



E-ISSN: 2790-068
P-ISSN: 2790-0673
IJLJJ 2022; 2(2): 95-102
Received: 26-06-2022
Accepted: 30-07-2022

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The meaning, importance of, and distinctions between S.2, S.3 and S.4 of the United Kingdom's health and safety at work act 1974

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Abstract

This article critically analyses sections 2, 3 and 4 of the United Kingdom's Health and Safety Act 1974 explaining and exposing some of their meanings and contradictions. Before these provisions, the health and safety at work ecosystem, statutes, policies and legislations were chaotic that both the worker, employee and the general public could not ascertain their precise duties, rights and responsibilities. Were the confusions cleared by the passage of these sections?

Keywords: Health and safety at work, lord robins committee, sections 2, 3 and 4 of health and safety at work 1974

Introduction

One of the problems pointed out by Lord Robins Committee was among other things, the fragmentation of legislations dealing with health and safety at work. Different statutes were dealing with variety of responsibilities and obligations "in varying degree of details and in apparently haphazard order"^[1]. There was no consistency as to what was the responsibility or obligation of whom, when and where. Both the employer and the employee could not form a comprehensive picture of the requirements that concern them"^[2]. The committee pointed out one of the main problems of the (then) statutes on health and safety at work, when it observed:

The present body of law comprises wide variety of detailed provisions on specific matters, spread over a number of main statutes and a host of subordinate statutory instruments. No central statement of general principles governs this conglomeration of prescriptions and prohibitions. There is no unifying or coordinating theme. As a result, people tend to look at particular parts rather than the whole, and fundamental objectives and obligations are obscured"^[3].

Presently, under the Health and Safety at Work Act 1974 (HSWA), the "basic and over-riding responsibilities of employers and employees"^[4] are clearly identified. The duties under the Act are (now) all embracing, "covering all workpeople and working circumstances"^[5], imposing not only obligations on employer and employee, but also on self-employed as well as controllers of premises. For instance, an employer has duties in relation to his employees, and any person who may be affected by his undertakings and the general public. A self-employed person has duties in his relations with his undertaking and persons who may be affected by his undertaking and the general public. Controller of non-domestic premises has

¹ See 'Safety and Health at Work, Report of the Committee on Health and Safety at Work (Robens Committee)', London H.M.S.O; 1972 (Cund. 5034, para. 126, p. 40.

² *Ibid.*

³ *Ibid*, para. 128, p. 41.

⁴ *Ibid*, para. 129, p. 41.

⁵ Para. 130, p. 41.

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duties in relation to persons who are not his employees, but who may visit or work in the premises for his own or their own undertakings. The main purposes of the Act as stated by Court of Appeal in *Westminster City Council v Select Managements Ltd* [6]. Are: to secure the health, safety and welfare of persons at work and to protect persons not at work against risks to health and safety arising in connection of the activities of persons at work, which risks are to be treated as including risks attributable to the manner of conducting an undertaking [7].

This article critically analyses the meaning, importance as well as the distinctions between sections 2, 3, and 4 of the HSWA 1974. It may be pointed out that, although generally speaking the breach of duties under sections 2, 3 and 4 may lead to prosecutions and conviction, they do not form part of general criminal law. They are regulatory offences requiring no *mens rea*. This means that they are strict liability offences. Another feature of the duties imposed under these sections is that, the duties are subjected to the defense of reasonable practicability under section 40. Thus, “[t]he onus of proving that it was not reasonably practicable to perform any duty imposed by sections 2, 3 or 4 is placed upon the accused” [8]. In addition, a conviction may be found for the breach of these sections by mere existence of the risks even though no harm (injury) is caused to anybody [9]. This feature distinguishes the test of liability under the regulatory offences from civil claim cases “where injury was a necessary element” [10]. It may also be pointed out that, although the Act has brought about many changes into the health and safety at work, particularly in sections 2-9, it did not completely replace or totally do away with the old system under previous statutes on health and safety law [11]. These statutes, as well as the Act would continue to co-exist together, only “to be progressively replaced by a new system of regulation and approved codes issued by the health and Safety Commission” [12].

