WE WANT TO SEE.....

...CORPORATE EXECUTIVES PERSONALLY LIABLE FOR THE WRONGDOINGS OF THEIR ORGANISATION

It goes with the job, it goes with the responsibility, it goes with the salary. There must be legislative changes to company and public law to punish both responsible individuals and the organisation as a whole when members of the public are negligently harmed

...MANAGERS ACCOUNTABLE TO THE PUBLIC

All levels of managers in all organisations must be transparently accountable to the public. A situation in which there are strong expectations on ordinary employees to be accountable while the accountability of managers is weak is completely unacceptable in a democracy which recognises the social impact of employers' policies

...BULLYING AT WORK MADE A CRIMINAL OFFENCE

People in positions of authority at work can often get away with threats, harassment, victimisation and mental pressure - simply because they have a position of authority. It is as wrong to bully someone at work as it is to bully someone on the street

...GAGGING CLAUSES STOPPED

Many employers, such as some NHS Trust Hospitals, put confidentiality clauses in contracts of employment which are of doubtful legality and enforceability. In recognition of the right to freedom of speech, the UK government should give clear policy guidance to employers to stop this intimidating practice

...A STATUTORY RIGHT TO COMPLAIN

Employment law must be amended to embrace a statutory right of employees to complain or raise a concern. Along lines similar to other anti-discrimination legislation (race, sex, disability) employers should have the onus placed on them to show that they are not infringing a right by dismissing or otherwise penalising an employee on a matter of social conscience

...PUNITIVE COMPENSATION

There should be no ceiling on tribunal awards to employees against employers who infringe their right to complain. Awards should not only make recompense to the employee, they should punish and deter the organisation in proportion to their assets or turn-over.

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The Whistle

FREEDOM TO CARE

THE CRIMES OF EMPLOYERS

A New Law to Protect Employees & the Public?

CONTENTS

THE WHISTLE

... is the bulletin of FREEDOM TO CARE and appears twice a year in at least 32 pages. A separate newsletter, WORKNET, is also provided for members.

***FREEDOM TO CARE** is a non-party network of doctors, engineers, nurses, social workers, lawyers, accountants, academics, scientists, health care assistants and others. It campaigns for the public accountability of employers and the civil rights of employees. Patrons are John Hendy QC and Allan Levy QC. It is a non-profit company limited by guarantee, registration No. 2973440 and it has received funding from Joseph Rowntree Reform Trust.*

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Geoffrey Hunt

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to address internal controls including monitoring and detection procedures and training.

The situation in the United States is complicated by the federal/state jurisdictional overlap and federal criminal law covers the regulatory sphere. However, the combined effect of the Guidelines and a more rigorous approach to the attribution of intention to the corporation means that corporate criminal liability is a force to be reckoned with.

What all these developments have in common is a commitment to establishing a more realistic basis for corporate liability and a recognition that organisational responsibility has both group and individual facets. Where UK principles have been lacking in sophistication is in their failure to comprehend the complexities of organisational attitudes and practices. I have argued that equally there is a need for organisations to observe some of the dynamics in the legal process.

Ultimately it is not legal principles or doctrine which will determine the risk of criminal prosecution to which organisations might be subjected but broader cultural attitudes to blaming and claiming for different events. As a result of those changes a new vocabulary encompassing terms such as "disaster litigation" and "corporate manslaughter" has emerged. The phenomena which they describe are not necessarily new but these phrases both reflect and affect the way we think about them. The apparently seamless web of legal responses to death and injury belies important changes in the roles played by the different components. Those responses are both reactive and procreative, both dependent on as well as influencing cultural understandings. Calls to blame individuals and collective institutions, demands for "justice", claims demands for compensation and pressure for increased safety: all these reverberate in and bear witness to the echo-chambers of the cultural process.

READING: *[Editor's Note: This article was submitted with full and rigorous bibliographic and case references. These were cut back due to shortage of space.]* *C Wells, Corporations and Criminal Responsibility, Clarendon Press, 1993; A Ogus, Regulation: Legal Form and Economic Theory, Clarendon Press, 1994; D Bergman, Deaths At Work: Accidents or Corporate Crime, WEA, 1991; R Brown and M Rankin, 'Persuasion, Penalties, and Prosecution: Administrative v Criminal Sanctions' in M Friedland (ed), Securing Compliance, University of Toronto Press, 1990, 325-353; C Wells, 'Corporations: Culture, Risk and Criminal Liability', Criminal Law Review 551 (1993); C Wells 'Cry in the Dark: Corporate Manslaughter and Cultural Meaning' in Loveland (ed) Frontiers of Criminality, Sweet and Maxwell 1995.*

harm in the criminal system. The Health and Safety Executive faces the problem from another angle - most of their prosecutions target companies (as the 'employer' to whom the legislation is addressed) and a view is emerging that companies can easily absorb blame. Of course, the edifice under which the HSE operates is so stigmatically distinct from mainstream criminal law and the penalties imposed generally so derisory that the effect of a conviction, whether of a corporation or an individual, is rather dilute. But even here there are differences- individuals can feel a different sort of pain in terms of acquisition of a criminal record, in terms of the possibility of a sentence of imprisonment and in the possibility of professional or director disqualification. What the HSE reflects in its call for more individual responsibility is a desire to target the right individuals - those with power and responsibility - rather than the shop-floor, or ferry-door, employee. When senior managers are vulnerable, we would expect organisations themselves to be concerned also.

What about corporate penalties? Again, there are indications from other jurisdictions that this is an issue being taken seriously. It is trite to note that a company can not be imprisoned. A combination of a fine and the incarceration of directors may be the most effective punishment. Fines are not the only option for the company itself. Corporate probation is used in the United States in addition to or as an alternative to fines. The maximum fine per offence was increased in 1984 to US$500,000 but the really significant changes came with the federal sentencing guidelines introduced in 1991, making companies vulnerable to extensive deterrent penalties.

In the United States, federal corporate liability is based on a broad, vicarious principle, irrespective of the offence definition (strict liability or mens rea). Sanctions are aggravated by factors such as the aggregate harm or gain from the illegal activity and the involvement or condemnation by 'high level personnel'. Against 'criminal purpose organisations' a power to execute (corporate capital punishment) is available. The Sentencing Commission characterises the guidelines as 'carrot and stick' with substantial benefits flowing for 'good corporate citizens', i.e. those which have effective programmes to detect violations, which report them when they occur and accept responsibility. The base punitive fine may be decreased by up to 95 per cent or increased by up to 400 per cent according to the company's culpability. Described as 'one of the most significant recent developments affecting risk management functions in the corporation', the guidelines thus make criminal penalties far more than externally imposed costs. Compliance programmes to reduce the base fine need

INTRODUCTION

We are delighted to be able to publish the paper by J Barrie Berkley, Vice-Chair of *Disaster Action*. The paper was presented at RoSPA, Health & Safety Congress in June 1995. (We are grateful to RoSPA for permission to reproduce it.) Mr Berkley describes *Disaster Action* "as an organisation whose prime concerns are the prevention of disasters and the welfare of those affected by such events. It was set up by people who have survived a disaster, who have been physically or mentally injured by one or who have been bereaved by one." Disaster Action has commissioned the drafting of a bill which would tighten up the law on the liabilities of corporations and their executives. It would address corporate manslaughter in particular. *Freedom to Care's* representatives have been attending the drafting meetings, supports the idea of more stringent laws to ensure the accountability of employers and believes that such laws would on the one hand make 'whistleblowing' less necessary and on the other help to facilitate freedom of speech in the workplace.

