Criminal Liability for Corporations that Kill: Proposals for Reform

Two Volumes

Volume I of II

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Bibliography

Table of Statutes

Australia

Australian Criminal Code Act, 1995 (C'th) – sections 12.1(1); 12.1(2); 12.3; 12.3(1); 12.3(2)(a)-(d)
Crimes (Workplace Deaths & Serious Injuries) Bill, 2001 – section 48
Occupational Health and Safety Act, 1985

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Dutch Criminal Code – Article 51

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New Zealand Securities Amendment Act, 1988 – section 20(3); 20(4)(e)

Scotland

Criminal Procedure (Scotland) Act, 1975 – section 333
Criminal Procedure (Scotland) Act, 1995 – sections 70; 143(3)

United Kingdom

Companies Act, 1948
Criminal Justice Act, 1925
Customs and Excise Management Act, 1979 – section 68(2)
Defence (General) Regulations, 1939 – regulation 82
Export of Goods (Control) Order, 1987 – article 2(v)
Fair Trading Act, 1973 – section 124
Finance (no. 2) Act, 1940 – section 35(2)
Health and Safety at Work, etc. Act, 1974 – sections 2(1); 3(1)-(3); 6; 21; 22; 37(1); 40; 52(b)
Local Employment Act, 1960
Management of Health and Safety at Work Regulations, 1992
Merchant Shipping Act, 1894 – section 502

Merchant Shipping Act, 1988 - section 31
Motor Fuel Rationing (No. 3) Order, 1941
Offences Against the Person Act, 1861 – section 20; 31
Perjury Act 1911 – section 9
Railway Clauses Consolidation Act, 1845 – sections 98; 99
Rehabilitation of Offenders Act, 1974
Restrictive Trade Practices Act, 1976 – section 35 (1)
Summary Convictions Act, 1848
Summary Jurisdiction Act, 1879 – section 17
Trade Descriptions Act, 1968 – sections 20(1); 24(1); 24(1)(a); 24(1)(b)
Video Recordings Act, 1984 – section 11(2)(b)

United States of America

Californian Penal Code – sections 7; 192; 672
New York State Penal Code – sections 10.00(7); 125.05(1); 125.10
Pennsylvanian Criminal Code – section 307(a)(3)
Texas Penal Code – sections 7.22; 12.51; 19.07; 107(a)(27)
United State Sentencing Reform Act, 1984

Table of cases

Australia

Nydam v R, [1977] V.R. 430
The Queen v Denby Pty. Ltd. and Timothy Ian Nadenbouch, (1994) 4 V.R. 157

Canada

Canadian Dredge & Dock Co. v The Queen [1985] 1 S.C.R. 662
R v Safety-Kleen Canada Inc., (1998) 16 C.R. (5th) 90
Rhône (The) v Peter A. B. Widener (The), [1993] 1 S.C.R. 497

Holland

Ijzerdraad Case, Hoge Raad, February 23rd 1954; N.J. 1954 378
Kabeljauw Case, Hogg Raad, July 1st 1981; N.J. 1982 80
The Hospital Case, Rechtbank Leguwarden, December 23rd 1987

Italy

The Italian Constitution – Article 27

Scotland

Carmicheal v Rosehill Engineering Works Ltd., [1984] S.L.T. 40
Dean v John Menzies Ltd., [1981] S.L.T. 50
Purcell Meats (Scotland) Ltd. v McLeod, [1987] S.L.T. 528

United Kingdom

Andrews v Director of Public Prosecutions, [1937] A.C. 576
Attorney General's Reference (no. 2 of 1999), [2000] Cr. App R. 207
Austin Rover v H. M. Inspectorate for Factories, [1989] 3 W.L.R. 520
Bolan v friern Hospital Management Committee, [1957] 1 W.L.R. 582

Bolton Metropolitan Borough Council v Malrod Insulations Ltd., [1993] I.R.L.R. 274
Caldwell, [1982] A.C. 341
Cato, [1976] 1 W.L.R. 110
Citizen's Life Assurance Company v Brown
Coppen v Moore (no. 2), [1898] 2 Q.B. 306
Cory Brothers & Co., [1927] 1 K.B. 810
Director General of Fair Trading v Pioneer Concrete (U.K.) Ltd., [1994] 3 W.L.R. 1249
Director General of Fair Trading v Smith's Concrete Ltd., [1992] Q.B. 213
Director of Public Prosecutions v Kent and Sussex Contractors, [1944] 1 K.B. 146
Donoghue v Stevenson, [1932] A.C. 562
El Ajou v Dollar land Holdings Plc., [1994] 2 All E.R. 685
Fagan, [1969] 1 Q.B. 439
Glasgow Corporation v Muir, [1943] A.C. 448
H. L. Bolton (Engineering) Co. Ltd. v T. J. Graham and Sons Ltd., [1957] 1 Q.B. 159
H. M. Coroner for East Kent ex. p. Spooner, (1989) 88 Cr. App. R. 10
Hall v Brooklands Auto racing Club, [1933] 1 K.B. 205
I.C.R. Haulage Ltd., [1944] K.B. 551
John Henshall (Quarries) Ltd. v Harvey, [1965] 1 All E.R. 725
Kite v O. L. L. Ltd., 8th December 1994, Winchester Crown Court, Unreported
Kong Cheuk Kwan v R, (1985) 82 Cr. App. R. 18
Lamb, [1967] 2 Q.B. 981
Laurence, [1981] 1 All E. R. 974
Lennards Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd., [1915] A.C. 705
Meridian Global Funds Management Asia Ltd. v Securities Commission, [1995] 2 A.C. 500
Miller, [1983] 2 A.C. 161
Moore v Bresler, [1942] All E.R. 515
Moussell Brothers Limited v London and North Western Railway Co., [1917] 2 K.B. 836
Nettleship v Weston, [1971] 2 Q.B. 691
Pearks, Gunston & Tee Ltd. v Ward, [1902] 2 K.B. 1
Peter Bayliss Kite, [1996] 2 Cr. App. R. (S.) 295
Pharmaceutical Society v London and Provincial Supply Association, (1880) 5 A.C. 859
Pittwood, (1902) 19 T.L.R. 37

R v Adomako, [1994] 3 W.L.R. 288
R v Associated Octel, [1995] I.C.R. 281
R v Bateman, (1925) Cr. App. R. 8
R v Board of Trustees of the Science Museum, [1993] I.C.R. 876
R v Brintons Limited, Court of Appeal, June 22nd, Unreported
R v British Steel Plc., [1995] I.C.R. 586
R v Birmingham & Gloucester Railway, (1842) 3 Q.B. 223
R v Board of Trustees of the Science Museum, [1993] I.C.R. 876
R v Gateway Foodmarkets Ltd., [1997] I.R.L.R. 189
R v Great North of England Railway Company, (1846) 9 Q.B. 315
R v Great Western Trains Co. Ltd., Central Criminal Court, July 27th 1999
R v F. Howe & Sons, [1999] I.R.L.R. 434
R v Mara, [1987] 1 W.L.R. 87
R v Nelson Group Services, [1998] 4 All E.R. 331
R v P & O European Ferries (Dover) Ltd., (1991) 93 Cr. App. R. 72
R v Redfern and Dunlop ltd. (Aircraft Division), [1993] Crim L.R. 43
R v Seymour, [1983] 2 A.C. 493
R v Supremeplan Ltd., Court of Appeal, June 20th 2000
R v Swan Hunter Shipbuilders Ltd. and Another, [1982] 1 All E.R. 264
R v Tyler, [1891] 2 Q.B. 588
Re Supply of Ready Mixed Concrete (no. 2), [1995] 1 All E.R. 135
R. M. C. Roadstone Products Ltd. v Jester, [1994] I.C.R. 456
Seaboard Offshore Ltd. v Secretary of State for Transport, [1994] 1 W.L.R. 541
Stone and Dobinson, [1977] 1 Q.B. 354
Tesco Stores v Brent London Borough Council, [1993] 2 All E.R. 718
Tesco Supermarkets Limited v Brent London Borough Council
Tesco Supermarkets Ltd. v Nattrass, [1972] A.C. 153
Wells v Cooper, [1958] 2 Q.B. 265

United States of America

Commonwealth v Illinois Central Railway Co., (1913) 152 Ky. 320; 153 S.W. 459
Commonwealth v McIllwain School Bus lines Inc., (1980) 283 Pa. Super 350; 443 A. 2d 1157
Commonwealth v Schomaker, (1981) 293 293 Pa. Super. 78; 437 A. 2d. 999

Commonwealth of Kentucky v Fortner L.P. Gas Company Inc., 610 S.W. 2d 941
Commonwealth of Pennsylvania v Penn Valley Resorts Inc., 343 Pa Super. 387; 494 A. 2d. 1139
Granite Construction Co. v The Superior Court of Fresno County, (1983) 149 Cal. App. 3d. 465
New York Central R. R. v United States (1909) 212 U.S. 481
People v Rochester Railway & Light Co., (1908) 195 N.Y. 102; 88 N.E. 22
State v Ford Motor Co., No. 5324 (Ind. Super. Ct., September 3rd 1978)
State v Lehigh Valley R. Co., (1917) 90 N.J.L. 372; 103 A. 685
The People of the State of New York v Ebasco Services Incorporated, (1974) 77 Misc. 2d 784; 354 N.Y.S. 2d 807
U. S. v Atlantic Richfield Co., 465F.2d. 58
U. S. v Bank of New England, 821 F. 2d. 844
U. S. v Time D. C., 381 F. Supp. 730
United States v Danilow Pastry Corp. (1983) 563F. Supp. 1159 (S.D.N.Y.)
United States v Van Schaik, (1904, C.C.N.Y.) 134F 592
Vaughan and Sons Inc. v The State of Texas, (1987) 737 S.W. 2d. 805

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Abstract

In 1996 the Law Commission published Report No.237 *"Criminal Law: Involuntary Manslaughter - A Consultation Paper"*. In that document they set out their proposals for a radical new offence of "corporate killing". Seven years later and the Government is still no closer to enacting a statutory offence of corporate manslaughter than it was then despite the current Labour Government making promises to this effect in its 1997 election manifesto.

Since the Law Commission Report was published we have seen Great Western Trains prosecuted unsuccessfully for the Southall train crash in 1997. We have also heard recently that Network Rail and Balfour Beatty will be prosecuted following deaths caused by a train derailment in October 2000. Yet this prosecution also seems doomed to failure so long as the common law maintains the "doctrine of identification" as the basis of liability for corporate manslaughter.

Throughout the course of this thesis we will be examining the law governing corporate manslaughter in England and Wales. We will examine the way that the doctrine of identification has evolved in the context of the historical development of corporate criminal liability. We will also witness the way in which the doctrine of identification has been utilized by the courts in corporate manslaughter prosecutions and the problems this causes.

Having concluded that the current common law position is unsatisfactory we will proceed to examine alternative approaches to the liability problem. This includes a treatment of sections 2 and 3 of the *Health and Safety at Work etc. Act, 1974*, and the legal position in other jurisdictions. Before drawing some conclusions on this matter we will also look at the interesting problem of corporate punishment.

Chapter 1: Introduction

An examination of the many volumes that have been published on the subject of corporate criminal liability will show that it is traditional in 'an introduction' to begin by looking at the seminal work of Edwin H. Sutherland in *"White Collar Crime"*. Convention suggests that a considerable section should show that Sutherland is the father of corporate crime and that one is greatly indebted to him in a consideration of corporate manslaughter.

Whilst one cannot understate the importance of Sutherland's work in bringing this area of criminal activity to the attention of the general public, it is felt that the most important moment in the development of this notion of "corporate crime" lies in a decision made almost half a century before Sutherland's work was published.

It is inconceivable to think that Lord Macnaghten could have possibly realised the impact his ruling on the matter of corporate identity would have on the law governing corporate crime over a century later. The decision here referred to is *Salomon v Salomon & Co. Ltd.*[1] which concerned claims

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[1] [1897] AC 22

made by unsecured creditors against Salomon following the liquidation of his business.

Salomon owned a small but successful leather business. On the basis of this success he decided to turn his business into a limited liability corporation, which he did by fulfilling the statutory requirements set out in section 6 of the *Companies Act, 1862*. That section required seven or more members to subscribe to the memorandum of association. In this instance, the seven signatories were Salomon, his wife and their five children, all of whom were issued with a £1 share. Salomon was issued with a further £20,000 worth of shares along with £10,000 worth of debentures (secured as a floating charge against the company's assets).

The business began to run into financial difficulties, however, so Salomon transferred his £10,000 to Broderip for £5,000 which he ploughed back into the business. Unfortunately, however, matters did not improve and when Broderip was not paid the interest on his debenture, he soon realised that the company's financial prospects were poor. As a result, he called in a receiver who put the corporation into liquidation. This raised enough funds to settle the corporation's debts to Broderip but did not settle the debts

owed to the company's unsecured creditors. Hence the receiver tried to render Salomon personally accountable for the debt.

At first instance Vaughan Williams J. held that although the corporation was properly registered as a legal entity, it had been formed contrary to the "spirit" of the *Companies Act, 1862* because the court felt that the seven members who signed up to the memorandum should have actively participated in the running of the corporation rather than having a merely superficial interest. As a result, the court held that the corporation was actually an agent of the principal, Salomon, and as the principal Salomon should be held personally accountable for the debts of his agent.

On appeal, the Court of Appeal agreed with the first instance decision in substance, but declared that the true basis for liability in this case was that the company held its property on trust for the beneficiary, Salomon. As such the creditors were entitled to a claim against Salomon through the corporation.

The House of Lords, however, declined to follow the approach of the lower courts. Instead they took the view that the statutory language of section 6

of the *Companies Act, 1862* merely required that the company should have had seven members as signatories to the memorandum in order for it to be validly incorporated. Since A. Salomon Ltd had been incorporated in accordance with the provisions of the 1862 Act, it was a corporate entity.

Lord Macnaghten could find no provision in the statute that required the subscribers to take an active part in the running of the company. As his Lordship eloquently stated "we have to interpret the law, not make it".[2] As such, he stated:

> "The company is at law a different person altogether from the subscribers to the memorandum, and though it may be that after incorporation the business is entirely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company in law is not the agent of the subscribers or the trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act."[3]

The case may have principally concerned the liquidation of a corporation, and there is little doubt that the legislature was keen to allow the easy

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[2] *Salomon v Salomon & Co. Ltd* [1897] AC 22, per Lord Macnaghten at page 46

formation of limited liability companies to encourage the entrepreneurial spirit of the small businessman during the industrial revolution, but the importance of the creation of a separate legal corporate entity in relation to corporate crime cannot be understated. The courts clearly realised the potential implications of the decision in *Salomon*. A corporation was to be considered as a separate entity for the purposes of business decisions; it could hold property independently from its constituent members, a corollary of which being that corporations were also capable of holding independent states of mind.

In relation to corporate manslaughter, therefore, the decision of Lord Macnaghten in *Salomon* proved to be a pivotal moment in the history of the offence, even more so than a trio of cases decided in 1944[4], which will be examined later. As will be seen, discovering a corporation's criminal intent is dependent upon the prosecution being able to find a member of a corporation who is the "directing mind and will"[5] and who possesses the necessary *mens rea* for the offence that the corporation has been charged with. If such a person can be found, they are identified as the embodiment

[3] *Salomon v Salomon & Co. Ltd* [1897] AC 22, per Lord Macnaghten at page 57

recourse for the victims once the unacceptable consequences of risky corporate activities do eventually materialise, the law finds itself ill equipped to deal with larger corporations with complex and diffuse power structures. As will be seen during the course of this thesis, the common law has developed in a way that appears to favour larger, poorly organised corporations. The "doctrine of identification" that has been devised by the courts as a basis of criminal liability for corporations has proven to be a hindrance to justice for those who have been wronged by corporations.

This problem has not, however, gone unnoticed and in 1996 the Law Commission published its proposals for a reform of the law of corporate manslaughter following the publication of its consultation paper in 1994. During the course of this document the Law Commission examined the law governing corporate manslaughter past and present and it was concluded that it was in desperate need of reform. The result was a recommendation from the Law Commission for the implementation of a new statutory offence of "corporate killing" which would be established if it could be shown that a "management failure" led to the victim's death. This new approach represented a marked change from the current law because the

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[5] *Tesco Supermarkets Ltd v Nattrass*

basis for liability in the Law Commission's proposed offence was more "corporate" in nature. The Law Commission's approach would impose liability where it could be shown that the *corporation* organised its activities in a manner that failed to ensure the health and safety of those employed in or affected by those activities.

In accordance with the election manifesto promises made by the Labour Party prior to its election in 1997 about the implementation of a statutory offence of corporate manslaughter, the Home Office published a paper (with a foreword by the then Home Secretary Jack Straw) highlighting the government's commitment to the creation of such an offence. This included a treatment of the Law Commission's proposals and advancing the government's own proposals for reform. Acknowledging the necessity for a new approach to corporate manslaughter the Government largely agreed with the Law Commission's proposals. There were, however, some aspects of the proposed offence that the Government wanted to alter namely the scope of the offence to punish individuals. It is against this background that this thesis' discussion is set.

Throughout the course of this thesis it is intended to show that the current state of the law governing corporate manslaughter is unacceptable, paying particular attention to the inadequacies of the "doctrine of identification". Having identified the problems with the current offence of corporate manslaughter alternative approaches to the problem are explored it is around this basic premise that my thesis is structured.

In Chapter 2 an examination of the law of corporate manslaughter is commenced by looking at the historical development of the law of corporate manslaughter. The importance of such a discussion is that by providing a historical background to the "doctrine of identification" it sets out the context within which the offence of corporate manslaughter is to be understood. Throughout the chapter there will be an examination of important case law developments in the common law which highlight the methods used by the courts to gradually erode the immunity of corporations to the criminal law.

Having determined that the courts were willing to impose liability on corporations for crimes requiring proof of *mens rea* Chapter 3 sees us turn our attention towards the current state of the law of corporate manslaughter.

This chapter begins with an examination of the law governing individual liability for manslaughter as this provides the basis for the corporate offence. Attention is then turned to the pivotal cases of *H. M. Coroner for East Kent ex. p. Spooner*[5] and *P. & O. European Ferries (Dover) Ltd.*[6]. The importance of these cases lies in the fact that the former case showed that the courts were willing to impose liability on a corporation for manslaughter, and the latter not only provides us with the first example of a corporation being prosecuted for manslaughter in England and Wales but also because it showed the problems that the "doctrine of identification" can create for any successful prosecution..

In Chapter 4 we begin to look at some alternative approaches to the problem of imposing liability for manslaughter on corporations. In this chapter the proposals for reform advanced by the Law Commission and the Government are examined. As with the Government's views the Law Commission's proposed new offence of "corporate killing" will be analysed and appraised which, as we will be seen, has as its central premise the notion of a "management failure". It will be suggested in the course of this section that those ideas for reform that are based on a holistic approach to

[5] (1989) 88 Cr. App. R. 10

corporate behaviour should be embraced rather than one which has a heavily individualistic bias as does the present law.

In Chapter 5 it is questioned whether it is futile to seek out a means of imposing criminal liability upon a corporation. In sections 2 and 3 of the *Health and Safety at Work Act 1974* we already see that duties have been imposed on corporations for causing death to employees or the general public by its undertakings. An examination of the case law relating to both sections shows that the courts are very willing to impose liability on 'corporations that kill' and take a strict view of attempts to curtail the scope of these two sections. It is noted, however, that there is a strong perception amongst the general public that regulatory crime is not "real" crime. Whilst corporations are undoubtedly punished for regulatory offences, there is an additional stigma that attaches to those who have been convicted of a criminal offence. Attempts are made in the last section of the chapter to determine whether there is some irreplaceable value to this notion of stigma.

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[6] (1991) 93 Cr. App. R. 72

Despite advancing the argument that if stigma does have some extra value it can be harnessed by using an adverse publicity punishment for regulatory offences, it is recognised that in the public eye, at least, there is still a much greater symbolic value attached, rightly or wrongly, to criminal prosecutions. As such it is necessary to seek alternative means to impose criminal liability. The search for an alternative basis of liability therefore leads to an examination of "tried and tested" methods that have already had a degree of success in holding corporations accountable for their actions. Therefore in Chapter 6 a more detailed examination of the decision of the Privy Council in *Meridian Global Funds Management Asia Ltd. v Securities Commission*[7] is undertaken. In that case the court suggested that the decision in *P & O Ferries (Dover) Ltd.* was nothing more than a pronouncement on the particular statute at issue in that case. The decision in *Meridian Global Funds Management Asia Ltd.* if followed in later cases would have created a more flexible rule of attribution which would have varied according to the particular statute or rule of law in question. The approach in this case is dismissed, however, on the grounds that it still has its roots in an individualistic form of liability which, as has been seen in the case of the doctrine of identification, can prove troublesome for the courts.

[7] [1995] 2 AC 500

With this in mind those theories of liability which have group behavioural patterns as their basis are examined. The reason for including these theories in such a discussion is that the doctrine of identification takes what is perceived to be an overly simplistic view of the corporate decision making process. This chapter aims to show that any theory of liability that relies on ascribing the liability of individuals to corporations is flawed because it fails to recognise that decisions made within a corporation will rarely be made by one person but are normally reached as a group, by voting at a board meeting for example. Its failure lies in its inability to account for the fact that individuals may reach decisions as part of a group that they would shy away from by themselves. Throughout Chapter 7 examples are provided both of such behaviour and the catastrophic consequences these courses of action can have. Furthermore some of the theories about corporate behaviour are highlighted in a bid to harness them as an alternative means of imposing liability on corporations.

Chapter 8 involves a discussion of the approach that is adopted in other jurisdiction in a bid to discover some better means of imposing corporate criminal liability. Throughout this chapter not only will the legislative

attempts of our neighbours in Scotland and of other Commonwealth jurisdictions such as Australia and Canada be examined, but also the approach of some European legislatures in Holland and Italy and in the United States will be considered. In keeping with the belief that it is better to adopt a holistic approach to the question of determining corporate liability, it is suggested that approach in Italy and that proposed in Australia will be of particular interest.

Having spent a great length of time focusing on how to impose liability the focus is then shifted to the question of punishing corporations for their crimes which is a topic of particular interest. If one is eventually able to find corporations liable for corporate manslaughter it would be catastrophic if the courts were left simply with a means of punishment that amounted to little more than "a slap on the wrist". This would undermine the effectiveness and stature of any statutory provision that was enacted. Therefore, in Chapter 9 a number of methods for punishing corporate offenders are examined. These methods range from a simple fine to more "exotic" alternatives such as enforced self-regulation and corporate probation. Used in conjunction with an effective system of corporate criminal liability, these new forms of punishment can be used to alter

corporate behaviour in a manner which favours the development of an organizational structure which is more geared towards the promotion of workplace safety.

Finally, in Chapter 10 proposals are advanced to indicate the way in which the law should develop in future. In order to provide some form of structure to the chapter the forthcoming prosecution of Network Rail and Balfour Beatty is used as a case study. Based on the facts as disclosed in the Health and Safety Executive reports some possible predictions about how the case might progress are put forward and alternative approaches that might lead to a successful prosecution are considered.

Clearly, the current position governing corporate manslaughter is unsustainable. The inadequacy of the law in this matter should no longer be tolerated. Finally, it is expected that a detailed examination of each of these topics will help to identify the best approach for the law to take in the future and in this thesis some of the options available to us will also be examined.

Chapter 2: The Historical Development of Corporate Criminal Liability

As the foundation for the rest of the work in this thesis this chapter contains an examination of the state of the common law governing the offence of corporate manslaughter. The discussion of this area of law will be divided into two main parts: 1) a brief outline of the law relating to the development of corporate criminal liability (dealt with in this chapter); and 2) a statement of the law of corporate manslaughter as it stands today (discussed in Chapter 3). In the discussion of this topic the main intent is to merely state the law as it is rather than enter into any detailed debate about its merits. Most of my comments on this matter until the next chapter which deals with proposals for reform of the law governing corporate manslaughter.

Corporations have not always been within the ambit of the criminal law. Indeed, as will be seen, in the early stages of the development of company law the legal position of the company was unclear. In this first section of this chapter the historical development of the law of corporate manslaughter will be considered (although this is no more than a cursory examination). In the discussion of this topic area the first issue to be looked at is the early

bars to corporate liability and the means employed by the court and the legislature to circumvent them.

Having dealt with this area attention is then shifted to how the courts managed to subject corporations to the full force of the criminal law. The main item for discussion in this section is the way the courts overcame the difficulty of attributing *mens rea* to a corporation which was a fundamental obstacle to be overcome by the courts. The examination of this topic will illustrate the two main methods utilised by the courts to attribute corporations with criminal liability, namely the doctrine of identification and vicarious liability. Discussion of these two doctrines is vital as corporate manslaughter is a common law offence which requires proof of *mens rea*. Hence this discussion is not merely of historical interest, but, furthermore, it sets the context for the development of corporate liability for manslaughter and provides the basis for the offence.

Before that area of the law can be looked at, it is first necessary to consider the early bars to corporate liability as it was not easy to bring corporations within the remit of the criminal law. A number of important philosophical and practical bars faced early attempts to the prosecution of corporations, namely;

The problem of attributing the necessary criminal intent was overcome by the courts creating a legal mechanism based on the theory of organic representation. This lead to the birth of the doctrine of identification, a conceptual tool which allowed the courts to impute liability by analogy. In an oft quoted passage, Viscount Haldane LC highlighted the fact that in some cases the courts were willing to treat certain members of the company as the alter ego of the corporation itself. He stated:

> "[A] corporation is an abstraction. It has no mind of its own any more than it has a body; its active and directing will must consequently be sought in the person who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation".[2]

The importance of the *alter ego* theory as a means of attributing liability to a corporation, as well as the problems associated with this use of metaphysics will be discussed more fully in the treatment of the doctrine of identification and vicarious liability in relation to the offence of corporate manslaughter.

The matter of the *ultra vires* bar was dispatched with relative ease. It was thought that a corporation could not be liable for a criminal act committed by its agents where that act could not be authorised by the corporation because it was outside the ambit of its powers. L. H. Leigh comments:

> "In the law of tort ... Lord Lindley put the matter beyond doubt in *Citizen's Life Assurance Company v Brown*. The corporation civilly was to be placed in the same position as a human employer with respect to liability for the torts of his employees. All employers were liable for torts involving malice committed by his employees in the course of their employment. The corporation was in the same position. The courts thus adopted the view that the relevant enquiry was not directed to the nature of the act in question, but to whether it was done in pursuit of objects competent to the corporation".[3]

The position with regard to *criminal* liability for *ultra vires* acts, however, was simply dismissed by inference as it was never raised in any of the cases involving the imposition of corporate criminal liability.

The greatest bar to be overcome by the courts, however, was the particular procedural problem which corporations posed to the English justice system.

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[2] *Lennards Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] AC 705, at 713

The biggest problem was the fact that corporations, as a legal person, clearly have no physical existence. In the case of indictable offences, on assize, a corporation had to appear personally in court.[4] Having no physical existence this proved to be a practical impossibility, therefore a corporation was not triable at assize and indeed could not be committed for trial. How did the courts overcome this problem? Leigh states:

> "The system was to prefer a bill before the grand jury ... if a true bill were returned and the matter remitted to assize it was then necessary to remove the indictment by *certiorari* to the King's Bench. There *ex gratia curia* the corporation could appear and plead by its attorney. ...When once the indictment had been preferred before the King's Bench, the court could compel the corporation to appear".[5]

Despite being a very long and drawn out process its use was continued with only minor alterations until the arrival of the *Criminal Justice Act, 1925*. This Act aimed to provide a simpler mechanism with which to commit a corporation to trial. This was done by making it easier for a corporation to

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[3] *"The Criminal Liability of Corporations in English Law"*, L. H. Leigh (1969: Lowe & Brydone, London), p. 9

[4] On trial for a summary conviction, however, it was acceptable for a corporation to be represented in court by its counsel or attorney under the provisions of the *Summary Jurisdiction Act, 1848*.

[5] *"The Criminal Liability of Corporations in English Law"*, L. H. Leigh (1969: Lowe & Brydone, London), p. 10.

appear in court by its representative. Where the corporation was charged with an indictable offence the examining justices could make an order empowering the prosecutor to present a bill in respect of the offence named in the order, provided they were satisfied that enough evidence had been adduced. The order was deemed sufficient to constitute a committal for the purposes of any enactment referring to committal for trial. Should the Grand jury at assize or quarter sessions return a true bill against the corporation, the corporation could appear at trial and plead by its representative before the court of assize or sessions. With regard to cases falling within s.17 of the *Summary Jurisdiction Act, 1879* states Leigh, a corporation could claim by its representative to be tried by a jury. This representative could be appointed, quite simply, by a statement in writing signed by the managing director of the corporation. This changed once again in 1933 with the abolition of the Grand Jury, after which:

> "a bill could be preferred before the court if the corporation had been committed for trial or, if a bill had been preferred, with the consent or by direction of a justice of the High Court, or pursuant to an order made under section 9 of the Perjury Act, 1911".[6]

The effect of this procedural review was to make the corporation's lack of a physical existence less of a bar to anyone seeking legal redress against it.

By the early 1930's, therefore, it was clear that a corporation could face trial in the English courts. What was not necessarily clear, however, was whether it was possible for criminal corporations to be subjected to the full force of the English criminal law. The early impetus to take steps to remedy this situation has its roots in a number of factors. Celia Wells advances the following explanation:

> "The development of corporate executive structures clearly challenged a legal response. The individual entrepreneur was being replaced by more complex business arrangement, and in terms of activity, the development of the railways transformed the landscape, the economy and mobility. Corporations began to cause damage and injury both to property and person. Plaintiffs discovered that the individual at fault might not be suable or worth suing. It emerged that what was simplest for the injured party was also the safest for management; to treat the corporation as the actor".[7]

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[6] *"The Criminal Liability of Corporations in English Law"*, L. H. Leigh (1969: Lowe & Brydone, London), p.12

[7] *"Corporations and Criminal Responsibility"*, Celia Wells (1993: Oxford, Clarendon Press), p. 97

How then were the courts to impose liability on corporations? Clearly the legal postion of the corporation needed much clarification. Its lack of *mens rea*, its physical inability to act and the aforementioned problems created by any attempt to indict a corporation, might have suggested that the regulation of the corporate activities could be outside the ambit of the criminal courts. This was not the case, however. Early efforts to pin criminal liability on a corporation resulted in companies being held liable for failures to perform a public duty which resulted in a nuisance, for example, the blocking of a public highway[8]. Leigh states:

> "The liability of corporations ... derives its real impetus from liability for non-feasance in cases of public nuisance. Such a prosecution was seen not as in essence a criminal proceeding but as a means of enforcing the performance of a public duty. No *mens rea* was required and, as the gist of the offence lay in a failure to eradicate the nuisance, no question of ascribing an act to the corporation arose".[9]

Since the aim of any prosecution was the ultimate removal of the nuisance rather than the punishment of the defendant, the question of the corporation appearing in court was never an issue. The question of punishment was

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[8] *R. v. Great North Eastern Railway Company* (1846) 9 Q.B. 315

equally unproblematic as punishment was by means of a fine, a form of penalty which could easily be imposed on a corporation. This meant that the next major conceptual step for the law to take was to impose liability on corporations for misfeasance, that is to say for a positive act rather than an omission.

