the persons who may work, maintain, or have charge of machinery, power-driven equipment, and explosive-powered tools;

(*c*) the protection of persons in the vicinity of any machinery or power-driven equipment and explosive-powered tools;

(*d*) the maintenance and safeguarding of machinery, power-driven equipment, and explosive-powered tools; and

(*e*) the installing, dismantling, cleaning, working, and testing of machinery, power-driven equipment, and explosive-powered tools.

12. Boilers and pressure vessels and associated equipment.

13. Gear.

14. Refrigeration equipment.

15. Amusement devices.

16. Traffic controls.

17. The handling and storage of materials.

18. The protection of persons in work places from areas of hazard.

19. Protective clothing, protective equipment, and rescue equipment.

20. Safety supervisors.

21. Scaffolding, formwork, falsework, and related equipment.

22. Shoring.

23. The carriage and handling of cash.

24. The protection of health of employees in industry, including—

(*a*) the prevention and control of dust;

(*b*) the prevention of the escape of poisonous or deleterious vapours, fumes, and gases;

(*c*) apparatus for collecting, filtering, and preventing the inhalation of dust, vapour, fumes, and gases; and

(*d*) mechanical appliances to assist ventilation.

25. Ventilation, heating, cooling, humidity, air space, and floor space.

26. First-aid, medical, and nursing facilities and arrangements.

27. Lighting.

28. Noise levels and protection from noise.

29. The medical examination of employees.

30. The protection of persons in the vicinity of work places.

31. Maximum weights that may be lifted manually by any employee of a prescribed class or kind.

32. The employment of females and young persons.

33. Control of outworkers.

34. Facilities and equipment for taking of meals by employees and the provision of meal breaks.

35. Facilities for the storage of employees' tools.

36. Seating facilities for employees.

37. Washing and toilet facilities, changing rooms, rest rooms, and drinking water.

38. The fees for doing any act or thing under this Act.

39. The fixing of fees for the registration or renewal of registration of premises subject to Division I of Part III of the Act.

40. The powers and duties of authorized officers.

41. The inspection of work places.

42. The responsibilities and duties of owners or occupiers of work places.

43. The form of records, returns, notices, documents to be used, and information to be kept, given, or furnished for the purposes of this Act, and the keeping, giving, or furnishing thereof.

44. Returns to be made for the purposes of this Act.

45. Employees' safety representatives.

T. J. Hughes, Government Printer, Tasmania

Appendix E

Ontario

Occupational Health & Safety Act 1979

2ND SESSION, 31ST LEGISLATURE, ONTARIO
27 ELIZABETH II, 1978

An Act respecting the Occupational Health and Occupational Safety of Workers

THE HON. R. G. ELGIE
Minister of Labour

TORONTO
PRINTED BY J. C. THATCHER, QUEEN'S PRINTER FOR ONTARIO

An Act respecting the Occupational Health and Occupational Safety of Workers

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. In this Act, Interpretation

1. "committee" means a joint health and safety committee established under this Act; 1976, c. 79, s. 1 (*a*), *amended*.

2. "competent person" means a person who,

   i. is qualified because of his knowledge, training and experience to organize the work and its performance,

   ii. is familiar with the provisions of this Act and the regulations that apply to the work, and

   iii. has knowledge of any potential or actual danger to health or safety in the work place; *New*.

3. "construction" includes erection, alteration, repair, dismantling, demolition, structural maintenance, painting, land clearing, earth moving, grading, excavating, trenching, digging, boring, drilling, blasting, or concreting, the installation of any machinery or plant, and any work or undertaking in connection with a project; 1973, c. 47, s. 1 (*d*), *amended*.

4. "constructor" means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer; 1973, c. 47, s. 1 (*e*), *amended*.

5. "Deputy Minister" means the Deputy Minister of Labour; 1973, c. 47, s. 1 (*f*).

6. "designated substance" means a biological, chemical or physical agent or combination thereof prescribed as a designated substance to which the exposure of a worker is prohibited, regulated, restricted, limited or controlled; *New*.

7. "Director" means an inspector who is appointed under this Act as a Director of the Occupational Health and Safety Division of the Ministry; 1971, c. 43, s. 1 (*da*); 1972, c. 122, s. 1, *amended*.

8. "employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services; 1971, c. 43, s. 1 (*e*); 1973, c. 47, s. 1 (*h*), *amended*.

9. "engineer of the Ministry" means a person who is employed by the Ministry and who is registered as a professional engineer or licensed as a professional engineer under *The Professional Engineers Act*; 1971, c. 43, s. 1 (*g*), *amended*.

R.S.O. 1970, c. 366

10. "factory" means,

    i. a building or place other than a mine, mining plant or place where homework is carried on, where,

        A. any manufacturing process or assembling in connection with the manufacturing of any goods or products is carried on,

        B. in preparing, inspecting, manufacturing, finishing, repairing, warehousing, cleaning or adapting for hire or sale any substance, article or thing, energy is,

            1. used to work any machinery or device, or

            2. modified in any manner,

C. any work is performed by way of trade or for the purposes of gain in or incidental to the making of any goods, substance, article or thing or part thereof,

D. any work is performed by way of trade or for the purposes of gain in or incidental to the altering, demolishing, repairing, maintaining, ornamenting, finishing, storing, cleaning, washing or adapting for sale of any goods, substance, article or thing, or

E. aircraft, locomotives or vehicles used for private or public transport are maintained,

ii. a laundry including a laundry operated in conjunction with,

A. a public or private hospital,

B. a hotel, or

C. a public or private institution for religious, charitable or educational purposes, and

iii. a logging operation; 1971, c. 43, s. 1 (*h*), *amended*.

11. "health and safety representative" means a health and safety representative selected under this Act; 1976, c. 79, s. 1 (*d*), *amended*.

12. "homework" means the doing of any work in the manufacture, preparation, improvement, repair, alteration, assembly or completion of any article or thing or any part thereof by a person for wages in premises occupied primarily as living accommodation; 1971, c. 43, s. 1 (*i*).

13. "industrial establishment" means an office building, factory, arena, shop or office, and any land, buildings and structures appertaining thereto; 1971, c. 43, s. 1 (*j*); 1974, c. 104, s. 1 (*i*), *amended*.

14. "inspector" means an inspector appointed for the purposes of this Act and includes a Director; 1971, c. 43, s. 1 (*k*); 1973, c. 47, s. 1 (*i*), *amended*.

15. "logging" means the operation of felling or trimming trees for commercial or industrial purposes and includes the measuring, storing, transporting or floating of logs and any such activities for the clearing of land; 1971, c. 43, s. 1 (*kb*); 1974, c. 104, s. 1 (2), *amended*.

16. "mine" means any work or undertaking for the purpose of opening up, proving, removing or extracting any metallic or non-metallic mineral or mineral-bearing substance, rock, earth, clay, sand or gravel; R.S.O. 1970, c. 274, s. 169 (1) (*d*), *amended*.

17. "mining plant" means any roasting or smelting furnace, concentrator, mill or place used for or in connection with washing, crushing, grinding, sifting, reducing, leaching, roasting, smelting, refining, treating or research on any substance mentioned in paragraph 16; R.S.O. 1970, c. 274, s. 169 (1) (*g*), *amended*.

18. "Minister" means the Minister of Labour; 1971, c. 43, s. 1 (*l*); 1973, c. 47, s. 1 (*j*).

19. "Ministry" means the Ministry of Labour;

20. "occupational illness" means a condition that results from exposure in a work place to a physical, chemical or biological agent to the extent that the normal physiological mechanisms are affected and the health of the worker is impaired thereby and includes an industrial disease as defined by *The Workmen's Compensation Act*; *New*.

R.S.O. 1970, c. 505

21. "owner" includes a trustee, receiver, mortgagee in possession, tenant, lessee, or occupier of any lands or premises used or to be used as a work place, and a person who acts for or on behalf of an owner as his agent or delegate; R.S.O. 1970, c. 274, s. 1, par. 18; 1971, c. 43, s. 1 (*n*); 1973, c. 47, s. 1 (*l*), *amended*.

22. "prescribed" means prescribed by a regulation made under this Act; *New*.

23. "project" means a construction project, whether public or private, including,

    i. the construction of a building, bridge, structure, industrial establishment, mining plant, shaft, tunnel, caisson, trench, excavation, highway, railway, street, runway, parking

lot, cofferdam, conduit, sewer, watermain, service connection, telegraph, telephone or electrical cable, pipe line, duct or well, or any combination thereof,

ii. mining development,

iii. the moving of a building or structure, and

iv. any work or undertaking, or any lands or appurtenances used in connection with construction; 1973, c. 47, s. 1 (*n*), *amended*.

24. "regulations" means the regulations made under this Act; 1971, c. 43, s. 1 (*r*); 1973, c. 47, s. 1 (*o*), *amended*.

25. "shop" means a building, booth or stall or a part of such building, booth or stall where goods are handled, exposed or offered for sale or where services are offered for sale; 1971, c. 43, s. 1 (*s*), *amended*.

26. "supervisor" means a person who has charge of a work place or authority over a worker; *New*.

27. "trade union" means a trade union as defined in *The Labour Relations Act* that has the status of exclusive bargaining agent under that Act in respect of any bargaining unit or units in a work place and includes an organization representing workers or persons to whom this Act applies where such organization has exclusive bargaining rights under any other Act in respect of such workers or persons; 1976, c. 79, s. 1 (*g*), *amended*. R.S.O. 1970, c. 232

28. "work place" means any land, premises, location or thing at, upon, in or near which a worker works; *New*.

29. "worker" means a person who performs work or supplies services for monetary compensation but does not include,

i. an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation program, or

ii. a patient who participates in a work or rehabilitation program in a psychiatric institution, mental health or retardation centre or

home, or rehabilitation facility. 1973, c. 47, s. 1 (*t*), *amended*.

PART I

APPLICATION

Application to Crown

2.—(1) This Act binds the Crown and applies to an employee in the service of the Crown or an agency, board, commission or corporation that exercises any function assigned or delegated to it by the Crown. 1971, c. 43, s. 3; 1973, c. 47, s. 2 (1), *amended*.

Application of other Acts

(2) Notwithstanding anything in any general or special Act, the provisions of this Act and the regulations prevail. 1976, c. 79, s. 11.

Application to private residences

3.—(1) This Act does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection therewith.

Farming operations

(2) Except as shall be prescribed and subject to the conditions and limitations prescribed, this Act or a Part thereof does not apply to farming operations.

Teachers, etc.

(3) Except as shall be prescribed and subject to the conditions and limitations prescribed, this Act or a Part thereof does not apply to,

1974, c. 109

(*a*) a person who is employed as a teacher as defined in *The Education Act, 1974*; or

(*b*) a person who is employed as a member or teaching assistant of the academic staff of a university or a related institution. *New*.

PART II

ADMINISTRATION

Delegation of powers

4. Where under this Act or the regulations any power or duty is granted to or vested in the Minister or the Deputy Minister, the Minister or Deputy Minister may in writing

delegate that power or duty from time to time to any officer or officers of the Ministry subject to such limitations, restrictions, conditions and requirements as the Minister or Deputy Minister may set out in the delegation. *New.*

Appointment of inspectors and Directors

5.—(1) Such persons as may be necessary to administer and enforce this Act and the regulations may be appointed as inspectors by the Deputy Minister and the Deputy Minister may designate one or more of the inspectors as a Director or Directors. 1971, c. 43, s. 6 (1, 2); 1973, c. 47, s. 4 (1, 2), *amended.*

Director may act as inspector

(2) A Director may exercise any of the powers or perform any of the duties of an inspector under this Act or the regulations. *New.*

Certificate of appointment

6.—(1) The Deputy Minister shall issue a certificate of appointment, bearing his signature or a facsimile thereof, to every inspector.

Production of certificate

(2) Every inspector, in the exercise of any of his powers or duties under this Act, shall produce his certificate of appointment upon request. 1971, c. 43, s. 7; 1973, c. 47, s. 5, *amended.*

Mandatory selection of health and safety representative

7.—(1) Where the number of workers at a project regularly exceeds twenty, the constructor shall cause the workers to select at least one health and safety representative from among the workers on the project who do not exercise managerial functions. *New.*

Order appointing health and safety representatives

(2) Where no committee has been established under section 8, or where the number of workers at a project does not regularly exceed twenty, the Minister may, by order in writing, require a constructor or an employer to cause the selection of one or more health and safety representatives for a work place or a part or parts thereof from among the workers employed at the work place or in the part or parts thereof who do not exercise managerial functions, and may provide in the order for the qualifications of such representative or representatives.

Idem

(3) The Minister may from time to time give such directions as the Minister considers advisable concerning the carrying out of the functions of a health and safety representative. 1976, c. 79, s. 5 (1), *amended.*

What Minister shall consider

(4) In exercising the power conferred by subsection 2, the Minister shall consider the matters set out in subsection 4 of section 8. *New.*

Selection of representatives

(5) The selection of a health and safety representative shall be made by those workers who do not exercise managerial functions and who will be represented by the health and safety representative in the work place, or the part or parts thereof, as the case may be, or, where there is a trade union or trade unions representing such workers, by the trade union or trade unions.

Powers of representative

(6) A health and safety representative may inspect the physical condition of the work place or the part or parts thereof for which he has been selected, as the case may be, not more often than once a month or at such intervals as a Director may direct, and it is the duty of the employer and the workers to afford the health and safety representative such information and assistance as may be required for the purpose of carrying out the inspection.

Idem

(7) A health and safety representative has power to identify situations that may be a source of danger or hazard to workers and to make recommendations or report his findings thereon to the employer, the workers and the trade union or trade unions representing the workers.

Notice of accident, inspection by representative

(8) Where a person is killed or critically injured at a work place from any cause, the health and safety representative may, subject to subsection 2 of section 25, inspect the place where the accident occurred and any machine, device or thing, and shall report his findings in writing to a Director.

Entitlement to time from work

(9) A health and safety representative is entitled to take such time from his work as is necessary to carry out his duties under subsections 6 and 8 and the time so spent shall be deemed to be work time for which he shall be paid by his employer at his regular or premium rate as may be proper. 1976, c. 79, s. 5 (2-6), *amended*.

Additional powers of certain health and safety representatives

(10) A health and safety representative or representatives of like nature appointed or selected under the provisions of a collective agreement or other agreement or arrangement between the constructor or the employer and the workers, has, in addition to his functions and powers under the provisions of the collective agreement or other agreement or arrangement the functions and powers conferred upon a health and safety representative by subsections 6, 7 and 8. *New*.

Application

8.—(1) Subject to subsection 3, this section does not apply,

(*a*) to a constructor or an employer who undertakes to perform work or supply services on a project; or

(*b*) to an employer in respect of those workers who work,

(i) in that part or those parts of a building used for office purposes,

(ii) in a shop where goods or services are sold or offered for sale to the public, except any part used as a factory,

(iii) in a building used for multiple residential accommodation,

(iv) in a library, museum or art gallery,

(v) in a restaurant, hotel, motel or premises for which a licence or permit has been issued under *The Liquor Licence Act, 1975* except that part used as a kitchen or laundry, 1975, c. 40

(vi) in a theatre or place of public entertainment, or

(vii) in premises occupied and used by a fraternal or social organization or a private club.

Establishment of joint health and safety committees

(2) Subject to subsection 3, where,

(*a*) twenty or more workers are regularly employed at a work place;

(*b*) a regulation made in respect of a designated substance applies to a work place; or

(*c*) an order to an employer is in effect under section 20,

the employer shall cause a joint health and safety committee to be established and maintained at the work place unless the Minister is satisfied that a committee of like nature or an arrangement, program or system in which the workers participate is, on the date this Act comes into force, established and maintained pursuant to a collective agreement or other agreement or arrangement and that such committee, arrangement, program or system provides benefits for the health and safety of the workers equal to, or greater than, the benefits to be derived under a committee established under this section.

Minister's order

(3) Notwithstanding subsections 1 and 2, the Minister may, by order in writing, require a constructor or an em-

ployer to establish and maintain one or more joint health and safety committees for a work place or a part thereof, and may, in such order, provide for the composition, practice and procedure of any committee so established. *New.*

What Minister shall consider

(4) In exercising the power conferred by subsection 3, the Minister shall consider,

(*a*) the nature of the work being done;

(*b*) the request of a constructor, an employer, a group of the workers or the trade union or trade unions representing the workers in a work place;

(*c*) the frequency of illness or injury in the work place or in the industry of which the constructor or employer is a part;

(*d*) the existence of health and safety programs and procedures in the work place and the effectiveness thereof; and

(*e*) such other matters as the Minister considers advisable. 1976, c. 79, s. 4 (3), *amended*.

Composition of committee

(5) A committee shall consist of at least two persons of whom at least half shall be workers who do not exercise managerial functions to be selected by the workers they are to represent or, where there is a trade union or trade unions representing such workers, by the trade union or trade unions.

Powers of committee

(6) It is the function of a committee and it has power to,

(*a*) identify situations that may be a source of danger or hazard to workers;

(*b*) make recommendations to the constructor or employer and the workers for the improvement of the health and safety of workers;

(*c*) recommend to the constructor or employer and the workers the establishment, maintenance and monitoring of programs, measures and procedures respecting the health or safety of workers; and

(*d*) obtain information from the constructor or employer respecting,

(i) the identification of potential or existing hazards of materials, processes or equipment, and

(ii) health and safety experience and work practices and standards in similar or other indus-

tries of which the constructor or employer has knowledge. 1976, c. 79, s. 4 (4), *amended*.

Minutes of proceedings

(7) A committee shall maintain and keep minutes of its proceedings and make the same available for examination and review by an inspector.

Powers of designated member

(8) The members of a committee who represent workers shall designate one of the members representing workers to inspect the physical condition of the work place, not more often than once a month or at such intervals as a Director may direct, and it is the duty of the employer and the workers to afford that member such information and assistance as may be required for the purpose of carrying out the inspection.

Idem

(9) The members of a committee who represent workers shall designate one or more such members to investigate cases where a worker is killed or critically injured at a work place from any cause and one of those members may, subject to subsection 2 of section 25, inspect the place where the accident occurred and any machine, device or thing, and shall report his findings to a Director and to the committee. *New*.

Posting of names and work locations

(10) A constructor or an employer required to establish a committee under this section shall post and keep posted at the work place the names and work locations of the committee members in a conspicuous place or places where they are most likely to come to the attention of the workers.

Meetings

(11) A committee shall meet at least once every three months at the work place and may be required to meet by order of the Minister. 1976, c. 79, s. 4 (6, 7), *amended*.

Entitlement to time from work

(12) A member of a committee is entitled to such time from his work as is necessary to attend meetings of the committee and to carry out his duties under subsections 8 and 9 and the time so spent shall be deemed to be work time for which he shall be paid by his employer at his regular or premium rate as may be proper. 1976, c. 79, s. 4 (8), *amended*.

Additional powers of certain committees

(13) Any committee of a like nature to a committee established under this section in existence in a work place under the provisions of a collective agreement or other agreement or arrangement between a constructor or an employer and the workers, has, in addition to its functions and powers under the provisions of the collective agreement or other agreement or arrangement, the functions and powers conferred upon a committee by this section.

Dispute resolution

(14) Where a dispute arises as to the application of subsection 2, or the compliance or purported compliance therewith by an employer, the dispute shall be decided by the Minister after consulting the employer and the workers or the trade union or trade unions representing the workers. *New.*

Summary to be furnished R.S.O. 1970, c. 505

9.—(1) For work places to which *The Workmen's Compensation Act* applies, the Workmen's Compensation Board, upon the request of an employer, a worker, committee, health and safety representative or trade union, shall send to the employer, and to the worker, committee, health and safety representative or trade union requesting the information an annual summary of data relating to the employer in respect of the number of work accident fatalities, the number of lost workday cases, the number of lost workdays, the number of non-fatal cases that required medical aid without lost workdays, the incidents of occupational illnesses, the number of occupational injuries, and such other data as the Board may consider necessary or advisable.

Posting of copy of summary

(2) Upon receipt of the annual summary, the employer shall cause a copy thereof to be posted in a conspicuous place or places at the work place where it is most likely to come to the attention of the workers. 1976, c. 79, s. 8, *amended.*

Director to provide information

(3) A Director shall, in accordance with the objects and purposes of this Act, ensure that persons and organizations concerned with the purposes of this Act are provided with information and advice pertaining to its administration and to the protection of the occupational health and occupational safety of workers generally. *New.*

Advisory Council on Occupational Health and Occupational Safety

10.—(1) There shall be a council to be known as the Advisory Council on Occupational Health and Occupational Safety composed of not fewer than twelve and not more than twenty members appointed by the Lieutenant Governor in Council on the recommendation of the Minister.

Term of office of members

(2) The members of the Advisory Council shall be appointed for such term as the Lieutenant Governor in Council determines and shall be representative of management, labour and technical or professional persons and the public who are concerned with and have knowledge of occupational health and occupational safety.

Chairman and vice-chairman

(3) The Lieutenant Governor in Council shall designate a chairman and a vice-chairman of the Advisory Council from among the members appointed.

(4) The Lieutenant Governor in Council may fill any vacancy that occurs in the membership of the Advisory Council. Vacancies

(5) The remuneration and expenses of the members of the Advisory Council shall be determined by the Lieutenant Governor in Council and shall be paid out of the moneys appropriated therefor by the Legislature. Remuneration and expenses

(6) The Advisory Council, with the approval of the Minister, may make rules and pass resolutions governing its procedure, including the calling of meetings, the establishment of a quorum, and the conduct of meetings. Powers of Advisory Council

(7) The function of the Advisory Council is and it has power, Idem

(*a*) to make recommendations to the Minister relating to programs of the Ministry in occupational health and occupational safety; and

(*b*) to advise the Minister on matters relating to occupational health and occupational safety which may be brought to its attention or be referred to it.

(8) The Advisory Council shall file with the Minister not later than the 1st day of June in each year an annual report upon the affairs of the Advisory Council. Annual report

(9) The Minister shall submit the report to the Lieutenant Governor in Council who shall cause the report to be laid before the Assembly if it is in session or, if not, at the next ensuing session. *New.* Idem

11.—(1) The Minister may appoint committees, which are not committees as defined in paragraph 1 of section 1, or persons to assist or advise the Minister on any matter arising under this Act or to inquire into and report to the Minister on any matter that the Minister considers advisable. Advisory committees

(2) Any person appointed under subsection 1 who is not an officer in the public service of the Province of Ontario may be paid such remuneration and expenses as may be from time to time fixed by the Lieutenant Governor in Council. *New.* Remuneration and expenses

12.—(1) The Lieutenant Governor in Council may fix an amount that shall be assessed and levied by the Workmen's Compensation Board upon employers in Schedules 1 Assessment to defray expenses

R.S.O. 1970, c. 505

and 2 under *The Workmen's Compensation Act* to defray the expenses of the administration of this Act and the regulations and such amount shall not exceed $4,000,000 for the fiscal year in which this Act comes into force and shall be subject to increase in each subsequent fiscal year by a sum not exceeding 10 per cent of the amount fixed for the preceding fiscal year.

Method of collection

(2) The Workmen's Compensation Board shall add to the assessments and levies made under *The Workmen's Compensation Act* upon employers in Schedules 1 and 2 a sum calculated as a percentage of the assessments and levies and which percentage shall be determined as the proportion that the amount fixed under subsection 1 bears to the total sum that the Workmen's Compensation Board fixes and determines to be assessed for payment by employers in Schedules 1 and 2, and *The Workmen's Compensation Act* applies to such sum and to the collection and payment thereof in the same manner as to an assessment and levy made under that Act.

Idem

(3) The Workmen's Compensation Board shall collect the assessment and levy imposed under this section and shall pay the amounts so collected to the Treasurer of Ontario. 1973, c. 47, s. 29, *amended*.

PART III

DUTIES OF A CONSTRUCTOR, EMPLOYER, SUPERVISOR, WORKER, OWNER AND SUPPLIER

Duties of constructor

13.—(1) A constructor shall ensure, on a project undertaken by the constructor that,

(*a*) the measures and procedures prescribed by this Act and the regulations are carried out on the project;

(*b*) every employer and every worker performing work on the project complies with this Act and the regulations; and

(*c*) the health and safety of workers on the project is protected. 1973, c. 47, s. 14 (3), *amended*.

Notice of project

(2) Where so prescribed, a constructor shall, before commencing any work on a project, give to a Director notice in writing of the project containing such information as may be prescribed. *New*.

Duties of employers

14.—(1) An employer shall ensure that,

(*a*) the equipment, materials and protective devices as prescribed are provided;

(*b*) the equipment, materials and protective devices provided by him are maintained in good condition;

(*c*) the measures and procedures prescribed are carried out in the work place;

(*d*) the equipment, materials and protective devices provided by him are used as prescribed; and

(*e*) a floor, roof, wall, pillar, support or other part of a work place is capable of supporting all loads to which it may be subjected without causing the materials therein to be stressed beyond the allowable unit stresses established under *The Building Code Act, 1974*. 1974, c. 74

Idem (2) Without limiting the strict duty imposed by subsection 1, an employer shall,

(*a*) provide information, instruction and supervision to a worker to protect the health or safety of the worker;

(*b*) when appointing a supervisor, appoint a competent person;

(*c*) acquaint a worker or a person in authority over a worker with any hazard in the work and in the handling, storage, use, disposal and transport of any article, device, equipment or a biological, chemical or physical agent;

(*d*) afford assistance and co-operation to a committee and a health and safety representative in the carrying out by the committee and the health and safety representative of any of their functions;

(*e*) only employ in or about a work place a person over such age as may be prescribed;

(*f*) not knowingly permit a person who is under such age as may be prescribed to be in or about a work place;

(*g*) take every precaution reasonable in the circumstances for the protection of a worker; and

(*h*) post, in the work place, a copy of this Act and any explanatory material prepared by the Ministry, both in English and the majority language of the

work place, outlining the rights, responsibilities and duties of workers.

Idem (3) For the purposes of clause *b* of subsection 2, an employer may appoint himself as a supervisor where the employer is a competent person. 1971, c. 43, ss. 24 (1-3), *part*, 28 (1, 2); 1973, c. 47, s. 17 (1, 2), *amended*.

Idem **15.**—(1) In addition to the duties imposed by section 14, an employer shall,

(*a*) establish an occupational health service for workers as prescribed;

(*b*) where an occupational health service is established as prescribed, maintain the same according to the standards prescribed;

(*c*) keep and maintain accurate records of the handling, storage, use and disposal of biological, chemical or physical agents as prescribed;

(*d*) accurately keep and maintain and make available to the worker affected such records of the exposure of a worker to biological, chemical or physical agents as may be prescribed;

(*e*) notify a Director of the use or introduction into a work place of such biological, chemical or physical agents as may be prescribed;

(*f*) monitor at such time or times or at such interval or intervals the levels of biological, chemical or physical agents in a work place and keep and post accurate records thereof as prescribed;

(*g*) comply with a standard limiting the exposure of a worker to biological, chemical or physical agents as prescribed;

(*h*) where so prescribed, only permit a worker to work or be in a work place who has undergone such medical examinations, tests or x-rays as prescribed and who is found to be physically fit to do the work in the work place; and

(*i*) where so prescribed, provide a worker with written instructions as to the measures and procedures to be taken for the protection of a worker. *New*.

Idem (2) For the purposes of clause *a* of subsection 1, a group of employers, with the approval of a Director, may act as an employer.

16.—(1) A supervisor shall ensure that a worker, Duties of supervisor

(*a*) works in the manner and with the protective devices, measures and procedures required by this Act and the regulations; and

(*b*) uses or wears the equipment, protective devices or clothing that his employer requires to be used or worn.

(2) Without limiting the duty imposed by subsection 1, a supervisor shall, Additional duties of supervisor

(*a*) advise a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware;

(*b*) where so prescribed, provide a worker with written instructions as to the measures and procedures to be taken for protection of the worker; and

(*c*) take every precaution reasonable in the circumstances for the protection of a worker. R.S.O. 1970, c. 274, s. 177 (6); 1971, c. 43, s. 26; 1973, c. 47, s. 17 (1, 3), *amended*.

17.—(1) A worker shall, Duties of workers

(*a*) work in compliance with the provisions of this Act and the regulations;

(*b*) use or wear the equipment, protective devices or clothing that his employer requires to be used or worn;

(*c*) report to his employer or supervisor the absence of or defect in any equipment or protective device of which he is aware and which may endanger himself or another worker;

(*d*) report to his employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he knows; and

(*e*) where so prescribed, have, at the expense of the employer, such medical examinations, tests or x-rays, at such time or times and at such place or places as prescribed.

(2) No worker shall, Idem

(*a*) remove or make ineffective any protective device required by the regulations or by his employer, without providing an adequate temporary protective device and when the need for removing or making

ineffective the protective device has ceased, the protective device shall be replaced immediately;

(*b*) use or operate any equipment, machine, device or thing or work in a manner that may endanger himself or any other worker; or

(*c*) engage in any prank, contest, feat of strength, unnecessary running or rough and boisterous conduct. 1971, c. 43, ss. 27, 29, 31 (3); 1973, c. 47, ss. 18, 19, 20, *amended*.

Duties of owners

18.—(1) The owner of a work place that is not a project shall,

(*a*) ensure that,

(i) such facilities as may be prescribed are provided,

(ii) any facilities prescribed to be provided are maintained as prescribed,

(iii) the work place complies with the regulations, and

(iv) no work place is constructed, developed, reconstructed, altered or added to except in compliance with this Act and the regulations; and

(*b*) where so prescribed, furnish to a Director any drawings, plans or specifications of any work place as prescribed. 1971, c. 43, s. 22.

Mine plans

(2) The owner of a mine shall cause drawings, plans or specifications to be maintained and kept up to a date not more than six months last past on such scale and showing such matters or things as may be prescribed. R.S.O. 1970, c. 274, s. 617, *amended*.

Plans of work places

(3) Where so prescribed, an owner or employer shall,

(*a*) not begin any construction, development, reconstruction, alteration, addition or installation to or in a work place until the drawings, layout and specifications thereof and any alterations thereto have been filed with the Ministry for review by an engineer of the Ministry for compliance with this Act and the regulations; and

(*b*) keep a copy of the drawings as reviewed in a convenient location at or near the work place and

such drawings shall be produced by the owner or employer upon the request of an inspector for his examination and inspection. 1971, c. 43, s. 17 (1, 5), *amended*.

Additional information

(4) An engineer of the Ministry may require the drawings, layout and specifications to be supplemented by the owner or employer with additional information. 1971, c. 43, s. 17 (3) (*b*), *amended*.

Fees

(5) Fees as prescribed for the filing and review of drawings, layout or specifications shall become due and payable by the owner or employer upon filing. 1971, c. 43, s. 17 (6), *amended*.

Duties of suppliers

19. Every person who supplies any machine, device, tool or equipment under any rental, leasing or similar arrangement for use in or about a work place shall ensure,

(*a*) that the machine, device, tool or equipment is in good condition;

(*b*) that the machine, device, tool or equipment complies with this Act and the regulations; and

(*c*) if it is his responsibility under the rental, leasing or similar arrangement to do so, that the machine, device, tool or equipment is maintained in good condition. 1971, c. 43, s. 30; 1973, c. 47, s. 24 (2), *amended*.

PART IV

TOXIC SUBSTANCES

Orders of Director

20.—(1) Where a biological, chemical or physical agent or combination of such agents is used or intended to be used in the work place and its presence in the work place or the manner of its use is in the opinion of a Director likely to endanger the health of a worker, the Director shall by notice in writing to the employer order that the use, intended use, presence or manner of use be,

(*a*) prohibited;

(*b*) limited or restricted in such manner as the Director specifies; or

(*c*) subject to such conditions regarding administrative control, work practices, engineering control and time limits for compliance as the Director specifies.

Contents of order

(2) Where a Director makes an order to an employer under subsection 1, the order shall,

(*a*) identify the biological, chemical or physical agent, or combination of such agents, and the manner of use that is the subject-matter of the order; and

(*b*) state the opinion of the Director as to the likelihood of the danger to the health of a worker, and his reasons in respect thereof, including the matters or causes which give rise to his opinion.

Posting of order

(3) The employer shall provide a copy of an order made under subsection 1 to the committee, health and safety representative and trade union, if any, and shall cause a copy of the order to be posted in a conspicuous place in the work place where it is most likely to come to the attention of the workers who may be affected by the use, presence or intended use of the biological, chemical or physical agent or combination of agents.

Appeal to Minister

(4) Where the employer, a worker or a trade union considers that he or it is aggrieved by an order made under subsection 1, the employer, worker or trade union may by notice in writing given within fourteen days of the making of the order appeal to the Minister.

Delegation

(5) The Minister may, having regard to the circumstances, direct that an appeal under subsection 4 be determined on his behalf by a person appointed by him for that purpose.

Procedure

(6) The Minister or, where a person has been appointed under subsection 5, the person so appointed, may give such directions and issue such orders as he considers proper or necessary concerning the procedures to be adopted or followed and shall have all the powers of a chairman of a board of arbitration under subsection 7 of section 37 of *The Labour Relations Act*.

R.S.O. 1970, c. 232

Substitution of findings

(7) On an appeal, the Minister or, where a person has been appointed under subsection 5, the person so appointed, may substitute his findings for those of the Director and may rescind or affirm the order appealed from or make a new order in substitution therefor and such order shall stand in the place of and have the like effect under this Act and the regulations as the order of the Director, and such order shall be final and not subject to appeal under this section.

(8) In making a decision or order under subsection 1 or subsection 7, a Director, the Minister, or, where a person has been appointed under subsection 5, the person so appointed, shall consider as relevant factors, Matters to be considered

(a) the relation of the agent, combination of agents or by-product to a biological or chemical agent that is known to be a danger to health;

(b) the quantities of the agent, combination of agents or by-product used or intended to be used or present;

(c) the extent of exposure;

(d) the availability of other processes, agents or equipment for use or intended use;

(e) data regarding the effect of the process or agent on health; and

(f) any criteria or guide with respect to the exposure of a worker to a biological, chemical or physical agent or combination of such agents that are adopted by a regulation.

(9) On an appeal under subsection 4, the Minister or, where a person has been appointed under subsection 5, the person so appointed, may suspend the operation of the order appealed from pending the disposition of the appeal. Suspension of order by Minister, etc., pending disposition of appeal

(10) A person appointed under subsection 5 shall be paid such remuneration and expenses as the Minister, with the approval of the Lieutenant Governor in Council, may determine. Remuneration of appointee

(11) This section does not apply to designated substances. Application

(12) A Director is not required to hold or afford to an employer or any other person an opportunity for a hearing before making an order under subsection 1. *New.* No hearing required prior to issuing order

21.—(1) Except for purposes of research and development, no person shall, New biological or chemical agents

(a) manufacture;

(b) distribute; or

(c) supply,

for commercial or industrial use in a work place any new biological or chemical agent or combination of such agents unless he first submits to a Director notice in writing of his intention to manufacture, distribute or supply such new agent or combination of such agents and the notice shall include the ingredients of such new agent or combination of agents and their common or generic name or names and the composition and properties thereof.

Report on assessment

(2) Where in the opinion of the Director, which opinion shall be made promptly, the introduction of the new biological or chemical agent or combination of such agents referred to in subsection 1 may endanger the health or safety of the workers in a work place, the Director shall require the manufacturer, distributor or supplier, as the case may be, to provide, at the expense of the manufacturer, distributor or supplier, a report or assessment, made or to be made by a person possessing such special, expert or professional knowledge or qualifications as are specified by the Director, of the agent or combination of agents intended to be manufactured, distributed or supplied and the manner of use including, the matters referred to in subclauses i to vii of clause *l* of subsection 1 of section 28.

Interpretation

(3) For the purpose of this section, "new biological or chemical agent or combination of such agents" means any such agent or combination of such agents other than those used in one or more work places and included in an inventory compiled or adopted by the Ministry. *New.*

Designation of substances

22. Prior to a substance being designated under paragraph 14 of subsection 2 of section 41, the Minister,

(*a*) shall publish in *The Ontario Gazette* a notice stating that the substance may be designated and calling for briefs or submissions in relation to the designation; and

(*b*) shall publish in *The Ontario Gazette* a notice setting forth the proposed regulation relating to the designation of the substance at least sixty days before the regulation is filed with the Registrar of Regulations. *New.*

PART V

REFUSAL TO WORK WHERE HEALTH OR SAFETY IN DANGER

Application

23.—(1) This section does not apply to,

(*a*) a person employed in, or who is a member of a police force, to which *The Police Act* applies;

R.S.O. 1970, c. 351

(*b*) a full-time fire fighter as defined in *The Fire Departments Act*; or R.S.O. 1970, c. 169

(*c*) a person employed in the operation of a correctional institution or facility, training school or centre, detention and observation home, or other similar institution, facility, school or home.

Idem (2) Where circumstances are such that the life, health or safety of another person or the public may be in imminent jeopardy, this section does not apply to a person employed in the operation of any of the following institutions, facilities or services whether granted aid out of moneys appropriated by the Legislature or not and whether operated for private gain or not:

1. A hospital, sanatarium, nursing home, home for the aged, psychiatric institution, mental health or mental retardation centre or a rehabilitation facility.
2. A residential group home or other facility for persons with behavioural or emotional problems or a physical, mental or developmental handicap.
3. An ambulance service or a first aid clinic or station.
4. A laboratory operated by the Crown or a laboratory licensed under *The Public Health Act*. R.S.O. 1970, c. 377
5. Any laundry, food service, power plant or technical service or facility belonging to, or used in conjunction with, any institution, facility or service referred to in paragraphs 1 to 4. *New*.

Refusal to work (3) A worker may refuse to work or do particular work where he has reason to believe that,

(*a*) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;

(*b*) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or

(*c*) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

Report of refusal to work (4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal

to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

(*a*) a committee member who represents workers, if any;

(*b*) a health and safety representative, if any; or

(*c*) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

Worker to remain near work station

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station. 1971, c. 43, s. 31 (1, 2); 1976, c. 79, s. 5 (1), *amended*.

Refusal to work following investigation

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

(*a*) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;

(*b*) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or

(*c*) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

Investigation by inspector

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause *a*, *b* or *c* of subsection 4.

Decision of inspector

(8) The inspector shall, following the investigation referred to in subsection 7, decide whether the machine, device,

thing or the work place or part thereof is likely to endanger the worker or another person. 1976, c. 79, s. 3 (2-4), *amended*.

Idem

(9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause *a*, *b* or *c* of subsection 4.

Worker to remain at a safe place pending decision

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

(*a*) assigns the worker reasonable alternative work during such hours; or

(*b*) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

Duty to advise other workers

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be so assigned has been advised of the refusal by another worker and the reason therefor.

Entitlement to time from work

(12) The time spent by a person mentioned in clause *a*, *b* or *c* of subsection 4 in carrying out his duties under subsections 4 and 7, shall be deemed to be work time for which the person shall be paid by his employer at his regular or premium rate as may be proper.

PART VI

REPRISALS BY EMPLOYER PROHIBITED

No discipline, dismissal, etc., by employer

24.—(1) No employer or person acting on behalf of an employer shall,

(*a*) dismiss or threaten to dismiss a worker;

(*b*) discipline or suspend or threaten to discipline or suspend a worker;

(*c*) impose any penalty upon a worker; or

(*d*) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations. 1971, c. 43, s. 24 (5); 1973, c. 47, s. 17 (4); 1976, c. 79, s. 9 (1), *amended*.

Arbitration

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection 1, the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

Inquiry by Ontario Labour Relations Board R.S.O. 1970, c. 232

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection 2, and section 79 of *The Labour Relations Act*, except subsection 4*a*, applies with all necessary modifications, as if such section, except subsection 4*a*, is enacted in and forms part of this Act.

Idem

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection 2, sections 91, 92, 95, 97 and 98 of *The Labour Relations Act* apply, with all necessary modifications.

Onus of proof

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection 2, the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection 1 lies upon the employer or the person acting on behalf of the employer. 1976, c. 79, s. 9 (2-5), *amended*.

Jurisdiction when complaint by Crown employee

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection 1.

Board may substitute penalty

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection 2, the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

Exception R.S.O. 1970, c. 351

(8) Notwithstanding subsection 2, a person who is subject to a rule or code of discipline under *The Police Act* shall have his complaint in relation to an alleged contravention of subsection 1 dealt with under that Act. *New*.

PART VII

NOTICES

Notice of death or injury

25.—(1) Where a person is killed or critically injured from any cause at a work place, the constructor, if any,

and the employer shall notify an inspector, and the committee, health and safety representative and trade union, if any, immediately of the occurrence by telephone, telegram or other direct means and the employer shall, within forty-eight hours after the occurrence, send to a Director a written report of the circumstances of the occurrence containing such information and particulars as the regulations may prescribe.

Preservation of wreckage

(2) Where a person is killed or is critically injured at a work place no person shall, except for the purpose of,

(*a*) saving life or relieving human suffering;

(*b*) maintaining an essential public utility service or a public transportation system; or

(*c*) preventing unnecessary damage to equipment or other property,

interfere with, disturb, destroy, alter or carry away any wreckage, article or thing at the scene of or connected with the occurrence until permission so to do has been given by an inspector. R.S.O. 1970, c. 274, s. 612; 1971, c. 43, s. 33; 1973, c. 47, s. 25, *amended*.

Notice of accident, explosion or fire causing injury

26.—(1) Where an accident, explosion or fire causes injury to a person at a work place whereby he is disabled from performing his usual work or requires medical attention, and such occurrence does not cause death or critical injury to any person, the employer shall give notice in writing, within four days of the occurrence, to a Director, and to the committee, health and safety representative and trade union, if any, containing such information and particulars as may be prescribed. R.S.O. 1970, c. 274, s. 613; 1971, c. 43, s. 34; 1973, c. 47, s. 30, *amended*.

Notice of occupational illness

(2) Where an employer is advised by a worker or by a person on behalf of the worker that the worker has an occupational illness, the employer shall give notice in writing, within four days of being so advised, to a Director and to the committee, health and safety representative and trade union, if any, containing such information and particulars as may be prescribed. 1971, c. 43, s. 34, *part, amended*.

Idem

(3) Subsection 2 applies, with all necessary modifications, where an employer is advised by a former worker of the employer or a person on behalf of such worker, that such worker has or had an occupational illness. *New*.

Accidents, explosions, etc., at a project site or mine

27. Where a notice or report is not required under section 25 or 26 and an accident, premature or unexpected

explosion, fire, flood or inrush of water, failure of any equipment, machine, device, article or thing, cave-in, subsidence, rockburst, or other incident as prescribed occurs at a project site, mine or mining plant, notice in writing of the occurrence shall be given to a Director and to the committee, health and safety representative and trade union, if any, by the constructor of the project or the owner of the mine or mining plant within two days of the occurrence containing such information and particulars as may be prescribed. R.S.O. 1970, c. 274, s. 614, *amended*.

