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Repository Citation
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THE SAFETY PROVISIONS IN BRITISH FACTORY LAW

W. F. Frank

"It is not made any easier by the fact that most engineers know no law and, I say it with due respect, few lawyers know much engineering. There is an almost complete absence of understanding between the two branches of technology which approach this difficult question."

INTRODUCTION

The purpose of this paper is to describe the most important safety provisions in British factory law in the light of their judicial interpretation with a view to bringing out some of the significant changes in attitude which have taken place in the last few years. In order to restrict this paper to a manageable size no reference will be made to purely administrative provisions or indeed to those provisions of substance which have not yet been extensively considered by the courts.

A discussion of the kind envisaged here cannot proceed in a legal vacuum and it must therefore inevitably contain some reference to the common law relating to negligence. This is, of course, a subject which deserves separate treatment and the author can only refer readers to the many authoritative works that are in existence already.

At common law an employer owes a duty to his employees to take reasonable care for their safety. This duty is an implied duty arising out of the contract of service but it exists also in tort independently of contract and most actions are brought in

*Dr. Jur., M. Sc. (Econ.), B. Com., LL.B., Head of the Department of Management and Business Studies, Lanchester College of Technology, Coventry, England; Member of the Editorial Board of the Journal of Business Law and its Departmental Editor for Management Law.

fact in tort. Lord Wright specified the employer's duty as consisting of the provision of competent fellow-workers, adequate tools and materials, and a proper system of work and supervision. While such a specification of the employer's duties may be convenient for the purpose of exposition, it has its dangers if it is taken to imply that it represents an exhaustive statement of the employer's obligations and it is perhaps safest to follow the simple restatement of Lord Somerville who said that "put in its simplest terms the general scope of the duty of an employer is a duty to take reasonable care in all circumstances."

The employer's common law duty to provide for the safety of his employees is in some respects wider and in others narrower than the duties imposed upon him by various statutes. It is wider inasmuch as it applies to all employees and to all sorts of danger, while statutory safety duties are generally restricted to particular employments and to specified hazards. It is narrower than his statutory duties since it is not "absolute"; the employer at common law is only obliged to take such safeguards as are reasonable in the circumstances, while many of the statutory duties are absolute and the employer has to protect the servants' safety whether or not in the circumstances it is reasonable to expect this of him. The employer when sued for common law negligence is also able to employ a wider range of defenses than is open to him in an action for breach of statutory duty. Lastly, it should be remembered that the common law duties exist only vis-à-vis the servants of a particular employer and do not avail independent contractors, while statutory duties frequently exist for the benefit of servants, independent contractors, and indeed also of persons not employed in the premises at all.

The statutory duties which form the subject matter of this

6. E.g., the defense of volenti non fit injuria.
8. The duty to fence applies only in respect of workmen whose job it is to use the particular machine or whose job brings them into its vicinity. It does not benefit someone who, at the critical time, was not working for the occupier under a contract of service. Napieralski v. Curtis (Contractors) Ltd., [1959] 1 Weekly L.R. 835.
paper are those existing under the Factories Act, 1961. This is a consolidating act which has replaced the earlier Factories Acts of 1937, 1948, and 1959. Any references in this paper to "the act" must be taken to refer to the 1961 act.

DEFINITION OF A FACTORY

A "factory" means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labor in any process for or incidental to any of the following purposes:

"(1) the making of any article or part of any article;

"(2) the altering, repairing, ornamenting, finishing, cleaning or washing, or the breaking up or demolition of any article, or

"(3) the adapting for sale of any article . . . being premises in which . . . the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control."

In addition to this general definition, the act also enumerates certain other types of premises which are to be treated as factories, whether or not they are covered by the general definition.

The general definition of a factory is based on four criteria, i.e., (a) the employment in manual labor, (b) one of the processes enumerated, (c) work carried on by way of trade or for purposes of gain, and (d) the employer's right of access or control over the premises.

The premises constituting a factory may be open-air premises so that a factory is not necessarily represented by a building. Persons must be "employed" in these premises; thus a private workshop used by its owner only would not be a factory, nor would a technical school, since the persons engaged in manual labor in the premises (i.e., the students) are not em-

9. 9 & 10 Eliz. 2, c. 34.
10. 1 Edw. 8; 1 Geo. 6, c. 67.
11. 11 & 12 Geo. 6, c. 55.
12. 7 & 8 Eliz. 2, c. 67.
14. 9 & 10 Eliz. 2, c. 34, § 175(1).
15. Id. at § 175(2).
ployed there. The fact that the persons employed in the premises must be engaged in manual labor does not mean that all of them must be so engaged, provided that the employment of people in manual labor is the main purpose for which the premises are used. Where the employment of persons in manual labor is merely incidental to another purpose for which the premises are used (e.g., the employment of a porter in a shop of a firm of dispensing chemists), the premises will not be treated as a factory. In passing it may be noted that nothing in the definition of a factory restricts it to premises where machinery is in use. A cobbler’s shop where shoes are being repaired by simple hand-tools would thus be a factory provided always that persons are employed in these premises.

Coming now to the purpose for which the premises are used, the main difficulties have arisen in connection with the phrase “adapting goods for sale.” The mere packing of goods will clearly not be considered an adaptation for sale, but where in the process of placing goods into containers the commercial value of the goods is altered (e.g., the bottling or canning of beer, or the making up of flowers into wreaths) there is an adaptation for sale.

The work in the factory must be undertaken by way of trade or for purposes of gain. The two objectives have to be read disjunctively so that it is not necessary that gain should be coupled with trade. Trade is not synonymous with business, since it consists of the act of buying and selling while business may be concerned with the supply of services.

Where a place situated within the boundaries of a factory is solely used for a purpose other than the processes carried on in the factory, that place will not be deemed to form part of the factory, but may be deemed to be a separate factory if it falls within the general definition of a factory. A place situated within the general confines of a factory will thus not be covered by the provisions of the act if it is used for a purpose which is neither directly nor incidentally connected with the main purpose of the factory, this being of course the use of manual labor.