The legal difficulties and deficiencies surrounding corporate liability are explored in Celia Wells' article. She is Professor of Law at Cardiff Law School, University of Wales and is a leading authority on the issue of the criminal liability of companies. She is the author of two recent books on corporate liability and crime. As this issue goes to press she is researching at Bond University, Australia for a few months. Her valuable background article is adapted from a paper commissioned for the Economic and Social Science Research Council's Conference on Risk in Organisational Settings, London, May 1995. She wishes to make known her gratitude to Professor Graham Loomes, Director of the Risk and Human Behaviour Programme, for permission to reproduce it here.

We point out that the important and informative views of Celia Wells and J Barrie Berkley are quite independent of the policy of *Freedom to Care*. Of course, it is vital to bring together the work of different organisations and individuals in tackling the issue of freedom of speech in the workplace and we shall continue to strive to do so. *Freedom to Care's* position on employees' freedom of speech in relation to corporate responsibility is presented in Chapter One.

[NOTE: Both Wells' and Berkley's articles were written before the Law Commission issued 'Legislating the Criminal Code: Involuntary Manslaughter' LC 237, March 1996. From HMSO £17.50.]

CHAPTER ONE

DON'T PAY, WON'T LISTEN
Geoff Hunt

Man-made disasters such as the Clapham rail crash, the Piper Alpha oil platform explosion, the King's Cross fire and the 'Herald of Free Enterprise' ferry sinking are the most striking manifestation of suppression of free speech in the workplace. In almost every case there were employees who knew something was wrong, who knew that people might be killed, but were too afraid to speak up, were ignored or were even told to 'shut up or else..'. All these disasters were preventable. Take two recent examples. Joy Cawthorne alerted her manager of dangers to children canoeing at the Lyme Regis Activity Centre but the action which might have saved four lives was not taken. Ferry staff had warned P&O that leaving port with open bow doors put lives at risk but nothing was done and 193 died.

A policy of encouraging free speech in the workplace saves lives. Disasters are the worst outcome of a culture of corporate secrecy and bullying, in both private and public sectors. On a daily basis unnecessary risks are taken, 'accidents' wait to happen, a blind eye is turned, and veiled threats are made. Indeed our very society rests on an unacceptable degree of mismatch between corporate objectives and public welfare, especially in the private sector. Employers deny, almost by reflex, the civil rights and social duties of employees, while employees have learned to deny them too to keep out of trouble. Meanwhile the 'trouble' boomerangs sooner or later for individuals and for society at large.

Having failed to listen to conscientious employees, let alone positively encourage freedom of speech in the workplace, irresponsible companies which have caused disaster have been able to avoid paying any real price for their misdeeds and failures. Their attitude is: 'We won't listen to what you say, and, in any case, even if what you say proves to be right we won't have to pay'. One may well ask whether companies will listen to those who speak up when they do not have to pay for the harmful consequences of not listening. *Freedom to Care*'s approach is twofold - we encourage employees to speak up and we

corporate liability which will allow the corporation to be held liable for that conduct if it can be proved that the practices or culture of the company encouraged or at least did not prohibit the offence complained of. An adventurous response can be seen in the Australian Criminal Code Act 1995, enacting Law Reform Commission proposals to extend and supplement the *Tesco v Nattrass* doctrine. It is envisaged that the standard principles the Code introduces will eventually extend beyond federal offences an apply to similar situations under state law. The Act applies the general principles of criminal responsibility under the Model Criminal Code to corporations. Under this model code, intention, knowledge or recklessness will be attributed to a body corporate whenever it expressly, tacitly or impliedly authorised or permitted the commission of the offence. Such authorization or permission may be established in three ways. The first restates the Tesco rule and the second extends it to 'high managerial agents'. It is the third path to attribution which marks a fundamental departure from traditional conceptions. Here the idea of 'corporate culture' is specifically given legislative recognition. Where its culture encourages situations leading to offence the company will be responsible. 'Corporate culture' is defined as an attitude, policy, rule, course of conduct, or practice existing within the body corporate generally or in the part of the body corporate where the offence occurred.

Under the proposals, the prosecution can lead evidence that the company's unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance. Even where formal documents endorse compliance, the company will be liable if it is clear that non-compliance was expected or tolerated within the company. Other jurisdictions are also keen to go beyond the individual director or officer approach. The Canadian Law Reform Commission's two-fold proposals recommend that aggregation be added to the formula for attribution for negligence offences and that, for subjective mens rea offences, the knowledge of the person with authority over the area of the corporation's operations can represent the fault.

4: CONCLUSION

Two other areas need to be mentioned: the relationship between individual and corporate liability and the issue of penalties.

As far as individuals and organisations are concerned, there is nothing in the current legal scene which prevents the prosecution of both. As I have already suggested the obstacles presented by the restrictive *Tesco v Nattrass* doctrine have been something of a smokescreen for a generalised reluctance to pursue particular types of

with or derived from the activities of an individual human actor in the corporation - is less assured than it was. If we point to the legal environment in Europe, in the United States, Canada and Australia then an indication of the way that liability may develop over the next 10 to 15 years can be gathered.

Moves towards the introduction of corporate liability in the civil law jurisdictions of Europe are encouraged by the Council of Europe which has identified the quest for common or convergent responses to challenges confronting modern European society as one of its priority areas for intergovernmental action. In terms of individual jurisdictions, corporate criminal liability outside the socio-economic or regulatory sphere has been relatively rare but is a matter of reform in many jurisdictions. In 1988, the report of the Council of Europe's Select Committee of Experts concluded that the acts and omissions of separate officers within the corporation should be aggregated in determining whether the corporation had itself committed an offence.

The Dutch position probably conforms most closely to this. Under revisions to their Criminal Code in 1976, there is specific reference to the possibility of charging a corporation with battery and manslaughter, and in 1982 the Supreme Court adopted a 'power and acceptance' principle of liability: did the company have power to determine whether an employee did the act in question, and did the corporation 'accept' such acts? It is not just the business enterprise which is at risk here of course. State universities or local authorities can be found guilty of environmental crimes and in one case in the Netherlands the district court of appeal found the State itself guilty of the crime of polluting the grounds of an airforce base. The Supreme Court of the Netherlands, however, reversed this decision, establishing that the State itself could never be criminally liable.

Even those countries which do not have corporate liability actually manifest a much closer correspondence with ideas of blaming businesses for negligently caused harms than is often thought to be the case. For example, in Italy prosecutions for manslaughter against company directors are not at all unusual. In the UK, the reluctance to pursue companies has been part of a resistance towards attaching criminal blame to their directors or other senior officers. The debate about corporate liability has to be seen as part of that wider debate about crimes of the powerful. Because of their code-based systems, developments in European countries may resolve at the outset many of the principles of corporate liability which remain opaque in England.

There are moves also in Canada and Australia whose legal tradition is closer to our own, to introduce a more systems-based form of

encourage employers to listen and act - the two go hand in hand.

