Are Injuring and Killing at Work Crimes?

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ARE INJURING AND KILLING AT WORK CRIMES?

By HARRY J. GLASBEEK* and SUSAN ROWLAND**

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** Ms. Rowland is a member of the 1979 Graduating Class of Osgoode Hall Law School.
I. THE NEED FOR ACTION

It is not popular to say that Canadian society is divided into two classes — capitalists and workers, or ruling class and the oppressed. Acknowledgement that such division exists would require accepting that a deep conflict exists between classes of people, conflict which is continuous. Accordingly, much is made of the apparent merging of the “haves” and “have-nots” as evidence of the lack of class differentiation. Usually such reasoning is accompanied by assertions that political and social aims can be satisfied through the electoral process. Conflicts that do exist are explained as inevitable results of clashes in a pluralistic society where a variety of values and interests interact. The prevailing ideology is that such conflicts are not serious because, at bottom, all members of society share the same overall respect for pluralism and understand that it is legitimate for everyone to use all “responsible” means to achieve their personal and group interests. Such battles are quite different from those which would take place if there were but two rival classes in society with irreconcilable objectives. If that were the case, a war of extermination would be fought. The pluralists apparently see no evidence of such a war around them, not even an analogue of it.

When nations fall out it is sometimes difficult to perceive whether or not they are at war. One supposes that an exchange of angry diplomatic notes, or a recall of ambassadorial personnel, or the calling for a vote of condemnation at the United Nations are clearly not acts of war. The parties are still using dispute mechanisms which they believe can solve the difference between them by means acceptable to both. If one of the countries involved sets up a naval blockade preventing the other from obtaining necessary supplies, some controversy might arise as to whether or not a state of war exists. There will be no doubt about the matter if one country issues a written declaration that a state of war exists. Similarly, there will be no doubt at all if the two nations assemble all their people and weapons and begin destroying each other. The injuring, killing and destruction that will ensue will be indisputable evidence of war. Now, in our kind of industrial society, if members of one clearly identifiable class of society are injured, killed and destroyed on a massive scale on a routine basis while members of the other class are relatively immune from such disaster, why is this not seen as evidence of war?

What follows is a series of tables and figures which, while not conclusively establishing the incidents and distribution of industrial injuries and disabling occupation-related diseases, go a long way to show the nature and scope of industrial disaster which faces workers engaged in manufacturing

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1 For instance, in the standard labour law casebook in Canada, the authors (when providing a rationale for the exclusive bargaining agency rule in the United States and Canada) argue that unions were not seen as vehicles for political social expression, suggesting such needs were satisfied by other institutions. This was so because by the time that trade unionism had developed “basic political rights had been obtained by their members” and “[the widely shared feeling that working class unity was not essential to the satisfaction of fundamental political and material needs”, which existed diminished people’s need to use trade unions as agents for “long-range social and political change”. Industrial Relations Centre, Queens University, Labour Relations Law (2d ed., Kingston: Labour Relations Law Casebook Group, 1974) at 227.
enterprises, as compared to the dangers facing people working in other situations and in much different capacities. We begin with a table that indicates the difference that the nature of work makes to one’s life expectancy and to the likelihood of dying as a result of a disease associated with one’s occupation.

<table>
<thead>
<tr>
<th>Occupations</th>
<th>Death from all causes</th>
<th>Tuberculosis</th>
<th>Lung Cancer</th>
<th>Bronchitis</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Workers</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Coal face miners</td>
<td>180</td>
<td>294</td>
<td>140</td>
<td>293</td>
</tr>
<tr>
<td>Construction riggers</td>
<td>142</td>
<td>138</td>
<td>152</td>
<td>149</td>
</tr>
<tr>
<td>Engineering labourers</td>
<td>139</td>
<td>169</td>
<td>151</td>
<td>217</td>
</tr>
<tr>
<td>Furnacemen</td>
<td>108</td>
<td>106</td>
<td>168</td>
<td>151</td>
</tr>
<tr>
<td>Fishermen</td>
<td>144</td>
<td>171</td>
<td>188</td>
<td>148</td>
</tr>
<tr>
<td>Textile process workers</td>
<td>133</td>
<td>111</td>
<td>116</td>
<td>161</td>
</tr>
<tr>
<td>Dockers</td>
<td>136</td>
<td>180</td>
<td>171</td>
<td>220</td>
</tr>
<tr>
<td>Kitchen hands</td>
<td>130</td>
<td>410</td>
<td>88</td>
<td>165</td>
</tr>
<tr>
<td><strong>Professional Classes</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mine managers</td>
<td>66</td>
<td>18</td>
<td>56</td>
<td>33</td>
</tr>
<tr>
<td>Contracting managers</td>
<td>50</td>
<td>33</td>
<td>66</td>
<td>21</td>
</tr>
<tr>
<td>Engineering managers</td>
<td>70</td>
<td>17</td>
<td>68</td>
<td>25</td>
</tr>
<tr>
<td>Personnel managers</td>
<td>67</td>
<td>40</td>
<td>44</td>
<td>64</td>
</tr>
<tr>
<td>Ministers, MPs</td>
<td>75</td>
<td>29</td>
<td>59</td>
<td>?</td>
</tr>
<tr>
<td>Judges, solicitors</td>
<td>76</td>
<td>33</td>
<td>40</td>
<td>24</td>
</tr>
<tr>
<td>Clergymen</td>
<td>62</td>
<td>9</td>
<td>17</td>
<td>17</td>
</tr>
<tr>
<td>Teachers</td>
<td>60</td>
<td>23</td>
<td>34</td>
<td>23</td>
</tr>
</tbody>
</table>

The table is explained as follows:

"The report calculates its statistics by establishing the total number of deaths in all occupations and then applying the national average to each of the 340 occupational groups that it studies. This average is called a 100. Where less than the average number of deaths for all workers is found, the figure is below a 100 and where more, above. On this scientific basis, which takes years to compile, averages are found for deaths from all causes and certain diseases and illnesses. Some examples from the report are shown, [above]."

There cannot be much doubt that the likelihood of contracting certain types of diseases is much higher among people of one class than it is among persons who belong to another class.  


3 We also note that we have used the word “class” in a rather loose fashion in this context. But, for our purposes, it suffices to show that certain kinds of productive workers die much more often from the effects of specific diseases than do members of working groups which belong to quite different income groups in our society. For a table giving a similar indication note Table D9 in Ont. Report of the Royal Commission on the Health and Safety of Workers in Mines (the Ham Commission) (Toronto, 1976). The increased hazards for the population in one part of the province when compared to the whole of the province may be explained, in part, by the fact that in Northern Ontario people work in far more dangerous conditions than elsewhere in the province. In particular, this is due to the prevalence of mining industries.
This paper wishes to concentrate particularly on combatting the effect of occupation health hazards that cause disabling disease. There are no satisfactory figures that indicate how much disease in our society is due to occupational circumstances. Thus, it is impossible to say how serious the problem is in statistical terms. Professor Ison has indicated that the problem is certainly many times larger than statistical compilation from figures such as Workmen’s Compensation Boards’ records indicate. He bases this on the fact that of all reported deaths from all causes, 75.6 percent are attributed to disease, and that of all disability pensions paid under the Canada Pension Plan, 95.2 percent relate to disabilities resulting from disease. By comparison the Alberta, British Columbia and Manitoba Workmen’s Compensation Boards attribute compensation payable for disability due to disease at somewhere between a mere 3 percent to 17 percent of all claims they process. This suggests that most disease in Canada is not work-related. Professor Ison is not convinced:

Thus while the bulk of permanent disabilities and premature deaths result from disease, the bulk of workers’ compensation claims for death and permanent disablement result from trauma. There is no obvious explanation for the contrast. A logical possibility, of course, is that only a small proportion of disabilities from disease result from employment. But that explanation could not be accepted with any confidence because the lists of disabling and fatal diseases include some larger—volume categories in respect of which the etiology is unknown or uncertain, either with regard to the category as a whole or with regard to a significant proportion of cases in the category. With regard to some of these large—volume categories, such as cancer, it is known that some proportion of the total result from employment, but it is not known exactly, or even roughly, what proportion of the total result from employment.

It is possible that the actual incidents of disablement from industrial disease could be several times that which would be indicated by the statistics of compensation claims.⁴

Professor Ison’s cautious approach is meritorious and we, for our part, are discouraged from speculation. But there are figures which indicate the nature of the industrial hazard faced by workers even if it does not prove the precise extent and scope of it.

Boden and Wegman write as follows:

Every year roughly 14,000 American workers are killed in on-the-job accidents; more than 2 million are injured. Fatalities from job related illnesses are estimated (accurate data is scarce) to run as high as 200,000 a year.⁵

A more conservative estimate is found in the American President’s Report on Occupational Safety and Health, 1972, which stated that as many as 100,000 fatalities per year are due to occupation-caused diseases.⁶ Dr. Irving Selikoff, a pioneer in occupational disease research, documents that in the United States 4,000 miners will die every year and that their deaths will be attributed to

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⁴ Ison, The Dimensions of Industrial Disease, Research and Current Issues Series, No. 35 (Kingston: Industrial Relations Centre, Queen’s University, 1978) at 2.


⁶ United States, Executive Office of the President, President’s Report on Occupational Safety and Health, (1972), at 111.
black lung disease. Further, he shows the coal mining industry has produced, to date, roughly 210,000 totally disabled miners. In the asbestos industry, which has been Dr. Selikoff's main area of research, he has come up with some staggering figures. He took a group of pipe coverers who belonged to a New York City union local named the International Association of Heat and Frost Insulators and Asbestos Workers, a group whose members could all be accounted for for the period 1943-1963. There were 632 men in the unit. By statistically determining how many people in an "average" group of a similar size in society should have died, or should have died of particular causes, such as lung cancer, and then comparing these "average" figures to what actually had happened to the members in the pipe coverers' group, Professor Selikoff found the following facts. There should have been six or seven deaths attributable to lung cancer in an "average" group; in the pipe coverers' group there were forty-two. There should have been no deaths of mesothelioma in an "average" group; in the pipe coverers' group there were three. There should have been nine deaths of cancer of the stomach, colon, oesophagus or rectum in an "average" group; in the pipe coverers' group there were twenty-nine. The increased incidence of disability due to working with asbestos was thus clearly established. Dr. Selikoff then followed through by determining what had happened to the members of the pipe coverers' group by 1975. For an "average" group of the same number of people, similar in age and other vital statistics, there should have been, by 1975, 305 deaths. There were in fact 451 deaths among the pipe coverers' group. There should have been fifty-two deaths from cancer in the "average" group; there were 200 in the pipe coverers' group.7

These examples are but the tip of the iceberg. Much-documented cases where processing substances are linked to disease include situations in which vinyl chloride, benzpyrine, and betalnetylamine and benzidine have been used in manufacturing. Further, the fact that silicosis is related to sandblasting activities is well-known, as are the effects of lead smelting and of fluorspar mining. In addition, it is pertinent to note that some 25,000 toxic substances are presently used in manufacturing industries and that new ones are introduced at the rate of 500 to 600 a year.8 The possible consequences of the use of some of these substances by themselves, let alone in the many possible combinations which might be employed, are incalculable and, as research increasingly shows, the implications are frightening.

7 From the text of a speech given to the Ontario N.D.P. Convention, June 12, 1976. Dr. Selikoff also mentioned the following: "Let me give you some official credentialled reports of what the result has been [at Elliot Lake—from a Department of Health Table which Dr. Selikoff produced] at least until 1974. It was found that, on the whole, 3 to 10 times as many deaths were occurring of lung cancer as expected among the miners there who had died. Altogether from 1963 to 1972 (and this is interesting, because the number there is totally incomplete and there are many migrant miners who worked there who were never found, and who will not be found under present circumstances) 368 men died. Of these, 58 (15%) died of work accidents. Of the 260 men who died a "natural death", 41 (20%) of all deaths were of lung cancer at Elliot Lake".

Although it is possible to argue—and no doubt it will be argued—that many of the diseases which disable workers would have been suffered by them in any event, it is hard to question the flavour of the sampling of figures offered. Quite simply, working is "dangerous to your health." To understand this, note the known incidence of traumatic injury. For instance, the Workmen's Compensation Board of Ontario regularly handles about 430,000 traumatic injury claims a year. Compare this to the 85,000 car accident victims per year in Ontario about which much public lamenting is heard, while the hazards at work are hardly ever the subject of public debate.

It seems self-evident to us that the horrific prospects for workers in industry require a dramatic call for preventive action.

II. WHAT CAN BE DONE?

In this section we will merely set out the various mechanisms which are or could be used to lessen the materialization of risk at the work place. This will be followed by a cursory discussion of how effective these mechanisms could ever be.

1. As all employment situations create some inherent risk, to eliminate all risk of injury, logically, one ought to eliminate all enterprise. This is obviously an unacceptable means of approaching the problem. But it is put forward because it characterizes what is at issue: it is the fact of enterprise which creates the risk. The focus of any scheme which hopes to better conditions for workers has to be the nature of and control over the enterprise.

2. Many of the occupational hazards are created when the enterprise is set up. In particular, the choice as to the product to be made, the materials to be used in that process, the design and structure of the buildings and selection of equipment, are all matters which are decided by the entrepreneur without any necessary reference to the desire and needs of any other interested parties and, in particular, those of the workers. These decisions are left to management because there is an unquestioned precept that the investor of capital should have the prerogative of making decisions as to how that capital is to be expended. While it is true that in respect of safety conditions in a new plant there are usually some legislative and zoning requirements which have to be met by the entrepreneur, they are of a minimal kind. They certainly never go to the nature of the product to be made and the materials to be used. Yet, a recommendation that no enterprise should be commenced without being granted a licence by a body interested in the safety of the workers who are going to be employed in the enterprise is not completely out of step with

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9 Stellman and Daum, Work is Dangerous to your Health (New York: Pantheon Books, 1973).


social mores. We do not let medical practitioners, lawyers or dentists practice without permits establishing their qualifications; we do not let builders build the kind of premises that they wish to build anywhere they choose: we have zoning laws and permits systems governing such activities; we do not permit anyone with the requisite amount of capital to set up a banking business, and so forth. The point is, the notion that a permit must be obtained before certain businesses can even be commenced is not novel; it has been accepted whenever it is clear that large segments of the public will be adversely affected by uncontrolled behaviour of entrepreneurs. The same urge to protect people who are at work, except at a minimal level, has not yet been felt. The relationship between entrepreneur and the public at large is clearly viewed quite differently from that between the entrepreneur and his employees.\(^{12}\)

3. A mechanism which is much advocated and indeed often relied on is to leave the matter of safety at work to the bargaining of the parties affected, employers and employees. The notion is that our labour laws are flexible enough to permit anything to be bargained about, including safety matters. That is, employees can ask that the employers diminish their profitability to ensure greater safety at work or, alternatively, employees have the flexibility to demand less by way of remuneration for their efforts in exchange for increased safety measures by the employer. This device permits employees to decide for themselves how much safety they ought to insist on and has, therefore, the attraction of a self-determination scheme.

4. Another potential tool is the creation of joint management-employee safety committees. These can of course be erected by bargaining between employers and employees but they can, in addition, be provided for by mandatory legislative order. Such joint committees could be given the power to inspect the premises at any time they chose, to make recommendations as to how to improve conditions they felt to be dangerous, to inquire into complaints made by workers and, if necessary, to close down the operation of a plant until conditions had improved sufficiently to meet the requirements set out by the committees.

5. An even more direct interference than the statutory mandating of joint management-employee committees would be the creation of effective statutory bodies which had the task of regulating health and safety conditions in work places. These could provide for standards of safety and health regulation, complemented by an inspectorate which would have the right to impose penal-

\(^{12}\) For the argument that these initial decisions are vital to occupational well-being, see Ison, supra note 4, at 5. For an unusual public admission of the importance of good engineering design to ensure safety at work, see the statement by the Legal Director of the Order of Engineers of Quebec, Mr. Claude Lajeunesse, as reported in The Gazette, of August 12, 1975. Mr. Lajeunesse was reported as saying that "too many engineers don't recognize their first duty, in law, is to serve the public rather than the companies that hired them. Often an engineer will merely throw up his hands in defeat if a company rejects his built-in safety designs as too expensive. But the fact is, companies are obliged to abide by the engineer's safety recommendations, if he stands firm. It is time engineers stopped acting like company clerks and shoulder a social responsibility." Mr. Lajeunesse was further reported as saying that Quebec's industrial accident rate could be halved if the province's 17,000 engineers designed their projects with safety in mind.
ties and the right to stop operations until standards which have been set by the agencies are met.

6. Another device which has been suggested is the imposition of an injury tax on employers, the idea being that every time a worker's injury or disease is deemed to be attributable to work conditions, the employer is to be made to pay an appropriate penalty into a fund. The employer would then be forced to focus on the financial wisdom of not improving working conditions. The tax could be collected by having the employer either declare the injuries and disabilities incurred by his workers to a safety and health agency, in much the same way as the employer would normally disclose his income to the revenue authorities. Alternatively, the employer could have the workmen's compensation claims made in respect of injuries and diseases that led to disablement at his work place scrutinized by an appropriate agency. From this scrutiny, an appropriate injury tax to be levied on the employer could be calculated.

7. Implicit in all of the suggested devices now in use or which could be put in use, is a tool which should always be employed: education of all concerned people (including workers, employers, unions, designers, engineers, architects, and doctors) in respect of the real, hazardous nature of working.

III. INHERENT DEFICIENCIES OF THESE MECHANISMS

It has already been pointed out that the focus of any scheme for improvement in safety conditions in the work place has to be the exercise of control over enterprise. Let us make it clear at the outset that there is no expectation by us that this society will set out to control enterprise completely. It is not beyond the bounds of possibility, however, that our society would adopt various permit schemes, that is, schemes requiring that certain criteria be met before an investment could be made in a particular kind of enterprise. Were this to happen on a systematic basis it would be a most useful device with which to improve work conditions. But our hopes of this occurring without a dramatically new understanding of the problems are slight. We are a so-called free enterprise society wedded to the notion that investors must be encouraged and that state interference is a disincentive to such investment. There will always be well orchestrated opposition and political resistance to any notion that investment should not be left as free as possible. This makes the possibility of using a permit system on an organized basis a very tendentious one. At most, it can be seen as a useful supplementary device.

The argument that the opponents of a systematic permit system will make is that the best way to achieve better work conditions for workers is to rely on the bargaining between employers and employees. Indeed, this is the argument which will be made just as strenuously when interference is sought to be imposed after the entrepreneur has set up his undertaking, even though, at that point, such interference has been much more common and seems to be more readily accepted now than previously. The argument that such matters ought to be settled by a free bargaining system never does fall on deaf ears in a society in which labour law principles are based on the view that anything re-
lating to work conditions that employees do not wrest away by bargaining remains a prerogative right of the employer.  

The question to be faced, therefore, is whether bargaining by employees can ever achieve those kinds of normative work conditions in respect of safety which a society might deem acceptable. Note that the raising of the question in this form assumes that there are certain minimum conditions which a society is entitled to insist upon—regardless of which economic doctrine prevails. Whether or not this assumption is theoretically defensible, we point out that such societal consensus has led to the stipulation for minimum wages, equal pay, anti-discrimination in employment regulations, maximum hours, and control over employment of children. As a society we have acknowledged that there are some needs which have to be met and, if people cannot satisfy them through their own efforts, we as a society are willing to provide them. We have not been generous in this regard, but the notion is clearly an acceptable one. We therefore feel entitled to say that bargaining will have failed if it does not provide minimum satisfaction of this kind. What follows is an attempt to show that bargaining will always fail to provide such satisfaction in respect of safety in the work environment and that, therefore, remedial state interference should be permitted.

The first thing to note is that collective bargaining in our labour relations system will take place only after an enterprise has been started and a work force gathered. The hazards caused by the very setting-up of the enterprise by the selection of the products to be made, the materials to be used, the processes to be employed, the equipment and plant design will all exist before bargaining takes place. Arguably, if employees are in a strong enough bargaining position when they come to such an enterprise and if they recognize the hazards, they can effect changes to the kind of product which it is sought to be produced, to the processes utilized, to the materials employed and to the design of the plant.

But unfortunately, this hoped-for strength in employees is unlikely to be found frequently. There are some real problems inhibiting the organization of employees, which no amount of theorizing about free enterprise economic models can spirit away. Note that more than sixty percent of all workers in this country are not unionized. Even more significant may be the fact that of the less than forty percent of the work force which is unionized, a good

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13 It has sometimes been argued by collective bargaining theorists that where people are in a collective bargaining situation the employer does not begin with any prerogative of management rights. But note that whether an individual contract of employment or a collective agreement is the contract in question, there is no doubt that the employer may exercise unrestricted rights unless they have been specifically given away; e.g., the right to close down the business, to advertise new products, to make new products, to stop making a certain kind of line, to automate, to subcontract, to discipline, to rearrange shifts, and so forth, are all prerogative of management rights which have been recognized by courts and boards and which can only be restricted if the employees have managed to obtain concessions written into their agreement with the employer to that effect.

14 Corporations and Labour Unions Return Act Report for 1976, Part II—Labour Unions. In 1976, 32.2 percent of an estimated 8,631,000 wage and salary workers in the major industry groups reporting under CALURA were members of labour organizations. The group of workers in respect of which this calculation was made included persons ineligible for union membership.
third or more are in public service industry where the issues of safety and the work environment are, in general, unlikely to be as pressing. Theoretically it is true that nothing stops people from organizing in greater numbers and that the fact that so few people have decided to enhance their bargaining position by forming trade unions indicates that they have freely chosen to remain unorganized. Consequently, if they are not in a position to bargain more effectively than they have in respect of safety and health at work, this is due to a free economic choice. But this is an oversimplification of the organizational ability of workers in this country. There are serious constraints imposed on organization by law, especially for those workers who find themselves in certain industrial sectors or in smaller groups in which established unions are not very interested. Such workers, if they are minded to bind together, must belong to an appropriate bargaining unit; they must first form a voluntary association, then get a certain number of people in the bargaining unit signed up as members; the voluntary association must have at that point, in place, an acceptable constitution which must be ratified, and so on. All this may have to be arranged in the face of vigorous employer opposition which is restrained only by a fragile set of rules. Even more important, perhaps, is the inhibition on organization created by the fact that so many people within the work force are not permitted to belong to trade unions. There are also real limitations on organization because of the existing trade union practices. Unions of a particular kind have developed in North America\footnote{Basically international unions, with a very special view of their role, of which more will be said below.} and they have entered into agreements not to raid each other. As was noted before, because it is so difficult for a spontaneous union movement to succeed, the established unions have little need to worry about ensuring their viability by finding more members. The result has been that, when unions have calculated the cost of organizing a small plant against the cost of obtaining and administering agreements, they have tended to opt for non-organization. Thus, it is hard to believe that the failure by many people to organize into unions which, notionally, could enhance the health and safety conditions of workers by increasing bargaining strength, is due to a free choice by workers.

In any event, to leave it to the bargaining ability of trade unions to protect workers in their work environment has additional difficulties. It requires a great knowledge of occupational health problems by trade unions. That knowledge does not yet exist and will take a long time to acquire. More important, trade unions have come to accept the fact that the ownership of the means of production is vested in employers and that, fundamentally, it is not the trade unions' role to wrest it away from them. This means that trade unions believe that their role is to improve the workers' share of the productive enterprise rather than to change the power relationship in respect of investment and ownership. It is much easier to quantify improvements in terms of dollars than it is in terms of quality of working conditions. To do the latter, trade unions must understand not only the nature of occupational health hazards but must also educate their membership to the same level of comprehension before they can sensibly make arguments that it is more important to obtain greater safety at work than it is to get an extra amount of money in the pay cheque. This argument assumes that trade unions will see improvement in
working conditions as being something they must trade off against increases in remuneration. There is no logical necessity for trade unions to make that assumption. But one of the corollaries of not questioning the employers' right to ownership of assets and return on investment of those assets is that trade unions have come to accept that the easiest way to increase workers' income is to take the same share of the produced cake as it increases in size, rather than to make an attempt at cutting into the profit of the employer. To attempt the latter, after all, would be a step in the direction of questioning the right of ownership. The ingrained belief that, in the long run, the share of both workers and employers is predestined by market principles—that workers can make no inroads into the share of income attributable to investors and income earners—leads to the belief in trade unions that improvement in working conditions at the immediate expense of the employers will be an eventual expense to the worker.

Further, in making the argument that bargaining is unlikely to lead to acceptable safety and health conditions at work, we refer to the already stated proposition that bargaining does not come into play in our society until the plant, with all its inherent hazards, has been set up. Combining this with the fact that, as has been asserted, unions are not interested in imposing too great a cost on employers in respect of health and safety conditions because this will minimize their chances of appearing as good and useful agents to their membership, all that unions are left with when bargaining about health and safety is the goal of installing relatively cheap safeguards. Thus, they will seek to obtain some institutionalized methods whereby they will be allowed to inhibit unsafe productive processes. In order to be able to do this they must have available to them information about the actual conditions prevailing in the plant and they must also have the power to do something about unacceptable conditions. Schemes to attain those objectives have sprung up as a result of collective bargaining. The most common of these are joint employer-employee safety committees with equal representation. The nature of these committees varies in sophistication. Some are merely allowed to inspect the plant and report to the employer and to the employees about prevailing conditions; others are actually given all the information available and may have power to make recommendations about how to combat health hazards; others have even been given the power to halt production until conditions are remedied to their satisfaction. So far these bargained-for joint committees have not resulted

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16 This is of course not universally true. There are occasions when trade unions make incursions into the profit rate of employers and do so consciously and with zeal. But, on this continent, as a generality, the unions have deliberately opted for what they term to be business unionism, a phrase made famous by Samuel Gompers. For a detailed analysis see Hoxie, *Trade Unionism in the United States* (2d ed., New York: Russell and Russell, 1966).

17 This is a very short summary of findings made by P. Walden in an unpublished paper, *Occupational Health and Safety in Ontario*, written at Osgoode Hall Law School in April of 1977. Ms. Walden examined the contents of collective agreements in respect of health and safety. She discovered and discussed provisions for joint committees in the United Auto Workers and General Motors agreement of 1976, in the agreement between Oil, Chemical and Atomic Workers and Polysar, Domtar and Dow Chemical, in the agreement between the United Steelworkers, Local 6500 (Sudbury) and International Nickel, in the agreement between Lumber and Sawmill Worker's Union, Local 2693 and employers in the logging industry, in an agreement between Canadian Union of Base Metal Workers and Canadian General Electric.
in much improvement because, at best, they come into effective play when conditions are egregious in relation to already established standards. Further, the committees are seldom in a position to question the original manner of setting up the plant, and, as Walden concluded, without exception the joint committees are advisory bodies only. They can discuss, recommend, review, suggest and persuade but in every case the final authority for making changes rests solely with management. And management's interest in a safe and healthy working environment is by no means the same as that of workers: when the crunch comes, such considerations will usually take second place to the overriding goal of private industry of making a profit.\textsuperscript{18}

In summation, inasmuch as bargaining is to be relied upon to provide better working conditions, it is a plausible safeguard only in those unusual bargaining situations that favour workers. It is thus left to the theorists who wish to rely on the precept of self-determination in a free market to argue that the principle of voluntariness in economic terms is so fundamental and worthy of support that, if people do not bargain for better conditions than they have, it must be assumed that the unsafe conditions which result are the best the market can afford, and, therefore, the best such people deserve. In our view, this is an unacceptable "principle" when the physical well-being, indeed, the very existence of people, is involved. That our view is by no means idiosyncratic is reflected by the fact that, despite the apparent popularity of the tenets of economic self-determination in a market economy, many legislative schemes exist to ensure that there will be employer-employee joint committees to monitor and report on safety conditions in the workplace. Such interference by the state with the free enterprise model may have been necessitated to help perpetuate the overall dominance of employers over employees, inasmuch as natural compassion could lead to instability if human lives were seen to be treated as insignificant in the drive for profits.