21. 9 & 10 Eliz. 2, c. 34, § 175(6).
in one of the specified ways.\footnote{Street v. British Electricity Authority, [1953] 2 Q.B. 399; Thorogood v. Van den Berghs and Jurgens Ltd., [1951] 2 K.B. 537 (the oiling and testing of electric fans used in a margarine factory held to be incidental to the main purpose of the factory).} A canteen situated in factory grounds forms part of the factory for the purposes of the act if it is intended, even if in part only, for the use of manual workers employed in the factory,\footnote{Luttman v. Imperial Chemical Industries Ltd., [1955] 1 Weekly L.R. 980.} but not if it is used solely by managerial staff.\footnote{Thomas v. British Thomson Houston Ltd., [1953] 1 Weekly L.R. 67.} A separate workshop for the repair and maintenance of equipment used in the factory forms part of it,\footnote{Thorogood v. Van den Berghs and Jurgens Ltd., [1951] 2 K.B. 537.} but an office where no manual workers are employed does not.

**GENERAL SAFETY PROVISIONS**

The general safety provisions of the act are contained in Part II. Sections 12 to 15 of the act, dealing with the fencing or guarding of machinery, have given rise to the largest volume of case law and it is here also that some of the more significant changes in judicial interpretation may be found.

Five types of equipment must be securely fenced, namely:

1. Every flywheel directly connected to any prime mover and every moving part of any prime mover;\footnote{9 & 10 Eliz. 2, c. 34, § 12(1). A prime mover means every engine, motor, or other appliance which provides mechanical energy derived from steam, water, wind, electricity, the combustion of fuel or other sources. Id. § 176(1).}

2. The head and tail race of every water wheel and of every water turbine;\footnote{Id. § 12(2).}

3. Every part of electric generators, motors, and rotary converters;\footnote{Id. § 12(3).}

4. Every part of transmission machinery;\footnote{Id. § 13. Transmission machinery means every shaft, wheel, drum, pulley, system of fast and loose pulleys, coupling, clutch, driving belt, or other device by which the motion of a prime mover is transmitted to or received by any machine or appliance. Id. § 176(1).}

5. Every dangerous part of any machinery, other than those mentioned already.\footnote{Id. § 14(1).}

Fencing is not required\footnote{Except in the case of prime movers.} where the equipment is in such a
position or of such construction as to be as safe\textsuperscript{32} to every person employed or working on the premises as it would be if securely fenced.\textsuperscript{33} In determining whether any part of machinery is in such a position or of such construction as to be as safe as it would be if securely fenced no account must be taken of examinations of part of the machinery while it is in motion or of any lubrication or adjustment shown to be immediately necessary and which can be carried out only while the machine is in motion. No account must be taken either of lubrication or mounting or shipping of belts undertaken in respect of machinery used in certain processes specified in ministerial regulations\textsuperscript{34} as requiring these operations to be undertaken while the machinery is in motion. These lubrications, adjustments, etc., may, however, be undertaken only by male persons over the age of eighteen.\textsuperscript{35}

The machinery referred to above must be securely fenced and the act does not circumscribe the duty by reference to practicability or reasonability. Thus, if a piece of machinery cannot be securely guarded and still retain its commercial usefulness, then a factory occupier who uses this equipment (by definition, not securely guarded) will be absolutely responsible for any injury that may result to an operative.\textsuperscript{36}

While all flywheels, prime movers, electric generators, and transmission machinery must be securely guarded (unless safe by position or by construction), other machinery need be guarded only insofar as it is “dangerous.” Whether or not a part of machinery is dangerous depends ultimately on whether injury was foreseeable. In the recent case of Close v. Steel Co. of Wales, Ltd.\textsuperscript{37} Lord Guest defined this term as follows: “I take

\begin{itemize}
\item \textsuperscript{32} In Hodkinson v. H. Wallwork, Ltd., [1955] 1 Weekly L.R. 1195, transmission machinery nine feet above the ground was held not to be in such a position as to be as safe as if it were fenced. Similarly, the fact that a piece of machinery is accessible only if a ladder is used does not bring it within the scope of the exception clause. Butler v. Glacier Metal Co., [1924] unreported.
\item \textsuperscript{33} It has been suggested that in deciding whether or not a piece of machinery is by position or by construction as safe as if it were securely fenced the test of foreseeability has to be used in the same way as in determining the dangerous nature of a piece of machinery. Cf. REDGRAVE, FACTORIES ACTS 39 (20th ed., Fife and Machin, 1962).
\item \textsuperscript{34} Samuels suggests that this exception will only free the occupier from a criminal prosecution without affecting, however, his civil liability. SAMUELS, FACTORY LAW 58 (6th ed. 1957).
\item \textsuperscript{35} The Operations at Unfenced Machinery Regulations, 1938. S.R. & O. 1938, No. 641.
\item \textsuperscript{36} 9 & 10 Eliz. 2, c. 34, § 15.
\item \textsuperscript{37} John Summers & Sons Ltd. v. Frost, [1955] A.C. 740.
\end{itemize}
the test whether a part of a machine is dangerous from the dictum of du Parcq, J., in *Walker v. Bletchley Flettons, Ltd.* as qualified by Lord Reid in *John Summers & Sons, Ltd. v. Frost* whether it might be "a reasonably foreseeable cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur."

The fact that an accident has taken place which could have been prevented by a guard on the machine does not necessarily prove that the machine is dangerous and should have been guarded, though it may be difficult to disprove the presumption of its dangerous propensity for the future. The court will have to consider whether the injury was foreseeable and, in doing so, the judge will consider possible dangers to an average worker, one perhaps not too safety-conscious, but nevertheless not inclined to reckless behavior. What one need not provide for is some completely reckless act on part of a worker.

Once it has been proved that a part of a machine is dangerous it becomes the occupier's duty to insure that the machine is securely fenced. The courts have used the same test (i.e., that of foreseeability) in deciding whether a guard is secure as that employed by them in determining whether a part of machinery is dangerous. Fencing is secure only if it effectively removes the danger against which the guard has been provided. No guard is, of course, absolutely secure in the presence of a reckless worker unwilling to heed obvious danger. Law will therefore consider the guard to be secure if, in all foreseeable circumstances, it will protect workers against the risks which are foreseeable when using this part of machinery. We reach therefore once more the conclusion that proof of injury to a workman is not conclusive evidence that a dangerous part of machinery has not been securely fenced. Not only may the court hold that the part in question was not "dangerous" and thus did not require fencing because injury was not foreseeable, but even where injury was foreseeable an action by an injured worker.

may yet fail if the court is satisfied that it was not foreseeable for anyone to get hurt with the existing guard in position.

