Delegates will have read the publicity brochure for this conference which has highlighted a recent disaster in Scotland at ICL Plastics (Stockline). Nine workers were killed in an explosion at the factory. Was it the absence of health and safety laws that allowed it to happen?

Without knowing the full details of this accident it is likely that the following would have applied to the company and its employees:

1. The Workplace (Health, Safety & Welfare) Regulations 1992.

2. The Provision and Use of Work Equipment Regulations 1998

3. The Management of Health and Safety at Work Regulations 1999.

4. The Health and Safety at Work Act 1974.

In addition there are many other regulations which are supposed to provide protection to workers in the workplace including:

- The Manual Handling (Operations) Regulations 1992
- The Personal Protective Equipment Regulations 2002
- The Health and Safety (Display Screen Equipment) Regulations 1998.
- The Construction (Health Safety and Welfare) Regulations 1996
- The Control of Substances Hazardous to Health Regulations – updated on a number of occasions since 1988
- Work at Height Regulations 2005

Despite these extensive laws, many of which originate from European Union Directives, tens of thousands of people are still seriously injured or killed in the UK every year as a result of accidents at work and exposure to dangerous substances.

According to the HSE:

- 241 workers died as a result of an accident at work in 2006/2007 compared with 217 in 2005/06, an 11 per cent increase.

These figures do not include the thousands who die directly and indirectly each year as a result of occupational disease. In the HSC's Health & Safety Statistics for 2006/07 they estimate that 4,000 deaths each year are due to asbestos exposure and a similar number due to COPD arising from occupational exposure to fumes, chemicals and dusts.

Although the number of non-fatal injuries has been falling in recent years there were still:

- 28,267 major injuries to employees reported in 2006/07, and

- 113,083 other injuries to employees causing absence of over 3 days.

In the appendix are three examples of accidents where it can be seen clearly that the injuries could have been avoided. These deaths and injuries have not occurred because existing laws covering health and safety at work are inadequate. If we look at the language that is common to many of them it is quite explicit. The duty upon an employer is often mandatory.

The Provision and Use of Work Equipment Regulations 1998

Maintenance

5. - (1) Every employer **shall ensure** that work equipment is maintained in an efficient state, in efficient working order and in good repair.

The Workplace (Health, Safety and Welfare) Regulations 1992

Maintenance of workplace, and of equipment, devices and systems

5.—(1) The workplace and the equipment, devices and systems to which this regulation applies **shall be maintained** (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair.

The Control of Substances Hazardous to Health Regulations 2002

Assessment of the risk to health created by work involving substances hazardous to health

6. - (1) An employer **shall not** carry out work which is liable to expose any employees to any substance hazardous to health unless he has –

(a) made a suitable and sufficient assessment of the risk created by that work to the health of those employees and of the steps that need to be taken to meet the requirements of these Regulations; and

(b) implemented the steps referred to in sub-paragraph (a).

Prevention or control of exposure to substances hazardous to health

7. - (1) Every employer **shall ensure** that the exposure of his employees to substances hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled.

As personal injury lawyers we can only recover compensation for our injured clients because we are able to show that the employer has breached one or more of these statutory duties or has been negligent. But as trade unionists our primary concern is to ensure that working people are not injured in the first place. In other words, we have to ensure that these laws are enforced so that accidents and occupational illness do not occur.

Consider the case of 17 year of Daniel Dennis from South Wales who went to work for a roofing company. He had been in the job for just one week. He had not been properly trained and had no safety equipment. He fell to his death through a store skylight on 8 April 2003. If the employer, Roy Clark, had observed the Work at Height Regulations 2005 Daniel would be alive today.

When criminal laws are broken the full might (and resources) of the state are used to punish the lawbreaker. A simple example is shoplifting.

THEFT ACT 1968

1. Basic definition of theft

(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'theft' and 'steal' shall be construed accordingly.

This law is enforced through an army of enforcement officers – the police. If the security guard in a high street shop believes that someone has taken items with the intention of not paying for them they will apprehend the shopper and call the police. The accused is then arrested, physically taken away to a police station and charged. The state will then prosecute them and the court will impose a penalty.

The budget for the Ministry of Justice in 2007/08 was £8.8 billion covering criminal courts, prison and probation services. In addition there are billions spent by local policing authorities. In 2006/2007 the amount spent simply on *overtime* by one policing authority, London, was £128.6million.

So who are the police for health and safety law?