Various provinces have set up such legislative schemes.\textsuperscript{19} Where joint committees are created by dint of legislation it becomes clear that their functioning will be subject to the vagaries of the political process. For example, in Manitoba an extensive scheme of employer-employee joint committees, backed by a governmental inspectorate and standard-setting agency was set up. However, as soon as the government changed from the New Democratic Party to the Progressive Conservative Party, the inspectorate was diminished in number to such an extent that the scheme has been rendered impotent.\textsuperscript{20}

\textsuperscript{18} Inasmuch as it was stated that some joint committees may have the power to halt production, the only one of this kind found was the U.A.W.-G.M. agreement in which there is such power where both the company and the union representatives agree (after a joint investigation of the situation), that there is a "reasonable basis for concluding that a condition involving imminent danger exists." Where there is a dispute, the agreement provides a special health and safety complaint procedure which proceeds via the normal grievance channels to arbitration. But the production processes cannot be halted as of right because of a joint committee finding.


\textsuperscript{20} Smith, \textit{Manitoba Discovers the Price of Norma} (November 1978), 7 Last Post 14.
Typically, the legislation, in addition to providing for joint employer-employee committees, will provide for the creation of an administrative agency which sets what it determines to be appropriate safety and occupational health standards and then, by a system of inspection, provides for the enforcement of the standards. Perhaps the most famous of all these models is the one which has been in existence in the United States.\footnote{The Occupational Safety and Health Act, 29 U.S.C., 651 (1970). It created two bodies, a standard-setting body, National Institute for Occupational Safety and Health (NIOSH), and an agency which is to determine whether the standards ought to be applied, to what extent, and then to enforce them, the Occupational Safety and Health Agency (OSHA).}

It will be immediately apparent that such schemes will run into difficulties. Take the initial setting of an appropriate regulatory standard. Because diseases may have more than one cause, it is difficult to state with accuracy whether certain environments and substances will produce particular unacceptable health consequences. For instance, despite an abundance of evidence there are still people who argue that there is no conclusive link between cancer and the use of asbestos.\footnote{See Alexander, “Osha’s Ill-Conceived Crusade Against Cancer,” Fortune, 3 July 1978, at 86.} Even if it is accepted that there is an identifiable link between a substance used in a manufacturing process and a disease, it remains open to dispute how much exposure to the particular product is actually unsafe. In part, the difficulty in measurement arises because there is frequently a time lag between the actual exposure to a substance and the ensuing occupational disease. Thus, when the statutory body does its research, it will have before it a great deal of respectable scientific opinion which varies tremendously in its appraisal. This leads to the second part of the difficulty: researchers can, not to put too fine a point on it, be bought and sold in very much the same way as most commodities in the marketplace are.\footnote{This cannot be documented with precision, but for a general indication, which can leave no impartial observer in doubt, see Scott, Muscle and Blood (New York: Dutton, 1974).}

In addition, because there are often grounds for genuine disputation, it will take a great deal of time and research before a pronouncement can be made. In the United States, there has been a division of labour created by the statute, as a result of which the Occupational Health and Safety Agency (OSHA) actually promulgates the standards after the National Institute for Occupational Safety and Health (NIOSH) researches into what the standard ought to be. When first created, OSHA was asked to set immediate Threshold Limit Values (TLV) for those substances in existence which were already considered dangerous. It set 400 such standards immediately. They were to be reviewed later by NIOSH. OSHA also has power to set up six months temporary standards while it awaits NIOSH reports. This power is to be used when it has a belief that the substances used in a particular process are inimical to health. As for the rest, NIOSH investigation is awaited. It has already been shown how many toxic substances are estimated to be in use in the manufacturing process, and, of these, at least 1,000–2,000 are considered to be highly dangerous to workers.
The American General Accounting Office report\textsuperscript{24} indicates how NIOSH proceeds when it sets out to investigate the nature of toxic substances and the optimum extent of control over them. First, NIOSH people do a literature search of all existing data on the toxic substance. It is estimated that such research takes six to twelve months. Then it must set up its own research process to fill in the blanks in the data so unearthed. This work is done by NIOSH staff or contracted out to people in the field. Three to five years will elapse before this research is completed. With all the information then available the NIOSH staff sets up a criteria document which is examined thoroughly by NIOSH technicians, outside consultants, professional societies, other federal agencies, and so forth. This process takes twelve to fourteen months. Before approval by the Director of NIOSH is actually given to a criteria document in respect of a particular substance, roughly six years will elapse. Between the commencement of the operation of the Act in 1970 and September 1, 1974, NIOSH had produced only eighteen criteria documents.\textsuperscript{25} Thus there is a serious problem, but that is not the end of the difficulty.

Having set up what ought to be the ideal standard, the feasibility of implementing it must be assessed. Usually the statute will say that the agency that sets the appropriate standards for exposure to particular substances at work places has to take into account the practicabilities of demanding compliance with a particular standard. Even in the absence of such statements, there can be no doubt that the agency would take such factors into account. After all, these agencies are created as a result of political decision making and they cannot be insensitive to the politics that underly the legislation. This is reflected somewhat crassly at times.\textsuperscript{26} In addition to bowing to crude political imperatives, the agency, given the context in which it has been created, will inevitably take into account the effect its promulgation of standards may have on the profitability of a particular employer or of the industry in which the employer functions. Indeed, under the American scheme this has been given somewhat imprecise sanction by the federal courts when reviewing OSHA decisions. It has been held that OSHA is entitled to balance the costs of a standard against the viability of enterprise.\textsuperscript{27}


\textsuperscript{26} A most spectacular instance is recorded in Randall, "Worker Safety and Politics," \textit{Washington Star}, July 15, 1974. A letter by a Nixon aide to the Occupational Health and Safety Agency was reported as saying that "no highly controversial standards (that is cotton dust, etc.) ... be proposed by OSHA or NIOSH 'because of' the great potential of OSHA as a sales point for fund raising and general support by employers." And in the hearings before the Senate Select Committee on Watergate, the then Undersecretary for Labour said that "it would have been perfectly legitimate to say that OSHA would more nearly balance the relative interests of workers and employers under a Republican than under a Democratic administration." See Page, \textit{Toward Meaningful Protection of Worker Health and Safety} (1975), 27 Stan. L. Rev. 1345 at 1354-55.

Compounding these factors which inhibit the effectiveness of regulatory agencies in achieving better standards in respect of exposure to toxic substances is the fact that they rely on an inspectorate to enforce the standard they have erected. With the best of intentions in the world this may prove inefficient. Take, for example, the Target Health Hazard Project initiated by OSHA. Between the months of May, 1973 and February, 1974, as a result of this particularly intensive inspection program, 160 inspections for asbestos were made; this covered fewer than 3,600 of the 200,000 employees estimated to be exposed to asbestos; 275 lead inspections were made, covering 3,000 of the 1.6 million exposed workers; 400 silica inspections were made, covering fewer than 4,000 of the 1.1 million workers exposed to silicosis; 45 cotton dust inspections were made, covering 944 of the estimated 800,000 workers exposed; 897 carbon monoxide inspections were made, covering about 27,000 workers. Further, the system of fines and the right to close down operations where there has been flagrant violation of prescribed standards will be sanctions whose use may well depend on the political attitude of the agency.

More significant, perhaps, is the fact that the government in power can, as already noted in respect of the Manitoba legislative scheme, cut back on enforcement simply by not adequately financing the agency. But, superimposed on all these difficulties is the additional problem that inspectors under these kinds of schemes will usually try to get violators of standards to cooperate and will seldom recommend the imposition of penalties in the first instance. When they do finally impose penalties they tend to be rather light and will seldom lead to follow-ups. Apart from the political reasons against, and sheer physical impossibility of adequate inspection, there are also inbuilt constraints on enforcement by an inspectorate system. Empirical studies by sociologists point to the fact that inspectors are loath to use what they see as criminal stigmatization of employers in these kinds of circumstances. Even when the statutes promulgating the standards are formulated in ways which leave the inspectors no apparent discretion they will seldom impose penalties upon the finding of a violation. They tend to do so only after there has been a history of repeated violations, suggesting that they prefer to withhold the imposition of sanctions until they are convinced of the moral blameworthiness of the employer. Thus the efficacy of an inspectorate must be doubted.

Finally, the potential of an injury tax scheme may also be questioned. Because the causal connection between the disease and the environment is not always easy to establish, it will be hard to know when to impose such an injury tax. Moreover, the amount of the injury tax will be hard to fix. If the size of the penalties now imposed under regulations proscribing certain kinds of conduct are any indication, the likelihood of serious amounts being levied by

28 See supra note 25, at 666.
29 Senator Harrison A. Williams, Jr. (Dem.-N.J.) Chairman of the Senate Committee on Labor and Public Welfare, wrote in the Sept.-Oct. 1975 issue of Trial Magazine, that in OSHA’s first three years, 95 percent of all covered employers were not inspected at all and that in the fiscal year 1973, 98 percent of the violations cited by inspectors were classified as non-serious and carried an average penalty of $18.00.
way of injury tax is not very great. An injury tax scheme might also have a backlash effect because people might be dismissed if they are considered injury or disease prone. There may be discrimination in hiring. Also, as various workmen's compensation schemes have done from time to time, injury tax schemes could provide an incentive to employers to hide the nature of hazard-creating enterprise. This would happen under any kind of regulatory scheme aimed at improving safety and health conditions but there would be a greater incentive to do so under a scheme that set out specifically to tie financial assessment to particular debilitation.

IV. CRIMINAL LAW AS A MEANS OF SPOTLIGHTING THE PROBLEM

This sketch of the difficulties with the many existing and potential schemes that might be used to regulate safety and health conditions in the work place shows that it is the notion that profit-making is a sacrosanct principle that leads to the apparent reluctance to provide stringent and effective measures. This inarticulate premise makes it very difficult for a scheme to be devised ensuring the health and safety of workers if the scheme is to attain this objective at the expense of investors. Starting from the premise that the change of ownership of the modes of production is not on the agenda and that the best that can be hoped for is amelioration of workers' conditions through regulation, we are looking for a mechanism that will enable us to convince people that it is proper to attack profitability.

Let us commence this attempt by noting that it may not even be good economics to argue that the investor should not bear more of the cost of the materialization of risks created by the investment. The economic cost of injury and debilitation at work is enormous. Addressing the Richelieu Club in Montreal, the then Minister of Health and Welfare, the Honourable Marc Lalonde, said that time lost through industrial accidents was twenty-three percent higher than time lost due to industrial disputes. The Minister further pointed out that, in addition, injured workers occupied 14,000 hospital beds every day at a cost of approximately 500 million dollars per year. To this cost had to be added, he noted, 250 million dollars spent in medical treatment. It would be interesting to compare this external cost of enterprise to the cost that entrepreneurs would have to bear if they had to install safeguards to diminish this huge cost borne by people other than profit-makers. It is of course arguable that, in a planned society, it might be economically unjustifiable to maim and hurt people, given this kind of comparative costing. In a capitalist economy of the kind that we enjoy, an argument which relies on comparison of the global costs of industrial health and accidents with the cost of safeguards to individual enterprise would need refining. It would have to

31 He noted that there were 11.5 million man days lost due to industrial accidents in 1974 compared to 9.3 million man days lost due to work stoppages. It hardly needs to be pointed out that time lost due to industrial accidents may not be as harmful to particular productive enterprises as is time lost due to industrial stoppages. The former occurs in single instances and the work process may not be affected at all; the second is designed to have the opposite effect.

32 Speech quoted by Julian Major, Executive Vice-President, C.L.C., in an address to the Ninth C.L.C. Health and Safety Conference (September 22, 1975).
be shown that a particular social cost could be attributed to a particular entrepreneur's activity before action could legitimately be taken to internalize that cost to the enterprise concerned. This would raise causal problems of a very difficult nature but, if they could be overcome, even a capitalist society would have to acknowledge that precautions should be imposed on that basis.

Next, we wish to make a polemical argument. Even on the basis that, economically, the imposition of precautions and safeguards would cut into the profits of enterprises, it does not automatically follow that such costs ought not to be imposed. After all, there is nothing sacred about a particular rate of profit. If one abandons classical economics for a moment and recognizes that the world is not as competitive as the Samuelson-type theorists would have it be, it may well be that profits are made which could not be expected to be made in a true market economy. This will be the result of monopolies, oligopolies, the effect of tariff barriers in a particular market, tax subsidies, and other such interferences with real free enterprise. That is, there already has been serious interference with the market model; therefore, interference might be warranted on a general basis where it is clear that profits are not necessarily related to productivity.

But if this crude form of economic argument is rejected, as it is likely to be given the almost unanimous public adherence to free enterprise principles, what we need to do is to show that profitability may be attacked when the making of profit is associated not with laudable market practices but with heinous conduct.

If the physical onslaught which takes place in the workplace occurred outside the employer-employee environment there is no doubt that society would use the most formidable tool it has to stop such attacks: it would use

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33 At this point note again that there is also interference in respect of minimum wages, minimum hours, equal pay, discrimination in hiring and firing, etc.

34 It is not easy for us to prove that there are in fact profits which are not the result of head to head competition but, looking at a few entrepreneurs who would appear to mere 'laypersons' to be in oligopolistic situations, we may be able to give an indication as to how it might not be such an economic disaster if the costs of avoiding harm were internalized. Thus: would it matter very seriously if the profitability of Johns-Manville Corporation, a giant in the asbestos industry which had a year-ending income of $102,527,000 in December 13, 1977, were cut down a little? The total assets of the company were $1,333,800,000 (Financial Post Survey of Industrials, 1978). And again, Rio Algom Limited, a processor of uranium and other hazardous products, had net earnings, according to its Annual Report of 1976, of $31,629,000. (This was earned on sales of $401,611,000. The excess of assets over liability at that time being $321,748,000.) Would a reduction in its rate of returns be unwarranted interference in the market leading to calamity? Could a similar point not be made about Asbestos Corporation Ltd., which showed, at the end of December 31, 1977, a net profit of $21,021,000 earned on sales of $145,344,000? (From Moody's Industrial Manual, 1978). Asbestos Corporation Limited is controlled by General Dynamics Corporation and operates the famous Thetford Mines in Quebec. And Inco had a net income at the end of December 1977, of $99,859,000 (Financial Post Survey of Industrials 1978). The total assets of Inco are $4,075,764,000. Inco, of course, operates in the mining industry where many hazardous situations exist. Can it be argued strenuously that to cut into the profitability of these companies would be a mortal blow to their enterprises or enterprise in general? Can this argument be made strenuously in view of the fact that these operators are not—to say the least—in very competitive situations and unquestionably have caused serious harm to the people who work for them?
the criminal process and treat offenders as social pariahs. Prosecution under the criminal law of employers for the harm they do to workers rather than reliance on existing safety and health regulatory schemes would characterize the conduct of such employers as an unjustifiable preference for unregulated profit over the well-being of human beings who are, after all, very important in the garnering of such profits. Prosecution of entrepreneurial behaviour which can inflict grievous bodily harm or even death would thus identify the kind of conduct that warrants interference and regulation by government. Expectations that such interference would be more vigorous than it is now would not be misplaced. Indeed, it may become possible to talk openly about what is a “reasonable” profit in view of the need to reduce injury and disease to an “acceptable” rate. It is hard to imagine that there will be many people who will publicly advocate the principle that the earning of profit, even if it requires criminal conduct to be made, is more important than the health and safety of human beings. Better regulation might result because of the need to defuse the argument that there may be class distinctions in our society. Yet the controversy about the need for such regulation might well heighten awareness of the nature of the social organization which created the problem sought to be solved.

The use of the criminal process has another attraction. Because of the assumptions of the liberal state, the ideology of law requires it to claim that it punishes behaviour which has been judged unacceptable by society no matter who the perpetrator of the offensive behaviour is. It will be interesting to see how the administrators of the legal justice system respond when it is argued that entrepreneurs are offenders against the criminal process in much the same way as robbers of private property and people. It will provide something of an insight if the officers of justice resist the use of criminal prosecutions in this context. This may in itself serve the purpose of spotlighting the nature of the health and safety problem in particular and the assumptions about our social organization generally.

V. POTENTIALLY APPLICABLE CRIMINAL LAW PROVISIONS

What follows is a selection of criminal offences that might be used to serve the purpose of dramatizing the need for less inhibited state interference with the nature of enterprise to upgrade the safety and health of workers. As these offences were not devised for this purpose, it will be necessary to demonstrate that they can be so utilized. This will cause us to make arguments which, at first blush, might be perceived to be somewhat far-fetched. It is our position that this appearance of unreality is due to the reluctance we are all taught to have to use the criminal law to interfere with otherwise socially commendable activity, namely, productive enterprise. Therefore we will attempt to establish the essence of the offences we have selected to show that they are inherently capable of being utilized in the manner we advocate. In doing so, we will cover ground which will be trite to schooled criminal lawyers. Indeed, we do not claim that the exposition which follows is in any way exhaustive or novel. We are at pains, however, to show that technically the arguments we make about the applicability of the Criminal Code provisions we have chosen are, at the very least, plausible. If they are, then those interested in aiding the cause of greater safety and health for workers will have an addi-
tional and practical weapon at their disposal. In this light, note that the offense of criminal negligence has been dealt with at great length as its potential utility seems to be immense.

A. Criminal negligence: section 202

The relevant provisions of the Criminal Code\(^{35}\) are as follows:

202. (1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "duty" means a duty imposed by law.

203. Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.

204. Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and is liable to imprisonment for ten years.

The very name of the offence and the phrasing of its requirements seem to demand comparisons with tort liability in negligence. In tort the basis for recovery is that where A can or ought to reasonably foresee that his or her conduct is likely to affect B and then behaves in a way not consonant with the standard of care that is said to be reasonable for a person in A's circumstances, B is entitled to be compensated for any injury that he or she may have suffered as a result of A's conduct. A will be judged to have been negligent.

If this approach were adapted for use in prosecutions under sections 202-204 of the Criminal Code, these provisions would become a very powerful weapon in any arsenal built up with the intent to attack employers who allegedly operate unsafely. Clearly, an employer can or ought to foresee that the manner of operation of the workplace will affect the employees who work there. Failure to observe the standard of care which is perceived as reasonable, as a result of which injury to (or even death of) employees resulted, would lead to a finding of criminal culpability.

There is, however, a built-in bias against the use of the civil, objective test of culpability in criminal matters. Thus, Estey J. in *R. v. Watts and Gaunt* stated:

> It is a general rule that *mens rea* is an essential ingredient of criminal offences. Its meaning varies in relation to different offences, but it is generally described by Cave J. as "some blameworthy condition of the mind", *Chisholm v. Doulton*, (1889) 22 Q.B.D. 736, or by Chief Justice Robertson as "at least an intention to do a wrong or to break the law", *Rex v. Stewart*, [1940] O.R. 178 at 181, Tremear, 5th Ed., p. 18, Russell on Crime, 10th Ed., p. 25.\(^{38}\)

There are very powerful theoretical reasons for requiring a guilty intent as a prerequisite to the finding of criminal culpability. Inasmuch as the state

\(^{35}\) R.S.C. 1970, c. C-34.

of the law relating to criminal negligence runs counter to this theoretical ra-

tionale it will be argued strenuously—by those who support the theoretical

requirement of a guilty mind—that no use should be made of these provisions

of the Criminal Code against employers who had no intent, in the usual way

that this notion is understood in criminal law, to hurt their employees. Accordingly, it would not necessarily be advantageous to the proposals advocated in this article to find that an objective test has evolved in respect of the offence of criminal negligence. It might make the political task of persuading the forces of prosecution to exercise their discretion in favour of laying charges against errant employers under sections 202-204 more difficult than if it were believed that such employers will have to be shown to have had a guilty mind.

There are, however, signs that something akin to an objective test might be applicable to the offence of criminal negligence. Indeed, in Chisholm v. Doulton, one of the cases relied on by Estey J. in the passage cited above, Cave J., wrote that:

It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge—but as a general rule there must be something of that kind which is designated by the expression mens rea.

Thus, even one of the classic statements stipulating the incontrovertible need for a finding of guilty intent referred to the possibility that the intent might be established in an apparently non-subjective way, namely, by proving negligent conduct. Given this kind of confusion in language, it is not surprising that case law has evolved that has obscured the supposed rigid distinction between subjective intent on the one hand and the allegedly forbidden assessment of guilt on the basis of more objective criteria on the other hand. Although it would be foolish to pretend that what follows is a comprehensive survey of the law of criminal negligence in Canada, an attempt will be made to sort out these intertwined strands. It will be shown that subjective intent needs to be proved in order to succeed when laying a criminal negligence charge but that the way in which intent has been defined in this area makes it plausible to prosecute employers for wayward behaviour on bases similar to those on which one would bring an action in civil negligence.

1. Cases in which a form of subjective intent is easy to find.

Where the accused knows that to do what he or she does is conduct likely to cause bodily harm or death to another person and has no justification other than self-gratification for engaging in such conduct, it is reasonable to say that an appropriate guilty state of mind which satisfies the mens rea requirement has been established. A good illustration is provided by R. v. Petzolt.

37 The arguments as to why mens rea must always be found before attributing criminal responsibility are best put in Hall, Negligent Behaviour Should be Excluded from Penal Liability (1963), 63 Colum. L. Rev. 632. Some of these arguments will be addressed below.

38 (1889) 22 Q.B.D. 736, 16 Cox. 675 (C.A.).

39 Id. at 741 (Q.B.D.), 679 (Cox C.C.).

In that case the accused took his chimpanzee, which he knew to be vicious and to have a propensity to bite, out on to the street. The chimpanzee bit a child and the accused was convicted of criminal negligence. The court explicitly stated that advertence is a necessary ingredient to be proved and that in this case the Crown had discharged the burden in that respect. 41

To a similar effect are a series of cases in which a person with a known disability behaved as if he were not incapacitated and could meet the standard of care expected from a non-disabled person. Then, having in fact failed to meet this standard of care, the courts have had no difficulty in convicting such people of criminal negligence. Two illustrative cases are R. v. Shaw 42 and R. v. Taylor. 43 In the first, an epileptic, knowing of his disability, had a seizure while driving a car. As a consequence there was an accident resulting in fatalities; he was convicted of criminal negligence. In the second, a driver who had taken prescribed drugs and then imbibed alcoholic beverages, something which his medical advisor had told him explicitly not to do, had an accident after driving erratically as a result of this mix of medication and alcohol. He was also convicted of criminal negligence. 44

In these cases it is clear that the accused voluntarily embarked on a dangerous course of conduct and the apparently necessary subjective intent was found to exist on that basis. It follows that, if the accused had not acted voluntarily, it would be impossible to attribute guilty intent to him or her. The courts have so held. In R. v. Minor, 45 for instance, it was decided that, if believed, it would be a good defence to a motor manslaughter charge to establish that, at the time of the fatal collision, the driver was suffering from a temporary blackout. If such circumstances could be proved, it could not be shown that the accused was capable of forming the intent required for conviction. 46

This line of decisions seems unequivocal in its requirement of proving the accused's subjective intent.

2. Cases which raise the possibility that criminal negligence does not require a subjective intent.

Automobile accidents are a recognized evil in our society—so much so that legislatures will seek to educate the driving public, in an effort to improve its behaviour and thereby to ameliorate the accident toll. To this end, they enact provisions which, in their appearance, look very much like criminal statutes. Such provisions prescribe certain kinds of conduct and impose serious

44 This driver's car was, in addition, in a serious state of disrepair, a fact also known to the accused.
penalties for failure to comply. In this sense they share some of the aims of criminal law. Their objectives include specific deterrence of the particular miscreant and general deterrence of all such behaviour by all road users. All provincial legislatures in Canada have enacted such provisions.

The question of whether these provincial enactments are, in fact, criminal in nature came to be examined because of the nature of Canadian constitutional law. By dint of the constitutional distribution of powers, the provinces are not permitted to enact legislation which may be characterized as criminal law; such power is reserved exclusively to the federal legislature.

In O'Grady v. Sparling, it was held that a Manitoba statute, which prohibited driving without due care and attention and which provided for the imposition of a penalty should there be a breach of this provision, was within the legislative competence of the province. It was reasoned that even though an offence under the provincial statute might also amount to an offence under the Criminal Code, the Criminal Code always required proof by the prosecution that there be advertent negligence whereas this was clearly not required by the provincial legislation. That is, the provincial statute was not legislation in respect of criminal law because it created an offence which required no subjective intent; criminal law properly so called always requires this element.

At this point, there seemed to be no confusion: criminal negligence was defined as requiring advertence, making it essentially different to civil negligence. Unfortunately, the picture did not remain clear. A series of decisions was so equivocal that even Laskin C.J.C. became perplexed. Briefly, events unfolded as follows.

In Mann v. The Queen, it was held by the trial judge that the provincial statute that made careless driving an offence covered the same grounds as section 221(4) of the Criminal Code, which made it a criminal offence to drive dangerously in a public place. Hence it was held that the federal legislation occupied the field and the operation of the provincial careless driving section was precluded by reason of the dangerous driving provision of the Criminal Code. That is, the argument was not that the province could not enact such legislation but rather that, inasmuch as the section enacted overlapped with a section of the Criminal Code which did not require advertence, the federal legislation had through a valid exercise of its criminal law power made the provincial section inoperative. This reasoning suggests that the Criminal Code had, at least in the case of automobile regulation, abandoned the requirement of advertence.

When the case got to the Supreme Court of Canada this reasoning was rejected, but not so clearly that its ghost was laid to rest. Some members of the Supreme Court held that the history of section 221(4) showed that no

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48 Section 202(1), (criminal negligence), or section 233(1) (criminal negligence in the operation of a motor vehicle).
50 Now s. 233(4).
crime of inadvertent negligence had been created. Others concentrated more on the possibility that section 221(4) of the Criminal Code and the provincial section gave complementary areas of coverage. One of the arguments was that section 221(4) required dangerous driving, while the provincial section merely required careless and inconsiderate driving. Thus it was possible to be penalized for some conduct under the provincial statute, but not to be convicted by reason of that behaviour under section 221(4) of the Criminal Code. There was also an argument that, no matter how broadly one wished to construe the criminal law power, it ought never to be interpreted so as to lead to the extinction of a provincial regulatory power. Here, the regulatory power of the province had been used towards bona fide ends and ought not to be undermined.