In *R v Great North of England Railway Company*,[10] the defendant company had built a railway line that cut through and obstructed a highway. Contrary to statutory requirements the company had failed to build a bridge over the said highway. The prosecution alleged that this was analogous to trespass to land and that an indictment could lie against the corporation in respect of it. Having had their attention drawn to both the tendency at the time to treat corporations as civilly as well as criminally responsible, and the application of vicarious liability in tort, the court found the corporation guilty. Lord Denman C.J. highlighted the difficulty in any given case of distinguishing between an act and an omission. He stated:

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[9] *"The Criminal Liability of Corporations in English Law"*, L. H. Leigh (1969: Lowe & Brydone, London), p.16
[10] (1846) 9 QB 315

> "[It is] as easy to charge one person of a body corporate with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission".[11]

There were, however, crimes that a corporation could not commit stated Lord Denman CJ, these included treason, felony, offences against the person and perjury. This is justified on the basis that "these offences derive their character from the guilty mind of the offender, and at any rate were violations of the social duties belonging to natural persons".[12] A corporation could not, therefore, be guilty of these offences as they have no such duties. They could, however, be guilty of "commanding acts to be done to the nuisance of the community at large".[13] Finally Leigh concludes, Lord Denman CJ made his decision based purely on policy grounds, suggesting that he wanted to make an example out of the defendant corporation, possibly in an attempt to show the public that the courts were capable of exercising some control over these new powerful forms of business organisation. Lord Denman CJ realised that both those who ordered the work (the company directors) and the workmen could be

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[11] *R v Great North of England Railway Company* (1846) 9 QB 315, per Lord Denman C.J. at p.326.

[12] *"The Criminal Liability of Corporations in English Law"*, L. H. Leigh (1969: Lowe & Brydone, London), p.18

[13] *R v Great North of England Railway Company* (1846) 9 QB 315, 326

prosecuted, yet he declined to impose liability solely on the human actors involved. He states at p. 327:

> "[T]he public knows nothing of the former [the directors], and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make reparation for the injury. There can be no effective means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority: and there is no principle which places them beyond the reach of the law for such proceedings".

The undoubted aim of this statement was to try to place some kind of curb on the undoubtedly great powers of the corporate management. This was achieved by placing liability on the constituent members of the corporation. The suggestion is that it would be their ultimate responsibility to ensure that the company did not undertake an illegal course of action. The liability of corporations for misfeasance in cases of public nuisance was, by now, firmly established.

The introduction of legislative (or statutory) liability for corporations led to a further extension of the law's powers. Corporations became liable for

non-compliance with the terms of the various Clauses Acts, for example, the Railway Clauses Consolidation Act 1845 which dealt with the regulation of certain undertakings carried out by bodies corporate in carrying out public utility functions. The importance of such legislative intervention lay mainly in its ability to subject "certain areas of business activity to a detailed scheme of administrative control".[14] As the variety of corporate enterprises increased so did the volume of regulatory legislation and the number of convictions of companies who had breached their terms. Framed as strict liability offences, it became more common for corporations to appear as the accused in court cases.

At this stage, corporate liability [as in primary liability] for public nuisance offences was becoming increasingly accepted by the courts and the general public. One exception remained, however, that was cases involving *mens rea*. In those cases it was still preferable to hold the corporation vicariously liable as the master. The next logical step for the courts, therefore, was to try and find some mechanism by which to hold corporations *personally* liable. This was a necessary prerequisite before any assertion that a corporation could have a mind and will, and thus be subject to the criminal

[14] *"The Criminal Liability of Corporations in English Law"*, L. H. Leigh (1969: Lowe &

law, could be made. Such a mechanism was provided by the courts in the key case of *Moussell Brothers Limited v London and North Western Railway Co.*[15]

It had been a long established principle of the common law that vicarious liability was not a part of the criminal law. There were, however, exceptions to this rule. The first two were the common law offences of public nuisance and criminal libel, the final exception concerned statutory offences.

In *Mousell Brothers* the appellants were charged with two complaints under sections 98-99 of the *Railway Clauses Consolidation Act, 1845* for fraudulently trying to avoid the payment of certain freight charges. The offence required proof of *mens rea*. Finding the company guilty, Atkin J. stated:

> "... while *prima facie* a principal is not be made criminally responsible for the acts of his servants, yet the legislature may

Brydone, London), p. 21

[15] [1917] 2 KB 836

prohibit an act or enforce a duty in such terms as to make the prohibition of the duty absolute"[16].

When then might vicarious liability arise under a statute? Atkin J. continues at p.845:

> "To ascertain whether a particular Act of Parliament has that effect or not, regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom in ordinary circumstances it would be performed, and the person upon whom the penalty is imposed".

His Lordship's view on the matter appears to follow that of Channel J.[17] in *Pearks, Gunston & Tee Ltd. v Ward*[18] who stated:

> "By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the way of *mens rea*, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant. But there are exceptions to this rule in the case of quasi-criminal offences ... that is

[16] *Mousell Brothers Limited v London and North Western Railway Co.* [1917] 2 KB 836, 845.
[17] Quoted by Viscount Reading C.J. in *Mousell Brothers Limited* at p.843.
[18] *Pearks, Gunston & Tee Ltd. v Ward* [1902] 2 KB 1.

to say, where certain acts are forbidden by law under a penalty, possibly even a personal penalty, such as imprisonment, at any rate in default of a payment of a fine".

Wells is quick to highlight the similarity of the two decisions. In *"Corporations and Criminal Responsibility"*, she notes:

> "The emphasis [in *Mousell Brothers*] then is on the offence being statutory, and in this it echoes the 1902 decision of *Pearks, Gunston & Tee Ltd. v Ward*, which upheld corporate vicarious liability for a statutory offence (albeit one of strict liability) on the ground that there was no reason against its imposition, since the very object of the legislature was to forbid the thing absolutely. But Channel J. indicated that a corporation could be convicted under s.3 of the same Act which does involve criminal intent or at least knowledge"[19].

Mousell Brothers. appeared, therefore, to have taken the criminal liability of corporations a step further by imposing vicarious liability for statutory offences "beyond the realm of strict liability"[20]. A company could now be held liable for a statutory offence requiring *mens rea* where that statute gave rise to an absolute duty or prohibition. Whether such a duty or prohibition arose was a matter of construction resolved by referring to the *dictum* of

[19] *"Corporations and Criminal Responsibility"*, Celia Wells (1993:Oxford, Clarendon Press) p.100.

Atkin J. in *Mousell Brothers*. An opportunity for the potential widening of the ambit of corporate criminal liability using *Mousell Brothers* was presented to the courts in *Cory Brothers & Co.*[21] In this case the defendant company and three individuals were charged with both manslaughter and "setting up an engine calculated to destroy human life or inflict grievous bodily harm with the intent that the same should or whereby the same might destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact with it"[22] contrary to s.31 of the *Offences Against the Person Act, 1861*. In a bid to prevent thefts from its bunkers, the defendant company erected an electrified fence around one of its power-houses. A miner on a ratting expedition stumbled against it, and was electrocuted and killed. Holding that the indictment could not lie against the corporation, Finlay J. stated:

> "I am bound by authorities which show quite clearly that as the law stands an indictment will not lie against a corporation either for a felony, or for a misdemeanour of the nature set out in the second count of this indictment"[23].

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[20] *"Corporations and Criminal Responsibility"*, Celia Wells (1993:Oxford, Clarendon Press) p.101.
[21] [1927] 1 KB 810

Finlay J. supported this statement with *dicta* from the case of *R v Birmingham & Gloucester Railway*[24]; *R v Great North of England Railway*[25]; *Pharmaceutical Society v London and Provincial Supply Association*[26]; and *R v Tyler*[27]. All these cases were accepted as authority for the proposition that a corporation could not be guilty of "treason or of felony ... of perjury or offences against the person"[28]. Lord Denman C.J. in *Great North of England Railway* explained this statement by saying:

> "The court of Common Pleas lately held that a corporation might be held liable in trespass; but nobody has sought to fix them with acts of immorality. These plainly derived their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases: but they may be guilty of commanding acts to be done to the nuisance of the community at large"[29].

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[22] *Cory Brothers & Co.* [1927] 1 KB 810, 814.
[23] *Cory Brothers & Co.* [1927] 1 KB 810.
[24] (1842) 3 QB 223
[25] (1846) 9 QB 315
[26] (1880) 5 AC 859
[27] [1891] 2 QB 588
[28] Per Lord Denman C.J. in *R v Great North of England Railway* (1846) 9 QB 315, 326, quoted by Finlay J. in *Cory Brothers & Co.* [1927] 1 KB 810 at 816.
[29] Per Lord Denman C.J. in *R v Great North of England Railway* (1846) 9 QB 315, 326, quoted by Finlay J. in *Cory Brothers & Co.* [1927] 1 KB 810 at 816.

R. S. Welsh, in his article *"The Criminal Liability of Corporations"*[30], points out that the decision in *Cory Bros.* was heavily criticised at the time by C. R. N. Winn in his article *"The Criminal Responsibility of Corporations"*[31]. His argument runs thus:

> "In all likelihood a more detailed statement of the circumstances would reveal the fact that the moral responsibility for the erection of the fence lay with the directors ... The directors in their corporate capacity are, on such an hypothesis, the guilty parties, both morally and legally, since their command to inferiors who had no practical alternative to obedience was the originating cause of the colliers death. The directors are guilty in their corporate capacity and should have been indicted in that capacity: in their corporate capacity they constitute to all practical intents the corporation itself ... The *intra vires* decisions and commands of a board of directors are factually, and should be legally, the decisions of the corporation and not of individuals *qua* individuals; for a corporation is an entity in which individuals are united within a bond of association which modifies their mental processes"[32].

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[30] (1946) 62 LQR 345.
[31] (1929) 3 CLJ 398.
[32] *"The Criminal Responsibility of Corporations"* C. R. N. Winn, (1929) 3 CLJ 398 at 405-406.

Even at this (relatively) early stage in the development of the law of corporate criminal liability, it is clear that some academic commentators were beginning to recognise the potential for the mental state of the board of directors to be attributed to the corporation. Such a development would have allowed the courts to find that "[t]he corporate will may entertain *mens rea* and the corporate hands, which are factually the hands of its representatives acting in their corporate capacity, may perform the *actus reus*, and full criminal liability should logically attach to the corporation"[33].

Mousell's case however, was not even mentioned in the case of *Cory Bros.* It is arguable that, had Finlay J. recognised the potential of *Mousell Bros.* to enable a court to impose vicarious liability on a corporation for an offence requiring *mens rea*, the courts might have found the defendant company liable for the s.31 offence at least. At that stage the doctrine of identification had not been developed, so it would have been impossible to find a company guilty of manslaughter. Indeed, Stable J. commented in *ICR Haulage Ltd.*[34]:

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[33] Winn, *op. cited* at 407.
[34] [1944] KB 551

"[I]nasmuch as [*Cory Bros.*] was decided before the decision in *DPP v Kent and Sussex Contractors* ... if the matter came before the court today, the result might well be different. As was pointed out by Hallett J. in *DPP v Kent and Sussex Contractors*, this is a branch of the law to which the attitude of the courts has in the passage of time undergone a process of development"[35].

The doctrine of vicarious liability, in the context of corporate criminal liability, has been considered recently in two cases heard at appellate level[36]. The first of these was *Seaboard Offshore Ltd. v Secretary of State for Transport*[37]. The case concerned s.31 of the *Merchant Shipping Act, 1988*, which was brought into force following the findings of the Sheen inquiry into the Zeebrugge ferry disaster. The court had to consider whether a manager is vicariously liable for a breach of duty under that section, which arises from any act or omission by any of the managers servants or agents. In finding the defendant company guilty, Lord Keith of Kinkel stated:

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[35] *ICR Haulage Ltd.* [1944] KB 551, per Stable J at 556. Quotation taken from *"Legislating the Criminal Code: Involuntary Manslaughter"* Report No.237, Law Commission (HMSO:1996) at p.80.
[36] Cited in *"Legislating the Criminal Code: Involuntary Manslaughter"* Report No.237, Law Commission (HMSO:1996).
[37] [1994] 1 WLR 541

> "It would be surprising if by the language used in s.31 Parliament intended that the owner of a ship should be criminally liable for any act or omission by any officer of the company or member of the crew which resulted in unsafe operation of the ship, ranging from a failure by the managing director to arrange repairs to a failure by the bosun or cabin steward to close portholes. Of particular relevance in this context are the concluding words of s.31 (4) referring to the taking of all such steps as are reasonable for *him* (my emphasis) to take, i.e. the owner, charterer or a manager. The steps to be taken are such as will secure that the ship is operated in a safe manner. That conveys to me the idea of laying down a safe manner of operating the ship by those involved in the actual operation of it and taking appropriate measures to bring it about that such safe manner of operation is adhered to"[38].

He concludes at p.546:

> "[the offence under s.31] consists simply in a failure to take steps which by an objective standard are held to be reasonable steps to take in the safe operation of the ship, and the duty which it places on the owner, charterer or manager is a personal one. The owner, charterer or manager is criminally liable if he fails personally in the duty, but is not criminally liable for the acts or omissions of his subordinate employees if he himself has taken all such steps".

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[38] *Seaboard Offshore Ltd. v Secretary of State for Transport* [1994] 1 WLR 541, per

It is clear in this case that Lord Keith of Kinkel has declined to impose vicarious liability on the company because, on a proper interpretation of the statutory provision in question, the duty imposed was solely a personal one, which prevented the imposition of vicarious liability.

The second case is that of *R v British Steel Plc.*[39] The prosecution followed the death of an independent contractor who was carrying out work under the supervision of a British Steel employee. The House of Lords took a different approach to the court in *Seaboard Offshore Ltd.* This case involved a breach of section 3 (1) of the *Health and Safety at Work, etc. Act, 1974*, which requires employers to conduct their undertakings in a manner, which does not threaten the health and safety of "persons not in his employment who might be affected thereby"[40]. This would cover, for example members of the general public, such as visitors to the worksite, or people living nearby. Counsel for British Steel Plc. argued, under the doctrine of identification (which will be discussed later), the company could escape criminal liability if, at directing mind level, it had taken reasonable care. Heavy reliance was placed on the House of Lords decision in *Tesco*

Lord Keith of Kinkel at 545.
[39] [1995] ICR 586
[40] Section 3 (1) *Health and Safety at Work, etc., Act 1974*

Supermarkets Ltd. v Nattrass[41] (also to be discussed later) in which the company's defence was that the commission of the offence was due to the act of "another person"[42] and that the company had taken all reasonable care and exercised due diligence in trying to prevent the commission of such an offence. Considering this defence, Lord Reid concluded:

> " 'They' – the board of directors – set up a chain of command through regional and district supervisors, but they remained in control. The shop managers had to obey their general directions and also take orders from their superiors. The acts or omissions of the shop manager were not the acts of the company itself"[43].

Counsel for British Steel Plc. clearly hoped that the House of Lords would, in this instance, follow their earlier decision in *Tesco v Nattrass*. If this were the case then liability for the death would lie with Mr C. (the supervisor) for failing to operate a safe working system on site, rather than pinning liability on the company under the ordinary rules of attribution. Their Lordships refused, however, to entertain such an argument. It was possible, they suggested, to distinguish between the two cases by looking at

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[41] [1972] AC 153

[42] That is to say, a person who was not sufficiently senior in the corporate management structure to be identified with the company. This was a statutory defence provided by s.24 (1), *Trade Descriptions Act, 1968*.

the language of the two statutory provisions at issue in both cases. Having found, in accordance with the principles laid out in *R v Board of Trustees of the Science Museum*[44]; and *R v Associated Octel*[45] that Section 3 (1) *Health and Safety at Work, etc. Act, 1974* creates an absolute prohibition (subject to the defence of reasonable practicability), Steyn J. stated:

> "Given the interpretation which prevailed [in the aforementioned decisions] and which we have adopted counsel for British Steel Plc. concedes that it is not easy to fit the idea of corporate liability only for acts of the "directing mind" of the company into the language of s.3 (1). We would go further. If it be accepted that parliament considered it necessary for the protection of public health and safety to impose, subject to the defence of reasonable practicability, absolute criminal liability, it would drive a juggernaut through the legislative scheme if corporate employers could avoid criminal liability where the potentially harmful offence is committed by someone who is not the directing mind of the company ... If we accept British Steel Plc.'s submission, it would be particularly easy for large industrial companies engaged in multifarious hazardous operations to escape liability on the basis that the company, through

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43 *Tesco Supermarkets Ltd. v Nattrass* [1972] AC 153, per Lord Reid at 175.
44 [1993] ICR 876
45 [1995] ICR 281

it's "directing mind" or senior management, was not involved. That would emasculate the legislation"[46].

In the British Steel case, therefore, the court rejected the doctrine of identification in favour of vicarious liability. An important and beneficial aspect of this decision is highlighted by the Law Commission who point out:

"The court added that the effect of this judgement would be to reduce the time taken up in trials on s.3 (1) by dispensing with the need to examine whether particular employees were part of senior management, and to promote a culture of guarding against risks to health and safety caused by hazardous industrial activity"[47].

Such a judgement was ideal in the context of the *Health and Safety at Work, etc. Act, 1974*. It, arguably, reflected the spirit of the legislation and facilitated the achievement of its aims.

As a basis of corporate liability, it is clear that vicarious liability has been accepted by the courts, but it has not been so readily accepted by some

[46] *R v British Steel Plc.* [1995] ICR 586, per Steyn J. at 593.
[47] *"Legislating the Criminal Code: Involuntary Manslaughter"* Report No.237, Law Commission (HMSO:1996) p.73.

academic commentators. In his article *"Corporate Culpability"*, Chris Clarkson deals with the viability of vicarious liability as a basis for such an imposition of corporate liability. The main advantage of the doctrine of vicarious liability, states Clarkson, is that it avoids the problem of having to identify a person sufficiently important in the hierarchy of the company who has committed the crime. This is advantageous, states Clarkson, because it prevents companies avoiding criminal liability by delegating illegal operations to lower managers or employees, that is to say people not sufficiently important to be caught by the doctrine of identification.

Unfortunately it appears, however, that the disadvantages of this doctrine far outweigh its benefits. This is especially the case, Clarkson states, when applied to crimes involving *mens rea*. The disadvantages, he claims, are two - fold. Firstly, it has not been proved that using vicarious liability as a basis for corporate liability acts as any form of incentive to conduct its affairs in a criminally responsible manner. If anything, states Clarkson:

> "It has been pointed out that companies will, at most, only do what is reasonable to prevent harm and strict and vicarious liability could

actually operate as a disincentive to companies to engage in socially beneficial enterprises"[48].

The second problem, according to Clarkson, is that:

> "Vicarious liability may be over inclusive in that a company could be penalised for a fault of an employee for whom the company ought not to be held responsible in that a company may have done everything within its power to prevent the wrong doing. The company may have adopted clear policies and issued express instructions to avert the wrong. If a maverick, perhaps menial, employee decides to "go it alone" it hardly seems justifiable to hold the company liable for their actions or inactions"[49].

This second criticism is clearly aimed at the approach adopted by the court in *Coppen v Moore (no.2)*[50] and followed in *Director General of Fair Trading v Pioneer Concrete (UK) Ltd.*[51] where it was stated that an employer is not prevented from being found vicariously liable for the criminal acts of an employee where they have expressly forbidden the employee from committing the criminal act in question. This was an

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[48] *"Corporate Culpability"* Chris Clarkson *http://webjcli.ncl.ac.uk/1998/issue2/clarkson2.html*
[49] *"Corporate Culpability"* Chris Clarkson *http://webjcli.ncl.ac.uk/1998/issue2/clarkson2.html*
[50] [1898] 2 QB 306

important ruling as it prevents companies from enjoying the benefits of employees' criminal acts whilst still avoiding liability purely because they had forbidden it.

Of course, vicarious liability is not the sole means of attributing liability to a corporation. The doctrine of identification, or the *alter ego* theory as it is also known, has its origins in a trio of cases in 1944. It is to the development of this doctrine that I now shift my attention in the consideration of the historical development of corporate criminal liability. In this section the rise and fall of the popularity of this doctrine in the court system of England and Wales will be examined and the application of this doctrine to the substantive law of manslaughter will be considered at a later stage.

L. H. Leigh, at an early stage noticed a particular problem. He stated:

> "The existing rule of liability was [pre 1944] that corporate liability was vicarious liability. Consequently, before criminal liability could be imposed upon corporations, some method had to be found for

[51] [1994] 3 WLR 1249

ascribing liability personally to the body corporate. The *alter ego* theory has been said to provide the necessary defence"[52].

Indeed, "the introduction of this doctrine", the Law Commission state, "enabled criminal liability to be imposed on a corporation, whether as perpetrator or accomplice, for virtually any offence, notwithstanding that *mens rea* was required, and without having to rely on statutory construction"[53].

The change in the courts' attitude to the question of the criminal liability of corporations has often been identified as having its origins in the cases of *Director of Public Prosecutions v Kent and Sussex Contractors Ltd.*[54]; *R. v. ICR Haulage Ltd.*[55]; and *Moore v Bresler*[56]. These cases introduced, and developed into the criminal law, the oft-cited statement of Viscount

[52] *"The Criminal Liability of Corporations in English Law"*, L. H. Leigh (1969:Lowe & Brydone, London) p.91.
[53] *"Legislating the Criminal Code: Involuntary Manslaughter"* Report No.237, Law Commission (HMSO:1996) p.74.
[54] [1944] 1 KB 146
[55] [1944] KB 551
[56] [1944] 2 All ER 515. Note *"Confusion Worse Confounded: The End of the Directing Mind Theory?"* R. J. Wickins and C. A. Ong, [1997] JBL 524, which questions whether the language used by the courts in these cases actually does give rise to any doctrine of identification.

Haldane L.C. who said at page 713 in Lennards Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd.[57].

> "[A] corporation is an abstraction. It has no mind of its own anymore than it has a body; its active and directing will must consequently be sought in the person of somebody who for some purposes might be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation".

If such a person could be found then the corporation could be held liable because "his action is the very action of the company itself"[58].

In Director of Public Prosecutions v Kent and Sussex Contractors Ltd., the company was charged with two offences under the *Motor Fuel Rationing (No. 3) Order, 1941*, and Regulation 82 of the *Defence (General) Regulations, 1939*, committed by the company in an attempt to fraudulently acquire petrol coupons. The magistrates court refused to convict the company on the basis that the company could not form the necessary *mens*

[57] [1915] AC 705,713
[58] Lennards Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd., [1915] AC 705, per Viscount Haldane L.C. at 714

rea required to commit these offences. The prosecution appealed. Allowing the appeal Viscount Caldecote L.C. J. stated:

> "[Counsel for the defendant company's] argument on the question whether there can be imputed to the company the knowledge or intent of the officers of the company falls to the ground because although the directors or general manager of a company are its agents, they are something more. A company is incapable of acting or speaking or even thinking except in so far as its officers have acted, spoken or thought ... In the present case the first charge against the company was of doing something with intent to deceive, and the second was that of making a statement which the company knew to be false in a material particular. Once the ingredients of the offences are stated in that way it is unnecessary, in my view, to inquire whether it is proved that the company's officers acted on its behalf. *The officers are the company for this purpose*" (my emphasis).[59]

Supporting this view Macnaghten J. stated:

> "It's true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate ... If the responsible agent of a company, acting

[59] *Director of Public Prosecutions v Kent and Sussex Contractors Ltd.*, [1944] 1 KB 146, per Viscount Caldecote L.C. J. at 155.

> within the scope of his authority puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that according to the authorities ... his knowledge and intention must be imputed to the company",[60]

Interestingly, the case of *Mousell Brothers* was not applied in this case. The statutory regulations in question in *Kent and Sussex Contractors* were different from those in *Mousell Brothers* "in that they imposed no absolute criminal liability upon a principal or a master for the acts of his servants".[61]

This bold new approach was followed by the Court of Criminal Appeal in *R v I. C. R. Haulage*. In this case the company was charged with the common law offence of conspiracy. The offence required proof of *mens rea*, thus vicarious liability could not apply. Despite holding that there was no reason in law why this indictment should not lie against the company, Stable J. was keen to point out the limitations of this decision. He stated:

> "We are not deciding that in every case where the agent of a limited liability company acting in its business commits a crime, the company is automatically to be held criminally responsible ... Where

[60] Director of Public Prosecutions v Kent and Sussex Contractors Ltd., [1944] 1 KB 146, per Macnaghten J.
[61] *"The Criminal Liability of Corporations"*, R. S. Welsh, (1946) 62 LQR 345, 356

in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief, is the act of the company and in cases where the presiding judge so rules, whether the jury are satisfied that this has been proved must depend on the nature of the charge, the relative positions of the officer or agent, and the other relevant facts and circumstances of the case".[62]

So what exactly did the court decide in *I. C. R. Haulage*? L. H. Leigh states:

> "In the result the case clearly establishes two propositions. The first is that a distinction exists between personal and vicarious liability as respects corporations. The second is that, in the appropriate circumstances, the state of mind and actions of an agent may be the state of mind and acts of the company".[63]

This indicates that, in following the approach of the courts in the earlier case of *Kent and Sussex Contractors* and *I. C. R. Haulage* had established that it was possible for a company to be held *directly* liable for criminal offences requiring proof of *mens rea*. This meant that the courts were,

[62] *R v I. C. R. Haulage* [1944] 1 KB 551, per Stable J. at 559

[63] *"The Criminal Liability of Corporations in English Law"*, L. H. Leigh (1969: Lowe & Brydone, London), p. 34

seemingly, wiling to accept that a corporation could be found to hold the *mens rea* necessary to commit a "proper" criminal offence.

Further support for this view is to be found in the case of *Moore v Bresler*, the third case in the trio. This case served merely to confirm the growing acceptance of the *alter ego* theory by the courts, and the steady move towards accepting that a corporation could be directly liable for a criminal offence.

In this case the company and two of its officials (the secretary and manager of the Nottingham branch) were charged with publishing a document containing false information, with intent to deceive contrary to section 35 (2) of the *Finance (No. 2) Act, 1940*. The documents were produced with the aims of embezzling the company and avoiding the company's purchase tax liability. The Company was convicted. The secretary and manager were deemed to have acted "within the scope of their authority" despite the fact that their acts were fraudulent, and in making the fraudulent returns they were acting as officers of the company. Humphreys J. stated:

> "It is difficult to imagine two persons whose acts would more effectually bind the company or who could be said on the terms of their employment to be more obviously agents for the purposes of the company than the secretary and general manager of that branch and the sales manager of that branch".[64]

Clearly the courts, in the aftermath of these three cases, were willing to find a corporation guilty of a criminal offence in those situations where the officer holding the requisite *mens rea* was sufficiently senior within the corporate structure for them to be deemed to be the embodiment of the company itself.

With such an impetus for imposing direct corporate liability on corporations now existing, the language of identification began appearing in other court judgements. In *H. L. Bolton (Engineering) Co. Ltd. v T. J. Graham and Sons Ltd.*[65], for example, Denning L.J. famously said:

> "A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and

[64] *Moore v Bresler* [1944] 2 All ER 515, per Humphreys J. at p. 517
[65] [1957] 1 QB 159,

agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such".[66]

Wickins and Ong point out, however, that it was not until nearly 10 years later that the courts accepted the relevance of the judgement in *H. L. Bolton (Engineering) Co. Ltd.* to matters of criminal liability.[67] They point to the case of *John Henshall (Quarries) Ltd. v Harvey*[68] to support this assertion. The company was charged with aiding and abetting the use of over laden lorries in breach of road safety provisions. The facts are not important, but on appeal to the Queen's Bench Division it was ruled, following earlier authorities, that in the case of absolute offences there was no doubt that a master, be it an individual or a company, could be held vicariously liable for offences committed by their employees. Lord Parker, however, had to reconcile his approach with that of the courts in *H. L. Bolton (Engineering) Co. Ltd.* Lord Parker L.C.J. did this, Wickin and Ong state, "by stating that

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[66] *H. L. Bolton (Engineering) Co. Ltd. v T. J. Graham and Sons Ltd.* [1957] 1 QB 159, per Denning L.J. at 173. Cited with approval by the House of Lords in *Tesco Supermarkets Ltd. v Nattrass*.
[67] *"Confusion Worse Confounded: The End of the Directing Mind Theory?"* R. J. Wickins and C. A. Ong, [1997] JBL 524, 535
[68] [1965] 1 All ER 725,

aiding and abetting involved a guilty intent, and thus the knowledge of the servant could not be imputed to the master",[69] consequently the corporation's conviction was quashed. Under the terms of the "directing mind and will" test, the persons who had committed the offence (the weigh bridge operator and the office manager) were presumably not sufficiently senior figures within the corporate structure to be "identified" with the company. They were merely to be considered as the "hands" of the operation.

The pinnacle of the development of the doctrine of identification, however, is commonly accepted as being the case of *Tesco Supermarkets Ltd. v Nattrass*[70]. In this case the defendant company was charged with an offence under the *Trade Descriptions Act, 1968*, namely of offering goods for sale at a price less than that at which they were being sold. At trial the defendants tried to raise a defence under section 24 (1) of the Act on the grounds that the offence was due to the act or default of "another person", namely the manager of the store where the offence was committed. Furthermore, they asserted that they had exercised all due diligence to avoid

[69] *"Confusion Worse Confounded: The End of the Directing Mind Theory?"* R. J. Wickins and C. A. Ong, [1997] JBL 524, 535
[70] [1972] AC 153

the commission of such an offence. The justices held that the defendants had satisfied the requirement of due diligence, but the defence failed because the manager could not be said to be "another person" within the meaning of section 24 (1) (a). The defendants were convicted accordingly. On appeal, however, the Divisional Court found that, whilst the manager could be classified as "another person", Tesco had failed to exercise all due diligence within the meaning of section 24 (1) (b) of the Act. The appeal reached the House of Lords.

The central issue in this case was clearly whether the branch manager could be regarded as the embodiment of the company under the identification doctrine. If this were so then both the manager and the company could be held liable under the provisions of section 21 of the *Trade Descriptions Act, 1968*. The House of Lords allowed the appeal. They held that the branch manager was not sufficiently senior within the corporate structure to be referred to as the "directing mind and will" of the company. Having explained the nature of the doctrine of identification, Lord Reid continued:

> "It must be a question of law whether, once the facts have been ascertained, a person doing a particular thing is to be regarded as the company or merely as the company's servant or agent. In that case,

> any liability of the company can only be statutory or vicarious liability".[71]

Lord Reid then criticises the opinion of Stable J. in *I. C. R. Haulage Ltd.* who suggests that whether a company could be held liable for offences requiring *mens rea* depended, *inter alia*, on the nature of the charge facing the corporation. Lord Reid states:

> "I think that the true view is that the judge must direct the jury that if they find certain facts proved then, as a matter of law, they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company ... I do not see how the nature of the charge can make any difference. If the guilty man was in law identifiable with the company then, whether his offence was serious or menial, his act was the act of the company, but if he was not so identifiable then no act of his, serious or otherwise, was the act of the company itself".[72]

Their Lordships clearly felt that, in committing the offence, the branch manager was acting merely as a servant or an agent. This would prevent the courts from pinning liability on the company via the doctrine of identification. Thus the company could not be convicted under the statutory

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[71] *Tesco Supermarkets Ltd. v Nattrass* [1972] AC 153, per Lord Reid at 170.

provision because, under the section 20 (1) of the *Trade Descriptions Act, 1968* the branch manager did not hold a sufficiently senior position within the company for Tesco to incur liability. Therefore, under the provisions of section 24 (1) (a) of the act the criminal offence was deemed to have been committed by "another person", so the appeal was allowed and the corporation's conviction was quashed.