PART VIII

ENFORCEMENT

Powers of Inspector

28.—(1) An inspector may, for the purposes of carrying out his duties and powers under this Act and the regulations,

(*a*) subject to subsection 2, enter in or upon any work place at any time without warrant or notice;

(*b*) take up or use any machine, device, article, thing, material or biological, chemical or physical agent or part thereof;

(*c*) require the production of any drawings, specifications, licence, document, record or report, and inspect, examine and copy the same;

(*d*) upon giving a receipt therefor, remove any drawings, specifications, licence, document, record or report inspected or examined for the purpose of making copies thereof or extracts therefrom, and upon making copies thereof or extracts therefrom, shall promptly return the same to the person who produced or furnished them;

(*e*) conduct or take tests of any equipment, machine, device, article, thing, material or biological, chemical or physical agent in or about a work place and for such purposes, take and carry away such samples as may be necessary;

(*f*) in any inspection, examination, inquiry or test, be accompanied and assisted by or take with him any person or persons having special, expert or professional knowledge of any matter, take photographs, and take with him and use any equipment or materials required for such purpose;

(*g*) make inquiries of any person who is or was in a work place either separate and apart from another person or in the presence of any other person that are or may be relevant to an inspection, examination, inquiry or test;

(*h*) require that a work place or part thereof not be disturbed for a reasonable period of time for the purposes of carrying out an examination, investigation or test;

(*i*) require that any equipment, machine, device, article, thing or process be operated or set in motion or that a system or procedure be carried out that may be relevant to an examination, inquiry or test;

(*j*) require in writing an owner, constructor or employer to provide, at the expense of the owner, constructor or employer, a report bearing the seal and signature of a professional engineer stating,

(i) the load limits of a floor, roof or temporary work or part of a building, structure or temporary work,

(ii) that a floor, roof or temporary work is capable of supporting or withstanding the loads being applied to it or likely to be applied to it, or

(iii) that a floor, roof or temporary work, or part of a building, structure or temporary work is capable of supporting or withstanding all loads to which it may be subject without exceeding the allowable unit stresses for the materials used as provided under *The Building Code Act, 1974*; 1974, c. 74

(*k*) require in writing an owner of a mine or part thereof to provide, at his expense, a report in writing bearing the seal and signature of a professional engineer stating that the ground stability of, the mining methods and the support or rock reinforcement used in the mine or part thereof is such that a worker is not likely to be endangered; and R.S.O. 1970, c. 274, s. 618 (1) (*a*, *b*); 1971, c. 43, s. 8 (1); 1973, c. 47, s. 6 (1), *amended*.

(*l*) require in writing an employer to produce any record or information, or to provide, at the ex-

pense of the employer, a report or assessment, made or to be made by a person possessing such special, expert or professional knowledge or qualifications as are specified by the inspector, of any process or biological, chemical or physical agents or combination of such agents used or intended to be used in a work place, and the manner of use including,

(i) the ingredients thereof and their common or generic name or names,

(ii) the composition and the properties thereof,

(iii) the toxicological effect thereof,

(iv) the effect of exposure thereto whether by contact, inhalation or ingestion,

(v) the protective measures used or to be used in respect thereof,

(vi) the emergency measures used or to be used to deal with exposure in respect thereof, and

(vii) the effect of the use, transport and disposal thereof. *New.*

Entry to dwellings

(2) An inspector shall only enter a dwelling or that part of a dwelling actually being used as a work place with the consent of the occupier or under the authority of a search warrant issued under section 16 of *The Summary Convictions Act*. 1971, c. 43, s. 8 (4); 1973, c. 47, s. 6 (4).

R.S.O. 1970, c. 450

Representative to accompany inspector

(3) Where an inspector makes an inspection of a work place under the powers conferred upon him under subsection 1, the constructor, employer or group of employers shall afford a committee member representing workers or a health and safety representative, if any, or a worker selected by a trade union or trade unions, if any, because of his knowledge, experience and training, to represent it or them and, where there is no trade union, a worker selected by the workers because of his knowledge, training and experience to represent them, the opportunity to accompany the inspector during his physical inspection of a work place, or any part or parts thereof.

Consultation with workers

(4) Where there is no committee member representing workers, health and safety representative or worker selected under subsection 3, the inspector shall endeavour to consult during his physical inspection with a reasonable number of the

workers concerning matters of health and safety at their work.

Entitlement to time from work

(5) The time spent by a committee member representing workers, health and safety representative or worker selected in accordance with subsection 3 in accompanying an inspector during his physical inspection, shall be deemed to be work time for which he shall be paid by his employer at his regular or premium rate as may be proper. 1976, c. 79, s. 6 (1-3), *amended*.

Orders by inspectors where non-compliance

29.—(1) Where an inspector finds that a provision of this Act or the regulations is being contravened, he may order, orally or in writing, the owner, constructor, employer, or person whom he believes to be in charge of a work place or the person whom he believes to be the contravener to comply with the provision and may require the order to be carried out forthwith or within such period of time as the inspector specifies. R.S.O. 1970, c. 274, s. 618 (1), (*c*); 1971, c. 43, s. 10 (1); 1973, c. 47, s. 11 (1), *amended*.

Idem

(2) Where an inspector makes an oral order under subsection 1, he shall confirm the order in writing before leaving the work place. 1971, c. 43, s. 10 (2), *amended*.

Contents of order

(3) An order made under subsection 1 shall indicate generally the nature of the contravention and where appropriate the location of the contravention. 1973, c. 47, s. 11 (2), *amended*.

Orders by inspector where worker endangered

(4) Where an inspector makes an order under subsection 1 and finds that the contravention of this Act or the regulations is a danger or hazard to the health or safety of a worker he may,

(*a*) order that any place, equipment, machine, device, article or thing or any process or material shall not be used until the order is complied with;

(*b*) order that work at the work place as indicated in the order shall stop until the order is complied with, or until the order to stop work is withdrawn or cancelled by an inspector;

(*c*) order that the work place where the contravention exists be cleared of workers and isolated by barricades, fencing or any other means suitable to prevent access thereto by a worker until the danger or hazard to the health or safety of a worker is

removed. 1971, c. 43, s. 10 (3), *amended*; 1973, c. 47, s. 11 (3, 4), *amended*.

Posting of notice

(5) Where an inspector makes an order under this section, he may affix to the work place, or to any equipment, machine, device, article or thing, a copy thereof or a notice in the prescribed form and no person, except an inspector, shall remove such copy or notice unless authorized to do so by an inspector. 1971, c. 43, s. 10 (4); 1973, c. 47, s. 11 (6), *amended*.

Idem

(6) Where an inspector makes an order in writing or issues a report of his inspection to an owner, constructor, employer or person in charge of the work place, the owner, constructor, employer or person in charge of the work place shall forthwith cause a copy or copies thereof to be posted in a conspicuous place or places at the work place where it is most likely to come to the attention of the workers and shall furnish a copy of such order or report to the health and safety representative and the committee, if any, and the inspector shall cause a copy thereof to be furnished to a person who has complained of a contravention of this Act or the regulations. 1976, c. 79, s. 7, *amended*.

No hearing required prior to making order

(7) An inspector is not required to hold or afford to an owner, constructor, employer or any other person an opportunity for a hearing before making an order. *New*.

Entry into barricaded area

30. Where an order is made under clause *c* of subsection 4 of section 29, no owner, constructor, employer or supervisor shall require or permit a worker to enter the work place except for the purpose of doing work that is necessary or required to remove the danger or hazard and only where the worker is protected from the danger or hazard. 1973, c. 47, s. 11 (4), *part*.

Injunction proceedings

31. In addition to any other remedy or penalty therefor, where an order made under subsection 4 of section 29 is contravened, such contravention may be restrained upon an *ex parte* application to a judge or local judge of the Supreme Court made at the instance of a Director. 1973, c. 47, s. 13 (2), *amended*.

Appeals from order of an inspector

32.—(1) Any employer, constructor, owner, worker or trade union which considers himself or itself aggrieved by any order made by an inspector under this Act or the regulations may, within fourteen days of the making thereof, appeal to a Director who shall hear and dispose of the appeal as promptly as is practicable.

(2) An appeal to a Director may be made in writing or orally or by telephone, but the Director may require the grounds for appeal to be specified in writing before the appeal is heard. Method

(3) The appellant, the inspector from whom the appeal is taken and such other persons as a Director may specify are parties to an appeal under this section. Parties

(4) On an appeal under this section, a Director may substitute his findings for those of the inspector who made the order appealed from and may rescind or affirm the order or make a new order in substitution therefor, and for such purpose has all the powers of an inspector and the order of the Director shall stand in the place of and have the like effect under this Act and the regulations as the order of the inspector. Powers of a Director

(5) In this section, an order of an inspector under this Act or the regulations includes any order or decision made or given or the imposition of any terms or conditions therein by an inspector under the authority of this Act or the regulations or the refusal to make an order or decision by an inspector. Order, extended meaning

(6) A decision of the Director under this section is final. 1971, c. 43, s. 11; 1973, c. 47, s. 12, *amended*. Decision of Director final

(7) On an appeal under subsection 1, a Director may suspend the operation of the order appealed from pending the disposition of the appeal. Suspension of order by Director pending disposition of appeal

(8) This section does not apply to the order of a Director made under section 20. *New*. Application

33.—(1) No person shall hinder, obstruct, molest or interfere with or attempt to hinder, obstruct, molest or interfere with an inspector in the exercise of a power or the performance of a duty under this Act or the regulations. Obstruction of inspector

(2) Every person shall furnish all necessary means in his power to facilitate any entry, inspection, examination, testing or inquiry by an inspector in the exercise of his powers or performance of his duties under this Act or the regulations. Assistance to inspector

False information, etc.

(3) No person shall knowingly furnish an inspector with false information or neglect or refuse to furnish information required by an inspector in the exercise of his duties under this Act or the regulations. 1971, c. 43, s. 9; 1973, c. 47, s. 7, *amended*.

Monitoring devices

(4) No person shall interfere with any monitoring equipment or device in a work place.

Obstruction of committee, etc.

(5) No person shall knowingly,

(*a*) hinder or interfere with a committee, a committee member or a health and safety representative in the exercise of a power or performance of a duty under this Act;

(*b*) furnish a committee, a committee member or a health and safety representative with false information in the exercise of a power or performance of a duty under this Act; or

(*c*) hinder or interfere with a worker selected by a trade union or trade unions or a worker selected by the workers to represent them in the exercise of a power or performance of a duty under this Act. *New*.

Information confidential

34.—(1) Except for the purposes of this Act and the regulations or as required by law,

(*a*) an inspector, a person accompanying an inspector or a person who, at the request of an inspector, makes an examination, test or inquiry, shall not publish, disclose or communicate to any person any information, material, statement, report or result of any examination, test or inquiry acquired, furnished, obtained, made or received under the powers conferred under this Act or the regulations; 1971, c. 43, s. 13 (1); 1973, c. 47, s. 8 (1), *amended*.

(*b*) no person shall publish, disclose or communicate to any person any secret manufacturing process or trade secret acquired, furnished, obtained, made or received under the provisions of this Act or the regulations; *New*.

(*c*) no person to whom information is communicated under this Act and the regulations shall divulge the name of the informant to any person; and 1971, c. 43, s. 13 (5); 1973, c. 47, s. 8 (5), *amended*.

(*d*) no person shall disclose any information obtained in any medical examination, test or x-ray of a worker made or taken under this Act except in a form calculated to prevent the information from being identified with a particular person or case. *New*.

Compellability, civil suit

(2) An inspector or a person who, at the request of an inspector, accompanies an inspector, or a person who makes an examination, test, inquiry or takes samples at the request of an inspector is not a compellable witness in a civil suit or any proceeding, except an inquest under *The Coroners Act, 1972*, respecting any information, material, statement or test acquired, furnished, obtained, made or received under this Act or the regulations. 1971, c. 43, s. 13 (3); 1973, c. 47, s. 8 (3), *amended*.

1972, c. 98

Power of Director to disclose

(3) A Director may communicate or allow to be communicated or disclosed information, material, statements or the result of a test acquired, furnished, obtained, made or received under this Act or the regulations. 1971, c. 43, s. 13 (4); 1973, c. 47, s. 8 (4), *amended*.

Copies of reports

35. A Director may, upon receipt of a request in writing from the owner of a work place who has entered into an agreement to sell the same and upon payment of the fee or fees prescribed, furnish to the owner or a person designated by him copies of reports or orders of an inspector made under this Act in respect of the work place as to its compliance with subsection 1 of section 18. 1971, c. 43, s. 14, *amended*.

Liability of certain persons

36.—(1) No action or other proceeding for damages, prohibition, or mandamus lies or shall be instituted against a Director, an inspector, an engineer of the Ministry, a health and safety representative, a committee member, a worker selected by a trade union or trade unions or a worker selected by the workers to represent them for an act or an omission done or omitted to be done by him in good faith in the execution or intended execution of any power or duty under this Act or the regulations.

Liability of Crown

R.S.O. 1970, c. 365

(2) Subsection 1 does not, by reason of subsections 2 and 4 of section 5 of *The Proceedings Against the Crown Act*, relieve the Crown of liability in respect of a tort committed by a Director, an inspector or an engineer of the Ministry to which it would otherwise be subject and the Crown is liable under that Act for any such tort in a like manner as if subsection 1 had not been enacted. 1971, c. 43, s. 16; 1973, c. 47, s. 9, *amended*.

PART IX

OFFENCES AND PENALTIES

Penalties

37.—(1) Every person who contravenes or fails to comply with,

(*a*) a provision of this Act or the regulations;

(*b*) an order or requirement of an inspector or a Director; or

(*c*) an order of the Minister,

is guilty of an offence and on summary conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than twelve months, or to both.

Defence

(2) On a prosecution for a failure to comply with,

(*a*) subsection 1 of section 13;

(*b*) clause *b*, *c* or *d* of subsection 1 of section 14; or

(*c*) subsection 1 of section 16,

it shall be a defence for the accused to prove that every precaution reasonable in the circumstances was taken. R.S.O. 1970, c. 274, s. 625; 1971, c. 43, s. 36; 1973, c. 47, s. 26, *amended*.

Accused liable for acts or neglect of managers, agents, etc.

(3) In a prosecution of an offence under any provision of this Act, any act or neglect on the part of any manager, agent, representative, officer, director or supervisor of the accused, whether a corporation or not, shall be the act or neglect of the accused. *New*.

Certified copies of documents, etc., as evidence

38.—(1) In any proceeding or prosecution under this Act,

(*a*) a copy of an order or decision purporting to have been made under this Act or the regulations and purporting to have been signed by the Minister or an inspector;

(*b*) a document purporting to be a copy of a notice, drawing, record or other document, or any extract therefrom given or made under this Act or the regulations and purporting to be certified by an inspector; or

(*c*) a document purporting to certify the result of a test or an analysis of a sample of air and setting

forth the concentration or amount of a biological, chemical or physical agent in a work place or part thereof and purporting to be certified by an inspector,

is evidence of the order, decision, writing or document, and the facts appearing in the order, decision, writing or document without proof of the signature or official character of the person appearing to have signed the order or the certificate and without further proof. 1971, c. 43, s. 41; 1973, c. 47, s. 27, *amended*.

Service of orders and decisions

(2) In any proceeding or prosecution under this Act, a copy of an order or decision purporting to have been made under this Act or the regulations and purporting to have been signed by the Minister, a Director or an inspector may be served,

(*a*) personally in the case of an individual or in case of a partnership upon a partner, and in the case of a corporation, upon the president, vice-president, secretary, treasurer or a director, or upon the manager or person in charge of the work place; or

(*b*) by registered letter addressed to a person or corporation mentioned in clause *a* at his or its last known place of business,

and the same shall be deemed to be good and sufficient service thereof. *New*.

Place of trial

39. An information in respect of an offence under this Act may, at the election of the informant, be heard, tried and determined by the Provincial Court having jurisdiction in the county or district in which the accused is resident or carries on business although the subject-matter of the information did not arise in that county or district. 1973, c. 47, s. 28, *amended*.

Limitation on prosecutions

40. No prosecution under this Act shall be instituted more than one year after the last act or default upon which the prosecution is based occurred. 1971, c. 43, s. 37.

PART X

REGULATIONS

Regulations

41.—(1) The Lieutenant Governor in Council may make such regulations as are advisable for the health or safety

of persons in or about a work place. 1971, c. 43, s. 45 (1); 1973, c. 47, s. 31 (1), *amended*.

Idem

(2) Without limiting the generality of subsection 1, the Lieutenant Governor in Council may make regulations,

1. defining any word or expression used in this Act or the regulations that is not defined in this Act;
2. designating or defining any industry, work place, employer or class of work places or employers for the purposes of this Act, a part of this Act, or the regulations or any provision thereof;
3. exempting any work place, industry, activity, business, work, trade, occupation, profession, constructor, employer or any class thereof from the application of a regulation or any provision thereof;
4. limiting or restricting the application of a regulation or any provision thereof to any work place, industry, activity, business, work, trade, occupation, profession, constructor, employer or any class thereof;
5. respecting any matter or thing that is required or permitted to be regulated or prescribed under this Act;
6. respecting any matter or thing, where a provision of this Act requires that the matter or thing be done, used or carried out or provided as prescribed;
7. respecting any matter or thing, where it is a condition precedent that a regulation be made prescribing the matter or thing before this Act or a provision of this Act has any effect;
8. providing for and prescribing fees and the payment or refund of fees;
9. regulating or prohibiting the installation or use of any machine, device or thing or any class thereof;
10. requiring that any equipment, machine, device, article or thing used bear the seal of approval of an organization designated by the regulations to test and approve the equipment, machine, device, article or thing and designating organizations for such purposes;
11. respecting the reporting by physicians and others of workers affected by any biological, chemical or physical agents or combination thereof;

12. regulating or prohibiting atmospheric conditions to which any worker may be exposed in a work place;

13. prescribing methods, standards or procedures for determining the amount, concentration or level of any atmospheric condition or any biological, chemical or physical agent or combination thereof in a work place;

14. prescribing any biological, chemical or physical agent or combination thereof as a designated substance;

15. prohibiting, regulating, restricting, limiting or controlling the handling of, exposure to, or the use and disposal of any designated substance;

16. adopting by reference, in whole or in part, with such changes as the Lieutenant Governor in Council considers necessary, any code or standard and requiring compliance with any code or standard that is so adopted;

17. adopting by reference any criteria or guide in relation to the exposure of a worker to any biological, chemical or physical agent or combination thereof;

18. enabling the Director by notice in writing to designate that any part of a project shall be an individual project for the purposes of this Act and the regulations and prescribing to whom notice shall be given;

19. permitting the Minister to approve laboratories for the purpose of carrying out and performing sampling, analyses, tests, and examinations, and requiring that sampling, analyses, examinations, and tests be carried out and performed by a laboratory approved by the Minister;

20. requiring and providing for the registration of employers of workers;

21. providing for the establishment, equipment, operation and maintenance of mine rescue stations, as the Minister may direct, and providing for the payment of the cost thereof and the recovery of such cost from the mining industry;

22. prescribing forms and notices and providing for their use; and

23. prescribing building standards for industrial establishments. 1971, c. 43, s. 45 (2); 1973, c. 47, s. 31 (2), *amended*.

Repeals

42. The following are repealed:

1. *The Construction Safety Act, 1973*, being chapter 47.

2. *The Industrial Safety Act, 1971*, being chapter 43.

3. *The Industrial Safety Amendment Act, 1972*, being chapter 122.

4. *The Industrial Safety Amendment Act, 1974*, being chapter 104.

5. Part IX of *The Mining Act*, being chapter 274 of the Revised Statutes of Ontario, 1970, except sections 176, 611 and 616.

6. *The Silicosis Act*, being chapter 438 of the Revised Statutes of Ontario, 1970.

7. Section 78 of *The Civil Rights Statute Law Amendment Act, 1971*, being chapter 50.

8. *The Employees' Health and Safety Act, 1976*, being chapter 79.

9. Section 10 of *The Ministry of Labour Act*, being chapter 117 of the Revised Statutes of Ontario, 1970.

Commencement

43. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

44. The short title of this Act is *The Occupational Health and Safety Act, 1978*.

Appendix F

Unreported Decisions

IN THE MATTER of Regulation 15 of the Construction Regulations 1961

AND

IN THE MATTER of an application by A. H. PILLING. Appeal against suspension of Blasting Certificate.

Date of Hearing: 11 June 1976

Date of Decision: 15 June 1976

Counsel:

Mr Perkins for Appellant
Mr Ryan for Respondent

DECISION OF BOARD OF APPEAL

This is an appeal under Regulation 15 of the Construction Regulations 1961 by the appellant against a decision of the respondent dated 10 March 1976, wherein pursuant to Regulation 14 of the regulations the respondent suspended the Certificate of Competency as a construction blaster held by the appellant.

The facts on which the decision of the respondent were based may be briefly stated as follows:

(a) On 7.1.76 the appellant set off certain explosive charges in the Happy Valley area providing insufficient protective guards or covering with the result that scatter rock was strewn over the adjacent roadway and onto a nearby school football field.

(b) That in carrying out the explosive works the appellant failed to comply with standard practice and the Wellington City Bylaws in that he failed to first obtain a permit in writing from the local authority.

(c) That on the night of 14.1.76 the appellant set off explosive charges at Patent Slip which, due to excessive noise, caused major consternation

in the surrounding residential areas of Miramar and Hataitai.

It was the view of the respondent that such activities revealed an incompetence or irresponsibility on the part of the appellant as to be improper conduct rendering him unfit to hold the appropriate certificate of competency. This conclusion was formed pursuant to Regulation 14 1(D) and in the exercise of his discretion under Regulation 14 (2) in lieu of revoking the said certificate the Respondent suspended the same for one year.

The appellant disputed the opinion of the respondent and in answer to the three specific matters raised contended:

1. That in blasting at Happy Valley he had taken all reasonable precautions including
   (a) calling upon nearby residences to warn occupiers
   (b) Posting guards as sentries at appropriate roadside positions to halt traffic
   (c) In providing a guard by the use of the upturned scoop or shovel of the bulldozer to prevent the splay of scatter rock from the blast. He contended also that although there was some fly rock this went to the road only, not the football field and was soon cleared.
2. That he was unaware of the necessity to obtain a permit from the local authority - that such permits are not normally required and are in fact not issued for the majority of blasting work carried out.
3. That in respect of the Patent Slip explosion he had taken all reasonable precautions, including notification of all necessary persons or authorities and the posting of sentries. He was working submarine in some difficulties with water shifting sand anchoring his explosive charges and one charge must have floated to the surface where it was detonated. He considered this a misfortune - an unforseeable accident. The stillness of the night and other atmospheric conditions may have aggravated or exaggerated noise sound.

It can readily be seen that there is little conflict between the parties on the relevant facts save as to degree of fly rock on the first instance and extent of sound or shock waves on the second.

These issues of conflict can be readily resolved by this Appeal Board in that we find established the existence or presence of scatter rock to have extended to the roadway only. The evidence as to presence of rock on the football field is inconclusive. We are not satisfied that such rock as there was found necessarily emanated from the blasting in

Question, although it may have.

As to the Pattont Slip incident, we are firmly of the view that the explosive sound created was excessive - that it was such as to be heard within a radius of miles of the site of the blast and was sufficient to cause concern to the neighbourhood. We are not satisfied that there were any shock waves of consequence as such but rather noise waves. In neither instance has there been established any actual danger to life, limb or property. The real area of dispute between the appellant and the respondent is the interpretation or construction of the established activities of the appellant and the propriety ofhis behaviour as the holder of a certificate of competency as a contructbn blaster under the regulations.

In an appeal of this nature the Board is deemed to be a Commission of Inquiry under the Commissions of Inquiry Act 1908. It is required to sit in review of the decision of the respondent as Chief Safety Engineer.

In arriving at its decision the Board is entitled to review the wide of the evidence adduced and conduct its inquiry afresh and unhampered.

There is no onus or responsibility resting on the appellant to establish that the respondent was wrong, manifestly or otherwise, in the decision he made.

This Board is quite free to substitute its own decision for that of the Chief Safety Engineer (see Regulation 19(4)). Having the advantage of hearing sworn testimony subject to Cross Examination and as in the present case the assistance of counsel, it may well be said that this Board is in a better position than was the respondent to reach an appropriate conclusion.

On the facts established at the hearing this Board is firmly of the opinion that in the execution of the two blasting operations on the 7th and 14th January 1976 respectively the appellant has been lax in his methods and has failed to take the precautions which could reasonably be expected of the holder of the appropriate certificate of competency. The standard of care to be applied is that of the ordinary, reasonable and prudent blaster, similar to that which the law requires of motor drivers in the handling of vehicles under their charge. Not that of the rash at one end of the scale, or the ultra-cautious at the other - but the ordinary, competent, tradesmanlike, construction blaster and it is this test which we have applied. As to the first incident, it is clear that as a result of the explosion some rock (at least half a barrow load) scattered on the roadway. This, in our view, was due to the failure of the appellant to provide and use a proper and sufficient mat or guard. Without finding it

necessary to express any opinion as to whether a bulldozer shovel or scoop may comprise a metal plate and of itself be disqualified for use we are satisfied that its protectiveness against flying rock left much to be desired. As a guard it was ineffective and insufficient. An approved or recommended type guard or mat should have been used and would have prevented the splay of rock.

Dealing with the permit question, the Board considers that in his failure to ascertain the actual requirements of the particular local authority and the provisions of the By Laws the appellant was careless. Standard Procedures and Basic Traing for a certificate of competency require strick adherence to By Laws and whether or not the particular local authority sees fit to enforce compliance with any rigidity is no excuse for non-compliance. The responsibility rests on the contractor - the construction blaster. It should be noted however that the failure to obtain the requisite permit had, in our view, no bearing on the occurrence of the incident in question. As the local authority delegates to the construction blaster the responsibility for his mode of operation, we are of the view the use of an insufficient type of blast guard would have occurred, permit or not.

As to the second incident on 14 January 1976, again it is the view of the Board that in his work preparation the appellant has failed to take the precautions in setting and anchoring the explosives which a competent contruction blaster ought to have taken. We have no doubt that the excessive noise blast was caused by one charge exploding at surface level and not submerged three feet in water as was intended. We consider it likely that the sound was aggravated by the use of uncovered cordex lines and exaggerated by atmospheric conditions.

The real trouble however was directly attributed to one explosive charge rising to the surface becaus it was not anchored in a proper fashion. The appellant was aware of the tide and sea water washing away loose sand as he endeavoured to pile the same on the charges to secure them. Had he seen fit to bag the sand or take other effective anchoring measures the charge would have remained submerged. This failure to do so was due to a lack of proper foresight. In our view the likelihood of the loose sand shifting was a reasonably foreseeable result, particularly with the trouble experienced in placing it. It was in our view such as should have been apparent or occurred to a certificated construction blaster. In his failure to apprehend this risk and guard against it, the appellant was careless.

In dealing with each separate and established instance of carelessness we do not consider that any one alone standing by itself could or should be elevated to a position of improper conduct within the meaning of Regulation 14 1 (3). The impropriety of conduct or behaviour there embraced is such as to render unfitness to hold the appropriate certificate.

In our view each instance, if an isolated single lapse, could well have been dealt with by way of warning or censure. But the cumulative effect of the instances occurring on consecutive weeks - one job following the other - is such as to occasion to us concern, at the manner of behaviour of the appellant in the conduct of his duties as a construction blaster. His conduct has been such as to indicate a certain laxity in procedures or irresponsibility of attitude in dealing with such dangerous goods as explosives to justify a finding of impropriety under Regulation 14 1 (3) having regard to the cumulative effect of the matters established.

Such improper conduct in our view warranted a suspension of operations by the appellant to achieve an improvement in his standards.

As to the period of such suspension, we have no doubt that a period of one year appeared appropriate to the respondent on the facts as he understood them at the time. The evidence has tended to ameliorate the extent or degree of culpability and in our view an appropriate period of suspension is one of four months, sufficient to impress the necessity for strict compliance and observance of the established blasting rules, procedures and regulations on the appellant. However, as he has already been suspended for a period of some three months, pursuant to Regulation 15 (C) we make an order that the suspension order be cancelled on 10 July 1976. This is the unanimous view of this Board of Appeal.

K L Richardson
Chairman

Her Majesty The Queen on the information of Mark Caswell *Appellant*;

and

The Corporation of The City of Sault Ste. Marie *Respondent*.

1977: October 13, 14; 1978: May 1.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Public welfare offences — Mens rea — Reasonable mistake as a defence — Scope of defence of due diligence — Offences not requiring proof of mens rea but not strict liability offences.

Criminal law — Duplicity — Water pollution — Provision prohibiting discharging or depositing or causing or permitting discharge that may impair water quality — Test for duplicity — The Ontario Water Resources Commission Act, R.S.O. 1970, c. 332, s. 32(1) — Criminal Code, ss. 724, 731.

The respondent City entered into an agreement with a company for the disposal of all refuse originating in the City. The company was to furnish a site and adequate labour, material and equipment. The site selected bordered Cannon Creek which runs into Root River. The method of disposal adopted was the "area" or "continuous slope" method of sanitary land fill, whereby garbage is compacted in layers which are covered each day by natural sand or gravel. The side had previously been covered with a number of fresh water springs that flowed into the creek. Material was dumped to submerge these springs and the garbage and wastes dumped over this material, ultimately to within twenty feet of the creek. Pollution resulted and the company was convicted of a breach of s. 32(1) of *The Ontario Water Resources Commission Act*. The City also charged under that section, which provides that every municipality or person that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course, or on any shore or bank thereof is guilty of an offence. In dismissing the charge against the City the trial judge found that the City had nothing to do with the actual operations, that the company was an independent contractor and that its employees were not employees of the City. On appeal by trial *de novo* the judge found that the offence was one of

strict liability and he convicted. The Divisional Court set aside the charge as duplicitous and also held that it required *mens rea* with respect to causing or permitting the discharge. The Court of Appeal, while rejecting the ground of duplicity as a basis to quash, as there had been no challenge to the information at trial, agreed that *mens rea* was required and ordered a new trial.

Held: The appeal and cross-appeal should be dismissed.

The primary test for duplicity should be the practical one based on the only valid justification for the rule against duplicity, the requirement that the accused know the case he has to meet and be not prejudiced in the preparation of his defence by ambiguity in the charge. In this case there was nothing ambiguous or uncertain in the charge. Section 32(1) is concerned with only one matter, pollution, and only one generic offence was charged, the essence of which was "polluting". As the charge was not duplicitous it was not necessary to consider whether a duplicity objection can be raised for the first time on appeal.

Regarding *mens rea* the distinction between the true criminal offence and the public welfare offence is of prime importance. Where the offence is criminal *mens rea* must be established and mere negligence is excluded from the concept of the mental element required for conviction. In sharp contrast "absolute liability" entails conviction on mere proof of the prohibited act without any relevant mental element. The correct approach in public welfare offences is to relieve the Crown of the burden of proving *mens rea*, having regard to *Pierce Fisheries*, [1971] S.C.R. 5, and to the virtual impossibility in most regulatory cases of proving wrongful intention, and also, in rejecting absolute liability, admitting the defence of reasonable care. This leaves it open to the defendant to prove that all due care has been taken. Thus while the prosecution must prove beyond reasonable doubt that the defendant committed the prohibited act, the defendant need only establish on the balance of probabilities his defence of reasonable care. Three categories of offences are therefore now recognised (first) offences in which *mens rea* must be established, (second) offences of "strict liability" in which *mens rea*

need not be established but where the defence of reasonable belief in a mistaken set of facts or the defence of reasonable care is available, and (third) offences of "absolute liability" where it is not open to the accused to exculpate himself by showing that he was free of fault. Offences which are criminal are in the first category. Public welfare offences are *prima facie* in the second category. Absolute liability offences would arise where the legislature has made it clear that guilt would follow on mere proof of the proscribed act.

Section 32(1) being a provincial enactment does not create an offence which is criminal in the true sense; and further the words "cause" and "permit" which are frequently found in public welfare statutes do not denote clearly either full *mens rea* or absolute liability and therefore fit much better into an offence of the strict liability class. As the City did not lead evidence directed to a defence of due diligence and the trial judge did not address himself to the availability of such a defence there should be a new trial to determine whether the City was without fault.

Sherras v. De Rutzen, [1895] 1 Q.B. 918; *R. v. Prince* (1875), L.R. 2 C.C.R. 154; *R. v. Tolson* (1889), 23 Q.B.D. 168; *R. v. Rees*, [1956] S.C.R. 640; *Beaver v. The Queen*, [1957] S.C.R. 531; *R. v. King*, [1962] S.C.R. 746; *Kipp v. A.G. (Ont.)*, [1965] S.C.R. 57; *R. v. Surrey Justices, ex parte Witherick*, [1932] 1 K.B. 450; *R. v. Madill (No. 1)* (1943), 79 C.C.C. 206; *R. v. International Nickel Co. of Canada* (1972), 10 C.C.C. (2d) 44; *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *R. v. Matspeck Construction Co. Ltd.*, [1965] 2 O.R. 730; *Ross Hillman Limited v. Bond*, [1974] 2 All E.R. 287; *R. v. Woodrow* (1846), 15 M. & W. 404; *R. v. Stephens* (1866), L.R. 1 Q.B. 702; *Proudman v. Dayman* (1941), 67 C.L.R. 536; *R. v. Strawbridge*, [1970] N.Z.L.R. 909; *R. v. Ewart*, [1906] N.Z.L.R. 709; *Sweet v. Parsley*, [1970] A.C. 132; *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462; *R. v. McIver*, [1965] 2 O.R. 475; *Maher v. Musson* (1934), 52 C.L.R. 100; *R. v. Patterson*, [1962] 1 All E.R. 340; *R. v. Custeau*, [1972] 2 O.R. 250; *R. v. Larocque* (1958), 120 C.C.C. 246; *R. v. Regina Cold Storage & Forwarding Co.* (1923), 41 C.C.C. 21; *R. v. A.O. Pope*,

Ltd. (1972), 20 C.R.N.S. 159, aff'd 10 C.C.C. (2d) 430; *R. v. Hickey* (1976), 29 C.C.C. (2d) 23 rev'd 30 C.C.C. (2d) 416; *R. v. Servico Limited* (1977), 2 Alta. L.R. (2d) 388; *R. v. Industrial Tankers Ltd.*, [1968] 4 C.C.C. 81; *R. v. Hawinda Taverns Ltd.* (1955), 112 C.C.C. 361; *R. v. Bruin Hotel Co. Ltd.* (1954), 109 C.C.C. 174; *R. v. Sheridan* (1972), 10 C.C.C. (2d) 545; *R. v. Cherokee Disposals & Construction Limited*, [1973] 3 O.R. 599; *R. v. Liquid Cargo Lines Ltd.* (1974), 18 C.C.C. (2d) 428; *R. v. North Canadian Enterprises Ltd.* (1974), 20 C.C.C. (2d) 242; *Lim Chin Aik v. The Queen*, [1963] A.C. 160; *Reynolds v. Austin & Sons Limited*, [1951] 2 K.B. 135; *R. v. Pee-Kay Smallwares, Ltd.* (1947), 90 C.C.C. 129; *Hill v. The Queen*, [1975] 2 S.C.R. 402; *R. v. Gillis* (1974), 18 C.C.C. (2d) 190; *Groat v. City of Edmonton*, [1928] S.C.R. 522; *Chasemore v. Richards* (1859), 7 H.L.C. 349; *Millar v. The Queen*, [1954] 1 D.L.R. 148; *R. v. Royal Canadian Legion*, [1971] 3 O.R. 552; *R. v. Teperman and Sons*, [1968] 4 C.C.C. 67; *R. v. Jack Crewe Ltd.* (1975), 23 C.C.C. (2d) 237 referred to.

APPEAL and CROSS APPEAL from a judgment of the Court of Appeal for Ontario[1] allowing an appeal by the Crown and ordering a new trial after a judgment of the Divisional Court[2] allowing an appeal by the accused and quashing, after trial *de novo*, a conviction on a charge under s. 32(1) of *The Ontario Water Resources Commission Act*.

R. M. McLeod and *J. N. Mulvaney, Q.C.*, for the appellant.

R. J. Rolls, Q.C., and *R. S. Harrison*, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—In the present appeal the Court is concerned with offences variously referred to as "statutory," "public welfare," "regulatory," "absolute liability," or "strict responsibility," which are not criminal in any real sense, but are prohibited in the public interest. (*Sherras v. De Rutzen*[3]) Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature

[1] (1976), 13 O.R. (2d) 113.
[2] 13 O.R. (2d) 116.
[3] [1895] 1 Q.B. 918.

and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like. In this appeal we are concerned with pollution.

The doctrine of the guilty mind expressed in terms of intention or recklessness, but not negligence, is at the foundation of the law of crimes. In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without *mens rea*: (*R. v. Prince*[4]; *R. v. Tolson*[5]; *R. v. Rees*[6]; *Beaver v. The Queen*[7]; *R. v. King*[8]). Blackstone made the point over two hundred years ago in words still apt: "... to constitute a crime against human law, there must be first a vicious will, and secondly, an unlawful act consequent upon such vicious will ...," 4 Comm. 21. I would emphasise at the outset that nothing in the discussion which follows is intended to dilute or erode that basic principle.

The appeal raises a preliminary issue as to whether the charge, as laid, is duplicitous, and if so, whether ss. 732(1) and 755(4) of the *Criminal Code* preclude the accused City of Sault Ste. Marie from raising the duplicity claim for the first time on appeal. It will be convenient to deal first with this preliminary point and then consider the concept of liability in relation to public welfare offences.

The City of Sault Ste. Marie was charged that it did discharge, or cause to be discharged, or permitted to be discharged, or deposited materials into Cannon Creek and Root River, or on the shore or bank thereof, or in such place along the

[4] (1875), L.R. 2 C.C.R. 154.
[5] (1889), 23 Q.B.D. 168.
[6] [1956] S.C.R. 640.
[7] [1957] S.C.R. 531.
[8] [1962] S.C.R. 746.

side that might impair the quality of the water in Cannon Creek and Root River, between March 13, 1972 and September 11, 1972. The charge was laid under s. 32(1)* of *The Ontario Water Resources Commission Act*, R.S.O. 1970, c. 332, which provides so far as relevant, that every municipality or person that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course, or on any shore or bank thereof, or in any place that may impair the quality of water, is guilty of an offence and, on summary conviction, is liable on first conviction to a fine of not more than $5,000 and on each subsequent conviction to a fine of not more than $10,000, or to imprisonment for a term of not more than one year, or to both fine and imprisonment.

Although the facts do not rise above the routine, the proceedings have to date had the anxious consideration of five courts. The City was acquitted in Provincial Court (Criminal Division), but convicted following a trial *de novo* on a Crown appeal. A further appeal, by the City, to the Divisional Court was allowed and the conviction quashed. The Court of Appeal for Ontario on yet another appeal directed a new trial. Because of the importance of the legal issues, this Court granted leave to the Crown to appeal and leave to the City to cross-appeal.

To relate briefly the facts, the City on November 18, 1970 entered into an agreement with Cherokee Disposal and Construction Co. Ltd., for the disposal of all refuse originating in the City. Under the terms of the agreement, Cherokee became obligated to furnish a site and adequate labour, material and equipment. The site selected bordered Cannon Creek which, it would appear, runs

* Section 32(1) reads as follows:

32. (1) Every municipality or person that discharges or deposits or causes or permits the discharge or deposit of any material of any kind into or in any well, lake, river, pond, spring, stream, reservoir or other water or watercourse or on any shore or bank thereof or into or in any place that may impair the quality of the water of any well, lake, river, pond, spring, stream, reservoir or other water or watercourse is guilty of an offence and on summary conviction is liable on first conviction to a fine of not more than $5,000 and on each subsequent conviction to a fine of not more than $10,000 or to imprisonment for a term of not more than one year, or to both such fine and imprisonment.

into the Root River. The method of disposal adopted is known as the "area", or "continuous slope" method of sanitary land fill, whereby garbage is compacted in layers which are covered each day by natural sand or gravel.

Prior to 1970, the site had been covered with a number of fresh-water springs that flowed into Cannon Creek. Cherokee dumped material to cover and submerge these springs and then placed garbage and wastes over such material. The garbage and wastes in due course formed a high mound sloping steeply toward, and within twenty feet of, the creek. Pollution resulted. Cherokee was convicted of a breach of s. 32(1) of *The Ontario Water Resources Commission Act*, the section under which the City has been charged. The question now before the Court is whether the City is also guilty of an offence under that section.

In dismissing the charge at first instance, the judge found that the City had had nothing to do with the actual disposal operations, that Cherokee was an independent contractor and its employees were not employees of the City. On the appeal *de novo* Judge Vannini found the offence to be one of strict liability and he convicted. The Divisional Court in setting aside the judgment found that the charge was duplicitous. As a secondary point, the Divisional Court also held that the charge required *mens rea* with respect to causing or permitting a discharge. When the case reached the Court of Appeal that Court held that the conviction could not be quashed on the ground of duplicity, because there had been no challenge to the information at trial. The Court of Appeal agreed, however, that the charge was one requiring proof of *mens rea*. A majority of the Court (Brooke and Howland JJ.A.) held there was not sufficient evidence to establish *mens rea* and ordered a new trial. In the view of Mr. Justice Lacourcière, dissenting, the inescapable inference to be drawn from the findings of fact of Judge Vannini was that the City had known of the potential impairment of waters of Cannon Creek and Root River and had failed to exercise its clear powers of control.

The divers, and diverse, judicial opinions to date on the points under consideration reflect the dubiety in these branches of the law.

The Duplicity Point

Turning then to the question of duplicity, and whether the information charged the City with several offences, or merely one offence which might be committed in different modes. The argument is that s. 32(1) of *The Ontario Water Resources Commission Act* charges three offences: (i) discharging; (ii) causing to be discharged; (iii) permitting to be discharged, deleterious materials. The applicable principle is well-established: if the information in one count charges more than one offence, it is bad for duplicity: *Kipp v. Attorney-General for Ontario*[9].

The rule against multiplicity of charges in an information is contained in s. 724(1) of the *Code* which reads as follows:

> **724.** (1) In proceedings to which this Part applies, the information . . .
>
> (*b*) may charge more than one offence or relate to more than one matter of complaint, but where more than one offence is charged or the information relates to more than one matter of complaint, each offence or matter of complaint, as the case may be, shall be set out in a separate count.

Section 731(*a*) provides, however, that no information shall be deemed to charge two offences by reason only that it states that the alleged offence was committed in different modes.