On reflection, the overriding sense one got from the decision was that criminal negligence (then section 191, now section 202), the offence of criminal negligence in the operation of a motor vehicle (then section 221(1), now section 233(1)), and the offence of driving dangerously, (then section 221(4), now 233(4)) required advertence. It is not clear that in Mann this holding was essential to the actual decision reached and the refinements in the judgments left the door open for arguments on this point whenever a distinction would have to be made between criminal negligence on the one hand and the Criminal Code offence of dangerous driving on the other. The occasion to do this arose in the case of R. v. Binus. There the court was concerned with the distinction between criminal negligence in driving, that is, the offence defined by the combined effect of sections 191(1) and 221(1) (now sections 202 and 233(1)), and the offence of dangerous driving created by section 221(4) (now section 233(4)). In issue was the question of whether the section 221(4) requirements were met by proving that the driving by the accused fell short of the standard of behaviour of the reasonable driver. Laskin J.A., leading the Court of Appeal of Ontario, recognized that a section 221(1) offence included a section 221(4) one and then went on to examine whether the lesser offence required the Crown to prove the same state of mind as it must do in a criminal negligence case. His answer was that it need not. To overcome the apparent obstacle of Mann, Laskin J.A. argued that there, as in O'Grady v. Sparling, the Court had been at pains to distinguish the Criminal Code provision from a provincial one and had accordingly emphasized the fact that, for the purposes of the Criminal Code, mere inadvertent negligence was not enough. But this did not mean that the same amount of advertence was necessary to convict on a dangerous driving charge as for a conviction under criminal negligence. Going to the actual language of sections 191(1) and 221(1) on the one hand and section 221(4) on the other, Laskin J.A. pointed out that in the former ex-

61 Cartwright and Spence JJ.
62 Martland, Judson, Ritchie JJ. appeared to rely in part on this argument. Spence J. also seemed to support this line of thinking.
63 Fauteux, Abbott and Judson JJ. For a more detailed analysis of this very fragmented decision (and of other cases in this area of the law) see Burns, An Aspect of Criminal Negligence or How the Minotaur Survived Theseus Who Became Lost in the Labyrinth (1970), 48 Can. B. Rev. 47.
press reliance was placed on a finding of recklessness or wantonness, whereas this requirement was totally absent in the latter. This, the Court of Appeal reasoned, demonstrated that the state of mind required for the purposes of sections 191(1) and 221(1) was manifestly distinct from that which needed to be proved when a charge was laid under section 221(4). Thus he concluded that an objective test had to be applied when interpreting section 221(4). To now differentiate this Criminal Code offence from the provincial one of driving carelessly—as the holdings in O’Grady v. Sparling and Mann necessitated—Laskin J.A. argued that the distinction lay in the fact that under the provincial enactment it was possible to be found in breach even though no member of the public was endangered by the defendant’s conduct; whereas such actual danger was a necessary element of the Criminal Code offence. On appeal, the Supreme Court of Canada rejected the whole of this argument. Cartwright J. found the reasoning of the Ontario Court of Appeal most persuasive but held that, in view of the fact that five out of seven members in Mann had determined that advertent negligence needed to be proved under section 221(4), it was not open to argue that an objective test should be applied when interpreting that section. Having said that, the Supreme Court of Canada upheld the Court of Appeal’s decision on the basis that the trial judge had, in any event, sufficiently directed the jury’s mind to the necessity of finding something more than mere civil negligence.

The picture that must have been presented at this time was clear, even if the reasoning creating it was not: a state of mind known as advertent negligence had to be proved to convict under the Criminal Code provisions, sections 191(1), 221(1) and 221(4). That is, merely establishing a deviation from an objective standard of care was not enough; the accused had to have a “criminal” mind of some kind. But the Supreme Court did not help matters by its decision in Peda v. The Queen.

In that case the accused had been charged with dangerous driving under section 221(4) (now 233(4)) of the Criminal Code. In directing the jury, the trial judge had merely read out section 221(4) to them, with some explanation, but with no reference whatsoever to the need to find some advertence in the accused’s conduct. On appeal, it was held by the majority in the Court of Appeal that a proper direction had been given because the language

65 Ritchie and Spence JJ. concurred with Cartwright J.

66 From the discussion above, it is easy to see how lawyers might, in fact, differ about the specific reasons given for the decision in Mann, supra note 49. In this context note that in Binus, supra note 54, Taschereau C.J. and Judson J., classified the remarks in Mann as to the requirements of a high degree of negligence, behaviour worthy of punishment and moral blameworthiness as obiter dicta; [1967] S.C.R. 598. But note, without requiring advertence, these two justices still upheld the findings of dangerous driving; see note 61.

67 The Court of Appeal had dismissed the appeal from the conviction on the basis that the trial judge’s direction to the effect that some advertence was necessary could not have seriously affected the jury’s deliberations. There was sufficient evidence for a jury to find that the accused had been guilty of dangerous driving, even on the basis of the less demanding objective test set by the Court of Appeal.


69 Id.
of section 221 (4) was unambiguous and it described the nature of the conduct an accused must be guilty of before he or she could be convicted. The finding that such conduct had taken place satisfied the Criminal Code requirements without more. The Supreme Court of Canada agreed with this holding. The majority of that bench argued that, inasmuch as *mens rea* had to be proved, it did not require a special instruction to the jury because dangerous driving was defined in such a way that, if it was found to have occurred, a finding would also have been made that the appropriate mental element existed. They then went on to say that Laskin J.A., who had dissented when *Peda* was before the Ontario Court of Appeal, was wrong in his perception that *Binus* was a binding decision requiring a jury to be told that advertent negligence had to be proved. Their argument was that the Supreme Court in *Binus*, in holding that Laskin J.A. had been wrong in *Binus* in the Ontario Court of Appeal when he reasoned that a breach of an objectively set standard was sufficient, had not decided that the jury must be directed to find advertent negligence when trying a section 221 (4) case. Rather, since three members of the Supreme Court of Canada had stated that this requirement had to be satisfied, it was not necessary to the actual decision in *Binus*. In *Peda* it was now said that in *Binus* the essence of the decision was that a section 221 (4) charge would not lead to conviction if only inadvertent negligence were found. Further, inasmuch as it might be inferred from the judgments in the Supreme Court in *Binus* that they were insisting that a direction in terms of advertent negligence had to be given because this followed from the holding in *Mann*, the majority in *Peda* pointed out that such statements in *Mann* itself were obiter. Not surprisingly, Cartwright, C.J.C., with whom Spence and Hall JJ. agreed, held that the principle that the jury must be told that advertent negligence had to be proved was central to the decision in *Mann*. They now held in *Peda* that a jury must always be directed expressly to find advertence in a section 221 (4) case.

The obscurity of reasoning in *Mann* and *Binus* was now reaping its reward. But, despite the confusion surrounding section 221 (4), there had been no abandonment of the position that the three sections—191 (1), 221 (1) and 221 (4), (now 202, 233 (1) and 233 (4))—required advertent negligence to be proved. Certainly none of the arguments about advertence or inadvertence had been raised in respect of sections 191 (1) and 221 (1) of the Criminal Code,—the criminal negligence sections with which we are concerned in this paper. It seemed clear, even after *O'Grady*, *Mann*, *Binus* and *Peda*, that the criteria of wanton and reckless behaviour specified in those sections denoted the need for finding advertence. But a small doubt about this proposition has arisen. It stems from pronouncements by Laskin C.J.C. who has had every reason to be bemused by the legal reasoning adopted in this area.

In *Arthurs v. The Queen*, the Supreme Court of Canada had to deal with a case in which it was argued that the judge had failed to properly put the accused's defence to the jury. A secondary issue raised was whether the judge's directions had adequately countered any racial bias that might have

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60 Although, it will be remembered, Spence J. used other reasons as well.

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existed because of the fact that both the accused and his counsel were black. The accused had been convicted of causing bodily harm by criminal negligence in the operation of an automobile. Six members of the Supreme Court gave negative replies to the two questions put by the appellant; 62 Ritchie J. noted that "[C]rown counsel treated the charge as one which necessarily involved proof that the accused had deliberately run [the victim] down. In my view, this was a wrong approach which placed an unnecessarily heavy burden on the Crown." 63 This, of course, does not suggest that subjective intent need not be proved in this kind of charge, but merely that deliberate conduct need not be established. Laskin J., dissented, noting that the charge was a rather strange amalgam of homicide by criminal negligence in the use of a motor vehicle. He thought that the charge had to be viewed as one of homicide by criminal negligence, the particulars being homicide by the criminally negligent driving of a motor vehicle. In that light he went on to say that the direction which had been given by the trial judge in Arthurs, and which had been in common use in Ontario in criminal negligence cases, put too great an onus on the Crown because it required that the accused had with deliberate intent done something or omitted to do something which he or she knew or ought to have known would endanger the lives of others. 64 Having said that, Laskin J. could have left the point alone, as had Ritchie J. in his judgment. It would then have been open to reason that criminal negligence did not require proof of deliberate intent by the accused, but some element of advertence still needed to be proved. That is, the second branch of the Ontario direction—disregard for the lives and safety of others—would be the subjective intent which it is necessary to prove to establish that the offence of criminal negligence has been committed. But Laskin J. did not leave the point alone. Instead he stated:

Although the question of the type of mens rea involved in criminal negligence, as defined in s. 191(1), was not directly in issue in the judgments of this Court in O'Grady v. Sparling, Binus v. The Queen, and Peda v. The Queen, these cases support the conclusion that subjective intent is not a necessary ingredient of criminal negligence. 65

As this was clearly, in the context, an unnecessary argument to the decision and as Laskin J. was a dissentent, does this pronouncement have any importance?

That issue arose in a peculiar manner in R. v. Leblanc. 66 The accused was the pilot of a light aircraft in which he was to transport the victim. The victim was waiting on the ground when the pilot flew the aircraft very low near to where he stood to frighten him. He miscalculated, and a part of the

62 Fauteux C.J.C., Ritchie, Abbott, Martland, Judson and Pigeon JJ.
63 At 297 (S.C.R.), 572 (D.L.R.), 446 (C.C.C.).
64 This was part of a direction which had two branches. The first was as stated in the text; the second was that, in the alternative, the accused must have acted with such disregard for the lives and safety of others as to indicate that he or she was heedless of the consequences. This two-branched direction had been given the judicial stamp of approval in R. v. Titchner, [1961] O.R. 606, 29 D.L.R. (2d) 1, 35 C.R. 111 (C.A.); R. v. Torrie, [1967] 2 O.R. 8, 50 C.R. 300, [1967] 3 C.C.C. (C.A.).
plane hit the victim, killing him. The accused was convicted of criminal negligence. When the matter came to the Supreme Court of Canada, one of the issues was whether the trial judge had improperly admitted evidence to the effect that, on several previous occasions, the accused had made low flying passes over people waiting on the ground. The argument was that similar fact evidence can be admitted only where it proves a fact-in-issue and does so by way of a chain of inferences other than that the accused has a predisposition to behave in a particular way because of some unworthy characteristics he or she may possess. In this case, as there was no need to prove the actus reus, similar fact evidence could have been admitted only because it proved the mens rea of the accused. The accused reasoned that it was clear that he had not had any intention to kill the victim and that the Crown had not sought to base its case on any such supposition. Thus, the argument went, the similar fact evidence was totally unnecessary and its admissibility may well have prejudiced the jury against the accused.

The majority of the Court, led by de Grandpré J.,\textsuperscript{67} found that the similar fact evidence had been properly admitted because it tended to prove one of the facts in issue: mens rea. De Grandpré J. cited Ritchie J. and Laskin C.J.C. for the proposition that deliberate intent to cause harm was not an element to be proved in criminal negligence. But he relied on O'Grady v. Sparling for the proposition that advertence by the accused had to be established. That is, some kind of intent had to be proved. His Lordship, citing Peda, noted that often the very proving of the alleged conduct would establish the intent necessary to be proved in a criminal negligence case and that it might have been enough for the Crown to rely on the conduct of the accused, the nature of which was not disputed. However, he continued, this did not preclude the Crown from proving this intent—this advertence—by adding more evidence than was necessary. Hence, the similar fact evidence was properly admitted.

The minority in \textit{Leblanc} took a radically different view. Dickson J. argued that similar fact evidence, when the actus reus was not in question, could only be adduced where it was relevant to prove identity or intent or to negative accident or mistake or to rebut a defence otherwise open to an accused. Here identity was not an issue, nor could the Crown introduce the evidence to rebut a defence which had not been raised, was most unlikely to be raised and was, in the event, not raised. As to intent, Dickson J. argued that to prove the mental element of criminal negligence, it was sufficient for the Crown to establish that the accused had shown wanton or reckless disregard for the lives and safety of other persons. He cited the passage from the dissenting judgment of Laskin J. in \textit{Arthurs}, already extracted. Dickson J. went on to make the following observation:

That is to say, the mens rea of criminal negligence is determined by an objective standard. The majority of the Court in that case [\textit{Arthurs}] did not disagree with the statement by Laskin J. It is doubtful that similar fact evidence would be admissible to prove subjective intent—proof of subjective intent not being a requisite of the offence.\textsuperscript{68} (Emphasis added.)

\begin{itemize}
\item \textsuperscript{67} Martland, Judson, Ritchie, Spence and Pigeon JJ. concurred.
\item \textsuperscript{68} \textit{Supra} note 66 at 346 (S.C.R.), 249 (D.L.R.), 103 (C.C.C.).
\end{itemize}
To sum up the consequences of these decisions is not easy. At the very least, a strong minority of appellate judges feels a need to opt for an objective test in criminal negligence cases. Perhaps if it had not been for the peculiar constitutional framework in which the questions were put to Canadian courts, an objective test might have emerged. The various reasons advanced for upholding both criminal and provincial legislation had to have, or so it appeared to the judiciary, a common thread. That thread was found to be the need for advertence in the federal offences and the non-requirement of it in provincial ones. But for the need for such a demarcation point the issue may have been resolved otherwise. At present, however, it may be stated—with a good deal of diffidence—that the offence of criminal negligence requires some measure of subjective intent to be proved by the Crown. What is the nature of the intent which must be established?

3. The nature of the subjective intent required.

As has already been noted, there are some theoretical reasons why objective criteria ought not to be applied when determining criminality. Two of the foremost theorists who argue that criminality requires a guilty state of mind and that, therefore, an objective test is anathema to criminal law are Hall and Turner. The thesis of these writers, and others like them, is that an essential component of criminality is voluntary conduct. Inadvertent conduct is defined as not being voluntary and, therefore, not criminal. The reasoning is that it is ethically wrong to stigmatize a person as having acted immorally—which is what a criminal conviction entails—if the conduct of the accused was, in fact, not voluntary. In addition, the punishment which follows a criminal conviction is physically very harsh. It is seen as wrongful to inflict such hardship on people who were not ethically to blame for their conduct. An additional argument that these people use is that, inasmuch as punishment of a convicted person is meant to act as both a specific and a general deterrent, punishment imposed for involuntary acts cannot fulfill that function. By definition, people who do not act voluntarily cannot be deterred from the conduct in which they engage.

The writers who oppose the objective test on the foregoing bases equate inadvertent conduct with negligent conduct. To them, it follows as day follows night, that there ought to be no such thing as an offence of criminal negligence. It must be noted at this point that this description of how the criminal system ought to operate is consonant with some of the basic concepts relating to defences. The defences of insanity, automatism and drunkenness operate on the basis that the accused acted without necessary intent. The intent is, generally speaking, lacking in such situations because the conduct might be

classed as involuntary in the sense that that word has been used by the opponents of objective standard-setting in criminal law. What follows in this section will indicate that the courts are acutely aware of the need to find a subjective intent and that they therefore will speak about the need to find mens rea or voluntary conduct or both when attempting to determine criminal liability. It will also be shown that it may not be as difficult as it might be expected to demonstrate the requisite intent.

First, to demonstrate that it is true that the courts are not willing to find that every departure from an apparently objectively-set norm for behaviour is criminal, note the decision of R. v. Akerele. In that case a medical practitioner had wrongfully and carelessly mixed a drug which he was prescribing for sick children. As a result of his carelessness ten children died. The Privy Council held that, although the practitioner may have erred in the way that he approached his task, his carelessness did not amount to criminal behaviour. It may well have been that if the practitioner had been sued in tort he would have been found to have departed from the standard that a reasonable man could be expected to meet. If one equates inadvertent conduct with negligence, it seems to follow from this decision that inadvertent conduct cannot amount to criminal negligence. It would then appear that a subjective element of some kind needs to be found before criminal responsibility can be attached to conduct. The only other possibility would be to discover some intermediate state of mind between inadvertence and mens rea.

This leads to the second argument. Professor Hart has reasoned that negligence and inadvertence are separate concepts. He defined inadvertence as referring to those situations where the conduct of a person is the result of a truly blank state of mind. He agreed that where this was the fact no criminal responsibility ought to attach to the act of the accused. He differentiated this blank state of mind from negligence by describing the latter as a departure from what a reasonable man could and would do in the circumstances. Negligence was thus described as conduct which departed from a standard of behaviour which was objectively derived. In this sense, negligence was seen as the failure to think about how to meet the requirements which are objectively set. Not thinking about undertaking precautions which a reasonable person would take is the culpable state of mind known as negligence. This is to be differentiated from the situation where there was no intent to commit the act at all, or from the situation where the act was committed without any notion about its consequences because of an excusable failure to anticipate events.

In the Hart test, an objective test will be utilized at some stage of determining criminal liability. This obviously does not preclude the use of another test than the one used in civil cases being used in the inquiry. It is believed that it is the failure to see this that has caused unnecessary confusion in decision-making. As we have seen, because it has seemed important in Canada

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to differentiate between criminal and non-criminal matters for constitutional purposes, the focus has instinctively been on the need to show intent in criminal cases and the lack of necessity for doing this in other cases. It is suggested that the need to find intent in criminal cases was, because of its juxtaposition to civil cases, translated by some of the courts to mean that an inquiry into subjective intent, which made no reference at all to the civil means of determining the appropriate code of behaviour, was the only inquiry which was permitted to occur in a criminal negligence case. In fact, there may not be that much difference between the view of those members of the Supreme Court of Canada who apparently insist that the essential criterion in criminal negligence is subjective intent and the view of those of the other members of the Court it rejects, namely those of Laskin C.J.C. in Arthurs and Dickson J. in Leblanc. Inasmuch as this prestigious minority is arguing that an objective test is all that needs be satisfied in criminal negligence cases, it may be that, although its members use the language of civil liability, they are merely pointing to the need to set a standard which only can be done by the use of an objective test. Failure to meet such a standard will then perhaps suffice as evidence of the state of mind which is a prerequisite to establishing criminal responsibility. They are not necessarily arguing that the standard is to be set at the same level as it would be for a civil case.

Since the proponents of the necessity of a subjective intent might be using the Hart approach, while using the language of mens rea, they might seldom reach results which differ from those reached by the “objective test” proponents. Thus, they would be setting an objective standard first, and then deciding whether the deviation from it was sufficient to merit the attachment of criminal responsibility. If they set the objective standard as low as they would in a civil case to establish criminal responsibility, the emphasis will be on the nature of the deviation from the standard so set. A semblance of subjective intent searching will thus appear. But, clearly, the “objective test” proponents may set their standard so high that, in order to find a breach of it, a court would have to find the same kind of conduct as that which constituted a gross deviation from a lower “civil” standard. The difference between the subjective intent proponents and their objective standard antagonists would, if this analysis of what they actually do is correct, be of minor significance.

It is the thesis of this paper that decided cases show that the courts do determine culpability in criminal negligence cases by setting an objective standard and then assessing the nature of the deviation, if any, from that standard. All that remains to be shown is the nature of the assessment of the alleged deviation: does it in fact require a finding of such a huge departure from a “civil-type norm” that it makes sense to speak of a criminal intent which the word “subjective” denotes, or will it be sufficient to show that the accused failed to take precautions a reasonable man could and would have taken? If it is the latter of these approaches which is to be used, criminal negligence would be well-suited for use by those, who like us, wish to make employers criminally responsible for deficiencies in their operations. It is to be argued that, on the whole, the cases provide support for the latter position. Let us return to the cases.
(i) Conduct can truly be characterized as not voluntary when the accused was incapable, through no fault of his own, of thinking about taking normal precautions. No criminal responsibility ought to attach to such conduct. Nor will it. This is true inadvertence and will not be treated as criminal behaviour. The case of Minor, already discussed, is a good illustration.\textsuperscript{72}

(ii) When the cases of Petzoldt, Shaw and Taylor\textsuperscript{73} were discussed it was seen that there was no difficulty involved in holding the conduct in those cases to be criminally culpable. Using the analysis offered above, it can be seen that criminal negligence was found in those cases because the accused knew about what precautions they ought to have taken as reasonable people and either deliberately refused to take such precautions or foolishly and erroneously thought that they simply did not have to meet the standard requirements. A similar case is R. v. Coleman.\textsuperscript{74} In that case, a pilot decided to take off even though he was strongly advised that the conditions of fog were such that flying was inadvisable. For the purposes of the statute under which he was charged, wantonness or recklessness had to be proved. He was found to have been culpable. To repeat: in all these cases an objective standard was assumed to exist and a breach of that objective standard led to a finding of criminal culpability. In all it was manifest that something more than a mere or very slight breach of the objective standard was involved.\textsuperscript{75}

(iii) This brings us to the more difficult kind of cases, those in which it is not clear that the accused deliberately or simply foolishly ignored the precautions that a reasonable man could and would have taken. In particular, difficulties will exist where the accused was drunk and drove negligently. In R. v. Savoie\textsuperscript{76} the accused driver zigzagged all over the road and killed a boy who was walking alongside the road. The question facing the court was whether the jury should have been instructed that the accused, to be found guilty, had to have had knowledge of the danger he was creating. As the accused was very drunk it was arguable that he had no understanding of the risk he had created. It was held that the accused was criminally negligent because it is possible

\textsuperscript{72} Supra note 45. See also, R. v. Balcerczyck, supra note 46.

\textsuperscript{73} Supra notes 40, 42, and 43.

\textsuperscript{74} Supra note 41.

\textsuperscript{75} See also R. v. Gagnon (1956), 115 C.C.C. 82 (Que. Sessions of the Peace), the accused threw a bottle from the back of the car; he did not mean to hit anyone but hit a bystander; he was held to be criminally negligent; it was suggested that a criminal intent was necessary: that intent was inferred from the nature of the conduct. See also R. v. Dauphinée (1959), 31 C.R. 247 (N.B. Mag. Ct.) in which the accused’s truck was sought to be taken away by a person executing judgment; the accused threw a piece of heavy wood; regardless of whether or not it was intended to hit anyone the conduct was held to be criminally negligent; the conduct itself was sufficient to base a finding of the requisite intent.

\textsuperscript{76} (1956), 117 C.C.C. 327 (N.B.C.A.).
to be held wanton and reckless, as the provision requires, without having had actual knowledge of the danger which had been created by the accused's conduct. This decision is based on the notion that the accused did not behave as a reasonable man could or would have in the circumstances because a reasonable man would not have put himself in a position of not being able to appreciate the risk that he was creating for all people. A similar decision is R. v. Galloway. In that case the accused had entered into a drag race and therefore had deliberately set out to break the speed limit. It was held that the accused was criminally negligent, presumably on the basis that he had the requisite criminal intent because he put himself in a position where he was willing to defy the normal precautions that would be taken by a person driving a vehicle.

It is of interest to note that even as vigorous an opponent of the use of an objective test as Professor Hall would permit a finding of criminal responsibility in a case where a person about to drive an automobile "knows that he is ill or very tired or if he drinks alcoholic beverages knowing this will incapacitate him" or where "a railroad guard, who knows he has not read recently issued regulations concerning his work, acts recklessly when he controls the traffic despite his known ignorance." It appears fairly clear that what Hall (and Turner) may really be objecting to is the finding of criminal liability in cases where there truly is a blank state of mind. The courts have accepted this proposition.

It seems, then, that subjective intent will not mean that the accused must have had some kind of deliberate intent to cause harm or to be completely careless about whether or not he or she caused such harm. Both of these states of mind will, of course, allow a finding of criminal responsibility but something between that and a breach of an objective standard of care set at a civil level may be adequate. The difficulty of enunciating such a test in the form of a precise rule is manifest and it therefore has not been done. But the analysis of the cases above gives some indications as to what the courts may do in certain circumstances. In particular, they have adopted the technique of asserting that the necessary intent is present when the conduct is either inherently anti-social or belongs to a category of behaviour which has, over time, come to be unacceptable. Of particular interest in this context are

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77 Reliance was placed on a passage from Middleton J.A. in R. v. Greisman (1926), 59 O.L.R. at 162, [1926] 4 D.L.R. 738 at 743, 46 C.C.C. 172 at 177-78:

I think the great weight of authority goes to show that there will be no criminal liability unless there is gross negligence, or wanton misconduct. To constitute crime there must be a certain moral quality carried into the act before it becomes culpable. In each case it is a question of fact, and it is the duty of the court to ascertain if there was such wanton and reckless negligence as in the eye of the law merits punishment. This may be found where a general intention to disregard the law is shown, or a reckless disregard of the rights of others.

This was approved by the Supreme Court of Canada in American Automobile Insurance Company v. Dickson, [1943] S.C.R. 143, [1943] 2 D.L.R. 15.


79 Supra note 37 at 634.
a series of New Brunswick cases of which the first is R. v. Fortin.\(^8\) In that case a trial judge had suggested that before a person can be found guilty of criminal negligence, intention or knowledge of the consequences of his behaviour has to be proved. On appeal it was held sufficient that a particularly reckless act which clearly was in breach of an objective standard of care had occurred. The conduct itself allows a court to hold that the accused had a blameworthy state of mind, and such a state of mind can be found to exist when there has been a failure to think about the consequences of behaviour at all. Similarly, note the case of R. v. Coyne\(^8\) in which the accused, a man with good vision, shot at a shape he thought was a deer but turned out to be a man. Ritchie J., relying on his own judgment in Fortin, held that an honest belief was no defence and that a blameworthy state of mind could be inferred from the conduct of the accused.\(^8\) The test used in Fortin, and in these other cases cited, mirrors the analysis offered by Hart. It will be noted that, in essence, it is what the Supreme Court was saying, at least in part in Binus, and explicitly in Peda, where it was held that if, as a fact, dangerous driving had been found to have occurred, criminal negligence could be attributed to the accused because the conduct would be such as to show that the person had the necessary criminal intent. That is, dangerous driving by definition was such a departure from the objective standard which had been set in relation to driving that the blameworthy state of mind could be attributed to the accused (presumably unless it could be shown that the accused's driving was a result of a blank state of mind, such as an unexpected blackout).

The poverty of analytical tools in this area is now clear. In a large number of cases intent will be inferred from the nature of the accused's conduct. To determine whether conduct was dangerous, unacceptable or unreasonable (regardless of the state of mind of the actor), an objective standard has to be set. Very often this is set by implication and, therefore, it looks as if no objective test-setting is involved in the criminal negligence proceeding at all. Where the behaviour is something as crude as zigzagging across the road when driving a car, driving in contravention of other well known and clearly set out statutory standards and regulations, throwing a piece of wood when there are people standing about, taking a vicious chimpanzee out for a walk regardless of the many people who will be met on that walk, and so forth, it is easy to classify behaviour as criminally negligent without spelling out how the objective standard of care was first determined and how the moral blameworthiness of the accused was subsequently decided. Where the behaviour is not obviously in defiance of what a reasonable man in those circumstances could have and would have done, two possible approaches are open to a court. It may decide that the objective standard was in fact not breached or, alternatively, that it was not breached sufficiently to give rise to a criminal charge. Both require the setting of an objective standard of care. The latter approach is most likely to appeal to the judiciary when it is known that, civilly, the behaviour might have been seen as unacceptable. Therefore, in order to say that the conduct was nonetheless not criminally negligent, the

\(^8\) (1957), 42 M.P.R. 70, 29 C.R. 28, 121 C.C.C. 345 (N.B.C.A.).

\(^8\) (1958), 31 C.R. 335, 124 C.C.C. 176 (N.B.C.A.).