Health & Safety Executive

There are two bodies that are responsible for this task. The first, the HSE, has been subjected to a wide-ranging and critical review by the Work and Pensions Select Committee of the House of Commons (*The role of the Health and Safety Commission and the Health and Safety Executive in regulating workplace health and safety* – 21 April 2008*)*. It is recommended reading for everyone concerned with workplace health and safety.

http://www.publications.parliament.uk/pa/cm200708/cmselect/cmworpen/246/24602.htm

The report identifies two major problems, which have been highlighted by trade unions for several years not least Prospect. Firstly, the HSE has suffered from budget cuts year on year which are restricting its activities and causing it to lose highly qualified and experienced staff.

Secondly, the HSE recently changed its strategy away from enforcement through inspections and prosecutions. Instead their focus is on educating and persuading employers. Imagine the response if the government announced that the police force and criminal justice system were to be cut by the same extent and instead of deterrence and punishment they resorted to a moral campaign to persuade people not to commit criminal offences.

The HSE has produced a large quantity of research papers, guidance documents, leaflets and other practical literature for employers. Their education and advice work is vital. But without the threat of severe penalties many employers will regard health and safety as a dispensable item.

An urgent change of direction and resourcing is required to make the HSE the type of enforcement body that the supporters of the 1974 Health and Safety at Work Act intended.

Health and Safety Representatives

The second body that polices health and safety is that army of unsung heroes, union health and safety representatives. They were given statutory recognition through the Safety Representatives and Safety Committees Regulations 1977, drawing on section 2(4) of the 1974 Health & Safety at Work Act. They were seen as an essential and complementary part of the enforcement process.

On paper the regulations provide enormous power for elected representatives of the workforce to inspect the workplace and to request changes.

Regulation 3

Appointment of safety representatives

3(1) For the purposes of section 2(4) of the 1974 Act, a recognised trade union may appoint safety representatives from among the employees in all cases where one or more employees are employed by an employer by whom it is recognised.

(2) Where the employer has been notified in writing by or on behalf of a trade union of the names of the persons appointed as safety representatives under this Regulation and the group or groups of employees they represent, each such safety representative shall have the functions set out in Regulation 4 below.

Regulation 4

Functions of safety representatives

4(1) In addition to his function under section 2(4) of the 1974 Act to represent the employees in consultation with the employer under section 2(6) of the 1974 Act … each safety representative shall have the following functions:

(a) **to investigate potential hazards and dangerous occurrences at the workplace** (whether or not they are drawn to his attention by the employees he represents) and to examine the causes of accidents at the workplace;

(b) **to investigate complaints by any employee he represents relating to that employee's health, safety or welfare at work**;

(c) **to make representations to the employer on matters arising out of subparagraphs (a) and (b) above;**

(d) **to make representations to the employer on general matters affecting the health, safety or welfare at work of the employees at the workplace**;

(e) **to carry out inspections** in accordance with Regulations 5, 6 and 7 below;

(f) to represent the employees he was appointed to represent in consultations at the workplace with inspectors of the Health and Safety Executive and of any other enforcing authority;

(g) to receive information from inspectors in accordance with section 28(8) of the 1974 Act; and

(h) to attend meetings of safety committees where he attends in his capacity as a safety representative in connection with any of the above functions; but, without prejudice to sections 7 and 8 of the 1974 Act, no function given to a safety representative by this paragraph shall be construed as imposing any duty on him.

Regulation 5

Inspection of the workplace

5(1) **Safety representatives shall be entitled to inspect the workplace or a part of it** if they have given the employer or his representative reasonable notice in writing of their intention to do so and have not inspected it, or that part of it, as the case may be, in the previous **three months**; and may carry out more frequent inspections by agreement with the employer.

(2) Where there has been a substantial change in the conditions of work (whether because of the introduction of new machinery or otherwise) or new information has been published by the Health and Safety Commission or the Health and Safety Executive relevant to the hazards of the workplace since the last inspection under this Regulation the safety representatives after consultation with the employer shall be

entitled to carry out a further inspection of the part of the workplace concerned notwithstanding that three months have not elapsed since the last inspection.

(3) The employer shall provide such facilities and assistance as the safety representatives may reasonably require (including facilities for independent investigation by them and private discussion with the employees) for the purpose of carrying out an inspection under this Regulation, but nothing in this paragraph shall preclude the employer or his representative from being present in the workplace during the inspection.