Nature of Duties under Sections 2, 3 and 4

The general duties under sections 2, 3 and 4 impose obligations on the employer, self- employed and controller of premises “to do what is reasonably practicable to achieve

health and safety” [13]. For instance, section 2 generally requires “every employer to ensure so far as is reasonably practicable, the health, safety and welfare at work of his employees” [14]; section 3 requires “every employer” [15] and “every self-employed to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees)” [16] who may be affected by his undertaking are not exposed to risks to their health and safety. The controller of non-domestic premises by section 4, is duty bound “to take such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable” [17] that the premises, the access to and the egress from it are safe and do not expose those using them to risks to their health. The phrase ‘as far as is reasonably practicable’ is not defined under the HSWA and therefore its meaning which is a matter of court to define, varies from circumstance to circumstance, depending upon the fact and nature of each case. However, In *Edwards’s v National Coal Board* [18] it was held that, in order to determine the extent of duties qualified by the phrase of reasonable practicability: computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that if it be shown that there is a gross disproportion between them - the risk being insignificant in relation to the sacrifice- the defendants discharge the onus. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident...” [19].

The House of Lords in *Austin Rover Ltd. v Inspector of Factories*, [20] while interpreting the extent of duties under section 4(2), decided that where a duty is qualified by the phrase of reasonable practicability:

The risk of accident has to be weighed against the measures necessary to eliminate the risk, including the cost involved. If, for example, the defendant establishes that the risk is small, but that the measures necessary to eliminate it are great, he may be held to be exonerated from taking steps to eliminate the risk on the ground that it was not reasonably practicable for him to do so” [21].

It may be pointed out that, where Lord Goff’s test is to be applied, the more likelihood of eventuating of the risk, the heavier the burden to establish that it was not reasonably practicable for the defendant, in the circumstances to avert

⁶ [1985] 1 ALL ER 897

⁷ *Per Parker LJ. At 900.*

⁸ *Austin Rover Group Ltd. Inspector of Factories* [1989] 1 AC 619, per Lord Jauncey of Tullichettle at 633 [H]

⁹ *R v Board of Trustees of the Science Museum* [1993] 1 W.L.R.1171

¹⁰ G. Applebey, ‘From Butcher’s Cart to Postman’s Bicycle: An Overview of Risk and its various Aspects under Occupational Health and Safety law and for Injuries at Work in the United Kingdom’ (Bayreuth- Birmingham Conference on Risk and Law, March 2003), p. 2.

¹¹ Like the Factories Act 1969; Offices, Shops and Railway Premises Act 1963.

¹² G. Applebey, ‘British Legislation on Health and Safety at Work: a Reappraisal after Five Years’ (1979) Laval LR (Quebec, Canada) pp. 699-700.

¹³ B. Barrett, ‘Employers’ Criminal Liability under HSWA 1974’ (1997) 26 ILJ 149

¹⁴ See section 2(1) of the HSWA. (Emphasis added)

¹⁵ Section 3(1)

¹⁶ Section 3(2)

¹⁷ Section 4 (2) of the HSWA

¹⁸ [1949] 1 All ER 743

¹⁹ *Per Asquith LJ. at 747*

²⁰ n. 8 above.

²¹ *Ibid; per Lord Goff of Chieveley at 625.*

the risk; regard being had to the means and the cost of eliminating it. The prosecution shall prove the breach of the duty beyond reasonable doubt, after which the burden (persuasive or legal burden) shifts to the defendant to show, on preponderance of probability, that it was not reasonably practicable for him to take measures to avert the risk. However, this may be distinguished from the qualifications made under section 4(2), in which the controller of non-domestic premises, is required to take such “measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable” that the premises is safe and without risk to health. In *Austin Rover Ltd. v Inspector of Factories* Lord Jauncey determined whether the word “reasonable” refers to the measures to be taken by the controller of non-domestic premises or to the controller himself. Lord Jauncey pointed out that:

The middle words “reasonable” relates to the person and not measures. The question is not whether there are measures which themselves are reasonable...but whether it is reasonable for a person in the position of the accused to take measures with these aims. The emphasis is on the person of the accused. Thus while only one yardstick determines whether premises are safe at any one time the measures to ensure the safety required of each person having a degree of control may vary. Approaching the matter this way, content may be given to the words “so far as is reasonably practicable”^[22].