\(^8\) See also R. v. Manderville (1958), 31 C.R. 154, 124 C.C.C. 268 (N.B.C.A.); R.
court will have to say things such as the conduct was not grossly negligent or, what is even more unsatisfactory, that it was unintentional. These are ill-defined notions. But it is clear what the court is in fact doing. In both approaches—saying that the objective standard of care was not breached or that it was not breached sufficiently—the court is making a political decision. It is deciding how people are expected to behave in particular circumstances. As the conduct of the accused, rather than his or her true subjective intent, determines whether the behaviour was criminal, the issue is against what background the conduct is measured. It can only be against such factors as: (i) the nature of the risk it creates, (ii) any justification there may be for creating such a risk, (iii) the likelihood of harm and the gravity of such harm. There seem to be no other possible criteria by which to evaluate the acceptability of behaviour, unless it can be shown somehow that, regardless of the nature of the conduct, the accused had no criminal intent. This always remains theoretically possible. But, in a large number of cases, indeed the great majority, the court adjudging a criminal negligence charge is doing very much what it explicitly undertakes to do in a tort case. As is well known, what it does there is to measure the cost of eliminating the risk against the likelihood and gravity of injury. As Lord Reid said in the Wagon Mound (No. 2), the general principle is:

that a person must be regarded as negligent if he does not take steps to eliminate the risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. . . . [I]t is justifiable not to take steps to eliminate the real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour would think it right to neglect it.83

Arguably, because the result of a criminal conviction is so much more serious than that of a finding of civil liability, it may be true that, in a criminal trial, a court will find that it is very difficult to eliminate a particular cost which creates a risk or that the risk of likely harm and the gravity thereof is not very serious, whereas in a civil case the cost might be seen as manageable or the risk as great. This would mean that the courts would find no breach of the objective standard in a criminal case when the same behaviour might have led to a finding of liability in a tort case. This may often be explained by saying that the requisite intent was not established to attach criminal responsibility. A good example may be the case of Akerele. A theoretical difficulty in equating the criminal negligence process with that of the risk analysis apposite to civil negligence law is that, in criminal matters, it is the behaviour itself which is of significance, not the damage it causes. The nature of the behaviour characterizes it as immoral and worthy of punishment. In a tort case the behaviour itself may be egregious yet attract no sanctions because it caused no recoverable damage. Indeed, in some of the cases, explicit statements may be found to the effect that, in determining whether or not the accused has been criminally negligent, the actual consequences of the conduct

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ought not to be taken into account. Thus, in *Akerele* the Privy Council said that:

The act had already taken place, and its observed consequences, which only showed themselves at a later date, could not add to its criminality. The negligence to be imputed depends upon the probable, not the actual, result.84

But, even so, while it may be theoretically possible to evaluate the blameworthiness of conduct without reference to the actual consequences, it seems psychologically impossible to do so. In any event, it is to be noted that even the Privy Council did not reason that the consequences of conduct must be ignored but rather that the actual results, as opposed to the probable consequences, were to be disregarded.

In sum, when determining whether the conduct of the accused was such a deviation from the accepted norm as to warrant a criminal conviction (the task usually performed by courts when adjudicating criminal negligence cases), courts will balance the cost of eliminating the risk against the likelihood and gravity of harm. The imprecision of this formula needs no underlining. Its value as an analytical tool is not great. But, it has great significance in the context of this paper. The fact that the apparent requirement of subjective intent can often be satisfied by showing that the cost of eliminating the risk was less than the likelihood and gravity of consequence makes it theoretically and practically plausible to use the offence of criminal negligence as a sword in the occupational health sphere. Some of the practical difficulties are discussed in the next section.

4. The possibilities for Criminal negligence in occupational health cases.

It will have been noted that the definition of criminal negligence shows that the crime may be committed by either the doing of an act or by the omission of an act which the accused was required to do because the law imposed a duty to do the act. It is thus possible that it would be advantageous to show that a positive act led to the victim’s injury because the prosecution would be relieved from having to show that a breach of legal duty had taken place. This distinction between commissions and omissions, although suggested by the *Criminal Code*, is conceptually unattractive. Thus, an omission to put in proper ventilation can logically be categorized as the positive act of causing too much dust to remain in the room. There is no fact situation which cannot be characterized as either an omission or commission merely by engaging in minor sleight of hand. For instance, when the Nova Scotia Supreme Court was asked the question of whether a trial judge had appropriately characterized the negligent driving of a car as being a positive act, rather than an omission to take care, Ilsley C.J. said:

The learned Judge in effect left both act and omissions to the jury, as indeed he could not escape doing, because one or more of the omissions alleged to show criminal negligence involved positive acts on the part of the accused. When a person drives at excessive speed, he not only omits to do something which it is his duty to do, namely, to drive at a reasonable speed or to take reasonable care in the circumstances, but he also does something.85

84 *Supra* note 70 at 264 (A.C.), 372 (All E.R.), 175 (W.W.R.).
Whether the conduct is classified as a positive act or as an omission will not matter; each time the prosecution will have to establish that the necessary mental element and causative relationship existed. It is true that where a duty imposed by law has been breached it will be easier to establish these prerequisites to the founding of criminal responsibility than it might be otherwise. But, conceptually, nothing ought to turn on this.

Nonetheless, section 202 of the Criminal Code does create a distinction between commissions and omissions and, in some cases, it might help a court achieve one result rather than another by relying on this pedantic distinction and thereby avoiding expressing a manifest preference for one result over another. But, in the particular context of this paper—namely, the criminal negligence of employers for having unsafe premises—it will seldom be difficult to show that a duty imposed by law has been breached. That is, the notionally more difficult route of relying on an omission will, in fact, not be more difficult than establishing that a positive act led to the harm. This is so because most employer/employee situations will be governed by statutes which impose a duty in respect of safety and health. For instance, section 81(1) of the Canada Labour Code states:

Every person operating or carrying on a federal work, undertaking or business shall do so in a manner that will not endanger the safety or health of any person employed thereupon or in connection therewith.

In addition, there is a well established common law duty which is implied in the contract of employment to the effect that the employer shall ensure that the employee has safe working conditions. We will return to the nature of this duty shortly. For the moment let us note another minor difficulty in respect of the laying of a criminal negligence charge.

When the prosecution relies on an omission to do something which it is the accused's legal duty to do, there is an argument to be met that a breach of duty of the kind imposed by common law (which has just been referred to) will not suffice. This argument arises out of a difference in wording in the definition section of the Criminal Code's French version and its English one. In the English version of the Code there is no definition of duty, except that it must be one imposed by law, law being undefined. In the French version, the word "law" is defined in section 2. That definition, on its face suggests that "law" only includes the Criminal Code itself or an enactment of a legislature. It is here argued that this apparent restriction of the concept of duty

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88 "Loi" comprend
(a) une loi du Parlement du Canada,
(b) une loi de la législature de l'ancienne province du Canada,
(c) une loi de la législature d'une province, et
(d) une loi ou ordonnance de la législature d'une province, d'un territoire ou d'un endroit, en vigueur au moment où cette province, ce territoire ou cet endroit est devenu une province du Canada.
is not to be read into the Code. In support of that argument, note that in the first place, we already have referred to a number of cases where no reference was made to the breach of a duty imposed by either the Code or a statute of any kind, yet a criminal negligence charge was held to be well-founded. Such a case, for instance, was Petzoldt which was referred to earlier. There, it will be remembered, the accused was found guilty of criminal negligence when his vicious chimpanzee, which he took for a walk, bit a child. There seems to be no apparent Criminal Code provision or other statutory enactment prohibiting the walking of chimpanzees. Of course, this might lead one back to the argument that the distinction between positive acts and omissions is significant. That is, it could be argued by those who wish to restrict the meaning of "duty imposed by law" to one which is apparently suggested by the French version of the Code, that cases like Petzoldt are really cases where a positive act was committed and where, therefore, no breach of duty imposed by law had to be found. For the purpose of this reasoning the positive act must have been taking the chimpanzee out onto the street.

Another argument in support of the proposition that the duty may be imposed by Criminal Code, statutory provisions, or by common law is that, if it were not so, presumably an omission to perform a contractual obligation in Quebec might be classed as an omission to do a duty imposed by law because the law of contract there rests on statutory enactment, whereas an omission of the same kind in Ontario would not amount to omitting to do a duty imposed by law because there the obligation arises under common law. That kind of result could not have been intended by the draftsmen of the Code. It is therefore suggested that the phrase "la loi comprend" in section 2 of the French version of the Code means that "the law includes" not "the law means."

To recapitulate, inasmuch as there is a difference between a positive act and an omission, nothing much will turn on the distinction in the occupational health area in which we are interested in this paper because, if there is a positive act, there would be no need to establish a duty imposed by law, and, where there is a reliance on an omission (because, say, an adverse party sought to characterize the conduct as such), it will be easy to show that there is a duty imposed by law in most employer/employee relationships. This will not be inhibited by the definition of the word "law" in the French version of the Code. With that in mind we can now turn to some illustrative fact situations which demonstrate how the law of criminal negligence might be used in the occupational health area.

The first such situation is taken from a case which was brought before a coroner in Québec. Three workmen had been sent underground to do some

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80 Supra note 40. See also the judgment of Ritchie J.A. in R. v. Coyne, supra note 81.
80 Or, adapting the reasoning of the court in Forgeron, supra note 85, it was a positive, negligent act to omit to keep the chimpanzee at home.
81 Were it intended to mean "means" it is likely that the draftsman would have used the word "signifie."
82 Quebec Coroner's Inquest into the Death of Daniel Tardif, François Lamarre, Robert Paquet, held on 13th November 1978, case number 1660-78.
cable work in a part of Montreal where it was well known that there was a
danger of an escape of hydrogen sulphide from nearby refineries. It was
established that an inspector of Hydro Québec (who had contracted with the
workers' employer) had reported that basic precautions such as an exposure
measuring instrument, scaffolding and hats and gloves for the workmen, were
not available. Other workers gave evidence that there was no gas detecting
machinery nor appropriate ventilation. Further, there was evidence that sev-
eral workmen complained of feeling ill after their first day's work and had
complained about the lack of ventilators and gas measuring instruments. Two
workmen had had to be replaced because they felt so ill. Despite these events,
no action was taken by the company. When three of the workers were over-
come by fumes and died, a coroner's inquest was instituted. The coroner,
Me Laniel, held that he would recommend the laying of charges of criminal
negligence because this was the kind of case which called for such a measure.

The second illustration is taken from a Workers' Compensation Board
decision rendered in British Columbia. In that case the issue was whether
the Board should impose severe penalties until the employer concerned had
met the safety requirements which the Board wished it to satisfy. In particular,
the Board had found that there were signs and symptoms of lead poisoning
in many of the workers, that there were many airborne contaminants in the
blast furnace area, in the drossing plant and in the lead refinery complex of
the company. It was pointed out that the company had had many warnings
over a time span of several years to redesign its plant to meet what the Board
deemed to be appropriate safety requirements. The failure of the company
to do so had put the Board in a position where it had no option but to impose
a fine of such severity that the company would be forced to choose to rede-
sign the plant rather than to continue to absorb the fines. The Board appar-
ently hoped that this would be more cost-efficient than to continue to operate
in a way that was inimical to the safety of the employees in the plant. We
advocate here that there should be no difficulty in this kind of situation to
initiate a prosecution for criminal negligence because the employer had clearly
been given (as in the Québec hydrogen sulphide case) ample warning of the
fact that its plant was not safe. If it could be shown that workers had been
adversely affected by the condition of the plant then it ought to follow that
the employer had omitted to obey the duty imposed on it by law (be it a
lawful order of an agency such as the Workers' Compensation Board or the
common law duty to keep premises safe) and that it had done so knowingly
in a manner which could be appropriately described as wilful or reckless.

The third example offered arises from the facts of Cassiar Asbestos
Corporation and United Steelworkers of America, Local 6536 (B.C.). This
case was an arbitration in which the issue was whether the employer had been
entitled to discipline some clerical employees who had walked off their jobs
because they felt that their colleagues in the associated manufacturing process
were endangered by the great number of fibres of asbestos in the air about
them. The discipline issue does not concern us here. What is of interest is that

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93 Re Industrial Hygiene (1975), 2 B.C.W.C.B. 234, Decision No. 167.
it became clear in the case that the mine inspectors of the Provincial Department of Mines and Petroleum Resources had, prior to the incident, made reports which indicated that the asbestos fibre count was in excess of the accepted safety level. Further, by the time the arbitration came to the Board, both sides acknowledged that there had been a dangerous situation at the plant. The argument herein is that in that kind of case—where the company had had warnings of some kind that a known safety margin has been exceeded—there is ample ground to initiate a prosecution for criminal negligence. It could easily be shown that the employer knew that there was a doubt about the safety of work conditions. If, in addition, it could be shown that workers’ health had been adversely affected, a case could be made out that the employer did a positive act (by permitting too many contaminants to pollute the air) or omitted to do an act which it had a legal duty to do, (namely, to provide ventilation, slow down the process, provide respirators, and so forth), and had done so quite reckless of the effect such an omission would have on the employees.

Another situation in which the employer might easily be imputed to have knowledge of the unsafe conditions in the plant, is likely to arise where joint employer/employee committees, set up under the terms of a collective agreement or as a result of one of the many new occupational health statutes, have warned the employer that unsafe conditions exist.

In all these cases it will be easy to make out a case that the employer knew full well that the plant was unsafe, and that this employer was wanton or reckless of the bodily well-being of employees as shown by his refusal to heed actual warnings or acknowledging danger. This does not establish intent in the subjective sense of wanting to harm the employees, but it certainly establishes intent in the sense that it was used in cases like Petzoldt, Shaw, Taylor, Coleman, Savoie, Galloway, and so on.95

What will be the situation where it is not so clear that the employer knew that he was in breach of a safety statute which made the plant unsafe or where there was no clear indication to him that something was amiss? To prove criminal negligence in such cases will be extremely difficult if a subjective intent of the kind that is thought to be involved in most mens rea offences has to be established. We therefore return to our analysis of what the mental requirement in the offence of criminal negligence may be. It will be remembered that the argument was that all that must be shown is that the accused did not take the precautions which, given the cost of taking such precautions, should have been taken in view of the likelihood and gravity of injury. It was indicated that such a calculation would be difficult to handle even if the courts faced it squarely. But it may be possible to make predictions in the very particular context of the employer-employee relationship.

Assistance may be obtained from the nature and scope of the common law duty that an employer has to provide a safe working environment for his employees. The classic statement of the implied obligation in the employment

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95 Petzoldt, supra note 40; Shaw, supra note 42; Taylor, supra note 43; Coleman, supra note 41; Savoie, supra note 76; Galloway, supra note 78.
contract in respect of safety comes from the well known case of *Wilson and Clyde Coal Company Ltd. v. English*. It was there held that mine owners were liable for the failure of their manager to provide a safe system of work in the mine. The duty to be imposed on the employer—and one which was held to be non-delegable—was that the employer had to provide a competent staff of men, safe plant and equipment and a safe system of work. Although there are not all that many recent Canadian cases which have had to apply this principle this does not mean it is not part of the law of employment in Canada. The dearth of authorities here is attributable to the fact that, in Canada, people can no longer sue their employers in tort but must rely on workmen’s compensation schemes. There is, however, Supreme Court of Canada authority for the acceptance of the *Wilson and Clyde Coal v. English* principle. In *Marshment v. Borgstrom* the Supreme Court of Canada, citing the House of Lords decision with approval, went on to say that it stood for the proposition that:

> [t]he duties specified as the duties of the employer are ‘fundamental obligations of a contract of employment’, and in the next place, that these obligations fall within the same category as a statutory duty in respect of the characteristic that the employer cannot fulfill them by entrusting their fulfillment to competent employees.

The duty owed by the employer to the employees is one which requires the employer to behave with reasonable care in the circumstances. This is manifestly vague. But nonetheless it was the test enunciated by the Privy Council in *Toronto Power Co. v. Paskwan*, when it was asked to determine an appeal from a decision of the Supreme Court of Ontario.

It appears from the case law that, for the purposes of a civil cause of action in respect of a breach of the common law duty to provide a safe work environment, it is sufficient if it can be shown that the employer knew or ought to have known of the unsafe conditions which prevailed and then failed to take adequate precautions. Further, it is not always a defence to take only those precautions which other similar employers are taking. In some cases the employer has been required to force his employees to use safety equipment; merely making it available was not sufficient. Thus, in *Crookall v. Vickers-Armstrong Ltd.* the manufacturer’s process caused the emission of invisible particles into the atmosphere. When the process was first set up it was not known that this process presented that kind of danger. Some time...
later it became known that silicosis might be a disease associated with work in foundries of the kind the employer was operating. It was understood by all in the industry that workers should be provided with masks. When, in *Crookall*, employees contracted silicosis, the employer answered that silicosis could have been avoided by wearing the masks which were provided and that, therefore, the employer had taken all the precautions which he could be expected to take. But it was held that the employer had a duty of care—because of his knowledge of the danger—to enforce the wearing of masks by employees, even if they opposed this.101

If this test in respect of civil causes of action could be made applicable to criminal negligence prosecutions, it would be relatively easy to initiate successful prosecutions of that kind. And, indeed, there is an argument, based on one important case, which supports the idea that the equivalent of this civil test might be employable in criminal negligence cases. The case is *R. v. Rogers*.102 The accused was a former medical practitioner who had lost his licence. He had become a naturopath. A young child with a skin disorder was brought to him and he suggested a very low protein diet to help get rid of the skin irritation. The child began to lose weight and became sick. Repeatedly the child was brought back and the aggravating symptoms were explained to the accused and repeatedly the accused continued to prescribe the same diet for the child. Eventually the child was taken to the hospital and died. There was ample evidence to show that normal medical practice would have suggested exactly the opposite treatment to that which the accused had given. It was therefore alleged that the accused had been criminally negligent in causing the death of the child. The accused argued that he clearly did not intend to harm the child and that he was doing his very best. That is, in the context of this paper, it is plain that the accused was saying that he had no subjective intent and that he could only be said to have been objectively negligent. Of course, failure to meet the objective standard of care would, argued the accused, not suffice to convict him of criminal negligence. The British Columbia Court of Appeal held to the contrary. In particular, it held, under what was then section 187 and is now section 198 of the *Criminal Code*, that everyone who undertakes to administer surgical or medical treatment to another has a duty to have and to use reasonable knowledge, skill and care. The accused could, therefore, not say that he merely had to abide by what he thought was reasonable and appropriate skill. The standard had been set by the *Criminal Code* as being one which had to be met by the reasonable medical attendant in such circumstances and the person administering medical treatment was not allowed to escape the burden of that standard merely by saying that he had obeyed his own best instincts and had applied his knowledge carefully and diligently.

Could it not be argued then, that, since an employer has a duty imposed by contract law to take reasonable care and have reasonable knowledge of


the necessary precautions which must be taken in respect of the safety of workmen, the law has imposed a duty which cannot be escaped by merely asserting that a particular employer did his best, just as in *Rogers* the accused was incapable of arguing that he was doing his best? If this were a tenable proposition, then, in light of what has been said about the nature of the common law duty of care in respect of safety implied in every contract of employment, it ought to be relatively easy to prosecute an employer for criminal negligence. The argument is worth pursuing, but it may well be that courts, if confronted with it, will seek to avoid it by noting that *Rogers* was a peculiar case in that the objective standard of care imposed on doctors was imposed by the *Criminal Code* and that this was an indication that the significance of satisfying such a standard was a matter of serious concern to the draftsmen of the *Code*. This emphasis would permit the argument that the mere existence of a common law duty of care could not serve the same purpose as the standard imposed on medical practitioners by section 198 of the *Criminal Code*. To further bolster that reasoning it might be noted that medical practitioners already have a duty of care at common law to treat their patients with appropriate reasonable care and skill and that obviously the *Code* draftsmen thought that there was something peculiar about the medical practitioner-patient relationship which required this standard to be written into the *Code* and that it was this peculiarity which the Court of Appeal was recognizing in *Rogers*.

Because the duty implied in every contract of employment requiring an employer to take reasonable care to ensure safe working conditions for his employees is sought to be made the standard to be applied in criminal negligence cases, an alternative to the argument based on *Rogers* may be used. It relies on the precursor of the present section 202, namely, section 247 of the *Criminal Code*. That section had a formula which resembled very much the nature and spirit of the duty of care implied by common law as formulated in *Wilsons and Clyde Coal Co. v. English*. It stated:

> Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

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103 But note that section 201 of the *Criminal Code* emphasizes the peculiar relationship of employers/employees in much the same way as section 198 does that of medical practitioners/patients. Section 201 prescribes that every master has to take care not to unlawfully endanger his servants or apprentices. This is also a duty of care which exists at common law and, therefore, the embodiment of it in the *Code* may suggest that there is something special about the employer/employee relationship in much the same way as there is about the medical practitioner/patient relationship. Not too much emphasis is sought to be placed on this because section 201 seems to imply that there has to be *mens rea* before the *Code* becomes interested in the lack of care that a master might take in respect of his servants' or apprentices' bodily condition. Perhaps this sufficiently distinguishes it from section 198, but this possibility underlines the fact that the argument in the text is not to be given up without a fight.

104 R.S.C. 1927, c. 36.
It seems as if the failure to take safety precautions when one knew or ought to have known of danger—the formula used to describe the duty implied by common law in the employment contract—would lead to criminal responsibility. While it is true that the modern criminal negligence provision does not use the same phraseology in that it specifically refers to a requirement of wanton and reckless conduct, it is to be noted that, on several occasions, courts have said that the present section 202's language did not alter the essence of crime created by the old section 247.105 Therefore, it is not without interest to note what the judicial understanding of section 247 had been. In McCarthy v. The King, Duff J. interpreted section 247 as follows:

Where the accused, having brought into operation a dangerous agency which he has under his control, (that is to say dangerous in the sense that it is calculated to endanger human life), fails to take those precautions which a man of ordinary humanity and reasonably competent understanding would take in the given circumstances for the purpose of avoiding or neutralizing the risk, his conduct in itself implies a degree of recklessness justifying the description "gross negligence." The facts of course may disclose an explanation or excuse bringing the accused's conduct within the category of "reasonable" conduct.106

On its face, it is hard to see how a breach of the Wilsons and Clyde Coal Co. v. English formula could have been found and a breach of the formula offered by Duff J., as the test for criminal negligence, not be found. Hence, inasmuch as criminal negligence is a mirror image of what it once was, the common law duty in respect of safety owed by an employer to an employee may, if breached, give rise to a successful prosecution.

It may be argued that (i), this is not very much help because one still has to find a breach of the civil duty or (ii), a breach of the civil duty could not possibly satisfy the criminal requirement of *mens rea* in our present section 202 (in view of the change in wording from the former section 247). It is worth noting, however, how closely the language in McCarthy v. The King resembles the test which we suggested is used by the courts in criminal negligence, whatever the theorists argue. We reasoned that what the prosecution had to prove was that there had been a failure to take reasonable precautions and that a lack of precautions would be unreasonable if the likelihood and gravity of injury vastly outweighed the cost of taking such precautions. This bolsters our confidence that we accurately postulated the test to be applied in criminal negligence prosecutions. Using that test as the one which will be applied by the courts when prosecutions are brought against employers under section 202 (if not in all other cases), we now wish to show how reliance on the implied duty to provide safe work conditions which arises out of the contract of employment may be utilized to help found a charge of criminal negligence, even if it is not accepted that the mere establishment of a civil cause of action would suffice.

In both the McCarthy v. The King formula and our own analysis, it was noted that, in many cases, the burden of proof on the prosecution will be dis-
charged by merely proving the conduct of the accused. This will be so because the conduct may be of such a kind that there can be no question that it was the behaviour of a person who acted without taking precautions which a reasonable person would have taken in view of the likelihood and gravity of injury. Or, if this formulation is thought to be too close to the objective test imposed by the law of torts, the conduct itself may be said to suffice because it indicates that the failure to take precautions in a particular circumstance was such an imbecility or gross delinquency that it amounts to wantonness or recklessness and, therefore, satisfies the subjective element required by section 202. It was noted that this was part of the reasoning in Binus, Peda and LeBlanc.\textsuperscript{107} But, of course, to say that the conduct speaks for itself is another way of obfuscating the question. When will the conduct speak for itself? The common law contractual duty may help. An employer may be met with the argument that he knows full well that he has to meet a certain standard of care because the existing contract between him and his employees requires him to provide safe working conditions. If he therefore does not take precautions which he ought to have taken as a reasonable employer, he will have deliberately put himself in a position where his conduct can be characterized as speaking for itself, namely, being negligent to such an extent that it may be considered criminally negligent. It is noted at once that this runs the danger of saying that if there is a breach of the common law duty there is also a criminal offence, and we know that this might offend the principle which insists that civil and criminal negligence must be kept distinct. The point being made here is simply that, at the very least, an employer should not be permitted to say that he did not understand his obligation to take precautions. He should never be permitted to say that he was doing his best under the circumstances. If he does so, he runs the risk of being faced with the argument that, by ignoring the common law employer/employee duty, he was putting himself in a position where he could not live up to the kind of conduct with which the Criminal Code expected him to comply. This is the sort of argument which is used when breaches of statute are sought to be relied on to launch prosecutions. Thus a breach of statute which imposes a duty does not necessarily make a person responsible in criminal negligence. But such a breach may very well indicate that there has been conduct which speaks for itself and which may be characterized as criminal negligence. It is certainly proper to draw the jury's attention to the existence of the statute and the failure of the accused to abide by it. The Supreme Court judgment in LeBlanc\textsuperscript{108} stated this expressly. The breach of the statute is an indication of potential criminal responsibility. It is this which is being argued in respect

\textsuperscript{107} Binus, supra note 54; Peda, supra note 58; and Leblanc, supra note 66. In Leblanc it was held by the majority that mere proof of the conduct might be sufficient, but more proof of subjective intent could be offered if the prosecution desired.

\textsuperscript{108} Supra note 66 at 360 (S.C.R.), 259 (D.L.R.), 113 (C.C.C.). Similarly, in a civil action arising out of the contractual duty to provide safe working conditions, it is clear that not every breach of a safety regulation or statute will lead to a finding that there was a breach of the employer/employee duty of care. Indeed, there has been a tendency for the courts to read such statutes very strictly because they are penal in nature. If the employer does not fall within the four corners of the statute's intended purview, the likelihood is that he may escape liability under the statute but can be found liable under the contractual obligation.
of the contractual duty of care: breach of it does not automatically make conduct criminally negligent, but it assuredly helps characterize the conduct as being potentially of the kind which might be called grossly negligent and it robs the employer of a defence that he was merely doing his subjective best.

To focus the arguments advanced, consider the following illustrations:

(a) It is relatively well known that asbestos processing is dangerous to people's health. It is therefore incumbent upon an employer, under his common law duty to take care to ensure that appropriate precautions are taken to avoid harm to his employees. What is and what is not reasonable under the circumstances will be a matter for debate. But it certainly will not suffice for the employer to argue that everyone operated in the same way as he did. Further, the mere fact that he believed that he did not have to do anymore than he was doing will not necessarily exculpate him. Failure to provide safe working conditions by the standards of the common law contract of employment would indicate the existence of conduct which "spoke for itself."

(b) A similar example would arise where the noise level in a plant was consistently above that which "reasonable" employers know full well to be acceptable. That is, in a circumstance where there is a well known health risk, such as going above well-established decibel and intensity ranges, an employer must take precautions to avoid the causing of harm or run the risk of being held criminally responsible even though he did not intend to hurt anyone.

So much attention has been given to the intricacies and ramifications of the potential of criminal negligence because, in our view, it is the most useful of all the serious criminal charges which might be brought under the Code as weapons in the fight to prevent and diminish the incidence of occupational disease.

B. Duties of Master to Servant: Section 201

201. Every master who

(a) unlawfully does, or causes to be done, bodily harm to his apprentice or servant so that his life is endangered or his health is or is likely to be permanently injured, or

(b) omits, without lawful excuse, to provide necessaries of life for an apprentice or servant in accordance with any contract that he has entered into with respect to that apprentice or servant,

is guilty of an indictable offence and is liable for imprisonment for two years.

This provision is one of several resulting from a rationalization of a long development of the common law. That development has been carefully de-

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109 See R. v. Tichner, supra note 64.