At the moment the law is quite inadequate. Companies sometimes kill people and get away with it. Making a company pay a fine is not enough. Companies cannot be put in prison. But someone must pay. Companies are made up of people, and nothing more than people - directors, managers, employees, shareholders. It makes no moral sense to blame 'the company', make 'it' pay a fine (usually covered by insurance or passed on in consumer prices) and excuse the individual executives in the company who were responsible for harming others. After all, employers are often quick to blame individual employees for a wide range of failures, from the serious to the trivial. They too must be ready to take the blame for their failures - especially since the repercussions of their failures are greater.

Executives often justify their large salaries, office comforts, perks and prestige in terms of their high level of responsibility. In doing so they are logically accepting, whether they realise it or not, the rightness of high penalties for their failures. Justice is not served when those who accept high rewards for taking on a 'risky' job are able to hide behind the legal fiction of 'the company' when they fail to do that job properly. Our message to employers is simple: *if you want the rewards for doing it right, accept the penalties for doing it wrong.*

Recently both the public and the courts have been seeking individual legal liability at managerial level for health and safety negligence. In 1992 Rodney James Chapman became the first company director to be disqualified for a health and safety offence under section 37 of the 1974 Health & Safety at Work Act. In 1995, a demolition company director, Roy Edwin Hill, was the first director ever to be given an effective jail sentence for breaking health and safety regulations. His company had demolished a building in December 1994 without attempting to prevent the spread of asbestos dust. In the Lyme Regis canoeing deaths the boss, Peter Kite, was jailed for three years for manslaughter and the company, OLL, was fined £60,000.

But we have a very long way to go. There are about 400 deaths a year in UK workplaces. In most there are prima facie grounds for laying the blame with the employers. Yet Peter Kite was the first ever conviction for corporate manslaughter. The law makes prosecution very difficult and recent Law Commission proposals do not go far enough. As the law stands a senior member of the company ('a guiding mind and will of the company') must be guilty of manslaughter before the company can be convicted. In the Peter Kite case the company was very small. But in the 'Herald of Free Enterprise' disaster such a 'mind' could not be identified, so the company got off.

The Law Commission has just proposed a new offence of 'corporate killing' which makes it unnecessary to identify a guilty 'mind' first (*Legislating the Criminal Code: Involuntary Manslaughter*, LC 237, March 1996, HMSO). If the proposals are accepted by government then under a new law it will only be necessary to show that the organisation as a whole failed to do what could be reasonably expected of it. Unlimited fines and remedial action are also recommended in the report, although the question of individual executive liability is still not properly addressed. These recommendations take us one step away from an absurdly unjust situation, but only one step. As John Monks, General Secretary of the TUC has pointed out (letter, *The Independent*, 8 March 1996) the Commission's recommendations add little or nothing to existing health and safety law.

We already have a health and safety act and a regulatory body (Health & Safety Executive - HSE) to go with it, as well as a Crown Prosecution Service. Why are they not working effectively? Research and common experience show that the HSE is unable or unwilling to investigate and prosecute. Other bodies with health and safety responsibilities, such as local councils, also fail to implement the law. When prosecutions are successful the penalties imposed are often an insult to victims and their families and to society at large. Recently British Steel was fined £100 for a breach of the 1974 Act which led to a worker's death. *Freedom to Care* demands the following:

▸ The scope of the 1974 Act needs to be widened, the HSE needs far greater resources and powers, and the Crown Prosecution Service needs to think more seriously about corporate crime including corporate manslaughter. ▸ The HSE should be shutting down businesses more often and not letting off so many on the grounds that the health and safety measures which they might have adopted were not "reasonably practicable". ▸ The DTI should be as zealous in demanding the disqualification of negligent and socially irresponsible directors as it is in demanding their removal for financial mismanagement. ▸ Penalties should be punitive (and uninsurable), related to assets or turnover and criminally irresponsible executives should be jailed. ▸ Directors should, under amendments to the Companies Act, be given clear health and safety duties (just as they currently have financial duties). ▸ There should be a new legal obligation imposed on companies to publish annually their safety record, together with prosecutions, fines etc. for employees, shareholders, and all stakeholders to see and judge for themselves. That way they would save whistleblowers the trouble.

those involved in the OLL Ltd trial in evading the logic of the P&O trial collapse.

This now allows us to return to the embryonic 'systems' basis of liability. The Law Commission's recent consultation paper on involuntary manslaughter argues that the gross negligence formula overcomes the problems of having to find one particular officer who has the mens rea for the offence and allows emphasis to be placed on the company's attitude to safety. This question would only arise where the company has chosen to enter a field of activity which carries a risk to others, such as transport, manufacture or medical care. The steps the company has taken to discharge the "duty of safety" and the systems devised for running its business, will be directly relevant. Although only expressed as a provisional view, it is significant that the Law Commission echoes here the recognition of corporate safety systems voiced in the Seaboard case. Thus a real tension is exposed between the paradigm of criminal culpability based on individual responsibility and the increasing recognition of the potential for harm inherent in large scale corporate activity.

The recent developments I have sketched here have the potential to presage a new era in which attention shifts from individuals (whether high or low) within the company to the company itself as well as demonstrating a keenness to pin blame on companies and or their responsible officers. The gap of almost 50 years between the emergence of corporate liability for non-regulatory offences and serious consideration of corporate manslaughter cannot be explained in terms of mechanistic legal analysis. Risky corporate behaviour and recklessly caused deaths occur in far larger numbers than prosecution rates for manslaughter would ever suggest. What companies now face is the possibility that the legal and social construction of their harm-causing activities can be turned into a prosecution for manslaughter. From the efforts employed by P&O and by South Coast Shipping (owners of the Bowbelle which collided with the Marchioness in the Thames in 1990, drowning 52 people) to avoid prosecution, it is reasonable to infer that such a threat is not taken lightly.

3: FOREIGN AFFAIRS

The above account at least clarifies one thing - that to talk about organisational responses to the risk of criminal liability is hopelessly unrealistic. Neither variable can be easily captured. Organisations vary in size, function, structure and culture. On the legal side, liability has numerous faces and consequences of varying degrees of seriousness. Even the one certain thing - that liability will be inextricably bound up

manslaughter charges against P&O European Ferries and 7 employees.

The trial came to an abrupt end before the prosecution had finished presenting its evidence. After hearing evidence exclusively from employees and ex-employees of P&O, the trial judge said he was not convinced that the prosecution could establish that one sufficiently senior member of the company's management could be said to have been reckless. For the purposes of manslaughter as it was then understood, this referred to proof that the defendant had created an obvious and serious risk, (one which a prudent person would have realised), that the ferry could sail with its doors open. It is something of a mystery why this was elevated into such a legal obstacle given the findings of the Sheen inquiry, and I suggest that it merely confirms an unconscious disquiet with the attempt to frame a company and its directors as homicidal criminals.