The burden on the prosecution to prove the breach of duty under section 4, unlike other sections, is threefold:

The prosecutor must first prove that the premises are unsafe and constitute risk to health”²³; that the accused persons have some degree of control of the premises and that it would be reasonable for any person having that degree of control “to take measures which would ensure the safety of the premises”^[24].

And then the burden shifts to the accused to prove, on preponderance of probabilities that it was not reasonably practicable for him to take such measures. It may be noted that, because what is ‘reasonably practicable’ is a question of fact, it does not have a fixed and precise standard or test. However, practically speaking, “it can involve increase levels of expenditure for more affluent employers”^[25]. It would appear that, the more likely that the risk could eventuate, (and the stronger the employer is) the higher the standard of what is reasonably practicable in his position.^[26] Some measures might be practicable to be taken but might not be reasonably practicable. For instance, if the measure was never taken in such type of the case, in such type of industry, and if doing that could cost huge expenditure (disproportionate to the risk to be averted), such measure,

although practicable might not be reasonably practicable in the circumstance^[27]. However, where it can be established that the accused could have averted the risk by following some safer practice or procedures at his disposal, he could not rely on the fact that, the procedure was never practiced in such type of undertaking^[28]. F.B. Wright pointed out some of the advantages of the phrase reasonably practicable when he said:

The standard of reasonable practicability allows the courts and tribunals to take into account the many different circumstances inherent in industrial operations. It is therefore a changing duty, particularly over time, and from undertaking to undertaking. It is flexible, fair and seeks to reduce the negative influence of strict liability...while fulfilling its objective in catching the thoughtless and the indifferent”^[29].

Meaning of Duties under Sections 2, 3 and 4

The duties imposed on the employer under section 2 are generally “directed to the protection of employees”^[30] and may be divided into two. Section 2(1) stated broadly the duty of every “to ensure, as far as is reasonably practicable, the health, safety and welfare at work of all his employees”. Section 2(2) mentions (though not exhaustively) what the employer is required to do in order to carry out the general duty of ensuring safe working system for his employees under section 2(1). Thus, it was pointed out that:

“The intention of s 2(1) is to impose upon employers the task of reviewing the totality of their operations, to ensure that, in every aspect, they are as safe as is reasonably practicable”^[31].

The duty on the employer under this section is for his employees, i.e. persons with whom he has relationship under contract of employment^[32] when they are ‘at work’. However, by the regulation under the Health and Safety (Training for Employment) Regulations 1990^[33], persons other than employers who are in the place of work for purposes of receiving training or work experience are, for the purposes of health and safety being considered as employees of the company providing the training.

The judicial interpretation of the phrase ‘at work’ was considered in *Bolton Metropolitan Borough Council v Malrod Insulations Ltd*^[34]. An inspector from the Environmental Health Services of Bolton Metropolitan

²⁷ See *ibid*; particularly 371.

²⁸ *Ibid*.

²⁹ n. 25 above, para. 4.07 p. 313.

³⁰ B. Barrett, n. 13 above, p. 149.

³¹ B. Barrett and R. Howells, *Occupational Health and Safety Law: Text and Materials* (London: Cavendish Publishing Co.2000), p. 3.

³² Section 53 (1) of the HSWA 1974.

³³ S.I. 1990 No. 1380

³⁴ [1993] IRLR 274.

²² *Ibid*, at 636.

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ F.B. Wright, ‘Law of Health and Safety at Work’ (London: Sweet & Maxwell, 1997) in Document 17 European Occupational Health and Safety Law Research Centre, para. 4.09 p. 316

²⁶ *Marshall v Gotham* [1954] AC 360.