Within the context of the historical development of the doctrine of identification *Tesco Supermarkets Ltd. v Nattrass* is a very important case. Its main importance is that it clearly established that corporations could be brought within the ambit of the criminal law for offences involving *mens rea*. Secondly it proved that the *alter ego* theory had an important role to play in the criminal law. On the other hand, the "directing mind and will" test was later to be the downfall of the doctrine of identification's usefulness in the context of corporate manslaughter. *Nattrass*, therefore, raises the important question who may constitute the "directing mind and will" of a company? Their Lordships clearly held very differing views on this matter. Lord Reid, for example, talks of a company only being held liable for the acts of "the board of directors, the managing director and

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[72] *Tesco Supermarkets Ltd. v Nattrass* [1972] AC 153, per Lord Reid at 173

perhaps other superior officers of the company [who] carry out the functions of management and speak and act as the company".[73] Lord Diplock, however, took a different approach. He states:

> "What natural person or persons are to be treated as being the corporation for the purpose of taking precautions and exercising due diligence? My Lords a corporation incorporated under the terms of the *Companies Act, 1948* owes its corporate personality and its powers to its constitution, the memorandum and articles of association. The obvious and only place to look to discover by what natural persons its powers are exercisable is in its constitution ... In my view, therefore, the [answer to this question] ... is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors or by the company in general meeting pursuant to the articles are entrusted with the exercise of the powers of the company".[74]

Lord Diplock then turns his attention to the aforementioned speech of Lord Denning in *H. L. Bolton (Engineering) Co. Ltd. v T. J. Graham and Sons Ltd.*[75]. He states at page 200:

[73] *Tesco Supermarkets Ltd. v Nattrass* [1972] AC 153, per Lord Reid at 171
[74] *Tesco Supermarkets Ltd. v Nattrass* [1972] AC 153, per Lord Diplock at 199-200
[75] [1957] 1 QB 159

> "In the case in which this metaphor was first used Denning L. J. was dealing with acts and intentions of directors of the company in whom the powers of the company were vested under the articles of association. The decision in that case is not authority for extending the class of persons whose acts are to be regarded in law as the personal acts of the company itself beyond those who by, or by actions taken under its articles of association are entitled to exercise the powers of the company".

It is clear that, even at this early stage the doctrine of identification was presenting the courts with some conceptual difficulties. G. R. Sullivan highlights the problems created by the decision of the House of Lords in *Nattrass* in his article *"The Attribution of Culpability to Limited Companies"*. He states:

> "If findings of identification are confined to those corporate officials with plenary authority across a sphere of strategic corporate management – the minimum condition for Lord Diplock in *Tesco Supermarkets Ltd. v Nattrass* – at least a measure of doctrinal certainty is maintained. That certainty is lost when courts take a wider view in the interests of policy. Inconsistency inevitably arises. We are then confronted with cases where, for example, a non-executive director with no involvement in the company's management is nonetheless identified with the company yet the

> European sales manager of Dunlop (Aircraft) Ltd. is found to be too junior for identification with his employing company. Uncertainty is increased when courts depart altogether from the doctrine of identification where precedent would indicate that the doctrine was germane".[76]

It was not until twenty years later, however, "that a crack began to appear in the whole edifice of the directing mind theory".[77] In the case of *Tesco Stores v Brent London Borough Council*[78] Tesco was prosecuted for selling an age restricted video to a person under the age of eighteen contrary to the provisions of the *Video Recordings Act, 1984*. The prosecution had to prove that Tesco knew or had reasonable grounds to believe that the purchaser of the said restricted video was under the age of eighteen. Seemingly, this issue could have been resolved using the doctrine of identification. Under the rule in *Nattrass* it would have been absurd to find that a cashier was sufficiently senior in the corporate management structure to be viewed as part of the "directing mind and will" of the company so as to have their knowledge attributed to Tesco. Yet this is effectively what both the Magistrates and the Divisional Courts held. *Nattrass* was

[76] *"The Attribution of Culpability to Limited Companies"*, G. R. Sullivan (1996) 55 CLJ 515, 519

[77] *"Confusion Worse Confounded: The End of the Directing Mind Theory?"* R. J. Wickins and C. A. Ong, [1997] JBL 524, 538

distinguished and dismissed on the grounds that it dealt with a different statutory provision. As a matter of construction it was felt that the relevant provision of the *Video Recordings Act 1984* suggested that the intent and knowledge of the cashier was clearly intended to be attributed to the company itself. Whilst the decision in *Nattrass* was not criticised in *Tesco v Brent L. B. C.* there seemed to be an indication that the principle established in *Nattrass* was nothing more than an interpretative pronouncement restricted to a particular statutory provision, a view advanced by G. R. Sullivan in his aforementioned article.

Further inroads into the usefulness of the doctrine of identification were made by the Court of Appeal in *R v Redfern and Dunlop Ltd. (Aircraft Division)*[79]. The appellants were charged with knowingly attempting to supply tyres designed for combat aircraft in Iran contrary to section 68 (2) of the *Customs and Excise Management Act, 1979* and Article 2 (v) of the *Export of Goods (Control) Order, 1987*. The appellants had applied for an export license falsely identifying the consignee as a Swiss firm. The Department of Trade and Industry stated that they would have refused the license had they known the actual destination of the tyres. Furthermore,

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[78] [1993] 2 All ER 718

they claimed that the appellants knew that the said tyres were actually intended for supply to Iran, despite the fact that the appellants denied this claim. The appellants were convicted. On appeal Redfern claimed, *inter alia*, that the license, and thus the export, was lawful as it had not been revoked under any of the available statutory provisions. This very fact, he claimed, meant there was no charge to answer. Dunlop, on the other hand, claimed that Redfern was not a sufficiently senior employee within their corporate structure to be identified as part of the controlling mind. This, they claimed, meant that no criminal liability could be attributed to the company. The Court of Appeal dismissed Redfern's appeal but allowed Dunlop's on the grounds that in order to fix Dunlop with criminal liability it would have to be shown that:

> "... the individual whose conduct was under question [could be] identified with the company to the extent of being one of its directing minds or its very embodiment. That [means any] one of the persons in actual control by virtue of the company's constitutional documents, or a person to whom had been delegated the control of some part of the company or its management functions so that he could be said to have acted as the company's directing mind ... Clearly not every delegation of function would render the company

[79] [1993] Crim L. R. 43

criminally liable for its delegate's acts. Administrative or executive functions which did not confer true power of management and control would be insufficient".[80]

At first instance the trial judge had directed the jury that:

"... before they convicted the company they must be sure that the board had delegated to [Redfern] its functions in relation to the exportations, including the function of applying for licenses, so that he had full authority to act without reference to any body above him. He said that if [the jury] were sure that the board had delegated those functions to [Redfern] then the company was guilty".[81]
Redfern was four steps down the reporting ladder from the Chief Executive which might suggest that he was a sufficiently senior figure in the corporate management structure for liability to be attributed to Dunlop. The Court of Appeal, however, allowed Dunlop's appeal on the grounds that the trial judge had misdirected the jury with regard to : 1) the type of delegated functions that would have made said delegate part of the "directing mind and will"; and 2) the level of management and control that the appellant would have to operate at to render the company liable."

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[80] *R v Redfern and Dunlop Ltd. (Aircraft Division)* [1993] Crim. L. R. 43, 44-45
[81] *R v Redfern and Dunlop Ltd. (Aircraft Division)* [1993] Crim. L. R. 43, 45

This verdict lies in very stark contrast with the Courts' approach in the case of *El Ajou v Dollar Land Holdings Plc.*[82]. The facts of the case are complicated. The plaintiff was a wealthy Arab businessman who had lost a great deal of money in a share fraud. The disputed funds were invested by a company incorporated in England (Dollar Land Holdings), but whose shares belonged to a foundation in Liechtenstein. Wickins and Ong continue:

> "The question arose whether a constructive trust could be imposed on the company with regard to the misappropriated funds which had been invested in its property. This, in turn, depended on whether the knowledge of the Chairman of the Board of Directors could be imputed to the company. At first sight this would seem to have been a foregone conclusion, but the facts were unusual. The Liechtenstein foundation was set up to shield the identity of the real owners who lived in America. The American owners appointed three Swiss financial agents to be directors of the company. One of these agents acted as the Chairman, and attended to the paperwork and other matters needed to carry out the owner's instructions. The directors regarded themselves as being simply nominees of the owners and their only function being to carry out the instructions of the owners. The actual property investments and management decisions were carried out by the owners in consultation with the managing director

[82] [1994] 2 All E. R. 685

> of a subsidiary company. This individual was an experienced property developer, but had suffered a spectacular bankruptcy. This was convenient if he remained in the background. The defrauded investor [the Arab businessman] sought to fix the company with the knowledge of the fraud on the basis that the Chairman was a directing mind of the company, and alternatively on the basis of simple agency".[83]

All three judges involved in the appeal agreed that, in accordance with the findings of the trial judge, the Chairman's knowledge could not be imputed to Dollar Land Holdings on the grounds that he was the company's agent. However, they all agreed that the Chairman's knowledge could be imputed to the corporation on the basis that he formed part of the directing mind and will of the company. Their Lordships reached the same conclusion, however, on very different grounds. Nourse L. J., for example, stated:

> "[The doctrine of identification] attributes to the company the mind and will of the natural person or persons who manage and control its actions ... It is important to emphasise that management and control is not something to be considered generally or in the round. It is

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[83] *"Confusion Worse Confounded: The End of the Directing Mind Theory?"*, R. J. Wickins and C. A. Ong, [1997] JBL 524, 539

necessary to identify the natural person or persons having management and control in relation to the act or omission in point".[84]

In applying this reasoning to the case in hand, Nourse L.J. concluded:

"I start from the position that the transactions to be considered are those who by which DLH received assets representing the money fraudulently misapplied. The responsibility for the management and control of those transactions is not to be determined by identifying those who were responsible for deciding that DLH would participate in the Nine Elms project and the nature and extent of the participation, far less by identifying those who were responsible for business decisions generally ... Each of the steps taken by Mr Ferdman were taken without the authority of a resolution of the Board of DLH. That demonstrates that as between Mr Ferdman on the one hand and Mr Favre and Mr Jaton on the other it was Mr Ferdman who had the de facto management and control of the transaction ... In my view the directing mind and will of DLH in relation to the relevant transactions ... were the mind and will of Mr Ferdman and no other".[85]

Lord Justice Nourse appears, in this speech, to be advocating a more stringent interpretation of the directing mind and will test suggesting that it

[84] *El Ajou v Dollar Land Holdings Plc.* [1994] 2 All E. R. 685, per Nourse L. J. at 676

is necessary to look not for those who have general managerial power and control, but rather to identify those who hold such power in relation to the criminal wrong committed by the corporation. This seems to be a narrower interpretation of the doctrine of identification than that adopted by the courts in *Tesco v Nattrass*. In that instance the courts were, seemingly, willing to attribute liability to the corporation for criminal acts committed by a natural person or persons who held *general* managerial control.

Rose L. J. adopted a slightly different view of matters. Having looked at *Lennards Carrying Co. Ltd.* and *Tesco v Nattrass* Lord Justice Rose concluded:

> "There are it seems to me, two points implicit, if not explicit, in [the speeches of their Lordships in *Tesco v Nattrass*]. First, the directors of the company are, prima facie, likely to be regarded as its directing mind and will, whereas particular circumstances may confer the status on non-directors. Secondly, a company's directing mind and will may be found in different persons for different activities of the company"[86]

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[85] *El Ajou v Dollar Land Holdings Plc.* [1994] 2 All E. R. 685, per Nourse L. J. at 676-678

[86] *El Ajou v Dollar Land Holdings Plc.* [1994] 2 All E. R. 685, per Rose L. J. at 680

Rose L. J. appeared to be advancing a wider view of the doctrine of identification than that advanced by Nourse L. J. His Lordship was prepared to accept that people who held general management powers and functions *could* be found to constitute the directing mind and will although, in some circumstances, a non-director may be found to be part of the directing mind and will. Had he stopped there it is arguable that the Chairman's knowledge would not have been attributed to the company. His principle function was the management of the company's finances and he only held real managerial power and authority in that respect. The actual "day to day" management and investment decisions of the company were left to the real owners of the company. It was the duty of the directors of Dollar Land Holdings to carry out their wishes. Lord Justice Rose's approach, however, went further. He stated:

> "In the present case, the company's activity to which Ferdman's knowledge was potentially pertinent was the receipt of over one million pounds for investment ... Having regard to [the powers] he had in relation to the disputed funds, all carried out without the need for a resolution from the board of directors], it seems to me plain that, for the limited purposes here relevant, i.e. the receipt of money and the execution of the Yulara agreement, he was the directing mind and

> will of the company. In consequence, his knowledge of the fraud was DLH's knowledge".[87]

Even though the Chairman exercised no independent judgement and could only use these powers in a limited capacity to carry out the wishes of the American owners, Lord Justice Rose was still willing to attribute the Chairman's knowledge to the company where precedent might suggest that he wasn't sufficiently senior in the corporate management structure. Indeed, Lord Justice Hoffman dealt with this matter. He stated:

> "[The trial judge] did not accept that Mr Ferdman was the directing mind and will of DLH because he exercised an independent judgement. As a fiduciary he acted upon the directions of the American beneficial owners and their consultant Mr Stern. All that he did was sign the necessary documents and ensure that the company's paper work was in order. This involved seeing that the decisions which had really been taken by the Americans and Mr Stern were duly minuted as decisions of the board made in Switzerland".[88]

[87] *El Ajou v Dollar Land Holdings Plc.* [1994] 2 All E. R. 685, per Rose L. J. at 681
[88] *El Ajou v Dollar Land Holdings Plc.* [1994] 2 All E. R. 685, per Hoffman L. J. at 686-687

This did not prevent Lord Justice Hoffman from also finding Mr Ferdman to be part of the directing mind and will of Dollar Land Holdings. Reflecting the view of Lord Diplock in *Nattrass*, Lord Justice Hoffman opted to approach the question from the issue of the powers held under the company's constitution. He held:

> "...neither the Americans nor Mr Stern held any position under the constitution of the company. Nor were they held out as doing so. They signed no documents on behalf of the company and carried on no business in its name. As a holding company DLH had no independent business of its own. It entered into various transactions and on those occasions the persons who acted on its behalf were the board or one or more of the directors ... It seems to me that if the criterion is whether the candidate for being the directing mind and will was exercising independent judgement, as opposed to acting upon off-stage instructions, not even the board of directors acting collectively would in this case have qualified. It also did what it was told ... The authorities show clearly that different persons may for different purposes satisfy the requirement of being the company's directing mind and will. Therefore, the question in my judgement is whether, in relation to the Yulara transaction, Mr Ferdman as an individual exercised powers on behalf of the company which so identified him".[89]

Lord Justice Hoffman concluded that Mr Ferdman could constitute the directing mind and will in this instance. Having examined the position of Mr Ferdman compared to that of the other directors and the powers he exercised, Hoffman L. J. had no option but to hold that "as far as the constitution of DLH was concerned, he committed the company to the [Yulara] transaction as an autonomous act which the company adopted by performing the agreement ... this was sufficient to justify Mr Ferdman being treated, in relation to the Yulara transaction as the directing mind and will".[90]

At this stage the scope of the doctrine of identification appears to have become ever more uncertain. In *Redfern* the Court of Appeal was not willing to impute the liability of the European sales manager of Dunlop to the company, yet in *El Ajou* a director with very limited management functions finds his knowledge imputed to the corporation. This new approach to the doctrine of identification seemed to be based on the notion of delegation.

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[89] *El Ajou v Dollar Land Holdings Plc.* [1994] 2 All E. R. 685, per Hoffman L. J. at 687
[90] *El Ajou v Dollar Land Holdings Plc.* [1994] 2 All E. R. 685, per Lord Hoffman L. J. at 687

Matters were further confused by the House of Lords in *Re Supply of Ready Mixed Concrete (no. 2)*[91]. Some of the local managers of four cement companies entered into price fixing and market sharing agreements contrary to s.35 (1) of the *Restrictive Trade Practices Act 1976*. They entered into these agreements contrary to express orders from the board of directors and without their knowledge. These practices continued despite restraining orders issued by the Restrictive Trade Practices Court. The House of Lords discussed Nattrass in great detail and paid considerable attention to the case of *Director General of Fair Trading v Smith's Concrete Ltd.*[92] in which the court found that the company was not party to a price fixing agreement entered into by a unit manager. In that case the court dismissed the principle in *Nattrass* stating that it could not be applied to the law of contempt. In *Re Supply of Ready Mixed Concrete (no. 2)*, therefore, their Lordships might have been expected to resolve the matter on similar grounds. Instead their Lordships opted to enter into a detailed discussion of *Tesco v Nattrass*.

Lord Templeman held that the *Smith's Concrete Ltd.* case was inapplicable in this instance because it would allow the company to benefit from a

[91] [1995] 1 All E. R. 135

practise outlawed by Parliament providing that a member of higher management had prohibited it. He continued:

> "The decisions of the Court of Appeal in *Smith's* case and in the instant case infringe two principles. The first principle is that a company is an entity separate from its members, but, not being a physical person, is only capable of acting by its agents. The second principle is that a company, in its capacity of a tax-payer, landlord or in any other capacity, falls to be judged by its actions and not by its language. An employee who acts for the company within the scope of his employment is the company. Directors may give instructions, top management may exhort, middle managers may question and workers may listen attentively. But if a worker makes a defective product or a lower manager accepts or rejects an order he is the company."[93]

This appears to directly contradict the principles set out by the courts in *Tesco v Nattrass*. Lord Templeman's pronouncement effectively means that in *Re Supply of Ready Mixed Concrete (no. 2)*, and in *Smith's* case the company could be treated as a party to the local manager's conspiracy and to the contempt of court. This is because, in those instances, the local

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[92] [1992] Q. B. 213
[93] *Re Supply of Ready Mixed Concrete (no. 2)* [1995] 1 All E. R. 135, per Lord Templeman at 141-142

manager and unit manager respectively *were* the company for the purpose of the relevant legislation.

Lord Nolan on the other hand thought that the main issue was one of statutory construction. The statutory provision at issue in *Nattrass* had a due diligence defence, but the *Restrictive Trade Practices Act 1976* in question had more in common with those provisions which imposed strict liability. The Act could only achieve its intended purpose if the company could be held liable for the actions of the individuals who carried out the prohibited actions. On the liability of the corporation generally Lord Nolan said:

> "A limited company, as such, cannot carry on business. It can only do so by employing human beings to act on its behalf. The actions of its employees, acting in the course of their employment, are what constitute the carrying on of a business by the company. When the roll was called at a public house meeting at which the Bichester agreement was concluded the employees attending did not respond as individuals, they did so as representatives of their respective companies, fully competent as a practical matter of fact to make the agreement on behalf of their companies, and to see that it was carried out. A consensual element was required because it takes at least two parties to make a restrictive practice, but the consent required for the

Bichester agreement was not that of senior management or the board, all that was needed was the consent of the employees who could and did make the agreement effective".[94]

The potential effect of Lord Nolan's pronouncement on this matter was far reaching. Wickins and Ong saw the matter thus:

"Lord Nolan's approach seems to consign the directing mind and will theory, in most cases of criminal liability at least, to oblivion. Furthermore, his statement seems to give powerful support to the approach in El Ajou's case of basing liability on *de facto* rather than *de jure* management. This is more clearly seen when it is realised that it was conceded in *Smith's* case and apparently also in *Re Supply of Ready Mixed Concrete (no. 2)* ... that the managers acted without any actual or even ostensible authority in entering into the agreement. The rather surprising result is that the actions of a group of local managers informally meeting in the local public house and entering into an illegal agreement in defiance of the legally constituted directors, and without their knowledge, bind their companies and create criminal liability for them, even though all concerned knew that they had no authority whatsoever to act for their companies and that such agreements are illegal. Furthermore, such a result follows even if, as in *Smith's* case the directors have taken all reasonable

[94] *Re Supply of Ready Mixed Concrete (no. 2)* [1995] 1 All E. R. 135, per Lord Nolan at 150-151

steps to institute a system of management which will prevent such agreements being signed".[95]

Furthermore, they continue:

> "[I]t is suggested that the House of Lords could have applied the directing mind theory to the facts of the case without any difficulty if they had so wished and thus followed the *Tesco Supermarket's* case rather than distinguishing it. The refusal to do this is thus significant, and seems to show that the liberal attitudes to criminal liability of corporations adopted in the 1970's no longer have any appeal". [96]

The direction that these cases appeared to be taking suggested, therefore, that the doctrine of identification set out in *Tesco v Nattrass* no longer existed, or, if it was still recognised by the courts, then it existed, by now, in a very different form.

This alternative approach to corporate liability reached its pinnacle in the Privy Council case of *Meridian Global Funds Management Asia Ltd. v*

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[95] *"Confusion Worse Confounded: The End of the Directing Mind Theory?"*, R. J. Wickins and C. A. Ong, [1997] JBL 524, 548
[96] *"Confusion Worse Confounded: The End of the Directing Mind Theory?"*, R. J. Wickins and C. A. Ong, [1997] JBL 524, 548

Securities Commission[97]. In this case Koo, the Chief Investment officer of an investment management company and Ng, its senior portfolio manager, used funds managed by the company to purchase shares in ENC (a company registered in New Zealand). This was done *with* the authority of the Board of Directors. This meant that, for a short period of time, their company became a substantial stakeholder in ENC, but Meridian failed to notify ENC of this fact contrary to section 20 (3) of the *New Zealand Securities Amendment Act, 1988.* Koo and Ng of course knew that the company held these shares, but the Board of Directors and its Managing Director did not.

At first instance the High Court of New Zealand held that the company was in breach of its duty to give notice under section 20 (3) and that, for the purposes of section 20 (4) (e), the knowledge of Koo and Ng should be attributed to the company. The Court of Appeal in New Zealand upheld the decision resolving the matter on the reasoning that Koo was the directing mind and will of the company hence his knowledge could be attributed to the company.

[97] [1995] 2 AC 500

On appeal to the Privy Council two questions of law were raised:

1) Could Koo's actions be attributed to the company; and
2) Having regard to the policy of section 20 of the 1988 Act and on the true construction of section 20 (4) (e) what was the appropriate rule of attribution to be applied?

Lord Hoffman set about discussing the doctrine of identification. Mirroring the view of Lord Diplock in *Tesco v Nattrass* he begins:

> "[T]he company's primary rules of attribution will generally be found in its constitution, typically the articles of association ... There are also primary rules of attribution which are not expressly stated in the articles, but implied by company law ... These primary rules of attribution are ... not enough to enable a company to go out in the world and do business ... The company therefore builds upon the primary rules of attribution, which are equally available to natural persons, namely the principles of agency ... [H]aving done so, it will also make itself subject to the general rules by which acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract, and vicarious liability in tort".[98]

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[98] *Meridian Global Funds Management Asia Ltd. v Securities Commission* [1995] 2 AC 500, per Lord Hoffman at 506-507

Lord Hoffman recognises that there may be circumstances in which the aforementioned methods of attribution will not allow a company to "determine its rights and obligations".[99] This may occur where these rules of attribution are excluded, for example where *mens rea* is required or the rule in question is only applicable to natural persons. Lord Hoffman therefore ponders how such rules are to be applied to a corporation:

> "[1] The Court may come to the conclusion that the rule was not intended to apply to the company at all (e.g. where the only penalty for that offence is community service)... [2] The Court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the Board or a unanimous agreement of the shareholders. But there will be cases in which neither of these solutions is satisfactory, in which the Court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution for the substantive rule. This is always a matter of interpretation, given that it was intended to apply to a company ... how was it intended to apply? Whose act or knowledge or state of mind was *for this purpose* intended to count as the act, etc. of the company? One finds this by applying the usual canons of

[99] *Meridian Global Funds Management Asia Ltd. v Securities Commission*[1995] 2 AC 500, per Lord Hoffman at 507

interpretation, taking into account the language of the rule (if it is a statute) and its content and policy".[100]

On the basis of this pronouncement Lord Hoffman had no problem pinning liability on the corporation. He stated:

> "Once it appears that the question is one of construction rather than metaphysics, the answer to this case seems to be as straightforward to their Lordships as it did to Heron J. The policy of section 20 of the *Securities Amendment Act* is to compel ... the immediate disclosure of the identity of persons who become substantial security holders in public issuers. Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge is for this purpose to count as the knowledge of the company? Surely the person who, with the knowledge of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf, which made them substantial security holders, but would not have to report them until the Board or someone in senior management got to know about

[100] *Meridian Global Funds Management Asia Ltd. v Securities Commission* [1995] 2 AC 500, per Lord Hoffman at 507

it. This would put a premium on a Board paying as little attention as possible to what its investment managers were doing".[101]

Therefore, at this stage, there is no one all encompassing test for identifying the directing mind and will of a company. What *Meridian Global Funds Management Asia Ltd. v Securities Commission* left us with is a rule of attribution which will vary according to the statute or rule of law at issue in each case. It will be a matter of interpretation for the courts to decide whose *actus reus* or *mens rea* is intended for that purpose to be that of the company.

Furthermore, Lord Hoffman tried to reconcile the result in *Meridian* with that in *Nattrass* and *Re Supply of Ready Mixed Concrete(No. 2)* by claiming that both cases were reconcilable on the grounds that the outcome of these cases depended on the intent of the relevant legislation. Turning his attention to *Lennards Carrying Co. Ltd.* Lord Hoffman denied that Viscount Haldane's oft quoted passage was intended to create any general rule of attribution, but rather its effect was limited to creating a narrow rule

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[101] *Meridian Global Funds Management Asia Ltd. v Securities Commission* [1995] 2 AC 500, per Lord Hoffman at 511

of attribution restricted in its ambit to section 502 of the *Merchant Shipping Act, 1894*. He states:

> "[T]he anthropomorphism, by the very power of the image, distracts attention from the purpose for which Viscount Haldane L. C. said at p.713, he was using the notion of a directing mind and will, namely, to apply the attribution rule from s.502 to the particular defendant in the case:
>
> > "for if Mr Lennard was the directing mind of the company then his action must, unless a corporation is not to be held liable at all, have been an action which was the action of the company itself within the meaning of s.502".[102]

By the time British Steel Plc. were cleared by the House of Lords in the case of *R v British Steel Plc.*[103] it appeared that the retreat from the principles laid out in *Nattrass* was complete.

It is suggested that this new flexible approach to criminal liability is to be commended. By reducing the matter to one of interpretation the courts

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[102] *Meridian Global Funds Management Asia Ltd. v Securities Commission* [1995] 2 AC 500, per Lord Hoffman at 509-510, quoting Viscount Haldane L.C. in *Lennards Carrying Co Ltd* [1915] AC 705

[103] [1995] 1 WLR 1356

were able to look at the purpose of the legislation then determine whose actions may be treated as those of the company for that purpose in order to give best effect to the rule of law at issue. It appeared at that stage that the death knell had sounded for the doctrine of identification.

On September 19, 1997 the 1:15pm Swansea to London Paddington train was involved in a collision at Southall which left seven passengers dead and one hundred and fifty one injured. At the start of the ensuing manslaughter trial Lord Justice Scott Baker ruled that it was a condition precedent to a conviction for manslaughter by gross negligence for a guilty mind to be proved, and that where a non-human defendant was prosecuted it may only be convicted via "the guilt of a human being with whom it may be identified".[104] The following questions of law arose:

1) Can a defendant be properly convicted of manslaughter by gross negligence in the absence of the defendant's state of mind?
2) Can a non-human defendant be convicted of the crime of manslaughter by gross negligence in the absence of evidence

[104]*Attorney General's Reference (No. 2 of 1999)* [2000] Cr. App. R. 207

establishing the guilt of an identified human individual for the same crime?

It is only the second question which is pertinent at this stage of my work.

Lord Justice Rose set about reviewing most of the case law I have already covered in my discussion of the development of this area of the law, but he begins his discussion of the doctrine of identification by stating:

> "The identification theory, attributing to the company the mind and will of senior directors and managers, was developed in order to avoid injustice: it would bring the law into disrepute if every act and state of mind of an individual employee was attributed to a company which was entirely blameless".[105]

More importantly though, having considered the relevant case law, Lord Justice Rose finds that the theory of identification had not been replaced by the more flexible rules of attribution laid out in *Meridian et al.* He states:

[105] *Attorney General's Reference (No. 2 of 1999)* [2000] Cr. App. R. 207, per Rose L. J. at 211

"None of the authorities since *Tesco v Nattrass* relied on by Mr Lissack supports the demise of the doctrine of identification: all are concerned with statutory construction of different substantive offences and the appropriate rule of attribution was decided having regard to the legislative intent, namely whether Parliament intended companies to be liable. There is a sound reason for a special rule of attribution in relation to statutory offences, namely there is, subject to a defence of reasonable practicability, an absolute duty imposed by the statutes. The authorities on statutory offences do not bear on the common law principle in relation to manslaughter. Lord Hoffman's speech in *Meridian* is a restatement, not an abandonment of existing principles: see, for example, Lord Diplock in *Tesco v Nattrass* at page 200 H: "There may be criminal statutes which upon their true construction ascribe to the corporation criminal responsibility for the acts of servants and agents who would be excluded by the test that I have stated" (namely those exercising the powers of the company under its articles of association). The Law Commission's proposals were made after the *Meridian* and *British Steel* cases. Identification is necessary in relation to *actus reus*, i.e. whose acts or omissions are to be attributed to the company, and *Adomako's* objective test in relation to gross negligence in no way affects this. Furthermore, the civil negligence rule of liability for the acts of servants or agents has no place in the criminal law ... which is why the identification principle was developed. That principle is still the rule of attribution in criminal law whether or not *mens rea* needs to be proved".[106]

[106] *Attorney General's Reference (No. 2 of 1999)* [2000] Cr. App. R. 207, per Rose L. J. at 216

Bearing all of these considerations in mind Lord Justice Rose concluded that the doctrine of identification had not been made redundant in relation to common law offences. He stated:

> "None of the authorities relied on by Mr Lissack as pointing to the personal liability for manslaughter by a company supports that contention. In each case the decision was dependent on the purposive construction that the particular statute imposed, subject to a defence of reasonable practicability, on a company for conducting its undertaking in a manner exposing employees or members of the public to health and safety risks. In each case there was an identified employee whose conduct was held to be that of the company. In each case it was held that the concept of a directing mind and will had no application when construing the statute. But it was not suggested or implied that the concept of identification is dead or moribund in relation to common law offences. Indeed, if that were so, it might have been expected that Lord Hoffman in *Associated Octel* would have referred to the ill health of the doctrine in the light of his own speech, less than a year before, in *Meridian*. He made no such reference, nor was *Meridian* cited in *Associated Octel*. Indeed Lord Hoffman's speech in *Meridian* in fashioning an additional special rule of attribution geared to the purpose of the statute proceeded on the basis that the primary "directing mind and will"

rule still applies, although it is not determinative in all cases. In other words, he was not departing from the identification theory but reaffirming its existence".[107]

This is an interesting outcome as it appears to take a completely opposite direction to that in which the other case law pointed. Contrary to some academic opinion Lord Justice Rose explicitly stated that *Meridian* did not show that the courts had moved away from the doctrine of identification. Instead, in the course of his judgement, it appears that Rose L. J. has reduced *Meridian* from a significant milestone in the development of corporate criminal liability to a mere judicial pronouncement on a particular statute. This leaves us with two possible outcomes of *Attorney General's Reference (No.2 of 1999)*. Firstly, it could mean that there are now two alternative approaches to corporate criminal liability. That is to say that the appropriate test to be applied will depend on whether the offence charged is statutory, in which case the approach in *Meridian* would apply, or common law, where the directing mind and will theory of *Nattrass* will apply. Alternatively, whist this was not explicitly stated in *Attorney General's Reference (No.2 of 1999)*, it could be the case that *Meridian* has been

[107] *Attorney General's Reference (No. 2 of 1999)*, [2000] Cr. App. R. 207, per Rose L. J. at 218

overruled and now the doctrine of identification as set out in <u>Nattrass</u> is the sole means by which the court may impose primary liability on a corporation for offences requiring poof of *mens rea*.

It is clearly the case, however, that at this stage there are two methods of attribution which have been developed over the centuries to allow the courts to "pin" criminal liability on a corporation. On the one hand there is vicarious liability. This will be the appropriate method of attribution in those cases where the corporation is charged with a statutory offence which imposes an *absolute* duty on the defendant corporation. On the other hand there is the doctrine of identification (primary liability) which will be the appropriate rule of attribution when the company is charged with an offence (statutory or common law) which requires proof of *mens rea*.

Having looked at the two alternative basis of corporate criminal liability attention can now be turned to the development of the law of corporate manslaughter. In this examination of corporate manslaughter we will see that the doctrine of identification has proven to be a great hindrance to the development to this offence. This can be demonstrated by looking at the

milestone case of *R v P. & O. European Ferries (Dover) Ltd.*[108] and the judgments therein.