The P&O prosecution was nonetheless highly significant. It assisted the process whereby corporate manslaughter has come to acquire cultural meaning and it left no doubt that corporate manslaughter is a charge known to English criminal law. Converting these factors into a successful prosecution against OLL Ltd recently was aided and abetted by a coincidental change to manslaughter law. Instead of the obvious and serious risk category applied to P&O, gross negligence manslaughter has been revived. A recent appellate decision specifies the circumstances in which deaths caused from breach of a duty of care may amount to manslaughter. The provision of a public transport service or other commercial enterprises would raise such a duty. If the breach of duty amounts to 'gross negligence', a manslaughter prosecution could be instituted. Gross negligence includes the following:

> indifference to an obvious risk of injury to health; actual foresight of the risk coupled with the determination nevertheless to run it; appreciation of the risk coupled with an intention to avoid it but also coupled with such a high degree of negligence in the attempted avoidance as the jury consider justifies conviction; and inattention or failure to advert to a serious risk which goes 'beyond inadvertence' in respect of an obvious and important matter which the defendant's duty demanded he should address. (R v Prentice 1993 3 WLR 937)

Although the conceptual difference between this and the 'obvious and serious risk' test applied to P&O is arguably negligible, the arrival of a new definition undoubtedly assisted the prosecuting authorities and

CHAPTER TWO

INVOLUNTARY MANSLAUGHTER

CORPORATE RESPONSIBILITY FOR DISASTER & ACCIDENT PREVENTION

J Barrie Berkley

Disaster Action represents both family groups and individuals from more than a dozen disasters including: Clapham (rail signal failure), Hillsborough (football stadium crush), King's Cross (London Underground fire), Lockerbie (aircraft bombing), Marchioness (Thames riverboat collision), Piper Alpha (oil platform explosion) Zeebrugge (ferry capsize). Not only did the disasters result in the deaths of almost 1,000 people, they had traumatic effects on the lives of thousands of relatives and others involved. *Disaster Action* is also fully aware that about 400 people die at work each year and that many more suffer serious injuries.

A significant feature common to the disasters experienced by *Disaster Action*'s members is that they were all preventable. Thus, it was particularly distressing to almost all of the family groups concerned that there was a failure of the Criminal Justice System successfully to prosecute companies and their senior officers for serious criminal offences relating to these disasters.

The publication of the Law Commission's Consultation paper on Involuntary Manslaughter in April 1994 (1) for comment by interested organisations and individuals provided the opportunity for *Disaster Action* to respond to an important new initiative (2).

Whilst the proposals were generally welcomed by *Disaster Action*, there are other essential factors which need to be addressed to enable the necessary progress to be made. This paper discusses the wider field and identifies a series of measures which, we believe need to be implemented to make a substantial improvement in both disaster prevention and safety at the workplace.

WHAT SHOULD WE EXPECT FROM THE LAW?

When disasters occur, there is always a sense of outrage that such an event could be allowed to happen. Many survivors and victims' relatives campaign for change. There is general agreement that, at present, justice is not being seen to be done. The Law Commission's Consultation paper on Involuntary Manslaughter recognises that there is a public demand for improved corporate accountability. For example, there was a strong sense of injustice that the relatives of the victims of the Zeebrugge ferry disaster involving the m/v 'Herald of Free Enterprise' were unable to bring a successful prosecution against P&O for corporate manslaughter even though the ferry company was said to be "infected from top to bottom with the disease of sloppiness" (Mr Justice Sheen's report.) This disaster resulted in a loss of life of nearly 200 passengers and crew.

Injustice in the field of workplace safety is clearly evident from the fact that even for fairly serious breaches of the 1974 Health & Safety at Work Act, the average fine in 1992/93 was less than £1,500 and it is not uncommon for British courts to award a sum as low as £10,000 for a fatality. In this situation, it is reasonable to ask "Is a sufficient price being put on death, injury and loss by society to act as an appropriate deterrent to those organisations which, either through choice or negligence, do not provide adequate health and safety protection?"

Apart from the prospect of receiving penalties resulting from breaking health and safety laws, there is more than sufficient justification from an economic viewpoint for organisations to implement stronger measures to prevent disasters and accidents. A 1994 Health & Safety Executive (HSE) publication (3) estimated that the overall annual loss as a result of all work-related accidents and ill-health lies between £6 billion and £12 billion. When these economic losses are added to individual and societal losses, including loss of welfare resulting from pain, grief and suffering of individuals and their families, the total cost to society as a whole was estimated to be in the range of £11 - 16 billion. This is equivalent to between 2% and 3% of the Gross Domestic Product. Can Britain really allow such losses to continue?

Clearly, the law does not provide sufficient protection either at a personal level or from the overall standpoint of our society. Hence there is a clear need for the Government to accept the responsibility to ensure that the necessary changes in the law are enacted.

was wholly inadequate. The result of these and other changes is a rapid progression away from traditional judicial attitudes to corporate liability. The nature of legal (judicial) change is that it is incremental and indirect rather than radical or deliberate: in this, it may be very different from the kind of planned changes which organisations seek to achieve.

These changes interrelate with the radical shift which has led to corporate manslaughter prosecutions.

Corporate Manslaughter

The manifest desire on the part of disaster survivors and relatives to make companies accountable for their part in tragedy has provided a challenge to procedure and doctrine on a number of fronts. The P&O case is familiar to most people - 192 people died when the 'Herald of Free Enterprise' left Zeebrugge with its bow doors open on 6th March 1987 and capsized just outside the harbour. The Assistant Bosun, whose duty it was to shut the doors, was asleep in his cabin. His absence was not noticed nor was there a system to ensure that the vital task of closing the bow doors was performed irrespective of the potential failure of any one individual.

This was not the first occasion on which such a failure had occurred. The 'Herald' was a Roll on/Roll off passenger and freight ferry, owned by Townsend Car Ferries, a subsidiary of P&O European Ferries Ltd. The Sheen Report was severely critical of P&O's attitude to safety, laying out in stark terms the causal layers at which blame and responsibility can be targeted:

> At first sight the faults which led to this disaster were the aforesaid errors of omission on the part of the Master, the Chief Officer and the assistant bosun ... But a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company ... All concerned in management ... were at fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness.

It is from these hard-hitting words that the source of the emerging legal vocabulary of 'corporate' wrongdoing can probably be traced. However, there was much institutional resistance to a manslaughter prosecution and it was only after judicial review of the coroner's inquest, and eventual verdicts of unlawful death from the coroner's jury, that the Director of Public Prosecutions was persuaded to bring

Nattrass would have left the company beyond the reach of the legislation. The investment managers were not directors or senior officers. The Privy Council chose to return to first principles in answering the question - whose knowledge can be attributed to the company? The answer lay, they held, in statutory interpretation, taking into account therefore the language of the statute, its content and policy. The policy of the 1988 Act was to compel the immediate disclosure of the identity of a person who became a substantial security holder. In the case of a corporate security holder the relevant knowledge should surely be that of the person who with the authority of the company acquired the relevant interest even though, as in this case, their action was taken 'behind the company's back'. Meridian's conviction for the offence was upheld.

Despite going back to basics on the attribution question, the Meridian case fails to emerge with a coherent account. Recalling the three approaches to corporate blameworthiness (agency, 'brains' or systems) it can be seen that, although allowing for a more relaxed interpretation 'according to the construction of the particular offence', the case remains embedded in the language and ideas of the derivative model, of which the 'directing mind' serves as one version. Nonetheless the decision is an important one especially when viewed in the context of a number of other cases.

While Meridian challenges the narrow interpretation of direct liability, other decisions undermine the traditional approach from a different angle. It has been assumed that the distribution of offences between the vicarious and the direct type of liability is unproblematic. This is no longer so. The Court of Appeal recently refused to apply the restrictive direct doctrine to a health and safety charge. Section 3 of the 1974 Health and Safety Act puts a duty on employers to ensure, so far as is reasonably practicable, that others are not exposed to risk to their health and safety. British Steel could not escape liability by showing that, at a senior level, it had taken steps to ensure safety if, at the operating level, all reasonably practicable steps had not been taken.