Several tests have been suggested for determining whether an indictment or information is multiplicitous. Probably the best known test is that enunciated by Avory J. in *R. v. Surrey Justices, ex parte Witherick*[10], at p. 452. The charge was that of driving without due care and attention and without reasonable consideration for other persons. Avory J. said that, if a person may do one without the other, it followed as a matter of law that an information which charged him in the alternative would be bad. In *R. v. Madill*[11] (No. 1), at p. 210, Ford J.A. applied the test of ". . . whether evidence

[9] [1965] S.C.R. 57.
[10] [1932] 1 K.B. 450.
[11] (1943), 79 C.C.C. 206.

can be given of distinct acts, committed by the person charged, constituting two or more offences," and in *R. v. International Nickel Co. of Canada*[12], at p. 48, Arnup J.A. expressed the view that if a section containing two or more elements is to be construed as containing only one offence, one must be able to state with precision the essence of the single offence.

Each of these tests is helpful as far as it goes, but each is too general to provide a clear demarcation in concrete instances. This is shown by the variety of cases and the diversity of opinion in this case itself. To resolve the matter one must recall, I think, the policy basis of the rule against multiplicity and duplicity. The rule developed during a period of extreme formality and technicality in the preferring of indictments and laying of informations. It grew from the humane desire of judges to alleviate the severity of the law in an age when many crimes were still classified as felonies, for which the punishment was death by the gallows. The slightest defect made an indictment a nullity. That age has passed. Parliament has made it abundantly clear in those sections of the *Criminal Code* having to do with the form of indictments and informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities.

The duplicity rule has been justified on two grounds: to be fair to the accused in the preparation of his defence, and to enable him to plead *autrefois convict* in the future. As Avory J. said in *R. v. Surrey Justices, ex parte Witherick, supra*, at p. 452:

> It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading autrefois convict.

[12] (1972), 10 C.C.C. (2d) 44.

The problem of raising a defence of *autrefois convict* is illusory even when there is duplicity. It is difficult to see as a practical matter why the Crown would begin new proceedings after having just concluded a successful prosecution. Even if there were a prosecution, it could not succeed. Assume conviction of the City on a charge of (i) discharging; (ii) causing discharge of; (iii) permitting discharge of pollutant at a stated time and place. If another charge were laid at a later date in respect of (i) or (ii) or (iii), as related to the same pollutant and the same time and place, the new charge would be based on the same cause or matter which had already formed the basis of a conviction, and a further conviction would be barred: *Kienapple v. The Queen*[13]. It is equally clear that no problem of *autrefois acquit* arises, even where there is duplicity, because an acquittal means acquittal on all the offences charged, and thus there is no difficulty in raising the defence of *autrefois acquit* to a later charge of one of the same offences alone.

In my opinion, the primary test should be a practical one, based on the only valid justification for the rule against duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge? Viewed in that light, as well as by the other tests mentioned above, I think we must conclude that the charge in the present case was not duplicitous. There is nothing ambiguous or uncertain in the charge. The City knew the case it had to meet. Section 32(1) of *The Ontario Water Resources Commission Act* is concerned with only one matter, pollution. That is the gist of the charge and the evil against which the offence is aimed. One cognate act is the subject of the prohibition. Only one generic offence was charged, the essence of which was "polluting," and that offence could be committed in one or more of several modes. There is nothing wrong in specifying alternative methods of committing an offence, or in embellishing the periphery, provided only one offence is to be found at the focal point of the charge. Further-

[13] [1975] 1 S.C.R. 729.

more, although not determinative, it is not irrelevant that the information has been laid in the precise words of the section.

I am satisfied that the Legislature did not intend to create different offences for polluting, dependent upon whether one deposited, or caused to be deposited, or permitted to be deposited. The legislation is aimed at one class of offender only, those who pollute.

In *R. v. Matspeck Construction Co. Ltd.*[14], Hughes J. considered the very section now under study and, adopting the approach I favour, concluded that the charge was not duplicitous. The judge said, at p. 732:

> There can be no doubt in the mind of accused that he is charged with having in one mode or another, discharged or deposited material into water and that this material may have impaired its quality.

On the other hand, in the English case of *Ross Hillman Limited v. Bond*[15], where very similar language was used, May J. said, p. 291, that the *Act* (in that case s. 40 (5)(*b*) of the *Road Traffic Act, 1972*) created three distinct types of offence. I think that the authority of the English cases in this area of the law must be carefully considered and their aid discounted to the extent that the statutory provisions applicable differ from those contained in our *Code*.

I conclude that the charge in this case is not duplicitous. It is unnecessary, therefore, to consider whether a defendant can raise a duplicity objection for the first time on appeal.

The Mens Rea Point

The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental

[14] [1965] 2 O.R. 730.
[15] [1974] 2 All E.R. 287.

element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such.

Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.

Public welfare offences evolved in mid-nineteenth century Britain: (*R. v. Woodrow*[16] and *R. v. Stephens*[17]) as a means of doing away with the requirement of *mens rea* for petty police offences. The concept was a judicial creation, founded on expediency. That concept is now firmly imbedded in the concrete of Anglo-American and Canadian jurisprudence, its importance heightened by the every-increasing complexities of modern society.

Various arguments are advanced in justification of absolute liability in public welfare offences. Two predominate. Firstly, it is argued that the protection of social interests requires a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them. The removal of any possible loophole acts, it is said, as an incentive to take precaution-

[16] (1846), 15 M. & W. 404.
[17] (1866), L.R. 1 Q.B. 702.

ary measures beyond what would otherwise be taken, in order that mistakes and mishaps be avoided. The second main argument is one based on administrative efficiency. Having regard to both the difficulty of proving mental culpability and the number of petty cases which daily come before the Courts, proof of fault is just too great a burden in time and money to place upon the prosecution. To require proof of each person's individual intent would allow almost every violator to escape. This, together with the glut of work entailed in proving *mens rea* in every case would clutter the docket and impede adequate enforcement as virtually to nullify the regulatory statutes. In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legislation and the social ends to be achieved are of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude. In further justification, it is urged that slight penalties are usually imposed and that conviction for breach of a public welfare offence does not carry the stigma associated with conviction for a criminal offence.

Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked. The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial and, however one may

downplay it, the opprobrium of conviction. It is not sufficient to say that the public interest is engaged and, therefore, liability may be imposed without fault. In serious crimes, the public interest is involved and *mens rea* must be proven. The administrative argument has little force. In sentencing, evidence of due diligence is admissible and therefore the evidence might just as well be heard when considering guilt. Additionally, it may be noted that s. 198 of *The Highway Traffic Act* of Alberta, R.S.A. 1970, c. 169, provides that upon a person being charged with an offence under this Act, if the judge trying the case is of the opinion that the offence (a) was committed wholly by accident or misadventure and without negligence, and (b) could not by the exercise of reasonable care or precaution have been avoided, the judge may dismiss the case. See also s. 230(2) of the Manitoba *Highway Traffic Act*, R.S.M. 1970, c. H60, which has a similar effect. In these instances at least, the Legislature has indicated that administrative efficiency does not foreclose inquiry as to fault. It is also worthy of note that historically the penalty for breach of statutes enacted for the regulation of individual conduct in the interests of health and safety was minor, $20 or $25; today, it may amount to thousands of dollars and entail the possibility of imprisonment for a second conviction. The present case is an example.

Public welfare offences involve a shift of emphasis from the protection of individual interests to the protection of public and social interests. See Sayre, *Public Welfare Offences* (1933), 33 Colum. L. Rev. 55; Hall, *Principles of Criminal Law*, (1947), ch. 13; Perkins, *The Civil Offence* (1952), 100 U. of Pa. L. Rev. 832; Jobson, *Far From Clear*, 18 Crim. L. Q. 294. The unfortunate tendency in many past cases has been to see the choice as between two stark alternatives; (i) full *mens rea*; or (ii) absolute liability. In respect of public welfare offences (within which category pollution offences fall) where full *mens rea* is not required, absolute liability has often been imposed. English jurisprudence has consistently maintained this dichotomy: see Hals. (4th ed.), Vol. II, *Crimi-*

nal Law, Evidence and Procedure, para. 18. There has, however, been an attempt in Australia, in many Canadian courts, and indeed in England, to seek a middle position, fulfilling the goals of public welfare offences while still not punishing the entirely blameless. There is an increasing and impressive stream of authority which holds that where an offence does not require full *mens rea*, it is nevertheless a good defence for the defendant to prove that he was not negligent.

Dr. Glanville Williams has written: "There is a half-way house between *mens rea* and strict responsibility which has not yet been properly utilized, and that is responsibility for negligence," (*Criminal Law* (2d ed.): The General Part, p. 262). Morris and Howard, in *Studies in Criminal Law*, (1964), p. 200, suggest that strict responsibility might with advantage be replaced by a doctrine of responsibility for negligence strengthened by a shift in the burden of proof. The defendant would be allowed to exculpate himself by proving affirmatively that he was not negligent. Professor Howard (*Strict Responsibility in the High Court of Australia*, 76 L.Q.R. 547) offers the comment that English law of strict responsibility in minor statutory offences is distinguished only by its irrationality, and then has this to say in support of the position taken by the Australian High Court, at p. 548:

> Over a period of nearly sixty years since its inception the High Court has adhered with consistency to the principle that there should be no criminal responsibility without fault, however minor the offence. It has done so by utilizing the very half-way house to which Dr. Williams refers, responsibility for negligence.

In his work, *Public Welfare Offences*, at p. 78, Professor Sayre suggests that if the penalty is really slight involving, for instance, a maximum fine of twenty-five dollars, particularly if adequate enforcement depends upon wholesale prosecution, or if the social danger arising from violation is serious, the doctrine of basing liability upon mere activity rather than fault, is sound. He continues, however, at p. 79:

> On the other hand, some public welfare offences involve a possible penalty of imprisonment or heavy fine. In such cases it would seem sounder policy to maintain the orthodox requirement of a guilty mind but to shift the burden of proof to the shoulders of the defendant to establish his lack of a guilty intent if he can. For public welfare offences defendants may be convicted by proof of the mere act of violation; but, if the offence involves a possible prison penalty, the defendant should not be denied the right of bringing forward affirmative evidence to prove that the violation was the result of no fault on his part.

and at p. 82:

> It is fundamentally unsound to convict a defendant for a crime involving a substantial term of imprisonment without giving him the opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent. If the public danger is widespread and serious, the practical situation can be met by shifting to the shoulders of the defendant the burden of proving a lack of guilty intent.

The doctrine proceeds on the assumption that the defendant could have avoided the *prima facie* offence through the exercise of reasonable care and he is given the opportunity of establishing, if he can, that he did in fact exercise such care.

The case which gave the lead in this branch of the law is the Australian case of *Proudman v. Dayman*[18] where Dixon J. said, at pp. 540-41:

> It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.
> . . .

This case, and several others like it, speak of the defence as being that of reasonable mistake of fact. The reason is that the offences in question have generally turned on the possession by a person or place of an unlawful status, and the accused's defence was that he reasonably did not

[18] (1941), 67 C.L.R. 536.

know of this status: e.g. permitting an unlicensed person to drive, or lacking a valid licence oneself, or being the owner of property in a dangerous condition. In such cases, negligence consists of an unreasonable failure to know the facts which constitute the offence. It is clear, however, that in principle the defence is that all reasonable care was taken. In other circumstances, the issue will be whether the accused's behaviour was negligent in bringing about the forbidden event when he knew the relevant facts. Once the defence of reasonable mistake of fact is accepted, there is no barrier to acceptance of the other constituent part of a defence of due diligence.

The principle which has found acceptance in Australia since *Proudman v. Dayman* has a place also in the jurisprudence of New Zealand: see *The Queen v. Strawbridge*[19]; *The King v. Ewart*[20].

In the House of Lords case of *Sweet v. Parsley*[21], Lord Reid noted the difficulty presented by the simplistic choice between *mens rea* in the full sense and an absolute offence. He looked approvingly at attempts to find a middle ground. Lord Pearce, in the same case, referred to the "sensible half-way house" which he thought the Courts should take in some so-called absolute offences. The difficulty, as Lord Pearce saw it, lay in the opinion of Viscount Sankey L.C. in *Woolmington v. Director of Public Prosecutions*[22] if the full width of that opinion were maintained. Lord Diplock, however, took a different and, in my opinion, a preferable view, at p. 164:

> ...Woolmington's case did not decide anything so irrational as that the prosecution must call evidence to prove the absence of any mistaken belief by the accused in the existence of facts which, if true, would make the act innocent, any more than it decided that the prosecution must call evidence to prove the absence of any claim of right in a charge of larceny. The jury is entitled to presume that the accused acted with knowledge of the

[19] [1970] N.Z.L.R. 909.
[20] [1906] N.Z.L.R. 709.
[21] [1970] A.C. 132.
[22] [1935] A.C. 462.

facts, unless there is some evidence to the contrary originating from the accused who alone can know on what belief he acted and on what ground the belief, if mistaken, was held.

In *Woolmington's* case the question was whether the trial judge was correct in directing the jury that the accused was required to prove his innocence. Viscount Sankey L.C. referred to the strength of the presumption of innocence in a criminal case and then made the statement, universally accepted in this country, that there is no burden on the prisoner to prove his innocence; it is sufficient for him to raise a doubt as to his guilt. I do not understand the case as standing for anything more than that. It is to be noted that the case is concerned with criminal offences in the true sense; it is not concerned with public welfare offences. It is somewhat ironic that *Woolmington's* case, which embodies a principle for the benefit of the accused, should be used to justify the rejection of a defence of reasonable care for public welfare offences and the retention of absolute liability, which affords the accused no defence at all. There is nothing in *Woolmington's* case, as I comprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence on the balance of probabilities.

There have been several cases in Ontario which open the way to acceptance of a defence of due diligence. In *R. v. McIver*[23], the Court of Appeal held that the offence charged, namely, careless driving, was one of strict liability, but that it was open to an accused to show that he had a reasonable belief in facts which, if true, would have rendered the act innocent. MacKay J.A., who wrote for the Court, relied upon *Sherras v. De Rutzen*, *Proudman v. Dayman*, *Maher v. Musson*[24] and *R. v. Patterson*[25], in availing an accused the opportunity of explanation in the case of statutory offences that do not by their terms require proof of intent. The following two short passages from the judgment might be quoted (at p.

[23] [1965] 2 O.R. 475.
[24] (1934), 52 C.L.R. 100.
[25] [1962] 1 All E.R. 340.

481):

> On a charge laid under s. 60 of the *Highway Traffic Act*, it is open to the accused as a defence, to show an absence of negligence on his part. For example, that his conduct was caused by the negligence of some other person, or by showing that the cause was a mechanical failure, or other circumstance, that he could not reasonably have foreseen.
>
> . . .
>
> In the present case it was open to the accused to show, if he could, that the collision of his car with the car parked on the shoulder of the road, occurred without fault or negligence on his part. He having failed to do so was properly convicted.

An appeal to this Court was dismissed [1966] S.C.R. 254 on other grounds.

Later, in *R. v. Custeau*[26], MacKay J.A., again speaking for the Court, returned to the same point, at p. 251:

> In the case of an offence of strict liability (sometimes referred to as absolute liability) it has been held to be a defence if it is found that the defendant honestly believed on reasonable grounds in a state of facts which, if true, would render his act an innocent one.

In the British Columbia Court of Appeal the concept of reasonable care was discussed in *R. v. Larocque*[27] (selling liquor to an interdicted person contrary to a provincial statute) by Mr. Justice Sheppard, speaking for the Court, at p. 247:

> . . . That test has been defined in *Bank of New South Wales v. Piper*, [1897] A.C. 383 at pp. 289-90 as follows: 'On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent.'
>
> The onus would therefore be upon the accused to show not merely that he did not know that Pierre was an interdicted person but also that he, the accused, had used honest and reasonable efforts to become acquainted with the information supplied by the Department and to comply therewith and that notwithstanding such efforts he had an honest and reasonable belief that Pierre was not an interdicted person.

[26] [1972] 2 O.R. 250.
[27] (1958), 120 C.C.C. 246.

In an early Saskatchewan Court of Appeal decision in *R. v. Regina Cold Storage & Forwarding Co.*[28] (unlawful possession of liquor) it was held that *mens rea* was an essential element for conviction and that element was absent. Chief Justice Haultain appears to have conceptualized absence of *mens rea*, not as lack of kowledge or intent but rather in terms of reasonable care in an offence of strict liability. He said, at p. 23: "Absence of *mens rea* means an honest and reasonable belief by the accused in the existence of facts which, if true, would make the charge against him innocent."

In the New Brunswick case of *R. v. A. O. Pope, Ltd.*[29] (failing to provide properly fitted goggles contrary to the *Industrial Safety Act*, 1964 (N.B.), c. 5) Keirstead Co. Ct. J. held that the offence was one of strict but not absolute liability, and a defence of reasonable care was open to the accused to prove that the act was done without negligence or fault on his part. An appeal to the New Brunswick Supreme Court, Appeal Division, was dismissed without, however, any discussion of this issue.

Two more recent cases, one being from the Province of Ontario and the other from the Province of Alberta, deserve attention. In *R. v. Hickey*[30] (speeding) the Divisional Court held that the offence was one of strict liability, but that the accused would have a valid defence if he proved on the balance of probabilities that he honestly believed on reasonable grounds in a mistaken set of facts which, if true, would have made his conduct innocent. The accused had testified that he honestly believed because of the speedometer reading that he was not exceeding the speed limit. A test conducted by a police officer at the scene showed that the speedometer was, in fact, not working properly. The majority of the Court,

[28] (1923), 41 C.C.C. 21.
[29] (1972), 20 C.R.N.S. 159 aff'd 10 C.C.C. (2d) 430.
[30] (1976), 29 C.C.C. (2d) 23 rev'd 30 C.C.C. (2d) 416.

therefore, set aside the conviction. Mr. Justice Galligan made the following comment, at p. 36:

> Submissions were made to this Court about the difficulties involved in the prosecution of speeding cases and other strict liability offences if this defence is a valid one in law. In my opinion, the availability of the defence as a matter of law should make no unreasonable burden upon the prosecution or the Courts. It is clear from the Australian authorities that not only is the burden of proving such a defence upon the accused, he must prove it upon a balance of probabilities. It is not sufficient merely to raise a reasonable doubt. In this respect, the defence of mistake when raised as a defence to an offence of strict liability is very different than is the defence of mistake of fact when it is raised in a case involving *mens rea* as an essential ingredient of the offence. In the former case, the mistake of fact must not only be an honest one, but it must be based on reasonable grounds and it must be proved by the accused on the balance of probabilities. In the latter case the defence need only be an honest one and need not necessarily be based upon reasonable grounds and it need only cause the Court to have a reasonable doubt: see *R. v. Morgan et al.*, [1975] 2 W.L.R. 913 (H.L.) and *Beaver v. The Queen* (1957), 118 C.C.C. 129, [1957] S.C.R. 531, 26 C.R. 193.

The decision in *Hickey* was subsequently appealed to the Court of Appeal (1976), 30 C.C.C. (2d) 416. The Court allowed the appeal and restored the conviction. Mr. Justice Jessup, in giving judgment for the Court, said:

> Assuming, without deciding, that statutory offences can be classified into one of three groups mentioned by Estey, C.J.H.C., in his judgment given in the Divisional Court, we are of the opinion that the offence here in question, of speeding, under the *Highway Traffic Act*, R.S.O. 1970, c. 202, is a statutory offence within the third group mentioned by Estey, C.J.H.C.; that is one of absolute liability in the sense that reasonable mistake of fact is not a defence.

No reasons were given for the identification of the offence as one of absolute liability once the three groups of statutory offences were assumed to exist.

In the Appellate Division of the Alberta Supreme Court, the defence of reasonable care for an offence of strict liability was accepted after full consideration of the issues involved, in the recent

case of *R. v. Service Limited*[31]. The offence in question was that an employer "shall not permit a person under the full age of eighteen years to work during the period of time prohibited by this section." Mr. Justice Morrow, writing for the majority of the Court, said (at pp. 397-8):

> While the language of the particular regulation under review does in my view come within the category of absolute or strict liability offences, I am also of the opinion that the general language used—particularly with the inclusion of the word "permit," which has a connotation suggesting some intent is to be considered—brings this section into what probably can be described as the exception to the rule of absoluteness as suggested by Estey C.J.H.C., in his dissenting judgment in *Regina v. Hickey* (1976), 12 O.R. (2d) 578, 29 C.C.C. (2d) 63, 68 D.L.R. (3d) 88, reversed 13 O.R. (2d) 228, 30 C.C.C. (2d) 416, 70 D.L.R. (3d) 689 (C.A.), where at p. 580 he describes statutes which prohibit a specified act or omission but which are interpreted to permit the defence of an honest belief held on reasonable grounds in a mistaken set of facts which if true would render the act or omission innocent.
>
> The above exception or type of defence has long been recognized in Australia, . . .

It is interesting to note the recommendations made by the Law Reform Commission to the Minister of Justice (*Our Criminal Law*) in March, 1976. The Commission advises (p. 32) that (i) every offence outside the *Criminal Code* be recognized as admitting of a defence of due diligence; (ii) in the case of any such offence for which intent or recklessness is not specifically required the onus of proof should lie on the defendant to establish such defence; (iii) the defendant would have to prove this on the preponderance or balance of probabilities. The recommendation endorsed a working paper (*The Meaning of Guilt—Strict Liability*) in which it was stated that negligence should be the minimum standard of liability in regulatory offences, that such offences were (p. 32), "to promote higher standards of care in business, trade and industry, higher standards of honesty in commerce and advertising, higher standards of respect for the . . . environment and [therefore] the . . . offence is basically and typically an offence of negligence"; that an accused should never be con-

[31] (1977), 2 Alta. L.R. (2d) 388.

victed of a regulatory offence if he establishes that he acted with due diligence, that is, that he was not negligent. In the working paper, the Commission further stated (p. 33), "let us recognize the regulatory offence for what it is—an offence of negligence—and frame the law to ensure that guilt depends upon lack of reasonable care." The view is expressed that in regulatory law, to make the defendant disprove negligence—prove due diligence—would be both justifiable and desirable.

In an interesting article on the matter now under discussion, *Far From Clear, supra*, Professor Jobson refers to a series of recent cases, arising principally under s. 32(1) of *The Ontario Water Resources Commission Act*, the section at issue in the present proceedings, which "openly acknowledged a defence based on lack of fault or neglect; these cases require proof of the *actus reus* but then permit the accused to show that he was without fault or had no opportunity to prevent the harm." The paramount case in the series is *R. v. Industrial Tankers Ltd.*[32] in which Judge Sprague, relying upon *R. v. Hawinda Taverns Ltd.*[33] and *R. v. Bruin Hotel Co. Ltd.*[34], held that the Crown did not need to prove that the accused had *mens rea*, but it did have to show that the accused had the power and authority to prevent the pollution, and could have prevented it, but did not do so. Liability rests upon control and the opportunity to prevent, i.e. that the accused could have and should have prevented the pollution. In *Industrial Tankers*, the burden was placed on the Crown to prove lack of reasonable care. To that extent *Industrial Tankers* and s. 32(1) cases which followed it, such as *R. v. Sheridan*[35], differ from other authorities on s. 32(1) which would place upon the accused the burden of showing as a defence that he did not have control or otherwise could not have prevented the impairment: see *R. v. Cherokee Disposals &*

[32] [1968] 4 C.C.C. 81.
[33] (1955), 112 C.C.C. 361.
[34] (1954), 109 C.C.C. 174.
[35] (1972), 10 C.C.C. (2d) 545.

Construction Limited[36]; *R. v. Liquid Cargo Lines Ltd.*[37] and *R. v. North Canadian Enterprises Ltd.*[38]

The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by "supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control" (Lord Evershed in *Lim Chin Aik v. The Queen*,[39] at p. 174). The purpose, Dean Roscoe Pound has said (*The Spirit of the Common Law* (1906)), is to "put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morale." As Devlin J. noted in *Reynolds v. Austin & Sons Limited*[40], at p. 139: "... a man may be responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark." Devlin J. added, however: "If a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim."

The decision of this Court in *The Queen v. Pierce Fisheries Ltd.*[41] is not inconsistent with the concept of a "half-way house" between *mens rea* and absolute liability. In *Pierce Fisheries* the

[36] [1973] 3 O.R. 599.
[37] (1974), 18 C.C.C. (2d) 428.
[38] (1974), 20 C.C.C. (2d) 242.
[39] [1963] A.C. 160.
[40] [1951] 2 K.B. 135.
[41] [1971] S.C.R. 5.

charge was that of having possession of undersized lobsters contrary to the regulations under the *Fisheries Act*, R.S.C. 1952, c. 119. Two points arise in connection with the judgment of Ritchie J., who wrote for the majority of the Court. First, the adoption of what had been said by the Ontario Court of Appeal in *R. v. Pee-Kay Smallwares, Ltd.*[42]:

> If on a prosecution for the offences created by the *Act*, the Crown had to prove the evil intent of the accused, or if the accused could escape by denying such evil intent, the statute, by which it was obviously intended that there should be complete control without the possibility of any leaks, would have so many holes in it that in truth it would be nothing more than a legislative sieve.

Ritchie J. held that the offence was one in which the Crown, for the reason indicated in the *Pee-Kay Smallwares* case, did not have to prove *mens rea* in order to obtain a conviction. This, in my opinion, is the *ratio decidendi* of the case. Second, Ritchie J. did not, however, foreclose the possibility of a defence. The following passage from the judgment (at p. 21) suggests that a defence of reasonable care might have been open to the accused, but that in that case care had not been taken to acquire the knowledge of the facts constituting the offence:

> As employees of the company working on the premises in the shed "where fish is weighed and packed" were taking lobsters from boxes "preparatory for packing" in crates, and as some of the undersized lobsters were found "in crates ready for shipment," it would not appear to have been a difficult matter for some "officer or responsible employee" to acquire knowledge of their presence on the premises.

In a later passage Ritchie J. added (at p.22):

> In this case the respondent knew that it had upwards of 60,000 pounds of lobsters on its premises; it only lacked knowledge as to the small size of some of them, and I do not think that the failure of any of its responsible employees to acquire this knowledge affords any defence to a charge of violating the provisions of s.3(1)(*b*) of the *Lobster Fishery Regulations*.

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[42] (1947), 90 C.C.C. 129.

I do not read *Pierce Fisheries* as denying the accused all defences, in particular the defence that the company had done everything possible to acquire knowledge of the undersized lobsters. Ritchie J. concluded merely that the Crown did not have to prove knowledge.

The judgment of this Court in *Hill v. The Queen*[43], has been interpreted (*R. v. Gillis*[44]) as imposing absolute liability and denying the driver of a motor vehicle the right to plead in defence an honest and reasonable belief in a state of facts which, if true, would have made the act non-culpable. In *Hill*, the appellant was charged under the *Highway Traffic Act* with failing to remain at the scene of an accident. Her car had "touched" the rear of another vehicle. She did not stop, but drove off, believing no damage had been done. This Court affirmed the conviction, holding that the offence was not one requiring *mens rea*. In that case the essential fact was that an accident had occurred, to the knowledge of Mrs. Hill. Any belief that she might have held as to the extent of the damage could not obliterate that fact, or make it appear that she had reasonable grounds for believing in a state of facts which, if true, would have constituted a defence to the charge. The case does not stand in the way of a defence of reasonable care in a proper case.

We have the situation therefore in which many Courts of this country, at all levels, dealing with public welfare offences favour (i) *not* requiring the Crown to prove *mens rea*, (ii) rejecting the notion that liability inexorably follows upon mere proof of the *actus reus*, excluding any possible defence. The Courts are following the lead set in Australia many years ago and tentatively broached by several English courts in recent years.

It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented

[43] [1975] 2 S.C.R. 402.
[44] (1974), 18 C.C.C. (2d) 190.

by legislative act. In answer, it should be recalled that the concept of absolute liability and the creation of a jural category of public welfare offences are both the product of the judiciary and not of the Legislature. The development to date of this defence, in the numerous decisions I have referred to, of courts in this country as well as in Australia and New Zealand, has also been the work of judges. The present case offers the opportunity of consolidating and clarifying the doctrine.

The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, having regard to *Pierce Fisheries* and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

The Ontario Water Resources Commission Act, s. 32(1)

Turning to the subject matter of s. 32(1)—the prevention of pollution of lakes, rivers and streams—it is patent that this is of great public concern. Pollution has always been unlawful and, in itself, a nuisance: *Groat v. City of Edmonton*[45]. A riparian owner has an inherent right to have a

[45] [1928] S.C.R. 522.

stream of water "come to him in its natural state, in flow, quantity and quality": *Chasemore v. Richards*[46], at p. 382. Natural streams which formerly afforded "pure and healthy" water for drinking or swimming purposes become little more than cesspools when riparian factory owners and municipal corporations discharge into them filth of all descriptions. Pollution offences are undoubtedly public welfare offences enacted in the interests of public health. There is thus no presumption of a full *mens rea*.

There is another reason, however, why this offence is not subject to a presumption of *mens rea*. The presumption applies only to offences which are "criminal in the true sense," as Ritchie J. said in *The Queen v. Pierce Fisheries (supra)*, at p. 13. *The Ontario Water Resources Commission Act* is a provincial statute. If it is valid provincial legislation (and no suggestion was made to the contrary), then it cannot possibly create an offence which is criminal in the true sense.

The present case concerns the interpretation of two troublesome words frequently found in public welfare statutes: "cause" and "permit." These two words are troublesome because neither denotes clearly either full *mens rea* nor absolute liability. It is said that a person could not be said to be permitting something unless he knew what he was permitting. This is an over-simplification. There is authority both ways, indicating that the courts are uneasy with the traditional dichotomy. Some authorities favour the position that "permit", does not import *mens rea*: see *Millar v. The Queen*[47]; *R. v. Royal Canadian Legion*[48]; *R. v. Teperman and Sons*[49]; *R. v. Jack Crewe Ltd.*[50]; *Browning v. J. H. Watson Ltd.*[51]; *Lyons v. May*[52]; *Korten v. West Sussex C.C.*[53]. For a *mens rea* construction see *James & Son Ltd. v. Smee*[54]; *Somerset v.*

[46] (1859), 7 H.L.C. 349.
[47] [1954] 1 D.L.R. 148.
[48] [1971] 3 O.R. 552.
[49] [1968] 4 C.C.C. 67.
[50] (1975), 23 C.C.C. (2d) 237.
[51] [1953] 1 W.L.R. 1172.
[52] [1948] 2 All E.R. 1062.
[53] (1903), 72 L.J.K.B. 514.
[54] [1955] 1 Q.B. 78.

Hart[55]; *Grays Haulage Co. Ltd. v. Arnold*[56]; Smith & Hogan, *Criminal Law* (3rd ed.) at p. 87; Edwards, *Mens Rea and Statutory Offences* (1955), at pp. 98-119. The same is true of "cause." For a non-*mens rea* construction, see *R. v. Peconi*[57]; *Alphacell Limited v. Woodward*[58]; *Sopp v. Long*[59]; *Laird v. Dobell*[60]; *Korten v. West Sussex C.C., (supra)*; *Shave v. Rosner*[61]. Others say that "cause" imports a requirement for a *mens rea*: see *Lovelace v. D.P.P.*[62]; *Ross Hillman Ltd. v. Bond, supra*; Smith and Hogan, *Criminal Law* (3rd ed.) at pp. 89-90.

The Divisional Court of Ontario relied on these latter authorities in concluding that s. 32(1) created a *mens rea* offence.

The conflict in the above authorities, however, shows that in themselves the words "cause" and "permit", fit much better into an offence of strict liability than either full *mens rea* or absolute liability. Since s. 32(1) creates a public welfare offence, without a clear indication that liability is absolute, and without any words such as "knowingly" or "wilfully" expressly to import *mens rea*, application of the criteria which I have outlined above undoubtedly places the offence in the category of strict liability.

Proof of the prohibited act *prima facie* imports the offence, but the accused may avoid liability by proving that he took reasonable care. I am strengthened in this view by the recent case of *R. v. Servico Limited, supra*, in which the Appellate Division of the Alberta Supreme Court held that an offence of "permitting" a person under eighteen

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[55] (1884), 12 Q.B.C. 360.
[56] [1966] 1 All E.R. 896.
[57] (1907), 1 C.C.C. (2d) 213.
[58] [1972] A.C. 824.
[59] [1969] 1 All E.R. 855.
[60] [1906] 1 K.B. 131.
[61] [1954] 2 W.L.R. 1057.
[62] [1954] 3 All E.R. 481.

years to work during prohibited hours was an offence of strict liability in the sense which I have described. It also will be recalled that the decisions of many lower courts which have considered s. 32(1) have rejected absolute liability as the basis for the offence of causing or permitting pollution, and have equally rejected full *mens rea* as an ingredient of the offence.

The Present Case

As I am of the view that a new trial is necessary, it would be inappropriate to discuss at this time the facts of the present case. It may be helpful, however, to consider in a general way the principles to be applied in determining whether a person or municipality has committed the *actus reus* of discharging, causing, or permitting pollution within the terms of s. 32(1), in particular in connection with pollution from garbage disposal. The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so. The "discharging" aspect of the offence centres on direct acts of pollution. The "causing" aspect centres on the defendant's active undertaking of something which it is in a position to control and which results in pollution. The "permitting" aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen. The close interweaving of the meanings of these terms emphasizes again that s. 32(1) deals with only one generic offence.

When the defendant is a municipality, it is of no avail to it in law that it had no duty to pick up the garbage, s. 354(1)(76) of *The Municipal Act*, R.S.O. 1970, c. 284, merely providing that it "may" do so. The law is replete with instances where a person has no duty to act, but where he is subject to certain duties if he does act. The duty here is imposed by s. 32(1) of *The Ontario Water Resources Commission Act*. The position in this respect is no different from that of private persons, corporate or individual, who have no duty to dis-

pose of garbage, but who will incur liability under s. 32(1) if they do so and thereby discharge, cause, or permit pollution.

Nor does liability rest solely on the terms of any agreement by which a defendant arranges for eventual disposal. The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution. If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution. Whether it "discharges," "causes," or "permits" the pollution will be a question of degree, depending on whether it is actively involved at the point where pollution occurs, or whether it merely passively fails to prevent the pollution. In some cases the contract may expressly provide the defendant with the power and authority to control the activity. In such a case the factual assessment will be straightforward. *Prima facie*, liability will be incurred where the defendant could have prevented the impairment by intervening pursuant to its right to do so under the contract, but failed to do so. Where there is no such express provision in the contract, other factors will come into greater prominence. In every instance the question will depend on an assessment of all the circumstances of the case. Whether an "independent contractor" rather than an "employee" is hired will not be decisive. A homeowner who pays a fee for the collection of his garbage by a business which services the area could probably not be said to have caused or permitted the pollution if the collector dumps the garbage in the river. His position would be analogous to a householder in Sault Ste. Marie, who could not be said to have caused or permitted the pollution here. A large corporation which arranges for the nearby disposal of industrial pollutants by a small local independent contractor with no experience in this matter would probably be in an entirely different position.

It must be recognized, however, that a municipality is in a somewhat different position by virtue

of the legislative power which it possesses and which others lack. This is important in the assessment of whether the defendant was in a position to control the activity which it undertook and which caused the pollution. A municipality cannot slough off responsibility by contracting out the work. It is in a position to control those whom it hires to carry out garbage disposal operations, and to supervise the activity, either through the provisions of the contract or by municipal by-laws. It fails to do so at its peril.

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of *respondeat superior* has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the context of a statutory defence of due diligence see *Tesco Supermarkets v. Nattras*[63].

The majority of the Ontario Court of Appeal directed a new trial as, in the opinion of that court, the findings of the trial judge were not sufficient to establish actual knowledge on the part of the City. I share the view that there should be a new trial, but for a different reason. The City did not lead evidence directed to a defence of due diligence, nor did the trial judge address himself to the availability of such a defence. In these circumstances, it would not be fair for this Court to determine, upon

[63] [1972] A.C. 153.

findings of fact directed toward other ends, whether the City was without fault.

I would dismiss the appeal and direct a new trial. I would dismiss the cross-appeal. There should be no costs.

Appeal and cross-appeal dismissed, new trial directed.

Solicitor for the appellant: Ministry of the Attorney General for Ontario, Toronto.

Solicitors for the respondent: Fasken & Calvin, Toronto.

IN THE SUPREME COURT OF NEW ZEALAND
[illegible]
[illegible]

BETWEEN [illegible]

Appellant

AND [illegible]

Respondent

Hearing - August 29, 1968

Counsel - Monagan for appellant
Bisson for respondent

Judgment - 12th September 1968

JUDGMENT OF ROPER J.

The appellant company appeals against its conviction in the Magistrates Court at Hastings on a charge pursuant to s.13(1) of the Construction Act 1959 of failing to take all reasonable precautions to ensure the safety of its workmen who were engaged in construction work. A further charge against the company pursuant to s.13(a) of the same Act of failing to provide suitable and efficient scaffolding was dismissed by the learned Magistrate.

The facts of the matter are simple. The appellant company using its own skilled carpenters was building a new two-storey boning building at its freezing works at Whakatu. At the time of the incident with which we are concerned in these proceedings namely the 26th October 1967 the steel framework for the building had been erected up to the second floor level and the concrete floor of the first floor had been laid. On the 26th October three employees of the company, all skilled carpenters, were laying shutters on the steel framework of the second floor preparatory to the pouring of the concrete for that floor. These shutters, which are of wood, form the foundation upon which the concrete floor is laid and measure approximately 7' by 4' and weigh about 150 lbs. The shutters were being lifted by the three men in a rather novel way. Each of the three men drove a double-headed nail into the appropriate position on the shutter

and then lifted the shutter by means of a carpenter's hammer clawed onto the second head of the nail. Supporting the shutter in this way the three men then had to move forward in unison for a distance of some 6 ft and lay the shutter in its appropriate position. One of the men on the leading edge of the shutter was required to walk out on a 12" wide steel girder which formed part of the building. If this man were to fall outwards there was a free fall of 60 ft to the ground. If on the other hand he were to fall inwards there was a free fall of 12 ft to the concrete floor below, being the first floor of the building. The other man on the leading edge of the shutter was required to walk along a 12" wide unfixed planK which lay between two girders. If this man fell in any direction he would land on the concrete floor of the building 12 ft below. The man carrying the rear of the shutter was in a much safer position in that he walked along shutters which had already been laid. On the 20th October the three men Foot, Parata and Robertson had moved forward carrying a shutter in the manner described and were about to place it in position when Robertson fell from the steel girder to the ground below with fatal results. Robertson had been on the leading edge of the shutter with Foot. Parata and Foot dropped the shutter which fell to the concrete floor below and Foot must be regarded as exceptionally fortunate in that he was able to retain his balance and not follow it down.

It is not necessary for the determination of this case to decide how or why Robertson fell or what caused his death but on the evidence it seems very likely that he had a heart failure or a blackout prior to his fall. It may be significant that he fell without a sound and in fact Foot did not seem to be aware that he had fallen until Parata called out. It was substantially on these facts that the charge was brought against the appellant company.

Mr Monteath for the appellant submitted that it was not unreasonable to require the workmen to place the shutters by the

method that was adopted having regard for the fact that the men were experienced carpenters and were following a system of work which had been in vogue for some five or six years. Mr Monagan pointed to the evidence of expert witnesses called for the appellant to the effect that the procedure adopted here was the procedure normally adopted by the building trade. Mr Monagan joined issue with the learned Magistrate's finding that no precautions at all had been taken for the safety of the men and pointed to the following precautions that had in fact been taken:-

(1) Only experienced men were used on this type of work and they were closely watched for signs of nervousness;

(2) The men were required to wear suitable footwear;

(3) The work was not carried out if there was a wind or other weather conditions which might adversely affect stability.

Mr Monagan's contention in short was that the appellant company had followed the general practice in the building trade and that consequently there was no breach of s.11(b) of the Act.

General practice has always been taken into account in determining the standard of care but it is not conclusive because no one can claim to be excused for want of care because others are as careless as himself. See Morgan v. Great Central Gas Consumers Co. (1860) 2 F. & F. 457. As to what were reasonable precautions in the eyes of the safety inspector of the Labour Department it is convenient to refer to a letter dated the 14th February 1958 written to the appellant's solicitors, the second paragraph of which reads:-

> "With reference to your request for further particulars in respect of the charge under Section 11(b) of the Construction Act 1949 I am informed that following the accident the Safety Inspector issued a direction under Section 14(1) of the Act for the provision of scaffolding beneath floors for protection of those securing shutters for upper floor. He also required a guard rail around the outer perimeter of the floor. It is contended that the defendant should have foreseen the danger and a reasonable precaution on its part for the safety of workmen would have been to provide the

scaffolding and guard rail as referred to above. No doubt other precautions could have been taken such as providing a net underneath the workmen and scaffolding alongside the outside of the steel frame of the buildings, and by using a crane instead of man-handling shutters weighing 150 lbs."

It was not contended by Mr Monagan that any of the safety precautions suggested by the Labour Department were impracticable but merely that they are unnecessary.

I am firmly of the opinion that such precautions as were taken by the appellant company were hopelessly inadequate. I agree with Mr Monagan that what may appear hazardous to a layman may not be hazardous to a skilled expert but having said that it seems to me that in the present case the appellant company had in effect cast on its employees the obligation of looking to their own welfare. Any error of judgment or loss of concentration on the part of any of the three men could involve all three in disaster. This dependence on one another greatly increases the risks. Since the accident scaffolding has been erected below the workers and a guard rail placed along the side of the building. In my opinion this could and should have been done from the outset and it could not possibly be said that such precautions are unreasonable.

It is interesting to speculate what the position would have been had this been a ten-storey building. Would the men have laid shutters in the same manner for the tenth storey floor at a height of approximately 200 feet or would there come a height when the courage of the men failed and some other system was adopted? A fall of 88 ft could be just as disastrous as a fall from 133 ft.

It is of significance that pursuant to the Construction Regulations 1961 Reg. 44 every working platform more than 10 ft high must be securely fitted with a guardrail or alternative protection where there is a danger of workmen falling from the platform. In theinstant case although the girder would not come within the definition of a "working platform" there was

absolutely no protection at all from the men falling either 38 ft or 19 ft from their working place. Reg. 24 of the Building Regulations 1948 (U.K.) is even more stringent in that every side of a working place from which a person is likely to fall more than 6'6" must be provided with a suitable guard rail.

In essence the appellant company's workers had to rely upon their own skill and nerve for their safety. The fact that other contractors may use a similar system of work is not conclusive of the matter. It may not be possible in some circumstances to eliminate a risk entirely but at least an employer must take reasonable precautions to reduce it as far as possible. In my view the company did not take all reasonable precautions and consequently the appeal must be dismissed.

The appellant is ordered to pay the costs of the respondent in the sum of £30.