The next point to consider is against what kind of hazard the worker is to be protected. Post-war case law on this issue has passed through three stages. The earliest attitude was that "the purpose of a guard is to keep the worker out and not that of keeping the machine or its products in." This meant that a guard had to be so designed that it prevented direct physical contact between the body of the operator and the dangerous part of the machine, but that the guard need not be designed so as to prevent parts of the machine or of materials used in the machine from flying out and hitting the operator. In the early 'fifties in a number of decisions the Court of Appeal altered its approach and held that to be secure a guard had to protect the worker against all foreseeable risks of injury; and if it was foreseeable that parts of the machine might break and strike the operator, then the guard had to be so designed as to prevent this from happening. In two cases, decided quite recently, the House of Lords has overruled the Court of Appeal and has restored the earlier position. Their Lordships were by no means happy about the implications of their decision which was based largely on section 14(2) of the act which provides:

"In so far as the safety of a dangerous part of any machinery cannot by reason of the operation be secured by means of a fixed guard, the requirements of sub-section (1) of this section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

This is a harmless enough sounding provision aimed clearly at permitting the use of automatic guards where this is a more satisfactory safety device than the use of fixed guards. The reader will notice, however, that the automatic guards are said

44. "If it is known—or might reasonably be anticipated—that parts of the machine might fly out or break off and do injury, then those parts are dangerous and must be fenced." Per Denning, L.J., in Hewnham v. Taggart, Morgan & Coles, Ltd. (1956) unreported. See also Dickson v. Plack, [1953] 2 Q.B. 464.
46. "The argument has shown how technical and artificial the question of protection under section 14 has become and how illusory in certain respects the words 'Every dangerous part of any machinery . . . shall be securely fenced.' have now become." Per Holroyd Pearce, L.J., in Eaves v. Morris Motors, Ltd., [1961] 3 Weekly L.R. 657, 694.
to satisfy the requirements of subsection (1) if they prevent the operator from *coming into contact* with the dangerous part of the machinery. Since section 14 cannot be interpreted disjunctively, the House of Lords drew the conclusion that the general requirements of the section are fulfilled if a guard is provided which prevents direct contact between worker and machine, *i.e.*, which keeps out the worker, even if it does not keep in the machine.

In respect of the danger from flying parts of material, the House of Lords in their decisions relied on section 14(6) of the act which authorizes the Minister of Labour to make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine. It was argued that if the general duty to fence embraced also this type of situation there would have been no need to provide for it separately by regulations.

It should be noted in passing that while an employee injured by a part of machinery or by particles of material which have flown out and hit him has no redress at present under the Factories Act, he may well be able to claim damages for common law negligence if the injury was one which his employer should have anticipated and therefore should have guarded against.47

Clearly the present position as to the occupier’s duty to fence is a most unsatisfactory one. The duty, as interpreted by the courts, is narrower than what Parliament must have intended when enacting it. This limited interpretation has led to further inconsistencies. In a recent case48 it was held that where the potentially dangerous part of a machine was inaccessible to the operator so that his body could not come into contact with it, there was no duty to guard that part, notwithstanding that an employee could suffer injury through a tool held by him coming into contact with the dangerous part of the machine. It was strenuously argued on behalf of the plaintiff that a hand-tool was an extension of the operator’s body and comparisons were drawn with the case where some part of the operator’s clothing might come into contact with the piece of machinery; but, while at least one learned judge believed that a part of machinery should be treated as dangerous if there existed a possibility that

it might come into contact with the worker's clothing, the court was not prepared to extend this situation to where a tool was concerned.

The machinery which has to be securely guarded includes only those machines which form part of the factory's equipment; it does not include machinery produced in the factory for sale. Thus, an electric fan used in a factory will clearly have to be securely guarded while it is being tested, but not a similar fan which has been made in the factory and which is being tested before shipment. As before, however, the employer's common law duty to provide a reasonably safe system of work will extend to such a situation.

It has been pointed out already that where it is impossible to guard securely a dangerous part of machinery without making the machine practically useless the machine cannot be used without the occupier committing a breach of the act. The Minister of Labour may, however, make regulations modifying or extending any of the safety provisions of the act. Regulations of this kind may be made in respect of all factories or in respect of any one specified class or description of factories. Some of the regulations made under this section specify the type of guard to be provided for particular dangerous parts of machinery and where such a guard has been provided, the factory occupier has satisfied the requirements of the act, even if this guard does not securely guard the dangerous part. The Minister is thus in effect enabled to create exceptions to the absolute nature of the duty to guard. The regulations apply only in

49. Sellers, L.J., In the House of Lords Debate on § 14(2) of the act, Viscount Hailsham shows surprise that anyone could doubt that clothes count as part of the person for the purpose of this section. 248 H.L. Rep. 73, col. 1350 (25th April 1963).
52. 9 & 10 Eliz. 2, c. 34, § 76.
53. E.g., Woodworking Machinery Regulations, 1922 S.R. & O. 1922 No. 1196 Horizontal Milling Machines Regulations, 1928 S.R. & O. 1928 No. 548. These and many similar regulations were made under § 60 of the Factories Act, 1937, and are now continued in force by virtue of § 183 and the Sixth Schedule to the 1961 act.
respective of the dangerous parts enumerated in them; other dangerous parts of the same machinery will have to be guarded in accordance with the general provisions of the act.\(^{55}\)

All guards provided in pursuance of the safety provisions of the act must be of substantial construction and must be constantly maintained\(^{56}\) and kept in position while the parts requiring to be guarded are in motion or in use, except where the parts are necessarily exposed for examination and for any lubrication or adjustment shown by the examination to be immediately necessary.\(^{57}\) "In motion or in use" means in motion or in use for the purposes for which the machine is intended\(^{58}\) and does not refer to a situation where the parts are in motion for repair purposes or where they are being moved by hand.\(^{59}\)