[108] (1991) Cr. App. R. 72a

Chapter 3: The Current State of the Law Governing Corporate Manslaughter

In the previous chapter we have dealt with the various obstacles, both procedural and conceptual which have faced both the judiciary and legislature in any attempt to hold corporations accountable for breaches of the criminal law. We have also considered the various statutory and common law tools which have been used to overcome these obstacles. But the most important outcome of all the case law which has been discussed up to now, is that the doctrine of identification became the basis for any attempts to impose criminal liability upon a corporation for offences requiring proof of *mens rea*, and consequently also forms the legal basis for the offence of corporate manslaughter.

In this chapter we will look more specifically at the development of the common law offence of corporate manslaughter focusing particularly on those cases which have resulted in a trial that has failed spectacularly to bring anyone to justice. The benefit of such failures is that they have served to highlight time and time again the inadequacies of the doctrine of identification when attempting to impute *mens rea* to a corporation in the case of manslaughter. These cases all serve to support a central premise of

this thesis, namely that the current state of the law governing corporate homicide is unacceptable and that a new alternative basis needs to be sought.

It may be helpful to increase our understanding of the corporate offence of manslaughter, however, to first look at the individual common law offence of gross negligence manslaughter, as it is this offence which has been adapted to create an offence of corporate manslaughter. It will be easier to understand why the courts have such difficulties imposing liability for manslaughter on a corporation once it is realised that the individual offence of gross manslaughter has caused more than its fair share of problems for the courts.

What constitutes gross negligence? The starting point is the classic statement of the law in this field made by Lord Hewart C.J. in *R v Bateman*[1]. He stated at pages 10-12:

> "If A has caused the death of B by alleged negligence, then, in order to establish civil liability, the plaintiff must prove ... that A owed a duty to B to take care, that that duty was not discharged, and that the

[1] (1925) Cr. App. R. 8

default caused the death of B. To convict A of manslaughter, the prosecution must prove the three things above mentioned and must satisfy the jury, in addition, that A's negligence amounted to a crime ... [I]n order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state, and conduct deserving punishment".

This formulation obviously owes much to the civil law test for negligence (liability for which requires proof of a lower level of negligence than its criminal counterpart). It was approved by the House of Lords in *Andrews v Director of Public Prosecutions*[2].

In *Andrews* the defendant ran over a pedestrian and drove off. He was convicted at first instance but appealed on the grounds that the judge had misdirected the jury. The Court of Appeal dismissed Andrews' appeal, but the Attorney General certified that the case involved a point of law of general public interest. Despite their disapproval of the trial judges direction the House of Lords dismissed the appeal on the grounds that on the facts, even with their new direction, Andrews would still be found guilty

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[2] [1937] AC 576

of manslaughter. Of Lord Hewart C.J.'s direction, Lord Atkin said at page 583:

> "I think, with respect, that the expressions used are not, indeed they probably were not intended to be, a precise definition of the crime. I do not myself find the considerations of *mens rea* helpful in distinguishing between degrees of negligence, nor do the ideas of crime and punishment in themselves carry a jury much further in deciding whether in a particular case the degree of negligence shown is a crime and deserves punishment. But the substance of the judgement is most valuable and, in my opinion, is correct".

Hence, upon deciding the matter of the correct direction for the jury, Lord Atkin states:

> "It would appear that in directing the jury in a case of manslaughter, the judge should in the first instance charge them substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in *Bateman's* case and then explain that such a degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving, and then indicate to them the conditions under which they may acquit of manslaughter and dangerous driving"[3].

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[3] *Andrews v Director of Public Prosecutions* [1937] AC 576, per Lord Atkin at 584-585

Following *Andrews*, therefore, it seems that the basis of this breed of manslaughter was gross negligence. In order to prove the defendant guilty of this offence it had to be shown that:

1) that the defendant owed a duty of care to the deceased;
2) that the defendant breached this duty;
3) that the breach caused the death of the deceased; and
4) that the defendant's negligence was gross (that is to say that it showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment).

The offence of gross negligence was briefly thrown into disarray by the case of *R v Seymour*[4]. In this case the House of Lords adopted a wider test than that used in *Andrews* by relying on recklessness rather than gross negligence as the basis for this offence. The effect of this meant that it was open to the jury to find a defendant guilty of manslaughter regardless of the nature of their conduct once it had been shown that the defendant had

created an obvious and serious risk of harm by said conduct. It was no longer open to a defendant to protest their innocence on the grounds that their negligence was not "gross". On the other hand the House of Lord's direction in *Seymour* did not cover those cases where the death was caused by an omission or (as happened in some cases) by medical negligence. Furthermore, as pointed out by the Law Commission, the *Seymour* test incorporated what has now become known as the 'Caldwell lacuna'. By this lacuna in the law a defendant who realised there was a risk but believed he had done enough to neutralise it would escape conviction"[5]

The balance was redressed by the Court of Appeal case of *R v Prentice and others*[6] and the subsequent House of Lords case of *R v Adomako*[7]. In *Prentice* the Court of Appeal declined to follow the guidance of the House of Lords in *Seymour*. Instead the Court of Appeal accepted the continued existence of gross negligence manslaughter. Lord Taylor justified the need for such an offence on the grounds that, whilst reckless manslaughter was based largely on a risk taken by the defendant, in some cases the defendant will have created no risk but rather had acted negligently in cases where

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[4] [1983] 2 AC 493. Applied by the Privy Council in the case of *Kong Cheuk Kwan v R.* (1985) 82 Cr. App. R.. 18

[5] Law Commission Report No 237 (HMSO:1994) at pages 67-68

care was required because the risk of death still existed. The test for gross negligence manslaughter, it was stated, was the same as that found in the *Bateman/Andrews* formulation.

Having considered *Bateman* and *Andrews*, Lord Mackay concluded that the law of involuntary manslaughter should be based on the test of gross negligence manslaughter laid out in those cases. He states at page 295:

> "... In my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterized as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent on him involving as it might have done a risk of death to the patient, was such that it should be judged criminal."

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[6] [1994] QB 302
[7] [1994] 3 WLR 288

In dismissing the appeal, Lord Mackay answered the question of law (at page 297) as follows:

> "In cases of manslaughter by criminal negligence involving a breach of duty, it is a sufficient direction to the jury to adopt the gross negligence test set out by the Court of Appeal in the present case following *R v Bateman* ... and *Andrews* ... and that is not necessary to refer to the definition of recklessness in *R v Lawrence* ... although it is perfectly open to the trial judge to use the word "reckless" in its ordinary meaning as part of his exposition of the law if he deems it appropriate in the particular circumstances of the particular case".

It is clear that the correct test for this branch of the offence of manslaughter is that laid out by the courts in *R v Bateman* and *Andrews*. How then are the individual elements of the offence to be established?

In the law of tort there has been much consideration of whether a duty of care exists in any given case[8]. The situation with the criminal law is not, however, so clear cut. The criminal law has, however, developed the notion of a duty of care in two instances. The first of these is where the defendant has failed to act in a particular set of circumstances, namely: where the

defendant is closely related to the victim (see *Stone and Dobinson*[9]); where the defendant is under a contractual duty (see *Pittwood*[10]) or where the defendant has undertaken to care for the deceased either by way of a promise or simply by embarking on a particular course of action (see *Stone and Dobinson*). Failure to act in these instances may lead to the imposition of liability in the event of death. The second instance is where the defendant has held themselves out as possessing some special skill or knowledge (particularly in cases of death arising from medical negligence). In these situations liability arises not because of some failure to act, but because the defendant has performed an action badly. The duty in these instances stems from the reliance the patient/victim/etc. has placed on the defendant by virtue of the very nature of the relationship between the parties (e.g. doctor/patient, bank-manager/client).

The second requirement of the *Bateman* formulation is that the accused breached the duty of care. This established in law by determining whether the defendant's conduct fell below the standard of care that might be expected of him. Only then can there be such a breach. How does the law

[8] See *Donoghue v Stevenson* [1932] AC 562 and the infamous "neighbour principle" laid out by Lord Atkin in that case.
[9] [1977] 1 QB 354

attempt to determine the standard of care that is to be expected of the defendant? In the law of negligence, the standard of care differs according to the type of defendant. In the case of the unqualified defendant the standard expected of him is that of the reasonable man ("the man on the Clapham omnibus")[11]. The test is objective although there is a subjective element to the test in that it is for the judge to determine what is reasonable or foreseen[12]. The position is different where the defendant has or professes to have some special skill or knowledge[13]. It appears that the standard required of professionals is that of the reasonably prudent professional who has the same skills/knowledge as the defendant. The defendant's conduct cannot be measured against that of the reasonable man or the man on the Clapham omnibus because he does not posses those skills.

In *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, Mr. Justice McNair put the test thus:

> "Counsel for the plaintiff put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the

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[10] (1902) 19 TLR 37
[11] See *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205
[12] See the cases of *Glasgow Corporation v Muir* [1943] AC 448, 457; and *Nettleship v Weston* [1971] 2 QB 691 for examples of this test in action.
[13] See *Wells v Cooper* [1958] 2 QB 265

standards of reasonably competent medical men at the time. That is a perfectly accurate statement as long as it is remembered that there may be one or more perfectly proper standards, and if a medical man conforms with one of those proper standards, then he is not negligent. Counsel for the plaintiff was also right, in my judgement, in saying that a mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds. That again is unexceptionable. But the emphasis which is laid by counsel for the defendants is on this aspect of negligence: he submitted to you that the real question on which you have to make up your minds on each of the three major points to be considered is whether the defendants, in acting in the way they did, were acting in accordance with a practice of competent, respected medical opinion ... I myself would ... put it this way: a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that art"[14]

Obviously this approach causes some conceptual problems. In the case if *Bolam*, for example, the defendant engaged in a course of conduct which was held reasonable by a "responsible body of medical opinion", but not by the entire medical profession. Furthermore, under the *Bolam* formulation the standard of care to be expected of the defendant is clearly set by the medical profession. This means that the legal standard to be expected of the

[14] *Bolam* [1957] 1 WLR 582, per McNair J. at 586-587.

defendant is established by non-legal persons. Staying with the medical profession, this effectively means that they are allowed to police their own sector and reduces the scope of the public to question medical opinions or practices. Whilst this matter has been discussed in relation to the medical profession, this situation is true for all professions (except for those that are immune from prosecution).

The notion of a "duty of care" has been subjected to some criticism from C.M.V. Clarkson, who states:

> "As defined, manslaughter by gross negligence is dependent upon the finding that there has been a "breach of duty". The most that can be hoped is that this phrase is redundant, and that the jury will focus on whether the defendant has been sufficiently negligent or careless. However, the phrase has the potential to cause confusion. It is difficult to see how it can be helpful to the jury to import civil concepts into the criminal law and it is not clear whether terms such as "duty of care" and "breach" mean the same under the criminal law as in the law of tort"[15]

[15] *"Criminal Law: Text and Materials"* C. M. V. Clarkson & H. Keating, 4th edition (Sweet & Maxwell: 1998), page 657

The third requirement is that the defendant's conduct must have caused the death of the victim. This is clearly a question of causation and is not dealt with by the Law Commission or any of the articles which have been considered thus far. Presumably it is felt that there is nothing to be gained by a further discussion of this matter in this context.

The fourth and final requirement is the most problematic. It must be shown that the defendant's negligence was "gross". Under the *Bateman* formulation the level of negligence that must be proved is greater in the criminal law than under the civil law. This is made clear by Lord Hewart C.J. in *Bateman*. He states:

> "[I]n order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment".

In the later case of *Andrews*, however, Lord Atkin, whilst accepting the substance of Lord Hewart C.J's ruling, doubted whether this direction

would aid the jury at all in their determination of whether the necessary gross negligence was present in any given case.

It is here that we encounter real problems with the *Bateman/Andrews* formulation of the individual offence of manslaughter. Firstly, the test is somewhat circular in its nature. In effect, the jury is directed that they must convict the defendant of a crime if they feel that a crime has been committed. "This amounts to little more than telling the jury to determine guilt on the basis of how they feel about it"[16]. The Law Commission points out in Report No. 237 that this effectively means that the jury is left to decide a question of law. Since juries do not give reasons for their decisions, for they say, it would be impossible to determine what criteria will be applied in an individual case and that this would lead to uncertainty in the law. Clarkson and Keating state at page 657:

> "This is a vague formulation which provides the jury with little by way of a yardstick against which to test their gut reaction. This renders the law uncertain to an alarming degree and increases the chance of inconsistent verdicts".

This statement raises the issue of ambiguity. Lord Mackay's formulation requires that the defendant's conduct be so bad as to amount to criminal conduct, but how bad is "so bad"? Gardner puts the problem thus:

> "There is some potential ambiguity here. Imagine, as a simple instance of this kind, that a jury is asked to decide whether a person is tall. The jury's task is to attend to a single factor, height, and to draw a line. Assessing badness is not quite like that. Certainly, it requires line drawing too, but it may well involve looking to more than one factor. Moreover, there is room for debate over what the relevant factors are. His Lordship does not make clear whether this debate too is to be remitted to juries, so that each jury may take into account whatever factors it deems relevant (and then settle the questions of degree involved in those factors), or whether the debate is settled as a matter of law, so that judges should instruct juries as to the proper factors to take into account (the juries then again, settling the questions of degree involved in these factors). Nor, if the latter be right, does his Lordship make clear what are those proper factors"[17]

It appears, therefore that there is little guidance provided by the courts as to when the law should find a defendant guilty of gross negligence. One approach purported by Lord Atkin in *Andrews* is the use of "recklessness"

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[16] *"Criminal Law: Text and Materials"* C. M. V. Clarkson & H. Keating, 4th edition (Sweet & Maxwell: 1998), page 657

as a good way of describing negligence. An examination of the courts treatment of the issue of recklessness, however, shows that this approach is also flawed. Effectively the courts adopted two different approaches to the question of recklessness. The first was to suggest that recklessness was a degree rather than a species of negligence. Indeed Lord Atkin stated in *Andrews* that:

> "Simple lack of care such as will constitute civil liability is not enough; for the purposes of criminal law there are degrees, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case".

The second approach taken by the courts, despite receiving warnings against embarking on such a course, was to attempt to define recklessness. In *Stone and Dobinson*, for example, Lord Justice Geoffrey Lane formulated a two-limbed test to identify recklessness. He stated:

> "Mere inadvertence is not enough. The defendant must be proved to have been indifferent to an obvious risk of injury to health, or

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[17] *"Manslaughter by gross negligence"*, Simon Gardner, (1995) 111 L.Q.R., at page 23

actually to have foreseen the risk but to have determined nevertheless to run it"[18].

This test had two main effects. The first was to provide support for the idea that recklessness was merely a degree of negligence. The second was to suggest that recklessness was a separate heading of manslaughter from gross negligence, a view that was clearly shared by the House of Lords in *Seymour*. What the courts had done was to place great importance on establishing the defendant's state of mind in order to determine guilt. The test for recklessness was subjective. The Law Commission points out, however, that these cases which rely on subjective recklessness[19] were gone against expressly by Lord Hewart C.J. in *Bateman* who "explicitly stated the test to be capable of involving both advertence and inadvertence of risk: the defendant was at fault if he "recklessly undertook a case which he knew, or should have known, to be beyond his powers""[20]. This suggests that the test envisaged in Bateman is an objective test, and that no alternative formulation would suffice.

[18] *Stone and Dobinson* [1977] QB 354, per Geoffrey Lane L.J, quoted in Law Commission Report No. 237 at pages 55.
[19] See for example *Lamb* [1967] 2 QB 981, and *Cato* [1976] 1 WLR 110
[20] Law Commission Report No. 237 (HMSO: 1994), quoting Lord Hewart C.J. in *Bateman* (1925) 19 Cr. App. R. 8.

It is clear that in any case where the jury is faced with a case of gross negligence manslaughter they have an unenviable task. How can a jury be expected to carry out their task properly when even the courts appear uncertain about the true basis of this offence. Virgo puts the matter thus:

> "The greatest difficulty with gross negligence manslaughter arises from the fact that there can be no definite conclusions as to what constitutes gross negligence, this being a matter for the jury to determine by reference to all the circumstances of the case. This is a major weakness of this head of manslaughter in that too much is left for the determination of the jury with little assistance from the judge in directing them as to the law. If the essence of liability is something as vague as gross negligence then a degree of uncertainty cannot be avoided, but there is clearly a need for more detailed legal guidance as to what is meant by gross negligence"[21]

It is clear that far too much is left to the jury under the *Bateman/Andrews* formulation. This cannot help but lead to uncertainty and inconsistency in the law. Different jurors will hold different views on the appropriate standards that may properly be expected of individuals, particularly professionals. This could easily lead to juries in two cases with near

[21] *"Back to basics: Reconstructing manslaughter"*, Graham Virgo, (1994) 53 C.L.J. 44, page 49.

identical facts coming to different conclusions on the question of gross negligence. In the meantime, however, gross negligence is still the correct basis for this branch of manslaughter despite the problems the question of gross negligence raises. This brings us to consider the offence of corporate manslaughter.

As can be seen in the case of *Cory Brothers Ltd.* it was once felt that a corporation could not be charged with the common law offence of manslaughter. In *H. M. Coroner for East Kent ex. p. Spooner*[22] the families of two victims of the Zeebrugge ferry disaster made applications for judicial review proceedings to be brought challenging the coroner's decision not to press manslaughter charges against P. & O. Ferries Ltd. or its directors. In that case Mr Justice Bingham stated:

> "The first question is whether a corporation can be indicted for manslaughter. The coroner originally ruled that it could not. In the course of argument in this court we indicated at an early stage that we were prepared to assume for the purposes of this hearing that it could. As a result the question has not been fully argued and I have not found it necessary to reach a final conclusion. I am, however,

[22] (1989) 88 Cr. App. R. 10

tentatively of the opinion that on appropriate facts the *mens rea* required for manslaughter can be established against a corporation".[23]

This pronouncement clearly went against the views of Mr Justice Finlay in *Cory Brothers Ltd.* who felt that a corporation could not be indicted for a felony or offences involving personal violence. Furthermore, Mr Justice Bingham's statement paved the way for manslaughter proceedings to be instigated against P. & O. Ferries Ltd.

The ensuing case of *R v P. & O. European Ferries (Dover) Ltd.* was to prove a landmark case in the historical development of the law of corporate manslaughter. The trial highlighted both the weaknesses of the substantive laws of manslaughter when applied to corporations, and the particular problem that the doctrine of identification created in any attempt to attribute liability to a company for corporate manslaughter.

The facts of the case make grim reading.[24] Having crossed over from Dover earlier on the morning of 6 March 1987, the roll-on roll-off (ro-ro)

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[23] *H. M. Coroner for East Kent ex. p. Spooner* (1989) 88 Cr. App. R. 10, per Bingham J. at 16

[24] Facts taken from *"Zeebrugge: Learning from Disaster – Lessons in Corporate Responsibility"* Stuart Crainer (1993; Herald Charitable Trust, London)

ferry the *Herald of Free Enterprise* was due to depart from Zeebrugge at 18:00 hours. With the car deck already being loaded, the First Officer went to inspect proceedings. Whilst on the car deck he, mistakenly, believed he had seen the Bosun heading towards the control panel used for closing the bow doors. Believing that things were proceeding normally, the First Officer headed back to the bridge to prepare for departure. The bow doors had recently been changed from a visor style to a clam type so that, when the ship set sail with the bow doors still open, they were out of sight of the bridge. The ship passed the inner-harbour breakwater at approximately 18:20 and accelerated out towards the open sea. Having reached a speed of 15 to 18 knots the ship began to take on water through the open bow doors at a rate of two hundred tons per minute. At 18:25 the ship turned round and rolled over onto a sandbank less than a mile from the harbour with only the starboard side of the ship remaining above water. 192 people lost their lives.

At the outset Mr Justice Turner held that in order to find the company guilty of manslaughter it was necessary to find some officer who could be identified with the company who was guilty of the individual offence of manslaughter. It is important to note that at that time the appropriate test

for manslaughter was that laid out by Lord Roskill in *R v Seymour*[25] which was based on the notion of "recklessness" as defined in *Caldwell*[26], and in *Lawrence*[27].

The *Seymour* test for manslaughter stated that a defendant would be guilty of the offence of manslaughter where:

1) The defendant, by their actions, created an obvious and serious risk of causing physical injury (or death) to another person: and
2) That in creating the risk the defendant, having recognised that some risk was involved, nevertheless went on to take it.

It was for the jury to decide whether the risk was "obvious and serious", but "obvious and serious" to who? Turner J. ruled that the "obvious and serious risk" had to be have been evident to "a reasonably prudent person engaged in the same kind of activity as that of the defendant whose conduct is being called into question". This proved to be a major stumbling block for the prosecution.

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[25] [1983] 2 AC 493
[26] [1982] AC 341
[27] [1981] 1 All E. R. 974

Mr Justice Turner was in no doubt that a corporation could be guilty of manslaughter. He stated:

> "... I would be minded to follow a route close to that adopted by Henry J. in *Murray Wright*'s case ... in New Zealand who ruled that if it be accepted that manslaughter in English Law is the unlawful killing of one human being by another human being (which must include both direct and indirect acts) and that a person who is the embodiment of a corporation and acting for purposes of the corporation is doing the act or omission which caused the death, the corporation as well as the person may also be found guilty of manslaughter".[28]

Yet his Lordship effectively demolished the prosecution's case by ruling that the prosecution had to prove that the risk of the ship sailing with its bow doors open should have been obvious to a person engaged in the same kind of activity as that of the defendant. The prosecution had already called several P. & O. ship's Masters, all of whom had testified that the risk of sailing with the bow doors open had not occurred to them. This effectively reinforced the defence's claim that any risks inherent in the operating system were not obvious. After all, these were professionals who had

[28] *R v P. & O. European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72, per Turner J. at 89

worked with the same operating system as the *Herald of Free Enterprise* without incident. Indeed "the system had worked without mishap for years ... in which there had been upwards of over 60,000 sailings .... about 5,000 on the Zeebrugge run".[29] It also became apparent that this was not the first time a Townsend Thorensen ship had set sail with its bow doors open, but it appears that these incidents were never reported to the shore based management so the operating system was never revised. It was clearly a risk that was never obvious to anyone until it happened. Mr Justice Turner, therefore, was left with no option but to direct the jury to find all but the Assistant Bosun and Chief Officer not guilty after little over three weeks. The prosecution decided not to pursue a conviction against them on the grounds that it would be against the public interest to do so.

It is respectfully submitted that this was an unacceptable result. There were, to the layperson, clearly a number of faults inherent in the operating system that may have created an "obvious and serious" risk. First, and foremost, the door closing procedure operated on a system of negative reporting. In basic terms, the captain assumed that if he heard nothing then

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[29] *"Zeebrugge: Learning from Disaster – Lessons in Corporate Responsibility"* Stuart Crainer (1993; Herald Charitable Trust, London), quoting counsel for the defence's statistics.

the doors were shut. Indeed, this system was criticised by both the prosecution and the Sheen Inquiry. Further confusion was created by the fact that it was not uncommon for people other than the Assistant Bosun to close the bow doors. The Assistant Bosun was, in fact, quoted as saying that he often arrived at the car deck to find that someone had already closed the bow doors. This shambles of a system may well have operated without incident until that fateful day, but it is suggested that the danger should still have been obvious to the reasonable ordinary person. So how could the court fail to reach such a conclusion?

Celia Wells blames Mr Justice Turner's overly simplistic approach to the question of risk. She states:

> "Three points can be raised about Turner J.'s interpretation of recklessness: the obvious risk question; the prudent person question; and the prior knowledge question. The prosecution had not alleged that the defendant's had foreseen the risk themselves. The question then was whether they had failed to realise an obvious and serious risk of physical injury ... [Bergman] explains the trial judge's approach in these terms: "Evidence that the ships had, in the past, sailed safely was the main reason for the failure of the prosecution. The system "had worked without mishap for over seven years"

> during which there had been "upwards of over 50,000 sailings". This approach demonstrates a clear failure to consider what he meant by risk. It is reminiscent of the small child who, having survived crossing a road without looking, disputes the risk in such a strategy with the statement "But it was safe; I didn't get run over".[30]

A detailed study of what would have been an appropriate approach to risk and recklessness is not appropriate or necessary at this stage for, as we will see, the basis for corporate manslaughter is now gross negligence.

It is difficult to avoid feeling P. & O. have, in some way, been "rewarded" for adopting sloppy practices and their questionable management skills. It is plausible that a revision to the system as simple as requiring the Assistant Bosun to make a positive report to the captain the bow doors were closed could have saved 192 lives. We have also seen that poor communication within the company meant that the shore managers were unaware of the other open door sailing incidents and thus had no reason to revise the system. Why should it be that the Sheen Inquiry found that "from top to bottom the body corporate was infected with the disease of sloppiness", yet

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[30] *"Corporations and Criminal Responsibility"* Celia Wells 1993 (Oxford Clarendon Press) p.70

the court was unable or unwilling to point the finger of blame when, presumably, the same facts were available to them.

It is questionable whether Mr Justice Turner would have reached the same conclusion had the basis for the offence of corporate manslaughter been gross negligence as defined by the courts in *Andrews v D. P. P.*[31] and in *R v Adomako*[32]. The company clearly owed a duty of care to their passengers by virtue of the nature of their relationship. By failing to transport their passengers safely from A to B they had breached that duty, and that breach caused the death of 192 people. It is a matter for academic debate whether the company's negligence should be characterized as gross. I do not intend to discuss this question any further here, but I feel it is worthy of further contemplation at a future date. The fact of the matter is, however, that justice simply was not done in this case.

Not all prosecutions against corporations for manslaughter are destined to fail however. In 1994 the English Justice System saw the first successful prosecution of a corporation for manslaughter. O. L. L. Limited and its director, Peter Kite, were both successfully prosecuted for manslaughter

[31] [1937] AC 576

following the death of four teenagers during a canoe expedition from an activity centre in Lyme Regis[33]. In this instance Peter Kite was shown, as Managing Director of the company, to owe a duty of care to those who utilised the centres facilities and engaged in their activities to ensure their safety. The breach of this duty, it was alleged, consisted of:

> "(i) failing to devise, institute, enforce and maintain a safe system for the execution of an outdoor leisure activity, namely canoeing, by students attending the St. Albans Centre, Lyme Regis, Dorset...
> (ii) failing to procure the employment by O. L. L.. of an adequate number of staff, suitably qualified to give safe instructions in canoeing.
> (iii) failing to procure the provision by O. L. L. at the centre of all equipment necessary for the safe instruction of canoeing.
> (iv) failing to heed, either adequately or at all, the content of an undated letter sent to O. L. L. by Pamela Joy Cawthorne and Richard Retallick in or about late June 1992 [which made complaints about the absence of safety and failing to supervise the Centre Manager].
> (v) failing to supervise the Manager of the centre (namely Joseph Thomas Stoddart) so as to ensure that canoeing was being safely taught at the centre".[34]

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[32] [1995] 1 AC 171
[33] *Kite and O. L. L. Ltd* Winchester Crown Court, 8 December, 1994 unreported
[34] *Peter Bayliss Kite* [1996] 2 Cr. App. R. (S.) 295, per Swinton Thomas L. J. at 296

The deaths occurred during an open sea canoeing trip involving a teacher, eight students and two instructors. The teacher got into difficulties early on in the trip so one of the instructors, Mr Mann, stayed with him. The second instructor, Miss Gardner, proceeded on the journey across the bay with the children. They got swept out to sea and got into trouble. The canoes got swamped and four children drowned. Whilst the Managing Director clearly had no criminal intent (he did not even know that novices were taking part in open sea trips, and was not present at the time of the accident), his failure to implement an adequate safety system proved decisive. It will be noted, in this instance, that the court had no difficulty in attributing Kite's liability to the company. This was a one man company, it was easy to identify the directing mind and will of the company, he had sole responsibility for these matters, he was guilty of gross negligence manslaughter.

In 1999 two directors of a haulage company were found guilty of corporate manslaughter after one of their drivers fell asleep at the wheel and caused a fatal crash. It was alleged that Roy Bowles Transport Ltd. had ignored the excessively long working hours of this driver who often worked 60+ hours without taking proper breaks.[35]

[35] *The Times*, 20 November, 1999

In the same year the courts allowed leave to seek judicial appeal to the family of Simon Jones. They wanted to challenge the Director of Public Prosecution's decision not to bring manslaughter charges against the Directors of Euromin after Simon, a 24 year old casual dock worker, was crushed when a crane's grab bucket closed suddenly as he was unloading cobbles from a ship.[36] In March 2000 the High Court overturned the decision of the Director of Public Prosecutions and the Crown Prosecution Service not to prosecute. In the subsequent hearing at the Old Bailey in 2001 however Euromin Ltd and its general manager, Richard Martell were acquitted of manslaughter in a jury trial.

More recently English Brothers Ltd. of Wisbech were convicted of causing the death of gang foreman Bill Larkman. The company was fined thirty thousand pounds plus twelve and a half thousand pounds costs after pleading guilty to separate charges of corporate manslaughter and breaching health and safety regulations. Mr Larkman fell to his death whilst erecting an onion store at a farm.

[36] *The Times*, 21 September, 1999

These cases all point to two things. Firstly it is arguable that we are witnessing a climate in which the courts are becoming more willing to accept that a company can be guilty of manslaughter. Secondly it is apparent that the law is weighted heavily in favour of the larger corporations. The larger a company is, and the more diffuse its power structure, the harder it is going to be to identify one person who is sufficiently culpable of manslaughter. But, even if such a person is found, there is little likelihood that they will be sufficiently senior within the corporate chain of command to be deemed part of the directing mind and will of that company. Yet in the case of the one man company this is not a problem. Is it just that a two-tiered justice system is developing? Why should it be that a company is rewarded for adopting a stance where no one takes responsibility for their actions? This is the main problem with the identification theory in *Nattrass* when applied to corporate manslaughter. Fisse and Braithwaite put the problem thus:

> "[The principle in *Tesco v Nattrass* is highly unsatisfactory], namely because it fails to reflect corporate blameworthiness. To prove fault on the part of one managerial representative of a company is not to show that the company is at fault as a company but merely that one representative was at fault; the *Tesco* principle does not reflect

personal fault but amounts to vicarious liability for the fault of a restrictive range of representatives exercising corporate functions. This compromised form of vicarious liability is doubly unsatisfactory because the compromise is *struck in a way that makes it difficult to establish corporate criminal liability against large companies.*[37] Offences committed on behalf of large concerns are often only visible at the level of middle management whereas the *Tesco* principle requires proof of fault on the part of a top-level manager. By contrast fault on the part of a top-level manager is easier to prove in the context of small companies. Yet that is the context where there is usually little need to impose corporate criminal liability in addition to or in lieu of individual criminal liability".[38]

This problem is all too evident in the recent case of *R v Great Western Trains Co. Ltd.*[39] In September 1997 one of Great Western Trains' (GWT) trains passed a red light at 125 mph and collided with a freight train at Southall. The crash left seven people dead. Gary Slapper highlights counsel for the Prosecution, Mr Lissack Q. C.'s, novel approach to the question of corporate manslaughter. He argued that, following the decision of the House of Lords in *Adomako*, Mr. Justice Turner's ruling in the P. & O. case was no longer good law. The appropriate test for manslaughter was

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[37] My emphasis

[38] *"Corporations, Crime and Accountability"*, Brent Fisse & John Braithwaite (1993: Cambridge University Press), p. 47

now, he claimed, purely objective, that is to say that the question is now "was the defendant grossly negligent, that is, criminally careless judged by ordinary reasonable standards".[40] There was no need, he argued, to look for a guilty directing mind and will of the company because the defendant's state of mind was not in question. Despite the lucid and logical approach adopted by Mr Lissack Q. C. Mr. Justice Scott-Baker rejected his argument on the grounds that *Adomako* did not deal with the situation under which a corporation could be found guilty of manslaughter. Furthermore, he stated that even if a Director for Safety had been brought into the dock to face manslaughter charges such a prosecution would have failed. This statement was based on Scott-Baker J.'s belief that the Director was not sufficiently culpable.