Solicitors - Dowling, Wacher and Co., Napier
Crown Solicitor, Napier

M.1218/78

BETWEEN: CORPORATION OF THE MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF MANUKAU

Appellant

A N D: DEPARTMENT OF LABOUR

Respondent

Hearing: 30 November 1978

Judgment: 28 February 1979

Counsel: W. Mackey for appellant
C. Cato for respondent

JUDGMENT OF MAHON J.

The Corporation of the Mayor, Councillors and Citizens of the City of Manukau was charged with an offence against sections 11(f) and 22 of the Construction Act 1959 upon an information which read as follows :

> "being an employer in relation to notifiable construction work within the meaning of Regulation 5(c) of the Construction Regulations 1961, namely the excavation of a trench at Hastie Avenue, Mangere Bridge, failed to cause to be duly and faithfully observed a rule that the provisions of any enactment making provision for the safety of persons and applicable in respect of workmen engaged on construction work shall be complied with in that there was not maintained the minimum distance prescribed by Regulation 82(1) of the Electrical Supply Regulations 1976 between a conductor of a live overhead electric line and the boom of a track mounted caterpillar C255 mechanical excavator".

The appellant was convicted in the Magistrates' Court at Otahuhu

The facts were that upon the date assigned in the information a Safety Inspector employed by the Department of Labour visited some construction work being carried out by the Appellant in Hastie Avenue, Mangere East. He found that an excavator was working and that in the course of excavating the earth the top of the boom of the excavator had been allowed to come very close to some overhead power lines. The Inspector saw that the top of the boom was only about two feet from the power lines. The power lines were live and carried a high voltage. The Inspector instructed the operator of the excavator to withdraw the vehicle from such close proximity to the power lines as the Inspector was aware that the operator was in a position of extreme danger, even though the boom was still some distance away from the power lines, because of the latent tendency of the electric current to arc across the gap between the power lines and the boom. The weather was humid and overcast and there was a slight drizzle. These factors accentuated the danger of arcing to which I have just referred.

I now must cite Regulation 82(1) of the Electrical Supply Regulations 1976, of which the relevant portion reads as follows:

> "82.(1) Subject to the provisions of this sub-clause, the minimum distance between a conductor of any live overhead electric line and any mechanical or power operated or mobile or adjustable crane, hoist, boom, ... or any part thereof (not owned by an Electrical Supply Authority and under the control of a competent person), or any load thereon, shall be 3.5m. ..."

The clearance of two feet observed by the Inspector was naturally well inside the permitted minimum of 3.5 metres.

On these facts, and after reserving his judgment in order to consider the legal submissions advanced by counsel, the learned Magistrate convicted the Corporation upon the grounds that the provisions of Regulation 82(1) above quoted

are incorporated into the Construction Act 1959, which admittedly applied to the operations being carried on by the Corporation on the day in question. Section 11(f) of the Construction Act, which forms part of the general safety

> "11. (f) The provisions of any enactment making provision for the safety of persons and applicable in respect of workmen engaged in any construction work shall be complied with by the employer and workmen engaged in that construction work."

By Section 4 of the Acts Interpretation Act 1924 the word "act" includes regulations made thereunder, and the word "enactment" is only a synonym for the word "act". Reference must then be made to Section 22 of the Construction Act which is in the following terms;

> "22. In every case where under this Act or under any regulations for the time being in force under this Act, any requirement, obligation, rule, or provision is imposed or enacted or required to be observed with respect to or in connection with any construction work the employer shall cause the requirement, obligation, rule or provision to be duly and faithfully complied with or observed, and if the requirement, obligation, rule or provision is not duly and faithfully complied with or observed the employer commits an offence against this Act."

Seeing that Regulation 82(1) of the Electrical Supply Regulations 1976 is an enactment making provision for the safety of persons, and is applicable in respect of workmen engaged in construction work, then Section 11(f) plainly incorporated the Regulation into the Construction Act, and under Section 22 the breach of such incorporated provision constituted an offence. Such was the view taken by the learned Magistrate.

The argument of Mr Mackey, on behalf of the Appellant, was founded upon three alternative propositions. It was first submitted that the Appellant was not an "employer" within the meaning of Section 22 of the Construction Act. That submission was in turn founded upon the definition of "employer" in Section 2 of the latter statute which includes

a "bailee" of mechanical plant "notwithstanding that the bailee is not liable for the payment of the wages of the plant's operator". This was the definition of "employer" which had been relied upon by the Respondent.

The facts were that an incorporated company, which operated a plant hire business, had hired the excavator to the Appellant. The plant hire company had also provided the services of the plant operator, and was responsible for the wages of the plant operator. Those wages were incorporated in the hire charges paid by the Appellant. It was argued by Mr Mackey that upon these facts the Appellant was not a "bailee" in terms of the statutory definition. The basis of this argument was that the excavator was at all times in the possession and under the control of the employee of the plant hire company, or of the hire company itself, and was not in the exclusive possession of the Appellant.

In answer to that submission Mr Cato, on behalf of the Respondent, submitted that upon the admitted facts the excavator was bailed to the Appellant, to be used for such purposes as the Appellant saw fit, that it was immaterial by whom the wages of the operator were paid, and that during the period of hiring the plant was in the physical possession of the Appellant alone.

The word "bailee" in the statutory definition of "employer" must bear its ordinary legal meaning. It was said in Pollock & Wright, "Possession in the Common Law" (1888) at p.160:-

> "There seems to be no reason to doubt that in general the same thing is a bailment for the purposes of the criminal law, both common and statutory, as in civil matters".

The concept of bailment at common law inevitably means exclusive possession by the bailee of the chattel which has been

bailed. Cf. Paton on Bailment p.29; 2 Halsbury (4th edn.) para.1501 (n.8). The argument for the Appellant in the present case is that upon the facts the Appellant was not shown to have exclusive possession of the plant which he had hired. That submission necessarily depends, as I see it, upon the circumstance that the operator of the plant was the servant of the owner of the plant and that the operator's services were hired to the Appellant along with the plant itself. If the excavator had merely been handed over to the Appellant to be used and operated by its own employees for some specified rate of hire on a daily or weekly basis, then no doubt the argument of the Appellant corporation could not be sustained. What is relied upon, as I have said, is the fact that the plant was being operated by a servant of the owner.

The statutory definition clearly suggests that the identity of the operator of the plant which has been hired may be a material factor in determining whether the hirer is a bailee. But I am not sure whether that circumstance has the weight which the statutory definition seems to imply. There have been many cases decided at common law in which the question of vicarious liability for negligence has turned upon the right of control over the operator of plant which has been hired. Many such cases have involved the hiring of cranes by harbour boards. Mersey Docks & Harbour Board v. Coggins and Griffith (Ltd.) (1947) A.C. 1 is perhaps the leading authority. In cases of that kind it has often been a factor of considerable importance that the operator is paid by the owner of the plant as this will ordinarily be some evidence pointing to lack of exclusive control over the operator on the part of the hirer. In this case, however, the question is only whether the Appellant was a bailee and since the Appellant was admittedly in possession of the excavator at the time of commission of the alleged offence, then the only remaining

question is whether the Appellant had exclusive possession, bearing in mind that the plant was being operated by an employee of the owner. The answer to that question probably lies in the evidence as to what measure of control the Appellant had over the operator of the machine. Even though the operator was at all material times the employee of the owner of the plant, nevertheless if the results of the arrangements in the present case were that the Appellant had unqualified power of control over the operator's activities, then that is cogent evidence to support the view that the Appellant had exclusive possession during the period of the hiring. It is the transference of that unqualified power of control that has been held sufficient to absolve the general employer of liability at common law for the acts and defaults of the operator. Cf. Mersey Docks & Harbour Board v. Coggins and Griffith (Ltd.) (supra), Lord Uthwatt at p.353.

With particular reference to the question of bailment, there have been at least three cases in which it has been held that the transfer of machinery with an operator has not amounted to a bailment of the machinery. These cases are: Crafter v. Burns /1939/ S.A.S.R. 153; Dayman v. Gleader /1939/ S.A.S.R. 277; Coast Crane Co. Ltd. v. Dominion Bridge Co. Ltd. (1961) 28 D.L.R. (2d) 295. The first two cases involved the hiring of motor vehicles where payment of the driver was made by the owners of the vehicles. It was held in each of those cases that upon the particular facts the true contract was one by which the owner of the vehicle carried goods for reward on behalf of the hirer, and that in no case was the vehicle bailed to the supposed hirer. In the Canadian case a heavy crane was hired to the defendant and the operator of the crane was made available to the defendant on terms that his wages were to be paid by the defendant. The crane having been damaged, the question arose whether it had been bailed to the defendant, for in the case of bailment, the onus of proving

the exercise of all due care would have lain upon the defendant as bailee. It was held on the facts that control over the activities of the driver was vested jointly in the owner and the hirer, and that since the damage to the crane occurred not while it was working, but at a time when the operator was responsible to the owner for its safety, the defendant was therefore not in exclusive possession of the plant so as to make the defendant a bailee.

Such cases only demonstrate the proposition that the question of bailment or not will depend upon the particular facts of each transaction, and in my opinion a great deal will turn on the exact nature and characteristics of the chattel which is hired. In this case the chattel hired to the Appellant was a mechanical excavator. The manner in which the excavator was to be used was entirely within the control of the Appellant. There is no evidence in the case to suggest otherwise. The Appellant had physical possession of the plant at all material times, and I can see nothing in the evidence to displace the primary inference that this was a chattel bailed to the Appellant with the services of an operator provided, and that the Appellant had exclusive possession of the machine during the period of hiring, there being no suggestion in the evidence that the owner of the plant was intended to exercise or did in fact exercise any control over the operator.

As I have indicated already, it will not be sufficient in a prosecution of this kind under the Construction Act to prove mere possession of plant on the part of the defendant, and there may be many cases in which the defendant is operating plant pursuant to a contract of hire which does not in fact constitute the defendant as bailee because there is no exclusive possession, in which case the defendant will not be

an "employer" for the purposes of the Construction Act. For the reasons advanced, however, the Appellant in this case, by virtue of the contract of hire and having regard to the evidence given, obtained in my opinion exclusive possession of the plant during the contract of hire, and was accordingly a bailee and therefore an "employer" within the meaning of the Act. Consequently the first submission of the Appellant must be rejected.

The second argument for the Appellant was based upon the words of Regulation 82(1) of the Electrical Supply Regulations 1976. I have already cited the relevant extract from the text of the Regulation. It was submitted by Mr Mackey that there will be an exemption from the requirements of Regulation 82 where (a) a machine is owned by a person other than an Electrical Supply Authority, and (b) that machine is operated by a competent person. With respect, that submission is plainly untenable. As Mr Cato said, the terms of Regulation 82(1) make it quite clear that the restriction on the use of cranes and other machines imposed by the Regulation applies in any case where the relevant plant is not owned by an Electrical Supply Authority and is not under the control of a competent person. Here the plant was not within the exempting provisions and the Regulation was obviously applicable. This second argument advanced for the Appellant must likewise fail.

Thirdly and finally, it was submitted by Mr Mackey that the offence referred to in the information required proof of mens rea, and it was submitted that the foreman employed by the corporation who gave instructions to the plant operator had not been shown to have meant or intended or known that the plant would come within dangerous or prohibited proximity to the overhead power lines.

It was argued by Mr Cato that the terms of sections 22 and 11(f) of the Construction Act, when read together, clearly impose absolute liability.

The answer to this submission advanced for the Appellant turns primarily on the wording of section 22. It will be noticed that where any requirement, obligation, rule or provision is to be observed with respect to construction work, then the employer "shall cause" the relevant requirement "to be duly and faithfully complied with or observed" and if the employer fails in that duty then he is stated to have committed an offence against the Act. By virtue of section 11(f) the provisions of Regulation 82(1) of the Electrical Supply Regulations 1976 are imported into Construction Act. Therefore, in terms of section 22 the Appellant corporation was under a duty to "cause" the requirement of Regulation 82(1) to be carried out. The essential question then is whether that duty on the Appellant corporation was an absolute duty, in that mere omission to comply with the duty necessarily results in conviction notwithstanding the absence of mens rea.

The Construction Act 1959 was enacted to replace the Scaffolding and Excavation Act 1922 and the various amendments thereto, and the purpose of the statute was to provide new rules for the safety of workmen engaged in construction work. The tenor of the legislation is the same as the safety provisions enjoined on employers under the Factories Acts. In the United Kingdom and in New Zealand and elsewhere in the Commonwealth the liability of an employer to observe a designated precaution stipulated in any one of the Factories Acts has normally been held to be absolute.

In Warner v. Metropolitan Police Commissioner (1969) 2 A.C. 256 Lord Reid referred to the category of statutory offences under public health, licensing and industrial legislation where it has conventionally been held that absence of mens rea is no defence, and in my opinion the Construction Act 1959 obviously falls within the category of industrial legislation so described. Then, when one looks at the text of section 22, it is observed that there is nothing to suggest that proof of mens rea is required, and one might go further and say that the terminology of the section seems itself clearly to impose absolute liability for the employer is liable unless he "causes" the relevant requirement to be complied with or observed. Thus the concept of vicarious liability is dispensed with and also the related but different questions as to whether the servant or agent committing the quasi-criminal default is to be identified with the company or corporation which has been prosecuted for the relevant statutory offence.

If I am wrong in construing section 22 literally, then there is a principle which in any case seems conclusive against the argument for the Appellant. The principle I have in mind is that stated by Lord Reid in Sweet v. Parsley (1970) A.C. 132 when he said, at p.149:

> "It has long been the practice to recognise absolute offences in this class of quasi-criminal acts, and one can safely assume that, when Parliament is passing new legislation dealing with this class of offences, its silence as to mens rea means that the old practice is to apply."

The principle so expressed seems, in my opinion, plainly to be applicable here. The safety requirements contained in the Construction Act and also in the Construction Regulations 1961 and also in any other Regulation or enactment falling within the description stated in section 11(f), are aimed at the prevention of death or injury to workmen and other persons

engaged in or about construction work. In that class of legislation the liability of a person in breach of the safety provisions has conventionally been held to be absolute, in the absence of any defined excuse based on practicability, it being no defence that the defendant could not, by the exercise of reasonable care, have known or discovered that a danger in fact existed or that his premises were unsafe or that danger was imminent. The legislation has been construed as involving the proposition that the defendant must take the risk, and if it is found that he has infringed the statutory prohibition or requirement then he must pay the penalty prescribed for the quasi-criminal offence.

In enacting the Construction Act 1959 the legislature must be presumed to have had in mind the cognate legislation dealing with safety of workmen in factories and the absolute duties placed upon occupiers of factories and workshops.

Examples of that type of legislation in New Zealand are the Factories Act 1946 and the Machinery Act 1950. Mandatory provisions relating to the safety of workmen have been enacted in those statutes in terms which are absolute. The only possible qualification may be found in one or two of the provisions under the Factories Act 1946, for example in section 47, where there is a duty to provide and maintain safe means of access and a safe place of employment "so far as is reasonably practicable". But even there, the exculpatory clause only entitles an employer to excuse compliance with a duty otherwise absolute upon the grounds that it was not reasonably practicable to do so, a situation which does not amount to requirement of proof of mens rea. Section 22 of the Construction Act 1959 contains no reference to

"reasonable practicability" and the presumption is that the legislature, in the interests of preserving the safety of people in or about construction sites, refrained from introducing any exculpatory clause, and intended the employer's duty to be absolute in conformity with the general pattern of industrial legislation aimed at securing the safety of workmen and other persons.

In these circumstances the duty imposed by section 22 is in my opinion both literally and inferentially absolute, and absence of mens rea is no defence. This third submission of the Appellant, which was not advanced before the learned Magistrate, must therefore be rejected.

The appeal is accordingly dismissed with costs in favour of the Respondent in the sum of $100 and disbursements.

Mr Haynes 34274

Solicitors: Mr Mackay 799350
Brookfield, Prendergast, Schnauer & Smytheman, Auckland, for Appella:
Meredith Connell & Co., Auckland, for Respondent
Mr Haynes
Mr Carter 34274.

Mr Concord Accountant 80900

IN THE MATTER OF THE JUDGMENT CONCERNING PPG INDUSTRIES CANADA LTD. HANDED DOWN BY HIS HONOUR J.J. FLYNN, A JUDGE OF THE MAGISTRATES' COURT IN AND FOR THE PROVINCE OF SASKATCHEWAN ON THE 15TH DAY OF JUNE, A.D. 1978.

J U D G M E N T

THE COURT: The accused PPG Industries Canada Ltd. are charged that on or about the 7th day of November, 1977 at a construction site in Wascana Centre Authority in Regina, Saskatchewan did fail, contrary to Section 3(a) of the Occupational Health and Safety Act (1977) to ensure insofar as is reasonably practicable the health, safety and welfare at work of all of his workers by failing to ensure that the workers installing windows at a hight greater than ten feet above grade or floor level were adequately protected from hazards associated therewith, being an offence under Section 32(a) of the said Act.

The facts in this case are not in dispute. I think they can be fairly summarized as follow s:

Two employees of the defendant corporation were engaged in the installing of windows in a building known as the Wascana Center office building, which said building was under construction in the City of Regina. Prior to commencing installing the windows, the workers had, (according to defence evidence) met with their superior and had a discussion regarding the installation of the windows and the question of safety was discussed at that time. While safety belts were available and on the site for the workmen to use, they had concluded they were not necessary.

The procedure to be followed in installing the windows was that first a preformed piece of material was inserted in a pocket between the outside and the inside wall immediately above the window area. This piece of metal (which I shall refer to as a bracket

for want of a better word) would be cut to the length corresponding to the window width, so that in effect it completely covered the top of the window. After the window was inserted the bracket would be pulled down in the pocket. When the bracket went down in place a lip of some 3/8 of an inch to 1/2 of an inch (my approximation) in depth, would fit over the upper outside edge of the window holding it firmly in place. When the window is in place and the bracket pulled down, a workman would step out on the window ledge and holding the window with one hand drill two holes through the bracket lip into the window casing. Screws would then be placed in these holes holding the entire unit together.

The evidence indicated that once the bracket was dropped into place the workmen felt the window would easily support them in their work.

The bracket I would describe as a lengthy piece of white metal with an enamelled exterior. I would imagine that it was pressed from a single sheet of flat metal. There is first a vertical piece approximately one and a half inches in depth; then a right angle and a horizontal piece one and a half inches wide; then a second right angle and it drops vertically approximately two inches; then about a ninety-five degree angle as the metal again moves horizontally towards the exterior over the window for approximately one and a half inches. Then another bend of approximately ninety-five degrees forming what I have referred to as the lip, moving down from three-eighths to half an inch. A piece of that particular bracket or metal is marked as Exhibit P.7.

The workmen had followed this procedure throughout the construction and in fact the job was nearly completed when, while installing windows on the second floor, a workman who had stepped onto the ledge to drill

the holes felt the window he was holding start to come out of the frame. The workman fell and was injured. I should say that while at that time he was on the second floor, I am satisfied that that is more than ten feet above grade level. There is also evidence the windows had been installed in exactly the same manner on the third floor. His co-worker had managed to hold the window from falling or it would have fallen as well on top of the worker. The evidence of the workmen was that they felt the bracket should have held the window and that they had no explanation for it not doing so. As stated earlier, the workmen were not wearing safety belts although the same were on the site; nor was there any platform or constructed restriction to prevent the workmen from falling.

I think that the law with regard to this particular type of offence is now quite clear. In the recent case of Caswell v. The Corporation of the City of Sault Ste. Marie, an unreported decision of the Supreme Court of Canada. Mr. Justice Dickson dealing with the matter before that Court states:

> "I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
>
> 1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly

be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault."

I am satisfied that the words used in the statute insofar as it is reasonably practicable squarely places this offence within the second category. I am also satisfied that there is nothing in the statute that implies mens rea. For that reason I find this to be a case of strict liability, one where all that is necessary is that the Crown proves the prohibited act which prima face imports the offence. It leaves the defence an opportunity to prove, and the burden of proof is on the defence, to prove that he took all reasonable precautions to avoid it or the defence of due diligence as it is sometimes referred to.

With those words as to the law on the subject I intend to return to the facts of the particular case.

I am satisfied that the Crown proved beyond a reasonable doubt a prima face case and that in the words of Mr. Justice Dickson imports the offence.

The question is then, did the defendant company exercise reasonable care to ensure the health and safety of its employees.

Just before I pass on, it is interesting to note that Mr. Justice Dickson in his judgment referred to Dean Roscoe Pound's, a quotation from Dean Roscoe Pound's text The Spirit of the Common Law where he has this to say:

"The purpose is to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morale."

He is speaking of the type of offences with which we are dealing her

While the witnesses say they can see no explanation as to why the window didn't hold, several explanations occur to me. If in the pressing of the bracket (and I imagine, as I said, it was probably made in that manner although I don't know), the last angle referred to, that is the angle of the lip to the piece

immediately prior to it, happens to have been formed at a greater angle than the angle immediately preceeding it. The result would be that it would not fit flat against the exterior surface of the window and the applying of pressure on that window would cause it to force the bracket back up into the pocket. If, in the building of the pocket, the pocket should somehow be formed wider than is normal, the bracket would then tend to turn in the pocket when pressure was applied and again allow the window to slip out. If, in the inserting of the window into the space after the bracket had been applied, a piece of building debris (and I might say that it could be a piece of building debris the size of a very small marble), was dropped on the top of the window, it would hold the bracket from dropping into place. The possibility also exists that the workmen somehow failed to pull the bracket down properly or that they pulled the bracket down properly only on one end and not on the other end. Then by virtue of the fact that it was raised on one end when the window started to go out, the top of the window working against the partly raised lip would force the entire bracket back into the pocket.

I do not intend to indulge in speculation as to what explanation is the correct one. I don't think it would be proper for me to do so. All that is necessary for me to ask is if the degree of diligence with which the defendant company considered the safety and welfare of its workers was such as to absolve them from liability. When one considers that when the workmen went out on the ledge there was no safety belts or supporting structure, it is not in my mind unreasonable to expect that an accident may happen. Not just from the possibility of the window giving away, as apparently it happened in this case, for one of the several possibilities that I have mentioned or one of several other possibilities that may exist that I haven't contemplated. Workmen might also slip for one of several reasons.

Perhaps again from some debris on the window ledge that fell on there immediately prior to him stepping there without his sight; or because of some slippery substance that was there unobserved by him as a result of some spill in the course of construction; or as a result of absent mindedly stepping back; or he may be pulled from his ledge by a sudden strong gust of wind or some unexpected source of force such as the falling of debris to cause him to slip and lose his grip and fall.

He may, although the evidence indicates that the workmen in this particular case considered themselves to be normal healthy individuals, he may nontheless be stricken by a sudden fainting spell or an attack of nausea to cause him to lose his grip.

All or any of these possibilities exist and if they were contemplated at all by the defendant corporation they were not properly met.

The purpose of the statute is clear, to protect the safety of workmen and keep them from becoming injured so that they become then a public charge.

I adopt the view as expressed by Roscoe Pound in The Spirit of the Common Law as to it being the purpose of this particular statute. The defendant corporation has not in my mind proven that the defence of reasonable care has been made out. I find them guilty as charged. There will be a fine of $1,000.

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RE: R. vs PPG INDUSTRIES CANADA LTD.

I, MARION KELLY, hereby certify that thee foregoing pages, numb ers one to six (1-6) inclusive, contain a true and correct transcript of my shorthand notes taken herein to the best of my knowledge, skill and ability.

DATED at Regina, Saskatchewan this 19th day of June, A.D. 1978.

Court Reporter

IN THE MAGISTRATE'S COURT
HELD AT CHRISTCHURCH

CR.8009049561-2
CR 8009054571-2

BETWEEN SAFETY INSPECTOR.

Informant

AND A. F. BURDON LIMITED

First Defendant

AND WILKINS & DAVIES CONSTRUCTION CO. LIMITED

Second Defendar

Before: P. J. McAloon Esquire, Stipendiary Magistrate
Date of Hearing: 25 October 1978
Date of Decision: 6 December 1978 ~~6 November 1978~~
Mr Saunders for Informant
Mr Callaghan for First Defendant
Mr Fogarty for Second Defendant

DECISION

The Safety Inspector has laid two informations against the first defendant under Section 22 of The Construction Act 1959 in that the first defendant was in breach of regulations 32 (1) and 44 (1) of the Construction Regulations 1961. Pursuant to the provisions contained in Section 25 of The Construction Act 1959 the first defendant has joined the second defendant to the informations and has issued similar informations against the second defendant. The point at issue in the preliminary hearing was whether these informations were correctly laid by A. F. Burdon Limited. It appears from the informations against the second defendant that they have been laid by a law clerk, presumably employed by the solicitors acting for the first defendant, and Counsel for the second

defendant has taken issue with this in that he has submitted that Section 25 (1) of The Construction Act 1959 provides that such informations can only be laid by the employer, in this case A. F. Burdon Limited. Counsel submitted that the informations against the second defendant were bad because they had not been laid by the employer but by its agent, a law clerk employed by the first defendant's solicitors. Counsel went on to submit that the Construction Act 1959 does not contemplate a situation such as has arisen in this case in that it assumes the employer will never be a company. Counsel, in his argument, traversed the history of the Summary Proceedings Act Section 13 and referred to Section 51 of The Justices of the Peace Act 1927 and to the case of Foster v Fyfe 1896 2 Q.B.104. Counsel for the first defendant submitted that it was necessary for the Court to look at the intention of Parliament when enacting the Construction Act 1959 and submitte that the Court should give as full an interpretation to the provisions of Section 25 as was required to give full effect to Parliament's intentions. It was common ground between both Counsel that Section 25 provided and formed an exception to the provisions of Section 26 of The Construction Act 1959 which provided that all informations, except those brought pursuant to Section 25, be brought by the Inspector.

Under the provisions of Section 51 of The Justices of the Peace Act 1927 it was provided that an information may be laid by the Informant in person or by his Counsel or solicitor or by any other person authorised in writing in that behalf. This Section was repealed when the Summary Proceedings Act 1957 was enacted and it was replaced by Section 13 of the latter statute which provided, "except where it is expressly otherwise provide by any Act, any person may lay an information for an offence". My reading of this section of the Summary Proceedings Act 1957 makes me come to the view that Section 13 of that Act considerably widened and extended the provisions of Section 51 of The Justices of the Peace Act 1927. I have considered the case

of Foster v Fyfe (supra) which was concerned with the question of whether a police officer could lay an information under certain mining regulations which provided that the information could only be laid by the Inspector of Mines himself. In this particular case the police officer had purported to be acting as agent for the Inspector of Mines. Lord Russell of Killowen C. J. referred to Section 10 of Jervis' Act 1872 which made similar provisions to the laying of informations as our Section 51 of The Justices of the Peace Act 1927 and for that reason held that the police officer was entitled to lay the informatio as agent for and on behalf of the Inspector of Mines. If my understanding of the purport of Section 13 of the Summary Proceedings Act 1957 is correct then I believe the same principles apply, namely under The Construction Act 1959 Section 25 An agent, in this case a law clerk of the solicitors engaged by the employer company, is competent to lay an information agains a person or another company which the first company alleges to be the actual offender in terms of Section 25.

However, I have approached the question from a further point of view in that I concede that if I uphold the argument of Counsel for the second defendant there will be a serious hiatus in the operation of Section 25 of The Construction Act. I have turned to Section 5j of the Act's Interpretation Act which provides, "Every act .... shall be deemed remedial, whether its immediate purport is to direct the doing of anythin Parliament deems to be for the public good or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair large and liberal construction and interpretation as will best ensure the attainment of the object of the act and of such provision or enactmer according to its true intent meaning and spirit". Quite clearl the provisions of Section 25 are enacted to provide the true offender in the relationship of contractor and sub-contractors to be brought before the Court to answer the charge which was initially laid by the Safety Inspector. For this Court to give

a restrictive interpretation as to the operation of the provisions of Section 25 would, to my mind, be tantamount to acting in contravention to the provisions of Section 5j of the Act's Interpretation Act 1924 in that the true offender would thereby be prevented from coming before the Court.

I have further given consideration to the question under the provisions of the Mischief Rule of statutory interpretation. Haydon's Case 3Co Rep 7a gives four main tests which the Courts should apply in interpreting the provisions of the statute under this heading, namely:

1) What was the common law before the making of the Act?
2) What was the mischief and the defect for which the law did not provide?
3) What remedy was propounded by Parliament to cure the defect?
4) What is the true reason for the remedy?

In my view the usual arrangements between contractors and sub-contractors and independent contractors in a large building project are complicated and it is often extremely difficult for an outsider, in this particular case the Safety Inspector, to know who is the person really responsible for an alleged offence under The Construction Act. If the law was applied in its unadulterated form the Safety Inspector could quite easily find that the person he charged under Section 26 was not in fact the person who had committed the alleged offence. In my view the purpose of Parliament in enacting Section 25 was to cut through this difficulty and these complications by enabling a person so charged with an alleged offence to name the person it believe to be the true offender in its own right and by its own action. The true purpose behind the provisions of Section 25 are to see that the real alleged offender appears before the Court. I believe that this is in fact the mischief which Parliament was intending to overcome and that for this Court to apply a restrictive interpretation to the provisions of Section 25 of The Construction Act, as was submitted by Counsel for the second

defendant would be tantamount to allowing the mischief to continue.

For these reasons I am of the view that the informations laid by the first defendant against the second defendant have been properly laid and that the matter will be able to proceed on the 6 December 1978.

(P. J. McAloon)
Stipendiary Magistrate

IN THE MAGISTRATE'S COURT
HELD AT CHRISTCHURCH

C.R.'s 800949561-2
800954571-2

BETWEEN SAFETY INSPECTOR

Informant

AND A. F. BURDON LIMITED

1st Defendant

AND WILKINS & DAVIES CONSTRUCTION CO. LTD

2nd Defendant

Before: P. J. McAleon Esquire, Stipendiary Magistrate
Dates of Hearing: 6th and 18th December, 1978
Date of Decision: 24th January 1979
Mr Saunders for Informant
Miss Drake for first defendant
Mr Fogarty for second defendant

MAGISTRATE'S RESERVED DECISION

The first defendant faces two charges under Section 22 of the Construction Act, in that on 23 March 1978 it failed to comply with the provisions of regulations 32(1) and 44(1) of the Construction Regulations 1961. Pursuant to Section 25 of the Construction Act 1959 the first defendant has joined the second defendant to these actions and by arrangement both matters were heard together. Regulation 32(1) of the Construction Regulations 1961 provides:

> "There shall be provided and maintained safe means of access to every place at which any workman has at any time to work, and provision shall be made for satisfactory egress."

Regulation 44 (1) provides:

> "Every working platform more than three metres in height shall be securely fitted with a guard rail or alternative protection where there is a danger of workmen falling from the platform."

Section 22 of the Construction Act 1959 provides:

> "In every case, where, under this Act or under any regulation for the time being in force under this Act, any requirement, obligation, rule or provision is imposed or enacted, with respect to any construction work the employer shall cause the requirement

> obligation, rule or provision to be dearly and faithfully complied with or observed, and if the requirement, obligation, rule or provision is not dearly and faithfully complied with or observed the employer commits an offence against this Act."

Mr G. T. Adams the first prosecution witness said that on 23 March 1978 he was an employee of A.F. Burdon Ltd which was engaged as the sub-contractor to the second defendant in the painting contract following the second defendant's completion of a factory for U.E.B. Mono at Hornby. Mr Adams said he recalled the Safety Inspector coming while he was working on a scaffolding inside the middle of the factpry painting the interior of the factory. Mr Adams said that the scaffolding was twelve to thirteen feet in height and that he and a fellow employee by the name of Thompson were engaged on the scaffolding. Mr Adams said that at that time there were no guard rails around the scaffolding nor was there a ladder as it had been taken away and to gain access to the scaffolding he climbed up the cross-bracing. Mr Adams said that the first defendant paid his wages at that time. He further said that he vacated the scaffolding at the Safety Inspector's request.

In cross-examination by Miss Drake Mr Adams agreed that there was a water pipe running parallel with the scaffolding about four feet above the planks and that when the scaffolding was near the pipe it would be extremely difficult to put a railing around the scaffolding. At the time the Safety Inspector called, the scaffolding was 1ft away from the pipe and Mr Adams said that he thought that that side was safe. He said that it was his recollection that at the same time there may have been one railing on the other side but that the ends of the scaffolding were not blocked off. Mr Adams confirmed the Safety Inspector's visit as taking place on 23 March 1978.

Mr G. D. Stewart a Safety Inspector employed by the Department of Labour said that on 23 March 1978 he went to the Hornby building site in question and found two painters

working from the top of a 5.9 metre mobile frame scaffolding in the middle of the building. Mr Stewart said that the scaffolding itself was a notifiable construction work and that there were no guard rails nor was there any safe means of egress or access to and from the scaffolding. Mr Stewart said that the water pipe to one side of the scaffolding was four feet above the top of the top plank on the scaffolding and that the pipe was too high above this scaffolding to comply with the regulations as a railing. Mr Stewart said that in his opinion it was the responsibility of the 1st defendant to provide the railing and the means of access and egress and that in Mr Stewart's view this responsibility did not vest with the 2nd defendant.

Mr I. F. Burdon, the Manager of the 1st defendant company, gave evidence that the contract was entered into on the understanding that Wilkins & Davies would supply all the major scaffolding for his company's use and that the 2nd defendant would be responsible for the safety of the scaffolding including its erection and dismantling. Mr Burdon said that on 16 March 1978 he went to the site and considered that none of the four mobile scaffoldings on the site complied with the Safety Inspector's requirements. As a result of that Mr Burdon spoke to Mr D. P. Wright, the foreman of the 2nd defendant, in the presence of Mr Gibson his own foreman and told Mr Wright that he thought the scaffolding was insufficiently planked and that there was no access ladder on it. According to Mr Burdon, Mr Wright said that he would look into Mr Burdon's requirements. Mr Burdon said that Mr Wright did not say the safety of the scaffolding was Mr Burdon's responsibility. Mr Burdon said that he had had complaints about the scaffolding from Mr Gibson and at a later stage he went to see Mr Peck, a Quantity Surveyor employed by Wilkins & Davies and in charge of the contract. Mr Burdon said that he asked for Mr Peck's co-operation in the matter of having the scaffolding comply with the safety requirements.

In cross-examination by Counsel for the 2nd defendant Mr Purdon was referred to Clauses 13 and 15 of the contract between his company and the 2nd defendant. Paragraph 13 of the contract provides as follows:

> A. The sub-contractor, his employees and workmen in common with all other persons having the like right shall for the purpose of the sub-contract works be entitled to use any scaffolding belonging to or provided by the contractor while it remains erected on the site, provided that such use as aforesaid shall be on the express condition that no warranty or other liability on the part of the contractor or of its other sub-contractors shall be created or implied with regard to the fitness, condition or suitability of such scaffolding.
>
> B. Any scaffolding not covered in sub-clause A. above required for the express purpose of this contract work shall be provided by the sub-contractor.

Paragraph 15 reads as follows:

> "The need to maintain safe working conditions at all times is stressed and in particular the requirements of the Construction Act 1959 and the Construction Regulations 1961 together with subsequent amendments shall be complied with. In accordance with the terms of the Act the sub-contractor shall advise the contractor and also the Department of Labour in writing of the name of the safety supervisor proposed for this sub-contract, who will be responsible for all safety aspects of the sub-contract. In the event of the sub-contractor wishing subsequently to change the person so nominated the contractor and the Department of Labour shall be informed."

On the effect of these two clauses in the contract Mr Purdon was somewhat equivocal when answering questions put to him by Counsel for the 2nd defendant. He first agreed that Clause 15 meant that his company was obliged to maintain the scaffolding but said there were many other sub-contractors working on the scaffolding while it did not comply. He went on to say that he did not consider it was his company's responsibility to provide guard rails and that he did not instruct his men to maintain the scaffolding. He said that he told his foreman Mr Gibson not to use any scaffolding which he considered unsafe. However, prior to the visit of the Safety Inspector the 1st defendant does not appear to have notified the Department of Labour nor the contractor of the name of the certified safety supervisor and it appears that up to that time no certified safety supervisor was

appointed by the 1st defendant.

Mr A. J. Gibson, the 1st defendant's foreman, said that when he had complaints about the scaffolding he directed these to Mr Uright the 2nd defendant's foreman, and that in particular he had spoken to Mr Uright about the number of planks and the absence of hand-rails and cross-braces. Mr Gibson said that Mr Uright had told him that he was the Safety Inspector on the job and that he, Mr Uright, was responsible for the 1st defendant's men. Mr Gibson said that if Mr Uright told him to get up on a scaffolding he felt that he would have to as he was under the direction of the main contractor in this respect. Mr Gibson confirmed that as at 27 March the scaffolding had one hand-rail only and that during some of that period there was a ladder affixed to the scaffolding but that it was being constantly removed by other tradesmen in the building and was thus not continually available for the people working on the scaffolding. Mr Gibson said there were no standards for a rail around the scaffolding and that he and his men were not allowed to touch the scaffolding because none of them were certified to do so. However, later in evidence-in-chief, this situation was modified by Mr Gibson when he said that his company spent a total of one man week on work relating to improving the scaffolding.

In cross-examination Mr Gibson said that he had been told that Mr Uright was the Safety Supervisor and that he was qualified to say if the scaffolding was dangerous or not and that Mr Wright had instructed him and his men to get up the scaffolding and do the painting otherwise the scaffolding would be dismantled and Burden's would have to pay the cost of re-erecting it themselves.

Mr D. P. Uright, the foreman carpenter employed by the 2nd defendant on this site, agreed that the relationship between himself and Mr Gibson was not as harmonious as it could be. However, he said that the remarks coming from Mr Gibson and the 1st defendant were mainly relating to the lack

of planks rather than the absence of a guard-rail or a ladder on the scaffolding, as the 1st defendant seemed to require more planks than were available. Mr Wright confirmed that he had told Mr Gibson that he was the safety supervisor on the job and said that he had never been appointed safety supervisor by the 1st defendant in respect of the sub-contract. He denied that he ordered the 1st defendant's employees to work on sub-standard scaffolding but agreed that he told them that if they did not like the scaffolding as it was he would have it dismantled and they would have to pay the cost of having it re-erected. Mr Wright said that in general sense it was his responsibility that the scaffolding complied with the safety regulations, but that this was more a moral matter rather than a legal matter. In cross-examination by Miss Drake, Mr Wright said that he had never seen anyone remove the ladder from the scaffolding while somebody was working on it. He further said that for all he knew the person who removed the hand-rails could have been the painters but he was not on the premises on 23 March to observe what occurred. Mr Wright said that in his view the responsibility for keeping the scaffolding in a safe condition rested with each particular sub-contractor or independent contractor as the case may be. For his company to be responsible for the safety of the scaffolding it would have meant that the 2nd defendant provided a man below each scaffolding throughout the duration of the work. Mr Wright said that this scaffolding had been erected by Safeway Scaffolding at the commencement of the contract and that the appropriate certificates had been obtained from the Department of Labour and that the scaffolding had railings on the four sides of them.

Mr S. T. Peck a Quantity Surveyor employed by the 2nd defendant said that he and Mr Ian Burdon discussed the adequacy of the scaffolding but not its safety aspect. Mr Peck said that in his view the contract between his company and the 1st defendant meant that his company had to supply scaffolding adequate for the job.

As far as the evidence is concerned, I am prepared to hold and so hold, that the scaffolding did not have guard rails around the four sides on 23 March 1978 and that there was no ladder affixed to the scaffolding or other means of access and egress which could be described as safe. Section 22 of the Construction Act 1959 provides that this obligation shall be the responsibility of the employer. Section 2 of the Act defines employer in relation to any construction work (which includes scaffolding) as any person who is liable for the payment of wages of men employed on the work or who would be so liable if the men were so employed. It is quite clear from Mr Adams' evidence that he was an employee of the 1st defendant company. In my view this suffices to make the 1st defendant liable under the provisions of Section 22 of the Act for the breaches of regulations 32(1) and 44(1) of the Construction Regulations 1961. The contrary position was unsuccessfully advanced by Council in Barlow v Fletcher Construction Co. Ltd. 1963 N.Z.L.R. 952, 954, but this argument was firmly rejected by Henry J. The Learned Judge said:

> "The expressions "employer", "workmen" and "construction work" are unambiguous. The words employer and workmen are used in conjunction with each other and in relation to payment and receipt of wages. This clearly means the immediate employer of the workmen. In the case of an employer who is also a sub-contractor his obligation is, in my view, confined to the area of his constructional work and is owed to his workmen who are required to work within that area. It may well be that a particular obligation may, in given circumstances fall on more than one employer."

As Henry J. observed, it may well be that a particular obligation may, in certain circumstances fall on more than one employer. The 1st defendant when served with these proceedings took steps to join the 2nd defendant pursuant to the provisions of Section 25 of the Act, and in my view none of the provisions of Section 25 operate to the point where the 1st defendant is released from its responsibility under Section 22. Clearly the 1st defendant knew of the offence because of the complaints its employees made to the 2nd

defendant's officers, and further I do not believe that the 1st defendant did everything that could be reasonably expected of it to prevent such an offence.

I am quite satisfied on the evidence that the 1st defendant was, on the date in question, in breach of its obligations under Section 22 of the Act and the 1st defendant is accordingly convicted of both charges.

As to the liability of the second defendant in respect of the breach, the provisions of the contract between the 1st defendant and the 2nd defendant purport to impose some limitation on the 2nd defendant's liability under the Act by the provisions contained in Sections 13 and 15 of the contract which have been quoted above. However, I do not believe that this Act can be contracted out of by means of provisions similar to Sections 13 and 15 in the contract between the 2nd defendant and the 1st defendant. The obligation contained in Section 22 of the Construction Act is positive and mandatory. The Section says:

> "The employer shall cause the requirement to be complied with."

Further by Section 7(2) of the Act it is provided that:

> "Any provision of this Act or of any regulation under this Act relating to the safety of workmen employed in construction work shall apply also to the safety of persons lawfully in the vicinity of the work whether or not they are employed in the work."

The question to be determined is whether the 1st defendant has any responsibility because of the provisions of Section 7(2) for the safety of the 1st defendant's employees.

I have referred to the decision of Henry J. in McAuliffe v Fletcher Construction Co. Ltd. 1970 N.Z.L.R. 680 where the Learned Judge considered the responsibility of the defendant as head contractor vis a vis the responsibility of the sub-contractor painter to the plaintiff who was an employee of the sub-contractor painter. The Learned Judge said at page 684:

> "In my opinion the plaintiff was, in the circumstances of this case, by reason of the combined effect of Sections 22 and 3(2) a person to whom the defendant owed a statutory duty in respect of the said scaffolding. Subject to a question of causation still to be discussed, the plaintiff has established an actionable breach of statutory duty in his head."