Any person who sells or lets on hire for use in a factory in the United Kingdom any machine intended to be driven by mechanical power which does not contain the guards detailed in section 17(1) is guilty of an offense and liable to a fine not exceeding £200.\(^{60}\) Such a seller of machinery will, however, not be liable as a joint tortfeasor with the occupier of the factory to a worker who has suffered an injury because of the absence of the appropriate guard.\(^{61}\)

Hoists or lifts used in a factory must be of good mechanical construction, sound material and adequate strength, and be properly maintained.\(^{62}\) The last mentioned phrase implies that they must be kept in a continuing state of working efficiency.\(^{63}\) Hoists and lifts must be thoroughly examined by a competent person at least once every six months and a report on the exam-

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56. "Maintained" means maintained in an efficient state, in efficient working order, and in good repair. (§ 176) This includes supervision to insure that operatives properly adjust the guards provided. Cakebread v. Hoppings Brothers (Wetstone) Ltd., [1947] K.B. 641.
57. 9 & 10 Eliz. 2, c. 34, § 16.
60. 9 & 10 Eliz. 2, c. 34, § 17(2).
61. Biddle v. Truvox Engineering Co., [1952] 1 K.B. 101. There exists, however, a general common law duty for manufacturers of equipment, where the equipment is unlikely to be examined before being used, to exercise due care so that the equipment should be safe for those likely to use it. Cf. Haseldine v. Daw & Son Ltd., [1941] 2 K.B. 343; Mason v. Williams & Williams Ltd. and Thomas Turton & Sons, Ltd., [1955] 1 All E.R. 808. See also MUNKMAN, EMPLOYERS' LIABILITY AT COMMON LAW 129 et seq. (4th ed. 1959).
62. 9 & 10 Eliz. 2, c. 34, § 22.
ination must be entered in the general register kept in the factory. Where it is found that the hoist or lift cannot be safely used without certain repairs being undertaken, the person making the examination must within twenty-eight days send a copy of his report to the district inspector of factories. Every hoistway or liftway shall be efficiently protected by a substantial enclosure fitted with gates and this enclosure must be so constructed as to prevent, when the gates are shut, any person from falling down the liftway or from coming into contact with any moving part of the lift or hoist. The act contains further safety rules applying specifically to hoists and lifts used for carrying persons.

All floors, steps, stairs, passages, and gangways shall be of sound construction and properly maintained and shall, so far as is reasonably practicable, be kept free from any obstruction and from any substance likely to cause persons to slip. The reference to "sound construction" is to be interpreted as dealing with the structure of the surface of the floor and in deciding whether a floor complies with the requirements of the act, due notice must be taken of the purpose which the premises are intended to serve. "Properly maintained" is related to "sound construction" and means that the floor must not only be solidly constructed but must be maintained in this condition. The requirement that floors, etc., must be kept free from obstructions and free from slippery substances was introduced by the 1959 act mainly because the earlier phrasing of this section implied that a slippery floor did not constitute a breach of the act since it was not necessarily of unsound construction. The occupier's duty is restricted by the inclusion of the phrase "so far as is reasonably practicable." This phrase has introduced the principle of a balance of risk inasmuch as the court has to compare the likelihood of an employee suffering injury and the likely gravity of such an injury with the cost and inconvenience of taking effective steps to prevent the floor from being slippery.

64. 9 & 10 Eliz. 2, c. 34, § 22(2).
65. Id. § 22(3).
66. Id. § 22(4).
67. Id. § 23.
68. Id. § 26.
72. E.g., Braham v. J. Lyons & Co. [1962] 1 Weekly L.R. 1048, held that this section did not imply that a floor must be kept absolutely free at all times from...
The position under the act does not differ significantly from the position at common law where the employer is already under an obligation to take all reasonable steps to protect his employees from injury. This was interpreted in *Latimer v. A.E.C. Ltd.* as justifying the taking of some risks where the cost of making the floor absolutely safe would have been the loss of a night's work and pay by all the workers on the night shift.

Staircases must be provided with substantial handrails and openings in floors must be securely fenced except where the nature of the work renders this impracticable. All ladders must be soundly constructed and properly maintained. It should be noted that these obligations, unlike those referred to in the preceding paragraph, are absolute ones, and the occupier of the factory will not escape liability if he has taken all practicable steps without, however, achieving the result postulated in that section.

There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there. This section of the act deals in general terms with means of access, while the preceding section dealt with specific means of access, e.g., gangways and staircases. We have noted already that in the section dealing with specific means of access the employer's duty was an absolute one, while the present section calls upon him to do what is reasonably practicable. Prior to 1959 much learning was spent on distinguishing between the means of access to a place where a person has to work and the place of work itself, since the occupier's duty to provide safe conditions applied to the means of access only. Since 1959 both the means of access and the place of work have to be safe. It should be further observed that the occupier's obligation exists in respect of "any person" who has to work somewhere within the factory and embraces slippery substances but that merely all reasonable measures must be taken to keep it free.

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73. 9 & 10 Eliz. 2, c. 34, § 28(2).
74. *Id.* § 28(4).
75. *Id.* § 28(5).
77. 9 & 10 Eliz. 2, c. 34, § 29(1).
thus not only the occupier's own employees but also independent contractors and their servants. 80

The duty under section 29 is not an absolute one and the occupier may show by way of defense that it was not reasonably practicable for him to provide safe means of access. 81 What is or is not reasonably practicable depends ultimately again on a comparison of the degree of risk incurred if nothing is done with the cost or inconvenience of countering it. Some difficulty has arisen in interpreting "providing and maintaining" a safe access, especially as to whether this implies a continuing duty. 82 The occupier is expected to use a system which will insure that the safety of the means of access is maintained, but it is not reasonably practicable to expect of him arrangements which will effectively guarantee the safety of the means of access at any one point of time. It is now generally agreed that where the means of access have become temporarily unsafe because of the presence of some transient obstruction, 83 no breach of the occupier's duty has taken place. The degree of safety of the means of access depends on the principle of foreseeability; means of access are safe if they are secure in all foreseeable contingencies, but lack of safety in an unforeseeable contingency will not constitute a breach of duty.