110 Everything that is said in the text about occupational health problems also applies to traumatic injuries.
tailed by Glazebrook.\textsuperscript{111} He wrote his article in the context of a debate as to whether an omission could ever constitute a crime. His research demonstrates that there was once a notion that criminal responsibility could attach without the prosecution having to prove that a positive act had been committed by the accused. In particular, he writes, responsibility attached when the prosecution could show that something might have been done by the accused person to avoid harm and he or she deliberately did not undertake that preventive course of action. It transpired that as the Industrial Revolution—and the accompanying laissez-faire mentality that apparently took control of the collective judicial mind—progressed, questions were raised as to whether a person could be held criminally liable for merely not taking preventive action in the absence of a positive legal duty to provide safeguards, liability for omissions being seen as an interference with the freedom to be left alone. In response, the common law courts, in upholding the notion that people could be held responsible for omissions, sought to justify this by linking omissions to duties which had existed in antiquity.\textsuperscript{112} They relied on old cases such as \textit{Huggins},\textsuperscript{113} \textit{Patmore},\textsuperscript{114} and \textit{Squire}.\textsuperscript{115} Additional support was found by analogizing from the \textit{Poor Law}.\textsuperscript{116} That legislation imposed positive duties on people to maintain other people. Thus courts came to formulate a principle that, in certain cases, where there were identifiable positive duties, criminal responsibility would be attached where apparent omissions had led to death. Glazebrook summarized the legal position as follows:

1. Neglect that resulted in injury to health, as well as neglect that resulted in death was, if two further requirements were satisfied, indictable—as a misdemeanour.
2. It was necessary to show that the prisoner was, quite independently of the harm he had caused, under a legal liability in respect of his neglect, either because he was under a duty imposed by law or because he had undertaken it by contract.
3. Even if the prisoner was thus liable for his neglect, he was not indictable for it on this principle unless the person who had suffered the neglect was so helpless that he or she was unable to withdraw from the control of the prisoner and seek a remedy in any other way. This was thus basically a causal requirement.\textsuperscript{117}

There was thus a need to establish a legal duty and, as can be seen from the foregoing, the kind of legal duties that came to be accepted by the courts as leading to potential criminal liability were of the kind which suggested that certain people were in a situation of obligation to others because of a paternalistic relationship. That development is now subsumed in the \textit{Criminal Code}. We have already noted section 198 which requires any person undertaking the administration of surgical or medical treatment to do so with rea-

\textsuperscript{111} Glazebrook, \textit{Criminal Omissions: The Duty Requirement in Offences against the Person} (1960), 76 L.Q. Rev. 386.
\textsuperscript{112} They had to rely on unsubstantiated claims by Coke who had defined murder as including incidents of killing by famishing, and a jailer treating a prisoner more harshly than he ought to, and on the writings of \textit{Fleta}, \textit{Britton} and the \textit{Mirror of Justices}. See Glazebrook, \textit{supra} note 111, at 389.
\textsuperscript{113}(1730) 2 Ld. Raym. 1574.
\textsuperscript{114} (1789) O.B. Sessions Papers 214.
\textsuperscript{115} (1799) MS.
\textsuperscript{116} \textit{An Act for the Relief of the Poor}, (1601) 43 Eliz. 1, c. 2.
\textsuperscript{117} \textit{Supra} note 111, at 391-92.
reasonable knowledge and care. Section 199 states that any person undertaking an act is under legal duty to do it if an omission to do so would endanger life. This may be useful for our purposes inasmuch as every master must undertake to provide safe premises by reason of his legal obligation to his servants and a breach thereof is potentially a breach of section 199. Section 197 imposes positive duties on people such as parents, foster parents, guardians and heads of families to provide necessaries of life for children; on husbands to provide necessaries of life for spouses; on other people to provide necessaries of life to people under their charge where such people are unable to look after themselves. Section 200 makes it an offence to unlawfully abandon or expose a child under the age of 10, endangering his or her life or health. Section 201 is yet another provision in this part of the Criminal Code with the same intent and purpose.

Section 201 (b) is a provision much like section 197 in that it enforces, by criminal sanction, the provision of contracted-for necessaries of life. More directly useful to us is section 201 (a). It is the result of the development of the rule which grew up that, if apprentices had to be taken on by a particular master as a result of directives made under the Poor Law, a positive legal duty existed on the master to provide for such an apprentice. The common law courts came to regard this as a failure in respect of a legal duty which could lead to criminal responsibility. The common law judges went on to hold that it would make no sense to differentiate between this kind of apprentice and common apprentices, that is, those who came to masters not as a result of the compulsion of a Poor Law directive. Indeed, as Glazebrook argues, it became clear to common law judges that it would be wrong to insist that the duty (in respect of which a breach needed to be established) was created in a particular way and, therefore, they felt that the principle underlying the doctrine was wide enough to apply to master and servant situations where it was clear that the practice was that the master should provide necessaries for life. In our modern section 201 (a), unlike 201 (b), the duty to provide necessaries for life is not made explicit. But there is, we argue, a positive legal duty that arises from the mere fact of the existence of a master/servant relationship. If that is so, it is clear that the section may be of direct utility in the context of this paper, namely, to prosecute masters who do not provide their servants with adequate protection, thereby causing them bodily harm. There are some hurdles which have to be cleared before the section can be used in this way.

The first is that it must be shown that the master "does, or causes to be done" something which causes bodily harm. On its face this seems to require the doing of a positive act by the master leading to the harm. But, as has already been argued in the criminal negligence section of this paper, the requirement of a positive act may not be a difficult one to meet. An appropriate formulation of the master's conduct may fairly be characterized as a positive act, even though it entails something like omitting to provide ventilation. For instance, why not say that the master has put too many contaminants in the atmosphere? The argument does not bear repetition. In our view, this requirement does not seem to be an insuperable problem to the use of section 201 (a).
The next hurdle arises because the master must “unlawfully” do or cause to be done, bodily harm. Arguably, the word “unlawfully” in this context might require no more than proof that harm was inflicted by unreasonable behaviour of the master. That is, the reasoning would be that because a master/servant relationship is of a kind in which there is a legal duty not to inflict bodily harm, the very fact of it having been done would be sufficient to satisfy the requirement that the act was done unlawfully. Such an argument would be supported by the fact that the predecessor of section 201(a) was section 249 of the 1927 Criminal Code and that, in that section, the requirement of an unlawful act was directly linked to the failure to obey the duty imposed on a master or mistress to provide for the necessaries of life for a servant or apprentice. As the modern Code draftsmen apparently have not seen it important to require more than a master/servant relationship in that they do not single out the duty to provide the necessaries of life as an unlawful act, it might be argued that the word “unlawfully” is no longer meant to have a connotation other than the doing of harm to the servant/apprentice. But, even if this semantic argument is rejected, the requirement that the master “unlawfully” does or causes to be done bodily harm is not a serious problem in the context of this paper. Whenever a prosecution is launched because some people are suffering from a disease which is the result of a poor health situation at work, it is more than likely that the prosecution will be able to show that there has been some breach of a legislative standard or, at the very least, there will have been a departure from the common law standard of care that a master owes his servant to provide safe and healthy work conditions. That is, there will have been conduct in breach of a separate legal obligation.

The major obstacle to be overcome, as usual, is the fact that the accused must be shown to have intended the harm which was caused. The general presumption that subjective intent must be attributable to the accused will govern the reading of this provision. There are very few decisions dealing with section 201 and its Criminal Code predecessors. R. v. Brown was a case dealing with a fact situation from which the issue arose as to whether there was a failure to provide the necessaries of life for a servant. The servant in question was a 15 year-old boy who, because he was wetting his bed, had been removed by the master to a stable. This was at the height of a particularly cold winter. As a result of the freezing of the boy's ankles which had rendered him completely immobile, the accused did attempt to provide some help for the boy. He carried him back to the house after the boy had spent 14 days in intense cold in the stable. He bathed him and put him to bed. He also asked a neighbour what kind of remedy for frostbite he ought to use and asked a doctor what could be done about the boy's frozen feet. He did not tell anyone how bad the freezing of the feet actually was or anything about the condition of the servant in respect of other parts of his body which were also seriously deteriorating. In the result, the servant died of gangrene. When the accused was tried, the judge found that, although he was not in fact aware of the seriousness of the condition of his servant, he ought to have known

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118 R.S.C. 1927, c. 36.
that the servant was in serious trouble and that his failure to get better care for the boy amounted to gross negligence. This attributed knowledge and failure were held to be sufficient to convict the accused. It seems what needs to be shown in order to convict is advertence to the risk and then a failure to take precautions which a person knowing of the risk would take or could be expected to take.\textsuperscript{120}

It seems, then, that what needs to be shown is an "intentional" act by the accused of the same kind as it was argued had to be found in criminal negligence-type situations. It may be easier to prove intent in a section 201(a) case than in a criminal negligence one because it may be that a person charged under 201(a) should never be permitted to say that he honestly did not believe that there was any risk at all created for his servant or apprentice by his conduct. The accused's belief in the safety of his procedures should always be, it would be argued, a reasonable one. His actual belief that there was no risk should provide no defence. There are two lines of authority which would support such an argument. The first stems from the recent Supreme Court of Canada decision in \textit{R. v. City of Sault Ste. Marie.}\textsuperscript{121} In a judgment written by Dickson J. on behalf of a unanimous bench, it was said that there are three categories of offences to which \textit{mens rea} applies, and that in each the phrase had a different connotation. The first of these categories is constituted by offences which could be called criminal in the true sense of the word. Among such offences one would expect to find murder, theft and the like. A positive state of mind such as intent, knowledge, recklessness, has to be proved by the prosecution. The third category of offences is constituted by offences of absolute liability in which the accused will not be absolved of responsibility by showing that he or she had no intention to commit the act at all, let alone with malicious intent. The second category of offences is constituted by public welfare offences. Under these, it was held, a defence would be available to the accused to the effect that he or she reasonably believed in a mistaken set of facts which, if true, would have rendered his or her conduct innocent. Can it be argued that section 201(a) of the \textit{Criminal Code} is a public welfare offence? In describing the public welfare offences, the Supreme Court noted that their presence in the law was due to attempts to regulate behaviour where there were conflicting values to be protected. In particular, they will be found where:

\begin{quote}
It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latent pernicious activities have a strong claim to consideration.\textsuperscript{122}
\end{quote}

Given the historical background of section 201 and like provisions and the fact that we are seeking to utilize section 201 to protect health and safety,

\textsuperscript{120} For cases of a similar kind decided on the basis of precursors of the present provisions, see \textit{R. v. Friend} (1802), Russ. & Ry. 20, 168 E.R. 662 (K.B.D.); \textit{R. v. Ridley} (1811), 2 Camp. 650, 170 E.R. 1282 (K.B.D.); \textit{R. v. Smith} (1826), 2 Car. & P. 449, 172 E.R. 203 (K.B.D.). In addition to \textit{Brown}, supra note 119, there seem to be few such cases in Canadian jurisprudence. Citations are found in \textit{R. v. Bissonnette} (1879), R.A.C. 190, 23 L.C.J. 249 (Qué. Q.B.), a case which dealt with a procedural point relating to the form of the indictment in such cases.


\textsuperscript{122} \textit{Id.} at 1310 (S.C.R.), 170 (D.L.R.), \textit{per} Dickson J.
it might be successfully argued that section 201 (a) constitutes a public welfare offence to which the mens rea as described for category two offences by the Supreme Court is apposite.\textsuperscript{123}

Inasmuch as section 201 (a) is treated as a true crime—in the sense that this expression is used in the Sault Ste. Marie decision—it may still be arguable that the mens rea required is not the person’s actual belief, which the Supreme Court suggested it must always be in true criminal cases. The reasoning supporting this argument is to be gleaned from the recent House of Lords decision in DPP v. Morgan.\textsuperscript{124} Three members of the House of Lords\textsuperscript{125} held that, where a crime is defined without reference to mens rea and the accused wishes to rely on a defence of mistaken belief, it will be incumbent on the accused to show that that belief was reasonably based. The Supreme Court of Canada in Sault Ste. Marie did not have to address itself to crimes which lacked this definition of mens rea in an explicit form and, therefore, it may be reasoned that the Sault Ste. Marie decision may be read as not prescribing any principle in respect of such cases.

Even if the arguments supporting a watered-down version of mens rea in respect of section 201 (a) are rejected, it will be seen that it is plausible to argue that, in a prosecution under that section, the conduct of the accused may speak for itself very much as it does in criminal negligence, thus satisfying the intent requirement. The reasoning would be that where a master has clearly not taken care for the safety and health of his servant or apprentice, the circumstances may render it clear that no master could have failed to advert to the risk in respect of which precautions had to be taken—especially in view of the fact that the duty a master owes his servant is well ingrained in the psyche of all employers by dint of a long history upholding this precept. In this respect, the case of R. v. Blondin\textsuperscript{126} is of some assistance. It was there held that where it is necessary to establish recklessness, this requirement may be established by showing that the accused wilfully turned a blind eye to the risk. He or she will be deemed to have turned a blind eye where he or she has suspected the existence of the risk. It should be quite

\textsuperscript{123} To classify an offence as either being truly criminal in nature, or as one constituting an offence of absolute liability, or as one of a public welfare nature, requires an examination of "[T]he overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used," said the Supreme Court in Sault Ste. Marie, supra note 121 at 1326 (S.C.R.), 182 (D.L.R.). Note that in describing section 201(a) of the Criminal Code as a public welfare offence, there is a difficulty. The section might not be seen as providing for public health and safety, but only for that of a special group of the public, namely, servants and apprentices.

Since this was written, the decision in R. v. Prue and Baril (1979), 8 C.R. (3d) 68 (S.C.C.) has been read. There the Chief Justice at 73 stated that unless there was a clear indication against it, the inclusion of an offence in the Criminal Code made it a "true criminal" offence without more. It leaves the question of what is a "clear indication against it" open. In this regard note the holding of the dissentients, Ritchie and Pigeon JJ., that the section in question, s. 238(3), was of the second type listed in Sault Ste. Marie.


\textsuperscript{125} Lords Cross of Chelsea, Simon of Glaisdale and Edmund-Davies.

difficult for any master, in a situation in which a careful prosecutor is alleging that unsafe conditions caused servants to become diseased, to successfully argue that he did not suspect the existence of a material risk that such a disease might be inflicted. We appreciate that, if section 201(a) has to be restricted to this kind of situation, it does not provide a markedly different charge from prosecution in criminal negligence, at least as we analysed the essence of that crime. Nonetheless, because the stigma and the penalty are smaller, there may be more success in encouraging officers of the Crown to prosecute under section 201 than under the criminal negligence provision.

The final obstacle which has to be overcome before section 201(a) can be successfully used is the fact that it must be shown by the prosecution that the bodily harm done endangers life or that health is or is likely to be permanently impaired. This presents a problem only because some of the old decisions were concerned with this and held that a mere traumatic injury which caused permanent disablement would not be treated as a permanent impairment to health. Thus in R. v. Coventry,

127 it was held that the loss of toes by a servant, due to the negligence of the master in omitting to carry out his legal duties of providing for the necessaries of his servant or apprentice, was a permanent bodily injury, but was not necessarily a "permanent injury to health as I understand the expression." 128 [Emphasis added.] In the context of this paper, however, this difficulty does not seem to be a very significant one. After all, prosecutions will be brought where the workers have suffered a disease as a result of their occupation and permanent impairment to health should not be difficult to prove. No prosecution should be launched unless there has been some kind of serious disability of a permanent nature, such as, silicosis, cancer, and partial or total deafness.

C. Assault; unlawfully causing bodily harm: Section 245(2)

Section 244 of the Criminal Code defines assault. An assault is committed when a person either applies force intentionally to another person or, by an act or a gesture, causes another person to have reasonable grounds to believe that there will be an interference with his or her physical integrity. Section 245 then sets out the penalties for assault. Sub-section 1 of section 245 states that anyone who commits a common assault is punishable on summary conviction. Then follows sub-section 2:

Every one who unlawfully causes bodily harm to any person or commits an assault that causes bodily harm to any person
(a) is guilty of an indictable offence and is liable to imprisonment for five years; or
(b) is guilty of an offence punishable on summary conviction.

It is clear that, in part at least, sub-section 2 must be speaking of aggravated assault since it differs from sub-section 1 which speaks of common assault. This is also indicated by the fact that the offence under sub-section 2 is punishable as an indictable offence and leads to imprisonment for 5 years. The question which arises from the language of section 245(2) is whether

127 (1898), 3 Terr. L.R. 95, 3 C.C.C. 541 (C.A. N.W.T.).
128 Id. at 101 (Terr. L.R.), 549 (C.C.C.) per Wetmore J. Note that it was held sufficient for conviction that the master was negligent in the omission of carrying out his duty under the equivalent of what is now s. 201(b) of the Criminal Code.
there is also created an offence other than assault. It has been judicially held that there is. In *R. v. Prpich* 120 it was held that it is perfectly proper for a prosecution to be launched under section 245(2) in respect of the commission of an assault causing bodily harm without stating that such bodily harm was unlawfully caused. The court held that “to unlawfully cause bodily harm” was a separate offence to that of “committing an assault which causes bodily harm.” The court relied on *R. v. Kerim* 130 which also held that section 245(2) created two offences. It will readily be seen that the separate offence of “unlawfully causing bodily harm” could be of great assistance to us in our search for criminal offences with which to charge employers who do not take adequate precautions in respect of the safety and health of their employees.

As is true for section 201(a), it is necessary that there be ‘unlawful’ conduct by the accused. It has been held that there must be more than conduct which is “immoral and mischievous to the public” to satisfy this requirement. In *R. v. Clarence*, Stephen J., writing for the majority, said that for the purposes of this kind of statute, conduct will be “unlawful” only if it is forbidden by some definite law. 131 But, inasmuch as in the *Clarence* case itself the conduct was deemed “unlawful” because it might amount to cruelty in respect of a marital relationship and that it therefore infringed marriage law, it ought not to be too hard to spell out a breach of a definite law for the purposes of section 245(2) whenever a complaint is made in respect of a disease suffered by a worker as a result of conditions which prevailed at work. It should be easy to establish a breach of a statutory requirement, or of a prescription in a collective agreement, or even of the common law duty of care owed by a master to a servant. It might be argued that to be “unlawful,” the conduct has to be a breach of the law and that, by referring to the definition of the word “Loi” in the French version of the *Criminal Code*, there must be a breach of a statute. This argument was addressed in respect of criminal negligence and discounted. The same reasoning applies here.

Another difficulty which might have to be overcome in order to successfully use section 245(2) in respect of the causing of occupational disease arises because a court may refuse to accept the notion that to have, say, too many contaminants in the air, or to fail to provide adequate respirators, or to fail to ensure that there will be less noise, are really the kind of things which inflict bodily harm by “unlawful” conduct of the kind envisaged under a section mainly concerned with assault. The argument would be that assaults require an application of force or a threat thereof to the person and that the causing of disease is not such a threat or application of force. The argument is bolstered by the case of *Clarence* already cited. There it was held that the infliction of venereal disease upon the accused’s wife (by engaging in sexual intercourse) was not an assault-type offence. But it must be noted that in that case a great reliance was placed for this view on the use of the word “inflict” in the definition of the offence with which the court was dealing. In section 245(2) there is no such phraseology. Instead, there is the language of

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120 (1971), 4 C.C.C. (2d) 325 (Sask. C.A.).
“causing” bodily harm which suggests that harm can be caused without such
directness as the harm which results from a hit or a stroke. Against this rea-
soning, however, is the fact that the offence of unlawfully causing bodily
harm finds itself in an assault context, a context which does seem to suggest
that a measure of direct impact with a person’s body is required. Yet, to
the contrary again, it must be remembered that the courts have specifically
held that “unlawfully causing bodily harm” is an offence separate from that
of “committing assault which causes bodily harm.” Therefore, it is perfectly
reasonable to argue that the attendant criteria for assault are not to dominate
the separate offence of “unlawfully causing bodily harm.”

The phraseology of “causing bodily harm,” however, raises another ob-
stacle. It suggests that the harm must have been intentionally caused. The
nature of the mens rea required is not indicated in any way in this section.
Whereas section 244 speaks about intentionally applying force, its logic, as
already emphasised, does not necessarily apply to the separate offence of
“unlawfully causing bodily harm.” It may be plausible, therefore, to raise
again the argument that the nature of the mens rea required is the same as
that required in respect of section 201(a). The case for a more diluted form
of intent may not be as good here as it is when made in respect of section
201(a) because it is hard to argue that section 245(2) might be classified as
a public welfare offence. Thus, although the argument is not to be abandoned
without a fight, it may well be that a person accused under section 245(2) is
able to escape conviction if the prosecution cannot prove that the accused did
not actually believe that his or her conduct would lead to bodily harm.

The last point to be made in respect of section 245(2) is that the nature
of “bodily harm” does not seem to require evidence of very serious disability.
Thus in R. v. Donovan, the English Court of Appeal, in holding that it is a
crime to hit anyone with an intention to inflict bodily harm, said:

For this purpose we think that “bodily harm” has its ordinary meaning and includes
any hurt or injury calculated to interfere with the health or comfort of the prose-
cutor. Such hurt or injury need not be permanent but must, no doubt, be more than
merely transient and trifling.

D. Criminal Breach of Contract: Section 380

Section 380 of the Criminal Code provides as follows:

380.(1) Every one who wilfully breaks a contract, knowing or having reasonable
cause to believe that the probable consequences of doing so, whether alone or in
combination with others, will be

(a) to endanger human life,
(b) to cause serious bodily injury,

is guilty of

(f) an indictable offence and is liable to imprisonment for five years, or
(g) an offence punishable on summary conviction.

\[132\] Inasmuch as section 244(a) speaks about the application of force indirectly, it
must be taken to mean: not directly aimed at the particular person hurt, as in the case
where A aims a blow at B and hits C.

This is our modern enactment of the English *Conspiracy and Protection of Property Act, 1875*. Note that this statute, in turn, was a response to the reaction of the common law courts to the liberalising legislation of 1871-76, the *Trade Union Act, 1871* and the *Trade Union Amendment Act, 1876* which had provided that it would no longer be a criminal conspiracy for workers to combine to form trade unions merely because such combinations were in restraint of trade. The courts had held that, despite such saving provisions, trade unions would still be held responsible in criminal conspiracy if the combination had it as a purpose to coerce and molest employers in the conduct of their business. The 1875 statute was passed to protect trade unions from this judicial reading whenever they combined in specific ways. The effect was to legalize strikes and similar actions by not making them into criminal conspiracies when they took place in the context of trade disputes (as defined) and without overtones of intimidation. But such liberalization was limited also by the need, as the legislature saw it, to protect the public from the more serious effects of withdrawal of labour by workers. Accordingly, there was special concern with the interruption of gas, water and (later), electricity supplies which might be cut off as a result of the now permitted concerted workers' conduct. Hence it was provided that, inasmuch as breaches of contract—which is what strikes and like actions were understood to import—had these adverse effects, they would not be permitted. In our modern legislation this has been expanded so that no breach of contract which leads to the endangering of life or property, or the cutting-off of supplies of essential services, will be permitted by this provision which otherwise permits people—as far as the criminal law goes—to band together for collective bargaining purposes. Understandably, this section has never been used—to our knowledge—in the way that we now propose that it may be employed, namely as a tool with which to regulate employer conduct. But, as criminal law is always drafted as being applicable universally because the conduct it stigmatizes is seen as being anti-social and unacceptable, no matter who engages in it, there can be no theoretical bar put up by those who advance this claim of neutrality of the law to its use in the manner advocated, provided that no serious violence is done to the language of the legislation.

Resistance to it being so used in our context would only serve to underscore the nature of the inarticulate premise which, we argued in an earlier section, makes it so difficult to be tougher with employers than we are—that is, the premise that behaviour becomes less heinous when it is part of conduct engaged in with a so-called enterprise motive.

It should not be hard to find situations in which a breach of contract in the employer/employee situation leads to an endangering of life or the likelihood of serious bodily injury. We point again to the fact that there is an established duty owed by an employer to his employees to provide safe working conditions and that this duty is satisfied by requiring the employer to behave in a reasonable fashion. Failure to abide by regulatory requirements, inspec-
torates' orders, joint committee recommendations, or even simply failing to take a precaution which a reasonable employer in industry normally takes, would be a sound basis for an argument that there has been a breach of this employer/employee duty. There are, however, two apparent barriers to be overcome before the provision can be successfully used as a means of prosecuting employers who create unsafe working conditions.

The first of these is the potential argument that the duty owed by an employer to his employees to provide safe working conditions is not a contractual one. This argument is suggested by some statements in cases to the effect that the duty arises out of the relationship which is imposed by law, that is, it is only a tortious duty, not a contractual one. But, in Matthews v. Kuwait Bechtel Corporation, the English Court of Appeal having to face the question squarely for the first time, held that an employee could sue in either contract or tort in respect of unsafe working conditions. Both these limbs of substantive law gave rise to the duty. There might be differences in the remedies available under each, but it could not be said that the employer's duty to provide safe working conditions for an employee did not arise by implication from the contract of employment. For the purposes of section 380 there should be no difficulty in showing the requisite breach of contract where an employer does not behave as a reasonable employer would be expected to do in the circumstances.

The second requirement which has to be satisfied for the provision to be used successfully is that the conduct must have been wilful. This clearly suggests that it must have been intentional. Once again we have to face the question as to what is the nature of the intent required. It is worth noting that, in the English predecessor of section 380, the words used to describe the intent required were "wilfully" and "maliciously." Malice is often presumed to exist from knowledge. The condition of the accused's mind was further provided for in the English section by a phrase to the effect that the breach of contract must have been committed knowingly or with reasonable cause to believe that certain consequences would follow. This qualification came to be seen as describing the quality of the malice required under the section and, therefore, the word "maliciously" was eventually taken out of the provision. But the word "wilful" remained and it is clear that negligent conduct will not satisfy the requirement of the section. A deliberate act which leads to the breach of a contract must be proved. This, however, does not mean that the prosecution must show a willingness to breach a contractual term in order to do harm. What has to be shown is a willingness to do the act which amounts to a breach of contract. That being shown, the *mens rea* required by the section will be satisfied if the employer knew or had reasonable cause to believe that the consequences listed in section 380(1) would result from his conduct. Hickling, in his careful analysis of the history of the predecessor of section 380, summed this up as follows:

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Provided the conduct constituting the breach was itself intended, it is sufficient to show that such consequences were probable and that, at the time of the breach, the accused knew or had reasonable cause to believe that they would result from his conduct. The onus of proof on the prosecution will be discharged by showing that circumstances of which the accused knew, or must have known, were such as would have led any reasonable man to believe that such consequences would probably ensue.\textsuperscript{139}

The mental element, therefore, seems fairly easy to satisfy for the purposes of section 380: a deliberate refusal to comply with a statutory requirement, an inspector's order, or a refusal to abide by a joint committee's recommendation will satisfy the criteria.

Note further that it is not necessary for the prosecution to show that actual harm flowed from the wilful breach of contract. This enables a prosecution to be launched without having to face the always difficult causation problems which arise when conduct has to be linked to resulting consequences.\textsuperscript{140}

E. *Traps likely to cause bodily harm: Section 231*

(1) Every one who, with intent to cause death or bodily harm to persons, whether ascertained or not, sets or places or causes to be set or placed a trap, device or other thing whatsoever that is likely to cause death or bodily harm to persons is guilty of an indictable offence and is liable to imprisonment for five years.

(2) A person who, being in occupation or possession of a place where anything mentioned in subsection (1) has been set or placed, knowingly and wilfully permits it to remain there, shall be deemed, for the purposes of that subsection, to have set or placed it with the intent mentioned therein.