The circumstances of this particular case in so far as the relationship of sub-contractor contractor and employee are concerned, were similar to the circumstances of the present case and in my view by virtue of Section 3(2) together with my understanding of McAuliffe's case the 2nd defendant is thereby liable to the employees of the 1st defendant for the safety of the scaffolding. The 1st defendant's employees were clearly people who were lawfully in the vicinity of the work although they were not employed by the 2nd defendant and the 2nd defendant was in a position where it could clearly have foreseen and provided for the use of the scaffolding by the 1st defendant's employees. By virtue of Section 3(2) and Section 22 of the Construction Act 1959 I am of the view that the 2nd defendant must also be convicted of the two charges which have been brought against it by virtue of the provisions of Section 25 of the Construction Act 1959.

(P. J. McAleon)
Stipendiary Magistrate

IN THE SUPREME COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.No.191/79

BETWEEN FILKINS & DAVIES CONSTRUCTION CO. LTD
Appellant

A N D A.F. BURDON LTD
First Respondent

A N D SAFETY INSPECTOR
Second Respondent

Hearing: 9th July, 1979

Counsel: J.G. Fogarty for the Appellant
D.C. ~~Fitzgibbon~~ for the First Respondent
D.J.L. Saunders for the Second Respondent

Judgment: 30 JUL 1979

JUDGMENT OF ONGLEY J.

This is an appeal against conviction on two charges under the Construction Regulations 1961 brought by the first respondent against the appellant under the provisions of s.25(1) of the Construction Act 1959.

The second respondent had laid informations against the first respondent for breaches of Regulation 32(1), relating to the provision of safe means of access and egress to working places, and Regulation 44(1), relating to the fitting of a guard-rail to scaffolding above a certain height. The first respondent laid an information against the appellant alleging that the appellant was the actual offender. The charges were heard together and both companies were convicted of the two offences. A conviction having been entered on the two charges laid by him the Safety Inspector has no interest in this appeal. The first respondent has accepted the decision of the Court on the charges brought against it and counsel indicated that his client was no longer concerned as to whether the conviction of the appellant could be sustained. Accordingly, I gave leave to counsel for those two parties to withdraw from the proceedings thereby leaving the field to Mr Fogarty, counsel for the appellant, unopposed. Despite the lack of opposition the Court has a duty to determine whether or not the convictions were properly entered.

The first respondent (to whom I shall refer henceforth as "the respondent") was engaged as sub-contractor to the appellant on a painting contract following the appellant's completion of the construction of a factory for U.D.B. Nono at Hornby. On 23rd March, 1970 a Safety Inspector employed by the Department of Labour went to the building site and found two painters, employees of the respondent, working from the top of a 5.9 metre mobile frame scaffolding in the middle of the building. He found that there were no guard-rails nor any access ladder. It is not now disputed by the appellant that the scaffolding did not comply with the regulations in these two respects. The contest between the appellant and the respondent before the learned Magistrate was as to which of them had the responsibility of ensuring that the scaffolding complied with the regulations at the time of the offence.

By the terms of the contract between the appellant and the respondent the employees and workmen of the respondent were entitled to use for the purpose of the sub-contract works any scaffolding belonging to or provided by the appellant while it remained erected on the site. The scaffolding concerned in the charges was being used by the respondent's workmen pursuant to this entitlement.

Section 22 of the Construction Act 1959 places the responsibility for ensuring compliance with the requirements of the Act or regulations made under the Act upon the employer. An employer is defined in the Act so far as the term is relevant to these proceedings as follows:

> ""Employer", in relation to any construction work, means any person who is liable for the payment of wages of men employed on the work or who would be so liable if men were so employed; ...".

The primary question to be determined on the charges which were before the learned Magistrate therefore was whether the defendants to those charges or either of them was an employer within the defined meaning of that term. In respect of the respondent the learned Magistrate had no difficulty in finding that the witness Adams who had been on the scaffolding when the Safety Inspector arrived on the site on the day of the offence was an employee of the respondent and that it followed that the respondent was guilty of a breach of both regulations 21(1)

and 44(1) of the Construction Regulations 1961. In so finding he followed the decision of Henry J. in Barlow v. Fletcher Construction Co. Ltd [1967] N.Z.L.R. 952 in which it is reported at p.954 that the learned Judge said:

> "The expressions "employer", "workmen" and "construction work" are unambiguous. The words employer and workmen are used in conjunction with each other and in relation to payment and receipt of wages. This clearly means the immediate employer of the workmen. In the case of an employer who is also a sub-contractor his obligation is, in my view, confined to the area of his constructional work and is owed to his workmen who are required to work within that area. It may well be that a particular obligation may, in given circumstances fall on more than one employer."

As I have said, this finding in relation to the respondent is not now challenged and Mr Fogarty concedes that the learned Magistrate's approach to the matter up to this point was correct.

In relation to the appellant the learned Magistrate went on to point out, rightly in my view, that the duties cast by the Act and regulations upon an employer cannot be avoided by contractual arrangements between a head contractor and its sub-contractors.

Section 3(2) of the Act widens the scope of an employer's liability by requiring regard to be had to the safety of persons lawfully in the vicinity of the work whether or not employed in the work. It is in these terms:

> "Any provision of this Act or of any regulations under this Act relating to the safety of workmen employed in construction work shall apply also to the safety of persons lawfully in the vicinity of the work, whether or not they are employed in the work."

In relation to work being carried out on a scaffold a person who is an employer in relation to that work by virtue of having workmen employed in it has an obligation to all others lawfully in the vicinity whose safety may be affected by non-compliance with the Act or regulations. In relation to scaffolding that will include primarily other persons using the scaffolding. He cannot be convicted of a breach in relation to such persons however unless he is himself an employer in relation to the particular construction work in respect of which the Act or regulations are invoked.

The learned Magistrate found that the respondent's employees were people who were lawfully in the vicinity of the work although not employed by the appellant and that the appellant should clearly have foreseen and provided for the use of the scaffolding by such employees. There can be no quarrel with those findings so long as it is borne in mind that the appellant had no obligation to provide scaffolding which complied with the regulations unless it was an employer in relation to the scaffolding at the relevant time.

The learned Magistrate likened the factual situation to that which existed in Ledcliffe v. Fletcher Construction Co. Ltd [1973] N.Z.L.R. 680, and relied upon the statement of Henry J. in his decision upon a motion for non-suit following the jury's verdict. The passage quoted by the learned Magistrate is as follows:

> "In my opinion the plaintiff was, in the circumstances of this case, by reason of the combined effect of Sections 22 and 3(2) a person to whom the defendant owed a statutory duty in respect of the said scaffolding. Subject to a question of causation still to be discussed, the plaintiff has established an actionable breach of statutory duty in his head."

It is clear from that passage of the judgment that the learned Judge found the statutory duty upon the head contractor had been established in relation to the sub-contractor's employees. It is equally clear from the immediately preceding passage in the judgment that it was in the forefront of the learned Judge's mind that the existence of that statutory duty depended upon the defendant's status as "the employer". It may be assumed that that question of fact had been resolved on the evidence and was not in dispute at the time of the hearing of the motion for non-suit. Mr Fogarty submits that analysis of the evidence contained in the judgment is insufficiently detailed for it to be said with safety that the same conclusion should be reached in the instant case. The learned Magistrate said no more than that the relationship of the sub-contractor, contractor and employees in Ledcliffe's case were similar to the circumstances of this case. I think it is implicit in that statement that the learned Magistrate found that the appellant was an employer in relation to the scaffolding at the relevant time.

In view of Mr Fogarty's submission upon the facts I am obliged to examine the evidence relating to this issue. There is not very much that is relevant. Adams, the respondent's apprentice who was on the scaffold at the time of the Inspector's visit, said that only he and his fellow-worker Thompson were on it at that time. That was in accord with the evidence of the Inspector himself. Adams said that there were about five painters half a dozen carpenters and some of Kormald's (electricians) men on the site that morning. He said that other men were on the scaffold both before and after he and Thompson were on it but he did not identify them as the employees of anyone in particular. Stewart, the Inspector, saw no-one but the two painters on the scaffold during the morning. He said that it was not usual for painters to use scaffolding until after everyone else had finished with it. Mr Gibson, a painter then employed by the respondent, had been on the scaffold that morning before the Inspector's arrival. He said in evidence in chief that "the carpenters" were up there in the morning about an hour before the Inspector came. He then said "the carpenter was employed by Wilkins & Davies". He was cross-examined upon these statements and I repeat here the transcript of that part of the evidence:

> "Q. You said that the carpenters were up on this mobile scaffold that morning.
>
> A. Yes. I think it was the old chap, what's his name, Ernie I think it was.
>
> Q. What was he doing.
>
> A. Couldn't tell you, I don't know. I don't watch thecarpenters, what they're doing.
>
> Q. Well you were there as well I presume.
>
> A. Yes.
>
> Q. There would be only a limited range of things he could be doing.
>
> A. I think he was putting up the apex piece of timber. I could be wrong. I think that's what they were doing at the time.
>
> Q. Was it one carpenter or two carpenters.
>
> A. There was two actually up there, yeah.

Q. How long were they there.

A. Oh well there was jokers all over the place on that job. Wasn't a very well organised sort of a job, people everywhere.

Q. Just answer the question. How long were they there.

A. I couldn't tell you. Should be down in the diary, the work diary anyway."

The only witness called by the appellant to comment upon this was Wright, the appellant's foreman carpenter. He was not on the site that day but he said that so far as his knowledge extended none of his men were working on the scaffolding as the appellant had finished with the scaffolding the previous day. As to the elderly carpenter spoken of by Gibson he admitted the possibility of his having worked on the scaffold in the morning but in his view it was not probable because the carpentry work in that area had been finished.

In my view there was evidence upon which the learned Magistrate could reasonably conclude that an employee of the appellant had worked on the scaffold that morning so as to constitute the appellant an employer in relation to the scaffolding at the relevant time. That being so there was a responsibility on the appellant to ensure compliance with the regulations as they affected the safety of others lawfully in the vicinity, including the employees of the respondent.

Upon the findings of fact made by him the learned Magistrate correctly applied the law and the appeal will therefore be dismissed.

Solicitors:

Messrs Weston, Ward & Lascelles, Christchurch, for the Appellant

Messrs Twyneham (Roy) & Son, Christchurch, for the First Respondent

Messrs Raymond, Donnelly & Co., Christchurch, for the Second Respondent

49/1/15

In the Magistrate's Court at Gisborne

C.R. No.

BETWEEN ROBIN MILLIAN PRICHARD of Napier, Safety Inspector

Informant

AND ALLAN GORDON HALL of Tolaga Bay, Vineyard Owner and ALAN GARY HALL of Tolaga Bay, Engineering worker

Defendants

Date of Hearing: 26 October 1977
Date of Decision: 23 November 1977

Stapleton for Informant
Kearney for Defendant

DECISION OF W.M. MILLIS ESQ., S.M.

This is a prosecution under the Construction Act charging the defendants with using plant not maintained in good order and condition. The charge originates because of a fatal tractor accident on State Highway 35 just south of the Anaura Bay turn-off. I doubt whether the charge would have been laid had this accident not occurred.

Very briefly the situation is that the defendants contracted with the Ministry of Works to mow grass verges on the A portion of State Highway 35. For this purpose they used a tractor which was unregistered and which had no Warrant of Fitness. It was alleged by the Informant that it had defective steering and defective brakes. The power take off also had no protective covering. It had odd sized tyres on the wheels. There were no witnesses to the accident but it seems clear from all the witnesses both for the Informant and for the defendants that the tractor towing a mower went over a bank, overturned and crushed the driver. With minor variations all the witnesses who gave evidence relating to the accident itself indicated that an unsuccessful attempt had been made to reverse the tractor. It was clear from the evidence of all witnesses that the presence of a mower at the back of the tractor would act as a form of propeller. It would move the tractor either backwards or forwards depending which gear was engaged. I am satisfied from the totality of the evidence that the unfortunate man who was killed was the author of his own misfortune. It seems clear from all the evidence that he attempted a manoeuvre which in the circumstances and at the particular place should never have been attempted. It seems clear also from the

evidence of the defendants that the deceased had some difficulty in using the tractor. Indeed evidence was given that on at least two occasions the deceased had managed to jam the mower in gear so that it could not be used. I am satisfied also on the evidence that the condition of the tractor had little if any part in the cause of the accident.

It was acknowledged that the tractor was unlicenced and it was acknowledged that it had no warrant of Fitness. It had not been owned by the defendant Allan Gary Hall for very long and was not really intended for use on the road. At the time of purchase it was suggested that there had been some misunderstanding as to who should register it. There was evidence also that neither owner was aware that it required a Warrant of Fitness. The plain fact remains, however, that it was neither licenced nor warranted. After the accident the tractor was examined by Mr Bothomley, a Vehicle Inspector employed by the Ministry of Works. He gave evidence to the effect that the steering was defective, that the brakes were defective and that the tyres, being of unequal size, caused it to tilt. The tyres on the front wheel were of different makes. Another witness, Soloman, now a mechanic with the Post Office and with some years of experience in servicing tractors also gave evidence relating to the steering, to the brakes and to the uneven tyres. It was his view that the steering was defective, the braking defective and that the uneven tyres would have an unbalancing effect upon the operation of the tractor. So far as Mr Bothomley and Mr Solomon were concerned they did not examine the brakes until after the accident.

Mr Soloman indicated that in his view improper use of the brakes could burn out the linings in about two hours. As I have already indicated the evidence seemed to me to suggest that the deceased was not a particularly good operator on this particular tractor. I would have great hesitation in saying that the evidence satisfied me that the brakes were defective at the time the tractor first went on to the road in the deceased's control. The steering, however, I am in no doubt was, to say the least, poor. The tractor had in the main been used by the defendants on flat country but here the deceased was using it in circumstances where the defect in the steering would most likely show itself only when it was too late. I cannot over-look the evidence of two experts Messrs Bothomley and Soloman both of whom say the steering was so bad that they would hesitate to drive the machine.

The matter comes down to the points of law raised by Counsel. Mr Stapleton submitted that the work being carried out on the day of the accident was "construction work" within the context of the Construction Act 1959 and that the McCormick tractor being used was "plant" within the meaning of that Act. He was under the impression that Mr Kearney would suggest that the grass verges were not part of the road. However, Mr Kearney conceded that the tractor was being

used on a road.

The defence contention was that the Construction Act was not the vehicle whereby the defendants should be brought before the Court and that the tractor involved was not plant engaged in maintenance work within the meaning of the Construction Act.

The Construction Act according to its pre-amble is:

> "An Act to consolidate certain enactments of the General assembly and to make better provision for the safety and welfare of persons engaged in construction work."

Section 2 defines construction work as:

> "any work in connection with the construction erection, installation, carrying out, repair, maintenance, cleaning, painting, renewal, removal, alteration, dismantling, or demolition of:
>
> (a) _____
>
> (b) Any road, motorway, harbour works, railway, cableway, tramway, canal, or aerodrome."

Section 2 further defines mechanical plant as:

> "Mechanical Plant" means plant or machinery, the motive power of which is supplied wholly or partly by mechanical means, used in construction work for the hoisting, lowering, carrying or moving from place to place of material (or workmen) or for the digging or removal of earth or the sinking of piles; and includes any rope, blocks, pulley, sling, or attachment used in connection with any mechanical plant ....."

Section 15 of the Act reads:

> "The following rules shall be observed in respect of plant (other than mechanical plant), tools, and gear used in connection with the construction work:
>
> (a) Any such plant, tool, or gear shall be constructed or suitable and sound materials, shall be maintained in good order and condition, and shall be of adequate strength and suitable for the purpose for which it is used or intended to be used:
>
> (b) Plant, tools, or gear of a class or kind prescribed in that behalf by regulations under this Act shall not be used in construction work except subject to such conditions as may be prescribed in the regulations and by persons having such qualifications as may be so prescribed."

Clearly the tractor was not mechanical plant within the meaning of the Act and if a conviction is to be entered it must be on the basis that the tractor was plant engaged in construction work namely maintenance of a road.

Mr Kearney's first point is that the Construction Act is not the proper vehicle to bring the defendants to Court. The evidence disclosed that proceedings were contemplated by the Police and that a prosecution for man-slaughter was being considered. Nothing came of this. Whether or not the Ministry of Transport considered proceedings I do not know but it is certain that none were issued. It is

clear that there could have been no defence to charges under the Transport Act relating to the use of an unlicenced tractor without a current warrant of fitness. Possibly other informations could also have been laid. It may be that charges could have been laid under other Statutes. The point I make is that the fact that charges could have been made pursuant to other Statutes does not necessarily mean that charges are not possible under the Construction Act. Indeed, Section 3 of the Construction Act specifically states that the provisions of the Act are in addition to and not in substitution for the provisions of any other Act. If in fact the tractor was plant used in construction work as defined then it seems to me that it is competent for proceedings to be brought under the Construction Act. When arguing whether or not the grass verge was part of a road Mr Stapleton referred to Section 5(j) of the Acts Interpretation Act. Mr Kearney suggested that the same section should be used to show that proceedings did not lie. In my view the pre-amble to the Construction Act and the provisions of the Act generally seem to me to be something in the nature of a code designed to protect workmen engaged in construction work of whatsoever nature. Once again, the question seems to be solely "was the tractor plant engaged in construction work?"

It is clear that to justify a conviction I must first decide if mowing a grass verge is "maintenance" of any road. Maintenance is not defined anywhere in the Construction Act nor is a reference to the dictionary (Shorter Oxford English Dictionary Third Edition) very helpful. Maintenance is there said to be the act of maintaining. More help can be obtained from Words and Phrases Legally Defined Volume 3 at Page 191. I do not propose to recite what is said but from my reading I am satisfied that mowing the verge can properly be considered as maintenance. For reasons of safety, e.g: visibility either of the road ahead or of a ditch on the side of the road, keeping verges properly mown seems highly desirable.

Whether or not the tractor is plant within the meaning of the Act is more difficult. Once again the word is not defined in the Act, The Shorter Oxford Dictionary defines plant in this context as

> "fixtures, implements, machinery and apparatus used in carrying on any industrial process."

I refer also to Stroud's Judicial Dictionary Third Edition at Page 2211 where the meaning of "plant" is discussed. Words and Phrases Legally Defined Volume 4 at Page 135 also discusses the meaning of the word. The 1976 supplement of Words and Phrases has some interesting comment on Page 130. In most illustrations the meaning is discussed in relation to some specific statute but there is reference in Stroud to National Provincial and Union Bank of England -v- Charnley 1924 1 KB 431. In this case "plant used in or about the premises" was held to include motor vans. At page 442 Bankes LJ said:

> "The employers carried on the business of engineers and metal merchants at their factory. In the course of their business they acquired scrap metal which was cut up when necessary into pieces of a suitable size and sold to steel works. Among a load of scrap obtained by them was an old safe. It was locked and the key was missing. The employers knew nothing of its history. When it arrived at the factory an employee was told to cut it open with an oxyacetylene cutter. While he was doing so the safe exploded causing him serious injury. The explosion occurred because the safe contained gelignite. The employee brought an action against the employers for damages alleging that they were in breach of the duty imposed on them by Section 31(4)(a) of the Factories Act 1961 not to subject 'plant' containing any explosive substance to any cutting operation which involved the application of heat until all practicable steps had been taken to remove the substance or to render it non-explosive."

There was lengthy argument as to the meaning of the word but the dictum of Lindley LJ in Yarmouth -v- France 1887 19 QBD 647 at Page 658 applied.

> "..... in its ordinary sense, (he said), it includes whatever apparatus is used by a business man for carrying on his business, not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business ....."

In Haigh's case Lord Diplock said at Page 1148:

> "The marked preference which Courts habitually show for citing judicial in preference to lexicographers' definitions of ordinary English words, even when they are not legal terms of art, has led to the acceptance of Lindley LJ's definition as being the meaning of the word 'plant' where it has been used without any express statutory definition in a variety of enactments, particularly those dealing with taxation of industrial enterprises."

As a result I come to the conclusion that the tractor was plant being used in construction work. The true intent of the Construction Act is the protection of workers, it seems to be quite illogical to suggest in this context that a tractor is not plant.

There are one or two other matters which should be mentioned. The use of the tractor was requisitioned by a foreman of the Ministry of Works at Tolaga Bay. It is clear that he did nothing to satisfy himself as to the suitability of the tractor. He apparently did nothing to see if it was registered or warranted. Had he insisted upon a warrant being obtained any defects would probably have come to light. To the extent that these steps were not taken I think the Ministry of Works must take a share of responsibility. Despite all this, however, I still am of the opinion that it was the fool-hardy use of the tractor rather than its defects which was the principal cause of the accident. The matter is set down for hearing on 29 November 1977 when I will hear Counsel as to penalty.

(A. " Gillies)

Construction Act 1959

R.I.HUGHES (Dept. of Labour) v ARCHER BUILDING CONTRACTORS LIMITED

Decision of W.M.Willis S.M. 7/10/65

The company was charged with failing to take all reasonable precautions to ensure the safety of workmen employed by it in certain construction work and it was also charged under the Regulations pursuant to the Act. The evidence in respect of both charges was identical and related to the excavation of a trench for the purpose of laying water reticulation pipes. The evidence showed that the company intended to build a trench across the main highway at Mataura, for which purpose it was essential that a foreman from the Ministry of Works should supervise work. Due to some reason which is immaterial for the purposes of this case, the foreman did not arrive, so the Defendant's foreman decided to proceed with the trench from the edge of the road towards the Southland Freezing Company's Works. The trench was excavated under the railway line where provision had been made by the railways to ensure the safety of the line and when the trench was excavated under the line, a digger commenced the trench from the railway line towards the Freezing Company's buildings. This work was carried out with considerable speed, as about 40 ft. of trench had been dug in the space of 2 or 3 hours. Shortly after lunch when a train passed, there was a subsidence on one side of the trench where the overburden had been placed, resulting in the death of Mr.Stewart. Evidence was given by the Engineers as to the nature of the soil and its standing qualities and the Managing Director of the Defendant company gave evidence as to the qualifications of its foreman. Let me say at once that

I accept without reservation the fact that this foreman is a competent foreman. He had been employed by the company for 15 years and for approximately half of that period had been engaged as a foreman on major construction work carried out by the company in the Eastern Southland district.

To the extent that the company employed a responsible foreman it took reasonable precautions to ensure the safety of its workmen. However it must be responsible for the acts of its foreman and for the reasons I have already given when entering a conviction I think the foreman failed to take reasonable precautions. From the photographs produced and from the evidence already given and particularly because this trench was right on the railway line (in fact a portion was under the railway line) it could have been assumed that it would be more susceptible to subsidence than a trench elsewhere. It is significant that the trench subsided within a comparatively short time after excavation and it must be remembered also that a considerable amount of over-burden was placed on the side of the trench where the subsidence occurred. There was no evidence given by the company that it had done anything to prove the nature of the ground and under the Regulations, of course, excavations are to be timbered unless certain other precautions are taken. My impression is that as this job was to be done quickly, adequate thought was not given to the question of timber or to the safety of the trench itself. After all, in a space of 2 or 3 hours a 40 ft. trench had been dug and the work of backfilling already commenced. Mr. Brydone referred me to a case where the words "all reasonable precautions" had been interpreted but this is related to the contractual liability of parties under

a contract and I do not think it was relevant in this particular case. I can find no reference to the interpretation of these words as used in this context. Mr. Brydone further suggested that the company had fulfilled its obligation by appointing a competent foreman, but for the reasons I have given above, I think its duty was greater than that. I am strengthened in this belief by the rather peculiar provisions in Section 25 which empower an employer who is charged with an offence against the Act to lay an Information against any other person whom he alleges to be an actual offender, so that he may be brought before the Court. It was open to the company to lay an Information against its employee, but it has omitted to do so, from which I can assume that it is prepared to accept responsibility for the foreman's action.

Restructure amended 29/5/79

IN THE MAGISTRATE'S COURT
HELD AT AUCKLAND

C.R. No. 7004137998
C.R. No. 7004131131

DEPARTMENT OF LABOUR

INFORMANT

AUCKLAND REGIONAL AUTHORITY

DEFENDANT

Date of Hearing: 1 February 1978

Date of Decision:

Counsel: R. L. Akel for the Informant
Mr Latimour for the Defendant

DECISION OF P. H. BLACKWOOD S.M.

The defendant faces two charges, alleged to have arisen on 2 May 1977 at Riverhills Park, Gossamer Drive, Pakuranga. The first is that it committed an offence -

"against section 9(10) of the Construction Act 1961 and regulation 87(7) of the Construction Regulations 1961 in that it carried on notifiable construction work without a properly appointed Safety Supervisors holding a certificate of competency granted in respect of the particular kind or class of construction work being carried on."

The second is that it committed an offence -

"against section 12(a) of the Construction Act 1959 and regulation 71 of the Construction Regulations 1961 in that it did fail to securely protect workmen employed in or about an excavation and make that excavation safe for such workmen."

THE FACTS

The facts on which the prosecutions are founded are not in dispute except on one major issue, to which I shall later advert. On the evidence I find the facts to be as follows:-

1. In April 1977 the defendant wished to excavate a trench to lay a sewer at Riverhills Park, Gossamer Drive, Pakuranga, the trench to be at an average depth of four metres. By letter dated 19 April 1977 (Exhibit A) it wrote to the Informant as follows:-

"I wish to inform you that a trench of four metres average depth will be excavated within Manukau City's Riverhills Park, Gossamer Drive, Pakuranga.

This work will start approximately 28 April 1977. Duration of this work will be one (1) week. In accordance with section 9 of the Construction Act, Mr M. Doolan has been appointed Safety Supervisor for these works."

2. The defendant signed a "Joint Contract" (Exhibit D) with four men, Messrs Doolan, Wade, Collett and Newman, to carry out the excavation and lay the pipes. I shall refer to this contract in greater detail later in this decision.

3. The work envisaged and later in fact carried out was "notifiable work" as declared in regulation 5 of the Construction Regulations 1961. Mr Doolan was not at the relevant time a duly appointed safety supervisor under the Act.

4. On 2 May 1977 Mr D. K. McGrath, a safety inspector employed by the informant, inspected the site. Work was then in progress and excavations were taking place to a depth of approximately 18 feet. The sides of the excavation were vertical, with no shoring or support of any kind, and a man was working at the bottom of the trench. Mr McGrath considered that the excavation was unsafe and, indeed, dangerous, and immediately asked a Mr Lindeboon, a senior engineer employed by the defendant, who was then at the site, to get the man out of the trench. Mr McGrath then issued certain "Direction Orders" (Exhibit B), addressed to the defendant requiring -

   (a) No further excavations to be there carried out until the work had been notified to the informant and a safety supervisor for that type of work had been nominated; and

   (b) No work to be carried out in the 18 feet shaft that required any man to enter the shaft without approved protection against trench collapse.

   Later that morning part of the trench collapsed, but fortunately no workmen were in the trench when it happened.

5. On 5 May 1977 the informant received from the defendant an official notification under sections 8 and 9 of the Act. The notification purported to be dated 5 April 1977, and the relevant portions of which read:-

"Description of work: Connection of rising main from pumping station to existing manhole, Gossamer Drive, Pakuranga.
Employer: Auckland Regional Authority

Safety Supervisor: Mr D. Moorwood
Certificate Number: 393."

Mr Moorwood was then a duly appointed safety supervisor under the Act.

On the evidence I find:-

1. The work at Gossamer Drive was a notifiable construction work under section 8 of the Act and regulation 5 of the Regulations.

2. On 2 May 1977 the work was being carried out without a properly appointed safety supervisor.

3. The 18 feet trench was not on 2 May 1977 safe for workmen and there was a failure to protect such workmen securely.

The first charge is laid under section 9(10) of the Act, which reads in part -

> ". . . if any notifiable construction work is carried on without a duly appointed safety officer for the time being holding office as such being on duty in accordance with this section, the employer commits an offence against this Act."

The second charge alleges an offence against section 12(a) of the Act, which reads -

> "The following rules shall be observed in respect of excavations carried out in connection with construction work:
> (a) Every such excavation shall, as far as practicable, be securely protected and made safe for workmen employed in or about the excavation."

The offence must, I apprehend, arise under section 22 of the Act although it is not cited in the information. Section 22 reads -

> "In every case where under this Act or under any regulations for the time being in force under this Act any requirement, obligation, rule or provision is imposed or enacted or required to be observed with respect to or in connection with any construction work the employer shall cause the requirement, obligation, rule, or provisions to be duly and faithfully complied with or observed, and if the requirement, obligation, rule, or provision is not duly and faithfully complied with or observed the employer commits an offence against this Act."

It appears that the second charge could have been more happily and aptly framed if it had followed the wording of section 22, but defence counsel does not take the point. It is clear from the nature of each charge that the failure alleged against the defendant is because the informant claims that the defendant was "the employer" in respect of this work and this excavation.

The defendant claims it was not the employer. At the conclusion of the evidence the proceedings were adjourned to enable counsel to make written submissions. I have since received careful, comprehensive and lengthy submissions from each counsel, and I am indebted to each for his researches.

"Employer" is defined in section 2 of the Act as meaning, in relation to any construction work, -

> "any person who is liable for the payment of wages of men employed on the work or who would be so liable if men were so employed. . ."

The word "wages" is not defined in the Act. "Workman" is defined in section 2 as meaning -

> "any person engaged in any capacity in construction work; and includes an apprentice and an employer when engaged in the performance of any such work."

The Joint Contract produced as Exhibit D is in this form:-

1. It has a printed cover including these features -
   (a) The printed words "Contract No.".
   (b) Typed before the printed word "Contract" is the word "Joint".
   (c) Prominently printed are the words
   "Tender Form
   Condition of Contract
   Specifications
   Schedule of Quantities."
   (d) A printed notice to tenderers about closing times for tender and delivery of the tender.

For reasons which I shall later give, this cover is misleading as the contract was not "tendered" in accordance with customary commercial practice.

2. The first page is a standard cyclostyled "Appointment of Principal Contractor" signed by the four "Joint Contractors".

3. The next four pages are standard cyclostyled "General Conditions of Joint Contract".

4. Then follow seven pages of standard cyclostyled pipelaying specifications and four typed pages of specifications and schedules of quantities particular to the Gossamer Drive work.

I have described the form of contract with some particularity, as to me it explains some of the apparent incongruities about it. It seems clear to me that the defendant assembled standard forms for "Joint Contracts", added particular pages relating to the Gossamer Drive work, and then stapled the pages into a cover appropriate to make a neat and tidy package but inappropriate to

describe the contents.

Evidence was given by Mr Doolan, the "principal contractor" by the Director of Works for the defendant, Mr G. A. Tait, and by Mr J. Palmer, a senior pay clerk employed by the defendant. My findings on that evidence are as follows:-

1. Apart from a break of 12 months some seven or eight years ago, Mr Doolan has worked for the defendant for 28 years. He usually works with the group of three other men associated in this job, and most of the time their work is carried out pursuant to the type of contract evidenced in these proceedings. He prefers to work in this fashion, as he and his group find that they earn more money by working on a yardage or scheduled quantity basis than they do on wages.

2. Under this type of contract -
   (a) The defendant supplied all tools, equipment and materials.
   (b) The group was paid four-weekly.
   (c) The payment was calculated on an individual basis for each member of the group based on the number of hours each had worked during the period (e.g. 38, 34, 56 and 46), and from the amount payable to each was deducted tax at the rate applicable to that man.
   (d) 10% of the total amount payable was retained for a period after completion of the work, and, if necessary, deductions were made from that for any missing tools or equipment.

3. Mr Lindesaen approached Mr Doolan and offered him the contract. With the long association between Mr Doolan and the defendant, it appears that work was so offered on a regular basis at the rates applicable at the time. There was no tendering in accordance with customary commercial practice.

4. The levy payable to the Accident Compensation Commission in respect of the work carried out by these four men was paid by the defendant.

The General Conditions of Joint Contract forming part of Exhibit D purport to create the status of independent contractor and to negate any suggestions of an employer/employee relationship. The relevant provisions are:-

(e) Clause 2 - Status of Members of Group. This clause reads:-

> "It is hereby agreed and declared that no member of the group is an employee of the Authority and that each and every member of the group is an independent Contractor entering severally into

this Joint Contract with the Authority. No person other than the members of the group shall be allowed by the group to undertake any of the work included in the Contract, and no Contractor shall employ any workman or enter into any subcontract in connection therewith."

(b) Clause 4 provides for progress payments to be made, on the basis that the Engineer measures up the contract work completed to date, hands his calculations to the principal contractor, who then calculates the amount due to each individual in the group. That clause also covers the situation where any individual of the group terminates his "contract" before the work is completed, in which event the Engineer measures up the work to date and money due to that individual is calculated in the same manner as for progress payments.

(c) Under clause 8 either party may terminate the contract by seven days' notice in writing. In that event clause 9 provides for pro rata payment to the group.

(d) Clause 14 reads -

"The Group shall comply strictly with all relevant Acts, laws and By-laws. In particular, where applicable, the Group and each member thereof must comply in all respects with all the relevant requirements of the Construction Act 1959, and its Amendments; and also with the requirements of the Quarries Act, 1944, and of the Coal Mines Act, 1925, and any amendments thereto."

(e) Clause 15 sets out the authority of the Engineer. It reads -

"All the work shall be carried out under the direction and to the complete satisfaction of the Engineer, whose instructions in all points relating to the works, to the mode of execution, to the testing of the work, and to the quality of the materials and workmanship, are to be received and acted upon by the Contractors without delay. The Contractors shall at all times give uninterrupted access and afford to the Engineer every such facility for the supervision and examination of any of the works under this Contract as may be deemed necessary by the Engineer, or any person authorised by him; and the Engineer shall have power to condemn or reject any workmanship or materials that he may deem to be unsuitable for the purpose intended, or to be at variance with the drawing or specifications, and his determination of all questions relating to this Contract is to be conclusive and final."

(f) Under the heading "Compensation for Injury" clause 16 reads -

"It is understood and agreed that the Contractors are not employees of the Authority and are not entitled to any claim under the provisions of the Workers' Compensation Act 1922 or its amendments,

but as it is desired that provision should be made for the Contractors to be compensated for any injury arising out of and in the course of the Contract work and without prejudice to anything herein contained or implied, it is agreed that the Contractors, or their dependants as the case may be, shall be entitled to claim against the Authority in the circumstances under which payment would be due and for such amounts as would be payable under the provisions of the Workers' Compensation Act 1922 and its amendments if the Contractors were employees of the Authority within the meaning of that Act, and if the sums payable to the Contractors hereunder (other than sums for materials supplied) were wages.

Any payments made by the Authority under this clause with respect to any accident shall be a pro tanto discharge of the liability (if any) of the Authority, whether under statute or at common law, to a Contractor or to any dependent of a Contractor arising out of any accident occurring in connection with the execution of the contract work."

THE ISSUES

Numerous cases were cited by both counsel as to the principles to be adopted in construing the Act and the Joint Contract. It appears to me that the problem must be examined in three steps:-

1. Does the definition of "employer" in section 2 of the Act includes or excludes the defendant?

2. If it can include the defendant, what are the general principles of law in determining whether the relationship between the defendant and the group was one of a contract of service or a contract for services?

3. In applying those principles to the Joint Contract, was it a contract of service or a contract for services?

THE MEANING OF "EMPLOYER"

As mentioned above "employer" is specifically defined in section 2 of the Act as meaning (not "including") any person who is liable for the payment of wages of men employed on the work. The word "wages" is not defined. The principles for the construction of statutes have long been clearly established, and, so far as here relevant, are set out in the following extracts from Halsbury, 3rd Edition, Volume 36:-

"If there is nothing to modify, nothing to alter, nothing to qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning." (page 391, paragraph 585).

"Words are primarily to be construed in their ordinary meaning or common or popular sense....." (page 392, paragraph 587).

"The words of a statute are to be taken as used in their ordinary sense, and it is therefore permissible in ascertaining the ordinary sense of particular words to refer to dictionaries....." (page 393, paragraph 590).

"Although the words of a statute are normally to be construed in their ordinary meaning, due regard must be had to their subject matter and object, and to the occasion on which and the circumstances with reference to which they are used, and they should be construed in the light of their context rather than in what may be either their strict etymological sense or their popular meaning apart from that context." (page 394, paragraph 593).

Often the word "wages" is understood as meaning the remuneration paid to a servant for hourly or weekly work, as opposed to a salary. Dictionaries, however, tend to give it a wider connotation. The Shorter Oxford defines "wage" as -

"a payment to a person for service rendered; now especially the amount paid periodically for the labour or service of a workman or servant."

The International Webster New Encyclopedic Dictionary defines it as -

"money paid for labour or services, usually according to specified intervals of work, as by the hour, day or week."

Collins English Dictionary defines it as -

"payment paid for labour or work done; hire; reward; pay."

These definitions show that the word can be construed in its narrow sense, or it can be construed in a wider sense as payment or reward for service rendered or work done.

I believe that in section 2 of the Act the word "wages" should be construed in its wider sense, for these reasons:-

1. The object of the Act is, as set out in its preamble, to make better provision for the safety and welfare of persons engaged in construction work. The Act covers the appointment of safety inspectors, contains a number of safety rules and provisions, spells out the duties and liabilities of employers and workmen and provides for penalties for breach of the provisions of the Act. It would make an absurdity of the Act if an employer were able to say that he did not have to make a construction site safe, because the workmen employed by him were on an annual salary, rather than being paid for weekly or hourly services, or that the workmen were paid on a piecework or production basis rather than for the time they have spent on the site.

2. The second part of the definition in section 2 implies that the word "employer" is intended to cast a wide net. At first sight the words "or who would be so liable if men were so employed" seem to defy interpretation. I apprehend, however, that they are intended to cover voluntary workers, such as those attending working bees with a Parent Teachers Association. The legislature may even have intended to cover the type of situation we have in this case. Men are working on a construction site and have been placed there by the defendant. They are not being paid "wages" in the narrow sense of that word, but are being rewarded for work produced. If they had been employed as workmen, the defendant would have been liable to pay them wages.

3. Under the heading of "Application of Act" subsection (2) of section 3 provides:-

> "Any provision of this Act and of any regulations under this Act relating to the safety of workmen employed in construction work shall apply also to the safety of persons lawfully in the vicinity of the work, whether or not they are employed in the work."

This subsection again exemplifies the wide scope which the provisions of the Act are intended to have. To construe the word "wages" in a narrow sense would tend to limit that scope and unduly restrict the object of the Act.

I accordingly hold that the word "wages" is to be construed in its wider sense, so as to include payment for services rendered, whether calculated on an hourly, weekly, annual, piece-work, production or yardage basis. In terms of that interpretation, I find that in the circumstances of this case the defendant is not excluded from the definition of "employer".

GENERAL PRINCIPLES OF LAW

The general principle applicable in determining whether a contract is one of service or one for services is set out in Halsbury, 3rd Edition, Volume 25, page 452, paragraph 879:-

> "In general the distinction between a contract of service and a contract for work and labour or for services is similar to that which exists between a contract of service and a contract of agency, namely, that in the case of a contract of service the master not only directs what work is to be done but also controls the manner of doing it, whereas, in the case of a contract for work and labour or a contract for services, the employer is entitled to direct what work is to be done, but not to control the manner of doing it."

The statement appears to have been somewhat modified by subsequent cases. A succinct statement of the three conditions necessary to establish a contract of service is contained in the judgment of MacKenna J. in Ready Mixed Concrete v. Minister of Pensions [1966] 1 All E.R. 433 at page 439:-

> "A contract of service exists if the following three conditions are fulfilled:
>
> (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master;
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
> (iii) The other provisions of the contract are consistent with its being a contract of service."

Perhaps a fourth condition may have been added by the statement of Denning L.J. (as he then was) in Stevenson, Jordan and Harrison Ltd v. Macdonald [1952] 1 TLR 101 when he said at page 111:-

> "It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."

This statement has since been criticised (see the judgment of Roper J. in Hargreaves v. Maybead Bros Ltd [1971] N.Z.L.R. 559, 566) but it can be a useful guide depending upon the facts of the particular case. I believe, for reasons which I shall later give, that it is of assistance in this case.

The third condition mentioned by MacKenna J. has been the subject of considerable judicial comment, the most recent being the judgment of Megaw L.J. in Ferguson v. Dawson [1976] 3 All E.R. 817. At page 824 he said:-

> "My own view would have been that a declaration by the parties, even if it be incorporated in the contract, that the workman is to be, or is to be deemed to be, self-employed, an independent contractor, ought to be wholly disregarded - not merely treated as not being conclusive - if the remainder of the contractual terms, governing the realities of the relationship, show the relationship of employer and employee. I find difficulty in accepting that the parties, by a mere expression of intention as to what the legal relationship should be,

can in any way influence the conclusion of law as to what the relationship is. I think that it would be contrary to the public interest if that were so: for it would mean that the parties, by their own whim, by the use of a verbal formula, unrelated to the reality of the relationship, could influence the decision on whom the responsibility for the safety of workmen, as imposed by statutory regulations, should rest."

Megaw L.J. went on to say (page 825):-

"I would apply the principle laid down by Jenkins L.J. in Addiscombe Garden Estates Ltd v. Crabbe. That was a case where the issue was whether the legal relationship between the parties was that of landlord and tenant or licensor and licensee. The relevant contractual document was clearly and deliberately directed towards emphasising that the relationship was that of licensor and licensee. Yet the court held that it was not. Jenkins L.J. quoted from the judgment of Denning L.J. in Facchini v. Bryson as follows:

> "The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label which they choose to put on it. . . It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven - I will not in these days say a coach and four - but an articulated vehicle."

This is the end of Jenkins L.J.'s quotation from Denning L.J. Jenkins L.J. himself went on:

> "The present case, of course, has nothing to do with the Rent Acts, but the important statement of principle is that the relationship is determined by the law, and not by the label which parties choose to put on it, and that it is not necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties."

Ferguson v. Dawson was relied upon quite heavily by Mr Akel in his submissions, and in his submissions in reply Mr Latimour has carefully analysed that case and made three points:-

1. Ferguson's case was a claim for damages for personal injuries arising out of an alleged breach of a statutory duty under the Construction (Working Places) Regulations 1966 (U.K.). Mr Latimour submitted that the terms of the U.K. Statute and the N.Z. Statute differed significantly, that the provisions of our section 22 are narrow in their application when compared with the U.K. provision, and

accordingly that cases decided under the U.K. Act are largely irrelevant. I do not agree. Insofar as the question is whether a contract is one of service or for services, the Courts both here and in England have directed themselves to the general principles of law applicable to those contracts, rather than to the particular wording of the statute. Having decided that issue on the facts of each case, they then examine the contract in relation to the particular statute.