Upon the conclusion of this case, Richard Lissack Q. C. is quoted as saying:

> "If a company is large with responsibility for safety assumed by no one and avoided by everyone, it may conduct its undertaking as negligently as it wishes, knowing that, unless the prosecution can prove beyond doubt that a directing mind of the company personally authorised, procured or directed the specific wrong, that neither that

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[39] (Central Criminal Court 27/07/99)

[40] *"Corporate Homicide and Legal Chaos"* Gary Slapper, (1999) 149 NLJ 1031

individual nor the company could ever be convicted for manslaughter, with all that a conviction for that offence conveys".[41]

GWT were convicted of a health and safety offence and fined a record £1.5 million. This is still a relatively small amount though when compared to the annual turnover of some of these companies. Railtrack, for example, announced profits of £236 million for the first six months of the year, just three months after the prosecution of GWT. It is difficult not to feel that Great Western Trains Limited got off lightly. The case made it to the Court of Appeal as an Attorney General's Reference on the corporate manslaughter question.

Lord Justice Rose accepted Mr Lissack Q. C.'s submission that "large companies should be as susceptible to prosecution for manslaughter as one man companies ... and the public interest requires the more emphatic denunciation of a company inherent in a conviction for manslaughter".[42] Whilst accepting gross negligence as the basis of manslaughter, the court refused to impose liability on Great Western Trains. Mr Lissack Q. C. for the prosecution placed great reliance on his earlier argument relating to

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[41] *"Corporate Homicide and Legal Chaos"* Gary Slapper, (1999) 149 NLJ 1031

gross negligence. It was, he submitted, "unnecessary and inappropriate to enquire whether there is an employee in the company who is guilty of the offence of manslaughter who can be properly said to be acting as the company". Instead, he submitted, a company was perfectly capable of being "personally liable". Cases such as *Meridian*, *British Steel Plc.* and *Re Supply of Ready Mixed Concrete* (all of which I have already discussed) were advanced in support of this argument. This approach was firmly rejected by Lord Justice Rose who stated, quite clearly:

> "Identification is necessary in relation to the *actus reus*, i.e. whose acts or omissions are to be attributed to the company, and *Adomako's* objective test in relation to gross negligence in no way affects this. Furthermore, the civil negligence rule of liability for the acts of servants or agents has no place in the criminal law – which is why the identification principle was developed. That principle is still the rule of attribution in criminal law whether or not *mens rea* needs to be proved".[43]

He continues at page 217:

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[42] *Attorney-General's Reference (No. 2 of 1999)* [2000] 2 Cr. App. R. 207, per Rose L. J. at 211

> "There is, it seems to us, no sound basis for suggesting that by their recent decisions the courts have started a process of moving from identification to personal liability as the basis for corporate liability for manslaughter ... In our judgement, unless an identified individual's conduct, identifiable as gross criminal negligence, can be attributed to the company, the company is not, in the present state of the common law, liable for manslaughter".

The prosecution's case therefore failed.

The benefit of such pronouncements is that at least we are certain about the true basis of a company's liability for manslaughter. However, matters still have not improved. We are still left in a situation where it is far too easy for the larger companies to avoid liability for manslaughter because the current methods for attributing liability are particularly inept in those situations where the courts seek to impose liability on large corporate bodies with complex power structures. The next chapter of this thesis therefore concerns the search for alternative methods of imposing liability on corporations for deaths caused by their activities by looking at the proposals for reform of this area of the law advanced by the Law Commission and the Government.

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[43] *Attorney-General's Reference (No. 2 of 1999)* [2000] 2 Cr. App. R. 207, per Rose L. J.

at 216

Chapter 4: Proposals for Reform: The Views of the Law Commission and the Government.

In the previous chapter we saw how corporate criminal liability was developed through the years by the courts of England and Wales. The different methods of attribution utilised by the courts to impose criminal liability on a corporation were discussed. Finally we examined how the courts utilised these rules of attribution to try to attribute liability for manslaughter to a corporation. What were also evident, however, was the gross inadequacies of the doctrines of vicarious liability and identification when trying to determine corporate criminal liability. In the case of manslaughter in particular we saw that the courts were unable to impose criminal liability on P. & O. ferries following the Zeebrugge disaster because the only people who could properly be said to be liable for the individual offence (the Assistant Bosun and the Chief Officer) could not properly be described as forming part of the directing mind and will of the corporation.

In this section of the thesis, therefore, it is proposed to look at alternative means for imposing liability on a corporation for the offence of corporate manslaughter. The first step that will be undertaken is an examination of the Law Commission's proposed offence of "corporate killing" laid out

in Consultation Paper no. 135[1] and Report no. 237[2]. Secondly there is a discussion of the Governments proposals regarding the law of involuntary manslaughter (including corporate manslaughter) and their response to the Law Commissions proposals.[3]. It is also intended to look at the private members bill, put forward by the Labour Back–bencher Mr Andrew Dismore as a ten minute rule bill,[4] which was presented to the House of Commons in April 2000.[5] It was not adopted as law but it is a pertinent example of the steady show of support that is developing for any moves to create a statutory offence of corporate killing.

Having concluded an examination of these resources I the focus will then be on alternative approaches to the problem of creating an offence of corporate homicide. This will involve dealing with resources from other jurisdictions, for example the approach adopted by the courts in the United States (see Chapter 8), and from other disciplines, for example sociology when dealing with issue of criminological group decision

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[1] *"Criminal Law: Involuntary Manslaughter - A Consultation Paper"*, Law Commission Consultation Paper no. 135 (HMSO: 1994)
[2] *"Legislating the Criminal Code: Involuntary Manslaughter"*, Law Commission Report no. 237 (HMSO: 1996)
[3] *"Reforming the Law on Involuntary Manslaughter: The Government's Proposals"* http://www.homeoffice.gov.uk/consult/invmans.com
[4] See *"The Francis Bennion Website: In Parliament"* http://www.francisbennion.com/page155.html
[5] *"Corporate Homicide Bill"*. presented to the House of Commons on 18th April, 2000 http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmbills/114/2000114.htm

making (see Chapter 7). It is also proposed to deal with the alternative approach to corporate killing embodied in sections 2 and 3 of the *Health and Safety at Work etc., Act 1974* (see Chapter 5).

It is submitted that a detailed examination of these differing approaches to a common problem will help provide a better rounded solution to the corporate homicide problem. The search for a satisfactory alternative basis for corporate manslaughter begins with a discussion of the Law Commission's proposals for reform in this area of the law.

In February 1994 the Law Commission published its consultation paper *"Criminal Law: Involuntary Manslaughter"*. In it the Law Commission put forward for discussion its ideas for reform of the law governing involuntary manslaughter. Owing to a number of high profile public disasters[6] the Law Commission decided to pay particular attention in its proposals for reform to the law of corporate manslaughter. They state:

> "...we should not ignore what appears to be a widespread feeling among the public that in cases where death has been caused by the acts or omissions of comparatively junior employees of a large organisation ... it would be wrong if the criminal law placed all the

[6] Namely the capsize of the *Herald of Free Enterprise* and the sinking of the pleasure boat the *Marchioness*.

blame on those junior employees and did not also fix responsibility in appropriate cases on their employers who are operating, and profiting from, the service being provided to the public".[7]

Having undertaken an examination of the law governing the imposition of criminal liability on corporations (similar to that laid out in the previous chapter) the Law Commission set out its options for reform of the law in this field. The Law Commission's initial recommendation was that any proposed new corporate offence should not differ from any new proposed individual offence. The question to be answered they say is:

"...how the general law of manslaughter may be applied in the particular circumstances of a corporation, and not whether standards and requirements should apply to corporations which are different from those that apply generally, that is to say to individuals".[8]

Furthermore, the Law Commission realises the usual basics of criminal liability, that is to say conscious risk taking or *mens rea* for example, make it too complex for any attempts to impose corporate criminal

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[7] *"Criminal Law: Involuntary Manslaughter - A Consultation Paper"*, Law Commission Consultation Paper no. 135 (HMSO: 1994), page 89

[8] *"Criminal Law: Involuntary Manslaughter - A Consultation Paper"*, Law Commission Consultation Paper no. 135 (HMSO: 1994), page 127

liability to succeed. What is needed instead, they realised, was an alternative means of judging corporate fault. Indeed the Law Commission even hints at the notion of, what Fisse and Braithwaite would call, "reactive fault", which will be considered later.

The Law Commission pointed out that these problems with determining culpability were particularly evident in the case of corporate manslaughter. Hence, they provisionally recommended the creation of a special regime applying to corporate liability for manslaughter. The main question would be:

> "... whether the *corporation* fell within the criteria for liability for that offence."[9]

The "awareness of risk" question, the Law Commission argues, could be answered by looking at the decision making structure of the defendant corporation. Corporations undertake activities which are organised by the corporate decision makers. Inevitably, in this instance, there is some recourse to the doctrine of identification. The question becomes whether those involved in the decision making process should have been (not necessarily actually) aware of the risk that those activities might result in

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[9] *"Criminal Law: Involuntary Manslaughter - A Consultation Paper"*, Law Commission Consultation Paper no. 135 (HMSO: 1994) page 131

death or serious injury. This would entail making value judgements about the company's approach, amongst other things, to safety in organising its activities.

On the other hand, in order to answer the question of whether the company's conduct "fell seriously and significantly below what could be demanded of it in dealing with that risk", the Law Commission abandons the doctrine of identification. The Law Commission state:

> "The basic premise is that the company is required to arrange its affairs in a way which is reasonable granted the presence of the risk. This requires investigation of how the company operates to prevent death or injury ... If a corporation has *chosen* to enter a field of activity it has a clear duty to those affected by that field of activity to take steps to avoid the creation of serious risks".[10]

Juries should not assume that there had been a deviation from the reasonable standard purely because a death had occurred however. It is still possible for a death to occur even where all reasonable steps have been taken to neutralize all possible risks. The question is whether, having analysed the corporation's approach to the issue of workplace

[10] *"Criminal Law: Involuntary Manslaughter - A Consultation Paper"*, Law Commission Consultation Paper no. 135 (HMSO: 1994) page 132

safety, it had taken "steps to discharge that duty of safety[11], and that the systems which it had put in place to run its business" were satisfactory in the current workplace climate.

The Law Commission put forward these proposals for discussion and invited comments from concerned groups. The results of this consultation process were set out in Report no. 237 *"Legislating the Criminal Code: Involuntary Manslaughter"*. From their report it appears that there was a fair degree of support for a reform of this area of the law. Reasons adduced in favour of reform included:

1) The need to give practical effect to the recently established principle that an indictment lies against a corporation for manslaughter.

2) The need to maintain public confidence in industry and enforcement bodies by making it harder for corporations to escape culpability on a technicality.

3) The need to punish corporations for adopting unsafe working practices as a contributing factor to the death rather than the carelessness of an individual.

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[11] *"Criminal Law: Involuntary Manslaughter - A Consultation Paper"*, Law Commission Consultation Paper no. 135 (HMSO: 1994) page 132

4) The need to deter corporations from adopting sloppy and unsafe working practices.

5) The need to adopt new kinds of sentence in a bid to move away from the overly simplistic approach of imposing fines

6) The inadequacy of the regulatory offences in the *Health and Safety at Work etc., Act 1974.*[12]

On the other hand some people were against the concept of criminal manslaughter giving reasons including:

1) Practical considerations

2) In the event of a major disaster there would be an inquiry. Introducing an offence of corporate manslaughter may result in potential witnesses refusing to appear for fear of being prosecuted.

3) It would be harsh to punish a corporation for failing to reach a particular standard of safety where so many other corporations in the same field have also failed to recognise the need.

4) Punishing a corporation would result in innocent shareholders being penalised for no fault of their own – the "overspill" problem.[13]

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[12] *"Legislating the Criminal Code: Involuntary Manslaughter"*, Law Commission Report no. 237 (HMSO: 1996) page 89 - 90

The Law Commission, however decided to go ahead and try and extend corporate liability. They were faced with four possible avenues of approach, namely vicarious liability, the principle of aggregation, the creation of a radically new corporate regime or to adapt the individual offence of "killing by gross carelessness" to make it applicable to corporations whilst veering away from the doctrine of identification. What the Law Commission finally recommended was the creation of a new offence of "Corporate Killing" set out in the following terms:

> "**4.**- (1) A corporation is guilty of corporate killing if –
>
> (a) a management failure by the corporation is the cause or one of the causes of a person's death; and
>
> (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.
>
> (2) For the purposes of subsection (1) above –
>
> (a) there is a management failure by a corporation if the way in which its activities are managed or organised fails to

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[13] *"Legislating the Criminal Code: Involuntary Manslaughter"*, Law Commission Report no. 237 (HMSO: 1996) page 91 - 93

ensure the health and safety of persons employed in or affected by those activities; and

(b) such a failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual".[14]

This differs in quite some degree from the Law Commission's proposal for reform of the individual offence of gross negligence manslaughter. The formulation the Law Commission adopted provisionally was that a defendant would be liable where:

1. The accused ought to have been aware of a significant risk that his conduct could result in death or serious injury; and
2. His conduct fell seriously and significantly below what could reasonably have been demanded of him in preventing that risk from occurring or in preventing that risk, once in being, from resulting in the prohibited harm".

It is said that the first element is something of a formality, if the accused could not reasonably have been expected to be aware of the risk, then he

[14] *"Legislating the Criminal Code: Involuntary Manslaughter"*, Law Commission Report no. 237 (HMSO: 1996), Appendix A, page 137

could not be expected to do anything about it. On the other hand, the second limb of this test has numerous elements. Firstly, the accused's conduct must fall short of what can reasonably be expected of him: "That is, he is to be judged according to what might be expected of a doctor, a train driver or, in the alternative case, ordinary citizen"[15]. Secondly, where the accused acts in a manner which is not accepted by their profession they will, most likely, be found not to have acted in the manner expected of him. However, even if the accused does follow the standard practice, the jury should not be prevented, in situations where there is a high risk of death or serious injury, from finding that this practice is unacceptable. Thirdly, the accused's conduct must fall below the standard expected of him by a "substantial and significant degree". This reflects the idea conveyed by the label "gross negligence"[16]

This provisional formulation received a mixed response on consultation. Some reservation was expressed, for example, with regard to the use of the words "seriously and significantly" in the second limb of this test. Some of those consulted believed that too much court time would be taken up by legal argument in attempting to distinguish between them, favouring instead the use of words such as "substantially" or "far".

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[15] (HMSO: 1994) page 124
[16] (HMSO: 1994) page 124

Further concerns were expressed by members of the medical profession who felt that the provisional formulation did not reflect the realities of medical practice and that it would be difficult to categorise medical conduct in the manner suggested in the second limb of the test. Other concerns included the belief that, under this formulation, it will no longer be open to the jury to consider all the surrounding circumstances in determining ability (which is felt to be one advantage of the present test for gross negligence). Furthermore, there was concern that the proposed formulation was too vague, leaving the jury to categorise conduct as criminal or not[17].

The final formulation the Law Commission adopted for the new offence of "killing by gross carelessness" reads like this:

> 2 (1) – A person who by his conduct causes the death of another is guilty of killing by gross carelessness if –
>
> (a) a risk that his conduct will cause death or serious injury would be obvious to a reasonable person in his position;
>
> (b) he is capable of appreciating that risk at the material time; and

[17] *"Legislating the Criminal Code: Involuntary Manslaughter"*, Law Commission Report no. 237 (HMSO: 1996) page 48

(c) either –

(i) his conduct falls far below what can reasonably be expected of him in the circumstances; or

(ii) he intends by his conduct to cause some injury or is aware of, and unreasonably takes, the risk that it might do so.

In the first limb of the test it will up to the jury to decide whether the risk in question would have been "obvious to a reasonable person in the defendant's position". In making this determination the jury will be asked to take into account all the relevant facts known to the defendant at the time (including any special skills or knowledge the defendant may have claimed to possess). The defendant must also have been capable of appreciating the risk at the material time, a disability which leads to a temporary or permanent impairment to this ability may be used as a valid defence. The most important element is the third limb as the same phrasing is used in the corporate offence, that is to say, "that the accused's conduct fell far below what could reasonably have been expected of him in the circumstances or ... that he intended by his conduct to cause some injury or was aware of, or unreasonably took the risk that, it might do so".

This element of the offence may be satisfied in one of two ways. The first alternative (clause 2(1)(c)(i)) is similar to the test of dangerousness in road traffic offences. The defendant's conduct must fall far below what could be expected of him. Whilst avoiding the circularity of the *Adomako* formulation, states the Law Commission, it still suffers from leaving much to the determination of the jury which still leaves the danger of inconsistency in the application of the law. It is felt that the alternative of creating a rigidly defined offence would be unworkable and hence, they can find no way around this problem. On the other hand, it retains one desirable element from the *Adomako* gross negligence test in that juries would still be required to consider all the surrounding circumstances when evaluating the defendant's conduct.

The alternative (clause 2(1)(c)(ii)) is to prove that the defendant intended to cause some injury to another or was aware of the risk of doing so, and he nevertheless took it. It is said that this provision was included on the advice that it was easier to explain the principles of unlawful act manslaughter to juries and it was easier for them to understand than the vagaries of gross negligent manslaughter. Furthermore, the Law Commission feels that it would be easier for juries to decide whether the defendant acted intentionally or recklessly in respect of causing *some*

injury rather than deciding whether the defendant's conduct fell below what could reasonably be expected of him. It has been said that this alternative adds nothing to the scope of the offence, indeed, the kind of conduct which this clause is designed to cover, states the Law Commission, will frequently fall under both alternatives. Rather, clause 2(1)(c)(i) is intended to simplify the task for the jury by dispensing with the need for the jury to consider clause 2(1)(c)(ii) which is viewed as a more complicated, and mainly academic, question. This leads us into our discussion of the offence of corporate killing.

The novel element this provision introduces is the concept of a "management failure". The Law Commission could not avoid the fact that the doctrine of identification is particularly problematic when trying to impose liability on a corporation for manslaughter. The logical step to counteracting this problem would be to adopt a means of attributing liability to a corporation which does not require the courts to identify the mental state of any individual. What the Law Commission has tried to do instead is to concentrate on getting closer to establishing "true" corporate guilt. Whereas under the doctrine of identification the courts would attribute the mental state of a sufficiently senior employee to a corporation, the notion of a "management failure" suggests that the court would be able to examine, for example, the corporate decision making

structures and its operating systems. Whilst, ultimately, these systems and procedures were devised by individuals they were devised and adopted as a collective consciousness which we may call the corporation. Thus instead of finding a company liable for manslaughter caused by the unsafe actions of an employee, the courts would be punishing the corporation for failing to take sufficient steps to prevent those dangerous acts from occurring in the first place.

Indeed, the Law Commission point to the collapse of the P. & O. trial as an example of where the new proposed offence might have secured a conviction. As we saw in the previous chapter, the case against P. & O. failed because the two people whose actions ultimately caused the capsize of the *Herald of Free Enterprise* (the Assistant Bosun and Chief Officer) were not sufficiently senior employees within the corporate structure to attribute liability to the corporation. The Law Commission suggest that, using the concept of a "management failure" it would have been easy for the courts to find P. & O. ferries guilty of corporate manslaughter on the grounds that they had failed to instigate a safe operating system for their ferries and that this failure fell far below what could reasonably have been expected of them.[18]

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[18] See page 115-16 of *"Legislating the Criminal Code: Involuntary Manslaughter"*, Law Commission Report no. 237 (HMSO: 1996)

These ideas of collective responsibility are not new and this thesis contains a discussion of some other work carried out by philosophers and criminologists regarding the collective accountability of groups.[19] It is felt, however, that the Law Commission has taken a step in the right direction. It is clear that the criminal laws which apply to individuals struggle to cope when presented with corporate offenders. It is always going to be necessary for the law to evolve in order to cope with the new challenges brought by corporate offenders. The Law Commission should be commended for trying to embody in its offence a more accurate representation of corporate criminal liability.

The Law Commission received support for their proposals, particularly the "management failure" construction, from the Health and Safety Commission. In a letter to Mr Edward Pegg at the Sentencing and Offences Unit in the Home Office, they expressed their support. They suggested, however, that it should be slightly wider in its ambit than that probably envisaged by the Law Commission. They stated:

[19] For example: *"The Responsibility of Monsters and Their Makers"*, Peter A. French – in *"Individual and Collective Responsibility: The Massacre at My Lai"* ed. Peter A. French (1972: Schenkman Publishing, Masschusetts); *"The Challenger Disaster: Organizational Demands and Corporate Ethics"*, Russell Boisjoly, Ellen Foster Curtis and Eugene Mellican – in *"Corporate and Governmental Deviance"*, Ermann & Lundmann, and *"Collective Responsibility"* H. D. Lewis – in *"Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics"*, Larry May and Stacey Hoffman eds. (1991: Rauman & Littlefield).

> "In principle the Commission supports the application of the offence to work related deaths caused by occupational ill-health as well as accidents which is implicit in the way the offence is drafted. This will have the effect of applying the offence to deaths caused by exposure to health damaging agents such as pathogens, chemicals or certain fibres. However, there are significant practical implications in applying the new offence to long latency illnesses and these will need to be considered carefully."[20]

This is a potentially interesting and undoubtedly unexpected outcome of the Law Commission's formulation. One only has to look at the number of cases that have been brought by individuals against companies for long term illness caused by exposure to, for example, asbestos. This would really widen the scope of the offence, though this in itself presents a number of problems. The Health and Safety Commission recognise this and suggest that the law should not be applicable retrospectively, that is to deaths caused by exposures before the enactment of this new offence. Even so, they state, this may a difficult cut off to enforce in the case of illnesses caused by cumulative exposure. This would certainly eliminate the main problem that is perceived with this potential expansion to the clause, namely the reasonable practicability test.

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[20] Extract from a letter to Mr. Pegg at the Sentencing and Offences Unit in the Home Office, dated 7th September 2000. See also, H.S.E. press release CD47:00 – 13 September 2000

Technological, medical and research developments have shown us the error and ignorance of some of the working practices of the past which have been adopted to handle hazardous materials. It would be unfair, however, to impose modern safety standards on earlier incidents. What might be reasonably practicable in these times would not have been plausible, or indeed possible, in years gone by.

Not everyone agrees, however, that the Law Commission's approach is to be praised. In his *article "Manslaughter and Corporate Immunity"* David Bergman, for instance, feels that the Law Commission is still relying on the identification theory, albeit in a different form, to determine liability. Furthermore he suggests that they have adopted a very blinkered and uninspired approach to the attribution of liability problem. The Law Commission proposal requires the proof of "subjective recklessness" on the part of the company. Bergman states:

> "What this meant was that the Law Commission believed that the only way in which the courts can determine whether companies are guilty of offences requiring a "subjective state of mind" – in effect any offence requiring evidence of recklessness or intention – is through consideration of the state of mind of an individual within the company. Once the Commission had made up its mind that "subjective" manslaughter, in so far as it affects companies,

will continue to be adjudicated on according to the general principle of "identification", there was no question that the Commission would consider amending the general test of liability".[21]

Bergman has a fair point. The Law Commission has, possibly, taken a relatively conservative approach to the question of attributing liability to corporations, but his interpretation of the proposed offence cannot be endorsed. Certainly the actions that are being judged by the courts are the actions of individuals within the company but it is not necessarily solely these actions that are being punished. What the corporations are being punished for is for allowing a climate to develop in which sloppy working practices permeate the organisation of the corporation's activities.

It is hoped that an examination of the theories of collective responsibility will show that individuals will reach different solutions when considering the same problem both as an individual and as part of a group. In its most basic form a corporation is a group of individuals utilising a corporate identity to achieve maximum return for their investments whilst being protected from individual financial liability by

[21] *Manslaughter and Corporate Immunity"* David Begman, (2000) 150 N. L. J. 316, at 317

corporate law concepts as "limited liability" and the "veil of incorporation". The decisions of the corporation are the decision of these individuals expressed as corporate policies and actions. By concentrating on imposing liability on corporations for adopting unsafe working practices as part of its decision making procedures, for example, the Law Commission is focusing on, is viewed as, the closest representation of a corporate state of mind (that is to say a corporate decision) yet. It is submitted that it is impossible for the element of the individual to be completely removed from any test to attribute liability to a corporation.

Since it is Parliament which would eventually legislate for any statutory offence of corporate manslaughter, it is also important to consider the Government's view on this topic. In *"Reforming the Law on Involuntary Manslaughter: The Government's Proposals"*[22] the Government sets out its views on the Law Commission's proposals for reform. Although dubious about the ease with which a "management failure" could be proved, the Government recognized the usefulness of a new offence of corporate killing. They state:

[22] http://www.homeoffice.gov.uk/consult/invmans.com

> "The Government believes the creation of a new offence of corporate killing would give useful emphasis to the seriousness of health and safety offences and would give force to the need to consider health and safety management as an issue".[23]

Whilst not disagreeing with the substantive elements of the offence, there are two main areas where the Government's approach to the offence of corporate killing differs from that of the Law Commission. These are with respect to the potential defendants to any charge of corporate killing, and punishing company officers in the event of a successful prosecution for that offence.

The Law Commission recommended in Report No. 237 that its proposed new offence should not be extended to apply to unincorporated bodies, but rather it should focus solely on "the kind of organisation for which it is primarily designed – namely the commercial corporation".[24] This was justified, partly, on the basis that those persons who comprise the unincorporated body would still be liable for the individual offence. The Government, however, declined to follow this approach. Both parties recognised that, in effect, it may often be difficult to distinguish between an incorporated and unincorporated body. What the Government

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[23] *"Reforming the Law on Involuntary Manslaughter: The Government's Proposals"* http://www.homeoffice.gov.uk/consult/invmans.com (page 13 of 29)

[24] *"Legislating the Criminal Code: Involuntary Manslaughter"*, Law Commission Report no. 237 (HMSO: 1996), page 118

recommended, therefore, was that the offence should be made applicable to "undertakings", as defined in the *Local Employment Act, 1960* as "any trade or business or other activity providing employment". This would, the Government envisaged, increase the scope of the offence,[25] to include, for examples, schools and hospital trusts. Such an extension was justified on the grounds that such enterprises were already subject to liability within the scope of the *Health and Safety at Work etc., Act 1974.* No major objections can be made to this proposal but it does seem that the distinction between incorporated and unincorporated bodies is somewhat arbitrary. Surely justice demands that if an organisation has conducted its affairs in such a way that a death has resulted, why should it be protected from the full force of the criminal law merely because it is unincorporated. As a proviso, however, it is important to consider some of the financial implications of such an extension. It would certainly be very serious if the National Health Service were to be subject to prosecution and punishment for corporate manslaughter. Any fine which was imposed on it would necessarily affect the provision of effective medical treatment for the general public. The Government is consequently urged to consider such a matter with great care.

[25] Indeed, the Government estimated that this would make approximately 3 ½ million enterprises potentially liable to a charge of corporate killing.

The second major difference between the two approaches is found within the question of enforcement against secondary parties. The Law Commission recommended that the corporate offence should not be used to indirectly extend the liability of individuals. Despite the fact that section 37 (1) of the *Health and Safety at Work etc., Act 1974* provides additional liability to be pinned on individual directors where their conduct has contributed to a breach of sections 2 and 3 of that Act, the Law Commission stated:

> "There will no doubt be cases in which one or more of the company's employees will amount to the commission of one of the two "individual" offences; but where that conduct does not fulfill the requirements of liability for one of those two offences, we would not wish an individual employee to be caught by the corporate offence".[26]

The Government did not favour this approach. They were concerned that such an approach:

(a) could fail to provide a sufficient deterrent, particularly in large or wealthy companies or within groups of corporations; and

[26] *Legislating the Criminal Code: Involuntary Manslaughter"*, Law Commission Report no. 237 (HMSO: 1996), page 119

(b) would not prevent culpable individuals from setting up new businesses or managing other companies or businesses, thereby leaving the public vulnerable to the consequences of similar conduct in future by the same individuals.[27]

What the Government recommended therefore is:

> "[T]hat any individual who could be shown to have had some influence on, or responsibility for, the circumstances in which a management failure falling far below what could reasonably be expected was a cause of a person's death, should be subject to disqualification from acting in a management role in any undertaking carrying on a business or activity in Great Britain".[28]

It is submitted that such an extension may indeed add something to the offence of corporate killing in terms of increasing the deterrent effect of this offence. By threatening the individual directors with disqualification it reinforces the idea that the veil of incorporation is no defence against criminal liability. A threat to an individual's *personal* livelihood is arguably likely to encourage directors to take greater care when implementing safety policies and procedures. On the other hand

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[27] *"Reforming the Law on Involuntary Manslaughter: The Government's Proposals"* http://www.homeoffice.gov.uk/consult/invmans.com (page 18-19 of 29)
[28] *"Reforming the Law on Involuntary Manslaughter: The Government's Proposals"* http://www.homeoffice.gov.uk/consult/invmans.com (page 19 of 29)

the Government may be heading into controversial territory. Firstly there is the danger of encouraging companies to put forward a scapegoat for prosecution. Whilst the inconvenience and potential stigma of being temporarily disqualified from being a director are obvious, it is suggested that the financial benefits offered to the individual who accepted such a post would prove an effective counterbalance to such inconvenience. Whilst the Government's efforts to seek out new forms of punishment are to be commended, such a notion would, it is suggested lead to the demeaning of this sanction.

Nevertheless, the Health and Safety Commission also supported moves to ensure that individual officers of a culpable company were disqualified from holding a directors post, upon conviction, "for unlimited periods in the most serious cases"[29] Breach of such a disqualification order, argues the Health and Safety Commission, should be punishable by imprisonment. It is undoubtable that, whatever the formulation, committing corporate manslaughter should receive a heavy punishment. This is a matter which will be dealt with later in this thesis.

[29] Extract from a letter to Mr. Pegg at the Sentencing and Offences Unit in the Home Office, dated 7th September 2000.

Secondly, whilst the Government accepts that the doctrine of identification is unacceptable in the context of attributing liability for corporate killing, it is arguable that they are risking venturing back within the realms of this doctrine with this proposal. As I have argued, the Law Commission's proposed offence of corporate killing seems to aim to identify liability in the corporate collective consciousness. Yet, whilst accepting the main thrust of the Law Commission's offence of corporation, the Government reverts, to a degree, to the concept of a "directing mind and will" in order to find a means of punishing individual directors. Furthermore, it is questionable whether it is just to extend indirect liability to an individual where they have committed no criminal offence. Caution is urged before making any further moves in this direction.

Unfortunately this proposed new offence did not get any further than the discussion stage. Speculation was rife that moves towards creating a Corporate Homicide Bill would be announced in the Queens Speech in November 2002. For reasons not yet established, however, these proposals disappeared without trace. This meant that the closest we have come to a statutory offence of corporate manslaughter so far is Mr. Andrew Dismore's "Corporate Homicide Bill".

This Bill was initially presented to the House of Commons on the 18th April, 2000 and was scheduled for a second reading. The proposal was, however, dropped. Looking at the provisions therein it is apparent that this Bill simply adopts the proposals made by the Law Commission in Report No. 237 without implementing any of the changes proposed by the government. This is somewhat disappointing as it does not really contribute anything to the corporate homicide debate. What this does mean, however, this presents a "clean slate" on which to consider further alternatives to the doctrine of identification as a basis of liability. Chapter 6, for example, contains an examination of those group oriented theories of corporate liability that believe that there is such a thing as truly "corporate" fault, and in chapter 7 consideration will be given to the approaches to this problem adopted by other jurisdictions. Firstly, however, we will look at the *Health and Safety at Work etc., Act 1974.*

It will be seen that sections 2 and 3 of said Act should be considered as a serious alternative to any moves to create a corporate killing offence. Judicial support for its provisions are fast resulting in an increasing number of companies being successfully prosecuted and punished for workplace deaths, a process that is eased by its relatively straightforward approach to corporate liability. The Courts are not faced with complicated legal doctrines which seek to establish a potentially

fictitious corporate *mens rea*. Rather liability is absolute and the burden of proof is on the defendant companies to show that they did all that they could to discharge their duties under the 1974 Act.