The history of this section clearly indicates that it was meant to put a restriction on the rights of property owners to do anything they liked on their land. In particular, it was an inhibition sought to be put on the creation of traps and the setting of devices which were used to keep people off the land and which might cause intruders serious harm. Spring-guns, dog-spears, and booby traps of various kinds were the nature of the devices envisaged by the provision. That the curtailment of the property owner's conduct was not meant to be too stringent can be seen from the requirement that, to be held criminally responsible under section 231 and its predecessors, the accused must have intended to cause death or bodily harm. Given this background it is perhaps a little tendentious to offer this provision as a useful one in the context of this paper, but the argument that it could be so employed is worth making.

While it is most unlikely that there will be many situations in which an employer sets or places a trap or device with the intent of hurting an employee, there might very well be cases where such a trap or device has been set or placed and the employer, innocent as to the original setting or placing, knowingly leaves it in place. In such a case the employer will be deemed to


\textsuperscript{140} It may well be that if there are no actual consequences proved by the prosecution, a summary conviction may result rather than the punishment of imprisonment for up to five years which would ensue if the offence were treated as an indictable one.
have had the necessary intent for conviction under section 231 by dint of subsection 2 thereof. Indeed, the deeming phraseology of 231(2) would not seem to permit an argument by an accused that he or she did not intend to cause death or bodily harm by knowingly and wilfully leaving the trap or device in place. This was so decided in _R. v. Besse_, where the court pointed out that, if an intent which a section permits to be deemed is meant to be rebuttable by evidence showing an actual lack of intent in the accused, the draftsmen of the _Code_ usually specifically provide for such a possibility.

When would a situation raising the potential for the use of section 231(2) be likely to arise in an employer/employee setting? Typically, it might crop up where a piece of equipment which was sound when it was initially installed as long as it had, say, a protective guard, or appropriate resistors, or had attached to it a warning system, comes to be without such protective devices and the employer knowingly permits it to remain in use in such a defective manner. The only argument that suggests itself as capable of rejecting the application of section 231(2) in this kind of situation is that the piece of equipment ought to have been capable of description as a trap or device when it was first put in place. There is nothing in the section that indicates that such a reading is required. But, even if this argument is not an insuperable problem, it is unquestionably true that it may be seen as stretching the section as far as it can legitimately go and, perhaps even further, to reason that a piece of productive equipment should be labelled a trap or a device when, for the purposes of section 231, those words have been used to describe such things as spring-guns, alarm-guns and dog-spears. But the section does say "trap, device, or _other thing whatsoever_ likely to cause death or bodily harm." It would not be an unusual technique to interpret this phrase as not requiring an _ejusdem generis_ reading, that is, that "other thing whatsoever" does not only mean things like a trap or a device but, quite literally, means any other thing. We readily concede, however, that, given the history of the provision, this would be a strained, albeit not a startling, reading of the section.

A second point which arises is that, if it may be employed in our context at all, the section is much more likely to be useful where traumatic injury is probable rather than disease. Again, the history of the section indicates that it was concerned with guns being fired, trip-wires being activated, explosives being set off, and the like. That is, there was some notion of direct assault upon the body of a person. Accordingly, escape of contaminating fibres as a result of an employer, say, wilfully and knowingly not replacing an exhaust pipe, may not be seen as conduct intended to be included in the coverage of

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141 (1976), 26 C.C.C. (2d) 140 (B.C. Prov. Ct.).
142 Dohm Prov. Ct. J., supported this argument by contrasting sections 231 and 386(1) with sections 237(1), 306(2), and 320(4). Note further that the language of section 231(2) is not crystal clear. It is plausible to argue from it that, for the section to become operative, the trap, device, etc., must have been set or placed with the intent to cause death or bodily harm. But if this reading were given to 231(2) then that subsection would have no operation independent of 231(1).
143 The argument, however, can be supported by reasoning that the section requires a malicious act by the accused and that the deemed intent provision of subsection (2) should not be allowed to water down this section to a criminal negligence-type provision.
this section because the infliction of likely harm is simply too indirect. Yet, all that can be said with certainty is that the section is silent on the matter. It may well be that, if the trap used by an owner of land to keep stray dogs off his land was poisoned meat (instead of dog-spears), and a child ate such meat by accident, a prosecution under the section could be launched successfully. If this is so, it may not be too much of an extension to apply the section to a case where lead emissions impaired the health of a worker and the employer had wilfully and knowingly failed to replace a failing ventilation system.\textsuperscript{144}

In sum, we concede that to use this section in order to prosecute employers who provide unsafe working conditions may well be straining the historic intent behind the section to its very limit. But we have explored the possibility because, although in the situations posited as potentially lending themselves to the application of section 231 the effect will be to use the section very much as if it were the basis for a prosecution in criminal negligence, a section 231 prosecution has the advantage of being usable before harm has actually been done. Like section 201, therefore, it presents the possibility of focusing on the necessity for serious action in respect of safety and health without having to wait for harm.

F. \textit{Causing mischief: Section 387}

Section 387 of the \textit{Criminal Code} reads as follows:

\textbf{(1) Every one commits mischief who wilfully}
\begin{itemize}
  \item destroys or damages property,
  \item renders property dangerous, useless, inoperative or ineffective,
  \item obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property, or
  \item obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.
\end{itemize}

\textbf{(2) Every one who commits mischief that causes actual danger to life is guilty of an indictable offence and is liable to imprisonment for life.}

\textbf{...}

\textbf{(5) Every one who wilfully does an act or wilfully omits to do an act that it is his duty to do, if that act or omission is likely to constitute mischief causing actual danger to life, or to constitute mischief in relation to public property or private property, guilty of an indictable offence and liable to imprisonment for five years.}

There are difficulties to be overcome in order to be able to use this section in the context of our paper.

First, the title of Part IX is “Wilful and Forbidden Acts in Respect of Certain Property.” This indicates that the primary aim of section 387 is to prevent abuse of property with the additional goal that, if physical danger is created by the abuse of property, an aggravated offence will be said to have been committed. Thus, we may be stretching the intent of the legislature in

\textsuperscript{144} The section speaks of “bodily harm.” \textit{Quaere}: Does this include disease? We saw in relation to section 201 that physical injury was not necessarily seen as an impairment of health. This does not mean that an impairment of health should not be seen as bodily harm.
seeking to apply a provision of this kind to employers who delinquently keep unsafe premises. But, again, we merely point to the fact that a criminal law provision couched in universal terms, as this provision is, sets out to characterize certain behaviour as socially unacceptable. To those who argue that we live in a pluralistic rather than a class-divided society, it is not supposed to matter by whom or for what purpose particular behaviour is engaged in, unless a specific motive underlying the behaviour is explicitly made a defence to the created offence. It is also pertinent to note that section 387(6) provides for just such a defence when workers, involved in a legitimate dispute with an employer, cause a mischief as defined by sections 386 and 387. That is, the draftsmen of the provision foresaw the potential use of section 387 in relation to the workplace and decriminalized particular behaviour by employees which might otherwise be described as a mischief. No such protection was provided for employers. This may be because it simply was not deemed necessary as, in another provision—section 386—it is provided that no conviction under section 387 is possible if the owner (who for our purposes can be equated with the employer) has a total interest in the property which is wilfully destroyed or damaged, unless such a person also had an intention to defraud. That is, the draftsmen may very well have thought that there was adequate protection for an owner who was also an employer in cases analogous to those in which employees are given protection—cases in which a trade dispute leads to the destruction of property. In such cases, the owner/employer will be protected in the absence of fraud.

In the context in which we would like to see the section used it is unlikely that destruction by the employer of property in which he has a total interest and which will also lead to physical danger for workers will be the result of fraud. Nevertheless section 387 may be available for use in our context, despite the requirement of an intention to defraud in people with a total interest in the property destroyed or damaged.

First, it is to be noted that section 386(2) requires the mischief to be committed with fraud where the offence is one “to destroy or to damage” property. Not all of the means of committing offences in Part IX involve destroying or damaging property. It is arguable, therefore, that the requirement to defraud by a total owner does not apply to all of the offences created under this part of the Criminal Code. Note now that section 387(1)(a) speaks directly of destruction or damage of property, whereas paragraphs (b), (c) and (d) of that section do not. It may very well be that the need

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145 One would argue that a refusal to take precautions, knowing of the risk, in breach of a duty to take care, satisfies the literal reading of the section.

146 And also under sections in Part IX.

147 It might occur in the typical situation which the requirement of fraud obviously envisages, that is, where a person with total interest in a property destroys it to collect on, say, an insurance policy. There would be foreseeable danger to the people in the plant at the time such destruction took place. In those cases the likely harm to workers will always be protected by the criminal law because of our strong desire to curb such fraudulent activity. No special arguments need to be made about the use of the criminal law against employers who, in their chase for profit, neglect the well-being of their employees where such neglect is the result of such fraudulent activity.

148 In particular, see ss. 393, 394, 395 and 396.
to find an intention to defraud in a person with total interest in a piece of property affected by the wilful conduct of such a person and which also creates a physical danger, does not apply to these latter paragraphs because the property is not “destroyed or damaged.”

Even if the courts are reluctant to give sections 387(1)(b), (c), and (d) the reading contended for above, another argument may be mounted to support the use of section 387. As the intention to defraud must only be found in a person with a total interest in the property destroyed or damaged, there seems to be no such barrier if the person prosecuted has no interest in the property at all. Such a person might be, say, a foreman, a supervising engineer, or a safety manager.

To prosecute successfully under either sections 387(2) or 387(5), the wilful mischief affecting property must be directly linked to danger to life. Thus, in R. v. Nairn, it was held that it was not sufficient to show that the accused shot aimlessly, while drunk, in the general area in which people were grouped. The shooting resulted in a bottle being broken and the court went on to say that if the bottle had actually been held in someone’s hand at the time and a splinter had entered the eye of the person so holding the bottle, a prosecution might have succeeded. Let us now return to the definition of mischief in section 387(1) and hypothesize about the kinds of situations in which damage to property could create health hazards in the workplace. The breakdown of guarding machinery, exhaust or ventilating systems or the like, could clearly constitute such circumstances. Outright destruction of such equipment would satisfy the requirements of this section where there was also a finding of wilfulness (and, in the case of an owner with a total interest in the property, an intent to defraud).

Note the wording of paragraph 387(1)(b). This provision may be particularly useful because it would seem to be sufficient to let safeguarding equipment deteriorate rather than to require a positive and deliberate act of interference.

The mental element of the crime is wilfulness. “Wilful” is described in section 386(1) as the doing of an act or the omitting of the doing of an act which it is the accused’s duty to do, and doing or omitting to do so while knowing that it will cause an event (namely, property being damaged, destroyed, rendered ineffective, etc.). This causes no serious problem for the potential use of this section in our context. All that seems to be required is to show that the accused’s conduct was done with an understanding of its consequences. No malice of any kind need be proved. It should be fairly easy

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149 People with a partial interest in such property may be convicted without establishing such an intent to defraud and thus partners, etc., may be prosecuted under this section without the prosecution having to meet the more onerous requirement.


151 A difficulty may be created by the fact that section 387(2) speaks of danger to life, not just of impairment of health or of bodily harm. Arguably more than an impairment of health or bodily harm is therefore required. But note that a splinter in the eye from a shattered bottle was apparently seen as sufficient danger to life in Nairn. Note further that it was also held in Nairn that the charge under section 387 must be specific in identifying the persons whose lives are in danger. In our context this will never present any real difficulty.
to prove that a failure to maintain, or to respond to a request for repair, or that a decision not to renew insulation, etc., was a wilful act in the sense that it was a knowing one for the purposes of this section. Again, if the conduct is classified as an omission, there will, in this context, be no difficulty establishing an existing duty to act in respect of which the omission took place.\footnote{\textsuperscript{152}}

In conclusion, the section can, with a little imagination, be used successfully to launch prosecutions in the context of the creation of health hazards in the workplace. If the arguments necessary to support the use of this section in this context are rejected by the prosecutorial forces or a court, this may serve to focus attention on the issue as to why our society treats employers in the way it does. Awareness of the contradiction between the supposed nature of our society and the alleged essence of the legal system on the one hand and reality on the other hand may be heightened. To avoid this, more effective regulation of health and safety by the state may ensue. Note also that one of the advantages which section 387 has is that it permits prosecutions to be laid in anticipation of physical danger. There is no need to wait for harm to employees to occur. Finally, if the section is usable in the way that we have argued that it is, it will be even more useful in traumatic injury cases where the harm likely to arise out of property damage or defect will be more easily classified as likely to occur as a result of the particular conduct which it is sought to characterize as a mischief.

G. \textit{Common nuisance: Section 176}

Section 176 of the \textit{Criminal Code} provides:

\begin{itemize}
\item[(1)] Every one who commits a common nuisance and thereby:
\begin{itemize}
\item[(a)] endangers the lives, safety or health of the public, or
\item[(b)] causes physical injury to any person,
\end{itemize}
\end{itemize}

is guilty of an indictable offence and is liable to imprisonment for two years.

\begin{itemize}
\item[(2)] For the purposes of this section, everyone commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby:
\begin{itemize}
\item[(a)] endangers the lives, safety, health, property or comfort of the public, or
\item[(b)] obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.
\end{itemize}
\end{itemize}

Unlike the reasoning adopted in respect of sections 245(2), 231, 380 and 387, the argument supporting the use of this provision to lay criminal charges in respect of hazardous conditions in the workplace does not require an imaginative extension of the apparent intention of the legislature.

It has long been recognized that common nuisance is an appropriate remedy where the public is endangered by a particular activity. Thus, in \textit{R. v. Toronto Railway Co.}\footnote{\textsuperscript{153}} McDougall J. said:

\begin{quote}
The Crown in proceeding by indictment for a nuisance are taking the only course open to secure an abatement of the evil alleged to exist in this case, should it be
\end{quote}

\begin{footnotesize}
\textsuperscript{152} See our earlier argument on this point in the text at note 85.
\textsuperscript{153} (1900), 4 C.C.C. 4 (Ont. Co. Ct.).
\end{footnotesize}
found upon the evidence adduced at the trial that a danger to the lives and safety of the public was created . . . .

The charge was seen as one peculiarly fitted to avoid and prevent harm to the public.

There seems to be only one major hurdle to overcome in order to be able to apply the provision successfully in our context. This is the requirement that it is the life, safety, health, property or comfort of the public which must be threatened or affected. In *R. v. Schula* the court held that harassing telephone calls to three individuals over a prolonged period did not constitute a common nuisance because it did not affect the public as such. The cases which had found that there was a common nuisance have mainly arisen in situations where the public’s access to roads was impeded or endangered. Thus, in *R. v. Chittenden* the use of a very wide and large traction engine on a public highway was held to be a common nuisance because there was a substantial interruption and inconvenience of the travelling public—a nuisance to all potential road users. In another *R. v. Toronto Railway Co.* case it was held to be a common nuisance to systematically and regularly reverse electrical trams on a public thoroughfare without equipping the trams with warning lights or sounding gongs, for such failures created unexpected hazards for road users. This is to be compared with yet another *Toronto Railway Co.* case where the alleged nuisance was a breach of a contractual agreement not to overload streetcars. It was held that a breach of this contractual duty, not being one owed to the public in general, did not amount to a nuisance.

On the face of it, it does not seem as if section 176 will be all that useful in respect of prosecutions for the endangering of workers’ lives because endangered workers may not be regarded as the “public”. But there are some potentially helpful arguments. One arises from the Supreme Court of Canada decision in *Union Colliery Co. v. The Queen.* In that case it was held that, having accepted a public charter to operate a railway company, the accused corporation was, as a public carrier, bound to carry its passengers and loads safely. The court went on to hold that:

[even as carriers not of passengers, but of freight, carrying on their business by means of trains and locomotive engines, they were, in my view, equally bound to see to the safety and protection of their employees. Whether the persons alleged in the indictment to have been killed were employees or passengers does not appear, but whether passengers or employees, the company defendants were under an equal obligation to both, and the offence committed was an offence not so much against

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154 Id. at 10. The authority relied upon was *R. v. Stephens* (1866), L.R. 1 Q.B. 702, 14 W.R. 859.


156 (1885), 49 J.P. 503, 15 Cox. C.C. 725 (Q.B.D.).

157 (1905), 10 O.L.R. 26, 10 C.C.C. 106 (C.A.).


159 (1900), 31 S.C.R. 81, 4 C.C.C. 400.
individual right or against people in their private capacities, but against the public at large, and therefore, in the public interest, indictable.\textsuperscript{160}

Arguably, then, employees can complain that a common nuisance had been committed when their lives are endangered because it is the same as "the public" having been endangered. But note that in the \textit{Union Colliery} case the accused corporation had taken on a public duty and, in addition, there was at that time in the \textit{Criminal Code} a provision which imposed on those who had under their charge or control any animate or inanimate object or thing a duty to provide safeguards where failure to do so would endanger lives. Thus, the situation in a typical privately run plant might be viewed differently than in the \textit{Union Colliery} case in that in such a plant there is no public duty explicitly accepted by the employer, nor is there a direct equivalent of the old section 213 in the \textit{Criminal Code}.\textsuperscript{161} But, despite these apparent difficulties, it is worth noting that the offence does not require that all of the public must be endangered. In \textit{Schula} it was held that calls to three individuals did not constitute a common nuisance because these persons were not the public. But in so holding the court spoke as follows:

The present conviction must therefore be quashed on the grounds that the acts complained of were directed to three individuals and not to the public generally or to \textit{any section of the public}, and was therefore not a common nuisance.\textsuperscript{162} [Emphasis added.]

Conceivably, then, a large group of workers might thus be held to be an identifiable section of the public in respect of which a common nuisance may be committed.

Whatever doubts there may be about the strength of the foregoing argument, there can be little doubt that if the danger to workmen is also a danger to people outside the plant a common nuisance charge will be well-founded. Thus if, say, sulphur fumes inside the plant also endanger people living or passing near the plant, or if effluent pipes disgorge noxious and toxic substances into the environment which are also released inside the plant, it seems reasonable to conclude that the public is affected by the enterprise of the employer. To take a more grisly example (and thereby to underscore the utility of the provision in question), take the scientific findings that merely to live near an asbestos factory or to come into contact with asbestos workers' clothing may lead to mesothelioma.\textsuperscript{163} If these findings can be substantiated to a court, an effective prosecution for common nuisance might very well be undertaken against an asbestos producer.

\textsuperscript{160} \textit{Id.} at 86 (S.C.R.), 404-05 (C.C.C.) \textit{per} Sedgewick J. The particular failure in the case had been a neglect to maintain a bridge so that it became unsafe and collapsed when a train crossed it.

\textsuperscript{161} Note, however, that in s. 199 of the present \textit{Criminal Code} there is a duty imposed on anyone who undertakes to do an act, a section which is not too dissimilar to the old s. 213.

\textsuperscript{162} \textit{Supra} note 155 at 457 (W.W.R.), 387 (C.C.C.), 407 (C.R.).

\textsuperscript{163} See the work of Dr. Newhouse of the London School of Hygiene cited by Dr. Selikoff in his speech, \textit{supra} note 7.
All of these arguments are premised on the notion that the conduct that endangers life, health, and property, is in no way justifiable. In civil cases, the question of whether conduct is a nuisance is determined by an evaluation of the reasonableness of the conduct in its own right. The Supreme Court of Canada in the *Union Colliery* case held that the same test should be applied in criminal cases. In the context of this paper, if the reasonableness of the employer's conduct is crucial to determining whether a common nuisance is committed when the lives of employees are endangered, prosecutors would have to overcome the extreme reluctance of courts to make a finding of unreasonableness when it involves criminalizing people who are behaving in a productive and profit-making way. But the very wording of section 176 may preclude this proverbial escape hatch. It includes in the definition of common nuisance those situations where life or property is endangered as a result of an unlawful act. This requirement will be satisfied by a breach of a statute in respect of health or safety or, more usefully to us, a legislative enactment in respect of, say, environmental protection. That is, a nuisance will exist because of the endangerment. Note further that section 176 also provides that there will be a common nuisance where life and property are endangered as a result of a failure to discharge a legal duty. It would be unnecessary repetition to indicate once again that, in the employer/employee context, the establishment of a duty which will have been breached by acts or failures leading to poor safety conditions does not provide a serious difficulty.

One of the real advantages obtainable by using section 176 is that it can be utilized before lives, safety and property are in fact impaired. Indeed, the Ontario Court of Appeal in *R. v. Toronto Railway Co.* held that the fact that a life had been lost as a result of the railway company's conduct was merely illustrative of the fact that the public was endangered by the behaviour of the accused. Proof of actual damage done to individuals is not essential to conviction under this provision.

**H. Conspiracy: Section 243**

The discussion of the potential of this offence for use against employers who permit unsafe working conditions is included with a good deal of hesitancy. The main rationale for the retention of this criminal offence is that it provides the state with an appropriate tool with which to combat complex criminal organizations. But the very reasons which make it so useful in that context are the same ones which make it an offence capable of being abused to the serious detriment of important civil liberties and rights. It is a crime whose *actus reus* is the mental act of agreement by two or more persons. The crime is really the agreement to carry out a common design. Thus, it becomes feasible to prosecute people for thinking rather than doing, and even for as-

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164 *Supra* note 159. It has already been noted that the existence of a duty under the *Criminal Code* substantiated the finding of a common nuisance in that case.

165 See text at note 102.

166 *Supra* note 157.
sociating with certain people.\(^{167}\) This frightening possibility is made into a probability because the law of conspiracy has developed procedural and substantive rules which facilitate prosecutions. This is seen as a good thing because of the laudable objective of fighting organized crime. As a result, an exception to the rule against hearsay has been fashioned which permits whatever one conspirator may have said—extra-judicially—in furtherance of the conspiracy, to be used in evidence against other alleged conspirators. Procedures in respect of joint trials may also work against a particular individual accused since that accused, being associated with a large number of others, may be prejudiced by evidence adduced against such other people, even when a jury is advised that technically such evidence cannot be used in that way. We are, therefore, far from eager to advocate the utilization of an offence—even though it suits our purposes—when we believe that that offence ought to be diminished in scope, if not abolished altogether. We will, therefore, merely set out the bare bones of the offence for the sake of completeness.

It is a criminal offence to conspire to commit murder or an indictable offence.\(^{168}\) In as much as a conspiracy to commit an indictable offence of the kind discussed in this paper can be established, the section could be of use in the occupational health context. More useful to us than these sections, however, are sections 423(2) (a) and (b). They provide as follows:

\begin{enumerate}
\item Every one who conspires with any one
\begin{enumerate}
\item to effect an unlawful purpose, or
\item to effect a lawful purpose by unlawful means, is guilty of an indictable offence and is liable to imprisonment for two years.
\end{enumerate}
\end{enumerate}

This provision is an enactment of the common law offence. Section 8 of the \textit{Criminal Code} has abrogated all common law offences but, as the Supreme Court of Canada noted in \textit{Wright, McDermott and Feeley v. The Queen},\(^{169}\) criminal conspiracy was one of the few common law offences which Parliament had thought it advisable to perpetuate by codification. As a result the conspiracy provisions have been interpreted in line with the case law developed in respect of the common law offence.

In \textit{Wright, McDermott and Feeley} it had been argued that the requirement of unlawfulness of purpose was met by proving a purpose which was criminal only under the \textit{Criminal Code}. The Supreme Court of Canada, however, held that it would be sufficient if there was a breach of a provincial statute.\(^{170}\) In a subsequent case, \textit{R. v. Thodas},\(^{171}\) it was argued that a breach

\^167 The crime has its origin in a statute which was directed at abuses of criminal procedure—\textit{Ordinance of Conspirators}, 1305, 33 Edw. 1. It was soon widened to counter general social unrest which existed in society; see Pollack, \textit{Common Law Conspiracy} (1947), 35 Geo. L.J. 328. And the use made of criminal conspiracy as a tool of oppression of labour organizations is well-documented.
\^168 See sections 423(1) (a) to (d) of the \textit{Criminal Code}.
Occupational Hazards

of any statute would not necessarily amount to unlawfulness for the purposes of the Criminal Code offence of criminal conspiracy. The British Columbia Court of Appeal held that, at the very least, the breach of the statute before them did satisfy the requirement. There was a suggestion in the majority holding that the particular statute breached, dealing with securities, was of great social significance and that such breaches could not be ignored. From this an inference could be drawn that not every breach of any statute would suffice. Indeed, the dissentent in Thodas, Nemetz J.A., argued that only breaches of statutes which are of great importance to the safety of the public ought to be considered the kind of unlawfulness which satisfy the requirements of the offence of conspiracy. In our context, we would always be concerned with statutes of importance to the safety of the public and, therefore, even if the Nemetz J.A. principle were applied, it would not limit the scope of the crime of conspiracy in relation to occupational health problems.

Because in conspiracy it is not necessary to prove that particular acts were engaged in, it is not necessary to prove that a particular accused agreed to do particular acts with other members of the alleged conspiracy. What must be shown, however, is not only that there was an intention to enter into a particular agreement, but also that there was an intent that the common design would be carried out. Thus in R. v. O'Brien Taschereau J. held as follows:

I think there has been some confusion as to the element of intention which is necessary to constitute the offence. It is, of course, essential that the conspirators have the intention to agree, and this agreement must be complete. There must also be a common design to do something unlawful, or something lawful by illegal means. Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there must exist an intention to put the common design into effect. A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to obtain the object of the agreement. I cannot imagine several conspirators agreeing to defraud, to restrain trade, or to commit any indictable offence, without having the intention to reach the common goal.

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172 Id. at 751-52 (W.W.R.), 297 (C.C.C.). See also Kamara v. DPP, [1974] A.C. 104, [1973] 2 All E.R. 1242, 57 Cr. App. R. 880 (H.L.) in which it was held that not every breach of the law would amount to an unlawful purpose for the offence of criminal conspiracy and that, therefore, not every tortious act would so qualify. Note that in that case, however, a trespass was held to be an unlawful purpose because it involved an invasion of the public domain to an extent which inflicted more than nominal damages. It was also held that a real harm to the public as opposed to a few particular individuals had occurred because people in the building which had been invaded had truly felt threatened.

173 R. v. Sokoloski (1977), 13 N.R. 191 (S.C.C.). Note that the difficulty arose in that case because an agreement to sell and buy was characterized as part of a series of joint acts which, when so viewed, allowed a finding of conspiracy. The question of whether an exchange of different but corresponding set of promises amounts to a conspiracy has also created difficulties in American jurisprudence. See, for instance, Note, The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants (1948-49), 62 Harv. L. Rev. 276 and the discussion at 279-80 in particular.

To prove the intention to enter into an agreement to carry out a common design resort will frequently be had to the actual conduct of the various accused persons. Indeed, the agreement may be inferred from a series of incidents which in themselves are quite unimportant and insignificant.

The mens rea to be proved is that of entering into an agreement with the appropriate intention. It does not necessarily require intention to commit an unlawful act, but rather an intention to agree that a common design shall be carried out which is in fact unlawful, even though there may be no understanding in all of the alleged conspirators that it is in fact unlawful. The alleged conspirators must have known that certain acts will be committed or must have had an awareness of what acts would be committed or consequences would follow when seeking to attain the common design which they had agreed to achieve. They must also have known enough about the acts or consequences to make them criminally responsible for them if they had been charged with the offence of committing such acts or causing such consequences. That is, the co-conspirators must have had the intent which would have amounted to the mens rea requisite for conviction had they been charged with the substantive offence of doing such acts or causing such consequences.

In our context, this could mean that a common design which involved the breaching of statutory safety standards as an integral part of the achieving of the purpose of the agreement would be a conspiracy. It would not matter that the conspirators did not know that a breach of a statute or other unlawful act had been committed in seeking to achieve the common design, provided that they knew that acts which were to be committed had certain attributes which would make them responsible in law for such acts.