Finally, it should be noted that a means of access need be safe only if it provides access to a place of work. 84 Thus, where it provides access to a works canteen, for instance, the section would not apply, though an employee injured in such a place may have redress at common law.

Where any person has to work at a place from which he is liable to fall a distance of more than six feet six inches, then, unless the place is one which affords secure foothold and, where necessary, secure handhold, means shall be provided so far as is reasonably practicable, by fencing or otherwise, for insuring his safety. 85 In Wigley v. British Vinegars, Ltd. 86 the House of Lords held that a soundly constructed ladder provided both secure foothold and handhold for an experienced window-cleaner

85. 9 & 10 Eliz. 2, c. 34, § 29(2).
even though he, because of the nature of his work, was unable to use the handhold.

The act contains further general safety provisions in respect of explosive or inflammable dust and gas, steam boilers and steam and air receivers, and means of fire escape.

**SPECIAL SAFETY PROVISIONS**

Part IV of the act deals with Health, Safety and Welfare (Special Provisions and Regulations). Mention will be made here of the provisions concerning the removal of dust or fumes and those concerning the protection of eyes in certain processes.

In every factory in which in connection with any process carried on there is given off any dust or fume or other impurity of such a character or to such an extent as to be likely to be injurious or offensive to the persons employed or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust, fume or other impurity and to prevent it accumulating in any workroom.

The occupier must take steps to remove dust, etc., in two cases, namely (1) where the dust is dangerous or offensive or (2) where a substantial quantity of any dust, even though harmless by itself, is generated. As far as the first leg of the section is concerned, the occupier's duty to remove the dust arises only where he knows or should have known of its dangerous or offensive propensity. The dust must be dangerous in general and the fact that it happens to be dangerous to a particular employee who suffers from some allergy to it is not enough. In determining whether dust or fumes are offensive some regard has to be paid to the special conditions of the industry, meaning that people employed in a particular industry may have to put up with fumes which would clearly be treated as offensive in other industries. The second leg of the section deals with the situation where to the knowledge of the occupier a substantial

87. 9 & 10 Eliz. 2, c. 34, § 31.
88. Id. §§ 32-34.
89. Id. §§ 35-38.
90. Id. § 40 et seq.
91. Id. § 63.
quantity of dust is given off in the process and does not cover the situation where the quantity of dust generated is a small one but the occupier has allowed the dust to accumulate.

The occupier in these cases has a duty to take all "practicable measures" to protect the persons employed against the inhalation of the dust. What is "practicable" depends on the state of knowledge at that point of time and an occupier who provides masks which are considered to be adequate for the purpose will not become liable if it is later discovered that these masks do not provide adequate protection but that a different type of mask, previously unknown, would have done so.

Section 65 empowers the Minister of Labour to prescribe by regulations certain factory processes which involve a special risk of injury to the eyes from particles or fragments thrown off in the course of the process. Occupiers employing workers on any of these prescribed processes must provide suitable goggles or effective screens to protect the eyes of the persons working on these processes.

The courts have had occasion to consider what is meant by "providing" goggles. It has been held that it is not enough to have goggles available on the premises, e.g., hanging in the foreman's office, but that they must be placed somewhere where they are easily accessible when wanted or that clear instructions are issued to the workman as to where they are kept.

The "suitability" of the goggles provided depends on the process in which they will be needed but it has been held that the addition after "goggles" of the words "to protect the eyes of the persons employed" does not mean that the occupier's duty is an absolute one but merely represents a descriptive statement in respect of the goggles.

The duty to provide goggles exists only vis-à-vis the occupier's own employees and the employees of independent contractors who happen to be working in the factory cannot hold

97. "Practicable measures" include, however, the taking of steps to induce workmen to wear the masks provided for them. Crookall v. Vickers-Armstrong, Ltd., [1955] 1 Weekly L.R. 659.
the occupier liable if their own employer has failed to provide goggles.¹⁰¹

THE NATURE OF THE OCCUPIER'S LIABILITY

The various duties regarding safety in a factory are placed by the act on the "occupier" who may, but need not, be the owner of the factory. The act contains no definition of an occupier, but we may follow Lord MacLaren¹⁰² who said: "Occupier plainly means the person who runs the factory, regulates and controls the work that is done there." It is quite possible for different parts of the same factory building to be "occupied" by different persons who would then have to accept responsibility for the observance of the safety provisions in their part of the building.

An action brought by an injured workman who claims that his injury was caused by the employer's failure to carry out the safety provisions of the act is basically an action for negligence where, however, the standard of care which the defendant is alleged to have failed to observe is not the common law standard but that specifically laid down by the act. It is therefore particularly important to examine carefully the terminology of the act. This has to be interpreted in the light of the general purpose of the act,¹⁰³ which is that of preventing accidents to workmen. It is true, of course, that an occupier who acts in breach of any of the provisions of the act commits an offense for which he may be prosecuted by the inspector of factories irrespective of whether an injured worker will also bring a civil action for damages. Indeed, a breach of the provisions of the act constitutes an offense even if no one is injured. It has been argued that since a breach of one of the provisions of the act constitutes an offense, in the event of doubt as to the meaning of a particular phrase that sense should be chosen which would avoid criminal liability¹⁰⁴ and since such a phrase would have to be given the same meaning in criminal and in civil proceedings, the same principle should also apply in a civil action. This method of interpretation might however clash with the general purpose of the act, i.e., to protect workmen, and the courts

have therefore preferred to apply the normal principles of interpretation appropriate to penal statutes only where all other rules of interpretation have failed.\textsuperscript{105}

The meaning attached by the courts to "dangerous" parts and to "secure" fencing and "safe" means of access have been discussed already. The occupier is instructed by some sections\textsuperscript{106} of the act to take such measures as are "practicable." This means that he is called upon to do what is feasible and he is not expected to take precautions against dangers which are not commonly known,\textsuperscript{107} or to use safety devices which at that time have not yet been invented. "Taking practicable measures" includes, however, a duty to supervise and enforce the use of the appliances provided. Where the act asks that certain things be done if this is "reasonably practicable,"\textsuperscript{108} the standard of care that is thrust upon the occupier is less stringent than where there is no reference to reasonableness. To do what is "reasonably practicable" means doing what in the circumstances appears necessary or, alternatively, what a reasonable employer would consider desirable in the situation.\textsuperscript{109} Certain steps which are practicable in the sense that there do not exist any technical difficulties in implementing them, may not be reasonably practicable in that a reasonable occupier would consider the risk of injury too remote to warrant the installation of some expensive or complicated safety devices.\textsuperscript{110} We have shown already that this standard of care is similar to that imposed on an employer at common law.