2. Ferguson's case is clearly distinguishable on its facts. I agree that the facts of Ferguson's case are quite different to the facts of this case. All that emphasises, however, is that having determined the general principles and having applied those principles, each case must be determined on its own facts. I propose to do that in this case.

3. The propositions of Megaw J. concerning disregarding of express or implied terms stating the relationship between the parties were obiter dicta, and did not form part of the ratio decidendi. I agree. Nevertheless, Megaw J. simply cited with approval established authorities from prior English cases, although he ultimately did not find it necessary to apply them on the facts of the case before him. That does not alter the fact that the principles had already been established. I propose to follow those principles in this case.

The general principles of law which I find apply to the question of determining whether the contract in this case is a contract of service or a contract for services are briefly these:-

1. There must be a contract in which the worker is paid for his work and skill, whether payment is calculated by reference to time worked or services performed.

2. There must be a degree of control by the master as to how the wrk is performed sufficient to establish that the person who let the contract is in fact the master.

3. The Court is bound to examine the contract as a whole to determine its true nature, and may and, indeed, should disregard terms of the contract contrary to the nature which the Court determines is the true legal relationship between the parties.

4. The relationship between the parties is determined by law and not by the label which the parties choose to put on it.

5. It is of assistance in determining that relationship to consider the principle of "integration" enunciated by Denning L.J. in Stevenson's case.

APPLICATION OF PRINCIPLES TO THIS CASE

Having carefully studied the Joint Contract and reviewed all the evidence, I am firmly of the view that this is a contract of service and not a contract for services. I now give my reasons:-

1. The evidence establishes that the principal contractor, Mr Doolan, has worked for the defendant almost without interruption for 28 years. Obviously for many of those years he worked on a wage, although in more recent times he and his group preferred to work on the Joint Contract basis as they could earn more money. Mr Latimour submitted that the group were genuinely independent contractors by way of deliberate choice borne out of mutual advantage for both sides. He submitted that from the defendant's point of view it enabled it to obtain competitive prices for its construction contracts. There is simply no evidence to support that submission. There may be some advantages to the defendant in, for example, not having to pay overtime rates, or dirt money, or danger money, or whatever other penal rates may apply to a particular job, but there was no evidence to this effect. The evidence was, on review, skimpy, but insofar as it went it simply established that there was a long working relationship between the defendant and Mr Doolan, Mr Doolan and his group preferred to work on the joint contract system but did not always do so, and there was no suggestion that the Gossamer Drive contract was tendered in the ordinary commercial sense so as to enable the defendant to obtain competitive prices. In many ways it can be said that the "integration" principle enunciated by Denning L.J. is applicable here. This group had been an integral part of the defendant's work force or business for many years; Mr Doolan himself for 28 years. The history of the association between Mr Doolan and the defendant gives lie to any theory that he and his group are merely an accessory to the defendant's business.

2. In the witness box Mr Doolan gave me a clear impression of being a good honest workman, experienced in his line of work, but not giving the impression of the business or commercial background which is normally essential to a successful independent contractor. In my view he has for

many years been an employee of the defendant, working at times on hourly or weekly rates and at other times on "piece work", or paid for production.

3. Although the joint contract refers to a contract price and to progress payments, this can still amount to "wages" in terms of section 2 of the Act as I have earlier determined. Each of the group was paid according to the hours he had worked in each period, again a system more akin to payment of wages than to genuine distribution of the progress payment to an independent contractor. Although tax was deducted from the amount due to each of the group, that in itself, as Mr Latimour pointed out in his submissions, is not a factor compelling a Court to come to the conclusion that the relationship was one of master and servant. Taken together, however, with the other factors I have here mentioned, it reinforces the view that this was a contract of service.

4. Perhaps, however, the most compelling feature is the degree of control exercised by the defendant through its Engineer, and specified in clause 15 of the General Conditions. I repeat the first sentence of that clause -

> "All the work shall be carried out under the direction and to the complete satisfaction of the Engineer, whose instructions in all points relating to the works, to the mode of execution, to the testing of the work, and to the quality of the materials and workmanship, are to be received and acted upon by the Contractors without delay."

The emphasis is mine. In the passage from Halsbury, Volume 25, paragraph 673, cited above, one of the essential distinctions between a contract of service and a contract for services is that in the former the master not only directs what work is to be done but also controls the manner of doing it, whereas in the latter he is entitled to direct what work is to be done, but not to control the manner of doing it. Here, the defendant has expressly reserved to itself the right to control the manner of doing the work, a right which clearly spells out to me that the true nature of this contract is a contract of service.

5. Although clause 16 of the General Conditions (cited above) purports to exclude the provisions of the Workers' Compensation Act 1922, it also enabled the contractors to claim against the defendant in the circumstances where they could have claimed had they been workers under that Act. The

clause is now essentially irrelevant with the advent of the Accident Compensation Act 1972, but insofar as it assists in construing this contract it seems to me to confirm the true nature of the contract as one of service. It purports to exclude the Workers' Compensation Act, presumably to be consistent with clause 2 of the General Conditions, but at the same time ensures that the worker will be properly compensated for injuries. Of greater significance was the evidence that the defendant in fact pays to the Accident Compensation Commission the statutory levy in respect of the money earned by the group under this contract. Section 2 of the Accident Compensation Act 1972 defines an employee as meaning "any person who has engaged to work or works in New Zealand under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical or professional work, or otherwise, and whether remunerated by wages, salary, or otherwise."

The same section defines "employer" as meaning a person who "pays: or is liable to pay to any person (being an employee within the meaning of this subsection)..... any earnings as an employee as defined in section 103 of this Act.....". While these definitions are perhaps wider than their counterparts in the Construction Act, they still relate to work "<u>under a contract of service</u>". Although I have not carried out an exhaustive study of the Accident Compensation Act, it appears to me that the levy of which we are speaking is payable only in respect of earnings by those engaged to work under a contract of service, and does not relate to payments made to genuine independent contractors. The defendant was apparently prepared to regard itself as an employer of the group under the Accident Compensation Act but argues that it was not an employer of the group under the Construction Act. That reasoning I find to be pure sophistry.

Although clause 2 of the General Conditions purports to create the status of independent contractor, this clause is, I believe, contrary to the generality of the remaining terms of the contract, and must therefore be disregarded. It appears, indeed, that the defendant itself disregarded that clause when it initially notified the informant by letter (Exhibit A) of the work and of the appointment of Mr Doolan as safety supervisor, and later sent in the formal notification (Exhibit C) claiming it

was the employer under the Construction Act.

I accordingly hold that the true nature of the joint contract was a contract of service, and that the defendant was thereunder an "employer" as defined in section 2 of the Construction Act 1959. It is not disputed on the facts that if the defendant was an "employer" under the Act it failed to comply with its obligations as charged.

The defendant is convicted on each charge.

(B. H. Blackwood)
Stipendiary Magistrate

Solicitors for the defendant: Buddle, Weir & Co., Auckland

May 1973 Coram:
Blackwood S.M. 2 charges - Defendant convicted & fined $200, Court costs $5.00 on each charge.
Auckland.

35 Records 141/172

IN THE MAGISTRATE'S COURT
HELD AT WELLINGTON

C.R. 10903/64

BETWEEN SAFETY INSPECTOR

Informant

AND A. WILLIAMS CONSTRUCTION COMPANY LIMITED

Defendant

Date of Hearing: 28.8.64
4.9.64

Judgment:

Counsel:

Ducan for Informant
Inglis for Defendant,
and Robinson

DECISION OF J.B. THOMSON, S.M.

I deal first with the charge that the defendant failed to comply with an order given in writing on 26 June 1964 to cease work until the directions of a safety inspector were carried out. The direction and order are in the following terms.

"A. Under Section 18 (1) of the Construction Act 1959 you are directed to make all excavated faces on the site safe for workmen employed in or about the site as required by Sections 12A and 12B of the Construction Act 1959.

B. And also under Section 18 (3) I order that, until the above directions are complied with, work cease forthwith in connection with the permanent building construction on the portion of the site east of the line joining the ends of the 20ft high concrete walls until the above directions are carried out to the satisfaction of the Inspector".

FILE 13/4/65

In my opinion the cease work is invalid. Section 18 (1) of The Construction Act 1959 provides that where it appears to an inspector that construction work is being carried out in such a manner as to be dangerous to any workmen employed in the construction work he shall give the employer such directions in writing as he thinks necessary to prevent accidents. Sub-section (3) provides that where an Inspector gives any directions under Sub-section (1) he may also

at the same time or subsequently order any persons to cease forthwith such work in connection with the construction work as may be specified in the order until the directions are complied with.

The defendant submitted (inter alia) that the directions must relate to dangerous constructiin work and that only dangerous construction work can be stopped. In the present case the stop order covers work which was not dangerous. The lift shaft is an example of it. An employer should not be required to dissect from a cease work order the parts of it which are valid. If the order in its terms is too wide I should think that the whole order is ultra vires of the inspector's powers.

I think also that a cease work order may be given only in association with a direction to do specific work. A direction in the form in which the present direction is given amounts to no more than a direction to the employer in general terms to perform his statutory duty. What is contemplated is in my opinion a direction to do work which is specified in clear terms: i.e., protective work of a definite type, material and dimensions. I am confirmed in this view by the fact that Section 21 gives a right of appeal against the decision of an inspector given under Section 18. A Magistrate can confirm, modify or reverse the decision. If a Magistrate hearing an appeal against such a decision as the present one confirmed the direction and order the result would in terms be no more than an order to do what the inspector wanted, not what the Court prescribed. If the Magistrate thought that the work was being carried on in a dangerous manner he would have to frame some sort of specific direction which he is not equipped to do. The appeal provisions are not practical unless the direction is in specific terms which, if confirmed by the Magistrate give a positive direction as to what work should be done: and which can in an appropriate case be modified by the Magistrate. It was said for the informant that, as the most suitable method of dealing with a dangerous situation depended to a degree on the physical resources available to the employer, the Department preferred to leave the specific method of dealing with a problem to be settled by discussion. This is probably a very sound initial approach but when the procedure under Section 18 has to be invoked, the time for discussion has passed.

This information will therefore be dismissed.

The defendant is also charged with two other offences which can conveniently be discussed together:

1. That on or about the 23rd day of June 1964 being an employer in relation to construction work namely an excavation at the corner of Boulcott Street and Boulcott Terrace it failed to provide effective and adequate support for an exposed face more than 5 feet high on the north side of the said construction work and:

2. That on or about the 25th day of June 1964 it committed the same offence in relation to a face on the south side of the work.

These offences are laid under Regulation 71 of the Construction Regulations 1961 which is as follows:

"Excavations to be timbered - Every Face more than 5ft high of any excavation shall be timbered unless -

(a) the face is cut back to a safe slope: or

(b) the material in the face is of proven good standing quality under all anticipated conditions of work and weather: or

(c) the provision of timbering is impracticable or unreasonable by reason of the nature of the work and other adequate safety precautions are taken to the satisfaction of the Inspector: or

(d) by reason of the nature of the work and the position of workmen carrying out work in the vicinity, there is no danger to those workmen".

"To timber" is defined in Regulation 70 as meaning the use of timber, steel or other structural material for the purpose of providing effective and adequate support for an exposed face of an excavation. The charges therefore involve an expansion of the words of Regulation 71 using words from the definition of the word "timbered" in Regulation 70. No penalty is provided in the Regulations for a breach of any of them: but it was held in Barlow v Fletcher Construction Co. Ltd., 1963 N.Z.L.R. 952 that Section 22 of the Act applies to a breach of the Regulations as well as to a breach of the Act.

Before I deal with the facts relating to these two charges I consider an argument raised for the defendant that mens rea must be established before there can be a conviction. In Inspector of Factories v M.G.V. Stationery and Office Supplies 1964 N.Z.L.R. 310,

it was held that the offence of employing a person under 15 to work with machinery, and other offences under the Factories Act 1948 relating to the safety, health and welfare of factory workers and regulating work in factories, were offences of strict liability. I think that the same principles apply to offences under The Construction Act 1959. Section 85 (1) of the Factories Act 1948 is in substantially the same terms as Section 22 of the Construction Act 1959 and Tompkins J. attached considerable importance to the wording of the section. He attached importance also to Section 20 of the Factories Act which provides an escape clause for an innocent occupier in relation to an offence under the Act. This section has a counterpart in Section 25 of The Construction Act 1959. As The Factories Act is intended to ensure the safety and welfare of workers in a factory so the purpose of the Construction Act is to ensure the safety of workers in building work. Tompkins J. said (at page 318) "It seems to me that the effective control of the provisions of the Act relating to child and female labour, hours holidays, safety, health and welfare of factory workers, would break down if an occupier could escape by satisfying the Court that he had no guilty knowledge of the offence commited. I think that the same applies in respect of the provisions in the Machinery Act 1950 as to the safety of persons working machinery". In my opinion it applies equally in relation to the enforcement of The Construction Act 1959. I did not have the advantage of hearing argument from Mr Inglis upon the application of the M.G.V. case to The Construction Act as that case was first brought to the notice of the Court by Mr Duncan in closing. Mr Inglis had earlier submitted that the principles established in Lim Chin Aik 1963 A.C. 160 should apply to these prosecutions. This and other arguments of a general character werediscussed in the M.G.V. case and I think that what is said there applies to prosecutions under the Construction Act. Mr Inglis submitted also that the operative words in The Construction Act are often words which have no precise or unique meaning: such as "safe", "effective", "adequate", "as far as practicable", "securely", "sound construction", "sufficient strength", and so on; that these words being all relative, compliance with them can not be measured in any positive way but must be a matter of opinion; therefore honest belief in the sufficiency of compliance ought to be a defence. If this argument is valid it applies also to the Factories Act and the Machinery Act where similar words are used. There is a standard of adequacy, sufficiency, or safety in all such matters and that standard must be objective not subjective. In Munkman's Employer's Liability 5th Edt. p. 226 this proposition is derived from the authorities: "In one sense therefore 'safety' is relative, as it is related to some specific danger: in another sense it is absolute as the specific danger must be completely eliminated".

If honest belief in safety is to be the test of liability the actual safety or otherwise of the work is unimportant except insofar as it may influence the Court to think that in the particular case there was not an honest belief in the safety of what ever was under consideration (see Adams Criminal Law and Practice 74). This puts a premium on incompetence, unsoundness of judgment and overconfidence which has no place in such legislation as this.

I hold therefore that absence of mens rea is no defence to these two charges: and I turn to the evidence which was tendered to support them.

I deal first with the evidence relating to the north bank.

So far as these proceedings are concerned the story starts on Monday 22 June 1964 when Mr E.E. Hendriksen, Chief Safety Engineer of the Construction Division of the Department of Labour and a civil engineer of high qualifications and long experience, was walking down Plimmer's Steps. He saw men working directly below a face over 25ft high in a trench below the north bank so that their means of escape in the event of a fall of earth would have been seriously handicapped. "There was so little timbering or actual lateral support as to be almost ineffective". On Thursday 25 June he again visited the site as a result of information that there had been a fall in the area he had observed on 22 June. He found that there had been a fall of earth together with a collapse of a brick wall in such a position that if the men he had earlier seen had been working in the same position they would almost certainly have been killed. The part of the bank which came down contained agood deal of clay and loose material. Below that there was rotten rock which Mr Hendriksen says is typical of much of the country around Wellington. It has very little strength and is very treacherous in that it develops planes of weakness. The direction and cease work order referred to above were delivered on the 26June but as I have dismissed the charge relating to the cease work order it is unnecessary to consider the state of affairs after that date, to which a good deal of evidence was directed.

The defendant's account of this slip is that on the evening of 24 June Mr Cnossen the foreman on the job removed certain bracing which had up to that time been holding up the brick wall which later fell, hoping and believing that with the removal of these supports the wall would come down; and it came down as he expected during the night. I have some reservations about this explanation of the slip. Mr Crump a Safety Inspector was on the scene at 9.45 a.m. on 25 June for the purpose of looking at this slip. He asked Mr Cnossen when it had occurred. "He told me after all work had ceased on 23 June.

Apparently they did not know how it occurred". If the fall could be explained as Mr Cnossen now explains it, it is a little difficult to understand why the explanation was not tendered to Mr Crump then and there. I gathered that it was not given until the actual hearing of this charge. However I am not concerned so much with the cause of the fall as with the safety of the face. Mr Hendriksen thought that it was dangerous. Mr Cnossen conceded in evidence that he was not satisfied with the safety of the wall which came down. It is obvious that the wall could not have come down as Mr Cnossen planned unless the face itself first collapsed. If Mr Cnossen proceeded as he says he did, it indicates his opinion of its stability. If further confirmation is required it may be found in the evidence of Mr Williams himself. He said that though foundation trenches were dug by machines below the wall which came down, no work was done which brought men within 8 - 10 ft from the wall. The only reason for such a prohibition is that the workmen might have been endangered. It seems quite clear therefore that the face in this area was regarded by all concerned as unstable and unsafe. I have already indicated that I accept Mr Hendriksen's evidence that men were in fact working in the danger area on the 22 June.

I turn now to the events on the south bank. There is a sharp conflict between witnesses for the prosecution and the witnesses for the defence. Having gone to the site on the morning of the 25 June for the purpose of looking into the fall on the north bank, Mr Hendriksen and Mr Crump directed some attention to the south bank. They took photographs of it which were produced as B1 and B2. These photographs were taken at 11.30 a.m. There was an untimbered face some 15 ft above the general ground level and 20 ft above a point where men were actually working in a foundation trench. These men are shown in photograph B2. The face at the relevant portion was unsupported except for three tram rails which are shown in the photograph. Mr Crump pointed out to Mr Cnossen what he considered to be a danger, but Mr Cnossen said it was quite alright that it was good standing. Mr Crump left the job at about 11.50 a.m. and returned at about 2.00 p.m. He then found that there had been a collapse on the south face which, according to Mr Crump, Mr Cnossen was then busy trying to put right. He was making up a big shutter of 10 X 2 planks to slip down behind the tram rails. The shutter was lying on the drive in. He spoke to the foreman (presumably Cnossen) who said that the men were away having their meal at the time the slip occurred. Mr Hendriksen returned at 3.30 p.m. and he describes the slide as being fully 5 ft wide in from the original face to the inside edge of the collapse. It had gone right up to the kerb of the footpath at the edge of the site. By this time the shuttering which can be seen in photograph B3 had been put in position, but there was a big empty

space behind the shutter. Mr Hendriksen thinks that the collapse could not have occurred after the shutter had been put up. If it had been the material comprised in the slip could not have escaped. In other words Mr Hendriksen substantially confirms Mr Crump. According to Mr Cnossen there never was any slip. All he knows of is a slight subsidence which occurred after the shutter had been put in, of what he describes as "known loose fill", that is material which he put in or caused to be put in to fill up the space behind the shutter. He has no knowledge of the footpath having gone down. The shutter was not made up or applied in the afternoon as Mr Crump said. It was made in the morning. The face was chipped away to some extent to allow the shutter to be put in. The actual putting in of the shutter commenced at about 11.30 a.m. and the shutter was in position by about 12.15 p.m. I see no way of reconciling these two accounts of what occurred. I prefer the evidence of Messrs Hendriksen and Crump to the evidence of Mr Cnossen and the witnesses called for the defendant on this topic. It is perhaps worth mentioning, though I do not rely on it, that there is no indication in the photographs taken at 11.30 a.m. of any work which Mr Cnossen says began at that time.

On these facts I am of the opinion that the charges are established. It is clear that both on the north and south bank there were faces more than 5 ft high. It is clear also that these faces were not timbered. The burden of proving any of the four matters of excuse provided by Regulation 71 is by Section 27 (1) d, placed upon the defendant. The first is that the face was cut back to a safe slope. Having regard to the presence of the second matter of excuse I think that this one involves some positive act of making the face safe by sloping it. It was not suggested that the banks had been made safe in this way. Both of them were very steep. The second is that the material in the face was of proven good standing quality. I do not see how it could be suggested that anything of this sort had been proved. On the contrary I should be prepared to hold on Mr Hendriksen's evidence that the material on this site was of proven bad standing quality. The third is that the provision of timbering was impracticable and unreasonable and that other safety precautions are taken to the satisfaction of the Inspector. The evidence would not justify any such finding. The fourth is that by reason of the nature of the work and the position of men carrying out work in the vicinity there was no danger to them. I have already indicated my acceptance of the evidence of Mr Hendriksen that men were actually seen working on the 22 June in the trench below the north face where the fall occurred. So also men were seen and photographed below the untimbered south face on the 25 June.

I add that even if I took the view that mens rea was an essential element in these two offences I should be very much inclined to find that it was present. While the burden of proof is on the informant it is for the defendant to produce or point to some evidence from which the possibility of an innocent mind could mind could be inferred. On charges under Regulation 71 the absence of mens rea is not to be inferred merely because the Court can think that in a general way the defendant believed that there was no danger. This might be sufficient if the charge were laid under Section 12 of the Act. But under Regulation 71 the charges relate to a failure to do a specific thing, which failure may be excused in one of four specific ways. I must be able to find that the defendant or its servants had an honest belief in the existence of facts which if proved would mean either that the timbering had been done or that the defendant was entitled to rely on one of the four excuses which Regulation 71 admits. There could be no possibility of finding on the facts that the defendant or its servants honestly believed that they had timbered the faces in question. On neither face was there initially any real protective work at all. I do not see how I can hold on the evidence that there might have been an honest belief that either face had been cut back to a safe slope. Or that material in either face was of proven standing quality. As to the south face I do not overlook the fact that Mr Hendriksen and Mr Crump conceded that there could be a difference of opinion as to its stability, but this is a different thing from believing that it was of <u>proven</u> standing quality. Any face in this area must at least have been suspect and as Mr Hendriksen pointed out at least the top of the south face was not in its natural undisturbed state. There is no suggestion that the provision of timbering was impracticable or unreasonable. The last matter of excuse (that by reason of the nature of the work and the position of the workmen there was no danger) is clearly not available to the defendant in relation to the north face. Mr Hendriksen saw workmen in a position of danger on 22 June. What he saw must have been known to Mr Cnossen. Notwithstanding the evidence of Messrs Hendriksen and Crump that there could be a difference of opinion on the safety of the south face I am inclined to think that there was mens rea in relation to this face also. The regulation contemplates a certain state of affairs which is potentially dangerous. An employer who wishes to avail himself of the last excuse must be in a position to say that he honestly thought he had removed workmen out of any possible danger from the state of affairs which the regulation contemplates not that he thought that the state of affairs was not dangerous. In the present case the employer must have known that men were working below the north face immediately before it slipped. However I do not need to rely on this.

In respect of both of these charges the defendant is convicted.

Stipendiary Magistrate

35
7/13

IN THE MAGISTRATE'S COURT
HELD AT WELLINGTON

C.R. 3296/65

~~H.O. 35/4/49~~
1964/5711

BETWEEN ~~LABOUR DEPARTMENT~~ SAFETY INSPECTOR

Informant

AND A. WILLIAMS CONSTRUCTION COMPANY LIMITED

Defendant

Hearing: 26th & 29th March 1965

Decision: 29th March 1965

Counsel:
Mr Birks & Mr Duncan for Informant
Mr Collins for Defendant

ORAL DECISION OF R.D. JAMIESON, S.M.

1. In essence, the charge is that the defendant failed to take all reasonable precautions to ensure the safety of workmen employed in the work. The charge is defined in Section 11 (b) of the Construction Act 1959, although the offence itself is created by the operation of Section 22 of the Act.

2. The defendant Company was engaged in building a car-parking building at Boulcott Street, Wellington. This was being constructed on the open floor principle, so that each floor arose from the one below. The last completed floor was used as a platform from which to proceed. Pillars of reinforced concrete were erected to carry the next floor. Those pillars ran from north to south. At the top of each set of pillars a reinforced concrete beam was to be built, so that that beam also would, in each case, run from north to south. Between the boxing built for the concrete beams, acrow beams were placed. These do not form part of the finished building. They are relatively light metal beams which are placed between the sets of boxing for the concrete beams, so that each acrow beam is placed 2 ft from the next, measuring from centre to centre. These beams are, of course, placed to run from east to west. After that, sheets of plywood measuring 8 ft X 4 ft were placed on top of the acrow beams so as to cover all the spaces between the boxings for the concrete beams. This plywood would serve as the base for the pouring of the concrete slab floor, in due course. To complete the process, after the plywood has been laid, a stop 6 inches high is erected on top of the outer edge of the plywood for the obvious purpose of containing the concrete when poured, and to prevent any lateral movement of the concrete beyond the stop. When the new floor has set, the point is reached when the acrow beams are removed, and at that stage, of course, the plywood itself is similarly removed from below the new floor.

3. On this occasion the acrow beams had been put into position and it was necessary next to cover them with plywood. The late Mr O'Hara, Mr Clark, who gave evidence, the leading hand Mr Shaefer, and the foreman, are said to have been concerned with this work. The work should be regarded as it applies to a bay, which I understand to be the area between two of the boxings for concrete pillars, to which I have referred. It appears that that area would form a unit for the purpose of laying the plywood. I understand that there was a distance of 16 ft, more or less, between the acrow beams. First, plywood sheets were laid on the western side of the bay with their lengths running from north to south. Next, sheets were laid on the other, or eastern side, but

these were laid running from east to west. Mr Shaefer, the leading hand, placed the first sheet, which means the sheet at the northern face of the building. Here I should explain that it is necessary for the plywood to overlap the outer acrow beam, because the floor has to be laid with its edge in line with the outer edge of that beam. Consequently the stop has to be placed on the plywood beyond the last beam. It will be apparent, without going into detail, that seeing that the acrow beams were placed 2 ft apart and the sheets measure 8 ft X 4 ft, the overlap must be at least 22 inches if there is to be any overlap at all. To return to the day of the accident: when the sheets, to which I have already referred, had been placed, there was a gap between the two lots of plywood which could not be filled with sheets of standard size. At that point it was necessary for the carpenters to either cut sheets to fit, or find pieces which already suited the requirements. Mr O'Hara and Mr Clark were about to embark upon this task. Mr O'Hara was close to the northern most acrow beam and must have been standing on the outer sheet which ran from east to west and overlapped the last beam by 22 inches. He moved sideways for the purpose of measuring the outer end of the gap to be filled, and, when he did so the outer sheet upon which he was standing "kicked up", as Mr Clark put it, which is to say that it overbalanced and Mr O'Hara fell on to a shed at ground level suffering injuries from which he died.

4. I have referred to the charge which is laid. This is laid under a sub-section which lays down a general duty and it is apparent that it will not be as simple to apply as a specific regulation laying down an exact duty. In the latter case either the particular duty is complied with, or it is not. It seems to me that sub-section 11 (b) really does no more than state, in statutory form, the duty of an employer towards his servants, which has already been well-known to the Common Law for many years. The effect of Section 22 is to create a penal consequence of a breach of this general duty as now expressed in Statute. That duty, as recognized at Common Law, includes a duty to take all reasonable care (the Statute words it slightly differently) to provide a safe system of work where the circumstances are such that a prudent employer would lay down a system for the conduct of the work.

5. The informant alleges that the defendant was at fault. The prosecution suggests that he should have provided, at the stage which had been reached, a guard rail or a rope which would, at least, give an obvious indication of the danger line, which is the outer edge of the last acrow beam. Alternatively, it was claimed that the defendant should have supported the 22 inch overlap of plywood in some way, so as to render it safe if a man stood on it, and suggested that this might have been done by placing the acrow beams at a lower level and then placing wooden joists running from north to south above them to carry the plywood. Again as an alternative it suggested that the defendant should have provided outside scaffolding, either built up from the ground level or carried in some manner from the floor below. In addition, the prosecution pointed to the way in which the outer plywood sheet was laid, that is running from east to west, and claimed that this should not have been done.

6. It seems to me that all these suggestions relate to the provision of a safe system of work. The employer's duty is not merely to cope with known dangers as they become manifest. The employer has a duty to look ahead, to consider the operation which is to be carried out, to look for apparent dangers and, so far as is reasonably practicable, to provide safeguards against them. In doing that, the employer must consider not only the careful, alert, workman, but must remember that a workman cannot always be alert, and that his mind, when concentrating on an immediate task, may momentarily lose sight of a danger. The employer,

therefore, must allow for possible lapses from full attention and alertness.

7. Having said that, I should say also, that it is necessary for the Court to guard against reliance upon hindsight. Merely because a death has resulted it does not follow that a scape-goat must necessarily be found. I must judge the matter objectively, and apply the standard of reasonable foresight, not of hindsight. I turn first to the various suggestions, leaving aside for the moment the manner in which the last sheet was placed. As I have said, several suggestions were put forward. I think it is fair to the defendant to remember that as this was a relatively new method of work this, and no doubt other similar jobs, were subject to frequent inspection by the Officers of the Department of Labour and it does not appear that any of these suggestions were put forward before this tragedy. I say that, not to upbraid any Officer of the Department but merely to let it be seen that if the employer failed, then it seems to me that the manner in which he failed was not apparent to the Department before the accident. That in no way does away with the duty which I lay upon the employer. If no Inspector of the Department had ever gone near the job, its duty would have remained exactly the same.

8. It is necessary to remember that the duty of the employer is not to guarantee the safety of his workmen. This, even if every care is exercised, is clearly impossible in many avocations, and construction work is one of these. The Section requires that all reasonable precautions be taken. Certain risks clearly must be accepted. When that is necessary, competent men must be employed and must, to some extent, guard themselves, by the exercise of their experience and skill, from risks which have to be accepted. In rigging the scrow beams and laying the first few sheets of plywood, it is apparent that some risk of a fall cannot be avoided. Even to rig-up a guard rail might involve some risk. There is this to be said of that, however, that at that stage the immediate task of the man involved is to set up that guard rail and he should be much more conscious of dangers which he is running, with his eyes open, than a workman whose immediate task is some other mundane matter. It does appear, I should note, that once a new floor was laid provision does seem to have been made for a guard rail around the outside of the floor. A question which I have to consider is whether, at the stage which had been reached at the time of this accident, the risk which was encountered by O'Hara had ceased to be an unavoidable risk by reasonable standards.

9. It seems to me that the suggestions of supporting plywood by wooden joists, or in some similar manner, and of using outside scaffolding, may both have merit and may need to be considered. As Mr Collins has pointed out, this charge must be established beyond reasonable doubt, and after hearing the evidence I consider that these particular suggestions call for more expert scrutiny than it is possible for me to give to them. I shall simply say that I would not feel that on the evidence before me I could hold that it was proved beyond reasonable doubt that the defendant was guilty of this charge because he did not adopt one or other of those methods. I come then to the suggestion of stretching a rope between the steel starter rods which are left protruding from the top of each pillar. These rods rise from 3 ft to 4 fr above the level of the new floor. I was told that since the accident the practice has been adopted of stretching a rope between these starter rods. It is very easy to be wise after the event and I do not propose to allow myself to be influenced by the fact that the defendant Company has adopted that practice since the accident. A wise man will frequently adopt a practice of that kind after a tragedy, even though in his heart of hearts he does not, himself, consider that it would have made any difference. I have, however, to look at the matter as it should have appeared, in my view, to the employer before this accident happened. I do feel that that

22 inch overlap constituted a dangerous trap. I consider also that if any reasonable man sat down and soberly considered the possibilities inherent in that overlap, he would at once see that here was something that could be dangerous and should, if possible, be guarded against. I think that it would also be obvious that the danger, if it arose, could be a danger to life. It does seem to me that in that case a reasonable conclusion, based on foresight, would be that as soon as the acrow beams were in position, and before the work of laying the plywood commenced, a rope or something similar should be stretched between the starter rods. At the very lowest this would give to a workman a constant reminder of the danger line. At the highest it might give a man something to clutch. At all events I do think that there was a danger that should have been foreseen, and, that could have been met to this extent quite simply. I hold that the defendant Company was in breach of its duty in that respect.

10. I turn then to the laying of the outer sheet of plywood, which was laid from east to west. The sheet was 4 ft wide. That is 48 inches. To give an overlap it could only be placed so that its edge, inside the building, rested on the second acrow beam, and it could not go beyond the centre of that beam to allow for the next sheet being supported. The result, therefore, is that the exact point of balance of that sheet would be at the very centre of the last acrow beam. It would follow, in my view, that very little weight would be required to tip the sheet to its northern side, where its edge was unsupported. Had the sheet been laid the other way I cannot be satisfied that it would not have tipped. In my view, however, it is a logical conclusion that it would have been more difficult to cause it to tip. A man might have had greater warning of what was happening and I think, therefore, that placing the sheets in that way was dangerous and tended to increase whatever danger there was. I think also that if careful forethought had been exercised this would have been apparent and proper instructions would have been given to see that this did not happen. At first I felt that this may well have been the casual negligence of a workman. It is, I think, clear that where there is a proper system, the fact that an individual workman is guilty of such casual negligence does not mean that the employer can be said to have failed to supply a proper system. Mr Williams, however, said in evidence that it did not matter which way you laid the plywood sheets, and it is impossible, therefore, for me to hold that this was a deviation from proper instructions by a thoughtless man. It may well be that in addition anybody who carefully studied the possibilities of a situation which obviously was potentially dangerous, would have thought it proper to direct that the outer sheets should be wired down to the beams at the inner extremity. That also was not done. I think that on this point, the manner in which the outer sheet upon which O'Hara was standing was placed, I am bound to hold that there was a breach of duty and to convict. At the very least, if sheets were to be laid in this way then it was, in my view, essential that they be secured before men went on to them.

11. It will be apparent that I consider that a conviction should be entered on two grounds, one relating to the failure to provide a rope or its equivalent, and the other the manner in which the outer sheet of plywood was laid.

12. Finally I will repeat what I said earlier to Counsel. If you use sheets 8 ft X 4 ft you must either have no overlap at all, or a minimum overlap of 22 inches. It seems to me also, that one may fairly say, the greater the overlap, the greater the danger. I had no evidence upon which I could determine exactly what minimum overlap was necessary to carry the stop. It did seem to me that that minimum was probably much less than

22 inches. No compeint was made by the prosecution about this, and I have not held it against the defendant at all. I feel that I should suggest that, whatever else is done, that overlap could well be restricted to the minimum necessary. This would merely involve providing some sheets of plywood which would need to be 6 ft 2 inches long, plus whatever is determined to be the minimum overlap, so that these particular sheets could be used at the open face of the building where there is a sheer drop. It may be that there is some practical difficulty here which is not apparent to me as a layman, but I put the point forward for consideration by the experts.

13. I have been told that the defendant Company has on three previous occasions been convicted of offences relating to safety matters. I must obviously take this into account in fixing a penalty, and at first sight I wondered whether it was not my duty to inflict the maximum penalty on this occasion. Having regard, however, to the perhaps rather unusual nature of the circumstances arising in the present case, I will not go to that length but the penalty must nevertheless be substantial. The Company will be fined £60.0.0., Solicitors Fee 20 guineas, Court Costs £1.10.0. and Witnesses Expenses £2.0.0.

Sgd. R.D. JAMIESON

Stipendiary Magistrate

[illegible]

[illegible]

BETWEEN [illegible]
Informant

AND [illegible]
Defendant

Date of Hearing: 18,19,25 November & 3 December 1976
Date of Decision: 15 December 1976

Counsel:
Mr Lawson for Informant
Mr Heron for Defendant

RESERVED DECISION OF K. I. McDONALD, S.M.

The defendant company is charged that on or about the 2nd March 1976 at Wellington being an employer where construction work was being carried out namely in the construction of academic building at the Wellington Public Hospital failed to observe the rule that every employer shall take all reasonable precautions to ensure the safety of workmen employed in the work. The charge is laid under Section 11 (b) of the Construction Act 1959 and Section 24 of the same Act.

The facts giving rise to the prosecution are as follows: About mid morning on the 2nd March 1976 a cantilever scaffold platform in use by the defendant on the construction site at the Wellington Public Hospital collapsed and fell from floor 5, a distance of some 18 metres to the ground. Three men working upon the platform on a loading out operation died from injuries sustained in the fall. The platform comprised a cantilever working deck of some 10' by 10' (exterior portion) suspended

from the exterior working face of the building and held in place by a base or foot resting on the concrete floor of that level and held or pinned in place by four screw props. Screw props are a vertical pipe device screwed to an adjustment from the base beams of the platform to the concrete ceiling (or underside of the floor above). The props were positioned in two rows of two each on the left and right side of the platform. This particular platform had been designed by an engineer for the defendant and constructed under his supervision. It had been in use for some months on this particular site and had operated effectively on all previous occasions. The system of "loading out" by means of such a platform was a commonly accepted practice at the time and the mode of securing the base or the foot by means of screw prop fasteners was general in the industry. The mode of operation was designed and used as a time and labour saving device for the transfer of building materials and equipment from one floor to another. The materials and equipment for transfer were loaded out on the deck of the platform from where they were capable of being slung in a crane and transported via the exterior face of the building to another floor. At the time of the mishap this platform had been loaded with some 27 screw U forms (a type of metal shutter for concrete boxing) and associated beam type equipment to a total weight of 2,744 lbs. The three men working on the deck weighed a combined total of some 525 lbs. The safe working load capacity for the platform was set at 3,360 lbs, 1.5 tons. The safe working load capacity for the screw props in use was 4,200 lbs. It should be noted that the weight or load was carried by each rear screw prop on either side of the platform. The forward prop in each case was not load bearing but provided stability from lateral movement to prevent any shifting sideways of a screw type action. The concrete floor of level R had been swept clean in each area where the base or foot of the platform (R.S.J. Beams) were required to rest but a metal Dynabolt had not been removed. This bolt was in the line of placement of the right base stringer or beam and protruded at least some 5/8" above and from the concrete floor. At some stage this right base beam rested on this bolt which was consequently bent over to a height of some 3/8" above floor level. The presence and discovery of this bolt has played a significant part in these proceedings as will become apparent. The task of

clearing the platform base site had been assigned to one of the deceased (a labourer) by the sub-foreman. The placement, erection and fixing of the platform was left to the three men in the gang, all deceased. They comprised one leading hand construction worker and two labourers. This work was not supervised by any person in authority although the sub-foreman on the site did visually check the same before the platform was put in use. The platform contained a sign or notice reading "Maximum Load 1½ tons". There were no eye witnesses to the collapse of the platform and as a result conflicting views or theories have been advanced at the hearing by experts for the prosecution and defence respectively.

For the prosecution a reconstruction has been made and a hypothesis advanced which was termed at the hearing, the Blakely Theory. It is the opinion of Dr Blakely that when the platform was placed in position the right base beam rested not on the concrete floor as it should, but only on the floor at its rear and on the Dynabolt to the front of the base. This had the effect of lifting the forward portion of the base and permitted the bolt to act as a false fulcrum - the true or correct fulcrum should have been the exterior edge of the concrete floor. When weight was placed on the platform a lever type action was caused with the bolt as the lever fulcrum. This strained, dislodged and bent the right rear acrow prop whereby the platform slewed, broke away and fell forward out of the building. In respect of this theory the existence of the protruding Dynabolt was a dominant feature and it was in reliance on this theory that the prosecution framed its case and indeed presented the defence with further particulars of the present charge.

The expert called by the defence propounded a contrary opinion as to the cause of the collapse. The view so advanced was called the "Barker Theory". In the opinion of Mr Barker the platform collapsed because it was overloaded. The load of U forms and associated equipment was placed on the platform on the right hand side - the positioning of this load was such as to cause it to exert a greater weight capacity or force than its actual measured weight. The load so exerted was well in excess of the load bearing capacity of either of the rear acrow props. The positioning of the load caused the right rear prop to bear

most if not all of the force exerted - this was in excess of the safe loading capacity of the prop which accordingly buckled producing a chain type reaction similar to that in the Blakely Theory. In the opinion of Mr Barker the right base beam rested on the front exterior edge of the concrete floor as was intended, and the beam accordingly possessed its correct fulcrum. Whilst the bolt should not have been left protruding from the concrete floor, its presence had no significant effect on the stability of the platform although with the base beam resting on the front edge (its correct fulcrum) and the beam then sitting on the crushed bolt at 3/8" high the rear of the beam was elevated some 15/16" off the concrete floor. Such elevation was of no significance in the view of Mr Barker as the rear prop had been fully tightened to its maximum extent (even though this allowed the base at the rear to ride high off the floor) the rear screw props would still bear their weight load. Mr Barker further contended that the screw props had failed prematurely. That is to say even though the weight load exceeded the safe working load on the prop such prop should still have been capable of withstanding it. It was unable to do so and had therefore not attained the safety factor which is expected in such type of equipment. It was reasonable in his view to assume a safety factor of 2.6 to 3. (In this connection I should explain that a safety factor of 3 means that if a prop has a safe working load of 4,200 lbs it should in fact be capable of bearing three times that amount that is to say 12,600 lbs. The safe working load is the maximum load to which the prop should be subjected in the interests of safety. The safety factor is a form of built in protection to allow for various contingencies in construction work including possible overload, faulty construction, irregular placement of props and suchlike) The safety factor in the props used was in Mr Barker's view below that which was necessary.

Of the two conflicting theories for the collapse of the platform I prefer and accept that propounded by Mr Barker namely that it was due to overload. I accept that the weight of the load positioned as it was on the platform deck was in excess of the safe working load for the platform and right rear screw prop. As a result that prop, being extended beyond its safe load capacity, gave way. In my opinion this was the substantial real

and effective cause of the mishap namely overload on the platform. Whilst the theory advanced by Dr Blakely was a perfectly creditable and acceptable reconstruction on the facts as they appeared or were given to him, I prefer and accept the Barker Theory for the following reasons:

(a) The discovery of the Dynabolt heralded a significant cause to Dr Blakely in his search for clues as to the reasons for the collapse. I have no doubt that thereafter with the false fulcrum theory then firmly in mind other evidence discovered or information supplied was considered in the light of compatibility with the false fulcrum theory - which it was at that time! This approach was perfectly understandable but subsequent evidence has tended to disprove the theory.

(b) The Blakely theory is based on the assumption that of the fore and aft props those at the rear of the beam or base were tightened first. This was not in fact correct. The evidence established that the front props were first tightened and accordingly the lever theory was not practicable.

(c) Dr Blakely assumed the load on the platform was distributed on a centre line and within 2' either side thereof, namely that the load was as centrally situated as was possible. Inquest photographs subsequently made available by the police to the defence enabled Mr Barker to establish conclusively that the load was not so placed but rather off centre to the extreme right of deck. Finally Mr Barker had an advantage not enjoyed by any other witnesses in remaining in court throughout the protracted hearing and he was accordingly in a better position to draw conclusions from the evidence tendered and assist the court with his deductions than others not so fortunate.