It may be that in some circumstances a higher mens rea requirement than merely having the intention necessary to be convicted of a substantive offence must be present in founding a conspiracy charge. This possible gloss arises out of the decision in Churchill v. Walton. In that case co-conspirators had been charged with having entered into an agreement to achieve a common design: a breach of a statute. The acts committed in furtherance of the alleged conspiracy had, for the purpose of that statute, strict liability attached to them. Therefore, strict liability would have made it very easy to establish the intention in the conspiracy charge if the test set out above had been applied. The House of Lords, however, held that it would be necessary to show that the alleged conspirators not only knew that the acts were being committed (which is all that was necessary for the strict liability offence), but also that they knew that they were unlawful when so committed. This makes some sense because, for the purpose of statutory regulation, it may

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175 This explains why it is easy for one accused to be prejudiced at the trial as a result of the proving of wrongful acts by other co-accused persons.
177 See generally Goode, Criminal Conspiracy in Canada (Toronto: Carswell, 1975) at 18-40; in particular, at 35.
well be worthwhile to hold people strictly liable but, where people are being charged with a *Criminal Code* offence for the same breach of statutory regulation, it does not seem out of line, especially as the prosecution's burden of proof problems are reduced in conspiracy cases, to require a higher degree of intention to convict a person for that offence.\(^{179}\)

In sum, it will be relatively easy to establish that the offence of conspiracy has been committed where there has been an agreement to commit one of the indictable offences identified in this paper as apposite in certain industrial circumstances. It will be readily available where there is a common design to lower the standard of the duty of care owed to workers where this is evidenced by conduct suggesting that this is the aim of a number of people controlling safety standards in an enterprise. It will be readily available where an agreement, evidenced by conduct, can be deduced to defeat the aims of a statutory safety-health scheme. It will be readily available where a company enters into any agreement of the kind listed above with some of its employees who make decisions on its behalf.\(^{180}\) Our preference is that in each of the cases where conspiracy would be an available charge, no prosecution ought to be launched where agreements culminate in actual substantive offences. Where such offences are actually committed there should be no reason to use the tool of conspiracy at all: the perpetrator should be charged rather than people who may have agreed to commit the crime.\(^{181}\)

I. *Murder: Section 212(c)*

As a practical matter, the only provision which could be used to convict employers of murder because of death arising out of unsafe conditions in their plant is section 212(c).\(^{182}\) Let us state at the outset that we do not advocate such use of section 212(c) because it requires a reading of the

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\(^{179}\) It is not certain that the same reading would be given to the *mens rea* requirement in conspiracy by a Canadian court as was done in *Walton*, *supra* note 17. In other areas of inchoate crimes, the Canadian courts seem to have been satisfied with a finding that the *mens rea* required is the same as that applicable when a person is charged with the associated substantive offence. See *Lajoie v. The Queen* (1973), 33 D.L.R. (3d) 618, 10 C.C.C. (2d) 313, *R. v. Trinneer* (1970), 10 D.L.R. (3d) 568, 72 W.W.R. 677, [1970] 3 C.C.C. 289.

\(^{180}\) See discussion of the criminal responsibility of corporations in the text accompanying note 222, infra.

\(^{181}\) Note s. 21(2) of the *Criminal Code* which attributes the requisite intention, when the actual offence has been committed, to any of the conspirators so that such a conspirator no longer is merely a conspirator but also becomes a person who is guilty of the substantive offence.

\(^{182}\) It is not likely that an employer who keeps unsafe premises would do so because he means to kill one of his employees or means to inflict bodily harm on one of them which he knows is likely to cause her/his death, reckless of whether or not this will cause death. Therefore ss. 212(a)(i) and (ii) are of no practical importance in the context of this paper. Nor is s. 213, which deals with the causing of bodily harm which results in death when committing a number of listed offences such as treason, robbery, arson and rape, of any practical interest to us.

Section 212 states:

Culpable homicide is murder
section which would make murder convictions more readily available in all sorts of circumstances which we believe ought not to give rise to murder charges at all. This section of the paper, therefore, is merely included to give a full picture of the potential of criminal law as a health and safety regulator.

Section 212(c) states that culpable homicide is murder:

where a person, for an unlawful object does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

On its face this provision is much less stringent in its requirements than the other ones defining murder; indeed, it seems completely out of character with the main ones, sections 212(a)(i) and (ii). Those sections require a finding that the accused positively meant to kill or cause bodily harm. By contrast, section 212(c) has no such subjective element in it. The accused merely should, as a reasonable person in the circumstances, have known that his or her act was likely to cause death. It is surprising that in a Criminal Code in which the requirement of subjective intent is to be implied unless there is a provision to the contrary, a section relating to the most serious of all offences does not clearly insist on subjective intent.

Unsurprisingly, the commentators have classified section 212(c) as an anomaly, to be given as narrow scope as possible. In particular, Hooper and Parker have pointed out that the section is based on the English Draft Code of 1879 and that, at that time, the provision would have had a different import than it may now have. In particular, they note that Stephen, whose Digest of the Criminal Law of 1877 formed the basis for the English Draft Code, was a strenuous opponent of the felony-murder rule and that it can hardly be supposed that he would have favoured a provision which, in effect, widens the scope of that objectionable rule. Hooper therefore looks for a different explanation for the inclusion of what is now section 212(c) in the Draft Code. He points out that in the 1870's notions about mens rea were not as refined as they are today and it was believed that an accused's intent could be gleaned only by determining the foresight of a reasonable person in the circumstances of the accused. At that point of legal develop-

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not.

Nor will s. 212(b) be of practical use in the context of this paper as it also deals with an intention to cause death or bodily harm, in this case resulting in death of a person other than the one who was meant to be hurt.

183 See discussion in the criminal negligence section of the paper, text accompanying note 35, supra.


186 He was also one of the Commissioners who drafted the Code.
It was assumed that a person must be taken to have intended the natural and probable consequences of his or her acts. Today there is no such assumption. Instead, the trier of fact may infer that an actor intended to attain the natural and probable consequences of his or her act, but need not do so.  

Hooper further points out that the presumption of intent made sense when the English Draft Code was being formulated because the accused could not be a witness at that time and there seemed to be no other sensible way of getting at the accused's intent than by using an objective test such as that an actor must be taken to have intended the natural and probable consequences of his or her act.

Taking all this together, the commentators surmise that the precursor of section 212(c) was not meant to be anything more than a provision which purported to make it murder when an accused intended death or grievous bodily harm to ensue and, in the later case, was reckless as to whether or not death would follow. In effect, it would be a stylistically different way of stating what is now section 212(a) (i) and (ii), since the objective test was really a way of formulating the subjective one in vogue at the time of the English Draft Code. Both Hooper and Parker noted that section 212(c) has seldom been used and that in most situations in which it has been relied on to found murder charges, section 212(a) (i) or (ii), or section 213 would have yielded the same result. They argue that section 212(c) should be read as anomalous and not be used as its phraseology suggests, namely, to permit attaching criminal responsibility for murder on an objective basis.

In recent years, however, some courts, notably in Ontario, have shown a willingness to give greater scope to section 212(c). Whereas the act which leads to death need not have been so intended, the section requires that the act must have been done to attain an unlawful object other than the cause of death. As long as this was read as requiring to show that the act done would have been seen by a reasonable person in the accused's circumstances as likely to cause death, and that the act done was separate from the unlawful object sought to be attained, violent acts directed at a victim could not lead to a conviction for murder unless the accused had deliberately intended to cause death or bodily harm regardless of whether death ensued. This was so because such violent acts would also be the unlawful object, for example,
assault, which needed to be proved to make section 212(c) applicable. Thus, in *R. v. Desmoulin*, the theory of the prosecution was that the accused had beaten a child, causing injuries which resulted in its death. The Ontario Court of Appeal held that the assault on the child could not constitute the separate unlawful object which had to be proved to make section 212(c) applicable. Thus, even if the historical background is not accepted as sufficient ground to limit the scope of section 212(c), a severe limitation on its availability would exist if the *Desmoulin* reasoning were universally applied. But, in *R. v. Tenant and Naccarato*, the act of leaving the scene of a confrontation, returning with a revolver and pointing it at the victim, was held to be separate from the unlawful object of assaulting the victim (who died from his injuries).

This separation of the act from the assault was artificial. The Ontario Court of Appeal found support for its reasoning in the rather enigmatic decision of the Supreme Court of Canada in *Graves v. The Queen*. In a subsequent case, the same argumentation was relied upon to convict a person of murder who had conspired to commit arson causing an explosion which killed a person. The act of setting fire was seen as separate from the unlawful object of the conspiracy. In *R. v. DeWolfe*, an attempt was made to halt the trend. It was there held that the pointing and using of firearms could not be both the acts done and the unlawful object required by section 212(c). It had been argued that these acts were also the unlawful object because they contravened the *Criminal Code*’s provisions in respect of the proper use of firearms. The Ontario Court of Appeal held that section 212(c) should not

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190 (1976), 30 C.C.C. (2d) 517 (Ont. C.A.). For a similar decision see *Hughes v. The King* (1951), 84 C.L.R. 170 (H.C. Aust.). Note that the English Draft Code, which contained s. 212(c)’s predecessor, was also the basis for the criminal codes of New Zealand, Western Australia, Tasmania, and Queensland. *Hughes* arose out of a crime committed in Queensland.


192 (1913), 47 S.C.R. 568, 9 D.L.R. 589, 21 C.C.C. 44. There the three accused had trespassed on the victim's property. The victim, holding a loaded gun, asked them to leave. The accused rushed at him and the victim used his gun as a club. It went off and he died. The accused were held guilty of murder. In *Tenant and Naccarato* the Ontario Court of Appeal said:

It is implicit in the judgment of the Supreme Court of Canada that the unlawful object relied upon to bring the accused within s. 259(d) of the *Code* (the predecessor of s. 212(c)) was an attack or assault upon the deceased and that the act done to achieve that unlawful object was the conduct of the accused in rushing at the deceased in the circumstances. In our view, the facts of that case can only be brought within the subsection if the conduct of the accused in rushing at the deceased is regarded as a separate act done to achieve an unlawful object, namely, to attack or assault the deceased.

At 702 (O.R.), 94-95 (C.C.C.).

193 *R. v. Quaranta* (1975), 24 C.C.C. (2d) 109 (Ont. C.A.). Note that in this case the act done was easier to separate from the unlawful object. In *Tenant and Naccarato* it is difficult to perceive how an assault which requires a threat of an act or an act is distinct from the completion of the threatening act. In *Quaranta* it would have been equally difficult to distinguish between the act of setting fire and the unlawful object of arson. The finding that there was a conspiracy, however, makes the distinguishing process more persuasive.

194 (1976), 31 C.C.C. (2d) 23 (Ont. C.A.).
be left with the jury unless there was plain evidence of an unlawful object separate from the acts. Indeed, the Court said that:

the facts [of a particular case] should not be subjected to a metaphysical examination to uncover further unlawful objects; a common sense view of the evidence should be taken. Cases such as Tennant and Naccarato and Graves can well be regarded as high-water marks of the construction and application of this subsection and should not be construed as points of departure.  

There is thus a discernible development in the direction of greater scope for section 212(c). The apparent retreat in DeWolfe may arrest this trend, but in our context this is not so important because, in the occupational health area, the unlawful object will be easily separable from the acts which cause death. Take for example a case in which the employer's process leads to too many contaminating fibres being released into the plant's atmosphere. This act, even if it is not intended to cause death or bodily harm, may very well be of the kind that a reasonable employer in those circumstances would know to be likely to cause death. The unlawful object could be a breach of statute, a failure to comply with an inspector's order, or a breach of contract. The crime would then be complete. At this juncture, note that there is nothing to indicate what kind of an unlawful object is necessary to satisfy section 212(c). Parker, alarmed by the development in Tennant and Naccarato, argues that a reading of section 212(c) in its proper historical setting would require that "unlawful object" be read as "inherently violent." This would bring the section into operation in circumstances where an approximation of subjective intent might be found. There seem to be no compelling data supporting this reasoning, but it does underscore an anxiety about section 212(c) which we share. Returning to our occupational health example, it is clear that a murder conviction of an employer in such circumstances would amount to a conviction as a result of a "misdemeanour-murder" rule. This was precisely what the High Court of Australia warned against in Hughes v. The King. In that case, this unacceptable development was seen as an outgrowth of failing to separate the act from the unlawful object. In our context, this result could obtain even if Tennant and Naccarato reasoning is rejected.

The objection to the Tennant and Naccarato development is that it may herald a greater willingness to exploit section 212(c). We oppose this, even though it could be of dramatic use in the occupational health area, because, if

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195 Id. at 29. As remarked in note 193, supra, the finding of conspiracy in Quaranta left the holding in that case more in line with a narrow reading of s. 212(c). In DeWolfe, the Court of Appeal, which was obviously not in a position to say that Tennant and Naccarato was wrong, sought to narrow its possible effect by noting at 28 that "in both Graves and Tennant and Naccarato the accused persons were parties to a conspiracy or something very close to it."

196 As usual, it might be argued that the contamination of the atmosphere is due to an omission (e.g., failure to ventilate) rather than to an act. We refer to our argument on this point in the section on criminal negligence, text accompanying note 85, supra.

197 Add to this the possibility of conspiracy; see the discussion in section H of this part, text accompanying note 167, supra, et seq.

198 Supra note 185, at 134.

199 Supra note 190.
it is applied, it could work to characterize as murder acts and conduct which we clearly would not want to treat as seriously. Since this article is concerned with demonstrating that entrepreneurs should be treated no more favourably than other persons by the criminal law, it would not behove us to make an argument that they should be treated as criminals when no one else would be so characterized for analogous behaviour. If it be argued that all people, including entrepreneurs, should be charged under section 212(c), we return to our argument that the section is anomalous in that it is out of step with the other homicide provisions of our *Criminal Code* and, as Hooper and Parker have shown, ought not, as a matter of its history, to be used as a literal reading of its phraseology suggests it could be.

We take heart from the fact that, at least in the context of occupational health causing death, the section may be very difficult to use because of the requirement that the death of the victim must occur within a year-and-a-day of the accused's act. We will return to this point.200

VI PRACTICAL AND CONCEPTUAL PROBLEMS INHIBITING THE USE OF CRIMINAL LAW

A. The initiating of prosecution

One of the difficulties with using criminal law in the way that has been suggested in this article is the built-in reluctance to stigmatize as criminal an activity that is regarded as being productive. Therefore, even if the arguments made herein do persuade people of both the capacity and utility of the criminal law in the employer-employee context, the launching of prosecutions may well be hindered by the refusal of prosecutorial officers to initiate proceedings.

The nature of criminal offences is that they are offences against the state and that therefore the state is the appropriate prosecutor.201 In the normal course of events, the Attorney-General or his agents will keep control over criminal proceedings. An information may be laid by any private citizen, but this is usually done by a policeman. Where the information is one in respect of an offence of a summary nature, a trial will follow the laying of the information unless the Attorney-General exercises his right to stay the proceedings.202 Where the offence is an indictable one, a preliminary inquiry will follow the information. If the court, as a result of this inquiry, decides to commit the accused for trial, the prosecutor may prefer an indictment. The prosecutor may be the private citizen who brought the information in those jurisdictions where grand juries are still employed, as well as the Attorney-General or his officers.203 The only other persons who may prefer an indict-

200 See the section on causation, text accompanying note 224, *infra*, *et seq.*
202 Section 723(1) of the *Criminal Code*. As to the laying of information and the ensuing proceedings in summary offences, see Part XXIV of the *Code*.
203 Prosecutor is so defined in s. 2. Section 504 refers to a “prosecutor.” Where grand juries are not employed the word “prosecutor” is not used in the pertinent provisions, but rather the Attorney-General, his agents, or persons to whom the Attorney-General or the court has given permission to prefer an indictment; see s. 507.
ment are the Attorney-General or his officers, or persons who are given permission to do so by the Attorney-General or the court. But, regardless of who is entitled to prefer an indictment, the Attorney-General can always direct a stay of proceedings, even where he has preferred the indictment. The exercise of the Attorney-General’s discretion to direct a stay of proceedings or not to prefer an indictment is not reviewable by a court. He does not have to give reasons to support the way in which the discretion was exercised. It is his duty to assess the public’s interest in having a prosecution go forward or not. This residual right to control creates serious political difficulties which will have to be overcome to enable prosecutions to be launched even where the charges brought look as if they should result in conviction of the accused.

There is an argument that if a private citizen, as a result of a breach of criminal law, apprehends injury to a right or interest he or she possesses which is different to the right all citizens have in other people complying with law, such a citizen may obtain an injunction to prevent criminal conduct. As this remedy would be one offered to a citizen to protect a civil right or interest, only incidentally raising an issue of public interest, it will be available without requiring permission to apply for it from the Attorney-General or from any other such public official. There are some questions as to whether or not this makes the remedy potentially available to a worker who fears injury because of an existing or anticipated breach of the Criminal Code. These include the issue as to whether the worker has the kind of right or interest in his or her physical well-being which is to be protected by the remedy and whether a breach of a universally applicable section of the Criminal Code, as opposed to health or welfare legislation aimed at a particular

204 Sections 505 and 507.
205 Section 508.
206 R. v. Osborne (1975), 11 N.B.R. (2d) 48, 25 C.C.C. (2d) 405, 33 C.R.R. 211 (N.B.C.A.). This is not to say that where a court believes there has been an abuse of process by the forces of prosecution it does not have the power to stay proceedings: Rourke v. The Queen, [1978] 1 S.C.R. 1021, 76 D.L.R. (3d) 193, (1977), 35 C.C.C. (2d) 129; but the majority thought that the power should be exercised only in the most exceptional circumstances; compare R. v. Catagas, [1977] 3 W.W.R. 706, 38 C.C.C. (2d) 296 (Man. C.A.), where it is suggested that the decision to stay proceedings is essentially a matter of the politics of the administration of justice and should, therefore, not be complicated by the judiciary.

207 The availability of the remedy was identified by the House of Lords in Gouriet v. Union of Post Office Workers, [1978] A.C. 435, [1977] 3 All E.R. 70, where the applicant had sought a restraining order to prevent a trade union from carrying out its threat to put an embargo on mail between the U.K. and South Africa. The Attorney-General had refused to grant his consent to act as a plaintiff in a relator action. The House of Lords held that this was not a reviewable decision, but went on to say that, but for legislation granting trade unions immunity in torts actions, the applicant might have had an interest worthy of protection by way of an injunction. See the judgments of Lord Wilberforce at 474-75 (A.C.), 78 (All E.R.), Viscount Dilhorne at 491-92 (A.C.), 92 (All E.R.), Lord Diplock at 496-98 (A.C.), 96-97 (All E.R.), Lord Edmund-Davies at 506-07 (A.C.), 104 (All E.R.), Lord Fraser at 522-24 (A.C.), 118-119 (All E.R.). Shortly afterwards the English Court of Appeal held (2 to 1) that performers and recording companies were entitled to an order enjoining bootleggers; see Ex Parte Island Records Ltd., [1978] 1 Ch. 122, [1978] 3 All E.R. 824.
section of the community, is the kind of provision which may be enforced by a civil remedy. But, even if these hurdles can be cleared, two immense practical problems remain. The first is that an interlocutory injunction would be the most useful remedy for an endangered worker but, as a matter of practice, if not of law, to obtain this the applicant has to give an undertaking that he or she will make good the losses incurred by an enjoined defendant should it be decided, at the eventual trial, that the injunction ought not to be granted. In our context this might present an insurmountable barrier to a worker. It is possible that a court would listen sympathetically to an argument that the requirement of an undertaking in respect of costs is not mandatory and, therefore, that a worker who believed there was a genuine jeopardy to his or her health should not effectively be deprived of this legal remedy because of his or her relative impecuniosity. Further, it may be that to issue a writ seeking a permanent injunction is worthwhile. Although

208 In Ex Parte Island Records Ltd., supra note 207, at 137 (Ch.), 831 (All E.R.) Lord Denning M.R., after analysing a whole series of cases where injunctive relief was given, opined that the applicant did not have to establish “rights of property, strictly so called,” but that all that was required was to demonstrate that there had been an unlawful interference with the plaintiff’s trade or calling. It should not be too hard to show that where a criminal offence is being committed, danger to a worker’s physical well-being represents an unlawful interference with her/his trade or calling, particularly as in Springhead Spinning Co. v. Riley (1868), L.R. 6 Eq. 551, a case cited with approval by both the House of Lords in Gouriet and by the majority in Ex Parte Island Records, an employer was permitted to argue that loss of profits and goodwill as a result of a strike and boycott entitled it to an injunction because it was the same as causing that loss by making the plant uninhabitable by inundating it with noxious fumes. It does not seem to stretch things too far to argue that, where the harm feared is physical danger to the person complaining rather than harm to the employer whose protectible loss is due to those persons being endangered, an injunction ought to be granted. If it be argued that the employer stands to lose profits and goodwill whereas the workers will suffer mere physical harm, note that the workers also stand to lose earnings and earning capacity. Inasmuch as the Criminal Code provisions are sought to be differentiated from such statutes as health and welfare enactments which set out to protect particular sections of the community (and Lord Diplock in Gouriet at 498-501 (A.C.), 98-99 (All E.R.) suggested that he saw the potential injunctive relief in that context), note that in Gouriet the statute breached was one affecting the general public, as it was in the Springhead Spinning case and that, even though in Ex Parte Island Records the statute protected only performers, Lord Denning’s analysis did not hinge on that feature. Indeed, Lord Denning provided an answer to another perceived difficulty, namely that to give an injunction in respect of a breach of the criminal law could lead to double jeopardy; see Island Records at 135 (Ch.), 829 (All E.R.).

209 The applicant also has to show that (i) the harm likely to be inflicted is irreparable, (ii) the balance of convenience between the plaintiff and the defendant warrants the making of an interlocutory order, and (iii) a prima facie case exists that an unlawful interference with a right has occurred or will occur. The first two requirements may not be so difficult to satisfy in our context. As to the third, it could be a sticking point because of the rather uncertain state of the law discussed above. It is possible that the need to demonstrate a prima facie case has been removed since the decision in American Cyanamid Co. v. Ethicon, [1975] A.C. 396, 1 All E.R. 504 (H.L.), and Canadian decisions apparently adopting it: Bank of Montreal v. Calbax Properties Ltd. (1977), 4 A.R. 483 (S.C.), Labelle v. Ottawa Real Estate Board (1977), 16 O.R. (2d) 502 (H.C.). To the contrary, however, seems to be Toronto Marlboro Major Junior “A” Hockey Club v. Tonelli (1975), 11 O.R. (2d) 664, 67 D.L.R. (3d) 214, 25 C.P.R. (2d) 175 (H.C.), and some doubt is thrown on the matter by Abouna v. Foothills Prov. Gen. Hospital Bd. (1975), 65 D.L.R. (3d) 337 (Alta. S.C.).
there would be an undesirable lag of time between the issuance of a writ and
the trial, this route could provide workers with a bargaining tool and, if the
issue were to go to trial, it would focus attention on the fact that workers need
to resort to extraordinary remedies to protect their very special interest in
working conditions.

But this brings us to the second problem. As the granting of an injunc-
tion is a civil remedy to protect rights against breaches of the criminal law,
it is an extraordinary remedy and one which is not likely to be granted where
courts are not satisfied that no other means of relief are readily available. It
will be hard for workers to satisfy courts of this because the various safety
and health statutes provide for inspectors, joint committees and agencies
which can provide help in a crisis. Inasmuch as the argument in this article is
that these schemes will, in general, fail to provide adequate protection, in any
one case it is hard to overcome the argument that they provide a means of
redress.210

In sum, it may not be easy to launch prosecutions of the kind this article
advocates but, since the difficulties arise from the political reluctance of the
state to prosecute employers for behaviour which it would otherwise charac-
terize as anti-social, ammunition will be provided for those lobbyists who
demand greater direct regulation of entrepreneurial activities. The state, con-
fronted with the contradiction that it does not wish to label producers crim-
ninals while, at the same time, expressing a desire for a safe work environment,
would find it increasingly difficult to resist demands for planning and licensing
systems, even if this meant reduced profitability for enterprise.

B. Criminal responsibility of corporations

In many of the cases in which criminal responsibility is sought to be
imposed on employers, the employer will be a corporation. If a criminal
charge can be successfully brought against employees, (for example, super-
visors who are responsible for safety and health in a plant, managers or di-
rectors who decide on particular materials or processes, foremen, etc.), can
the corporations who employ them also be made criminally responsible?

The Criminal Code clearly envisages that there will be situations in
which a corporation can be held criminally responsible. Section 647 provides
that a corporation which is convicted of an offence is liable, in lieu of any
imprisonment which is prescribed for that offence, to be fined in an amount
within the discretion of the court if the offence is an indictable offence or in
an amount not exceeding $1,000 if the offence is summary. It does not fol-
low that a corporation will be responsible for every act of its employees.
Mens rea must be established and there is an obvious question as to whether
or not the intent of an employee can be attributed to that of the employing
corporation.

210 It is true that in Attorney-General for Ontario v. Grabarchuk (1975), 11 O.R.
(2d) 607, 67 D.L.R. (3d) 31 (Div. Ct.) it was held that an injunction could be granted
where other remedies for a breach of statute were available, but in that case it was the
Attorney-General seeking the injunction and he was able to show that the public as a
whole would be adversely affected if the normal remedies had to be relied on by it.
As early as 1900 the Supreme Court of Canada held in *Union Colliery Co. v. The Queen*\(^{211}\) that a corporation could be held criminally responsible for omitting, without lawful excuse, to perform a specifically created duty to avoid danger to human life in respect of something under its charge or control.\(^{212}\) In the *Union Colliery* case it had been argued that manslaughter could have been charged on the facts which were actually presented to the court and that a corporation could never be held responsible for a crime such as manslaughter. The Supreme Court of Canada had said that, as it did not have to address itself to that problem, it would leave the question open. In *R. v. Canadian Liquid Air Ltd.*\(^{213}\) the question did confront the court directly. It was held that a corporation could be found criminally negligent if the processes it employed would establish that it had a wanton or reckless disregard for life. The context in which this principle was enunciated is noteworthy. The accused company had undertaken to make an area of its plant gas-free and had set up what appeared to be an appropriate process to achieve this end. It failed because an employee did not follow the set-out procedures properly. The company was held not to be criminally negligent because the employee’s failure did not establish the wantonness or recklessness required to prove criminal negligence in the corporation. On the contrary, its conduct had been impeccable even though the performance of its employee had not been. The company would have been held responsible if, having undertaken to keep the plant gas free, it had not devised an appropriate means of attaining this objective.\(^{214}\) For our purposes, it is of interest that the breach of a duty which it is necessary to prove when prosecuting in criminal negligence would have been found to be present in the *Canadian Liquid Air* case because there had been a breach of section 199 of the *Criminal Code*. It recites:

> Every one who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

This approach could be very useful in relation to criminal negligence prosecutions in our context. Where an omission amounting to a breach of a legal duty needs to be established, it could be argued that, as every master undertakes to do an act, namely to keep premises safe because of the master’s un-abrogated common law duty to take care, the failure to set up appropriate safeguards could be a breach of duty because it was a failure to do an act carefully which the master had undertaken to do.

Returning to our immediate problem, it is clear then that the corporation can be held criminally responsible in its own right.\(^{215}\) The question that re-

\(^{211}\) *Supra* note 159.

\(^{212}\) In coming to this view reliance was placed on *R. v. The Great North of England Ry Co.* (1846), 2 Cox C.C. 70, 115 E.R. 1294 (Q.B.); *Whitfield v. South Eastern Ry* (1858), El. Bl. & El. 115, 120 E.R. 451; and *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 4 Q.B.D. 313, 5 App. Cas. 857.