Borough Council found four defects in the electrical equipment of the respondents, although not in use by the respondent's employees as at the time the said defects were discovered. The respondent was charged for the breach of duty under section 2(1) of the Act. It was contended that no breach of duty under section 2(1) could be found if the employees are not at work. That since by virtue of section 22 of the HSWA an Inspector is empowered to serve prohibition notice to stop, with immediate effect and in advance, any activity which involves the risk of serious personal injury, it implies that, the breach of duty under section 2(1) and 2(2) could only be maintained when the employees are at work. The court however, rejected this narrow interpretation and broadly interpreted 'at work' in line with the main purpose of the Act, to cover not only when the employees are actually at work.

It could be understood from the above judgement that, a broad interpretation should be given to the provision of section 2 so that the main purpose of the Act should be achieved. The whole purpose of the Act would have been defeated if no breach could be found unless if the employees are actually at work. It may also be pointed out that, if this narrow interpretation were to be maintained, there could be a contradiction in principle, because under regulatory offences "the offence is committed if the conduct is unlawful, whether or not any personal injury has occurred"^[35].

In *R v Swan Hunter Shipbuilders Ltd and Another*^[36], the Court of Appeal again considered whether or not the duties under section 2 extended to the provision of information and instructions on safety to employees of an outside contractor (or subcontractor). A book (called Blue Book) containing information on the risks of oxygen enriched atmosphere was published and distributed to the employees of Swan Hunter, instructing and educating them on how they could protect themselves and the safety measures they would take in case of fire accident. The book was not distributed however, to the employees of the outside contractors working on the ship as a result of which a fire ensued. The appellants were charged among other things, with the breach of section 2(1) of the Act, for their failure to maintain a safe system of work. They argued that, if section 2(1) was strictly construed their duties under it did not extend to visiting workers. This was rejected by the Court of Appeal. Dunn LJ. Held that:

If the provision of a safe system of work for the benefit of his own employees involves information and instructions as to potential dangers being given to persons other than the employer's own employees, then the employer is under duty to provide such information and instruction"^[37].

Section 2(2) generally, requires the employer, without prejudice to his duty under section 2(1), to provide competent workforce and personnel with adequate information, training and instruction under sufficient supervision. Section 2(2) (a) requires the employer to ensure "the provision and maintenance of plant and systems of work that are, as far as is reasonably practicable, safe and

without risks to health". Under section 53(1) 'plant' "includes any machinery, equipment, or appliance". The section therefore imposes duties on the employer to supply to his employees, tools, instruments and machines that are safe and without risks to their health. In *R v Mara*^[38], an employee of another company, not of the appellant, was electrocuted while using a faulty cleaning machine belonging to the appellant and with the appellant's permission. The Court of Appeal confirmed the appellant's conviction and dismissed the appeal on the ground that, the appellant's failure to replace or remove the defective cable was a breach of duty under section 2(2) (a). It would appear, from this decision the employers duty could be extended to the provision of safe working environment and safe equipments, not only to his own employees, but also to other persons whom the employer knows, or could have reason to know that they would use his employees' workplace or equipments. Section 2(3) requires the employer to prepare and appropriately revise a written statement on health and safety of his employees. He should also make the organisation as well as the arrangements for the carrying out of such policies and must bring these to the knowledge of his employees. However, by Employers' Health and Safety Policy Statements (Exceptions) Regulations 1975, and by the decision in *Osborne v Bill Taylor of Huyton Ltd.*^[39] persons who carry on an undertaking and who at any one time employed less than five employees are exempt from making such policy. Section 2 (4)-(7) generally deals with the aspect of "worker involvement"^[40] imposing a duty on the employer to consult his employees on matters pertaining to their health, safety and welfare. It would appear, the sub-sections are not intended to have direct effect because they are subjected to guideline or regulations to be made by the Secretary of State. However, they do provide an important consultative forum for tackling issues on health and safety of the workplace and the employees.