Hoists and lifts must be of "sound construction" and the same criterion is also applied in respect of passages, etc. Earlier decisions argued that something could not be soundly constructed in a functional vacuum, inasmuch as soundness of construction always relates to the purpose which the thing is intended to serve.\textsuperscript{111} Later decisions have followed a different line of approach and the position today appears to be that "sound construction" is a synonym for "well made" so that something (e.g., lifting tackle) may be of sound construction although totally

\textsuperscript{106} E.g., §§ 28(4), 30(8), 31(1) (2) (4), 32(2).
\textsuperscript{108} E.g., 9 & 10 Eliz. 2, c. 34, §§ 22, 23, 28(1), 29(1) (2).
unsuitable for the purpose to which it is being applied. Similarly, where the act imposes a duty that something shall be “properly maintained,” this relates only to the general physical condition (e.g., of floor boards in a passage) and does not call for the removal of obstacles that may accumulate on the surface.

The House of Lords have recently drawn attention to the ambiguity of the phrase “properly maintain” which may either imply an absolute duty to keep something in a proper and efficient state or may merely impose an obligation of servicing the thing in question. Of these two possible interpretations their Lordships preferred the former one.

**BURDEN OF PROOF**

In an action for breach of statutory duty as in any other action for negligence the plaintiff has to prove not only that there existed a duty and that it has been broken but also that there exists a definite causal link between the breach of that duty and the injury which he has sustained. It is not of course necessary to show that the breach of duty was the sole cause of the injury, but it must at least have materially contributed towards it. This point is particularly important where the plaintiff has suffered injury which he would have avoided if the occupier had provided the safety appliance demanded by the act. It is not enough for the plaintiff to prove his injury and the absence of the safety device; he must also satisfy the court that he would have used the device if it had been provided. Where the plaintiff has made it clear in the past that he would not use the particular type of device (e.g., goggles or a safety belt), he cannot subsequently claim that his injury was caused by the absence of the device.

Proof of a causal link between the absence of a safety device and the plaintiff's injury is, of course, always difficult and the court will not insist on direct evidence, such as an outright refusal by the occupier of a request by the plaintiff to be pro-

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vided with a particular type of device. In some cases the court will be satisfied with proof by inference\textsuperscript{118} or with proof based on balance of probability.\textsuperscript{119} This is perhaps particularly important where a worker has contracted a disease, the effects of which become noticeable only some years later, by which time he may have changed his employment. The court will then have to be satisfied that the absence of safety devices (\textit{e.g.}, exhausts to remove dangerous dust) in the plaintiff's earlier employment has materially contributed\textsuperscript{120} to the disease from which he is now suffering.

While clearly a breach of one of the safety provisions of the act will entitle an injured worker to claim damages,\textsuperscript{121} it is open to doubt whether a similar cause of action will accrue where one of the welfare provisions of the act has been broken. This depends on whether, in the opinion of the court, the particular provision was intended to grant a right of action to a class of persons to whom the plaintiff belongs. This question was discussed at length, though not with particular reference to the Factories Acts, in \textit{Solomons v. R. Gertzenstein, Ltd.}\textsuperscript{122} Somervell, L.J., quoted with approval a statement made by Atkin, L.J., in \textit{Phillips v. Britannia Hygienic Laundry Ltd.}:\textsuperscript{123} "Therefore, the question is whether these regulations, viewed in the circumstances in which they were made and to which they relate, were intended to impose a duty which is a public duty only or whether they were intended, in addition to the public duty, to impose a duty enforceable by an individual aggrieved." Somervell, L.J., concluded that there did not exist a rule of thumb formula that could be applied but that it was necessary in each case to consider the act. Where the act provides remedies of its own for a breach of certain of its provisions (\textit{e.g.}, fines), the question is whether these remedies exclude the possibility of a civil action by the injured party. This has to be answered by reference to

\begin{itemize}
\item \textsuperscript{118} [W]here you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulations was not connected with the accident, was not the cause of the accident." Lord Goddard, C.J., in \textit{Lee v. Nursery Furnishing Ltd.}, [1946] 1 All E.R. 387, 390 (C.A.).
\item \textsuperscript{120} Gardiner v. Motherwell Machinery & Scrap Co., [1961] 1 Weekly L.R. 1424 (H.L.).
\item \textsuperscript{121} Groves v. Wimborne (Lord), [1898] 2 Q.B. 402.
\item \textsuperscript{122} [1954] 3 Weekly L.R. 317.
\item \textsuperscript{123} [1923] 2 K.B. 832, 842.
\end{itemize}
the overriding purpose of the act. Where the act provides no specific sanctions for the breach of its provisions, the plaintiff's position would appear to be an even stronger one.

Applying this reasoning to the problem before us we find that the courts have in many cases allowed a cause of action to a plaintiff who claimed that he had suffered injuries because of a breach by the defendant of one of the health or welfare provisions of the Factories Act. This is so, notwithstanding the fact that sections 8 and 9 contain specific provisions regarding the enforcement of Part I of the act dealing with health.

Not all health and welfare provisions will of course be dealt with in the same manner. "Welfare" may at times include elements of safety, while other welfare provisions appear to have no direct relevance to safety issues. It is necessary therefore to consider each section independently and on its merits to determine whether it is primarily intended to secure safety or welfare. This is particularly important where the effects of the particular section have not yet been judicially considered.