Chapter 5: A Ready Made Solution? Sections 2 and 3 of the *Health and Safety at Work etc., Act 1974.*

As was seen in the previous chapter, the stage is still set for the introduction of a statutory provision governing the offence of corporate manslaughter. There is a growing feeling amongst some members of the academic community that any attempt to provide such an offence is fraught with such difficulties that it is almost certain to fail. These same academic commentators also question the need for the creation of a statutory offence of corporate killing when there are, so they claim, adequate statutory provisions in place to deal with deaths caused by corporate activities.[1] The provisions they point to are sections 2 and 3 of the *Health and Safety at Work etc., Act 1974.*

This section of the thesis, therefore, contains an examination of these provisions and identifies the duties laid out therein. Subsequently there is a discussion of the way the Courts have interpreted these duties and punished companies for breaching them. Finally, on the basis of these considerations, it is questioned whether it is acceptable to leave the

[1] See for example *"Corporate Liability for the Health and Safety of Others"*, Irene Mackay, (1996) 146 N.L.J., 438; *"Boardroom G.B H"*, David Bergman, (1999), 149 N.L.J., 1656; *"Manslaughter and Corporate Immunity"*, Jason Daniels & Ian Smith, (2000) 150 N.L.J., 656.

provisions of the *Health and Safety at Work etc., Act 1974*, as the sole statutory provisions with which to punish corporations for causing deaths.

An example of this academic support can be found in *"Manslaughter and Corporate Immunity"*, an article written by J. Daniels and I. Smith.[2] In this article they advocate more academic and popular support being given to sections 2-3 of the *Health and Safety at Work etc., Act 1974* and deal with some of the similarities between them and the new proposed corporate killing offence. The main thrust of this article is the commentator's view that it is pointless to create this offence of corporate killing because sections 2-3 are perfectly adequate substitutes. The first argument is that the offence of corporate killing and contravention of the general duties of the *Health and Safety at Work etc., Act 1974* both carry a similar penalty, namely an unlimited fine. This means that the main aim of the new offence has to be achieving retribution "by way of the stigma associated with a conviction for killing".[3] If it is not accepted that this is a legitimate aim then we must question whether the deterrence issue can be satisfied by the provisions of

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[2] *"Manslaughter and Corporate Immunity"*, (200) 150 N.L.J. 656, J. Daniels and I. Smith
[3] *"Manslaughter and Corporate Immunity"*, (200) 150 N.L.J. 656, at 656

the *Health and Safety at Work etc., Act 1974*, contravention of which, in the eyes of the authors, is more likely to lead to a successful prosecution.

The two offences clearly have different aims. The criminal offence of corporate killing clearly has retribution as its aim. On the other hand, the general duties found in sections 2-3 have more of a deterrent aim.[4] The authors state:

> "This argument manifests itself in the view that regulatory crime is not "real" crime. To that extent the notion of stigma veers more towards an offence where the culprit is found to be morally culpable. In short, there more stigma attached to the crime of manslaughter than a regulatory offence".[5]

Once the ambit of section 2 and section 3 have been determined we realise that they have been quite effective in successfully punishing corporations for dangerous working practices which have caused deaths. This is largely, as will be seen, down to the court's recognition of the intent behind the *Health and Safety at Work etc., Act 1974*, and the judiciary's reluctance to

[4] This matter is not quite so "black and white". There is no doubting, for example that the Corporate Killing offence also has a degree of deterrence inherent in it, it is just that it is not identified as its primary goal.
[5] *"Manslaughter and Corporate Immunity"*, (200) 150 N.L.J. 656, at 656

let companies side-step these general duties. In *R v British Steel Plc.*[6] and *R v Gateway Foodmarkets Ltd.*[7] for example, we will see the courts refusing to accept the companies' defence that they had done everything that was reasonably practicable at *directing mind* level to nullify risks to health and safety in the workplace. Accepting this construction would have left it open to companies to avoid liability by delegating dangerous tasks to lower level employees. Another example will be seen in *R v Board of Trustees of the Science Museum*[8] where the courts were willing to adopt a wide construction of the general duties in order to bring a variety of conduct within their ambit. What then do sections 2 and 3 provide?

Section 2(1) of the *Health and Safety at Work etc., Act 1974*, imposes liability on an employer for putting employees under unnecessary risk. This can include those situations where dangerous working practices have resulted in the death of an employee in the workplace. Section 2(1) states:

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[6] [1995] 1 W.L.R 1356
[7] [1997] IRLR 189
[8] [1993] I.C.R. 876

> "It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees".[9]

The term "employees" encompasses those who have been employed under a contract of employment or apprenticeship, and also covers all those persons "who have been provided with the relevant training or work experience in the workplace".

The question of when an employee may be considered to be "at work" was considered by the Courts in *Bolton Metropolitan Borough Council v Malrod Insulations Ltd.*[10]. As was said by the courts, "it was unique to prosecute for a breach when work had not begun or before it was suggested anyone was at risk"[11]. Malrod Insulations were originally charged with breaching the duty under section 2 for using a decontamination unit with defects which were liable to result in anyone using said unit receiving a severe electric shock. They appealed on the grounds that the duty under section 2 was only owed to an employee at work. Under section 52(b)

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[9] The general duty under section 2(1) of the *Health and Safety at Work etc. Act, 1974*, is further extended by the *Management of Health and Safety at Work Regulations, 1992*, which require that the employer carry out a proper risk assessment in the workplace, and that he takes steps nullify the risks.

[10] [1993] I.R.L.R., 274

[11] *Bolton Metropolitan Borough Council v Malrod Insulations Ltd.* [1993] I.R.L.R., 274,

Health and Safety at Work, 1974 "an employee is only at work throughout the time when he is in the course of his employment".[12]

> "the essence of the submission was that, on a proper construction of the statute, before the defendant could be found guilty of the offence charged, its employees had in fact to be at work in the removal of the asbestos whereas, on the evidence, at the time the alleged offence no one was at work. It was submitted that the statutory duty only arose when the defendant's employees were at work".[13]

The Court, however, did not share this view. It was held that on no common sense basis could the words "at work" mean that the duty to provide a safe plant arose only when men were actually at work:

> "Such a construction would lead to the conclusion that the duty came to life when the employees reported for work in the morning, that it existed throughout the working day but would then fall in limbo at the end of the day, only to be revived the next morning. Under this construction if an inspector went on site at the end of the working day and found a defect in the plant, he would be powerless to institute proceedings for a breach of duty ... Moreover the employer's duty under section 2 is not confined to employees who are engaged in a

[12] *"Trends in Occupational Health and Safety"*, Brenda Barrett, (1994) 23 I.L.J. 60, 62
[13] *Bolton Metropolitan Borough Council v Malrod Insulations Ltd.* [1993] I.C.R. 358

specific process. It applies to all "employees" of an employer. Accordingly, there can be a breach of duty if any employee is exposed to risk of injury from an unsafe plant even though not engaged in the work in question".[14]

It should be noted that the employer's duty is to "ensure" the safety of their employees. Subject to the defence of reasonable practicability, set out in section 40 of the *Health and Safety at Work etc. Act, 1974*, an employer is therefore in breach of this duty if an employee is injured, however caused, at work. It is worth noting, however, that the Courts have also held in cases such as *R v British Steel Plc.*[15] that the corporation can only be held liable where the act complained off was committed by a senior member of the company's "directing mind and will". Professor F. B. Wright, however, feels this is wrong.[16] Instead he suggests that the prosecution should first prove the breach of the duty. The burden of proof would then shift to the defence to show that they did everything that was reasonably practicable within their power to discharge the duty. If, for example, it could be shown that the task had been delegated to an employee who had no relevant training or instruction, then the company could be found liable for

[14] *Trends in Occupational Health and Safety"*, Brenda Barrett, (1994) 23 I.L.J. 60, 63
[15] [1995] 1 W.L.R. 1356
[16] Private communication with Professor Wright.

breaching section 2 even if the employee was only a junior. This suggestion makes sense in light of the criticism of the doctrine of identification set out earlier in this thesis. The ultimate aim of this section is to ensure that the companies do everything in their power to ensure the safety of their employees. It would render the statutory provision useless if companies could circumvent this duty by delegating potentially risky tasks to junior and unskilled employees.

An opposing result, and a good example of section 2 (1) of the *Health and Safety at work etc., Act 1974* being applied by the courts is to be found in the Court of Appeal case of *R v Gateway Foodmarkets Ltd.*[17]. In this case Gateway was prosecuted following the death of a duty manager who fell nearly 30 feet through a trapdoor on the roof of their Broomhill store. This store had a goods lift which jammed frequently. Without the knowledge or consent of Gateway's Head-Office, the company contracted to maintain the lift had told the store personnel how to remedy the problem without calling them out. This involved going on to the store roof and freeing an electrical contract. On the day of the fatal accident the contractors had carried out

[17] [1997] IRLR 189

some routine maintenance and unexplainably left the trapdoor open. Mr Finn ventured on to the roof to free up the jammed lift but going from darkness to sunshine his vision was affected and he did not see the trapdoor open. The company was charged with an offence under section 2(1).

One of the main areas of contention was that Head-Office had not authorised this course of conduct and so Gateway claimed in their defence that since the act was carried out at store management level Gateway, as a company, could not be held liable because they were the acts of people who weren't part of the "directing mind and will" of the company. Lord Justice Evans began by holding that section 2 (1), as decided by Lord Hoffman in *R v Assosciated Octel* in relation to section 3(1), imposed a direct duty on the employer, "the company, as employer, is liable when the necessary conditions for liability are fulfilled"[18]. Thus the liability imposed by sections 2 and 3 was a primary, rather than vicarious, liability. Referring to the case of *R v British Steel Plc.* Lord Justice Evans stated:

> "The appellants' submission is that [imposing liability on an employer for a section 2 offence whenever the relevant event occurs would lead] to what has been called the "absurd" consequence that

[18] *R v Gateway Foodmarkets Ltd.* [1997] IRLR 189, Evans L.J. at page 191

> the employer is criminally liable under the section for the acts or omissions of even its most junior employees ... The "absurdity" argument was considered in *R v British Steel Plc.* ... when Steyn LJ said that it had proved troublesome for the court ... The court concluded that "there may be circumstances in which it might be regarded as absurd that an employer should even be technically guilty of a criminal offence", but that "in any event, so called absurdities are not peculiar to this corner of the law ... That circumstance is inherent in the adoption of general rules to govern an infinity of particular circumstances.[19]"

Lord Justice Evans reached his conclusion by reference to the reasonable practicability defence made available by the disputed section. He worked on the logic that the defence could be satisfied by actions carried out by precautions taken by both the company and its servants and agents, that is to say by the company or on its behalf. In his view "the concept of the "directing mind" of the company would have no application here".[20] Thus Lord Justice Evans concludes:

> "First, there is no clear legal basis for distinguishing between "management" and (other) employees. Secondly, if the test is whether all reasonable precautions have been taken by the company

[19] *R v Gateway Foodmarkets Ltd.* [1997] IRLR 189, Lord Justice Evans at page 191-2
[20] *R v Gateway Foodmarkets Ltd.* [1997] IRLR 189, Lord Justice Evans at page 192

> or on its behalf then it would not seem to be material to consider whether the individual concerned, who acted or was authorised to act on behalf of the company, was a senior or a junior employee ... a failure at store management level is certainly attributable to the employer, whilst leaving open the question whether the employer is liable in circumstances where the only negligence or failure to take reasonable precautions has taken place at some more junior level."[21]

Whilst not actually providing a definitive answer on the "directing mind" question Lord Justice Evans indicated that the courts were not really willing to entertain this kind of defence. This is not that surprising since, after all, the offence created by sections 2 and 3 are absolute. The mental state of the offender is not relevant. The issue of whose actions have lead to the commission of the offence creates problems for manslaughter prosecutions because the offence requires the proof of a suitably guilty state of mind. It has already been seen that the courts will only consider the company guilty if the acts were committed by part of the directing mind and will of the offending company. Since the main issue with sections 2 and 3 is solely that an unsatisfactory state of affairs has arisen, caused by the defendants, regardless of their state of mind, the "directing mind and will" defence should not be accepted by the courts.

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[21] *R v Gateway Foodmarkets Ltd.* [1997] IRLR 189, Lord Justice Evans at page 192

Section 3(1), on the other hand, is intended to protect those members of the general public (or visitors to a worksite for example) who may be adversely affected by the unsafe working practices of an undertaking. For my purposes this provision would be relevant in those instances where members of the public have been killed in train crashes or even capsizing ferries. Section 3(1) states:

> "It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety".

This duty is extended to self-employed persons under section 3(2) and both must inform those people, not in their employment, whose health or safety may be affected by their undertaking of this risk under section 3(3). Section 3 is effectively an extension of the duty laid out in section 2 and its scope has been shown to be very broad. Furthermore, in *R v British Steel Plc* the Court highlighted the fact that section 3(1) creates an absolute prohibition.

An example of the broad scope of section 3(1) can be seen in *R v Board of Trustees of the Science Museum*[22]. In this case the appellant's water cooling tower was found on inspection to contain the bacteria which causes legionnaire's disease. The appellants were charged with failing to discharge their duty under section 3(1) in that they exposed the general public to the "risk" of contracting the disease by failing to ensure the adequate maintenance of their water cooling tower. At first instance the defendants claimed there was no case to answer on the basis that there was no evidence that any bacteria had left the building or even that it had been inhaled by anyone. The trial judge, however, stated that it was sufficient that the risk was present. On appeal the question was whether the mere risk of the bacteria escaping was sufficient or whether it had to be proved that the bacteria did in fact escape.

Mr. Justice Steyn found that the former was the case. He stated:

> "In the context [of section 3] the word "risk" conveys the idea of a possibility of danger. Indeed a degree of verbal manipulation is needed to introduce the idea of actual danger which the defendants put forward. The ordinary meaning of the word "risks" therefore

[22] [1993] I.C.R. 876

supports the prosecution's interpretation and there is nothing in section 3, or indeed in the context of the Act, which supports a narrowing down of the ordinary meaning ... The adoption of the restrictive interpretation argued for by the defence would make enforcement of section 3(1), and to some extent also sections 20, 21 and 22 more difficult and would in our view result in a substantial emasculation of a central part of the Act of 1974".[23]

A second, and more recent, case where a prosecution under section 3 has been brought before the Courts is *R v Nelson Group Services*[24]. The Court's decision in *Nelson* "is important for indicating clearly the correct approach to the section and the role of the defence of reasonable practicability".[25] Lord Justice Roch stated:

> "[I]f persons not in the employment of the employer are exposed to risks to their health or safety by the conduct of the employer's undertaking, the employer will be in breach of section 3(1) and will be guilty of an offence under section 33(1) (a) of the Act unless the employer can prove on the balance of probability that all that was reasonably practicable had been done by the employer or on the employer's behalf to ensure that such persons were not exposed to

[23] *R v Board of Trustees of the Science Museum* [1993] I.C.R. 876, per Steyn J. at page 882
[24] [1998] 4 All E.R. 331
[25] *"Conducting an Undertaking and Criminal Liability under the Health and Safety at Work Act 1974"*, John Marston (1999) 163 J.P.R. 404

such risks. It will be a question of fact for the jury in each case whether it was the conduct of the employer's undertaking which exposed the third persons to risks to their health and safety. The question what was reasonably practicable is also a question of fact for the jury depending on the circumstances of each case. The fact that the employee who was carrying out the work ... has done the work carelessly or omitted to take a precaution he should have taken does not of itself preclude the employer from establishing that everything that was reasonably practicable in the conduct of the employer's undertaking to ensure its employees were not exposed to risks to their health and safety had been done.".[26]

Finally in R v Associated Octel[27] the Courts dealt with the question of what comes within the definition of a company's undertaking. In this case the appellants argued that the activities carried out by an independent contractor, hired for their expertise in the field, did not fall within the ambit of their undertaking. The argument was that they had employed a specialist who was competent to decide how best to carry out the work and that the job in question was the *contractor's* undertaking. On the basis of this argument they claimed that any risks caused by the contractor's activities did not put them in breach of the duty under section 3 and that they did not

[26] *R v Nelson Group Services* [1998] 4 All E.R. 331, per Roch L.J., quoted in *"Conducting an Undertaking and Criminal Liability under the Health and Safety at Work Act 1974"*, John Marston (1999) 163 J.P.R. 404, 405
[27] [1994] 4 All E.R. 1051

owe a duty to the independent contractor's employees or the member of the general public. This view did not carry any favour with judges. They held that the word "undertaking" meant "enterprise" or "business" and that "the cleaning of a plant was necessary for the business and so was part of Octel's undertaking, whether the work was carried out by the employer or by an independent contractor"[28]. The appellants also claimed that the fact they had no control over the conduct of the independent contractors also prevented them from being in breach of the duty under section 3. The Court, however, held that the question of control was not relevant in determining what constitutes the conduct of an undertaking.

This question of control has also been discussed in the cases of *R.M.C. Roadstone Products Ltd. v Jester*[29]; *R v Mara*[30]; and *R v Swan Hunter Shipbuilders Ltd. and Another*[31]. In *R.M.C. Roadstone Products* the defendants had also engaged an independent contractor to carry out repairs on its premises. Arrangements were made to remove certain asbestos sheets from an adjacent disused factory to aid in these repairs. Whilst it was open to the company to give directions to the contractors about how best to carry

[28] *"Corporate Liability for the Health and Safety of Others"*, Irene Mackay, (1996) 146 N.L.J., 438
[29] [1994] I.C.R. 456
[30] [1987] 1 W.L.R. 87
[31] [1982] 1 All ER 264

out their work (despite the fact that they were under no common law duty to lay down a safe system of work for them) the independent contractors were left to do their work in any way they chose. In the course of the removal of said sheets a Mr Derhum ventured onto the asbestos roof, which had no real load bearing capacity, and fell through a sky light to his death. The defendant company was prosecuted under section 3 (1) of the *Health and Safety at Work etc., Act 1974*. In its defence the company contended, amongst other things, that the removal of the asbestos sheets by the independent contractors did not fall within the ambit of the of the company's conduct of its undertaking. Mr. Justice Smith took an interesting approach to defining "undertaking". He stated:

> "A defendant's undertaking is its business or enterprise ... [T]he company's business of manufacturing road-making materials carried out at its premises ... included as part of the undertaking, the maintenance and repair of the premises. The activity of obtaining asbestos sheets for the repair of their premises, whether they were to be obtained by purchase from suppliers or by arranging for the removal and collection of second hand sheets from other premises, was for the benefit of the company's undertaking".[32]

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[32] *R.M.C. Roadstone Products Ltd. v Jester* [1994] I.C.R. 456, per Mr. Justice Smith at page 97.

Mr. Justice Smith went on to conclude that if the removal work had been carried out by employee's of the defendant company then there could be no doubt that the removal of the asbestos sheets was an activity being carried out as part of the defendant's undertaking. The fact that the defendant's chose to have the work carried out by independent contractors was not a defence. He stated:

> "If it was conducting its undertaking through contractors it owed a duty to ensure the safety of Mr. Dehun, and it was properly convicted".[33]

Mr. Justice Smith also had a few words to say on the question of control. He disagreed with the courts view in *R v Associated Octel* that the matter of control was completely irrelevant. Instead he was willing to follow counsel for the prosecution's argument that total control was unnecessary, but rather partial control would suffice relying on the Scottish authority of *Carmichael v Rosehill Engineering Works Ltd.*[34] which suggested that "a defendant's

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[33] *R.M.C. Roadstone Products Ltd. v Jester* [1994] I.C.R. 456, per Justice Smith at page 97.

[34] 1984 S.L.T. 40

conduct of his undertaking is not limited to those activities over which he has complete control".[35] Mr. Justice Smith stated:

> "I find myself attracted to Mr Hoskin's alternative submission and, with great hesitation, I have come to the conclusion that it is well founded ... [there are many situations where] a person may share control of an activity which may still be described as the conduct of his undertaking ... [including for example where] a main contractor and his subcontractor may both be said to be conducting their undertakings in respect of the subcontract work"[36]

Mr. Justice Smith then went on to announce that it was necessary in this situation to prove that there was a degree of shared control in this instance so that it could properly be said that the removal of those asbestos sheets was part of the company's undertaking. What level of control would be considered satisfactory? Justice Smith stated:

> "Before he can say that an activity is within the conduct of his undertaking, the employer must ... either exercise some actual control over it or be under a duty to do so. If, where the employer is a

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[35] _R.M.C. Roadstone Products Ltd. v Jester_, [1994] I.C.R. 456, per Justice Smith at page 100

[36] _R.M.C. Roadstone Products Ltd. v Jester_, [1994] I.C.R. 456, per Justice Smith at page 100

principal, he chooses to leave the independent contractor to do the work in the way he thinks fit, I consider that the work is not within the ambit of the principal's conduct of his undertaking. It is wholly the contractor's undertaking. If the principal does involve himself, albeit voluntarily – as, for example, by instructing the contractor's to adopt a certain method of work, or by lending a piece of equipment – then it may be that his involvement would be within the ambit of his undertaking. If the system of work proved to be unsafe, or the equipment proved to be defective and gave rise to a risk".[37]

Mr. Justice Smith proceeded to find that the defendant had left the subcontractors to their own devices and was under no duty to lay down a safe system of work. They did not try in any way to exert a degree of control over the subcontractor's activities thus it could not possibly be concluded that the removing of the asbestos sheets fell within the conduct of their undertaking.

It is important to note in relation to Justice Smith's verdict, however, that what *R v Associated Octel* did decide in relation to the issue of control, was that the degree of control a principal exerts over an independent contractor is important when considering the matter of reasonable practicability. It is

[37] R.M.C. Roadstone Products Ltd. v Jester, [1994] I.C.R. 456, per Mr. Justice Smith at page 101

often the case, as with Associated Octel, that the principal has employed the independent contractor especially for their expertise in a particular field. In these instances it may not be reasonably practicable for the principal to do anything other than to "leave them to it". It was stated at page 1063:

> "In most cases the employer has no control over how a competent or expert contractor does the work. It is one of the reasons why he employs such a person – that he has a skill and expertise, including the knowledge of appropriate safety precautions which he himself may not have".[38]

This is not, however, the end of the matter. The question of what may be "reasonably practicable" is a matter of fact and degree to be considered in each case. In the Associated Octel case there was evidence that the principal company had recommended the safety equipment that should be used to carry out the cleaning work. In so advising the subcontractors they had assumed some control over the way the work was carried out. This, it was held, shifted the burden of proving that everything that was reasonably practicable to neutralise the risk had been done shifted to the principal.

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[38] *R v Associated Octel* [1994] 4 All ER 1051 at page 1063.

In *R v Mara*[39] the courts also had to decide whether the acts of the subcontractor could be brought within the ambit of the company's undertaking. In this case the defendant company had contracted a cleaning company to clean the premises of their Solihull branch. The contract included a provision which allowed the employees of the principal company to utilise the cleaning equipment provided by the subcontractors which were left at the principal's premises. The equipment included a polisher/scrubber for cleaning the loading bay. This machine had a defective cable which revealed some of the wiring beneath the insulation. The floor of the loading bay was normally wet which rendered the machine unsafe. An employee of the principal company used the machinery on this wet floor and received an electric shock which killed him. The defendant company was charged with an offence under section 3 (1).

They were convicted at trial but appealed, *inter alia*, on the grounds that the judge had ruled wrongly in deciding that where a cleaning company accepts a contract to clean certain parts of a premises and allowed employees on those premises to use their equipment to clean other parts at other times the use of said equipment came within their undertaking. Effectively C.M.S.

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[39] *R. v. Mara [1987] 1W.L.R. 87*

(the defendant company) claimed in their defence that, since the accident happened on a day when they were not contracted to work, and it occurred outside of their supervision, the only undertaking being conducted was that of the principal company. Consequently, they claimed they were not in breach of section 3 (1) and had consented to no such breach. Lord Justice Parker, however, dismissed the appeal. He stated:

> "... it is not permissible to treat the section as being applicable only where an undertaking is in the process of being actively carried on. A factory, for example, may shut down on Saturdays and Sundays for manufacturing purposes, but the employer may have the premises cleaned by a contractor over the weekend. If the contractor's employee's are exposed to risks to health or safety because machinery is left unsecured, or vats containing noxious substances are left unfenced, it is, in our judgement clear that the factory owner is in breach of his duty under s.3(1)".[40]

Lord Justice Parker concluded that providing cleaning services was part of C.M.S.'s undertaking, and the manner in which they conducted there undertaking was to clean the principal's premises on weekdays and to leave their equipment on the premises which could be used by the principal's employers on weekends. This equipment included a faulty piece of

[40] *R v Mara* [1987] 1 W.L.R. 87, per Parker L.J. at page 90

machinery. In doing so they were carrying out their undertaking in a way which meant they weren't providing or maintaining a safe plant for its own employee's. Since C.M.S. were aware that this equipment would also be used by the principal's employees they were placed under a duty to ensure that these employees weren't exposed to risks by the way in which C.M.S. conducted their undertaking. C.M.S.'s conviction was, therefore, upheld.

Finally in *R v Swan Hunter Shipbuilders Ltd. and Another*[41] the defendant company was prosecuted following a fire on a ship that was being worked on in a shipbuilder's yard. The fire was caused by an employee of a subcontractor failing to remove oxygen hoses they were using from the lower, poorly ventilated, decks to the open top deck at the end of the day. This led to the atmosphere below deck becoming oxygen enriched and, when a welder lit his torch the following day this oxygen enriched atmosphere resulted in a fierce fire starting. Eight workers died. Employees of Swan Hunter were well aware of the dangers of such an event occurring and had compiled and distributed a rule book which was given to its employees. The rules demanded that at meal times and at the end of the day the oxygen hoses should be taken to a ventilated area (one of the upper

[41] [1982] 1 All ER 264

decks) or that the hose should be switched of at the manifold. This rule book was not, however, made available to the subcontractors. The defendants were charged with breaching their duty under section 2 (1) of the *Health and Safety at Work etc., Act 1974*, for failing to provide a safe system of work to ensure the safety of their employees.

Swan Hunter were appealing against an earlier conviction on the question whether section 2 (1) placed them under a duty to provide the employees of the subcontractor with information on the dangers of oxygen enriched atmospheres and instructions to ensure the safety of both their and the subcontractors employees on their ship. The court adopted a narrow interpretation of sections 2 and 3 and decided that this situation could be covered by the general duties laid out in section 2(1). Lord Justice Dunn stated:

> "As the judge said, that is a strict duty. If the provision of a safe system of work for the benefit of his own employees involves information and instruction as to potential dangers being given to persons other than the employer's own employees, then the employer is under a duty to provide such information and instruction. His protection is contained in the words "as far as is reasonably practicable" which appear in all the relevant provisions. The onus is

on the defendant to prove on a balance of probabilities that it was not reasonably practicable in the circumstances of the case."[42]

The question of what conduct might prove to be "reasonable practicable" has also been cleared up to a degree. What is reasonably practicable will be a matter of degree for each case. Furthermore, in determining what is reasonably practicable it is permissible to weigh up the risk of the accident occurring against the cost of eliminating it.[43] The following of a universal standard will not be enough, though failing to follow industry standards may prove damaging. Evidence that employees have been properly trained may also help to discharge the duty under section 3 (1). Finally, where the disputed activity was carried out by, or under the supervision of, a competent employee who had been properly delegated the responsibility by the "directing mind and will" of a corporation, the fact that the activity went wrong whilst under their supervision will not absolve the defendant corporation of liability. This is because the duty under section 3(1) is

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[42] *R v Swan Hunter Shipbuilders Ltd. and Another* [1982] 1 All ER 264, per Dunn L.J. at page 271

[43] "If ... the risk is small but ... the measures necessary to eliminate it are great, [the defendant] may be held to be exonerated from taking steps to eliminate the risks on the grounds that it may not be reasonably practicable for him to do so". Per Lord Goff in *Austin Rover v H. M. Inspectorate for Factories* [1989] 3 W.L.R. 520, quoted in *"Conducting an Undertaking and Criminal Liability under the Health and Safety at Work Act 1974"*, John Marston (1999) 163 J.P.R. 404, 405

absolute. Allowing a narrow construction of the issue of control would have severely curtailed the scope of sections 2 and 3.

There is no disputing the fact that sections 2-3 of the *Health and Safety at Work etc., Act 1974* provide an interesting and plausible alternative to the corporate manslaughter problem. The main benefit of these two provisions is the fact that the courts do not have to concern themselves with the problematic matter of establishing the necessary *mens rea* at the directing mind level. In that respect they are similar to strict liability offences. This means that reliance on these provisions has seen a number of companies prosecuted and punished for deaths caused by their irresponsible actions, which is something severely lacking from prosecutions citing corporate manslaughter. Thus it is not surprising that people are "highlighting the virtues" of sections 2 and 3 of the *Health and Safety at Work etc., Act 1974* rather than that of the Law Commission's proposed offence of corporate killing.

This can be attributed to a number of factors. Firstly, the duties laid out in the 1974 Act are, by now, long established. Consequently they have been discussed extensively in the courts and have resulted in the establishment of

settled principles. The concept of "management failure", on the other hand, relies on questions of standards of care to be expected and could create a degree of uncertainty and result in a great deal of unnecessary litigation.

Secondly, the provisions of the 1974 Act have a wider scope than the proposed corporate killing offence. Daniels and Smith point to the fact, for example, to the fact that the Law Commission's offence cannot deal with those situations where only a "serious" injury occurs.[44] Under sections 2 and 3, however, a company may be successfully prosecuted regardless of the outcome of their breach. They also point to the Court of Appeal in R v F. Howe & Sons[45] as an example of this broad scope. As will be seen later when discussing the issue of corporate punishment, the Court of Appeal directed that serious injury and death should be considered aggravating factors when sentencing a corporation. In some cases, they stated furthermore, a court may deem the offence so serious that they should consider whether the defendant should still be in business. This is a good step because it encourages the sentencing court to consider the degree of

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[44] *"Manslaughter and Corporate Immunity"*, (2000) 150 N.L.J. 656, J. Daniels and I. Smith. See also David Bergman's proposals which I mention in the previous section.
[45] [1999] IRLR 434

seriousness of the breach and to punish accordingly by setting a fine which should properly illustrate society's disapproval of their actions.

Further insights into the possible advantages of relying solely on a regulatory approach can be gained by looking very basically at some of the background to the *Health and Safety at Work etc., Act 1974*. By understanding its aims and goals we can see that the provisions therein clearly have a role to play in combating corporate killers. In an examination of the state of safety laws some thirty years ago, the Robens Committee concluded that the main problem was that there was simply too much law in this field. This led to confusion amongst employers and a view developed that safety laws were nothing more than "detailed rules imposed by external agencies".[46] In a bid to get industry more involved in the creation of safer working environments the Robens Committee opted for a more self-regulating system of safety law. This emphasized a belief that the main responsibility for dealing with workplace safety matters should lie with those who create the risks and those who have to work with them. This belief was later encapsulated in the *Health and Safety at Work etc., Act, 1974* a statutory provision which had a number of key underlying

[46] *"Law, Resistance and Reform, 'Regulating' Safety Crimes in the UK"*, Steve Tombs, Journal of Social and Legal Studies (1995) Vol.4, pg 343-363

philosophies. Firstly it was stressed that any regulatory bodies set up under the 1974 Act should not be regarded as a police force for the industry. Instead their job was to be the giving out of safety advice and ensuring compliance with the Act's provisions. Secondly the approach to ensuring compliance which the Act favoured was prevention rather than punishment. A gradual improvement of safety standards was achieved initially by bargaining with employers to persuade them of the effectiveness of following safety regulations rather than by dragging them through the courts. That is not to say, however, that blatant breaches of the law would not lead to rigorous enforcement of the relevant provisions.