Section 3 (1) and (2) generally impose duties upon the employer and self-employed in respect of persons who are not their employees, but who may be affected by their undertaking, to ensure, (so far as is reasonably practicable) that these persons are not exposed to the risks to their health or safety. Both employer and self-employed are required by s.3(3) to give to those who may be affected by their undertaking and who are not their employees "the prescribed information" as to how their undertaking may affect these person's health or safety. When could an employer be considered to be conducting his undertaking? Or could an employer be considered as conducting his undertaking even if his own employees are not at work? The effect of the Court of Appeal's decision in *R v Mara*^[41] is that an employer could be considered as conducting his undertaking, even when his own employees are not at work. An employer could be found in breach of s. 3 if for instance,

³⁸ [1987] 1 All ER 478.

³⁹ [1982] ICR 168.

⁴⁰ B. Barrett and R. Howells, n. 31 above, Chapter 13 generally.

⁴¹ N. 38 above.

³⁵ B. Barrett and R. Howells, n. 31 above, p. 4

³⁶ [1982] 1 All ER 264

³⁷ *Ibid*, at 271

he (it) as in this case, on a day in which his own employees were not at work, allowed his unsafe equipments to be used by persons not his employees, or left unsafe the workplace. It would appear that, the emphasis is usually on the effect of the undertaking not on the time when it is being carried on.

In *R v Associated Octel Co. Ltd.* ^[42] a small firm of specialists was engaged by the appellant to make repairs in its chemical plant, which was designated as a 'major hazard site'. Eight of the firm's employees were engaged by the appellant on full time basis. However, they had to get work permit and approval of the appellant's engineers before starting any repairs. One of the firm's employees was badly injured while cleaning a tank with a lining light. The appellant was charged under section 3(1) of the HSWA. It was argued on its behalf that it had no case to answer under s.3 (1), because the victim was not carrying out the appellant's own undertaking; he was an employee of an independent contractor and the appellant had no control over him. The House of Lords rejected this argument, dismissed the appeal and confirmed the Court of Appeal's decision. Lord Hoffmann delivering the judgement stated that section 3 was not concerned with the concept of control as in vicarious liability. The question under section 3 is not whether or not the employer exercises control over the employee of an independent contractor, the question is simply whether the activity in question can be described as part of the employer's undertaking ^[43].

It would appear from the above decision that the House of Lords cast doubt over the interpretation of section 3 given Mrs. Justice Smith in *RMC Roadstone Products Ltd. v Jester Ltd* ^[44] which was called "a difficult borderline case" ^[45]. In a contract to repair a building, the employers intended to buy new asbestos but the contractors offered using old ones from a nearby disused factory. After getting the owner's permission, the employers offered their equipments to the contractors to be used in removing the asbestos, but the employers' engineer cautioned the contractors to be careful. In the process of removing the asbestos one of the contractors fell down and died. The employers were charged and convicted under section 3(1). Mrs. Justice Smith while quashing the conviction held that:

I am unable to accept that 'conduct of an undertaking' should be so widely construed. Nor am I able to accept that control is irrelevant to conduct of an undertaking...I am unable to accept that the mere opportunity to exercise control over an activity is enough to bring that activity within the ambit of the employer's conduct of his undertaking. Before he can say that an activity is within his conduct of his undertaking, the employer must, in my judgement, either exercise some actual control over it or be under a duty to do so. If the principal chooses to leave the independent contractor to do the work in the way he thinks fit, I consider that the work is not within the ambit of the

principal's conduct of his undertaking ^[46].