This mood of realism in the appellate courts' approach to corporate responsibility was inconceivable at the time of *Tesco v Nattrass*. At the lower court levels, there is more ambivalence - at their trial, British Steel had been convicted but only fined £100. For a breach which led to a worker's death that is extraordinary. The Court of Appeal, refusing leave to appeal, not only confirmed that the reasonably practicable formula in s. 3(1) of the 1974 Act did not affect the essentially strict nature of the liability imposed, it also made clear its view that the fine

PROBLEM AREAS

Disaster Action believes that there are four important associated areas of the law which must be considered alongside the main issue of the general law of manslaughter covered by the Law Commission Consultation Paper. These are: investigation policy, prosecution policy, directors' duties, punishment of corporations.

Investigation policy

Disaster Action's first concern is the adequacy of the investigation into potential crimes. The Law Commission's Consultation Paper refers to this. It states that some commentators "allege inadequate scrutiny by both the police and the Health & Safety Executive in the context of a general culture which does not recognise corporate crime as being 'real' crime." The Law Commission goes on to state that the consultation paper was "however ... devoted to studying the substantive law, the reasons for the failure, as a matter of law, of such prosecutions as are brought, and proposals for the reform of the law, if appropriate."

Whilst *Disaster Action* understands that the purpose of the Law Commission is to consider whether legislative reforms are required, and not to consider the investigative policy of the police or any other agency, we believe that the two issues are inextricably linked and any reform of the law of manslaughter must take investigative policy into account.

It is our contention that there is a serious bias in the criminal justice system which allows deaths and injuries that take place in circumstances where a company or its officers might be criminally responsible, to fail to be subject to rigorous investigative scrutiny. This situation is illustrated in *Disaster Action*'s 1990 submission to the Royal Commission on Criminal Justice. We showed how in three disasters - the King's Cross fire, and the Zeebrugge ferry and the Marchioness riverboat sinkings - there appear to have been inadequate investigations.

Furthermore, a recent report issued by HASAC (4) which examined confidential documents relating to 28 workplace deaths in the West Midlands - shows an astonishing laxity of investigation by the HSE and Local Council Environmental Health Departments. In general, there was a tendency to look at peripheral matters rather than at the root cause of each incident.

We believe that the issue of investigation is crucial since a manslaughter prosecution cannot take place unless sufficient evidence

is discovered, and it is the lack of sufficient evidence that is the most often stated reason for a decision against legal action (5). It is evident that reform of the law of manslaughter will remain simply an academic exercise unless the investigative policy is changed - so that every disaster is treated, from the very start, as potentially the result of the crime of manslaughter. The crime of manslaughter must be ruled out before considering the commission of any other offences. The same principle should apply to deaths and to serious injuries at the workplace.

Prosecution policy

Disaster Action's second criticism of the Criminal Justice System (CJS) relates to the prosecution policies of regulatory agencies and the Crown Prosecution Service (CPS). It is *Disaster Action*'s experience that these bodies are unwilling to amend their prosecution policy in line with a perception that isolated or multiple deaths in a corporate setting could be the result of 'real' crime that should lead to manslaughter prosecutions.

When a disaster or accident takes place, the first investigative body which will be at the scene will depend upon whether the disaster was related to the sea, land or air. If it is on land it is likely to be investigated by either the HSE or the Local Council; if it concerns sea or air transport, it will be either the Marine (MAIB) or Air Investigation Branches.

These agencies do not have a 'punitive' prosecution policy - that is, one which will advise that a prosecution should take place if any criminal culpability is discovered. It is fair to say that, unlike the police, the HSE and the Local Council Environmental Health Departments are 'regulatory agencies' which undertake some investigative work. Their function is to advise employers on safe working practices, to inspect workplaces and to negotiate compliance with the relevant health and safety standards. Tough prosecution policy is not on their agenda. The MAIB and AAIB are a little different.

Disaster Action believes that this has two consequences: firstly, the agencies will not refer *prima facie* manslaughter cases to the police or CPS for a thorough investigation to take place and for consideration of the appropriateness of a manslaughter prosecution; and secondly, the agencies will rarely prosecute individuals for non-manslaughter offences for which they can take action. This situation is discussed in the 1994 HASAC report (6).

Disaster Action is concerned that this non-punitive prosecution attitude exhibited by these agencies in the context of isolated deaths,

corporate blame, based on company culture and practices is gaining acceptance.

As I have explained, English law takes two different routes to finding a corporation guilty of an offence. For regulatory offences, the vicarious principle is used while for mainstream offences, the much more restrictive identification doctrine is invoked. Under this, only when directors of senior officers are, or should have been aware, of safety shortcuts will liability be possible. It was not until the House of Lords' decision in *Tesco v Nattrass* in 1971 that serious consideration was given to which senior officers would be regarded as being identified with the company itself for these purposes. Only those who can be regarded as controlling officers - the board of directors, the managing director and possibly others - discharging duties for which they are not responsible to superiors within the company, are so identified. This leaves many large, complex companies relatively immune, for those who can represent the company for these purposes are rarely those at the centre of operational or safety policy determination.

Systems Liability

The essential difficulty is how to measure the culpability of a corporation. The 'vicarious principle' measures it by looking to all employees as agents of the company. *Tesco v Nattrass*, for mens rea offences, measures it by looking to senior officers and/or directors. There is, however, a third possibility, one not derivative on the wrongdoing of any one individual, but assessing the company's culpability by looking at its culture, its practices and procedures. Recognition of the philosophical and legal complexities in deciding whose actions and whose knowledge can be said to represent the corporation can be observed in a series of cases culminating in the Privy Council's advice in *Meridian Global Funds Management Asia Ltd v Securities Commission*. In these reinterpretations of *Tesco v Nattrass*, there is growing evidence that a 'systems-based' principle of liability for mens rea offences many be emerging.

Two senior investment managers in Meridian, a large Hong Kong investment company, improperly used their authority to buy into a New Zealand company with a view to gaining control of it. As a result Meridian fell foul of a New Zealand statute which requires that, as soon as person knows or ought to know that they are a substantial security holder in a publicly listed company, notice is given to the company and to the stock exchange. Should the knowledge of the senior investment team be attributed to the company? A strict application of *Tesco v*

guilty minds, on this version of liability, were those of the company - they acted as the company. Thus, as a juristic person, a corporation itself is capable of committing almost any criminal offence, so long as a director or equivalent has authorised it.

Criminal Liability of Officers and Directors

Directors and officers are the vehicle through which direct liability of the company is achieved. However, despite some suggestion otherwise, it seems clear to me that it is not necessary actually to prosecute a director or officer in order to find the company itself liable. It should be sufficient that there is evidence against the director or officer. Directors and officers can also be criminally liable as aiders and abettors of the company's crimes or of the crimes of their fellow directors. However, in practice such action is rarely brought. Of more practical significance is the potential for growth in the use of what are known as directors' liability clauses which are common in regulatory legislation and are increasingly demanded to satisfy European harmonisation. Such legislation often provides specifically that where the offence is committed by a corporate body with the consent, connivance of, or is attributable to the neglect of any director, secretary or similar officer, they as well as the corporation shall be guilty and liable to be proceeded against and punished accordingly.