\(^{213}\) (1972), 20 C.R.N.S. 208 (B.C.S.C.).


mains is: Can it be criminally liable for the acts of its employees? The difficulty is the attribution of the employee's intent to that of the corporation. In the past this question caused considerable difficulty. But, since the decision in *R. v. Fane Robinson Ltd.*, it has become accepted that corporations can have the necessary *mens rea* to commit crimes if the acts were committed by individual employees with the requisite intent. To make a finding that the corporation was criminally responsible in *Fane Robinson* it had to be held that, although a corporation acts through people, if the actor was a directing mind of the corporation and had the necessary intent, the corporation would be deemed to have that intent. In *R. v. St. Lawrence Corp.* it was held that:

While in cases other than criminal libel, criminal contempt of Court, public nuisance and statutory offences of strict liability criminal liability is not attached to a corporation for the criminal acts of its servants or agents upon the doctrine of *respondeat superior*, nevertheless, if the agent falls within a category which entitles the Court to hold that he is a vital organ of the body corporate and virtually its directing mind and will in the sphere of duty and responsibility assigned to him so that his action and intent are the very action and intent of a company itself, then his conduct is sufficient to render the company indictable by reason thereof. It should be added that both on principle and authority this proposition is subject to the proviso that in performing the acts in question the agent was acting within the scope of his authority either express or implied.

The question that now remains is, who or what constitutes a directing mind of a corporation for these purposes? When the test was first propounded in *Lennard's* case it was done in the context of the act of a managing director of a limited company. In *Fane Robinson* the situation was of a similar kind.

Gradually the courts have come to recognize that, in line with the activities of complicated corporate structures, the doctrine ought to be stretched to cover the acts of corporate officers who could generally be described as

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217 Compare this to those situations where the alleged crime is committed as the result of the corporation's failure to set up appropriate processes.


A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation. . . . his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company. . . .

This was cited at 410 (D.L.R.), 236 (W.W.R.), 197 (C.C.C.), of the report of the decision in *Fane Robinson, supra* note 216.

"responsible officers." Thus, in *R. v. Waterloo Mercury Sales Ltd.* a used car sales manager who worked for the accused corporation had fraudulently caused odometers on cars to be turned back. The corporation had not indicated that it wished this to be done. The sales manager was not an officer or director of the company but he did operate two used car lots for it and was responsible for keeping stocks replenished and for keeping the cars in working order at all times. He had twelve people assisting him in these tasks and approved all sales made from the car lots. He was responsible to a general sales manager who was in turn responsible to the president of the accused corporation or to the treasurer-secretary of that corporation. The sales manager was not a signing officer of the corporation nor was he authorized to sign cheques. He was responsible for all invoices issued in respect of used car sales and was able to create debts which were honoured by the company after a rubber-stamping procedure by the comptroller-treasurer. The court held that the used car sales manager had an intention to defraud which could be attributed to the accused corporation. Thus it is clear that corporations can be held criminally responsible in two guises: for failure to make and create appropriate conditions after they had undertaken to do so and for the wrongful acts of responsible officers, a term which has a widening although not very precise meaning.

Note that, as a consequence of these developments in the law, corporations can be held criminally responsible when charged with conspiracy where the alleged conspiracy may result out of an agreement between the corporation and its responsible officers. This notion creates conceptual difficulties because the only intent that the corporation can have in the first place is that of the officers with whom it has allegedly entered into the wrongful agreement. To enable courts to come to this view they have to hold that the individual officers are acting in a dual capacity.

Although it is clear that it is possible to prosecute corporations for criminal offences, a difficult question remains. When, as a matter of social policy, ought a corporation to be made criminally responsible? It is one thing to say that the juristic personality of a corporation is equivalent to that which is attributed to a human being. It is another to say that the nature and the purpose of these juristic entities are the same. Thus, inasmuch as the aims sought to be achieved by the criminal law have been formulated in the context of what effect enforcement of the criminal law will have on human beings, they may be unattainable if the same criminal law provisions are enforced against corporations. That is, the aims of deterrence, prevention, retribution and rehabilitation may not be attainable by making a criminal corporation responsible in the same way as a human being would be in respect of particular behaviour. And, even if these aims are attainable by enforcing the criminal

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law against a corporation, there still may be good political reasons why one would not wish to make a corporation criminally responsible. For instance, it may be obfuscating to make a corporation responsible rather than individual actors who benefit directly from the criminal behaviour; if one takes the juristic personality argument too seriously it might serve to hide the fact that the people who are really behaving anti-socially are not doing so because of their felt need to please an entity known as a corporation but rather to feather their own nests while hiding behind a corporate veil. Or, if one believes that some worthwhile objectives can be attained by imposing criminal responsibility on corporations, for example specific deterrence or creating a greater emphasis on internal discipline in corporations, one would still have to look at the way a particular corporation is organized to determine whether or not such desiderata can, in fact, be achieved. Thus, different approaches might be warranted depending on whether the corporation is seen as (i) a single unit in which all decisions are made as part of a unitary, rational decision-making process, (ii) a group of loosely allied decision-making units who discretely govern a narrow range of topics in which such decisions have to be made according to prescribed organizational rules, or (iii) a collective in which bargaining takes place between a hierarchy of players, as a result of which decisions emerge on behalf of the total organization. Thus, in the first kind of organization it might be appropriate to visit criminal responsibility on the corporation in the same manner as one would impose it on an individual, inasmuch as all decisions are made for the juristic person's benefit. In the second model postulated this would not be so clear, although a similar argument might be mounted. In the third category the better argument would seem to suggest that the individual actors who bargain with each other ought to be made personally responsible. The picture will be more complicated if, as is very likely to be true in many cases, the corporation is seen as being constituted by a combination of these structural models.\textsuperscript{223}

To state these difficulties is not to resolve them. They are merely raised in this context because we are making an argument that, in principle, employers should be criminally prosecuted for their failure to provide adequate working conditions. It would be wrongful not to recognize that, even if criminal prosecutions are an appropriate sanction where employers have behaved in a particular anti-social manner, some employers might on principle not be appropriate targets for such sanctions.

C. The requirement of a causal connection

This aspect of the criminal law trial presents no greater difficulty in the occupational health area than it does in any other kind of criminal law case. Sometimes the relationship between the harm alleged by the victim and the poor working conditions under which he or she laboured will be easy to

\textsuperscript{223} The notion of these models of organization and what the different structures might mean from the point of view of the attachment of criminal responsibility has been taken from a very useful note by Kriesberg, \textit{Decision Making Models and the Control of Corporate Crime} (1976), 85 Yale L.J. 1091. We were also greatly aided by an unpublished paper by W. B. Fisse of the Faculty of Law, Adelaide University, \textit{The Social Policy of Corporate Criminal Responsibility}. 
establish because the harm will be associated with particular processes or materials used at the workplace. Thus, in *Central Asbestos Co. v. Dodd*, workers had been diagnosed as having asbestosis, a disease known to be directly related to the inhalation of asbestos fibres. It was not doubted by the courts considering this and associated cases that the necessary causal connection between exposure to asbestos and disease to permit a finding of liability in tort had been established. The same form of reasoning would apply in a criminal trial, although the burden of proof would there be different. This latter aspect might make the task difficult at times for the prosecution as a matter of fact, but it presents no inherent legal problem. The burden of proof will usually be discharged by the use of expert scientific opinion. Such opinion will have to prove the length of time and amount of exposure which is necessary to cause the particular harm done when certain materials or processes are used in an enterprise. Proof will also have to be given that there was in fact exposure to the materials or processes beyond the accepted limits. Difficult though it may be to marshal sufficient proof to discharge the burden imposed on the prosecution in certain cases, it will also be noted that such a debate in open court might be beneficial in its own right, given some of the objectives set out in this paper.

It is to be noted that the prosecution does not have to prove that a particular process or material was the only cause of the harm suffered by workers when a criminal charge is brought in respect of the wrongful use of such process or material. If the accused's conduct is a substantial cause of harm this will establish the necessary nexus to found criminal responsibility. It is the function of the judge to determine whether the evidence is reasonably capable of permitting a finding that the accused's conduct was a substantial contributing factor to the harm. If he or she believes it is, the jury is left to answer the question of whether or not it was in fact such a contributing factor. The principle that the accused's conduct must not necessarily be the only cause which inflicted the harm on the victim is very important to us in the context of this article, because it has as a corollary the rule that the victim's conduct will not necessarily relieve the accused of criminal responsibility. Thus, if an argument is made that the victim might have contracted the particular disease whether or not he or she had worked at the plant in question, it will not necessarily defeat the prosecution's case.

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In *R. v. Smithers* the Supreme Court of Canada set out to explain causal principles. Dickson J., who delivered the unanimous judgment of the Court, cited a decision of his own:

in which the accused, one Alan Canada, following an argument, struck his brother lightly on the head with a piece of firewood as a result of which the brother died some time later without regaining consciousness. The medical evidence showed that the bony structure of his skull was unusually thin and fragile. The accused on the advice of counsel, pleaded guilty to a charge of manslaughter and I have never considered that he was wrong in doing so.220

That is, the accused is to take the victim as he or she finds her or him.227

Even if the victim's susceptibility to harm is increased by the victim's own conduct this will not necessarily relieve the accused of criminal responsibility. Thus, in *R. v. Blaue*228 the accused had inflicted wounds which would not have been fatal but for the victim's refusal to accept blood transfusions. She had so refused because of her religious convictions. It was held that the accused was guilty of manslaughter because the accused's conduct had substantially contributed to the victim's death. In this regard note again *R. v. Nicholson*229 where, in addition to the accused's blows, the abnormally small heart of the victim and his suffering of Bright's disease, over-indulgence in alcohol had contributed to the victim's death. Nonetheless, the accused was convicted.230

In our context it follows from all this that the mere fact that the disease is contributed to by the worker's physical make-up or habits, such as smoking and drinking, would not necessarily defeat a criminal prosecution against an employer, unless a finding is also made that the intervening cause (smoking or drinking) made the conditions of employment insignificant as a cause. Although conceptually the distinction between a substantial contributing cause and a cause which has no legal significance is one which is difficult to maintain, it is the kind of exercise which has been performed in the criminal law process (and for that matter in tort law) for a very long time. Such judgment-making is, of course, never logically convincing. It suffices to note here that the reasoning generally employed in no way makes the establishment of a causal connection between, say, a particular contaminant on the one hand and a particular disease on the other, a peculiarly difficult one which would make the criminal process inapposite for criminal charges brought in respect of causing the harm of occupational ill-health.231

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220 *Smithers, supra* note 225, at 331 (D.L.R.), 437-38 (C.C.C.).
227 See also *R. v. Nicholson* (1926), 47 C.C.C. 113, 59 N.S.R. 323 (N.S.C.A.), in which the victim had an abnormally small heart and suffered from Bright's disease.
229 *Supra* note 227.
230 See also *R. v. Holland* (1841), 2 M. & Rob. 351, 174 E.R. 313; *Governor Wall's Case* (1802), 28 St. Tr. 51; *R. v. Flynn* (1867), 16 W.R. 319 (Ir.)
231 The judicial confidence that judges know how to discharge the obligation of distinguishing between significant legal causes and insignificant ones can be gleaned from statements such as that offered by Lord Wright in *The Oropesa*, [1943] P. 32 at 39, 59 T.L.R. 103 at 104, [1943] I All E.R. 211 at 215 (C.A.):
It is also worth noting that, as a consequence of the above principles relating to causation, it follows that medical treatment administered to a victim which in fact worsens a condition initially caused by the accused's conduct will not automatically relieve the accused of criminal responsibility. Thus, in *R. v. Jordan* the English Court of Appeal held that abnormal treatment in the circumstances which prevailed had intervened between the accused's conduct and the death of the victim to such an extent that the accused should have been acquitted of murder at his trial. But, in that case, the victim had almost recovered from the accused's blows when the medical treatment which he received led to a worsening of his condition. The Court of Appeal indicated that, if the medical treatment had been more acceptable, it might have come to a different conclusion:

We are disposed to accept it as the law that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury...

A final point to be made in this section is that, where death ensues as a result of the accused's conduct, the death must have occurred within a year-and-a-day of the accused's act in order to permit a criminal prosecution to be brought. This is an anomalous restriction. It has its origin in the comparative state of frailty under which medical science laboured some time ago. It must have been much more difficult in earlier times than it is now to connect events with results which occurred at a much later point of time. Arbitrary and obsolete as this now seems, the requirement has to be met when death is an ingredient of a charge, as it always is in murder. It does, then, pose a serious difficulty in the context of this paper. Inasmuch as the infliction of death results from a series of exposures, the last exposure which can be identified as accelerating the death of the victim will be the event from which time can be made to run. This is the effect of section 209 of the *Criminal Code*.

To break the chain of causation it might be shown that there is something which I will call ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic.

It is to labour the obvious to stress that which is ultroneous or unreasonable to one judge may very well appear the opposite to another. Cf. the judgment of Haines J. in *Marshall v. Lionel Enterprises*, [1972] 2 O.R. 177 at 183, 25 D.L.R. (3d) 141 at 147 (H.C.).

232 *Supra* note 225.

233 *Id.* at 157. See also *R. v. Burgess and McKenzie*, [1928] 2 D.L.R. 694, [1928] 1 W.W.R. 633, 49 C.C.C. 243 (B.C.C.A.); *R. v. McIntyre* (1847), 2 Cox C.C. 379; *R. v. Pym* (1846), 1 Cox C.C. 339 (where necessary treatment given by competent surgeons acting competently was held not to be a factor rendering the accused's act not a cause); *R. v. Forester* (1886), 20 S.A.L.R. 78 (South Aust.) (where common knowledge and skill and good faith used in treatment which had, as had the accused's act, significantly contributed to the death, was held to be a non-intervening cause.) Note also that, inasmuch as death is the subject matter of a criminal charge, s. 208 of the *Criminal Code* provides: "Where a person causes to a human being a bodily injury that is of itself of a dangerous nature and from which death results, he causes the death of that human being notwithstanding that the immediate cause of death is proper or improper treatment that is applied in good faith."

234 See s. 210 of the *Criminal Code*. 
Code which provides that, even though a particular cause merely accelerates death, previous existing disease or disorder, such acceleration will be considered a legal cause of death for the purpose of the criminal charge.\footnote{See also \textit{R. v. Dyson}, [1908] 2 K.B. 454, [1908-10] All E.R. Rep. 736, 21 Cox C.C. 669 (C.A.).} Thus, in a situation where death arises from the infliction of traumatic injury, the requirement may not present any insuperable problems. There will, however, be difficulties where death is due to an occupational disease with a long incubation period. On occasions it will be possible to argue, even though the original exposure some twenty years or so before death was a sufficient cause,\footnote{An example of this might be asbestos cases where one short exposure is thought to be sufficient to induce disease.} that if the worker continued to work right up until a period of time less than a year-and-one day before her or his death, any extra exposure just before retirement was a cause of death. Such an argument would be fraught with difficulties of proof. And, clearly, the difficulties will become insurmountable where the last exposure to the substances or process was, say, some twenty or thirty years before death. From this it becomes clear that murder, even where it is otherwise theoretically available, will be a most impractical charge in the context of occupational health prosecutions.\footnote{See text accompanying note 182 \textit{supra}, where it is argued that s. 212(c) ought not to be used in the occupational health area and that, thankfully, the year-and-a-day rule may inhibit such use.} The same, however, is not true in relation to criminal negligence charges because these can be brought where the harm complained of is grievous bodily harm. Further, even where the victim dies, death is not an essential ingredient of the crime.

\textbf{VII. CONCLUSIONS}

The rather elaborate arguments presented in this article have not been made either in a spirit of malevolence based on a hatred of all employers, or to indulge ourselves in the sheer delight that academically-minded people get from engaging in abstruse, interesting, theoretical exercises. We have, rather, developed the arguments herein because of our belief that the regulatory mechanisms which our society employs at present will never yield anything like the amelioration in health and safety conditions in the workplace which we would like to see. In particular, the mechanism of the so-called discipline of the market will not bring us such results. For this conclusion the proof is in a well-known pudding. Until fairly recently there had been little, if any, state regulation of health and safety in the workplace. The toll on the physical well-being of workers was terrible. The argument we probably have to meet is that the cost in human life which was extracted was acceptable to workers or at least acceptable in the sense that the market defines that term. We reject that argument on two grounds. The first is that, as the market has never operated as the theorists would want it to, it cannot be assumed, therefore, that the dreadful state of occupational health and safety which has persisted was due to a free market operation and therefore represented an optimal economic adjustment between workers and their employers who had freely bargained. Second, even if the free market, in the theoretical sense of
that phrase, could actually ever be made to operate in our society, it might well be that, at any one time, the market conditions would be such that the optimal distribution of costs between employers and employees would require an even greater disaster for the physical well-being of workers than that which currently exists or which has previously existed. It is our assertion, vehemently made, that any scheme which could leave thousands, perhaps millions, of people physically debilitated is not worthy of a civilized society's support.

If the regulatory mechanism used is the market, as supplemented by state regulatory schemes, which is what we presently use, let us note that this is also likely to fail to provide the dramatic relief which we would wish to see. This pessimistic view is based on the fact that these regulatory schemes have assumptions built into them about the overriding value of market-oriented precepts and are, sometimes explicitly and other times implicitly, premised on the notion that there should be hesitancy and reluctance when interfering with profit-making enterprises.

We have therefore embarked on this exercise to demonstrate two things:

1. Regulation cannot ever make the work environment as safe as it should be. But better regulation will be a step forward. Such amelioration is more likely to occur if regulators can be convinced that failure to upgrade standards and enforcement will permit critics to claim that they are biased against workers at the behest of employers. They may be so convinced if it is shown that the practices of employers are, from the point of view of the law, criminal in nature. Legislators and administrators are not in a position to argue that the criminal law should reflect a bias favouring entrepreneurs and that it should not treat anti-social behaviour, which in other contexts would be characterized as criminal, as acceptable. In addition, the controversy surrounding the applicability of criminal law to workplace practices will raise a question as to whether the legal system is neutral in its concept and application. The raising of this question will aid the workers' cause.

2. In addition to demonstrating that, as a matter of established law, employers' behaviour may be so anti-social as to be criminal in nature and thereby helping, by the sheer force of this conceptual argumentation, to add to the urgency to find means by which to improve employers' behaviour, we have also sought to provide practical ways to focus the would-be regulators' attention on the enormity of the problem. Indeed, it is our argument that prosecutions ought to be launched in certain kinds of cases because they would be both useful in a generalistic way and also in the particular cases. While it is true that the more modern statutory regulatory schemes provide for controls which could eliminate the more flagrant and repeated violations of the existing standards, and as success in many of the discussed prosecutions depends on proving violations of established standards over a protracted period, it may be that few occasions will present themselves in which the criminal process can be employed. We hope this is true, but we are not sanguine.

First, it is almost inevitable that there will be egregious offenders, that is, people who, despite knowledge of the standard required by regulation, despite cautions which may be administered by appropriate inspectorates or
committees, will continuously endanger their workers. To prosecute such people will serve as both specific and general deterrence. It will also help to make the enforcing agencies more aware of their duties.\textsuperscript{238}

Second, as has already been pointed out in the earlier part of this paper, enforcement mechanisms under the statutory schemes will vary a great deal in intensity and scope. Inasmuch as they depend on workers’ ability to detect dangers and then to do something about their knowledge, the schemes are far from foolproof. Inasmuch as they depend on the watchfulness of enforcement agencies, they will vary with political will, competence and alertness. The data available in respect of the success rate to date are not confidence-inspiring.\textsuperscript{239} Note further that, whatever their mandate, the enforcement agencies may believe that coaxing is better than enforcement by way of imposing sanctions.\textsuperscript{240} A recent example of this is provided by the Canada Metal environmental case reported in \textit{The Globe and Mail}.\textsuperscript{241} It was there recorded that the environmental agency knew very well that there had been many violations of the standards set by it in respect of lead emission, but that at no time had the pertinent inspectorate sought to use the full range of sanctions available to it. It brought a very angry editorial from the newspaper. In our context, it is a good illustration of the kind of situation which might arise and in which criminal prosecutions might play a useful role.

Third, there will often be a long gap between the standard-setting in respect of particular substances or processes and the investigation into the dangers of the substances or processes.\textsuperscript{242} During that gap, conditions which are acceptable on the basis of the existing regulatory standards may, in fact, be seriously suspect because there is sufficient expert opinion available which suggests that there is a rational basis for believing that such existing standards do not adequately protect workers. Where there is such a belief it may well be worthwhile to bring criminal prosecution. For example, if it is known that the use of certain material or processes is in some degree dangerous and has already been much more stringently controlled in other countries, might it not serve a useful purpose to launch a criminal prosecution against an employer

\textsuperscript{238}A recent instance where an employer allegedly ignored safety regulations is provided by an item in the \textit{Washington Post} of Friday, October 27, 1978. It is there reported that the Occupational Safety and Health Administration imposed the heaviest fine in the agency’s history against N.L. Industries, the nation’s largest lead producer. OSHA alleged that, after it had moved to prescribe acceptable exposure levels of lead in the air following a long debate with the industry, N.L. Industries had knowingly allowed workers to be exposed to lead levels that exceeded permissible levels by more than 100 times, and that on other occasions lead levels regularly exceeded the federal limit by 2-4 times. In this case the agency itself sought to enforce its regulation. But it took a while for it to do so. Criminal prosecution might well be warranted in such a case, especially if it can be brought before serious harm is done to too many workers.

\textsuperscript{239}See text accompanying notes 21 to 28, \textit{supra}.

\textsuperscript{240}See text accompanying notes 29 and 30, \textit{supra}.

\textsuperscript{241}\textit{Globe and Mail}, April 23, 1979.

\textsuperscript{242}Thus the most recent Ontario statute, \textit{The Occupational Health and Safety Act}, S.O. 1978, c. 83, was passed to set up an agency which was to set standards. To date no standards have been set. Indeed the body to set standards has not yet been created. See also the discussion of NIOSH and OSHA operations in the first section of the article.
who continues to use such a material or process in the face of that knowledge? If it be argued that it will be difficult to prove criminality in view of the fact that the same stringent standards have not been set in our society by our regulatory schemes, it is to be remembered that, for many of the criminal offences described in this paper, knowledge of danger coupled with an understanding of the duty to provide safe working conditions may be sufficient to attract criminal responsibility. Just as a breach of statute does not necessarily indicate a breach of the criminal law, compliance with a safety statute does not necessarily indicate compliance with the criminal law. To wait for the outcome of long deliberations by an agency which is being bombarded by lobbyists with very diverse interests may be counterproductive. Consider here the asbestos situation. The question of the appropriate level of exposure to asbestos is still being debated vigorously. A scientific controversy still rages as to whether asbestos causes diseases when it is present in amount x as opposed to y. By 1918, the insurance industry in America and Canada, however, had already decided that the risk of exposure to asbestos was so great that it could not ignore it for its own profit-making purposes. Thus, in 1918 American and Canadian life insurance companies refused to insure asbestos workers.243 Or, consider the incident which occurred at a B.F. Goodrich Company plant in 1974 in respect of the liver cancer known as angiosarcoma which results from exposure to vinyl chloride in the plastics industry. In the outcry which followed the discovery that the prevalence of this disease in this plant using vinyl chloride vastly exceeded its incidence in the general population, it was noted that the employers had been aware of a report from Germany that a very high danger of liver cancer as a result of exposure to vinyl chloride existed and that this warning was ignored.244 Assuredly, an argument can be made that, where operations with certain materials and processes continue in the face of risks known to be high and severe, it might be worthwhile launching a criminal prosecution even though an existing standard is not breached or a standard has not yet been set.

Fourth, the statutory schemes which regulate standards will often be limited in scope and not cover a great number of people.245 Even where the statutory schemes purport to cover certain enterprises, the protection will depend in part for their controlling and monitoring of conditions on the workers' initiative. This tool will prove to be at its most inefficient in the


244 As reported by Brody, "Vinyl and Chloride Parley Told of Dangers to Workers," *New York Times*, May 11, 1974 at 17, col. 2. Note that one of the governing agencies, the National Institute of Occupational Safety and Health might also have had access to such a report prior to the investigation which resulted out of the Goodrich incident, but that OSHA did nothing until that incident hit the headlines.

245 E.g. *The Occupational Health and Safety Act*, supra note 242, in which people working on farms, teachers, university faculty, teaching assistants, people working inside correctional institutions, and patients participating in work programmes in psychiatric, retardation or rehabilitation facilities are excluded. Much more importantly, the joint committee programme, which is one of the real means of protecting workers under the scheme of the Act, does not apply to work places which have less than twenty employees on a regular basis.
poorly organized or totally unorganized sectors of the work force, the very sectors in which the most blatant violations of acceptable standards are likely to occur.

One strategic difficulty in urging the use of the criminal law in respect of occupational health problems is that such usage may influence standard-setters in respect of the kind of minima they will prescribe. That is, they may be influenced to set standards which can be met relatively easily by employers, while leaving serious health and safety problems extant. This might occur because of the anxiety such standard-setters will feel about employers being considered to be akin to common criminals merely because they are in breach of one of their regulations. But we do not take this pessimistic view. We do not believe that standard-setters are venal or callous. They truly want the best possible health and safety conditions for workers within their jurisdiction. But the term “best possible” indicates that it is not an absolute standard which they are seeking to set. What they are always looking for is a standard which keeps the risk of harm down to an “acceptable” level. At present, what it “acceptable” is very strongly influenced by market conditions. The prevailing understanding of market conditions is frequently based on instinct and guesses fed by strenuous lobbying from entrepreneurs who, understandably, resist all changes which might increase their costs. Standard-setters who do want to have as good a set of health and safety conditions as they can possibly achieve will be more resistant to these influences and blandishments if they can be persuaded that the harm inflicted by productive enterprises is, in its nature, capable of being characterized as harm caused by criminal behaviour. Indeed, this is also true of scientists who purport to be neutral when they are asked to set the level of optimum exposure to various materials and processes. If they start off with the premise that profit-maximization is of utmost importance their research will be quite different from what they would do if they began on a “workers’ safety first, profit last,” basis. We cannot elaborate here on the effect that beginning premises (usually inarticulate) have on scientific research, but merely note that there has been much writing of a critical and valuable nature in the area. We believe that to perceive health and safety at work from the workers’ perspective, a belief which may gain adherents by the use of the criminal process, could lead to better en-

246 There have been those who show how scientific institutions and individuals are organized in such a way that particular kinds of research only are undertaken. See Ben-David, The Scientist's Role in Society: A Comparative Study (Englewood Cliffs, N.J.: Prentice-Hall, 1971); de Solla Price, Little Science—Big Science (New York: Columbia Univ. Press, 1965); Ravetz, Scientific Knowledge and its Social Problems (Oxford: Clarendon Press, 1971); Ziman, Public Knowledge: An Essay Concerning the Social Dimensions of Science (London: Cambridge Univ. Press, 1968). There have also been those who have attempted to show the corruption of such scientific research; see Laudan, Progress and its Problems: Towards a Theory of Scientific Growth (London: Routledge & Kegan Paul, 1977). Then there have been those who have critically argued that science may be part of ideology and therefore a tool of the dominant class by which to categorize and use knowledge to its advantage. For instance, see Dickson, Alternative Technology and the Politics of Technical Change (London: Fontana, 1972); Gorz, ed., The Division of Labour: The Labour-Process and Class Struggle in Modern Capitalism (Hassocks, Sussex: Harvester Press, 1976); Young, Science Is Social Relations (1977), 5 Radical Sci. J. 65.
forcement of existing conditions and to the promulgation of more exacting ones. Given the continuation of our present economic system for the foreseeable future, our aim is to draw attention to the urgent need for a new frame of reference when looking after workers' health and safety. Nothing is more important, and thus the most drastic of measures are completely warranted.