Having now determined the facts and causes of the collapse I revert to the nature of the charge against the defendant. The charge is laid under Section 11 (b) and Section 22 of the Construction Act 1959. In summary it is alleged that the defendant company failed to take all reasonable precautions to ensure the safety of the workmen employed on the scaffold. I have had the advantage of perusing a decision of my brother Jamieson in a case of the Labour Department V Williams Construction Company CR: 3296/65 and I concur with the views expressed by my learned brother there. "That the statute does

no more than codify in statutory form what has been the common law rule for many years of an employer's obligation to protect his workmen. Failure to do so renders the employer liable to penal consequences for his default." The duty to take all reasonable precautions includes a responsibility to ensure all reasonable care is taken to devise and operate a safe system of work - further where the operation is attended by risk of danger that the workmen are kept fully informed and warned thereof. In certain circumstances warnings alone maybe insufficient. More maybe required in the nature of physical oversight and checking of the components of the operation by some person of special skills or ability. The standard of care to be taken for the protection of the workmen may vary from industry to industry and within such industry from trade to trade. The standard is that up to which the law requires the employer to measure and is set by the objective assessment of the precautions to be expected of the reasonable and prudent employer engaged in that particular sphere of activity. As was stated by my brother Jamieson in paragraph 6 of the decision to which I have referred.

"The duty is not merely to cope with known dangers as they become manifest. The employer has a duty to look ahead to consider the operation which is to be carried out, to look for apparent dangers and so far as is reasonably practicable to provide safeguards against them. In doing that the employer must consider not only the careful alert workman but must remember that a workman cannot always be alert and that his mind when concentrating on an immediate task may momentarily lose sight of a danger. The employer therefore must allow for possible lapses from full attention and alertness."

Care must of course be taken to protect the worker often times from the likely results of the worker's own activities or lack thereof. In particular to ensure instructions are adhered to - that the zealous or industrious worker does not create a factual situation of danger to himself or co-workers. That knowledge of matters technical - more common place with those skilled and trained in some science is not assumed to be possessed by others (workmen lacking in the availability of such knowledge merely by their presence on a site or experience with an opera-

In assessing such a duty of care to take all reasonable precautions the law does not set a standard of perfection nor will it condone laxity. The operative objective is the "reasonableness" of the care taken judged objectively in the manner I have referred to. In doing so it is essential to ensure a guard is kept against acting in hindsight. Merely because a tragic accident has occurred it is not necessary that some person or persons be blamed therefor. Nor is it appropriate that where as a result of such an accident a new technique is discovered or subsequent information reveals an alternative method such after acquired knowledge be assumed or considered as foreseeable prior to the occurrence. The standard to be set is that of reasonable foreseeability at the time of the occurrence. The employer is not required to under-write the complete safety of his workmen in all facets of an enterprise. He is not the guarantor of their safety. Certain risks are inherent in the mere exercise of living and they increase with the nature of life's calling or activity. One occupation of a high risk factor is construction work where certain risks must be accepted but the obligation remains on the employer to reduce the same by taking all reasonable precautions to eliminate unnecessary dangers - to guard in all respects against that which is or ought to be in reasonable contemplation as a possible source of danger to those employed. The Construction Act is directed towards ensuring so far as is reasonably practical, the safety and well-being of those employed in this industry. One final legal precept to be constantly borne in mind is that the onus rests throughout on the prosecution. In applying the legal standards, I have outlined to the facts as established there remains throughout the necessity for the prosecution to establish the charge of failure to take all reasonable precautions to my satisfaction - beyond reasonable doubt. In viewing the facts as I have found them established in the evidence and applying the criteria of reasonableness I find myself posed with the question - "Has it been shown that the defendant failed to take all precautions which ought reasonably to have been taken to guard the safety of the men working on the platform?" I find myself drawn irresistably to the conclusion that the answe to that question must be in the affirmative. In summary this

accident occurred because the platform scaffold collapsed. Such a collapse was due directly to overloading on the cantilevered deck thereof. (It may have been prevented if the screw props had been of greater weight bearing strength but this in my view is immaterial to the real issue for my determination.) The overloading on the platform came about due to the combined effect of the weight of the load and its particular displacement on the decking. Some of the precautions which on the evidence I consider should have been taken to ensure correct loading and placement on the deck included the simple expedient of a notice to workmen as to the number of the particular and itemised articles, which could be placed thereon with safety, as to the weight of each item to be loaded out and as to the method of such loading or placement to ensure proper central placement. It is to be noted that on other cantilevered platforms on this particular site such type of notice or precaution was adopted by the defendant. A further precaution called for in my view was the supervision of the loading operation by some responsible officer with a knowledge of the weight bearing capacity of the platform and the ability to assess or gauge accurately the force exerted by the equipment at all stages of the loading operation. Such an overseer would then have been in a position to accurately assess the loading situation - to direct the displacement of the equipment and ensure overloading was avoided. A further device which readily comes to mind would be some method of audible warning - electrical or mechanical - to be installed on the platform to draw attention when the maximum safe working load was being approached. On this particular scaffold apart from any verbal intimation to the men at an earlier date the only notice, warning or precaution taken against overloading was the notice 'Maximum load, 1½ tons'. In my view this was patently ineffective for the following reasons inter alia:- No means were provided to enable the workmen to calculate when such work load was reached. The workmen could not be expected to know the individual weights of the items to be loaded out and even had they known the same to carry out the necessary arithmetical calculations. The fact that the men may have been told or given a verbal instruction some time previously does not avail the defendant

or operate to discharge its duty. Memories may be short - men may be forgetful. The notice was deficient as to weight advice - whether the load included the body weight of any attendants or men working on the platform or otherwise. An example springs readily to mind of the form of notice which is installed in many lifts in buildings in the city identifying the number of persons who may travel in safety in that particular conveyance. One ponders why a similar type of precaution was not emulated on this particular platform scaffold. As weight displacement was also a known factor in the assessment of load force likewise notice ought to have drawn the attention of the workmen as to the correct method of loading which as I understand it is starting centrally or commencing centrally and working equally from either side of the platform. These comments while not exhaustive are sufficient to indicate the area in which the warnings were inadequate. I feel I need not traverse the subject further. Much was said in evidence as to the deficiency in the safety factors of the screw props used on the site. It would appear that at least three of the props used were of a safety factor value less than the manufacturer's rating but in my view such deficiency as there was did not cause this accident. The safety value factor may have acted to prevent or avoid the accident. It maybe suggested it was a contributing factor but it was not the real and effective cause of the mishap. In connection with these screw props it is appropriate I should mention the evidence indicates that such props are or were at the time accepted at face value in respect of safety factors and continued in use for some years without being subjected to fitness or weight bearing checks. A system of tests or checks at regular intervals to guard against "fatigue" or "strain hardening" would appear an appropriate precaution where screw props are likely to be used in the future. I do not base my finding on this charge on the failure to do so however having regard to that which I consider is the effective cause of the collapse, namely the overload on the platform. In respect of my decision I have had regard to the whole of the evidence adduced - that of the defence as well as the prosecution and on the totality of such evidence I have made my factual finding.

After applying the legal principles thereto I find the charge established to the necessary degree of proof required by the law. The defendant company is accordingly convicted.

THE COURT: (after submissions from Counsel as to penalty): I cannot but view this offence as serious. The Construction Act places a heavy onus on an employer to take all reasonable steps for ensuring the safety of his workmen. The men are obliged to earn their living under the system of operation provided for them by the employer. The Act is specifically aimed at the protection and safety of workmen. Here the workmen were engaged in a hazardous operation working on a platform on which they had no protection against nature in the event of a fall of the platform suspended as it was from the exterior of the building. In reaching the appropriate conclusion as to sentence I put from my mind the consequences of what did in fact occur. I have regard only to the degree of failure or fault established not to the consequences thereof. But the risk of injury or death is in fact one of the possible consequences of the failure or collapse of this type of platform. In construction work there is a degree of risk factor involved, such being the situation the very purpose of the Act is to endeavour to reduce or eliminate unnecessary dangers. In this case there was failure by the defendant to take precautions which it ought to have taken by way of the appropriate warnings or notice or by the appropriate supervision of the loading operation. This failure - having regard to the fact that on other platforms it took some similar type of precaution - is really inexcusable and I must accordingly view the offence in this light. I note that the maximum fine provided under the Act is substantial which is in keeping with the purposes of the legislation. In this particular instance the defendant company having been convicted is fined the sum of $1500 and is ordered to pay court costs $5.00 and a solicitor's fee (having regard to the fact that there were approximately three days involved at the hearing) of $350.

(K.L. Richardson)
Stipendiary Magistrate

IN THE MAGISTRATE'S COURT
HELD AT WELLINGTON

C.R. No 15501/73

BETWEEN SAFETY INSPECTOR
Informant

AND COMMERCIAL CONCRETE LIMITED
Defendant

Date of Hearing: 22 June 1973
Date of Decision: 26th July 1973

Counsel
Banks for Informant
O'Donnell for Defendant

RESERVED DECISION OF P. J. TRAPSKI SM

The defendant company is charged that "being an employer in relation to construction work.....did carry out....notifiable work without there being a duly appointed safety supervisor who holds a certificate of competency granted in respect of the class of work being carried out".

The charge is laid under Regulation 97(7) of the Construction Regulations 1961 as amended by the Construction Regulations 1961, Amendment Number 6 (SR 1971/187). This regulations states:

> "On and after the 1st day of April 1972, notifiable work shall not be carried out unless it is under the supervision of a safety supervisor who holds a certificate of competency granted in respect of the particular kind or class of construction work being carried out".

The defendant submits that it is an employer which exercises personal supervision of notifiable construction work through its Managing Director, Mr M. B. Antonievich, and as such is not

required to appoint a safety supervisor, let alone a certificated safety supervisor. As authority for this proposition Counsel for the defendant refers to Section 9(2) of the Construction Act 1959. This section states:

"Where an employer himself intends to carry out the functions of safety supervisor in respect of any work, the provisions of this Act relating to safety supervisors shall apply to the employer in all respects as if he had been appointed safety supervisor for the work under this section".

Mr O'Donnell says, in effect, that because that section refers only to "the provisions of this Act", and not to the provisions of any regulations made under the Act, there is no need for the safety supervisor to be certificated. Even if, as the defendant contends, the actions of Mr Antonievich can be imputed as the action of the Company, I do not think that this submission can be supported.

Section 9(1) of the Construction Act imposes liability on an employer, where it "is unable to exercise personal supervision of any notifiable construction work" to "appoint as his representative a suitable person (in this section referred to as a safety supervisor).....to carry out the duties and functions referred to" in that section.

Subsection (2) caters for the situation which Mr O'Donnell says applies here, namely "where an employer himself intends to carry out the functions of a safety supervisor"; it says that "the provisions of this Act relating to safety supervisors shall apply to the employer in all respects as if he had been appointed safety supervisor for the work".

Section 11 of the Act states:

"every employer shall exercise such supervision.....as will ensure that the provisions of this Act and of regulations thereunder are complied with or, if he is unable to exercise sufficient personal supervision for that purpose, shall ensure that the work is adequately supervised on his behalf".

This places an obligation on every employer to comply with the provisions of the Act, and the regulations, in the situation that Mr O'Donnell asserts applies, namely where the employer is

able to exercise personal supervision. It requires that the regulations (in this case regulation 96(7)) be complied with.

If however the defendant company is not able to exercise personal supervision then it must, pursuant to Section 11, ensure that the work is "adequately supervised" (in terms of Section 11) and that a "suitable person" (in terms of Section 9(1)) has been appointed safety supervisor. The question whether adequate supervision by a suitable person has been undertaken is in my view a question for the regulations to clarify. Section 30(1) of the Act empowers the making of regulations as "may.....be necessary or expedient for giving full effect to the provisions of this Act and the due administration thereof". Section 30(2) specifically empowers the making of regulations to prescribe "qualifications to be held under the Act". The regulations do just this in so far as the requirements of safety supervisors and add the sanction set out in Regulation 97(7).

The end result is that whether or not the Company is able to exercise personal supervision, I consider that a prima facie case has been made out.

Stipendiary Magistrate

(COPY)

IN THE MAGISTRATE'S COURT
HELD AT LOWER HUTT C.R. NO. 786/72

B E T W E E N : THE SAFETY INSPECTOR
~~LABOUR DEPARTMENT~~
Informant

AND : FRAEI & EDGAR LIMITED
a duly incorporated company having its registered office C/- Messrs McIntosh & Tanner
226 Jackson Street
PETONE.
Defendant

Hearing : 19 May 1972

Judgment : 30 May 1972

Counsel : Larsen for Informant
Keesing for Defendant

JUDGMENT OF F.F. HOBBS S.M.

This is a prosecution brought by the Labour Department, against the defendant company pursuant to the provisions of s. 22 of the Construction Act 1959 and Regulation 34A(1) of the Construction Regulations 1961, which Regulation provides as follows:

34A(1) "no employer shall cause or permit any workman to walk over or work on and no workman shall walk over or work on any brittle roofing material unless there is fixed directly under the roofing adequate sarking, adequate metal mesh or an approved safety net."

(2) "In this Regulation brittle roofing material means corrugated, flat or troughed asbestos, perspex, plastic material, glass pinex and any other material that cannot withstand the weight of a person without complete support."

On 30 September 1971 the defendant company was employed as a sub-contractor working on certain extensions to the Railway Workshops at Woburn. One of the defendant company's employees was a welder by the name of Epping who will hereinafter be referred to as the deceased. The work in progress at the time consisted of the erection of steel frame-work for the side walls and roof of an open ended

Structure over one of the railway lines at the Railway Workshops. This work was a larger version of a similar type of structure immediately abutting the extension being erected. The extensions under construction were the same width as the existing structure but the steel framing for the roof of the extensions was some 6 ft 3 ins higher than the existing structure. The roof of the existing structure was covered in corrugated aluminium sheeting except for one small area 8 ft x 3 ft 3 ins. which was covered by a translucent corrugated material described to me as Nova-roof. It was conceded for the purpose of this prosecution firstly, that the material Nova-roof is a brittle roofing material within the meaning given to those words in Regulation 34A(2) and secondly, that there was not affixed directly under the Nova-roof adequate sarking, metal mesh or an approved safety net. The distance from the edge of the roof of the existing structure abutting the extensions to the near edge of the Nova-roof skylight was a distance of approximately 7 ft 6 ins. The evidence discloses that at about 4 p.m. on 30 September the deceased was on the roof of the existing building presumably working on the frame-work of the extensions where such extensions abutted on to the roof on which he was standing. A witness, Mr Buckley, a carpenter working on the job, said that he suddenly heard a crash and the sound of the deceased's body hitting the ground. It is not disputed that somehow or other the deceased fell through the Nova-roof skylight on the roof of the existing structure to the ground as a result of which he suffered injuries from which he subsequently died. There were a number of helpful photographs produced to the Court showing the nature, size and extent of the work in progress and the relevant portions of the roof. In the course of the evidence there was some reference made to the position of ladders that were leaning on the roof of the existing structure to allow workmen to reach this roof from the ground and there was some suggestion in the evidence that the deceased may have been in the process of moving a ladder from one side of the roof to the other at the time the accident happened. In my view the evidence does not clearly establish that this is what the deceased was doing. Evidence for the prosecution was given by a Mr Sziranyi who was the main contractor on the job and he said that at the time of the accident he was not on the site but he admitted that during the course of the work some of his workman and others had been using the existing roof as a working platform to reach the work being carried out on the new structure. Mr Sziranyi said that he didn't think it was necessary to take any precautions with regard to the Nova-roof

skylight because it was sufficiently far away from the edge of the roof where men had been working and in any event it was no part of the work in progress. He said that as the main contractor he was responsible for all scaffolding and safety railing on the job. Evidence for the defendant company was given by Mr Edgar, a Director, who said that he at no stage gave the deceased permission to walk on the Nova-roof skylight. He said that when he last saw the deceased on the day in question he was working on a double ladder placed against the ridge of the roof nearest the extensions. Mr Edgar said that there would have been no need for the deceased to walk backwards over the existing roof towards the Nova-roof skylight. He conceded that he had allowed the deceased to use the roof as a working platform to perform any tasks connected with the extensions. He said that as far as the deceased was concerned he would have been able to do all the work that was necessary to the extensions from the edge of the roof of the existing structure. Mr Larsen for the department concedes that there is no evidence to show that the defendant company expressly instructed the deceased to be on the Nova-roof skylight but he submits that the defendant company had tacitly allowed the deceased to be there without thought for the possible consequences. He concedes that the defendant company did not "cause" the deceased to be there but says it did "Permit" him to be there. In support of this submission, Mr Larsen relied on the decision in R v Souter (1971) 2 All E.R. 1151. In that case Edmond Davies, L.J. in delivering the judgment of the Court of Appeal adopted as the test of "permitting" the test described by Lord Parker C.J. in Grays Haulage Co. Ltd v Arnold (1966) 1 All E.R. 896 where the learned Chief Justice said at p. 898 :

> "Knowledge is not imputed by mere negligence but by something more than negligence, something which one can describe as reckless, sending out a car not caring what happens."

He concluded by adopting as the test of "permitting",

> "actual knowledge or knowledge of circumstances which fixed them, as it were with a suspicion or knowledge of circumstances so that it could be said that they had shut their eyes to the obvious or had allowed something to go on not caring whether an offence was committed or not."

Applying that test to the circumstances of the present case, I must conclude on Mr Edgar's own evidence that he permitted the deceased to be on the roof of the existing structure using it as a working platform, but the Nova-roof skylight in the roof formed

only a very small proportion of its total surface area, taking up only some 26 sq. ft on one side only of the roof. It is plain from the wording of Regulation 34A that the restriction placed on employers and workmen applies in this case only to that part of the roof which was covered with brittle roofing material and cannot apply to the whole area of the roof. It is abundantly plain that it was not necessary for the deceased to "work on" the Nova-roof skylight so that the prosecution can only succeed if it can prove that the defendant company permitted the deceased to "walk over" the Nova-roof skylight. There was, as I have said, some evidence tending to suggest that the deceased may have been pulling a ladder up on to the roof immediately before the accident, but other than that there is nothing to show how the accident happened. If the deceased had been pulling a ladder up on to the roof that does not assist the prosecution because the deceased could quite easily have tripped while so doing and fallen through the skylight without ever actually placing his feet upon it. I am quite satisfied on the evidence before me that the department has failed to prove that the deceased was "walking over" or"working on" the Nova-roof skylight so that as a matter offact the prosecution must fail. Even if that were not the case, I am satisfied that if the test described by Lord Paker C.J. is applied to the facts of the present case it could not be said that the defendant company had permitted the deceased to walk over or walk on the Nova-roof skylight, rather am I satisfied that the accident which happened was totally unexpected and inexplicable. It could certainly not be said that this accident would obviously happen, nor do I think that the defendant company closed its eyes to either the possibility of an accident, or the provisions of Regulation 34A. The information is accordingly dismissed.

Signed M.F. Hobbs
(M.F. HOBBS)
Stipendiary Magistrate

IN THE MAGISTRATE'S COURT
AT WANGANUI

BETWEEN NEVILLE CHARLES BOWER

(Informant)

AND MADDER & BOURNE LTD

(Defendant)

AND

BETWEEN MADDER & BOURNE LTD

(Informant)

AND ALLAN LUKE SCHRODER

(Defendant)

Date of hearing: 23.9.70
Date of decision: 6.10.70

Counsel:

Mr Latham for 1st Informant
Mr Brown for Madder & Bourne Ltd.
Mr Tizard for A.L. Schroder

DECISION OF J.C.K. FABIAN, S.M.

The defendant is charged as an employer engaged on construction work on the Western Building Society's new building, St Hill Street, Wanganui, did fail to comply with a regulation required to be observed, in that he did fail to provide a guard rail for the stairwell and perimeters of a working place so as to prevent the danger of a fall of persons or material. This information is laid under Regulation 31(2) of the Construction Regulations 1961 (1968/67 Reprint) and Sections 22 and 24 of the Construction Act 1959. The prosecution arose out of a fatal accident on the site of the construction work.

The defendant company is the head contractor to the building owners. The Post and Telegraph Department contracted directly with the building owners to instal the telephone services and appliances.

The facts relating to this prosecution are not seriously in dispute. The evidence of a post office employee, a Mr Eru, discloses that he and fellow workmen from time to time came onto the site in the course of their employment. On the first visit a Mr Schroder, the foreman of the telephone gang, informed Mr England, the works supervisor of the defendant, that he and his men would be coming onto the job from time to time to instal cables and telephone services.

On the 11th day of May 1970 near enough to 1 p.m. Mr Schroder, with Messrs Eru and K. Hughes as linesmen, arrived on the site with the intention of proceeding to the third floor to instal cable in the vicinity of the ceiling rafters. Previously these men had ascended to second and third floors by using the back stairway. On this day a notice was placed on or near this stairway advising that it was not to be used or words to that effect. In any event these men found their way to the third (top) floor by means of the front

-et of stairs. There was no warning notice attached to or near this stairway. On arrival at the third floor Messrs Schroder and Eru moved to the far side of this floor and Mr Hughes commenced work by use of a ladder near the opening to the stairwell. Within a few minutes he was joined by Mr Eru, who had come to borrow a tool. At Mr Eru's suggestion Mr Hughes descended to the floor and during a second shift of the ladder, fell down the stairwell to the landing below, suffering injuries from which he subsequently died.

At the time of this accident the front stairway was being used by employees of "Cunic" division of Pepper & Fremont Ltd. Their job was the fixing of fire resisting material within the confines of the front stairs.

Mr England deposed that only two or three days prior to the accident the boxing had been removed from the opening on the third floor for the front set of stairs. He agreed with the prosecuting Safety Inspector and other witnesses that on 11 May 1970 no guard rail had been erected for the stairwell and perimeter at third floor level and stated as his reason for this that the employees of "Cunic" required that the opening be left uncovered to enable them to drop plumb lines from the rafters down into the stairwell in order to obtain levels. This requirement would be necessary for one week. He further deposed that after their first visit the department's men came and went without advising him though it is clear that he saw them from time to time on the site and on occasions worked in with them to their advantage. He further stated that he had advised his own employees not to work on the third floor during the "Cunic" operations. Be that as it may, the facts show that the "Cunic" workmen had access to the third floor in addition to the Post Office employees.

On the other hand Mr Bower, the Safety Inspector, explained that a guard rail could and should have been erected around the perimeter of this opening leading to the front stairs and by using normal methods of erection would not interfere with the requirements of the "Cunic" employees.

Mr Brown submits that the prosecution must fail on two grounds:

(1) That on a strict interpretation of Regulation (31) and Section 22 of the Act there is no liability on the defendant to comply therewith when the relationship of employer and employee does not exist. It is true that the Post & Telegraph Department is an independant contractor but as I see it Mr Brown's difficulty is to exclude the linesmen from the provisions of Section (3) subsection (2) of the Act which reads: "Any provision of this Act or of act regulations under this Act relating to the safety of workmen employed in construction work shall apply also to the safety of persons lawfully in the vicinity of the work, whether or not they are employed on the work."

In my opinion this extends the responsibility of the defendant to see that the safety regulations are enforced in order to protect all

rkmen and other persons lawfully on the site. If this be the legal position, then, Mr Brown contends, there was no responsibility on his client to comply in favour of the Department's employees as they were not lawfully on the premises. There is little merit in this submission as it is clear that such workmen were entitled, and with the knowledge and consent of the defendant, to come onto the site.

It is true, as Mr England stated, that on 11 May 1970 he had no direct knowledge of the telephone men working on this construction job but I hold he is a building supervisor of some experience who would or should know the methods of work adopted by the Post Office along with other trades that disappear but to return to the job when they consider the time is ripe. Further, as this particular construction was notifiable under the Act Mr England was the main, if not the only, Safety Supervisor.

Finally, Mr Brown submits that the wrong person has been prosecuted. He contends that as the foreman of an independant contractor it was primarily the duty of Mr Schroder to ensure that the safety requirements were enforced for the protection of himself and fellow workers and in support cited several passages from the judgment of Henry J. in Barlow v Fletcher Construction Co. Ltd (1963) N.Z.L.R. 952, and in particular lines 16 to 42, page 953. Certainly within this extract the learned Judge says "The Regulation does not place an obligation on any specific person. Unless s.22 of the Construction Act 1959 imposes certain obligations on someone to comply with Regulation 31 (2) then the Regulation is left without teeth", and again on Page 954 the judgment proceeds "Accordingly by reason of the above, an obligation to observe the Regulations lies on an 'Employer' who is defined as the person who is liable for the payment of wages of workmen employed on the work." His Honour went on to say (954, line 26 et sequa) "An employer cannot, vis-à-vis his own workmen, claim that the safety precaution was or ought to be the primary duty of someone else. The workman is entitled to look to his immediate employer and that is what the statute and Regulation provide." Though a civil claim for compensation factually it is on all fours with this prosecution, but in the event the dependants of the deceased workman successfully claimed against the head contractor.

Though not cited by Counsel, Mulready v J.H. & W. Bell Ltd and others (1953) 2 Q.B. 117 decided under similar English legislation refers to the other side of the same coin. In this case the sub-contractor had failed to comply with certain safety regulations but the head contractor, even though he had no factual knowledge of the breach of the statutory duty, remained liable for damages to the injured workman. This appeal decision was delivered by Lord Goddard C.J. in which he said (page 125) "Mr Nelson relied much on the breach of the regulations being a criminal offence, and said that the result of holding Bell & Co. (head contractor) liable in this case would be that they could be prosecuted and fined, when the fault, of which they

ght have no knowledge, was that of Kealing (sub contractor); and that while a contractor can extract an indemnity from his sub contractor for the damages in which he may be cast in a civil action, he could get no indemnity for the fine which might be imposed. Be that so; that only means that he must take care that the necessary precautions are taken by the sub contractor if he does not take them himself. Both he and the sub contractor may be liable both civilly and criminally."

For a consideration of a criminal prosecution as laid it is necessary, I think, to part company from the above authorities decided on civil claims because such a prosecution is purely incidental to the accident. I believe that the distinction was in the mind and referred to by Smith J. in Jackson v De Haviland Aircraft Company of New Zealand Limited (1944) N.Z.L.R. 484. Here the legislation under consideration was s.16 of the Inspection of Machinery Act 1928, the relevant portion of which is as follows:

"(1) The moving parts of all machinery shall be so guarded as to afford adequate protection to all persons working the machinery or in connection therewith, or who may be in the vicinity thereof."

In his judgment His Honour says at Page 493, line 28 et sequa: "The result of this consideration is that s.16 imposes upon an owner of machinery the duty of maintaining a standard of safety for the benefit of three separate classes of persons, and that the third class may include members of the public. Clearly, a breach of this duty may be visited by a penalty. Clearly, too, so I think, a person who belongs to the third of these separate classes, even though a member of the public, who is injured by reason of a breach of the statutory duty, should have a civil right of action for damages like the members of the other two classes. In my opinion, the Section may be construed so as to provide both for the adequate enforcement of the criminal remedy and for the sound enforcement of civil liability in favour of all three classes". The learned Judge goes on at line 43: "If a trespasser is injured, the owner is not thereby freed from criminal liability, because the question under the section is not whether any person has been injured and, if so, whether he was a trespasser or not, but whether the machinery is so guarded as to afford adequate protection for any person who had the right to be working at, or in connection with, the machinery, or who had a right to be in its vicinity." Applying this dicta, which was re-affirmed by the learned Judge at page 495, to this instant case, and allowing for the limitation imposed by s.5, s.s.(2), namely "Persons lawfully in the vicinity of the work" the head contractor's sphere of responsibility in my opinion, extended to include those who came onto the site to work under a direct contract with the owner. The contractor could be some trade specialist who employs no labour, yet becomes a workman by virtue of the definition of this expression appearing in Regulation 3 as follows: " ' Workman' means any person engaged in any capacity in construction work; and includes an

apprentice and an employer when engaged in the performance of any work." This definition was added to Regulation (3) by Regulation 2 of S.R. 1965/117.

From the foregoing and having regard to the facts presently for consideration I hold that the charge against the defendant has been proved in accordance with the standard of proof required in criminal prosecutions but before recording a decision in this prosecution, it is necessary to consider the information laid by Madder & Bourne Ltd against Allan Luke Schroder charging him with the same offence. The information is laid under s.25 of the Act.

Here it is necessary to find:

(a) That the offence was committed in fact by the said other person, without the knowledge, consent or connivance of the employer; and

(b) That the employer had done all that could reasonably be expected of him to prevent the offence.

Before considering these two ingredients I think it necessary to consider first what offence this defendant has committed, if any.

At the time of the accident Mr Schroder was a workman. At the same time he had the dual role of a foreman (or fictiously an employer). The first question for consideration is "Did this defendant commit an offence by failing to erect guard rails around the perimeter of the opening at third floor level to the stairwell in the circumstances then pertaining or was the real offence that of allowing one of his workmen to work in the area in such circumstances?"

It may at first sight appear that S.25 was enacted to provide relief to head contractors where a sub contractor failed to comply with the Safety Regulations but I am persuaded to another interpretation from a consideration of ingredients (a) and (b) above referred to, namely, that the section is in the form of an indemnity to an employer who has properly delegated the job of work necessary to ensure due compliance and the person so instructed, be he sub contractor, foreman, or workman, after acceptance and acknowledgement of such instructions, fails to carry out the same or does so in a negligent manner.

In reliance on his chosen representative the contractor concerned believes the work necessary to comply has been done and possibly received an assurance to this effect.

To hold that Mr Schroder should have erected guard rails of the nature as required by paragraph "C" of s.(11), extends his responsibility beyond that which is reasonable. Part V of the Regulations deals with general safety provision. Taking regulations 31 and 32 as examples the contents therefore point to obligations of the person or firm in charge of the whole construction work. It seems to me, therefore, that Mr Schroder was not guilty of the same offence.

Even if I had not so held I am unable to say that Madder & Bourne Ltd had done all that could reasonably be expected of it to prevent the offence. This is not to say that Mr Schroder has not committed a breach of the Act, as a study of s.11 may well disclose, but that

o course is a matter for the Safety Inspector and his advisors.

I have referred to Mr Schroder as the representative of the Post and Telegraph Department. His Counsel, Mr Tizard, does not admit that his client is other than a gang foreman employed by the department. So that as it may, by virtue of the definition of 'workman' to which I have referred, though not cited by Counsel, I consider that at all material times the foreman was a worker though this position would not, in my opinion, exonerate him if he offended under any relevant requirement of the Act.

The result is that the defendant Madder & Bourne Ltd is convicted of the charge preferred. I will hear Counsel on matters of penalty and costs.

IN THE MAGISTRATE'S COURT
HELD AT CHRISTCHURCH

C.R. No's 8234/73
8235/73
8236/73

BETWEEN DEPARTMENT OF LABOUR

Informant

AND MERVYN JOHN CARROLL

Defendant

Delivered 21 JUL 1973

RESERVED DECISION

These are three informations charging that Defendant (trading as Ace Electrical Engineers and Contractors) on the 6th day of March 1973 at Christchurch being an employer in relation to construction work being carried out at Reese Brothers Plastic Limited, Brougham Street, Christchurch.

1. Did use prefabricated frames in multi-lift scaffolding when the connection between frames superimposed vertically was such that the legs of such frames were not held in linear alignment without appreciable axial deviation.
2. Did fail to securely fit a working platform more than 10 fet in height with a guard rail or alternative protection where there is a danger of workmen falling from the platform.
3. Did deck a light duty working platform with standard 1½ inch planks which planks had a span in excess of four feet six inches.

These Informations are all laid under the Construction Regulations 1961 (Reprint 1968/67)

The first is laid under Regulation 58(d) which refers to prefabricated frames and members and reads:- ith respect to frames and members of scaffolding prefabricated for erection on the site of the scaffolding as multi-lift scaffolding the following provisions shall apply:

(d) Where frames are superimposed vertically the design of the connection shall be such as to ensure that the legs are held in linear alignment without appreciable axial deviation.

The second Information is laid under Regulation 44(1) which reads: Every working platform more than 10 ft in height shall be securely fitted with a guardrail or alternative protection where there is a danger of workmen falling from the platform.

The third Information is laid under Regulation 41(1)(a) relating to general provisions as to scaffolding.

It reads (1) Subject to the provisions of these regulations, the following provisions shall apply with respect to scaffolding:
(a) The maximum spans of timber planks used for decking working platforms shall be the maximum spans referred to in Table A of Part II of the First Schedule hereto.

Under Table A of Part II to the Second Schedule the maximum span for a light duty working platform is 4ft 6in.

The scaffolding the subject of these proceedings consisted of a bottom portion made of two prefabricated frames. They were fitted with cross beams to keep them rigid. Rollers were fixed to the bottom of the frames so that the scaffolding was moveable.

Provision was made for a second prefabricated frame to be placed on top of the bottom section so as to form what is termed multi-lift scaffolding.

Sleeves were welded on to the lower frames extending above the height of the frames.

Tubes on the two upper frames were slipped into these lower sleeves as a means of connection. The receiving sleeve had a diamter of 2 inches whereas the frame of the top section which slipped into it was 1½ inches, giving a slackness between the two sleeves of ¼ inch. Reference will be made to this later.

When the two top frames were put in position, cross bracing was fixed to them to keep them rigid. A plank was placed across the two top frames and a guard rail was provided for the upper section.

The facts are that Defendant Carroll is an electrical contractor trading under the name of Ace Electrical Engineers.

He had the wiring contract for a new building being erected for Reese Bros Plastics Ltd. He had worked on this job himself with two employees Tremberth and Gibb. The latter was an old friend of Defendant. He was an elderly man who had retired from

an electrical business in which he had an interest but had decided to engage in light work. He had been employed by Defendant a few months.

Tremberth had been employed by Defendant for about 22 years. He was a senior employee and Gibb was required to follow his directions.

The scaffolding which I have described had been borrowed from the builder by Defendant for use when wiring the new building. This work had been finished. The scaffolding had been dismantled. Part of it was in the yard and other parts were in different places in the factory. Defendant had finished with it but the reason it was left about the job was that Defendant was negotiating with the builder to buy it.

On the day preceding an accident to which I shall shortly refer, Gibb was working on the premises of Reese Bros. Plastic Ltd putting plugs on injection moulders. This was a floor level job.

Tremberth went down to see him. While he was there he was asked by the Manager to do a wiring job in a tool room. This work had nothing to do with the contract job, which was finished, and the tool room was in a different part of the premises. This wiring was just an extra job which arose incidentally while Defendant's employees were about the premises.

Tremberth showed Gibb generally what was to be done and told him to work with the engineer with what he wanted and where he wanted it. The job was a simple one which could have been done by an apprentice.

Part of it entailed attaching seven points to a main cable laid along the top rafter purlin of the apex of the roof. This required Gibb to work about 14 feet above floor level.

Tremberth told him when he came to do the plugs to ring and he or Carroll would bring a ladder down. A ladder could be moved round easier because of the trusses in the roof. No suggestion was made by Gibb of using the scaffold, which was not suitable for this work in any case.

On the following day Gibb went alone to do this work in the tool room. He had apparently made his own decision to use the

Scaffolding because the previous day he got an employee of Reese Bros. to help him find the parts.

He did not erect the scaffolding as it was designed to be used. He put only one frame on to the lower section of the scaffold and left the other end hanging down from the other end. On to the top of this unbraced frame he placed a plank, using a steel girder, part of the building itself as the other spigot. The plank was not fixed from sliding along on the pre-fabricated frame or the cross member of the building. The scaffolding used in this way was obviously unstable and so dangerous.

The same employee who had helped him find the parts of the scaffolding also helped him move it along in the room where he was working. He left him putting the plank on the scaffolding. The plank he used incidentally was not the builder's plank which had previously been used on the scaffolding.

The employee returned a short time afterwards and found Gibb lying on the floor, just below the scaffolding. He had obviously fallen from the plank on to the floor. As the result of this accident he was killed.

Neither Defendant nor Tremberth could possibly be expected to anticipate/would take it upon himself to use the scaffolding, much less use it partly erectdd, and for that reason unstable.

The scaffolding as used by Gibb did not comply with the Regulations.

The frame on top and joining into the connection was able to move in terms of the regulation so as to create axial deviation. It was a sloppy fit between the top frame and the frame that received it. The overall movement in the top frame was 8 inches horizontal. Where frames are superimposed vertically approximately one inch movement at the top of the frame itself would be normal. An eight inch movement was appreciable.

The fall risk of the workman was 10 feet 3 inchds which exceeded the regulation height of 10 feet and there was in fact no guard rail.

The Inspector treated the working platform as a light duty working platform, taking into account the work being done.

Therefore it followed that the plank which had been used could

have a maximum span of up to 4 feet 6 inches. The plank on the top platform had a span of at least 5 feet 3 inches from the purlin on which it was resting to the frame. It was sloppy and able to move. The plan shows the measurement as 5 feet 4 inches from the 1½ inch girder purlin. It follows since the frame was able to move up to 8 inches at that height the span could extend up to 5 feet 11 inches, depending on the position of the frame. In the way the scaffolding was used in this instance the span was entirely under the control of the person who so positioned the scaffold.

Mr Atkinson for Defendant submits that if there were breaches of the Regulations-and I am satisfied these were breaches of the three regulations as alleged - nevertheless these breaches do not amount to offences.

The Construction Act 1959 under the heading of "General Rules" provides in S.11: The following general rules shall be observed where any construction work is being carried out:

(a) Every employer shall exercise such supervision of the work as will ensure that the provisions of this Act and of regulations thereunder are complied with or, if he is unable to exercise sufficient personal supervision for that purpose, shall ensure that the work is adequately supervised on his behalf.

Mr Pankhurst states it is in relation to this that Defendant is charged and that this general direction is converted into criminal liability by imposing on an employer vicarious liability by S.22 which reads:

> In every case where under this Act any requirement, obligation, rule or provision is imposed or enacted or required to be observed with respect to or in connection with any construction work the employer shall cause the requirement, obligation, rule or provision to be duly and faithfully complied with or observed, and if the requirement, obligation, rule or provision is not duly and faithfully complied with or observed the employer commits an offence against this Act.

Mr Pankhurst concedes that S.104 which is the offence section

in the Construction Regulations 1961 does not refer to any of the three Regulations the subject of these prosecutions.

But he calls in aid S.4 of the Acts Interpretation Act 1924 in which it is provided that "Act" includes any Regulations made under any Act.

He submits that for the purposes of these proceedings therefore S. 22 should be construed to read "Regulation" for "Act" where the word Act first appears in this section.

If this construction is adopted then S.24 under the heading of "General Penalty" must come into operation. It reads:-

Every person who commits an offence against this Act (or any regulations for the time being in force under this Act) for which no penalty is provided elsewhere than in this section is liable to a fine not exceeding $1,000 .....

The words in brackets were added by an amending Act of 1968. Mr Pankhurst submits that this indicates the legislature was fully aware of the obligations enacted in the Regulations and supports his construction.

Therefore S.24 of the Act provides a penalty for breaches of the three regulations which have been proved.

I have only a brief note of the submissions of Mr Atkinson in reply so I shall not refer to them in stating the view I have taken of this matter.

In my view S.22 refers to obligations under "this Act" and to extend liability to requirements to be observed under the Construction Regulations seems to be placing an artificial construction on the words of S.22 of the Construction Act.

It will be noticed that under S.24 an offence can be committed against this Act or any regulations made under the Act.

It is significant that no mention is made at all of Regulations in S.22.

Reference has been made to these three sections in the Regulations.

S.34 - Every employer who knowingly causes or allows to be used defective plant and gear commits an offence against these regulations. S.96 - Every employer who knowingly causes or allows to be used any powder-powered tool in an unsafe manner or

one which is defective to such an extent as to be a likely source of danger to any person commits an offence against these regulations.

No penalty is provided in S.34, 96 and 104 of the Regulations so it seems to me that these must be the Regulations referred to in S.24 of the Act, for which an employer commits an offence.

It will be noticed that these three Regulations all bear words importing mens rea as distinct from the words used in the remaining Regulations.

I refer to the citation of Gresson J. in Fraser v Beckett and Sterling Limited and Another (1963) N.Z.L.R. 480, 486.

"I bear in mind also the decision of our Court of Appeal in R v Ewart (1906) 25 N.Z.L.R. 709 in which Edwards J. quoted what Wills J. had said in R. v Folson (1889) 23 Q.B.D. 168,172 when he was discussing whether an enactment was to construed as imposing a penalty when the act was done, no matter how innocently, upon the basis that a man should take care that the statutory direction was obeyed and thatif he failed to do so at his peril. He said - "Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes that there must be a guilty mind, must, I think, depend on the subject -matter of the enactment and the variou circumstances that may make the one construction or the other reasonable or unreasonable."

It is important to bear in mind that these Regulations apply also to civil claims which point to a distinction between a breach of the regulations which is not an offence and a breach of the regulations involving mens rea, which is an offence.

Reference is made also to the provisions of S.25 of the Act, which provides that the employer may have the actual offender charged.

The employer has a statutory defence if the Magistrate finds that the offence was committed without the knowledge, consent or connivance of the employer and that the employer had done all that could reasonably be expected of him to prevent the offence.

S.25 does not apply in this case, of course, because the offence were committed by Gibb, who is dead.

But if Gibb had survived the fall Defendant would have had the right to have had him charged and would have been held not guilty of the offences. The facts I would repeat are tht the scaffold was used without the knowledge consent or connivance of Defendant or his employee. Furthermore, by Defendant's employee in control of Gibb telling him a ladder would be available when required and having no reason to suspect Gibb would collect up the parts of the scaffolding and use them instead, Defendant had surely done all that could reasonably be expected of him to prevent the offence.

This being the case, the legislature could not have intended that Defendant should be responsible if he was not guilty of any neglect, much less so when the Act provides for a fine not exceeding $1,000 for every person who commits an offence against the Act. To place any other construction on the Act and regulations would be unreasonable. For these reasons, therefore, I have come to the conclusion that no offences have been committed by the Defendant and these three informations will be dismissed.

J.D. Kinder
Stipendiary Magistrate

IN THE MAGISTRATE'S COURT
HELD AT WELLINGTON

C.R. Nos. 61920-2/78

BETWEEN: DEPARTMENT OF LABOUR

Informant

AND: PLASTERCRAFT SERVICES LTD

Defendant

Date of Hearing: 7 September 1978
Date of Decision: 7 September 1978

Counsel:
Mr Ryan for Informant
Mr Marshall for Defendant

ORAL DECISION OF N.C. JAINE, S.M.

In this matter the defendant company has pleaded not guilty to two charges under the Construction Act 1959 and the Construction Regulations 1961, the first charge being laid under Section 11(b) of the Act and the second under Regulation 32(1) of the Regulations.