Prosecutions under these provisions are likely to increase. After the cutbacks in the early 1980s, many regulatory agencies are now better, if not well-resourced and heightened environmental and safety consciousness will affect individual as well as corporate prosecution risks. As a matter of public policy, insuring against criminal penalties is not allowed by law. The Companies Acts do, however, permit companies to take out D and O insurance to cover the costs of civil claims and the costs of a successful defence of a criminal action. Directors must declare in their annual report that liability insurance has been purchased causing concern that awareness of the insurance might fuel litigation. D and O insurance can influence any deterrent effects of personal liability in addition to any inherent problems in attempting to control companies through individual liability. A major difficulty is always going to be the separation of the collective entity, the company, from the individuals within it.

2: CHANGING CONCEPTIONS

Legal attitudes to corporate criminal behaviour have begun to shift. These changes are taking place at both the doctrinal and enforcement levels. In particular, there are signs that a more sophisticated model of

continues when they are involved in deciding what prosecution action should be taken after a disaster. The decision by the HSE against prosecuting London Underground after the King's Cross fire - because, amongst other things, there had been "significant improvements of safety management on the underground since the fire" - illustrates how the regulatory agency's non-punitive attitude remained intact even when a large number of deaths took place.

Disaster Action is also concerned about research which indicates a deep reluctance of the CPS to prosecute for manslaughter after workplace deaths. It is difficult to know whether criticism should lie more with the HSE in its failure to refer cases to the CPS or with the CPS in failing to ensure that the HSE refers more cases to it. We are sure, however, that if the police were failing to refer any particular types of crimes to it, the CPS would seriously give consideration to why this was so. In the West Midlands, however, none of the over 100 workplace deaths that have taken place in the last ten years have ever been referred to the CPS. Yet the CPS has never shown any interest in why this is the case.

Whilst we acknowledge that the uncertainty of manslaughter law could have influenced the CPS's decisions about workplace deaths, nevertheless we feel that they have not used the required vigour in prosecuting the companies concerned and their senior officers when deaths or serious injuries have occurred.

Disaster Action is concerned that the CPS's attitude to corporate manslaughter after workplace deaths is reflected in its prosecution decisions over disasters. Only one of the disasters which our family groups represent led to a manslaughter prosecution by the CPS and we are concerned that the decisions against prosecution in relation to the others may have had something to do with the CPS's bias against prosecuting companies for serious criminal offences.

Disaster Action is aware that the issue of prosecution policy is not directly within the ambit of the Law Commission. However, we mention it here for the same reasons as we dealt with investigation policy. There is little point in making reforms to the law of manslaughter if the CPS does not invest time and resources in properly inquiring whether manslaughter prosecutions should take place when deaths occur in a corporate setting, or if regulatory agencies fail to refer appropriate cases to the police or CPS.

It is, therefore, important that the Law Commission recommends changes in regulatory agencies and the CPS deal with possible corporate manslaughter cases.

Directors' Duties

In reviewing the reform of the law of manslaughter, *Disaster Action* believes that the Law Commission should consider the need to impose upon directors clearly defined duties. The issue of directors' duties should not be seen as unrelated to the law of manslaughter - simply considered a matter of health and safety law. The imposition of duties is in fact crucial to the operation of the law.

One of the reasons for the Crown's difficulty in pinning criminal responsibility upon the directors of P&O European Ferries over the Zeebrugge disaster, was the absence of clear legally defined duties. In determining the responsibilities which company directors bore, the Crown had to rely on the basic safety duties imposed on all 'employers' in health and safety law and on the company's own contracts of employment.

Unlike, for example, car drivers, or indeed a director's financial duties, there is no clear code of director's safety responsibilities. This allows a director to deny that she or he had specific responsibilities or indeed to try to push the blame onto someone else.

Just as it would be deemed unacceptable for a car driver to escape culpability for any uncertainty over what she or he should do whilst driving on the road, it should be impossible for company directors to escape manslaughter conviction simply due to the uncertainty that exists in ascertaining their duties.

Disaster Action believes that the Law Commission must consider the necessity of recommending that a series of broad safety obligations should be imposed upon company directors.

Punishment of Corporations

We also believe that the Law Commission must consider reforms to the sentencing of those companies which might in the future be convicted of manslaughter.

At present the only sentence available for the courts is a monetary fine. The unit fine system which became law through the Criminal Justice Act 1991 is not applicable to companies. It is, therefore, up to the discretion of the judge as to the level of the fine. Moreover, unlike the fining of individuals, the courts have no established procedure for determining the appropriate level of fine for the company. Furthermore, very little consideration has even been given by official bodies to the sentencing of companies.

In fact, cash fines can sometimes have drawbacks. For example, the higher the fine the more likely it is that others will pay - this means shareholders in the case of a private enterprise, taxpayers in the case

principles of interpretation which may be of statutory or judicial origin.

Corporate Criminal Liability

The corporation itself was first given recognition as a juristic person separate from its members and employees for the purpose of imposing criminal liability towards the end of the last century. This coincided with major changes in the role of corporations and with the development of extensive social legislation to control them. Corporate liability for criminal offences was confined at first to the regulatory sphere, but gradually other areas of criminal law have encroached into the boardroom. In general, three different theories of corporate blameworthiness compete for attention. The first is based on the agency principle whereby the company is liable for all its employees' acts. English law uses this conception for regulatory offences. The second, which English law utilises for all other offences, identifies certain senior officers within the company as its 'brains' and is accountable only for their transgressions, not those of other workers. The third, until very recently unheard of in this jurisdiction, locates corporate blame in the procedures, operating systems or culture of a company. My purpose here is to demonstrate that this third, company culture, theory, is beginning to achieve judicial recognition.

Many regulatory statutory offences were regarded from the start as capable of being committed vicariously by a corporation such that when an employee sold adulterated food, they did so as the corporation's agent. Since it arises from the employment relationship, vicarious liability is not confined to corporations. In relation to corporations it means that the company can be held liable whenever any of its employees offends in the course of their employment. However, it applies only to offences which do not require proof of a mental element, such as recklessness, intention or knowledge, on the part of the defendant.

It was not until the 1940s that English law countenanced the possibility of corporations committing other types of offences. For these, a much more limited doctrine developed. Known variously as 'direct', 'identification' or 'alter ego' liability, it sought to overcome the objection that an unnatural person such as a company was incapable of forming an intention or being reckless. It opened up the possibility of corporations being liable for the whole range of mainstream offences, including fraud and manslaughter. The notion of identification was brought into play under which the wrongdoing of certain senior officers - natural persons - in the corporation was identified with the corporation itself - the unnatural person. Their acts and accompanying

acceptance.

The combined effect of all these characteristics means that, when a prosecution is brought, the offence will not reflect the seriousness of the harm which has been caused. The proceedings will be in courts (usually but not invariably in magistrates' courts) more used to dealing with mainstream enforcement practices so that the regulatory offender benefits from the 'strict liability' paradigm while in fact they are probably repeat players with a history of non-compliance. With formal court action being the exception rather than the norm, when prosecutions are invoked offenders receive the benefit of the following assumptions - that they are first-time offenders and that the offence was committed as a result of bad luck rather than corner-cutting practices. In addition the offence label may poorly reflect the actual harm caused. The penalty imposed rarely compares with those for personal violence. Recently, British Steel was fined £100 for a breach of the 1974 Health and Safety at Work Act which led to a worker's death.