Section 4(1) of the HSWA imposes duties on controllers of non-domestic premises in relation with those who are not their employees, but who "use the non-domestic premises made available to them as a place of work or as a place where they may use as plant or substances provided for their use there" ^[47]. The duties imposed by the section apply also to the "premises made available and other non-domestic premises used in connection with them" ^[48]. By sub section (2) any person who has the control of such premises to any extent, or "of the means of access thereto or egress therefrom or of any plant or substance in such premises" is duty bound to take "measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable" that where he has control of to any extent, "is or are safe and without risks to health". By subsection 3, any person who by "any contract or tenancy" is under obligation to maintain or repair any premises (to which section 4 applies) or any means of access to the premises or egress from it; or is under obligation (of any extent) pertaining to the "safety or absence of risks to health arising from plant or substance in such premises" that person is to be treated as "a person who has control of the matters to which his obligation extends". Person having control as mentioned under section 4, refers to the person with "control of the premises or matter in connection with the carrying on by him of a trade, business or other undertaking (whether for profit or not)" ^[49] The meaning of section 4 was considered by the House of Lords in *Austin Rover Ltd. v Inspector of Factories* ^[50]. Escaping fumes killed an employee of outside cleaning contractors. The cleaning contractors were initially instructed (by Austin Rover) that, while cleaning the paint spray booth, should not use paint thinners from a pipe booth which was turned off but not completely capped. They should also enter the sump with an approved safety lamp. The contractors' employees' failure to follow these instructions led to the death one person. The appellant's argument (i.e. the Inspector of premises) was that, section 4 (2) should be broadly interpreted to the extent that, if the fact of total control by the accused was established, then the duty could be generally imposed. After this, then the prosecution was not under duty to prove further that the circumstances leading to the danger or the accident were foreseeable by the accused. The fact that the accused did not foresee the hazard leading to the accident was immaterial. It was argued on behalf of Austin Rover that, there is "element of objectivity introduced" ^[51] by the wording of section 4 (2). In that it could not be reasonable to require the controller of premises to take measures to avert the risks which he could not reasonably foresee. The House of Lords interpreted broadly the words "safe and without risks to

⁴⁶ *Supra*, at 1045 and 1047 respectively.

⁴⁷ Section 4 (1) (a) and (b)

⁴⁸ *Ibid*.

⁴⁹ Section 4 (4)

⁵⁰ n. 8 above. See also *Mailer v Austin Rover Group* [1989] All ER 1087

⁵¹ *Ibid*, at 622.

⁴² [1996] 4 All ER 846.

⁴³ *Ibid*, at 851.

⁴⁴ [1994] 4 All ER 1037

⁴⁵ Per Lord Hoffmann, *supra* at 852.

health” under s 4 (2). Lord Jauncey stated the meaning of the words as well as the extent of duties they impose when he said:

These words require consideration to be given not only to the extent to which the individual in question has control of the premises, but also to his knowledge and reasonable foresight at all material times”^[52].

The above judgement implies that, the ambit of duties imposed by s 4 (2) is to be construed objectively. For instance, where a company lets or sublets premises to X for work purposes, the company is of course under duty by s 4(2) to take measures which a company in its position could reasonably take, to ensure (as far as is reasonably practicable) that the said premises is safe for X’s employees use and without risks to their health. However, the company’s duties are to “be determined in the light of [its] knowledge of the anticipated use for which the premises have been made available and of the extent of [its] control and knowledge, if any, of the actual use thereafter”^[53]. It may be submitted that s 4(2) does not impose on the controller of premises duties “to take measures against unknown and unexpected events”^[54].

In *Westminster City Council v Select Management Ltd.*,^[55] the Court of Appeal decided on whether or not common parts of a block could be considered as non-domestic premises for the purposes of duties under section 4. A block of flat was managed by the appellant. It also had control of some common parts consisting of stair cases, landing and ground floor hall for the purposes of managing the block. Persons not employed by the appellant used to come to the block for purposes of repairing or maintaining the lift and other electrical installations in the common part. The Court of Appeal gave broad interpretation to the duties under s 4, and held that the interpretation of ‘plant’ under section 53 of the Act should be extended to lift and electrical installations. Fox LJ. Stated that:

“In my opinion, the common parts of the block, whether halls, stairs or corridors, lifts or other parts, are plainly non-domestic premises within the definition since they are used in common by the occupants of more than one private dwelling”^[56].

This interpretation implies therefore, a health inspector, a social worker, or a person visiting the premises for his own undertaking “may be able to sue the occupier for damages”^[57].