If the argument that prevention is better than a cure is accepted, then we quickly realise that a regulatory approach to dealing with corporations that kill has a number of advantages. The prime aim of the criminal law in pursuing a corporation on a charge of manslaughter is clearly retribution. Society demands that the perpetrator be punished for their wrong doing. This is important not only because justice must be seen to be done, but also because a prosecution of an offender shows society that the law will not tolerate such behaviour and subsequent punishment will clearly have a deterrent effect. On the other hand, the *Health and Safety at Work etc.,*

Act, 1974 has as its primary aim the promotion of workplace safety. Depending on an individuals personal view about which aim society should pursue in seeking to punish corporations that kill, they will favour either the criminal or the regulatory approach. It is apparent that the 1974 Act provides possibly the greatest benefits to society, punishing a corporation for killing an employee is a worthwhile course of action, but the criminal law is somewhat limited in its ambit. Surely it is better to ensure that the death never occurred in the first place or, where death has occurred, that it never happens again.

It is this potentially greater ambit that should put the general provisions laid out in the 1974 Act ahead of any proposed new offence governing corporate manslaughter. It should not be forgotten that the *Health and Safety at Work etc., Act 1974* provides a means for the Health and Safety Commission to try and ensure compliance with the relevant statutory provisions via a series of administrative sanctions, namely the issue of notices. The Robens Committee was keen to implement a quick and effective system of achieving results that did not require taking the offender through the courts. The system of notices was designed as a constructive means of exerting pressure on employers to achieve minimum safety standards. There are two

types of notice, an improvement notice and the prohibition notice, both of which shall be considered briefly.

The improvement notice is laid out under section 21 of the 1974 Act which is issued by an inspector who requires the remedying of a particular defect within a definite time frame. Upon inspecting a site an inspector may find that a statutory provision has been breached in circumstances which the inspector believes will mean the breach will continue or may be repeated. Upon making such a decision the inspector may issue an improvement notice. Within that notice the inspector must state that they are of the opinion that a particular statutory provision has been broken, which provision has been broken, why they have reached that belief and the steps to be taken to remedy the breach within a set time period. The notice may also set out a specific course of action to be undertaken in order to remedy the breach. It may not, however, require an employer to be subject to a more onerous burden than that he would normally be placed under in the law.

The prohibition notice, on the other hand, is laid out in section 22 of the *Health and Safety at Work Act 1974*. This may be issued by an inspector

where the inspector discovers some breach of the relevant statutory provision which is likely to create the risk of some serious personal injury. As with the improvement notice the notice must set out the fact that the inspector believes there to have been a breach, what that breach consists of and which provision has been breached. The notice will include an order to discontinue the dangerous activity until all steps have been taken to remedy the situation which has given rise to the risk. Under section 22(4) of the 1974 Act, the notice may be issued with immediate effect or to come into effect at the end of a defined period. It will normally be issued in those situations where the employer or other person refuses to comply with the inspector's advice, or where the person in charge of the operation does not have the necessary authority to act on that advice or where no one is apparently in effective control.

What is clear is that the Health and Safety Executive are not afraid to use their powers. In the year 2000/2001 alone the Health and Safety Executive issued 11,009 notices, 6,687 of which were improvement notices and 4,225 were prohibition notices.[47] When these factors combined are considered, it is clear that the *Health and Safety at Work etc., Act, 1974* has strong

[47] Statistics taken from the official Health and Safety Executive Homepage. See http://www.hse.gov.uk/statistics/pdf/tableefl.pdf

potential and in theory could render it unnecessary for the Government to enact alternative legislation to deal with corporate killing.

Why then has Parliament, and indeed more of the academic community, not supported this campaign and placed greater emphasis on pursuing corporations that kill via these provisions? An examination of academic and popular opinion suggests that "labelling" is a real hurdle to increasing popular support for this alternative approach. Many feel that the offences under sections 2-3 of the *Health and Safety at Work etc., Act 1974* are not "real crimes" and believe strongly that the criminal stigma attached to any conviction for corporate manslaughter is an important deterrent factor. Furthermore, the fact that the Health and Safety Inspectorate are ill equipped to pursue large companies through the courts cannot be ignored. They are clearly limited in terms of their resources, both monetary and personnel, and they are not trained to deal with deaths in the workplace in the same way as the police. Tombs claims, furthermore, that the very nature of the regulatory approach to health and safety means that it will be ineffective because "such regulation is fundamentally antagonistic to the

logic of firms within a capitalist economy"[48]. All these matters need to be considered further in this section.

The second issue, of resources, has been dealt with by Bergman in his article *"Boardroom G.B.H."*.[49] In a shift from focusing on workplace deaths he highlights the large number of serious workplace injuries that remain uninvestigated by the Health and Safety Executive. Furthermore he suggests that the Health and Safety Executive have not gone far enough in their attempts to impose liability on corporations for their harmful actions where these actions have not resulted in death. Bergman advances a number of figures in support of this claim, including the fact that, between 1996-1998, the Health and Safety Executive:

- investigated 555 sudden workplace deaths; but
- failed to investigate some 90% of 47,803 workplace major injuries – this amounts to 42,438 injuries remaining un-investigated.[50]

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[48] *"Law, Resistance and Reform, 'Regulating' Safety Crimes in the UK"*, Steve Tombs, Journal of Social and Legal Studies (1995) Vol.4, pg 343-363
[49] *Boardroom G.B.H.*, David Bergman, (1999) 149 N.L.J. 1656
[50] *Boardroom G.B.H.*, David Bergman, (1999) 149 N.L.J. 1656, page 1656

Obviously the Health and Safety Executive have only limited resources, indeed they advance this as a defence for failing to investigate in these cases deciding to concentrate on their preventative work. Bergman, however, cannot accept this and feels that their failures lead to too many companies escaping prosecution too easily. He advances the following calculation to support this view:

> "The H.S.E. investigated 5,365 of the 47,803 reported injuries and as a result prosecuted in 10.4% of the cases – that's 558 companies. Since there is no reason to believe that the prosecution rate would be any different had the H.S.E. investigated the remaining 42,438 injuries, around 4,413 companies will have avoided prosecution for health and safety offences involving a major injury".[51]

Bergman makes the further suggestion that the Health and Safety Executive should seriously consider the possibility of working more closely with the police in a bid to investigate any possible commission of an offence under the *Offences Against the Person Act, 1861*, specifically, Bergman suggests, section 20 of the Act. This section prohibits the "unlawful and malicious wounding" or "commission of grievous bodily harm" against a person "with or without a weapon". It is impossible to support such a suggestion.

[51] *Boardroom G.B.H.*, David Bergman, (1999) 149 N.L.J. 1656, page 1656

Bergman seems to be working on an idealised view of inter-agency work. It is a well documented fact, particularly in the case of the police and social services, that different agencies do not always work well together. This is unsurprising since such investigations would involve two sets of people from different disciplines, both with different aims and goals, and both with different views on how such an investigation would best be conducted. Secondly, such a suggestion makes the mistake of trying, once again, to pin liability on a corporation for offences requiring *mens rea*, a mistake that the *Health and Safety at Work etc., Act 1974* thankfully does not make. It seems that Bergman has conveniently glossed over these problems and, accordingly, appears not to understand the complications his suggestion would create. It is respectfully suggested that this suggestion should be discarded.

Bergman's proposals received what might be aptly described as an "irate" response from Richard Clifton in his position as Head of the Health and Safety Executive Policy Unit.[52] His first concern was to point out that the Health and Safety Executive also wanted to see increased rates of investigation for workplace accidents, but this would indeed draw resources

[52] *Boardroom G.B.H.*, Richard Clifton, (2000) 150 NLJ 104

away from their important preventative work. Clifton also puts forward some reasons why he feels Bergman's proposal is fruitless. He highlights the fact, for example that, in the event of the H.S.E. passing more work to the police in the form of workplace accidents, the police may also be reluctant to divert resources from other fields to cope with this increased workload. Furthermore, Clifton rejects Bergman's claim that pursuing convictions for breaches of the *Offences Against the Person Act, 1861* is the only way of persuading the courts of the seriousness of these corporate offences. On the contrary, he claims, the Health and Safety Executive have made a point of emphasizing to the courts the seriousness of breaches of health and safety legislation and have encouraged the courts to adopt more adequate penalties for these breaches. If Bergman's proposal were adopted, Clifton claims, the Health & Safety Executive's good work would be undone. Finally there is no indication that the courts would impose any higher penalties than they would under the *Health and Safety at Work etc., Act 1974* this would render Bergman's suggestion superfluous.

Before advancing any further, there is a bit more to be said on the subject of inter-agency work. In April 1998 a protocol was agreed to ensure effective

liaison between the enforcing and prosecuting authorities[53] in the event of a workplace fatality. Obviously the Health and Safety Executive cannot investigate the commission of a general criminal offence such as manslaughter. These are matters for the police and the Crown Prosecution Service. Under this protocol, however, the Health and Safety Executive are not prevented from assisting the police in any such investigation by providing them with their expertise on workplace matters and by passing on information they have gained in their investigative work. The agreed procedure in the event of a workplace death runs thus:

> "When H.S.E. is the enforcing authority both the police and H.S.E. will attend the scene of a work related death and the police will conduct an investigation where there is an indication of manslaughter ... H.S.E. will also investigate possible offences under the *H.S.W.A.*, but will not lay an information until the police and C.P.S. have reached a decision. Where the police decide that a charge of manslaughter, or other serious offence outside the *H.S.W.A.*, cannot be justified, H.S.E. will continue with its own investigation. If evidence examined during the course of their investigation indicates that an offence of manslaughter may have been committed, H.S.E.

[53] These consist of the Health and Safety Executive, the Local Authorities, the police and the Crown Prosecution Service.

will refer the matter to the police without delay. Exceptionally the H.S.E. solicitor s office may also contact the C.P.S."[54]

There still remains a lot to be said on the matter of deterrence and stigma. Do the provisions of the *Health and Safety at Work etc., Act 1974* provide an effective deterrent to corporate wrongdoers? To some commentators the answer is clearly no. When he considers the effectiveness of regulation Tomb suggests that the very nature of corporations make it difficult for the regulation to have much effect. Companies, he claims, fail to understand the cost accidents and, even when they do they fail to act on this understanding. This is partly because the corporations have too much of a blinkered view of effective safety management. Because these corporations are geared towards maximizing their profits they regard compliance with safety regulations solely as a short term cost. Instead they should learn to appreciate the long term benefits of such an investment such as fewer fines, or not having to pay benefits to sick employees. Furthermore, employers are less reluctant to accept any further developments in safety regulations on the grounds that it creates unfair competition. This view is based on a perception that larger companies are at a greater disadvantage to small companies: a) because they are subject to more regulations; and b) because

[54] *"Work Related Deaths"*, Barry Ecclestone (1994) 148 NLJ 910

the breaches of smaller companies are less likely to be detected. This unfair competition argument is further supported when one views corporations as competing on a global scale. It is clearly the case that U.K. based companies are competing against other corporations based in countries where there is a weaker regulatory regime, thus they can cut costs and price their services more competitively.

On the other hand, corporate behaviour does show signs that it is susceptible to deterrence based offences. A corporation which rigorously upholds the safety standards required of it has an obvious interest in ensuring that its competitors also maintain such high standards of compliance in the interests of fair competition. This suggests "that effective forms of deterrence constitute a condition of existence for law abiding behaviour on the part of corporations: that is, the existence of a likelihood of detection and credible sanctions following successful prosecution makes it possible for corporations to obey the law".[55] Secondly, Sutherland's views on corporate crime are accepted, that corporations make decisions based on cost effectiveness which is to say that when considering whether to embark on a criminal course of conduct they will do so if, on balance, the

[55] *"Law, Resistance and Reform, 'Regulating' Safety Crimes in the UK"*, Steve Tombs, Journal of Social and Legal Studies (1995) Vol.4, pg 343, at 346

potential financial benefits outweigh the chances of getting caught, then it is possible that this calculating side to corporations adds some legitimacy to the idea that deterrence based sanctions may be effective against corporations.

It should also not be forgotten that not all companies may have the same standards in complying with existing health and safety regulations. In a study entitled *"Business Responses to the Regulation of Health and Safety in England"*[56] its author contends that the philosophy of self-regulation that underpins the 1974 Act does not lend itself well to equal application to all corporations. Different corporations have different priorities when it comes to ensuring compliance with the necessary safety standards. As was noted earlier, the recommendations of the Robens report, encapsulated in the 1974 Act, were based on the assumption that there would always be a coincidence of the interests of the employers and of the workforce, namely that they would all want to ensure the promotion of health and safety in the workplace. Once this positive attitude was given some support and direction in the form of information and advice and information from the

[56] *"Business Responses to the Regulation of Health and Safety in England"* Hazel Genn, Journal of Law and Policy, Volume 15, July 1993

inspectors, it was hoped that this would lead to a gradual improvement in workplace safety. This assumption was, however, faulty.

In her study, Genn identified a number of different compliance strategies adopted by corporations. It was suggested that the level of motivation found within a corporation was directly related, for example, to the priority given to health and safety compliance, the corporation's compliance strategies, and their efforts to educate themselves about their statutory duties. In general terms they were labelled "high motivation corporations" and "low motivation companies". Their approaches to health and safety can be broadly summed up.

The "high motivation" company will generally represent the embodiment of the ideal advanced by the Robens committee, namely that there will be a concordance in the attitudes of employers and employees alike with regard safety matters. These companies will generally be large and well established, they will be involved in hazardous activities and they will place great value on their public image. Even where the company is not engaged in hazardous operations, compliance with safety regulations may still be given a high priority because the sheer size of the workplace makes it very

noticeable to the health and safety inspectorate and the local community. This would mean that poor standards in workplace safety would be more likely to be detected which would, in turn, affect public relations. The highly motivated company will often have appointed specialized safety personnel and many sources of information on safety matters. They found no problem in collating the necessary information and disseminating it to management and understood the need to keep up to date. These companies would generally have a good relationship with the inspectors and have a very proactive approach to safety compliance, often adopting internal review procedures and personal safety standards which often exceeded the requirements made of it by the law.

The "low motivation" company adopts a very different stance with regards to its compliance strategies. These companies tend to be smaller in size and do not tend to be engaged in particularly hazardous activities; subsequently they give health and safety monitoring a low priority and do not tend to have any specially appointed safety personnel. These corporations do not appear to have a particularly strong interest in maintaining high levels of compliance and often appear to have adopted the attitude that it is simply cheaper not to comply, particularly where compliance is not vital to the

continued existence of the corporation. Thus compliance with safety regulations is given a low priority when compared to the need to ensure production on time at a low cost. Furthermore, this type of company will rarely have the necessary motivation to seek out any information it needs, never mind read it. Little effort is made to ensure that it keeps up to date with relevant safety developments and these companies are often reluctant to utilise the safety inspector in his advisory role in order to aid them in their self-education. This is, Genn suggests, because these companies probably have such low safety standards that they regard reminding the inspectors of their presence as sheer madness. Finally they will generally adopt a very reactive approach to maintaining safety standards. That is to say that they will only tend to deal with those obvious risks that have been pointed out to them on previous visits by inspectors.

This sort of study suggests that whilst the health and safety regulations do have some deterrent effect it is clearly not that great. This is evidenced in the fact that not all companies are keen to invest a great deal of funds in the promotion of workplace safety when it is perfectly acceptable for them to carry out the very minimum levels compliance required of them by law. This view, whilst not stated explicitly made in the 1974 Act (it would after

all be counter productive if the Act encouraged employers to do no more than the minimum expected of them by law) is reinforced by the fact that inspectors, when issuing improvement notices, cannot require anything of an employer which they would not be expected to do under the law. This may begin to raise questions about whether the provisions of the health and safety regulations actually have enough "teeth" to become and effective alternative for the Law Commission's proposals. Regulatory crime has often been criticised on the grounds that it does not constitute "real crime". Could it be that we ought to place our faith in the criminal law to ensure the most effective means of dealing with corporate wrongdoers?

Such doubts have been raised by Bergman in *"The Perfect Crime? How Companies Escape Manslaughter Prosecutions"*[57]. Indeed Bergman, a clear advocate of the need to prosecute companies for manslaughter, suggests that it is not entirely implausible for the aims of the 1974 Act, namely prevention rather than punishment, to be achieved via the criminal law. In the meantime, however, we are more concerned with the exact opposite of this view, that is to say that we should be questioning whether the deterrent effect of the criminal law can be achieved via regulation. One

[57] *"The Perfect Crime? How Companies Escape Manslaughter Prosecutions"*, David Bergman, (1995: West Midlands H.A.S.A.C.)

aspect of this question is the issue of "stigmatization". As has already been seen, it is contested in some academic circles that one of the principal reasons why regulation is not a suitable alternative to criminal law, when prosecuting corporations for manslaughter, is because a regulatory offence does not have the necessary "stigma" attached to it to dissuade future offenders. This suggests that this notion of "stigma" has some irreplaceable deterrent value, a matter which merits some discussion.

Punishment versus Persuasion and the Question of "Stigma"

The two main questions to be answered in this section are:

1) Does the imposition of "stigma" on a convicted offender a sufficient deterrent to potential future offenders?
2) Can the regulatory approach to regulating potential offenders provide a sufficient deterrent to make it an effective alternative to the criminal law?

It is important to consider these issues because if we were to reach the conclusion that our needs could be satisfied via the regulatory route, then the need for a criminal offence of corporate killing could, effectively, be rendered obsolete. In our discussion we will look at both the views for and

against the "stigma" approach to deterrence. It is important to remember that this is by no means a fully comprehensive review of the debate in this field because it is largely outside the ambit of this thesis, rather it is merely intended to advance some of the views of the academic community with a view to reaching a reasoned and informed conclusion.

The stigmatizing of an offender may exhibit itself in a number of ways. It is not uncommon for those convicted of a criminal offence to be ostracised by their family and friends or for them to find it difficult to obtain meaningful employment. These forms of behaviour are basic examples of society expressing their disapproval of the offenders conduct and are the result of the individual becoming "labelled" as a "criminal" or a "deviant". This "informal" punishment is imposed on the offender in addition to any formal sanctions meted out by the courts. There are some situations, however, in which the supposed stigma has no bearing on an offender, as is the case with some copyright offences. One only has to look as far back as 2001 and the story of the internet based music swapping site "Napster"[58] to see that there are generally law abiding citizens who see no problem with

[58] See for example *"Comment: Napster still alive and kicking"*, *http://www.guardian.co.uk/today/articles/0,6729,471893,00.html* and *"Napster offers £690m to settle copyright cases"*, Amy Vickers, *http://media.guardian.co.uk/newmedia/story/0,7496,440941,00.html*

illegally downloading copyrighted material from the web, because it has become a view amongst the British public that we are being overcharged for many of our goods[59]. In those situations where the law is generally held to be "unpopular" the normal ostracizing and stigmatizing of an offender associated with the commission of a criminal offence does not occur. How can an offender's conduct be labelled as "deviant" when everybody is doing it?

These questions aside the ultimate aim of this section is to determine whether the imposition of criminal stigma has some additional deterrent value which cannot be achieved via alternative routes. The true deterrent value of any punishment is something that will be discussed in greater depth in my treatment of the problems of effectively punishing corporations for breaking the law.

In his book *"Crime, Shame and Reintegration"*[60] J. Braithwaite is dubious about whether the imposition of stigma on an offender has any beneficial deterrent effects at all. Indeed it appears in his discussion of the subject that Braithwaite feels that a heavy reliance on the imposition of stigma will

[59] The phrase "rip-off Britain" was coined around the end of the nineties. It reflects the publics view that the British consumer is being overcharged for goods when compared to our continental counterparts. See for example *"DTI price check in war against rip-off Britain"*, John Cassy, *http://www.guardian.co.uk/business/story/0,3604,257060,00.html*
[60] John Braithwaite, (Cambridge University Press: 1989)

actually lead to an *increase* in the national crime rate. Instead he recommends an approach which he calls "reintegrative shaming". What then is Braithwaite's reasoning behind this recommendation?

The stigmatization of an offender, or "disintegrative shaming" as Braithwaite labels it, may have a negative impact on those members of society who have been labelled as "criminals". There is a distinct chance, he suggests that those who have become so ostracised from the community may feel that they no longer have anything to lose by failing to comply with the law in future. A corollary of this view is that the shamed offender, in turn, feels that they no longer have anything to gain by being a law-abiding member of the community. The result of this is that these people may seek to fraternize with other members of the community who have been similarly labelled because they may find that they are accepted into the group more easily. However, by becoming involved with these "criminal subcultures" it dramatically increases the opportunity that an individual will go on to commit further crimes because it may make available to them a number of attractive criminal opportunities which they may be tempted to take.

On the other hand, "reintegrative shaming" is the process by which the offender is shamed followed by the reintegration of the offender into the community of law-abiding citizens. The reintegrative shaming approach advanced by Braithwaite is based on a "family model" of reintegration; it is based on the belief that families are "the most effective agents of social control in most societies" because "family life teaches us that shaming and punishment are possible while maintaining bonds of respect".[61] This method of social control, asserts Braithwaite, is best achieved in those societies which are "communitarian" and have high rates of "interdependency"[62]. For a society to be communitarian , states Braithwaite:

> "... its heavily enmeshed fabric of interdependencies ... must have a special kind of symbolic significance to the populace. Interdependencies must be attachments which invoke personal obligations to others within a community of concern. They are not perceived as isolated exchange relationships of convenience, but as matters of profound group obligations. Thus a communitarian

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[61] *"Crime, Shame and Reintegration"*, John Braithwaite, (Cambridge University Press: 1989), page 56

[62] Braithwaite states at page 85: "Communitarianism and interdependency are highly related concepts. While Communitarianism is a characteristic of societies, interdependency is a variable applied to the individual level of analysis ... The aggregation of individual interdependency is the basis for societal communitarianism."

society combines a dense network of individual interdependencies with strong cultural commitments to mutuality of obligations".[63]

Japan is advanced as a country whose justice system best embodies the "family model" of shaming. The Japanese individual places heavy reliance on being accepted by society, a need which is fostered from the family environment right the way through school and into the workplace. Each group aims to create a "family like ethos"[64] which psychologically raises the cost of becoming excluded or ostracised from the group. Japan, it seems, is a country committed to the reintegration of its offenders, for example, the ceremony of apology plays a big part in any legal conflict in a bid to re-establish harmony between the two parties. The best way to achieve this, Braithwaite states:

"... is through mutual apology, where even a party who is relatively unblameworthy will find some way in which he contributed to the conflict to form the basis of his apology".[65]

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[63] *"Crime, Shame and Reintegration"*, John Braithwaite, (Cambridge University Press: 1989), page 85
[64] *"Crime, Shame and Reintegration"*, John Braithwaite, (Cambridge University Press: 1989), page 62
[65] *"Crime, Shame and Reintegration"*, John Braithwaite, (Cambridge University Press: 1989), page 64

This kind of shaming works on the underlying acceptance of the idea that every individual necessarily seeks the approval of their peers. An individual it is claimed is more concerned, and thus more likely to be deterred by, the potential loss of reputation amongst friends, family and colleagues than the opinions of seemingly remote officers and institutions of the law.

This theory does, however, have its problems. Perhaps the largest is that Western societies and cultures are not really geared towards an effective implementation of such a theory. This is because Western societies are generally more individualistic than their Eastern counterparts. Braithwaite recognises this problem by stating that "[the] ideology of individualism dismantles the sanctioning capacities of those intermediate groups between the individual and the state".[66] This means that in these societies, responsibility for shaming the offender falls solely on the state which obstructs the re-integrative aspect of shaming. Secondly it does recognise the value of shaming via stigma.

[66] *"Crime, Shame and Reintegration"*, John Braithwaite, (Cambridge University Press: 1989), page 86

It is not unavoidable, states Braithwaite, that an individual who has been labelled as a criminal will necessarily get involved with criminal subcultures. Even if they do, however, there is no guarantee that an individual faced with a criminal opportunity presented to them by association with these subcultures is going to find the opportunity attractive. In the event of no attractive opportunities presenting themselves, there is an equally good chance that they may tire of being ostracised by the community and seek to prove that they are worthy of acceptance back into the law-abiding community. In such a situation, Braithwaite recognises, stigmatization will have had a rehabilitative effect. Thirdly, it is obvious that the concept of reintegrative shaming is not entirely effective in preventing the emergence of criminal subcultures in Eastern societies. Perhaps it can be explained by the apparently increasing invasion of Western cultures and belief systems into these communities, but it would be misleading to believe that Japan, for example, does not have a gang problem. It just so happens that the criminal underbelly of Japan does not receive quite so much attention as it does in "corrupt" Western societies.

Does Bratithwaite's theory of reintegrative shaming work in a corporate context? The method he recommends to implement this theory in the field

of white-collar crime is the increased use of self-regulation. This persuasion rather than punishment based approach to corporate crime would necessarily have to be backed up with the threat of punishment to ensure effective compliance with the law. An examination of 5 self-regulating companies in the U.S.A. with the best safety records threw up some interesting surprises. Rather than finding a system in which those who breach corporate safety procedures are faced with a system of harsh penalties (such as dismissal or demotion), Braithwaite found clear systems of internal accountability and regular reporting which fostered good communication amongst members of the corporation in the event of a safety failure. These systems worked best when attention was drawn to those who had failed to reach the standards required of them (shaming) backed up with advice and encouragement to aid improvement (reintegration).

A practical example of such a system can be found in the approach of the sports fashion retailers "J.D. Sports". It has become a regular occurrence for branch managers to receive "Heroes & Villains" bulletins which identify and praise individuals for positive results such as stopping a stolen credit card, but name and shame branches whose failure to follow company procedures has resulted in a loss to the store, for example, shop-lifting.

Similarly they encourage the publication of weekly area performance league tables. Both approaches are clearly intended to play on the branches' (and the individuals therein) sense of pride to ensure good results.

What then is recommended in the case of corporations? Braithwaite points to making corporations more integrated into the wider community as a key factor in ensuring greater corporate compliance because this would make them more susceptible to external pressure from society to comply. This cannot be done in isolation however. What is also needed, according to Braithwaite is for corporations to become socially integrated internally. What this requires is the removal of a system which isolates individuals and various subunits of a company from the other corporate players. This system facilitates organizational crime because it effectively encourages wilful blindness to deviant corporate behaviour. What is required by Braithwaite is an "internal moral community" in which an individual with a concern does not report it to their superiors then assume that they have "done their bit" and do no more, but rather that they pursue the matter as far as is necessary to ensure it is dealt with. As Braithwaite puts it:

> "Crime flourishes best in organizations that isolate people into sealed domains of social responsibility; crime is controlled in organizations where shady individuals and crooked subunits are exposed to shame by a responsible majority in the organization. Even if the majority are less than responsible, exposure gives maximum scope to such pangs of conscience as are in the offing, and increases the vulnerability to control from without."[67]

Walker[68] is another proponent of the belief that stigma is not necessarily an effective weapon in the crime control armoury. In fact he appears to share the belief that has permeated some legal thinking that efforts should be made to *reduce* the amount of stigma attached to offenders. Walker points to a number of legislative provisions which have been enacted in a number of countries which have this as their goal, for example those provisions which are intended to limit the period of time for which a conviction can officially be remembered. In Britain we have the *Rehabilitation of Offenders Act 1974* which applies to offences which resulted in not more than 30 months imprisonment. After a period varying between 6 months to 10 years, depending on the sentence, the offender's conviction is to be

[67] *"Crime, Shame and Reintegration"*, John Braithwaite, (Cambridge University Press: 1989), page 145
[68] *"Punishment, Danger and Stigma: The morality of criminal justice"*, Basil Blackwell Publishers: 1980

regarded as "spent". As a result they will be treated in law as if they had never even committed never mind been convicted of the offence in question. It is important that offenders be given "a second chance" if they are ever to become valuable members of society once more. Such a provision helps prevent the risk, identified by Braithwaite, of an increasing membership of criminal subcultures which would inevitably result from the creation of a large number of social outcasts.

Another phenomenon noted by Walker, which was identified earlier, is that some offences are less stigmatised than others because they are perceived by society as less criminal, for example some of the traffic offences such as speeding. This is not to suggest that the offender has not committed a crime but merely that the public will sometimes sympathise or in some cases identify with people who have, in the offenders eyes, been the victims of harsh bureaucracy on the part of the law enforcing authorities. This is consistent with the view held by some parties, which has been noted previously, that breaches of regulatory offences are not real crime. As a result the treatment received by those who have breached these "quasi-criminal" offences is in stark contrast to that which is generally expected.

Clarkson is dubious of the impact of stigma in the case of some corporate defendants. This is particularly so in the case of small companies which, to quote Clarkson "comprise about 45% of all companies in the UK"[69] because they don't really have a reputation to lose if they are punished.

Walker also identifies some further problems with stigmatising offenders. From the retributivist point of view, he asserts, it is crucial that any punishment dealt out by the courts must be proportionate to the gravity of the offence. Any additional hardship suffered by the offender as a result of stigmatisation, therefore, unfairly shifts the balance and renders the punishment disproportionate. It would be impracticable to expect judges to take any potential detrimental effects of stigma into account however. This is because stigma is not really a tangible idea with strictly defined boundaries. A judge is ill equipped to determine what level of stigma should be imposed on an offender because different individuals will react to the convict in different ways. No court in the land can completely govern the way an individual is meant to behave in relation to an offender. One only has to look at the recent outcry following the death of Sarah Payne every person registered on the Sex Offenders Register must have been

[69] *"Corporate Culpability"* C.M.V. Clarkson [1998] 2 Web JCLI

petrified that the lynch mobs which sprung up around the country would target them next. Despite opinions to the contrary, and regardless of the merits of such an approach, an offender still has the same legal rights as any other citizen. Thus if their property is damaged or they are assaulted, the perpetrators must be punished but the views or opinions which the perpetrator holds about the offender cannot be changed by force even if their behavior can be regulated once it crosses the boundaries of what is legally acceptable.

On the other hand, there is recognition that there is a degree of deterrence inherent in the notion of stigma which would reduce the net frequency of similar offences. This may exhibit in itself in a number of ways. For example a potential victim of a financial fraudster will most likely be put on their guard if they are aware of this person's previous convictions for similar offences. Secondly, Walker suggests that the stigma associated with a court appearance may be a greater deterrent than any potential punishment which they may receive, particularly where the penalties available for the offence in question are relatively minor. Finally he points to the theory that the punishing and stigmatization of the offender may serve to increase the

community's "moral cohesiveness" by uniting the law-abiders to speak out against the deviants.

Next we come to a paper entitled *"Stigma and Social Control: The Dynamics of Social Norms"*[70] written by Blume. In it he suggests that stigma may well be too unwieldy for us to use it effectively as a tool of social control. He shares Braithwaite's concern that individuals who find themselves stigmatized as criminals may choose to become part of "'counter-communities' - communities in which the stigmatised activity is ignored or even becomes a source of status". In Britain, furthermore, it may well be the case that we simply do not have a sufficiently "cohesive [and] well-organised" society to ensure effective social control of individual behaviour". Evidence of this fact, as viewed in a study cited by Blume, is not hard to find. It was found that in Britain those neighbourhoods with the lowest levels of social organization were those which also had the highest levels of violent and property crimes. This could partly account for the success that "Neighbourhood Watch" schemes have in reducing crime rates.

[70] *"Stigma and Social Control: The Dynamics of Social Norms"*, Lawrence Blume, http:www.afsnrm.aem.cornell.edu/pew/Papers/Blume/Blume.pdf.