Yet this picture is undoubtedly beginning to change. Maximum penalties have increased, environmental awareness and campaigns for deaths at work to be taken more seriously as concerns of the criminal law (both regulatory and conventional) are all knocking on the door of the corporate manager. While it has been suggested that 'good' companies are susceptible to administrative measures in complying with risk prevention measures, this leaves a large compliance deficit with a substantial number of firms habitually violating regulatory requirements. The stigma of criminal prosecution is regarded as the greatest strength of prosecution but it brings with it the limitation that authorities are unwilling to prosecute employers who are not perceived to be unreasonable risk-takers. This is one point where the interaction between public perception and liability is particularly unstable - a combination of symbolic condemnation through criminal prosecution and diminishing public tolerance of environmental and health and safety hazards may demand quite different risk management strategies.

Before outlining the law of manslaughter and its application to the business organisation, I need to take a diversion from the offence framework and turn to explore another aspect of the legal labyrinth - how does law address the corporation as opposed to the individual? Most criminal laws are written to the world at large - 'any person who does x commits an offence'. Even those which address a specific group of people, for example some offences in the Health and Safety at Work Act refer to an 'employer', do not indicate whether this includes non-natural persons. This can only be established from general

of a public corporation, and workers and consumers in both cases.

We maintain that 'Corporate Probation' is an option that should be seriously considered by the Law Commission. This already exists in the United States. In addition to, or as an alternative to a fine, the judge can impose upon a company a series of conditions which include changes in internal corporate practices to ensure that the company operates safely in the future.

THE LAW COMMISSION'S PROPOSALS

New General Law of Manslaughter

The Law Commission's main proposal relates to the reformulation of a new general law of involuntary manslaughter. *Disaster Action* has been very concerned - particularly since prosecution of P&O European Ferries - about the lack of clarity that has existed in the law. The main uncertainties have been about whether the crime required evidence of recklessness or gross negligence, and what was the legal test for each of these.

This uncertainty, we believe, has given the regulatory agencies, the police and the HSE an excuse for not taking seriously the possibility of manslaughter prosecutions against senior company officers after deaths in a corporate setting. It has enabled the criminal justice system to justify its poor record on manslaughter prosecutions. It is, therefore, crucial that this law is clarified.

One of the key aims of the criminal justice system is to deter unacceptable conduct and we believe that criminal law will only deter company directors and managers from subjecting people to unacceptable risks if it legislates a clear objective test of manslaughter.

It is our contention that criminal law should regulate company safety in much the same way as it regulates road safety, and that a company director should be treated in the same way as a driver. A machine, a ferry, or an underground station is, like a car, potentially dangerous and is only safe if it is used with due care and attention. A company director who is responsible for such activities and whose conduct falls far below the expected standard should also, if death results, be convicted of a serious criminal offence.

Disaster Action maintains that the definition of 'gross negligence' should avoid any language that requires from the jury an examination of the awareness of the defendant. It should be a simple test considering whether the conduct of the defendant fell far below what was expected. This is why we strongly support the Law Commission's proposed new standard of culpability. It is a fully objective test which

ignores the need for any examination of the defendant's state of mind. The test would establish two requirements:

(a) 'the accused ought reasonably to have been aware of a significant risk that his conduct could result in death or serious injury.'

This establishes the standard by which to judge the defendant's conduct. It asks 'what should the defendant have known about the risk?'

(b) 'his conduct fell seriously and significantly below what could reasonably have been demanded of him in preventing that risk or in preventing the risk, once in being, from resulting in the prohibited harm.'

This asks the question whether the defendant's conduct fell far below what is acceptable.

Disaster Action believes that, put together, the elements contained in the new test successfully express, without undue complexity, what most ordinary people understand by 'gross negligence'.

Furthermore, these essentially practical criteria are fully compatible with the concept of company safety auditing, which when correctly applied, can protect organisations from consequences of breaching the law and from losses associated with poor safety management.

Corporate liability

The manslaughter prosecution against P&O European Ferries over the Zeebrugge Disaster revealed a serious problem in the law of corporate manslaughter. The present law, as the Law Commission notes, requires that a senior member of the company ('a guiding mind and will of the company') must be guilty of manslaughter before the company can be convicted. The failures of P&O European Ferries as a whole could therefore not be considered the basis upon which to determine the company's culpability.

In effect, under the present law, there is no difference between the guilt of a senior manager or the company. If the individual is guilty, the company is guilty; if there is sufficient evidence against the individual, then the same goes for the company.

This principle is readily illustrated in the case against the outdoor leisure company OLL concerned in the Lyme Bay canoeing disaster. In an historic judgement on 8th December 1994, the managing director of the company was found guilty of the manslaughter of four teenagers in 1993, and sent to prison. The company was also found guilty of manslaughter. Yet had the director not been found guilty, the company would have been acquitted.

threatening. The problematic in this distinction is that it is inherently unstable and organisations need to understand the cultural dynamics at play in this area. What follows are the key points in the regulation/real crime dichotomy.

First, regulatory offences are statutory in origin, a difference which persists because of the uncodified nature of our criminal law, much of which is still derived from cases. As a result, that which is seen as core tends to reflect the 'moral' offences of earlier ages when corporate activity was non-existent or less familiar. This characteristic of our criminal laws allows the distinction between 'real' and quasi crime to persist without being formally recognised.

Second, unlike many other statutory offences, safety laws are enforced by separate agencies and not by the police. Each specialist agency has a specific remit bestowed by statute, contrasting with the police whose duties are general. While both agencies and the police have large areas of discretion in respect of priorities for investigation and decisions about whether to engage the prosecution process, they differ in the overall thrust of their activities. Regulators tend to be compliance, rather than deterrence, orientated; they work on a system of inspection and negotiation rather than on detection and automatic enforcement on the discovery of breach - an approach likened more to police practices in relation to juveniles, with caution preceding enforcement. There is widespread use of other formal enforcement instruments. Restricted resources as well as policy dictate these enforcement patterns; only when an accident actually takes place will action be taken by health and safety officers.

Third, safety legislation is often vague and exhortatory. Offences under the Health and Safety at Work Act, for example, do not specify the adverse effects or results of poor practice. Whether an unsafe practice results in injury or death is not reflected in the formal offence label, or in its definition. Contrast this with standard 'personal' injury offences such as assault occasioning actual bodily harm or wounding with intent. This makes regulatory offences rudimentary in nature. At the same time, they do not employ traditional culpability requirements such as recklessness and intention. In fact, they are often referred to as offences of 'strict liability' but this is not quite accurate either. The offence definitions frequently allow for a defence of 'due diligence', or the standard to be achieved is flexible. The Health and Safety at Work Act 1974, for example, imposes a duty on employers to ensure health, safety and welfare of employees "so far as is reasonably practicable". A number of reasons can be advanced for these definitional distinctions, ranging from prevention goals, costs, and standards

salvation. Not all business enterprises are incorporated, but incorporation is an important concept for it enables legal liability, whether criminal or civil, to attach to the firm itself rather than, or as well as, to any one person within it. A corporation is a legally recognised entity separate from its members. Companies must have at least one director and a secretary and the company's Articles will authorise the directors or others to act on behalf of the company or to delegate those powers. A company is legally separate both from those individuals who are entrusted with acting on its behalf and also of course from all its employees who may carry out tasks in the course of their employment which can be regarded for some purposes as the tasks of the company. The paradox is that, in this context, the risk for the company is its 'organisational setting', for that radically alters its legal status, but at the same time, that legal status may provide a protection both to the organisation and to the individuals within it.