Distinctions between Sections 2, 3 AND 4

There are some differences between the above sections, in respect of the imposition, nature and extent of the duties, as well as the elements required to establish the breach under the sections. For instance, sections 2 and 3 impose duties

“on a single person”^[58] i.e. the employer, in relation to health and safety of the place “he exercise[s] complete control over the matters to which the duties extend”^[59] i.e. the workpeople and the workplace. The extent of the duties under section 2 does not stop at the provision safe system of work and avoidance of risk, but also involves provision for the welfare of the employees, their adequate training and supervision etc. For this reason therefore, as observed by the High Court of Justicia Ry, “[i]t is not surprising then that the general duties in relation to such employees [are] spelt out in practical detail”^[60]. This distinguishes s 2 from section 3 and particularly section 4. Although “[t]he ambit of section 4 is far wider than that of sections 2 and 3”^[61], it does not directly require the controller of non-domestic premises to train or supervise persons who are not his employees. However, under section 2, as it was interpreted in *R v Swan Hunter*, the employer’s duties are extended to the provision of information and instructions not only to his own employees, but also to the employees of other outside contractors working in his work place. Although it is said that the duty under section 2 is on a single person of employer who completely controls the matters to which the duties are imposed, it would appear that, control ‘literally’ is not the basis of employer’s duty, but rather the existence of contract of employment between him and the employees. Section 2 also unlike sections 3 and 4 contemplates the existence of “continuous and legal responsibility”^[62] between the employer and the employees. For instance, by subsections (4)-(7) the employer is under duty to consult his employees on continuous basis on matters affecting their health and safety. This feature is unique only to section 2.

Section 3, unlike section 2 imposes duties on the employer (and self-employed), not only in relation to his own employees, but also in respect of persons who may be affected by his (its) undertaking and the general public. This in essence means that section 2, as put by Barrett:

“...reflects the concern which the law has always had for the safety of persons while in employment; [and] section 3 reflects the novel, but important, purpose of the Act of protecting the whole workforce and the public from the risk created by the activities of an organisation”^[63].

The distinction as well as the relationship between sections 2 and 3 could be seen in the decisions of *R v Swan Hunter* and in *R v Board of Trustees of Science Museum*^[64]. It could be inferred from these cases that a breach of section 3 (1) by an employer may lead not only to prosecution under the said section, but it could at the same time result to the breach of section 2(1) for failure to maintain a safe working

⁵⁸ *Austin Rover Ltd v Inspector of Factories*, n. 8 above, Per Lord Jauncey, at 634.

⁵⁹ *Ibid.*

⁶⁰ *Carmichael v Rosehall Engineering Works Ltd.* 1984 SLT, referred to in the judgement of Mrs. Justice Smith in *RMC Roadstone Products Ltd. v Jester Ltd* n. 47 above, at 1046.

⁶¹ *Supra*, at 635

⁶² Lord Robens Report, n. 1 above, para. 30, p. 41.

⁶³ B. Barrett and R. Howells, n. 31 above, p. 311

⁶⁴ n. 9 above.

⁵² *Ibid.*, at 635

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ n. 6 above.

⁵⁶ *Ibid.*, at 901.

⁵⁷ *Trolley’s Health and Safety at Work Handbook 2005* (UK: Lexis Nexis, Seventeenth Ed), para. 03001, p. 030/1

place. Reversibly, if the breach of s 2 could affect the public, prosecution under section 3 could be maintained. The same could apply to self-employed person. One of the distinctions between section 4 and sections 2 and 3 is that, unlike the two sections, s. 4 contemplates that there could be two or more persons sharing duties under the section who might be found guilty, either separately or together, at the same time or differently, depending upon the nature of each case. Lord Jauncey in *Austin Rover Ltd. v Inspector of Factories* pointed out to this difference when he said:

section 4, which imposes duties in relation to the safety of premises and plant and substances therein, recognises that more than one person may have a degree of control of those premises at any one time and hence be under duty in relation thereto”^[65].

Furthermore, unlike under sections 2 and 3, for the breach of section 4, the prosecution is not only to prove, the prima facie breach of the duty. He must prove further the extent “at that time [of] any degree of control of the premises”^[66] and that it would be reasonable for a person in the position of the accused to take such measures to ensure the safety of the premises. It may be pointed out that, the House of Lord’s decision in *R v Associated Octel* is to the effect that, section 4 “is to be less significant”^[67] in relation to risks to outside contractors, because a broad interpretation of section 3 could bring the occupier of the premises under the duties in section 3 rather than section 4^[68].