THE OCCUPIER'S DEFENSES

The occupier is unable to employ the defense of volenti non fit injuria since the very purpose of the act is to protect workmen against foreseeable risks. Of course, the worker himself must also consider his own safety and, if he were to act in open disregard of his own safety, the employer may plead contributory negligence. If it is then proved that while the employer has failed in his duties under the act, the plaintiff has also failed in his duty to look after his own safety, the court will apportion the loss suffered by the plaintiff between him and the defendant in proportion to their respective degrees of negligence. It is feasible that the employer's breach of duty may


125. *E.g.*, 9 & 10 Eliz. 2, c. 34, § 60 (sitting facilities). "Some of the welfare provisions such as section 44 (under the 1947 Act) which deals with facilities for sitting, seem to have purely welfare outlook; others, such as section 45 (1937 Act) which deals with first aid, seem to impinge substantially on matters of health and safety." Clyde, L.P., in Reid v. Westfield Paper Co., [1957] S.C. 218, 225.

126. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 5, c. 28.
be treated as a mere nominal breach so that the plaintiff's share in the damage could be assessed at 100%.

The occupier's duties under the act are personal ones and he cannot discharge these duties by delegating them to another person.\textsuperscript{127} If he delegates his duties — however competent the person may be to whom delegation has taken place — the occupier will remain liable if the duty has not been carried out.\textsuperscript{128}

It is sometimes contended that delegation is a defense where the duty has been delegated to the plaintiff himself.\textsuperscript{129} In point of fact, even in these circumstances there will be no valid defense of delegation but the occupier can clearly plead contributory negligence. Whether or not this plea will succeed will depend on the reasonableness of the occupier's action. If the plaintiff is a foreman or a skilled and experienced worker to whom it is reasonable to entrust the performance of these duties, the employer will succeed, but not if the plaintiff is a person lacking the necessary experience for the task entrusted to him (e.g., the fitting of a guard to a dangerous part of a machine).

CONCLUSIONS

Writing some four years ago, Professor O. Kahn-Freund committed himself to the following statement:\textsuperscript{130} "Today there can hardly be any country in which the civil liability of the employer for factory accidents — and normally this means the liability of the insurance company — goes as far as it does here." While this may well be true of the overall position, \textit{i.e.}, taking together the remedies at common law and under the Factories Act, it is not true if the Factories Act is considered by itself. The judges in applying the provisions of the act are bound by the text of the act and by the interpretation given to it by their predecessors. A series of recent decisions, most of which have been referred to already in this paper, shows clearly that what one must assume to have been the intention of the legislature in devising the occupier's duty under section 14 of the act has been seriously whittled down by the courts.

\textsuperscript{127} "But in truth the employer's obligation . . . is personal to the employer and one to be performed by the employer \textit{per se} or \textit{per alios}.” Lord Wright, in Wilsons & Clyde Coal Co. v. English, [1938] A.C. 57, 80.

\textsuperscript{128} Cf. Jackson, The Delegation by Employers of Their Statutory Duties, 8 INDUSTRIAL L. REV. 181 (1953).

\textsuperscript{129} Mulready v. Bell, [1953] 2 Q.B. 117.

\textsuperscript{130} LAW AND OPINION IN ENGLAND IN THE TWENTIETH CENTURY 262 (Ginsberg ed. 1959).
In order that the occupier be liable for an injury suffered by a workman it is necessary for the workman to prove (a) that there existed a dangerous part of machinery, (b) that this part was not securely fenced and (c) that the injury resulted directly from the absence of a guard. We have shown already that the test of foreseeability is employed in determining whether a part is dangerous. If "in the ordinary course of human affairs danger could not reasonably be anticipated from the use (of the part) unfenced" the part is not to be treated as dangerous and the occupier will not be liable if the plaintiff has sustained injury.

It would appear logical to proceed from this point and to argue that once it has been shown that a part of machinery is dangerous "the statutory obligation to see that it is securely fenced means that it must be so fenced as to give security from such dangers as may reasonably be expected in the working of the machine." Thus, if the danger involved is that of parts of the machine flying out, the guard should be such as to prevent these particles from hitting and injuring the workman. The two considerations which have induced the courts to adopt a more restrictive interpretation have been discussed already. The interpretation which the courts have attached to section 14(2) of the act clearly leads to the conclusion that the danger against which the fence is intended to guard the operator is merely that of direct contact with the dangerous part of the machine.

Similarly, section 14(6), which authorizes the Minister to make regulations in respect of any machine or process "requiring the fencing of materials or articles which are dangerous while in motion in the machine" has been understood as meaning that in the normal course of events, i.e., in the absence of specific regulations, materials in the machine need not be guarded.

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132. Id. at 326.
133. Cf. the views expressed by Lord Morton of Henryton in Hamilton v. National Coal Board, [1960] 2 Weekly L.R. 313, 334-35. Note, 76 L.Q. Rev. 478 (1960) suggests that if the act had intended a fence to guard the operator against flying parts, it would have used the expression "sieve" rather than "fence."
134. Sparrow v. Fairey Aviation Co., [1962] 3 Weekly L.R. 210 (lathe operator injured when his hand was flung against the check of the lathe. This was caused when a small hand tool held by him came into contact with the rotating jaws of the lathe. Direct contact of the operator's hand with the jaws was im-
Once it has been accepted that a “secure” fence need guard the operator only against direct bodily contact with the dangerous part of the machine, further consequences follow quite logically.

(1) There is no need to guard a dangerous part against contact with a hand-tool held by the worker, provided that it is impossible for the worker’s hand to come into direct contact with the part of the machine.\(^ {135} \)

(2) It is at least open to doubt whether the occupier would be liable if the worker is injured by the fence being thrown at him as a result of the disintegration of the machine guarded by it. The writer doubts whether the courts today would follow *Rutherford v. R. E. Glanville & Sons (Bovey Tracey) Ltd.*\(^ {136} \) where the Court of Appeal had held the occupiers liable when the plaintiff was struck by a guard which was displaced by a disintegrating carborundum wheel. The court held that since it was a foreseeable danger that the wheel might disintegrate, it should have been securely guarded not only against the possibility of direct contact but also so as to protect the worker from being hit by parts of it. In the light of the House of Lords decision in *Close v. Steel Company of Wales, Ltd.* it would appear that the *Rutherford* case would be differently decided if it came before the court today.