How then has criminal law been used to control the legal entity - the company? It is necessary to appreciate first the distinction between regulatory offences and mainstream or conventional offences. Safety laws, especially those concerned with aspects of industrial safety, are to be found mainly in regulatory legislation and are often dismissed as dealing with what is benignly described as 'mala prohibita' or 'quasi' crime, which is seen both as different from and less important than 'real' crime. Popular culture reinforces this with its representation of the crime world through police detective fiction. The difference persists also in academic and judicial accounts of criminal laws. For example, very few degree courses in law would touch specifically on regulatory law. Criminal law is taught almost exclusively around the 'real crime' (and in many cases statistically unrepresentative) offences such as murder, rape and theft. Company law often marginalises the issue of criminal liability. Environmental law or labour law would look at specialised aspects of regulation as they impact on business but nowhere would the question be addressed of how regulation affects the business enterprise in its different aspects. I believe this distorts the legal perspective and deprives scholars of easy access to relevant material.

The distinction drawn between regulatory law and mainstream law is both ideological and substantive. It is true that regulatory safety laws are specific in a number of ways, but in each case the difference is used as the unconscious launchpad for attitudinal distinctions roughly conforming to the "them and us" split in thinking about crime and criminality, under which 'crime' is the province of a specific underclass and in which white collar/business and institutional offending is not so

Disaster Action is highly critical of the situation which allows companies whose policies fall well below what would reasonably be expected of them, and are indeed 'grossly negligent', to escape prosecution because of insufficient evidence to prosecute any individual senior manager or director. We believe that the current law is a serious impediment to ensuring companies are deterred from subjecting people to unreasonable dangers. It is therefore our contention that there needs to be serious reform of the law of corporate manslaughter.

RECOMMENDATIONS

Despite the useful proposals of the Law Commission, it is *Disaster Action*'s view that a much wider role for corporate responsibility must be encompassed by the law. For this purpose the following recommendations are made:

(a) The criminal justice system must treat deaths which take place in circumstances where a company or a company officer might be guilty of a serious offence in the same way as traditional crimes of violence involving individuals. (b) In formulating legal reforms, proper consideration must be given to the deficiencies of the investigation and prosecution policies. (c) In the context of the crime of manslaughter alleged against senior company officers, legally binding directors' duties need to be defined. (d) The law of manslaughter relating to individuals is confused and the principle of corporate liability is highly problematical. Reforms are essential. (e) A court needs to be able to consider whether the company as a whole has acted with gross negligence rather than just considering the actions of a senior company officer. (f) The sentencing of a company found guilty of manslaughter needs to be reviewed. E.g. the use of 'corporate probation', as used in the U.S.A., should be considered.

Disaster Action is dedicated to using its resources to educate the public through the various media available so that the political climate can be created for the necessary changes. For this purpose a Private Member's bill is being prepared for presentation to Parliament.

(1) Involuntary Manslaughter: LCCP No. 135, Law Commission. (Since Berkley's article the LC has published its recommendations in paper 237.) (2) Response to Law Commission 'Involuntary Manslaughter Consultation Paper', LCCP No. 135, Disaster Action. (3) M V Davies & P Teasdale 'The Costs to the British Economy of Work-Related Accidents & Work-Related Ill-Health' HSE Books, 1994. (4) 'The Perfect Crime' West Midlands Health & Safety Advice Centre, 1994. (5) D Bergman, 'Disasters: Where the Law Fails', p. 14, Herald Families Assoc, Whaddon, Bucks. (6) 'The Perfect Crime', p. 10.

CHAPTER THREE

CORPORATIONS AND THE RISK OF CRIMINAL LIABILITY

Celia Wells

INTRODUCTION

Organisations face new challenges from the legal environment. People these days seem more likely to blame collective institutions for personal misfortunes and large-scale disasters, and there is some suggestion that this evidences a more general trend towards greater use of law and legal mechanisms in Anglo-American jurisdictions.

Traditionally organisations have been subject to relatively stable regulatory regimes in which their vulnerability to criminal liability, whether of an industry-wide type or industry-specific provisions, has been predictable and manageable. A rich literature exists on these forms of regulatory liability, on the patterns of enforcement and organisational responses to them.

Two parallel developments seem to have disturbed that tranquil picture. The first can be seen in calls for the use of more serious criminal sanctions against business organisations. This demand for greater criminal accountability of corporations has itself taken two different forms. One variant has been the significant increase in the maximum penalties which can be imposed for breach of regulatory criminal laws. At the same time, however, the march of criminal law into the corporate world has taken a quite different route, with organisations now at risk of prosecution for mainstream criminal offences such as manslaughter.

The second development is towards greater individual accountability within business organisations. Any conflict between this and the increased targeting of corporations is more apparent than real. Individual blame within corporations can take internal disciplinary forms - but here I have in mind more the targeting of directors and officers by regulatory enforcers and the threat to individual directors which liability for corporate manslaughter brings in its wake.

I will explain the legal background in which these developments have been played out, then describe the detailed changes taking place against that background. I move then to the broader picture painted with brushes dipped in the European and global palettes. In the particular field of corporate criminal liability, many individual European jurisdictions, despite their very different legal forms and systems are addressing the role of criminal law in relation to the corporate enterprise. The Council of Europe has recommended the promotion of corporate criminal liability and has spelled out principles to guide member states. Legal culture is more open-textured and open to influence from any number of sources than is often supposed.

1: THE LEGAL BACKGROUND

Criminal law

Two misconceptions about criminal law need to be exposed here. One commonly held view is that criminal law, unlike civil law, is not concerned with compensation between offender and victim. Yet increasingly this distinction is blurred with compensation orders and other reparative ideas insinuating themselves as a regular adjunct of sentencing options. A second misconception concerns what we think the purpose of criminal law might be. Criminal law is often discussed solely in instrumental terms and is thought to be justified only on the grounds of what it achieves by way of public protection. A moment's thought reveals that this does not accord with the actual practice of criminal law and punishment. Not only are there many other means by which social control is achieved, but any attempt to draw a causal connection between criminal enforcement and reduced crime is fraught with problems. However, another view of criminal law is that it has an ideological function, that it makes statements about the boundaries of tolerated behaviour.

In the case of corporate risk-taking it is difficult fully to separate these two conceptions. Arguments about deterrence may have fallen from favour as regards the punishment of individual offenders, but corporate bodies may be more susceptible to it. There is not a simple, linear relationship between the enforcement of criminal laws and perceptions of wrongful behaviour. Criminalisation (in its broadest sense) is a complex and often fragmented process and any role which criminal laws have in relation to safety will reflect and reproduce, as well as create, attitudes to risk.

Criminal Regulation of Safety

To talk about the criminal liability of corporations requires the marriage of two quite disparate areas of law - criminal law and the law of corporations - and for many of course, that disparity is regarded as natural and worthy of preservation. Criminal law is about 'wicked' individuals while corporations represent our economic and social