Importance of Sections 2, 3 and 4

The importance of duties under sections 2, 3 and 4 could be seen from the legal, social and economic perspectives. Section 2 is so important that it does not feature in work place only, but also is concerned with human resource development in the workforce. It requires the employer to train, instruct and provide information on safety matters not only to his employees but also to employees of other employers whose conduct may affect the health and safety of his employers^[69]. The duty on employer to prepare a written policy on health and safety arrangements for his employees could give vital direction on health and safety matters not only to the employer, but also to health and safety inspectors, and the HSC generally. The cumulative importance of sections 2 and 3 was demonstrated in *R v Swan Hunter, R v Mara* and *R v Associated Octel*. The protection given to employees of subcontractors could minimise putting at risk their health and safety at work by the main employer’s unsafe system of work, hiding behind the cover of the rules of vicarious liability in torts^[70]. Section 3 generally demonstrates one of the most important features of the HSWA, i.e. protection of general public

against the negative consequences of what is happening at workplace. This could be seen from the decision of Court of Appeal in *R v Board of Trustees of Science Museum*. The large scale of danger to the public by large concentration of legionella pneumophia, bacterium causing legionnaires (dangerous form of pneumonia), in the Museum’s air conditioning system, was prevented by invoking duties under section 3 and the health and safety principles of risk. Although section 4 does not contemplate carrying out of an undertaking by the controller of non-domestic premises himself, it would appear that its wide ambit as interpreted by House of Lords in *Austin Rover Ltd. v Inspector of Factories* covering “organisations varying from multi-national corporations to the village shop”^[71] could broadly give indirect protection to members of public^[72]. Because of the general importance of sections 2, 3 and 4, breach of duties thereunder results to criminal prosecutions although “does not give rise to civil liability”^[73]. However, on the basis of contract of employment, an employer (victim) may recover damages for tort action for negligence and for breach of statutory duties^[74].

An attempt is made in this article to explain the meaning and importance of sections 2, 3 and 4 of HSWA 1974 and the differences between these sections. It may be interesting in conclusion, to point out that, the sections do not deal only with matters of law, because if read from another perspective, economic and social benefits could be derived from them. For instance, although section 2 literally imposes duties on the employer directly rather than the employee, yet a broad interpretation could reveal that, “the preservation of safety and health at work is a continuous legal and social responsibility of all those who have control over the conditions and circumstances in which work is performed”^[75]. The section impliedly imposes corresponding duty on the employee who has received instructions and information on how to operate some equipment, to make sure that he abides by these instructions. Section 2 (4)-(7) which establishes social and legal relationship between employer and employee, through a consultative forum on matters of health and safety, reflects Lord Robens wisdom as it “would encourage employers and work people to take less narrow and more rounded view of their roles and responsibilities”^[76]. The cumulative importance of this is that, in addition to the fact that it protects the employee from risking his life, the over whelming economic reality of the arrangement is worth mentioning. Safe working system and healthy workers could mean increase of production which could facilitate economic development, not only of the employer but of the society generally.

⁶⁵ at 634.

⁶⁶ *Ibid*, at 636.

⁶⁷ Trolley’s Handbook, n. 57 above, para. 03019.

⁶⁸ For instance see p. 851 of the judgement in *R v Associated Octel*.

⁶⁹ B. Barrett and R. Howells, n. 31 above, p. 3.

⁷⁰ That was the main argument of Counsel representing *Associated Octel Ltd*. See p. 850 of the case.

⁷¹ Per Lord Jauncey, at 635.

⁷² See *Murphy v Bradford Metropolitan Council* [1992] 2 All ER 908, dealind with breach under section 2 of OLA 1957

⁷³ Per Lord Jauncey, *supra*, at 633. See also Sections 33 and 47 of HSWA.

⁷⁴ *Wilson and Clyde Coal Company v English* [1938] AC 57

⁷⁵ Lord Robens Report, n. 1 above, para. 130, p. 41.

⁷⁶ *Ibid*.

References

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