The facts of the matter are these. On 23 February 1978 the defendant company was engaged as a subcontractor in work on the National Provident Building being erected on the corner of Bowen Street and The Terrace in Wellington. The head contractor responsible for the construction of that building was a company described to the Court as Mainzeal and that head contractor employed the defendant company as a subcontractor to affix plaster board walls to wooden frame

work used in the construction of the building. On the day in question a Mr Warren Watts and a Mr Jim Brown were employed by the defendant company in this activity on the first floor and the mezzanine floor of this building. To enable them to affix walls in the stairway in that area they erected a plank by placing a ladder on what the Court was told was the first floor of the building and running a plank from that ladder across to a beam forming part of the wall of the stairwell. Immediately below that plank there was a decking on what is described as the half stair landing. After Mr Brown had placed the plank in position he was seen by Mr Watts to start to climb down towards the half stair landing by way of the dwangs in the building framework. Mr Watts engaged himself in cutting or measuring a board and heard a crash, he looked up and saw that Mr Brown had disappeared. Mr Watts ran down the stairs to find that the material on the half stair landing had disintegrated. Mr Brown had fallen through it and fallen some eleven or twelve metres to the floor below and was injured. The material placed on the half stair landing appeared to have been constructed of particle board less than half an inch in thickness and I had evidence that in the corresponding half stair landings higher up the building the decking was constructed of plywood some three-quarters of an inch in thickness which was described as much stronger than the particle board through which Mr Brown fell.

I turn on those facts to deal first with the charge under Section 11(b) of the Construction Act, and the first question is whether or not Plastercraft Services Ltd is an employer in relation to the construction work. Quite clearly the defendant is an employer within that Act and so far as this accident is concerned if one applies the decision of Mr Justice Henry in Barlow V Fletcher Construction Company Limited [1963] NZLR 952, and in fact it was not contested at this hearing that the defendant was in fact an employer within the Act.

I then turn to the issue as to the extent of the defendant's liability as an employer. It was common ground in this matter that the responsibility for the construction of the stairwell and the half stair landings was the responsibility of the head contractor described as Mainzeal. Does the defendant as an employer have any obligation? The answer to that lies in the same case that I have been referred to in this passage starting at line 38 of p.954:

> "In the case of an employer who is also a sub-contractor, his obligation is, in my view, confined to the area of his constructional work and is owed to his workmen who are required to work within that area. It may well be that a particular obligation may, in given circumstances, fall on more than one employer. That is no ground for choosing any particular employer as the person bound to the exclusion of all other employers engaged in construction work in the area to which the obligation applies. If what has been called "the primary obligation" falls on some other employer of workmen on the work (such as, in particular, the head contractor in occupation generally of the building site) then there is machinery which can ensure that the obligation is enforced against him. This present case is a clear example. If the safety of the workman of a sub-contractor is at stake in spatial relationship to that part of the work in which the head contractor alone can interfere with the structure or carry out the requisite steps, then the sub-contractor ought to provide for that in his sub-contract or first see that the head contractor has complied with his obligation. The obligation is not placed upon the particular employer necessarily to take the prescribed precautions - it is to cause the requirement to be duly and faithfully complied with. A workman is entitled to the protection of the safety device and the employer must ensure that it is there. Otherwise he is in breach in requiring his workman to do constructional work in the area which ought to be protected. The actual obligation of performing the act necessary for compliance and bearing the expense thereof is no concern of and is irrelevant to the requirement of protection vested in the workman. I do not need to go into the ramifications of the infinite variety of situations which may arise under building contracts; all I need say is that the

matters raised by counsel are not only not insuperable, but they are irrelevant to the question of construction.

Every employer is liable to his workman to see that the provisions for safety are observed to the extent to which they are applicable (a) to the area where his workman is required to work, and (b) to the nature of the work which the workman is called upon to do. That is a duty which arises under the legislation from the relationship of employer and workman, and from the nature of the work undertaken. There is, in my view, no ground upon which the clear relationship of employer and workman expressed in the Act can be whittled down to exclude an employer merely because he is a sub-contractor. An employer is presumed to know the law, and he should, if necessary, protect himself from any undue burden which he considers the law may have imposed upon him if that burden should properly,, as a matter of contract or as a matter of primary obligation or otherwise, be placed on the head contractor. An employer cannot, vis-a-vis his own workman, claim that the safety precaution omitted was or ought to be the primary duty of someone else. The workman is entitled to look to his immediate employer and that is what the statute and the Regulation provide."

The primary obligation as referred to in that particular passage did not fall on this defendant but if I apply those principles here while clearly it was the head contractor who was required to provide the adequate half stair landing, it was nevertheless the duty of this defendant to ensure that the head contractor complied with those obligations and this the defendant did not do. The landing was obviously inadequate as it shattered and a workman employed by the defendant fell through it.

The other question I must answer in applying the principles I have referred to is this - Was this defective landing within the area of the defendant's work and were workmen required by the defendant to work in that area? Here the injured worker had placed a plank immediately above the defective decking

and if the accident had not occurred was going to be required to work immediately above that decking in affixing wall board. I find no difficulty in holding that the answer to the question I have just referred to therefore must be "yes", and having made those findings it follows that a conviction must be entered in respect of the charge under Section 11(b).

I turn now to the charge under Regulation 32 of the Regulations, which relates to the obligation of the defendant to provide and maintain safe means of access and satisfactory egress. Here the complaint of the prosecution was that the defendant should not allow the use of dwangs for its employees to climb up or down. The reason given by Mr Minehan, the Labour Department Safety Inspector, was that dwangs would have a tendency to give way when downward pressure is applied on them. The prosecution contended that to enable the injured worker to get up and down to the position where the plank had been placed the defendant company should have provided a ladder. All witnesses before me agreed that it was common practice to use dwangs for access on a building site. I heard evidence from a Mr Cockburn, an independent quantity surveyor, with considerable experience in building and engineering in relation to high rise buildings and he referred to this practice and gave his opinion that dwangs may be unsafe only in an impact loading situation and that difficulty should not arise with people merely climbing up and down dwangs. He however gave an opinion that there was no more possibility of slipping off dwangs than there is of slipping off ladders. Quite apart from those matters however, the prosecution has other difficulties in relation to this charge. It is clear that in this case the dwangs did not in fact collapse, and also I have no evidence before me that the injured worker in fact slipped or fell from the dwangs. Taking all those factors into account I do not conclude that the defendant has failed to provide safe means of access or satisfactory egress and that charge will be dismissed.

I will say that having made the finding that there is an obligation on this defendant in the way I have described it

and that it is not simply sufficient for the defendant to have relied on the fact that Mainzeal had the primary obligation, that fact is nevertheless in my view quite clearly relevant to the question of the amount of the penalty. The fact that the primary obligation fell on someone other than the defendant is quite clearly relevant to the question of what penalty I should impose on this defendant. As has been pointed out by the prosecutor, in respect of each charge the defendant is liable to a fine of up to $2,000 which gives some indication of the seriousness with which the legislation regards the matter but I must balance against that the comment I have already made that the inadequacy of this decking was not the primary responsibility of this defendant.

Accordingly, in respect of the charge to which a plea of guilty has been entered the defendant will be convicted and fined $75.00 and ordered to pay Court Costs $10.00, Solicitor's Fee $25.00. In respect of the charge under Section 11(b) the defendant company will be convicted and fined the sum of $75.00, and ordered to pay Court Costs $10.00, Witness Expenses $6.50 and Solicitor's Fee $50.00.

(N.C. Jaine)
Stipendiary Magistrate

In the Magistrate's Court at Gisborne

C.R. 8010149/8

BETWEEN SENIOR SAFETY INSPECTOR of Napier

Informant

A N D POVERTY BAY ELECTRIC POWER BOARD of Peel Street, Gisborne

Defendant

Stapleton for Informant
Bull for Defendant

Date of Hearing: 24 November 1978
Date of Decision: 24 November 1978

DECISION OF P.T. RICE ESQ., S.M.

The defendant Board is faced with two charges against it under Sections 11(a) or alternatively 11(b) of the Construction Act 1959. Coupled with that Section is of course the Section which creates the offence itself which is Section 22 of the Construction Act 1959. Section 11(a) could be reduced in simple terms to the failure of supervision charge. Section 11(b) could be reduced in simple terms to failure to take reasonable precautions.

But dealing first with the legal submission of the defendant's Counsel that under Section 25 subsection 3 of the Construction Act 1959, that the inspector should have proceeded against some other person than this present defendant if he (the inspector) is satisfied that that other person could be convicted of an offence. That submission in my view must fail because in these informations the defendant is here charged as an employer itself. Section 22 of the Act, that is the offence Section, makes it quite clear that it is the employer and only the employer who can commit the offence. For that reason that legal submission must in my view fail.

Coming now to the facts of the matter it is clear that the Board was carrying out construction work within the meaning of that term as defined in the Construction Act 1959. Defined in Section 2 of the Act construction work means inter alia the erection or installation of any electricity reticulation.

It is established that Derek Keith Chatterton was employed by the Poverty Bay Electric Power Board, the defendant, and was engaged on construction work for the Board on 21 March 1978 at the Waipaoa Station when he died through an electrocution. The questions at issue are: was the work on which Mr Chatterton engaged adequately supervised by

the Board? or Did the Board fail to take all reasonable precautions to ensure his safety?

I find that the material facts are that the defendant Board was engaged in electrical reticulation at Waipaoa Station in February and March 1978. There was a group of six Board employees working at the Station. Included in this group was Mr Walmsley, a grade three line foreman - he was in charge of the group. On 21 March 1978 Mr Walmsley had split this group into two gangs. In one gang were Mr Walmsley himself, Mr Chatterton who was a leading hand and a Mr Ryan, a trainee. At that stage all the work that had to be done was to re-site the service to the manager's house. An electrical system was being brought in opposite to the existing system. The job was being done live because consumers in the area - consisting of three small cottages and a school apart from the Station itself - had had power off for two days. Mr Chatterton and Mr Walmsley were both working on the pole shown in the photographs produced. Mr Chatterton was working on the live side. It is apparently common practice, according to Mr Walmsley, for a lineman to swing on to the cross arms up the pole to save going up and down the ladder. Mr Walmsley went up the dead side of the pole to do some electrical work, he had to be lower on the pole to be underneath to screw fuses up. His head he says, would have been below the cross arms. His ladder and Mr Chatterton's ladder were completely opposite on the pole. He was as I have said, on the dead side of the pole. Mr Chatterton said "remember I am alive". At that stage he was tying in live wires. According to Mr Walmsley he made a further statement "you fully realise that the line I am doing is alive" and that was the last statement he made. The next thing that happened was the accident. Mr Chatterton was electricuted. He was pulled down as quickly as possible and given resuscitation without success. I find that the conduct and behaviour from then on by the employees of the Board could not be faulted; they did everything they could do in the rescue operation.

Mr Chatterton was wearing only shorts, a belt, a shirt and hat. His clothing was intricately examined by Mr Kersley. He had a flimsy type cir-tex shirt with a great amount of perspiration stain on it, light cotton shorts, good boots, sox and a small pair of underpants. Mr Walmsley says he only noticed what Mr Chatterton was wearing when he got him to the ground. Mr Walmsley admits that Mr Chatterton should have been wearing insulating gloves. He concedes that Mr Chatterton would have definitely needed insulating covers the way he was dressed. He agrees that Mr Chatterton was not complying with the rules of the Safety Manual issued by the Poverty Bay Electric Power Board. Mr Walmsley went on and said that this particular job was done in hot humid conditions and 90% of the job was done by the men in shorts and shirts.

Looking at all the evidence as a whole I am not satisfied that it has been proved to the Court's satisfaction that the defendant had failed to take all reasonable precautions to ensure Mr Chatterton's safety. Indeed the evidence suggests the opposite. The Board employs two safety officers. The Board organises six monthly courses for its linesmen. These courses run over a three day period. Over the last four years Mr Chatterton has attended eight such courses. The linesmen are provided with safety manuals, one of which was produced. On the site itself there were insulating gloves and insulating protective covers and overalls. Mr Chatterton himself was issued with gloves and overalls and stress is made in the safety manual of the necessity of wearing these gloves. Mr Hubbard, Chief Engineer for the Waitemata Electric Power Board, considered that the safety practices and training and supply of equipment and general instructions was adequate. I accept that evidence. Mr Turbott, the Engineer's assistant for the Board likewise considered that there was adequate instruction of safety given to the Board's employees. Having accepted that evidence I conclude that the information for failing to take reasonable precautions, that is under Section 11 (b), ought to be dismissed and it is dismissed.

Mr Hubbard in his evidence stated that supervision is a delegated responsibility right throughout a Boards' activity. He outlined a line-foreman's functions. He said the primary function of a line-foreman is to make it clear to his fellow employees what work is to be done; to see that all safety equipment is available; to see that they work safely on the job; to see that they have done their job efficiently and quickly. Mr Hubbard went on and said that the line-foreman in a sense is a safety officer. The responsibility of a foreman is outlined in Rule 22 of the Safety Manual. He must ensure that safety equipment is available and used correctly. Mr Walmsley was the foreman, he didn't ensure that Mr Chatterton was wearing gloves as he should have done. The crucial factors in Mr Hubbard's opinion for the accident were that Mr Chatterton transferred in mid air from the de-energised side of the pole to the live side but he proceeded to make connections without rubber gloves, that it would be extremely desirable had he had some form of protective clothing and that if for some reason he had to work through the liner, special precautions should have been taken for protective clothing. He was not so adequately protected against live conductors and was in breach of the rules.

But I take the view that it was Mr Walmsley's duty as foreman and employee to ensure that Mr Chatterton was so complying with the rules. He was the boss on the site and the men were under him. He was as Mr Hubbard has pointed out, in a delegated position of responsibility for the Board and acting as safety officer.

The supervisor duties are also referred to in the safety manual. The supervisor is responsible for taking immediate steps to correct any unsafe practice. Mr Fraser, the supervisor, stated that this

particular work was complicated technically. The practice was for the men to work below the lines but it was unsafe to work above them which of course is what Mr Chatterton did. Mr Rasmussen agreed that Mr Chatterton broke three rules in not wearing the apparel he should have been. The safety officers appointed by the Board were two. They did not at any stage visit the site. Mr Hubbard expressed the opinion that he felt it desirable that one should visit the site although there is apparently no statutory requirement for that.

One further point relating to the job itself over which there was a considerable amount of evidence concerned the absence of written instructions for the electrical installation at the Station. A detailed plan was prepared by the Board for the reconstruction and there was a good deal of written instruction on the plan itself but in my view the absence of any additional written instructions was not of any significance to this case nor does it indicate any improper or faulty practice on the Board's part.

Taking an overall view again of the evidence I come to the conclusion that there was not proper supervision on the part of the defendant that Derek Keith Chatterton was employed by it on 21 March 1978 and I accordingly convict the Board of the information laid under Section 11(a).

The Court in dealing with a matter where a loss of life has been involved and the Court has found that this has come about through inadequate supervision. Therefore, the monetry penalty cannot be light for these circumstances. The charge under Section 11(b) is dismissed. On the charge under Section 11(a) the defendant Board is convicted and fined $500.00, Court Costs $10.00 and Solicitor's Costs $75.00.

(P.T. Rice)
Stipendiary Magistrate

In the Magistrate's Court at New Plymouth CRN.8043021583-5

BETWEEN LABOUR DEPARTMENT SAFETY INSPECTOR
Informant

A N D SPECIALIST COATINGS (N.Z.) 1975 LTD
Defendant

Date of Hearing : 21 March 1979

Date of Decision : 23 March 1979

Counsel : Mr Laurenson for the Informant
Defendant in person

DECISION OF J.W. DALMER S.M.

The defendant company faces three charges. They arise out of an inspection of the Post Office building at Stratford on the 2nd June 1978. A Labour Department inspector, Mr Phillips, found that a scaffold had been erected on the street frontage of the building extending for the full length of that frontage and enabling workmen to reach the full height of the Post Office building. He found that there were four men on the job at the time of his inspection, all of whom were employed by the defendant company. Two of the men were on the top platform. One was working on the ground and two were working from small return scaffolds at the northern end of the building. Generally the work required of the defendant company was to apply sealer to the concrete surface of the Post Office building together with painting and maintenance. It is, however, fair to point out that at the time of the inspection on the 2nd June 1978 the inspector made no specific note of the actual work being carried out at the time of his inspection. Mr Phillips did however note various breaches of the regulations relating to scaffolding. He put those defects in writing for the benefit of the person in charge of the site and directed the defendant company's employees to leave the job until the scaffolding was altered. This was duly done. The 2nd June 1978 was a Friday and on the following Tuesday Mr Phillips returned and took photographs of the site. He noted that no changes had been made to the site from the previous Friday. He took no measurements because his means of access to the scaffolding was such that he was not prepared to risk climbing up on the scaffolding. Had he attempted to climb the scaffolding from outside the building he would have had to use the bracing for that scaffolding which Mr Phillips considered not to be safe. He recorded specifically that no ladders were to be seen on the scaffolding and he told me that this was the recommended form of egress and action in relation to scaffolding.

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ie defendant company faces three charges. The first relates to carrying on notifiable construction work without a duly appointed safety supervisor being on duty in breach of Section 9 of the Construction Act 1959. "Notifiable work" means construction work from time to time described as notifiable work by regulations made pursuant to the Construction Act 1959. Regulation 5 of the Construction Regulations 1961 declares notifiable work to be, amongst other things, any work in which workmen employed risk a fall of 5 metres or more. The evidence given by Mr Phillips was, to effect, that the top platform on the scaffolding was greatly in excess of 5 metres and indeed fixed by him at just under 8 metres. Further, his evidence was that from the verandah to the top platform was a distance of about 5 metres. The defence broadly to this particular charge was that the defendant company was not engaged in notifiable work within the meaning of Regulation 5 of the Construction Regulations on 2nd June 1978. It is common ground between the parties that as at 2nd June 1978 the defendant company had not advised the Labour Department that it was carrying on such work. The heights are important on this particular charge and the measurements given me by Mr Phillips have all been estimated by him.

As against that, Mr James, the Manager of the defendant company, and also a Director of that company, who conducted the defence for the company, said that he had actually carried out measurements and whilst agreeing that the height of the top platform of the scaffolding was well in excess of 5 metres, he did not agree that was so in relation to the small return scaffolds at the north end of the building on which one man was working at the time of Mr Phillips' inspection. Mr James' evidence was that the distance involved was something like 4.8 metres and that he personally measured this. Mr James also gave evidence that the two men seen by the Inspector on the 2nd June on the top platform were not carrying out work in relation to the defendant company's contract with the Post Office: instead, those two men were on a frolic of their own.

The Inspector could not see what the two men were doing on the top platform and in these circumstances I have no evidence whatever to contradict that given by Mr James to effect that the defendant company considered itself not engaged on 2nd June in notifiable work; and secondly that in any event the distance involved on what might be termed the middle reaches of the scaffolding were not such as to bring any work from those middle reaches within the definition of notifiable work.

Under Regulation 6 there is provision for notification in accordance with Regulation 5 to be given before the commencement of any notifiable work. There is, however, a proviso that where any work which, at its

ommencement, is not intended to be work which is notifiable under Regulation 5 of these regulations, the notification shall be given as soon as practical after it becomes notifiable. In other words, I take the view that the defendant company could quite properly, under Regulation 6, have given notification for commencement of notifiable work within the definition of Regulation 5, when it reached the stage, and not before it reached the stage, of carrying out such work. Put another way, the defendant company was not obliged at the beginning of the contract to give notice that at some future time it might be required to carry out work which was notifiable.

This duty, in my view, is satisfied by notifying the Department when work has reached the stage that it is appropriate to give the notification in terms of Regulations 5 and 6. That stage, on the evidence, had not been reached on 2nd June 1978 and accordingly I accept the defendant company's submission that it was not carrying on notifiable construction work on the date of Mr Phillips' inspection. If the defendant company was not carrying on notifiable construction work then no safety supervisor was required to be on duty. A second point which I mention is that this is a criminal statute with serious consequences for the defendant company and the measurements involved have not been sufficiently established. For these reasons the charge will be dismissed.

That leaves two further charges relating to the condition in which the scaffolding was found on the 2nd June. The first relates to the failure to provide safe means and egress and access to the scaffolding. Evidence was given by Mr Phillips that no foot or hand holds were supplied and the workers scrambled up and down the scaffolding. The recommended form of egress and access to the scaffolding was ladders but no such ladders were found by Mr Phillips to be there on 2nd June 1978. The photographs taken by him and produced in evidence were taken on the following Tuesday and again there is no sign of any ladders supplying egress or access to that scaffolding. Mr Phillips' evidence was that the scaffolding was not altered between 2nd and 6th June 1978. As stated, he saw workers climbing down the scaffolding using bracing, a practice which he regarded as dangerous, so much so that he would not follow the workers example himself.

Mr James gave evidence of instructions being given by him to alter the scaffolding because of the presence of young persons in the vicinity over the weekend, but he himself did not inspect the scaffolding until the 8th June, a Thursday, and in view of this I must accept the evidence given by Mr Phillips as to the scaffolding not being altered between his Friday inspection and the following Tuesday. It was suggested by Mr James that Mr Phillips had applied pressure to the workmen so as to get them down from the scaffolding as quickly as possible. Mr Phillips did

ot agree with this suggestion and I find that there is no evidence to indicate that Mr Phillips insisted on a rapid or emergency evacuation, if it can be called that, of the scaffolding. Mr James also submitted that an arrangement had been made with the Post Office for his workmen to have access to the scaffolding through windows of the Post Office building. No evidence was called to support this allegation or verify this arrangement from Post Office employees. It would have been easy to do so. It seems to me unlikely that such an arrangement would operate so that workers would traipse in and out of the Post Office building, and climb in and out of the Post Office windows. The evidence shows that the workmen took the direct route on the scaffolding to climb up and climb down and I find as a fact that this was not a safe means of access or egress because there were insufficient or non-existent foot or hand holds supplied. I find as a fact that the scaffolding was not safe in terms of Regulation 32(1) and accordingly a conviction will be entered on this charge.

The second matter relating to scaffolding concerns the top working platform on that scaffolding where it is alleged that the guard rails were fixed at a distance greater than 200 millimetres from the edge of the platform. Photograph A5 graphically illustrates the evidence given by Mr Phillips in support of this particular charge. The evidence from Mr James, was that he thought the top platform would be used by his employees and others in carrying out work to the Post Office building. He agreed that the guard rails were in a position which did not accord with Regulation 44(2). The scaffolding, on the evidence, was erected at the request of the defendant company and it was, I find, its responsibility to ensure that that scaffolding was maintained in proper order and in accordance with the Act and Regulations. The instruction given by Mr James to his employees was that they were to do as much work on the exterior as they were able to do. He knew they were likely to use the scaffold and he conceded that he thought it probable that the top platform would be used by his employees. It was suggested by him that the two employees seen by Mr Phillips on the top platform on the 2nd June 1978 were sky-larking. I am not at all satisfied that this was so. They may have been engaging in activity not connected with the specific contract which the defendant company had with the Post Office but certainly they were not sky-larking in the sense that they were playing the fool. I was told that the employees were looking at a problem relating to birds in the building which was not directly connected with the defendant company's contract, but certainly was connected with work rather than pleasure or playing the fool. The defendant company, I find, was responsible for maintaining the scaffolding in accordance with the Construction Act 1959 and the Regulations thereunder. It appeared from the evidence, that because of the cost of hiring boards the defendant company had hired only

.ufficient to allow a few boards to be placed on the top platform. In my view, this is an economy which is not justified, if the heavy responsibility cast upon the defendant company, in relation to the scaffolding, is to be observed. The company was under a duty to comply with Regulation 44(2) on its own admission the guard rails supplied were more than 200 millimetres from the edge of the top platform. Accordingly I find that the evidence sustains the charge and a conviction must be entered on this charge also.

The Construction Act and the Regulations made thereunder provide for certain standards to be maintained in relation, amongst other things, to scaffolding. The basic reason for those high standards being required is of course industrial safety. In my view it is important for companies to comply strictly with the requirements of the Act and Regulations and this duty is, I think, recognised by the heavy financial penalty which can be imposed for breaches of the Act and Regulations. I take into account that this is a first offence. I do however point out that in my view there were clear breaches in relation to this scaffolding. The degree of supervision offered by the defendant company was inadequate and I shall not take such a lenient view should there be any repetition. On each charge the defendant company will be convicted, fined $150.00, ordered to pay court costs $10.00, and solicitors fee $75.00.

"J.W. Dalmer"
STIPENDIARY MAGISTRATE

BETWEEN: MALLON CRUMP
Informant

A N D: V. J. PALMER & COMPANY LIMITED
Defendant

Hearing: 18 February 1966
Judgment: 25 FEB 1966

Counsel: Casey for Informant
Blake-Palmer for Defendant

costs awarded & fixed in sum of Court Costs

JUDGMENT OF J. F. KEALL, S. M.

These three informations have been laid by the Informant in his capacity as Safety Inspector in the Department of Labour. They allege breaches of the Construction Regulations 1961 (S.R. 1961/5). One information alleges that on 3 December 1965 at the Seaview Reclamation, Lower Hutt, the Defendant

> "being an employer within the meaning of the Construction Act 1955 did fail to provide adequate first aid facilities, appliances and requisites in accordance with the minimum requirements of the Chief Safety Engineer." - Contrary to Reg. 21 (ibid).

The remaining two informations are concerned with the same place, the Seaview Reclamation, but relate to 17 December 1965 when it is alleged that the Defendant, being an employer as aforesaid

> "did fail to provide adequate accommodation in which workmen could take their meals, spend their rest periods and shelter from inclement weather" - contrary to Reg. 24 (ibid), and

"did fail to provide sufficient and suitable sanitary conveniences" - contrary to Reg.25 (ibid).

By consent, all three informations were heard together and it was conceded that the Defendant was an "employer" engaged on construction work.

As the salient facts will appear in the course of my consideration of the charges I do not think it is necessary to outline the facts at this stage, except to say that the Defendant is a Company of some magnitude, engaged, among many other things, in an earthmoving reclamation contract on the shore of the Wellington Harbour at Seaview. At the date of the alleged offences, it had been so engaged for several months. I was not told the area of this reclamation but from the plan and photographs produced it would appear to be several acres in extent. Once again, I was not told whether there were any other structures on it, but as all the evidence pointed to only one, namely, the eating and changing shed, which is the subject of one charge and which hereafter I shall call "the shed", I feel safe in assuming that this was the only building at the relevant time.

Before proceeding to a consideration of the individual charges, I want to make the preliminary observation that a number of defences were raised. Some of these were of some substance but the majority may be grouped under the heading of "red herrings."

Turning to the first charge concerning the provision of first aid facilities, the Inspector visited the site on 25 November 1965. On the following day the Department wrote to the Defendant pointing out (inter alia) that no first aid kit was provided. The letter stated "no further action will be taken in this particular case, but you are to ensure that, before the next inspection is carried out in the near future, these matters will have been

attended to." On the 3 December 1965 the Inspector made his next visit. He inspected the interior of the shed and made enquiries from three workmen but was unable to locate a first aid kit. The main answer of the defence is that the kit, which the Inspector saw on a later date and which complies with the Regulation in that it is "adequate" was kept in a truck. The other suggestions from defence witnesses that a first aid kit would have been available on the premises of another Company next door or, that first aid facilities were provided at the defendant's depot, 4 miles away, are just not worthy of consideration as an answer to the defendant's positive liability under the Regulation. Similarly, some evidence about two way radio contact with the depot in case of accident appeared to be another "red herring" when the evidence disclosed that the truck normally on this site was not equipped with radio. The real question on this charge is whether there has been a failure on the defendant's part "to provide" a first aid kit and as the meaning of this obligation may affect other charges I leave it to be dealt with later.

In the second charge the Inspector's complaint relates to the adequacy of the accommodation provided for the men for use for meals, rest periods and for sheltering from the weather. This shed was 9 feet square and while, no doubt, it was adequate when first built it had obviously suffered considerable wear and tear. The inspector described it as containing a number of broken bags of cement, with the flooring under the cement gone and replaced by a sheet of plywood. The flooring by the door was broken, as illustrated in a photo. On a visit on a wet day the Inspector found the roof leaking in five places. There were half inch gaps in the walls between the vertical timbers.

In considering what is adequate, regard must be had to the purposes of the Act and Regulations. The Construction Act 1959 (under which the Regulations are made) is described in the preamble as

> "An Act to consolidate certain enactments of the General Assembly and to make better provision for the safety and health of persons employed in construction work."

Part IV of the Regulations within which Regs. 21,23 and 24 fall, is entitled "Health and Welfare." Reg. 24 (2) provides

> "Any such accommodation shall have a suitable floor and shall be furnished with suitable seats and tables and kept so furnished and equipped as to ensure that meals may be taken with reasonable comfort and security from the weather."

There are other provisions also but this is sufficient to indicate that in at least two respects, namely, the condition of the flooring and security from the weather that there has been a failure to comply with the Regulation. Once again I dismiss the suggestion that in the event of wet weather the men could return to the depot.

The third charge concerns the failure to provide sufficient and suitable sanitary conveniences. No conveniences of any sort at all were provided on the site. I was told that the men could use the truck to proceed to the conveniences at the Hutt Park Hotel, half a mile away. I was also told of an arrangement to allow the men to use a convenience belonging to another Contractor on an adjoining site about 300 yards away. Why it should be necessary to go to the hotel became clear from the Inspector's description of the neighbouring Contractor's toilet. When he first inspected it, it was lying on its side in a small lake of water. At a later stage, photographs were taken of it when it had been

stood up again but the photographs confirm the Inspector's evidence of the disgusting condition it was then in and I am satisfied that during the period of the Inspector's visits it was unusable. However, I think the real worth of these alternatives can be measured against the statement, in the evidence of the defendant's engineer in charge of the work, to the effect that the men were left to make their own arrangements and that this was something they can easily solve for themselves. That, I am sure, was the true position.

Returning to the meaning of the term "to provide", assistance is to be gained from the judgment of Moller J. in Inspector of Factories v Moorland Timber Company Limited (1965) N.Z.L.R. 613. Among other authorities, His Honour quoted with approval the following passage from the judgment of Devlin J. in Finch v Telegraph Maintenance and Construction Company Limited (1949) 1 All E.R. 452, 454:

> "I have listened to the careful argument of Counsel for the defendants, but I have come to the conclusion that it was not a 'providing.' Of course, goggles would be 'provided' if they were given to each man individually. I do not think that that is the only way in which they could be provided, but, in my view, in order to 'provide' them within the meaning of the Act, it would be necessary, either that they be put in a place where they come easily and obviously to the hand of the workman who is about to grind, or, at the very least, that he should be given clear directions where he is to get them. Accordingly, I think there has been a breach of Section 49."

Both Judges were dealing with legislation of a similar nature and the passage quoted is particularly applicable to the storage of the first aid kit in the truck. The date of the alleged offence was the second visit by the Inspector. There had been a warning letter but the Inspector was unable to find the kit despite enquiries from the workmen. The defence evidence was

that the kit was stored under the front seat of the truck. It was agreed that the truck could be absent to pick up equipment and available to convey men to the toilet at the hotel. It was, therefore, not on the site all the time. I am not even satisfied that the men knew the kit was in the truck, but, in any case, the obvious place for it was in the shed where it would "come easily and obviously to the hand of the workman" who required it. The flimsy excuse that it was not kept in the shed because the shed might be burgled by vandals was demolished by the equally flimsy excuse that a kit was available in the shed of an adjoining Contractor.

These Regulations impose positive obligations on employers and it was surprising to find in the defence evidence an apparent ignorance of those obligations and a casual attitude towards them. However, it was admitted that the attention of the defendant had been drawn to these particular Regulations by the Department only a few months earlier.

I am satisfied that all charges have been established and convictions will be entered. I will take into account that a first aid kit was available, although not so as to comply with the Regulation and on that charge the defendant will be fined £10. On each of the other charges the defendant will be fined £20 and in each of the three cases will be ordered to pay Court Costs £1.10.0 and Solicitor's fee £3.3.0d.

14 - 13/-
24 - 13/-
20 - 13/-
£3 - 9/- Ltd.

(J. F. KEANE)
STIPENDIARY MAGISTRATE.

[illegible] S.M. [illegible]

[illegible]

BETWEEN : [illegible]

Informant

A N D : [illegible]

Defendant

Date of Hearing : 13.3.79
Date of decision : 13.3.79

Counsel
Mr Ryan for Informant
Mr Rama for defendant

ORAL DECISION OF H. GILBERT, S.M.

I propose to give my decision now but it will be in a somewhat abridged form because of the time of day. I regret that this does not do justice to the efforts of counsel, nor will it answer all questions that have been raised by the expert witnesses. I am aware too that a number of witnesses who might have been excused have elected to remain in court, thus showing their interest in the outcome of these proceedings. This is a further factor which prompts me to give my decision immediately but in doing so, I will state the grounds for that decision in only general terms. If either party requires a full written decision, I will state the facts more fully and amplify the grounds of my decision at a later date.

The defendant is charged with an offence against S.11(b) and S.22 of the Construction Act 1959. The precise allegation is that the defendant "being an employer in relation to construction work namely the repair and maintenance of electricity reticulation at Waipapa Road, Hatuitai, did fail to cause to be duly and faithfully complied with the rule that all reasonable precautions shall be taken to ensure the safety of workmen employed in the work, in that it failed to take the necessary steps to ascertain the safety of a pole from which a workman was required to work."

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10/5/79

[It is to be noted that although the information alleges in the body of the information that the Council "did fail to cause to be....complied with" a particular rule (i.e. S.11(b)), the details of the failure set out in the concluding portion of the charge is a direct one alleging that the defendant failed to take the necessary steps to ascertain the safety of the pole. It is my opinion that the information refers to a direct breach of the particular rule by the defendant itself and is not a complaint that the defendant failed to ensure that one of its employees complied with a particular safety requirement. It is therefore the actions of the defendant in relation to the way it has carried out its duties to ensure the safety of employees who work on electricity poles that has had to be considered during the course of these proceedings, rather than the actions of an employee who failed to take all reasonable steps for his own safety, as was apparently the case. I say "apparently" as it is not the injured employee, Mr Te Kiri, who is the defendant, and it is unnecessary for me to determine the extent to which, if at all, he failed to observe the instructions he had been given. Under the circumstances, the fact that an employee has failed to take reasonable precautions for his own safety is not necessarily indicative that there has been a breach of the statutory duty imposed on the defendant. This is not a case of vicarious liability.]

[On 24 July 1978, three employees of the Municipal Electricity Department of the defendant, Mr Roti, the leading hand, Mr Te Kiri, a certificated lineman and Mr Sydney, a trainee lineman, were instructed to replace a defective power pole in Waipapa Road, Hataitai and renew the service lines carried by that pole. I accept the observation of Mr Goddard that the task was within the normal work activity of the gang and that in his words it was "an everyday sort of job." It was well within their capabilities and experience. Mr Te Kiri was working up a nearby pole to which the service lines were attached. In addition, that pole carried electrical transmission lines and telegraph wires and it was also used as a support for trolley bus lines. Before climbing the pole, Mr Te Kiri had carried out only the most cursory of visual examinations of the pole and had relied almost entirely on a "ladder" test, by leaning a ladder against the pole, climbing part way up and then using his weight on the ladder to see whether the pole was secure.

He had been working on and around the pole for some time, having climbed up and down the ladder several times and had spent perhaps as much as half an hour above ground level on the pole itself. He had sleeved the transmission lines, attached the new service lines to the pole with a 'U' frame and then proceeded to cut the old service lines. As he did so and those old lines fell away, the pole snapped off at ground level and fell into the street away from the direction taken by the cut service lines. Mr Te Kiri, who was strapped to the pole, fell with it and was injured. The cutting of the service line obviously created a condition of unequal force at the top of the pole which (as was later ascertained) was substantially weakened by internal rot at and for some distance above ground level. There were thus two effective causes for the collapse of the pole but the evidence is insufficient to determine whether only one of such causes would have led to the collapse.

After the accident, the pole was taken away and closely examined. It was a hardwood pole approximately 12 inches in diameter. At ground level, the interior of the pole had decayed leaving approximately one inch of sound timber around the circumference. This area of rot or decay extended upward for a distance of 3-¼ feet but the diameter of affected timber gradually diminished. Above that distance, the pole was quite sound. Two Council employees, Mr Goddard, Senior Distribution Engineer for the M.E.D. and Mr Vernon, the General Manager of the M.E.D. were both present when the pole was examined and both used the hammer or sound test but were unable to detect the interior decay in that way. Both considered that a "probe" test would have had the same result, in view of the approximate 1" of sound timber around the rotten core.

The factual situation surrounding the accident as set out above has emerged with reasonable clarity, largely through the evidence that was given as to the condition of the pole after it had collapsed. What is missing and cannot be supplied is some reasonable evidence as to the external state of the pole at ground level. It is therefore necessary for me to draw some inference as to that condition and the only inference I can draw from the evidence is that at ground level, the pole had the same general physical appearance as that part of the

pole from ground level up to a height of three or four feet. That is that the pole appeared quite normal. There is nothing in the evidence to suggest that at ground level (and I refer to a short distance from an inch or two above to an inch or two below ground level) the physical appearance of the pole was any different from its physical appearance over the next few feet above. Although no close examination of the stump was made, the cursory visual examination made by Mr Te Kiri and the similarly brief visual examination made by Mr Reti, the leading hand, suggests, in the absence of direct evidence to the contrary that the pole had the same sort of appearance at ground level as it had some distance above.

The footpath surrounding the pole was sealed and such sealing was in good order. Without breaking and removing that seal the pole could not be inspected below ground level.

This conclusion does not, of course, dispose of the proceedings as the substance of the prosecution's case seems to me to be that because there was an accident, therefore, so the argument goes, the defendant was at fault in not instituting a system of checking that would have ensured in this case that the defective pole was discovered before it was climbed by Mr Te Kiri. I do not accept this approach as representing the state of the law as that seems to me to call for a counsel of perfection. It seems to me to put the defendant, as the employer in the position of being an insurer. I do not accept that that is the law. What is required is that the Council takes reasonable steps. It is still open to the prosecution to argue that the steps taken were not reasonable and it may be fairer to the prosecution if I accept the prosecution case as having been put forward in that way.

The evidence also established that the defendant had adopted and carried out the recognised procedures both in the training of Mr Te Kiri, the issuing of his certificate of competency, the supplying of a safety manual (which Mr Te Kiri had acknowledged he had read and understood), and the provision of regular

refresher courses. I am satisfied that those standard requirements in terms of general training, particularly with reference to the safety procedures, were properly and adequately carried out. Mr Te Kiri was therefore duly qualified to carry out the job that he was instructed to do. What is more, he was an experienced, certificated lineman, having first obtained a certificate of competency in the Rotorua area in 1975, before being employed by the defendant. The real issue was whether something more should have been done, i.e. that although the defendant had taken some reasonable precautions, it had not taken all reasonable precautions. (S.11(b)).

There are two matters which present some difficulty for the prosecution. One is the evidence given by Mr Bullick as to the safety practices adopted by another electrical supply authority and it is quite clear that the actions that are taken by the Central Waikato Electrical Power Board are on all fours and are parallel with the ones adopted by the defendant through its M.E.D. The second matter of difficulty emerges in the main from the evidence of Mr Goddard. Even if all the recommended tests had been carried out on the pole, Mr Goddard was in some genuine doubt as to whether those tests would have disclosed the existence of a hidden defect. He left me with the clear impression that assuming that there was nothing else on site that would have drawn his attention to the hidden defect, he might well have climbed that pole himself.

That leaves to be considered, the question of the loading or the forces generated on the top of the pole by the weight and pull of a number of lines. This is a matter to which attention is drawn in the safety manual. It is therefore a matter which ought to have been in the contemplation of Mr Te Kiri. This however must, except in an extreme case, be largely a rather subjective assessment of the way in which the forces exerted by such loading will be reduced, altered or added to, as the case may be, by the particular work being carried out on any job. In the present case, it is unlikely that a consideration of this matter would have affected the decision of the average lineman whether to climb or not to climb the pole, or to cut or not to cut the service lines at the stage of the job that Mr Te Kiri cut those lines.

[It is this particular combination of events, namely the probability that none of the standard recognised and recommended tests would have revealed the hidden defect in the pole and the imprecise way of assessing in the field the loading at the top of the pole, that was the cause of concern to the expert witnesses, and lead them to reconsider present tests and safety requirements. However, the evidence does not enable me to pass judgment on those tests or procedures save to say that the evidence does not suggest any solution to the question which the expert witnesses have posed for themselves.]

The law required the defendant to take "all reasonable precautions"- not all precautions. I am satisfied that in this case, this was done. I think in the circumstances, it was a reasonable step to delegate to Mr Te Kiri [illegible] the duty of checking for himself the safety of the pole. In this respect, the observations of the Law Lords in Tesco v Nattrass (1972) A.C. 153 are not without interest, e.g. Lord Diplock p.[illegible] A-F. Although that decision is not in pari materia as it involved an offence of strict liability where a statutory defence was provided, it is at least persuasive authority for the proposition that delegation can in proper circumstances be a reasonable step or precaution for an employer to take.

I have not referred in detail to the decisions cited to me because of the constraints of time. I have reached a conclusion on a factual basis. In this case the defendant has taken those steps which the present state of experience and knowledge indicates are the proper and reasonable ones. I do not accept either that the defendant should carry out an inspection of all poles to ensure that they are absolutely safe or that the defendant should send with each gang of men a safety officer whose job it is to inspect poles. No basis for these or similar suggestions emerged in the evidence. I do not think that either of these approaches would be practical and there is no suggestion that that type of approach is one that finds favour with any other electrical supply authority. That is not to say that in all cases where safety is involved, a situation of absolute liability may not arise nor is it to say that in all circumstances it would be enough if an employer delegates to an

experienced employee the task of ensuring compliance with some regulation or law. It is in the particular circumstances of this case that I am satisfied that it was reasonable for the defendant to delegate to the man on the spot, Mr Te Kiri, a trained and certified lineman of reasonable experience, the task of satisfying himself that the pole was safe. It is quite clear that Mr Te Kiri did not do so. As I mentioned earlier, the defendant is not charged with Mr Te Kiri's apparent breach of the safety requirements. It has been established that the defendant had properly instructed him in the standard safety precautions that I have mentioned. In the light of present knowledge and experience on the part of the defendant, and (from the evidence of Mr Bullick) the knowledge and experience of another electrical supply authority, I can find no failure on the part of the defendant to take all reasonable precautions for the safety of Mr Te Kiri on the job he was employed and instructed to do.

Accordingly the prosecution has failed to prove that aspect of the case beyond reasonable doubt. Indeed, in my view, it has not even been proved on a balance of probabilities. The information is therefore dismissed. As I indicated when I gave my brief oral decision, if a written decision was required I would set out the facts and amplify my reasons. I have done so. The additional matters are shown in this written decision in square brackets.

H. Gilbert
Stipendiary Magistrate