Regulation 6

Inspections following notifiable accidents, occurrences and diseases

6(1) Where there has been a notifiable accident or dangerous occurrence in a workplace or a notifiable disease has been contracted there and:

(a) it is safe for an inspection to be carried out, and

(b) the interests of employees in the group or groups which safety representatives are appointed to represent might be involved. those safety representatives may carry out an inspection of the part of the workplace concerned and so far as is necessary for the purpose of determining the cause they may inspect any other part of the workplace; where it is reasonably practicable to do so they shall notify the employer or his representative of their intention to carry out the inspection.

(2) **The employer shall provide such facilities and assistance as the safety representatives may reasonably require (including facilities for independent investigation by them and private discussion with the employees) for the purpose of carrying out an inspection under this Regulation; but nothing in this paragraph shall preclude the employer or his representative from being present in the workplace during the inspection.**

(3) In this Regulation "notifiable accident or dangerous occurrence" and "notifiable disease" mean any accident, dangerous occurrence or disease, as the case may be, notice of which is required to be given by virtue of any of the relevant statutory provisions within the meaning of section 53(1) of the 1974 Act.

Regulation 7
Inspection of documents and provision of information

7 (1) Safety representatives shall for the performance of their functions under section 2(4) of the1974 Act and under these Regulations, if they have given the employer reasonable notice, be **entitled to inspect and take copies of any document** relevant to the workplace or to the employees the safety representatives represent which the employer is required to keep by virtue of any relevant statutory provision within the

meaning of section 53(1) of the 1974 Act except a document consisting of or relating to any health record of an identifiable individual.

(2) An employer shall make available to safety representatives the information within the employer's knowledge, necessary to enable them to fulfil their functions except:

(a) any information the disclosure of which would be against the interests of national security, or

(b) any information which he could not disclose without contravening a prohibition imposed by or under an enactment, or

(c) any information relating specifically to an individual, unless he has consented to its being disclosed, or

(d) any information the disclosure of which would, for reasons other than its effect on health, safety or welfare at work, cause substantial injury to the employer's undertaking or, where the information was supplied to him by some other person, to the undertaking of that other person, or

(e) any information obtained by the employer for the purpose of bringing, prosecuting or defending any legal proceedings.

Regulation 9

Safety committees

9(1) For the purposes of section 2(7) of the 1974 Act (which requires an employer in prescribed cases to establish a safety committee if requested to do so by safety representatives), the prescribed cases shall be any cases in which at least two safety representatives request the employer in writing to establish a safety committee.

(2) Where an employer is requested to establish a safety committee in a case prescribed in paragraph (1) above, he shall establish it in accordance with the following provisions:

(a) he shall consult with the safety representatives who made the request and with the representatives of recognised trade unions whose members work in any workplace in respect of which he proposes that the committee should function;

(b) the employer shall post a notice stating the composition of the committee and the workplace or workplaces to be covered by it in a place where it may be easily read by the employees;

(c) the committee shall be established not later than three months after the request for it.

It is apparent from the wording of these Regulations that trade union health and safety representatives have enormous power on paper to intrude into an employer's right to carry on their business as they think fit. Consequently, as the Wilson Government recognised, such reps. need legal protection against victimisation if they are to put themselves forward to carry out this role. This protection is found in the Employment Rights Acts 1976.

EMPLOYMENT RIGHTS ACT 1976

PART V

PROTECTION FROM SUFFERING DETRIMENT IN EMPLOYMENT

Rights not to suffer detriment

44. Health and safety cases

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) An employee is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed

to take) that a reasonable employer might have treated him as the employer did.

(4) Except where an employee is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where the detriment in question amounts to dismissal (within the meaning of that Part).

PART X

UNFAIR DISMISSAL

100. Health and safety cases

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of

an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

More law and poor law

Is there a need for more law? In our experience the laws governing health and safety can always be strengthened. The Corporate Manslaughter and Corporate Homicide Act 2007 is welcomed but remains fatally flawed. This was demonstrated by a prosecution in Liverpool in June 2008. North West Aerosols was fined £2 for causing the death of Christopher Knoop and severe burns to three colleagues when liquid petroleum gas ignited causing a fireball and the burning down of the factory. The company subsequently went into liquidation and had no assets to pay a substantial fine. More importantly, the directors of the company escaped prosecution altogether.

The employer of 17-year old Daniel Dennis was going to escape any penalty because the Crown Prosecution Service decided originally that there were insufficient prospects of success in securing a conviction of Roy Clark. Daniel's father went to his union, the GMB, who gave the go-ahead for Thompsons to challenge the CPS decison. Judicial Review proceedings in the High Court were successful and in December 2006 the CPS were ordered to review their decision. They finally decided to prosecute Clark for manslaughter and in April 2008 he pleaded guilty. The following month he was sentenced to 10 months imprisonment.

