Is there a disparity between the legislation and case law governing health and safety on the one hand and the public perception of health and safety on the other?

It's official: "the standing of health and safety in the eyes of the public," wrote the Prime Minister in October 2010[1], "has never been lower." Neither Mr Cameron nor anyone else gave the impression that this was a controversial statement; and it went without saying that he thought the system was too protective, rather than the reverse. Even the HSE acknowledges that health and safety has an image problem, and has set up a "Myth Busters Challenge Panel" to investigate some of the more ludicrous decisions taken in the name of health and safety[2].

But Mr Cameron could only say what he said in a country where workplace health and safety legislation has been a success. We should consider how far we have come. 100 years ago last autumn, on the morning of Tuesday 14 October 1913, an explosion tore through the Senghenydd coal mine and killed 440 people. Even though a previous explosion at the mine in 1901 had killed 81 miners, and despite several serious breaches of the Coal Mines Act 1911 being identified, the owners of the mine were fined just £10, and the manager, Mr Edward Shaw, £24.

Such a tragedy is, thankfully, unthinkable today; as is such a feeble reaction from the authorities. The Court of Appeal recently upheld a fine of £450,000 plus costs in *R v Watkins Jones*[3] following the death of a construction worker – even though the accident was caused mainly by the appellant's sub-contractor. Whilst serious accidents will never disappear, the UK has succeeded in greatly reducing their frequency and severity. In 2010, Great Britain had comfortably the lowest incidence of fatal injuries at work among the major economies of the EU: a rate of 0.71 deaths per 100,000 compares with 2.49 per 100,000 in France and 0.81 in Germany. Only Slovakia and the Netherlands performed better[4]. More than 80% of British employees think they work in a safe environment, more than anywhere in the EU except Norway and Germany[5]. In 1974 there were 651 fatal injuries to employees, compared to just

[1] In his foreword to a report by Lord Young of Graffham, *Common Sense, Common Safety*, 2010.
[2] See http://www.hse.gov.uk/myth/myth-busting/terms-of-reference.htm
[3] [2013] EWCA Crim 969
[4] See the HSE's report, *European Comparisons - Summary of GB Performance*, 2013 at p.2
[5] Ibid p.5

95 in 2012-13[6]. The UK statutory regime has been used as a model for several other common-law jurisdictions.

The origins of that statutory regime – centred on the Health and Safety at Work etc Act 1974 – might surprise some of its present-day critics. The 1974 Act emerged from the Robens Report of 1972 which concluded that "the first and perhaps most fundamental defect of the statutory system is simply that there is too much law… the sheer mass of this law, far from advancing the cause of safety and health, may well have reached a point where it becomes counterproductive." The 1974 Act replaced a piecemeal and unsatisfactory mass of industry-specific legislation. It sought to introduce a new approach based on risk, setting out broad goals and principles applicable to all workplaces, supported by codes of practice and guidance, and subject to HSE supervision and enforcement HSE. Since supplemented by regulations implementing numerous EU directives, the system imposes something close to strict liability on employers – thus placing on those best able to assess (and insure against) risk most of the cost of protecting workers' safety.

The system, in principle, is a good one. So why are we so hostile to health and safety law? Nobody seems very certain[7]. One part of the problem may simply be confusion: workplace health and safety law is often lumped together with the law of negligence, and personal injury litigation of any kind simply blamed on ambulance-chasing lawyers[8]. Another, perhaps, is the fact that most health and safety legislation now emanates from Brussels and is championed by the Trade Unions – neither being features likely to find favour with much of the mainstream press. Finally, economic change means there are now far fewer jobs in the UK in hazardous industries.

But the main reason is that the workplace health and safety system is a victim of its own success. Happily, relatively few UK workers now experience or even see a serious workplace accident. But almost all workers spend large and increasing amounts of time dealing with H&S processes: going through training and inspections, completing assessments, and reviewing policies. Meanwhile, H&S consultants (at least in the minds of most journalists) have become ever more meddlesome and risk-averse. This has little to do with the reality of health and safety law, but most people will not know that - there is indeed a gap between the substantive law and some inaccurate public perceptions of it. But the real disparity is between

[6] See http://www.hse.gov.uk/STATISTICS/history/index.htm
[7] Indeed Reading University Law School has set up a research group to investigate this very question.
[8] A conclusion favoured by Lord Young's report, op. cit. supra.

the low level of risk that most workers now face, on the one hand, and the disproportionately high level of administration that is routinely applied to deal with risk on the other.

This problem is being addressed. The report commissioned by the Government on health and safety law reform from Professor Löfstedt has concluded that the substantive law does not need to change[9]. His report does, however, recommend reforming the management of health and safety, describing it as "an unnecessary and bureaucratic paperwork exercise". Certainly Prof Löfstedt must be right that whilst all this administration might make workers slightly safer, it certainly encourages attempts to eliminate rather than manage risk. Perhaps most importantly, it gives a system intended to protect people an unfairly negative reputation.

The Government is rightly taking steps to address this disparity created by excessive administration. But we should be very wary of reducing the substantive protection afforded by the law to workers – and there have been some worrying recent developments in that direction. In *Baker v Quantum Clothing*[10] the Supreme Court considered s.29(1) of the Factories Act 1961, which provided that "every place at which any person has at any time to work… shall, so far as is reasonably practicable, be made and kept safe for any person working there." The Court held that "so far as reasonably practicable" imposed no wider duty on employers than the common law duty to take reasonable care: a break with at least one line of established case law[11] and a potential shift of the risk burden from employer to employee. Perhaps more significantly, s.69 of the Enterprise and Regulatory Reform Act 2013 has amended s.47 of the 1974 Act with effect from 1 October 2013. Employers will no longer be subject to civil liability for breach of the provisions of the Act or regulations made under it - save as specified by the Government in yet-to-be-published regulations. An employee injured at work may now only recover compensation from his employer if he can show negligence[12]. Unless, that is, he happens to work for an emanation of the state, since the underlying EU directives will doubtless remain directly enforceable by public-sector employees. Breach of H&S legislation may of course *evidence* negligence. But there is a real risk of a two-tier regulatory system emerging, split between provisions which are specified by

---

[9] See *Reclaiming health and safety for all: An independent review of health and safety legislation* by Professor Ragnar E Löfstedt of King's College, London

[10] [2011] UKSC 17

[11] See for example *Mann v Northern Electric Distribution Ltd* [2010] EWCA Civ 141, per Wilson LJ

[12] Even though the arguments in favour of a strict liability system were elegantly and succinctly set out as recently as February this year by Lord Drummond Young in the Court of Session in *Cairns v Northern Lighthouse Board and Calypso Marine Ltd* [2013] CSOH 22 at paras 36-38

the government as giving rise to automatic liability, and those which are not. There has been little public reaction to this change; even the unions hardly seem to have noticed.

As the procedural overload in health and safety law is corrected, so three new disparities now appear: one between the decreasing protection actually given to workers and the stable public perception of it; another, perhaps, between the protection provided in the public and private sectors; and a third between what are (according to the Government) the more or less important legislative provisions. None of these is desirable. Are we returning to a system where the costs of workplace accidents (absent negligence) are to be borne by either employees or the state rather than the employer? As the UK embarks on a generation of major infrastructure projects – rail and airport upgrades, nuclear power stations, fracking, and more – we might all think that health and safety legislation provides too much protection for the worker. In fact, the reverse could soon be true. Maybe we haven't come so far since 1913 after all: Mr Shaw might find the present-day situation strangely familiar.

James Williams

1 November 2013