3. There exists a divergence of views as to whether machinery may be said to be dangerous within the meaning of section 14 through conjunction with or juxtaposition with the material on which the machinery is working. Some judges\(^ {137} \) favor the view that the presence of the material is not relevant for the purpose of considering whether a machine is dangerous, while a different view has been taken by others.\(^ {138} \) Both views were carefully summed up by Holroyd Pearce, L.J., in *Eaves v. Morris Motors, Ltd.*\(^ {139} \) While Holroyd Pearce, L.J., favored the

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possible because the jaws were covered by the metal discs on which the operator was working). This decision has overruled the earlier case of *Johnson v. J. Stone & Co. (Charlton) Ltd.*, [1961] 1 Weekly L.R. 849.

135. Ibid.


latter interpretation, he appears to have received little support from his fellow judges.

The defects of the law under the 1937 act (and retained under the 1961 act) have been clearly summed up by Holroyd Pearce, L.J., as follows:140

"Under the former Act141 dangerous machinery had to be fenced if danger might reasonably be anticipated from it.142 Now dangerous machinery is only required by section 14 to be fenced against danger of a particular and limited kind, namely danger from workmen coming into contact with the machine. There is no protection under section 14 against a class of obvious perils caused by dangerous machinery, namely perils which arise from a dangerous machine ejecting at the worker pieces of material or even pieces of the machinery itself. Thus, there is now left a gap which neither logic nor common sense appears to justify."

What has happened to the Factories Act is something which occurs frequently enough when the overgrowth of precedent tends to hide the original aim of the legislature.143 The position which we have reached now is clearly unsatisfactory and is one which the courts themselves view with considerable disquiet. The courts having been caught in the net of the logic of precedent cannot by themselves find a way out and it is up to Parliament to take the next step. Fortunately, the common law as so often before has proved more flexible and by relying on the principle of reasonableness has kept open a door for the litigant who is unable to obtain satisfaction under the act.

There exists general agreement that the present position is unsatisfactory, but the agreement ends at this point. There does not exist similar agreement on what should be done to rem-

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140. Id. at 664.
141. Factory and Workshop Act, 1901; 1 Edw. 7, c. 22.
143. Referring to the interpretation given by the House of Lords to § 14(2) of the act, Lord Denning said: "I am afraid one has to face the fact that it is a fault of the interpretation which has been put on it by this House sitting judicially, which is infallible, which never makes a mistake and which can never correct itself." 248 H.L. Rep. 73, cols. 1332-33 (25th April 1963).
edy the situation. This came out clearly when the present state of the law was debated in the House of Lords on 25th April 1963.

Lord Shepherd, who opened the debate, drew attention to the recent decisions of the House of Lords in its judicial capacity and pointed out that in 1960 out of 190,000 reported factory accidents no less than 2,500 were directly attributable to objects flying out of a machine, either parts of the machine or particles of the work which the machine was undertaking. He referred to the fact that mention of "direct contact" in section 14(2) had been included in the act for the first time in 1937 and that clearly no one at the time had appreciated the significance of this addition. The law had thus been changed inadvertently. He suggested that the 1961 act be amended so as to extend the duty under section 14 to all foreseeable accidents, whether caused by direct contact or by injury from flying parts and that the Minister of Labour be authorized to make regulations, where appropriate, allowing exemptions from the absolute duty in respect of particular types of machines. Lord Shepherd gained support from two of the Law Lords, i.e., Lords Denning and Evershed.

The government case was put by Lord Hailsham. He agreed that the present state of affairs was unsatisfactory but opposed legislation on the lines proposed by Lord Shepherd on two grounds.

1. To remove the offending words from section 14(2) of the act would be a retrograde step, as it would make impossible to use certain types of machinery, e.g., power presses, which cannot be guarded by mechanical guards of the traditional type.

2. Lord Hailsham agreed with another Law Lord (Lord Reid) who had spoken in the debate, that the main purpose of the Factories Act was not that of providing means to working people to claim damages for injuries suffered, but rather that of acting as a means of preventing factory accidents. Thus, the main criterion in considering possible changes in the act
should be “What is most likely to prevent accidents” rather than “What is going to make it most easy to collect compensation after they have happened.” Lords Hailsham and Reid argued that an amendment to the act on the lines suggested by Lords Shepherd, Denning, and Evershed would make it more difficult to decide whether a guard was a secure one as it would substantially increase the number of hazards against which the guard was to protect the operative.

Lord Hailsham suggested, therefore, that the flaws in the law which had been discovered should be remedied by a judicious use of the powers of the Minister of Labour to make regulations, both under section 14(6) in respect of the fencing of materials and under section 76(1) in respect of any machinery or process which could cause risk of bodily injury. He added the further information that regulations in respect of the fencing of abrasive wheels were shortly to be published in draft form and that the revision of the existing regulations dealing with woodworking machinery and the protection of eyes were under active consideration.

There the matter rests at present. Lord Shepherd’s motion was by the leave of the House withdrawn since its main purpose (i.e., the ventilation of grievances) had been fulfilled. What the debate has shown once again is the difficulty of legislating in precise terms for a variety of contingencies. Perhaps there is a great deal of truth in the point raised by Lord Reid that the prime purpose of the act is that of preventing accidents by laying down a code of safety provisions. If these tend to become so complicated that the most conscientious employer finds difficulty in observing them and thus risks a fine of up to £300 for each infringement, much of the value of the act has disappeared. As far as the position of the injured workman is concerned, could not his rights be adequately protected if the law relating to negligence were codified, even if in part only, with perhaps the principle of *res ipsa loquitur* made applicable to accidents of the type discussed in this paper?

150. *Id.* col. 1338.
151. “The advantages of regulations are that they can be adapted to the particular circumstances of each machine. They are precise and lay down absolute, unqualified requirements where absolute and unqualified requirements are appropriate and they can make less stringent provisions in cases of difficulty.” *Id.* col. 1355.
152. 9 & 10 Eliz. 2, c. 34, § 156(2).