Unless company directors are given specific legal dutiues to ensure that health and safety laws are applied they will avoid prosecution when workers are injured through a director's failures to do this.

There are other areas where the law needs to be strengthened but the fundamental issue is observance. Who is going to ensure that employers will obey the law to maintain a safe workplace so that personal injury lawyers can wither away on the vine?

Appendix

Below are three cases of serious workplace injury that were reported in just one issue of the TUC's weekly *Risks* e-bulletin in May 2008 that I selected at random. Every week there is a similar sad catalogue of death and injury.

Subscribing to *Risks* is free:

http://www.tuc.org.uk/newsroom/register.cfm

Welsh firm canned on machine safety

A firm making cans has had to cough up compensation after a worker seriously injured his thumb. Unite member Gerald O'Reilly, 58, a machine operator at Impress Merthyr Tydfil Limited, secured £11,000 damages with the help of the union. A damaged can that jammed in the machine slashed through his gloves. 'The machine severed the digital nerve in my right thumb; the pain was excruciating,' Mr O'Reilly said. 'If I'd been given the correct type of industrial gloves, the can wouldn't have cut through. I still suffer from pain, numbness, pins and needles and reduced grip which is very frustrating given the work I do, and the fact that I show pedigree Chow dogs.' Unite regional secretary Andy Richards commented: 'Impress Merthyr Tydfil Limited failed to properly maintain the equipment which Mr O'Reilly was working on. The dangerous can and the lack of proper hand protection made the equipment unsafe. We hope this settlement will encourage other employers to sit up and take note and ensure that they are compliant with the various regulations which are there to protect employees like our member Mr O'Reilly.' Eamonn McDonough from Thompsons Solicitors said: 'Gerald O'Reilly's employer Impress was clearly in breach of its duty of care and as a result, he suffered totally unnecessary injuries and financial loss. He had to have many weeks off work initially and due to further symptoms was off work again months later.'

Fines not jail time for guilty managers

A court has fined two contractors and two individuals after a German worker died at a depot in Worksop, Nottinghamshire - but a manager was found not guilty of manslaughter. Hans Zdolsek fell 8.5m while he was working at the Wilkinsons distribution centre in February 2004. The firm has used plastic tie-wraps to secure a guard rail. Main contractor Siemens Dematic, now known as Oldbury (Banbury), was fined £100,000 and ordered to pay £47,000 costs at Nottingham Crown Court. Racking installation contractor Stow (UK) was fined £80,000 and ordered to pay costs of £41,000. Meanwhile Siemens Dematic project manager David Hill was found not guilty of manslaughter but received a £2,500 fine with £500 costs for a breach of the Health and Safety at Work Act. The site's health and safety director David Hastie received the same penalty. He admitted he knew plastic tie-wraps were being used to secure guardrails but did nothing to intervene. The sentences come after a joint prosecution by Nottinghamshire Police and the Health and Safety Executive.

Rail firms fined after worker loses leg

Three rail companies have each been fined £200,000 after a worker was electrocuted, suffering horrific injuries. Richard McBride was one of three men working on an overhead electric line at Marston Green during modernisation work to the West Coast Main Line route in July 2003. He narrowly avoided death but suffered terrible injuries and his lower leg had to be amputated after he received a massive 25,000 volt shock from a still-live cable. He received 30 per cent burns over his body. Rugby-based Elec-Track Installations Ltd, which employed the three men, pleaded guilty to a criminal breach of safety law. The charge detailed that the firm, now called Hythe Realisations, failed to ensure the safety of its employees while they were working on

overhead rail lines. Balfour Beatty and GT Rail Maintenance, which had formed a joint venture to carry out the work, entered guilty pleas to failing to ensure that persons not employed by them were not exposed to risk. In addition to their fines, both firms were ordered to pay £21,000 costs. The three companies were each fined £200,000 by Judge Christopher Hodson, sitting at Coventry Crown Court. Passing sentence, the Judge said the firms were guilty of systemic failings and their performance fell very significantly below the expected standard. The prosecution was brought by the Office of Rail Regulation (ORR). Commenting on the case, Allan Spence, deputy chief inspector of railways, said: 'With such a high risk activity, there should have been a robust permit to work system confirming it was safe to start work. Instead, the system these companies used was a short cut. That short cut tragically led to confusion and, in turn, to the awful burn injuries to this worker.'