Another view which has been identified in the literature is that the stigma attached to a criminal offence will gain the best deterrent effect as a result of the vast amount of publicity which would accompany any high profile conviction. However, whilst the criminal approach is deemed to be the toughest response to any breach of the law because it carries the greatest amount of stigma, it is also the most problematic because it is the most resource intensive approach.[71]

In contrast to commentators such as Braithwaite and Walker, Rasmussen is a commentator who believes that the notion of stigma has a legitimate role to play in the punishment process. This is because it provides us with useful information about a person, it renders people reluctant to deal with offenders either economically or socially, and this in turn serves to represent society's contempt for their criminal behaviour.

Rasmussen points towards an economic approach as a good explanation of why people refrain from committing crime. This approach believes that,

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[71] See *"Criminal Enforcement Role in Environment"* based on papers presented at the Fourth International Conference on Environmental Enforcement, *http://www.ssc.wisc.edu/econ/Durlauf/networkweb1/wpapers/es779.pdf*
"Stigma and Self-Fulfilling Expectations of Criminality", Eric Rasmussen, *http://econwpa.wustl.edu:8089/eps/le/papers/9506/9506001.pdf*

although internal motivations such as conscience are important in determining whether an individual will commit a criminal offence, it is better to search for an explanation which focuses "on more easily measured and manipulated external incentives such as criminal penalties". According to Rasmussen stigma is an external incentive not to commit crime and as such "standard economic modelling" can be used to determine the "how the criminal will respond to stigma and why people find it in their self interest to treat criminals differently from non-criminals". Furthermore, economic stigma, that is to say the reluctance of employers to employ convicts or a lower wage, for example, is easy to measure.

In his article, Rasmussen does identify some advantages that relying on the informal punishment embodied in stigma has over formal punishment issued by the courts, namely cost effectiveness. The argument he advances is that the policy of punishing via the medium of fines is overly problematic. As we will see when dealing with the topic of punishment, in some cases it may be necessary for a particularly large penalty to be imposed on the offender in order to achieve an adequate level of deterrence. This can be a problem because it might be that the offender has insufficient resources to pay the level of fine that is necessary to obtain the required

level of deterrence. This is a problem that is avoided by the imposition of stigma. An offender does not have to be in possession of any material assets to be subject to criminal stigma because the said stigma is effectively "a fine drawn on ...future rents [i.e. the future market value of their labour] ... which can be collected regardless of regardless of the criminal's present wealth". Further benefits of relying on stigma include the fact that it is not costly for the government like imprisonment. Stigma may also be deemed to have an incapacitating effect on the criminal in that his conviction will remove him from jobs which would have otherwise presented him with further opportunities to commit crime.

Further support for increasing the amount of stigma attached to criminal offences is found in Scruton's article in the City Journal[72] entitled *"Bring Back Stigma"*. Scruton advances the proposition that the importance of stigma has largely faded in modern society "and along with it most of the constant small-scale self-regulation of the community which depends on each individual's respect for, and fear of, other people's judgement". This he claims has lead to an increase of the number of official laws aimed at governing behaviour intended to fill the void left behind by abandoning

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[72] *"Bring Back Stigma"*, Roger Scruton, in the *City Journal* Autumn 2000, see *http://www.city-journal.org/html/10_4_bring_back_stigma.html*

stigma as a legitimate means of regulating behaviour. This is an unsatisfactory solution, he suggests, because "there is no evidence that the law can really compensate for the loss of social sanctions". The approach adopted by the law in combating crime is to increase the risks associated with the crime rather than "creating people who have no criminal schemes in the first place" which is one of the benefits associated with stigma.

On the other hand Scruton points to the harsh result that stigmatization may have on an individual. Whilst not a criminal offence illegitimacy resulted in the imposition of harsh social stigma from society, because it was the social norm for children to be born to married parents. The use of stigma may have, however been beneficial to a degree. In this case the damaging stigma of being born illegitimately was intended to "prevent people from breeding in socially destructive ways". But now that the stigma of illegitimacy has largely been removed due to a change in the views and moral values of a large portion of modern society, we are faced with an increasing number of "gym-slip" mums and single parent families. These in turn place a greater burden on the benefit system which costs the government more money and reduces the funding available for alternative projects. A similar argument is advanced in relation to divorce, namely that

the gradual removal of the stigma attached to divorce has led to an increase in "sexual polygamy" which is detrimental to the fabric of society.

Why then has there been this move away from the reliance on the use of stigma in order to regulate the conduct of individuals? It is Scruton's belief that this is due largely to the apparent shift in penal theory with regards to the treatment of offenders. Previously the aim of the law was to punish those who breached its provisions. In modern times, however, the main priority for the justice system seems to have become the rehabilitation and care of offenders. Effectively the law requires society to "forgive and forget, to "rehabilitate", on the assumption that the debt [to society] has been paid". The necessary result of this is that it is no longer "fashionable" to stigmatize and that it is not politically correct to hold what are viewed as "outdated" views regarding what constitutes appropriate behaviour so much so that the labellers become labelled.[73]

Finally we come to the work of Wong who also looks to stigma rather than fines as a more efficient means of punishing a corporation. Punishment by

[73] Scruton cites the example of people who oppose homosexuality, whilst it might be a legitimate view, being labelled as "homophobic", a label which has undesirable and damaging stigma attached to it.

way of stigma is more efficient than via fines because it provides a more accurate depiction of "the true cost of corporate crime"[74]. It is apparent, Wong claims, that a punishment system which relies entirely on fines is inefficient in that it appears to accommodate the undesirable social behaviour of corporations by expressing the message that the criminal justice system is nothing more than an inconvenient cost which can be budgeted for. This does not accurately depict society's disapproval; indeed it actually places a greater burden on society.

What remains consistent throughout this very limited sample of some of the literature in this field is the belief that an individual, or indeed a corporation for our purposes, may be deterred from committing a crime where the cost of being caught outweighs the benefits of breaching the law. It is clear from these articles that the term "cost" is not limited to pure economic loss but also extends to a loss of respect and status in the eyes of the offenders peers, and in some cases even a loss of self-esteem. The question remains, however, whether the imposition of stigma can provide a sufficient and effective deterrent to a corporation.

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[74] *"Stigma: A More Efficient Alternative to Fines in Deterring Corporate Misconduct"* Darlene R. Wong, *http://www.boalt.org/CCLR/v3/v3wongnf.htm*

It is anticipated that a discussion of the use of adverse publicity as an alternative punishment to fines will show that stigma may be an effective tool against corporations. A corporation, arguably more so than is the case with individuals, is vastly concerned with their public image and reputation. This is largely because a good reputation has great financial value to a corporation. Any punishment which has as its main aim the intention of damaging this reputation is going to have a far greater deterrent effect than a mere fine. This is partly because a corporation can calculate (or at least estimate) how much it will cost them if they are caught breaking the law. This means that not only can they make a more accurate cost-benefit analysis in any given situation, but it also increases the likelihood that a company will simply write off fines as necessary business expenses. On the other hand, whilst it undoubtedly has a value, the potential cost of any loss of reputation through breaking the law and the associated stigma is uncertain. Above all else a corporation values certainty. If an uncertain factor is present in the cost-benefit analysis it renders it more unlikely that a corporation will embark on a criminal course of action.

Whilst it has become clear that the use of stigma in relation to corporations has some definite deterrent benefits it remains to be decided whether that

stigma must be "criminal" in order to reap the maximum benefits. Rightly or wrongly, it is not uncommon to find the view that regulatory offences are merely "quasi-criminal", however, it is doubtful that criminal stigma, with regards to corporations, has any unique benefits. It is perfectly plausible to achieve the same results regardless of which approach we take. Whilst punishment for serious breaches of the *Health and Safety at Work etc., Act 1974* has traditionally come in the form of fines, why should society be forced to accept that this blinkered approach to punishing corporations continue without question? Obviously the danger remains if the legislature opted to utilise the stigma approach to punishing corporations that labelled corporations may form criminal subcultures. Since corporations are undoubtedly more powerful than individuals, the potential damage to society is much greater. It should not be the case, however, that we are precluded from encouraging the use of more creative forms of punishment for breaches of health and safety offences. As has already been mentioned, it is arguably easier to prove a regulatory offence than a criminal offence in the corporate context because we don't have to prove a criminal state of mind. If the law can harness the beneficial aspects of stigma in punishing breaches of regulatory offences then it is arguable that no greater benefits

would accrue from punishing corporations for manslaughter under the criminal law.

It is undeniable, however, that as long as the public continues to perceive regulatory crime not as "real crime" then there is still, in the public opinion at least, a much greater symbolic value attached to a criminal prosecution, regardless of how accurate this view may be. Since the current law proposed by the Law Commission will not be implemented in the foreseeable future then it is still plausible to search for an alternative approach which utilises the criminal law. It is hoped that a solution may be presented by looking at the law governing corporate criminal liability in other jurisdictions, and also by looking at group oriented theories of liability as an alternative means of attributing culpability to a corporation.

Criminal Liability for Corporations that Kill: Proposals for Reform

Two Volumes

Volume II of II

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Chapter 6: A Re-Examination of the Decision in Meridian Global Funds Ltd.

The academic literature that is available on the topic of reform of the laws relating to corporate criminal liability is vast and varied; however, one common thread that can be found running through it is a belief that the Privy Council in *Meridian Global Funds* advanced a basis for corporate liability that provided a more accurate depiction of corporate guilt.

It may be recalled that in the case of *Meridian Global Funds* the conviction of the defendant company was upheld by the Privy Council for its failure to notify another company, E.N.C., that it had just become a substantial stakeholder, contrary to the provisions of the *New Zealand Securities Amendment Act 1988*. On appeal to the Privy Council the defendant company claimed that it had committed no offence because the shares in question were purchased by the Chief Investment Officer of an investment management company and the company's senior portfolio manager. The logic behind this argument was that, under the doctrine of identification, these two people were not sufficiently senior in the corporate ladder to have their knowledge attributed to the company, thus the company could not have known about the purchase and therefore had no reason to inform

E.N.C. Lord Hoffman, however, refused to have his hands tied by the doctrine of identification. "Once it appears that the question is one of construction rather than metaphysics"[1], he stated, the answer was quite simple.

What Lord Hoffman decided was that the question of whose knowledge and actions could be attributed to the company was to be determined by the courts looking at the meaning of the words used and examining the policy of the act. In the case of *Meridian Global Funds* the court decided that the person whose knowledge and actions should be attributed to the company was "the person who, with the knowledge of the company, acquired the relevant interest [otherwise] the policy of the Act would be defeated"[2]. Therefore the court had devised a rule of attribution which varied according to the particular statute or rule of law in question in a particular case. This interpretation is supported by the view of Lord Hoffman who denies that *Tesco v Nattrass*, or that *Re Supply of Ready Mixed Concrete (No. 2)*, created any particular rule of attribution but rather the court's decision in

[1] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, per Lord Hoffman at 507
[2] Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500, per Lord Hoffman at 507

those cases simply amounted to a pronouncement on the particular statute in question.

Obviously there are certain advantages in developing a rule of attribution which does not rely on the prosecution having to show the connivance of the board of directors in order to establish corporate guilt. Indeed in the case of *Meridian Global Funds* Lord Hoffman cites with approval a speech made by Lord Templeman in *Director General of Fair Trading v Pioneer Concrete (U.K.)* who expressed concern that the verdict in *Tesco v Nattrass* might allow companies to benefit from illegal practices because it could show that only low level employees were involved in making the prohibited agreement. Wells also approves of the verdict in *Meridian* because it indicates that "courts are beginning to recognise the "corporateness" of corporate conduct, and thus to acknowledge the limitations inherent in the controlling officer/directing mind conception of liability"[3].

It is important to remember that the arguments in *Meridian* have are not new. We have already seen similar ideas used to great effect in a case we have already dealt with, *El Ajou v Dollar Land Holdings*. In this case, the

[3] *"A Quiet Revolution in Corporate Liability for Crime"*, Celia Wells (1995) 145 N.L.J. 1326 at page 1327

defendant company was found liable for the actions of a Swiss financial agent who acted as Chairman for an investment company. His powers were only to make investments on behalf of the true owners of the corporation. Their Lordships all found that he could be held as the directing mind and will of the defendant corporation although they all reached the same conclusion by different routes. Of particular interest is the verdict of Lord Justice Rose who was keen not to let precedent, which was decided on the basis of the identification doctrine, prevent them from holding the corporation liable. Lord Justice Rose imposed liability on the grounds that it was clear for the purposes of the offence in question that the person who was in charge of receiving and investing the money should be liable in these limited circumstances.

On the other hand, the *Meridian* approach also has its fair share of disadvantages. One of the most obvious problems that has been advanced is that it may actually be difficult to determine what the policy behind any given Act of Parliament actually is. Secondly, on the matter of construction it is unlikely "that the words of the relevant provision will yield the answer

as to who constitutes the company for the purposes of the offence'[4].

Furthermore one still has to identify someone who committed the criminal act in question before liability can be imposed on a corporation. This may prove difficult in larger companies were no such person can be identified which would lead to no liability being imposed. Thirdly it is important to note that the decision in *Meridian Global Funds* involved a regulatory offence, thus the principles laid out in that case remain untested in relation to common law offences (such as manslaughter). Indeed, Lord Hoffman was keen to point out that the mere fact that the criminal act was committed by a servant of the company did not automatically render the company liable for an offence.[5]

It might therefore be beneficial for us to look at two alternative bases for corporate liability for manslaughter that have been advanced in academic articles. These ideas include turning to the doctrine of vicarious liability and a consideration of the principle of aggregation.

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[4] *"Corporate Criminal Liability in the 1990's"* Michael Jefferson, (2000) 64 J.C.L. 106 at page 118

[5] All these concerns were raised by Michael Jefferson in his article *"Corporate Criminal Liability in the 1990's"*, *op. cit.*

In *Tesco Supermarkets Limited v Brent L.B.C.* the defendant company was charged with selling an age restricted video to a purchaser under the age of 18 contrary to the provisions of section 11 of the *Video Recordings Act 1984*. Under section 11 (2)(b) of that Act, the company had a defence if it could show that "it neither knew or had reasonable grounds to believe that the purchaser was under eighteen"[6]. The purchaser was under eighteen and the court at first instance found cashier had reasonable grounds to believe that the purchaser was underage. The company was convicted and appealed on the grounds that at "directing mind" level it had no reasonable grounds for knowing that the person was underage. Obviously the courts were reluctant to allow such a defence because it would have rendered the statute ineffective. On appeal the company was found not to be liable under the identification doctrine but it was held liable *vicariously*. The company was held to have the requisite state of mind, knowledge or belief through its employee and so the appeal was dismissed accordingly.

R v British Steel Plc was a case that was decided along similar lines to *Tesco v Brent*. The offence in that case offered the defendant company a defence if they could show that, at directing mind level, they had taken all

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[6] *"Corporate Criminal Liability in the 1990's"* Michael Jefferson, (2000) 64 J.C.L. 106 at page 113

"reasonably practicable steps" to prevent the commission of the offence. The defence did not alter the strict liability basis of the offence "therefore vicarious liability and not the identification doctrine was to be applied"[7].

Also, in *R v Gateway*, which we dealt with in an earlier section, the court held that the offence in section 2 of the *Health and Safety at Work etc., Act 1974* was a strict liability offence and that the company was therefore to be held liable vicariously. Unsurprisingly the company appealed on the grounds that, as a company, it had implemented a safe system of work across its branches. On this particular occasion it was the *local branch* who had failed to implement it and since the store could not be considered as part of the directing mind and will then the company had committed no offence. However, Lord Justice Evans held that the courts were unwilling to entertain such a defence and convicted the company accordingly. If *Tesco v Nattrass* had been applied then undoubtedly the defendants would have evaded liability, as would have been the case in *Brent* and *British Steel*. The court in this instance seem to have adopted an approach not to dissimilar to that in *Meridian Global Funds* in that the underlying policy of the *Health and Safety at Work etc., Act 1974* is to ensure that the health of

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[7] *"Corporate Criminal Liability in the 1990's"* Michael Jefferson, (2000) 64 J.C.L. 106 at page 114

employee's and members of the general public are not adversely affected by a corporation's activities. Allowing the "directing mind and will" theory to apply in cases involving prosecutions for breach of its provisions would drastically decrease the efficacy of the Act.

As a final word of caution, however, we should also look at *Seaboard Offshore Ltd v Secretary of State for Transport* in which the courts rejected the argument that the defendant company could be liable merely because its employees were operating a company vessel in an unsafe manner. The duty which arose under the contested provision (section 31 of the *Merchant Shipping Act 1988*) was personal to the owners, charterers or managers of the vessel. Once again the courts reached their decision by looking at the policy behind the provision. The House of Lords held that Parliament could not have intended in this instance for the company to be liable for the actions of low level employees. What the case of *Seaboard Offshore Ltd* does is highlight the fact that not all strict liability offences will automatically give rise to vicarious liability. In all cases it will be a matter of construction for the courts, in these instances both the wording of the statute and the policy behind it are important.

It is at least arguable that *Tesco v Nattrass* should have been decided on the basis of vicarious liability, however, in that instance the courts were faced with what has been described as a *"hybrid* offence"[8]. These are regulatory offences "which either allow a defence based on due diligence or lack of knowledge, or where constructive knowledge forms part of the offence definition"[9]. Such offences present a problem for certain long established principles of law. Generally, as we have seen above, it has been the case that a company will be vicariously liable for those regulatory offences in which the breach occurred as a result of the *actus reus* of its employee. On the other hand the identification doctrine has been used in the case of non-regulatory *mens rea* offences in order to pin liability on a corporation for offences committed by its senior officers.

Clarkson also highlights a number of difficulties with the doctrine of vicarious liability. The first problem he advances is there is no actual empirical evidence that supports "the proposition that this is the most effective way of achieving deterrence". A second problem he highlights is that, in some instances vicarious liability might be over inclusive. The argument he puts forward is that a corporation might find itself being held

[8] See *"A Quiet Revolution in Corporate Liability for Crime"* Celia Wells, *op. cit.*
[9] *op. cit.* at page 1326

liable in a situation where it would normally have evaded liability, or worse still being held liable in a situation where the defendant corporation has done their utmost to prevent the wrongdoing. Finally, and maybe in a somewhat contradictory fashion, Clarkson argues that the doctrine may be under inclusive in that the corporate infrastructure may be non-safety conscious or possibly even geared towards criminal activities yet no liability will be incurred by the corporation because no one individual can be pinpointed "who has committed the requisite elements of the crime"[10].

The major problem in the case of implementing vicarious liability as a basis for liability for corporate manslaughter, however, is the fact that the Law Commission specifically rejected this approach as embodied in *R v British Steel Plc.* in Report No.237. It was felt that employing vicarious liability as a basis for liability would render the scope of liability far too wide. The major concern was that a company would be found liable for the acts and omissions of any employees which resulted in a death. This would be the case regardless of how grave the company's own breach of duty was[11].

[10] See *"Corporate Culpability"* C.M.V. Clarkson [1998] 2 Web JCLI

[11] *"Legislating the Criminal Code: Involuntary Manslaughter"* Report No. 237, Law Commission (HMSO: 1996) page 94

An alternative approach then might be the doctrine of aggregation[12], as highlighted in the case of *P & O Ferries Ltd.* What the doctrine entails is the aggregation of the *mens rea* of two or more corporate employees in order to establish criminal liability. This is an approach that has already seen some support in the United States embodied in the "collective knowledge" doctrine[13]. Its use worldwide can also been seen in section 12(4)(2) of the *Australian Criminal Code Act 1995* and clause 22 of the proposals to amend the criminal code.

The doctrine allows for the courts to find a corporation liable vicariously for the acts of its employees by allowing for the conduct and fault elements to be aggregated. The obvious problem with the doctrine of identification as it stands in English Law is that the courts are looking for the culpable conduct of *one* employee within the company who is sufficiently senior within the management structure for liability to be incurred. This can be problematic, particularly in larger companies where the power structure is so diffuse, because it will often be impossible to identify such a person. This position is clearly not a true reflection of day-to-day corporate behaviour. As will be

[12] The points raised in this section derive mainly from *"Corporate Criminal Liability in the 1990's"* Michael Jefferson, (2000) 64 J.C.L. 106
[13] see *U.S. v Time D-C* 381 F. Supp 730, and *U.S. v Bank of New England* 821 F. 2d 844

argued later, it is unrealistic to expect that decisions affecting the running of the corporation (including its safety policies) will be made by one person in isolation. Furthermore, it may even be the case that the corporate decision making infrastructures are designed to prevent one person from knowing too much or even to isolate top officers from potentially hazardous courses of conduct.

The doctrine of identification is so enshrined in the English common law that if it remains as the basis for corporate liability then the notion of aggregation is faced with a severe problem. First and foremost, under the doctrine of identification if the actions of *one* lowly employee are not enough for a company to incur liability, then it is unlikely that the actions of *several* lowly employees will. What this means is that in order for the doctrine of aggregation to have any real impact it will first be necessary for the basis of corporate criminal liability in English law for *mens rea* offences to be vicarious liability.

A second major problem that faces supporters of the aggregation doctrine is that it has already been arbitrarily rejected by the English courts. Without carrying out a full exploration of the possible benefits of allowing the *actus*

reus and *mens rea* of several employees to be considered in order to establish liability Lord Justice Bingham rejected it arguing that the case against one defendant could not be made any stronger by providing evidence against another defendant. Indeed, Clarkson states that one of the major flaws of this doctrine is that "[while] the aggregated acts and states of mind of A, B, C, and D might cumulatively amount to a crime, the reality is that none of these individuals need personally be at fault"[14]. Furthermore, Clarkson claims, the doctrine of aggregation is not even a step forward in the development of corporate liability because "it simply perpetuates the personification of companies myth". He continues:

"[instead] of finding one person with whom the company can be identified, one finds several people" and so the doctrine still "ignores the reality that the real essence of the wrongdoing might not be what A, B, C, and D did but the fact that the company had no organisational structure or policy to prevent A. B. C. and D each doing what they did in a way that cumulatively amounts to a crime."

[14] *"Corporate Culpability"* C.M.V. Clarkson [1998] 2 Web JCLI

Both of the possible theories of liability that have been dealt with in this section still rely on the notion of attribution of responsibility as is the case with the doctrine of identification. It is suggested, however that our efforts might be better spent following a similar approach to that adopted by the Law Commission with their notion of a management failure. This would entail approaching the matter from the group behaviour perspective and it is to these theories that we must now shift our attention.

Chapter 7: Group Behaviour Based Theories of Corporate Criminal Liability.

This section of the thesis shifts the focus to the area of corporate liability theory which possibly holds the greatest promise. The articles that are dealt with in this section all deal with what is perceived to be real corporate guilt. As has been said before, the identification doctrine, which holds so much sway in the English law, provides a thoroughly inaccurate portrayal of corporate reality. No one person within the corporate ladder will be responsible for all the decisions made by a corporation. An examination of three articles concerning the explosion of the Space Shuttle *Challenger*, the Goodrich aircraft brakes scandal and the Pinto fire hazard all provide an insight into how corporations embark on criminal courses of activity. Throughout the course of the articles it will be seen that an individual's behaviour is directly affected by such obvious things as corporate policies, but also more intangible things as corporate politics and a desire to "save face". Placed in such situations we will see individuals willing to ignore previously strongly held ethical standards for the benefit of the company. This is indicative of a central premise of group oriented theories of behaviour that individual behaviour when considered in a group context, will alter.

Individuals within a group will often be seen to embark on courses of action which they would shy away from as an individual.

The Space Shuttle Challenger Disaster[1]

The Space Shuttle *Challenger* exploded approximately 73 seconds into its flight on January 28th 1986 killing all seven astronauts on board. A subsequent investigation resulted in a conclusion that the explosion had been caused by the failure of an O-ring to seal in one of the solid fuel rocket booster joints. The victims included Christa McAuliffe, a school teacher who had successfully applied to be the first "average" American into space. The American space programme was suffering from a lack of support at the time and this public relations exercise was seen as a way of re-igniting public support and firing the public's imagination to increase the popularity of space exploration. It is arguable that the importance of this fact should not be forgotten when considering the actions of those within Morton Thiokol and N.A.S.A.

During the subsequent investigation into the explosion, testimony was given by Roger Boisjoly who was a senior scientist and acknowledged

[1] The facts that are found in this section come mainly from *"The Challenger Disaster: Organizational Demands and Personal Ethics"*, Roger Boisjoly, Ellen Foster Curtis, and Eugene Mellican in *"Corporate and Governmental Deviance"*, Ermann & Lundmann, and also in "Challenger – Go for Launch", Panorama, BBC2 January 2002.

rocket seal expert who worked for Morton Thiokol (the manufacturers of the Solid Rocket Boosters). In his testimony he suggested that top management at both Morton Thiokol and N.A.S.A. were aware of the O-ring problem and the potential for it failing to seal. For our purposes this is interesting. What kind of corporate structure could operate in such a manner as to prevent anything being done to correct this ultimately fatal defect? An examination of the facts surrounding the events leading up to the launch provides a very useful, and disturbing, insight.

It appears that Roger Boisjoly became aware of the problem as early as January 1985 during the examination of the solid rocket boosters used in flight 51-C. He noted that on that day the ambient launch temperature was lower than it had been on previous launches he had attended, a factor that was later to become crucial. He discovered that the primary O-ring seals on two of the field joints had been compromised with one of them being penetrated. This was the first time this had ever happened. This was caused, Boisjoly concluded, by hot gas blow-by which resulted when the primary O-ring failed to seal and was probably related to the low temperature. Both his superiors at Morton Thiokol and engineers and management at N.A.S.A. were made aware of the problem.

Boisjoly soon became convinced of the need to further investigate the potential link between low temperatures and O-ring failure. These tests were carried out in March 1985 in conjunction with Arnie Thompson, the supervisor of Rocket Motor Cases. These tests provided strong evidence to support their theory that low temperatures adversely affected the O-rings ability to form an effective seal although they did not have a benchmark temperature at this stage.

One month later, an examination of the primary seal in a rocket booster joint from flight 51-B showed that it had failed to seal during its two minute flight. The reality of the situation was that if this had occurred in a field joint it would have been likely that the secondary seal would not have sealed and would probably have resulted in the loss of a flight. Obviously this caused a great deal of concern and Boisjoly related his concerns to key engineers and management within N.A.S.A. Progress on the matter was slow and thus Boisjoly wrote to R.K.Lund, part of the senior management of Morton Thiokol, to make sure they were aware of the problem. This lead to the creation of a "Seal Erosion Task Team" although history will show that this was little more than "paying lip-service" to the problem, evidenced by the fact that only five engineers out of 2,500 employed by Morton Thiokol were assigned to the team.

The situation did not improve, however, and even further evidence of the problems created by low temperatures was found after flight 51-C, which was also conducted in low temperatures, where more evidence of hot gas blow-by was discovered.

Real areas for concern, however, can be found in the events that unfolded the day before the launch. By this stage a degree of panic had set in and a meeting was convened involving teams of engineers and managers. In this meeting both Boisjoly and Thompson, having presented their evidence, made a firm recommendation against launch. Their argument was that if launch was permitted in low temperatures it would result in the primary O-ring failing to seal; this would result in hot gas blow-by which would erode the primary O-ring and cause a failure in the secondary O-ring. Needless to say this would be disastrous. Boisjoly and Thompson recommended that the launch should not take place if the ambient temperature was below 58 degrees. Since the forecast for launch day predicted temperatures of around 18 degrees, they recommended that launch should be aborted.

Regardless of the evidence presented to them, N.A.S.A. refused to accept this position. Larry Mulloy of N.A.S.A. disputed Boisjoly's findings claiming that evidence from flight 61-A could be interpreted to show that

temperature was not a relevant factor in the O-ring failure. He argued that Morton Thiokol, with their 58 degree requirement, was trying to introduce new Launch Commit Criteria the day before the launch. This simply was not acceptable to N.A.S.A. They were already under a great deal of pressure as the launch of the Space Shuttle *Challenger* had already been delayed twice previously, once by an incorrect prediction of bad weather and the second time by delays in sealing the crew compartment's hatch during which time the weather deteriorated enough to prevent launch. As a result of this second failure N.A.S.A. announced they wanted a 24 hour turnaround. Consequently, this put everybody under a great deal of pressure.

This resulted in a request for a five minute discussion during which Jerry Mason, senior Vice-President of Wasatch Operations, announced intriguingly that "a management decision was necessary".[2] Boisoly and Thompson quickly realised that there was a definite danger that the no-launch decision would be over-turned and so began to re-assert their case. It soon became evident to them that no one was listening and so they ceased their efforts.

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[2] *"The Challenger Disaster: Organizational Demands and Personal Ethics"*, Roger Boisjoly, Ellen Foster Curtis, and Eugene Mellican, page 215, in *"Corporate and Governmental Deviance"*, Ermann & Lundmann

Perhaps the most revealing comment during this five minute recess came from an exchange between Jerry Mason and R.K.Lund. Mason, it is reported, asked Lund to "take off his engineering hat and put on his management hat"[3]. It is easy to be over cynical, but it seems obvious what Mason was suggesting. Clearly the implication was that Lund should suppress those parts of his conscience that, as a result of his engineering experience, would have been telling him that it would be inadvisable to launch. This was made easier by realising, as a manager, the implications any decision to abort launch would have had for the corporations future business and relationship with N.A.S.A. It is of course arguable that they should have realised that a space shuttle exploding in the public eye would be considerably more damaging, but this was probably never even considered.

The four managers involved had a brief discussion and voted unanimously in favour of supporting a decision to launch. Subsequently Joe Kilminster set about revising the data that had already been presented to N.A.S.A. to support this new pro-launch position. This was accepted without any serious questioning by N.A.S.A. and the recommendation in favour of launch was signed and sent to the Kennedy Space Centre. The article *"The Challenger Disaster: Organizational*

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[3] *"The Challenger Disaster: Organizational Demands and Personal Ethics"*, Roger Boisjoly, Ellen Foster Curtis, and Eugene Mellican, page 216, in *"Corporate and Governmental Deviance"*, Ermann & Lundmann

Demands and Personal Ethics", cited below, highlights an interesting fact. It states that this process amounted to a total reversal of the burden of proof; ordinarily it had always been the duty of the engineers to prove to N.A.S.A. that it was safe to launch. This new approach, however, meant that it now became necessary for the engineers to prove it was *not* safe to launch.

Following the catastrophic events of January 28th, a failure investigation team was created by Morton Thiokol on the 31st; Boisjoly and Thompson were part of the investigation team. A later examination of the recovered debris and flight data suggested that the engineers were right. At ignition it seems that the O-Ring in the right Solid Rocket Booster disintegrated. The explosion was delayed by debris from the solid fuel plugging the hole created by the disintegration. At 53 seconds after launch the shuttle experienced the worst wind-shear ever felt by a shuttle. This served to dislodge the debris, breaking the temporary seal, resulting in an intense flame which started to burn through the SRB. At this point a connecting arm broke free causing the nose of the booster to swivel into the liquid oxygen tank. The aluminium shell ruptured and half a million gallons of liquid oxygen and hydrogen vaporized in moments. The shuttle exploded into hundreds of fragments.

It quickly became apparent that a major rift was developing between Boisjoly and senior management at Morton Thiokol, this could be seen for example in the fact that Boisjoly was given only a day to prepare his evidence for the Roger's Commission, and that he faced constant chastisement from senior management for disputing and contradicting the official company position. As a consequence Boisjoly found himself becoming increasingly isolated from both N.A.S.A. and Morton Thiokol and found his suggestions for seal redesign had been either ignored or altered. Eventually Boisjoly's position became more and more untenable as friction between him, management and even fellow co-workers grew. He later took extended sick leave.

It is difficult not to feel a degree of horror at the outcome of this example. Roger Boisjoly, it is arguable, should be commended for his actions. Even in the face of severe adversity he was willing to pursue a belief even to the point where he lost his livelihood. He was not able to make a difference, however, because he found himself faced with a corporate decision making structure that, quite simply, did not appear to be geared to ensure the safety of those people who might have been affected by its undertakings.

A different, and more common, experience, however, was endured by Kermit Vandivier in the case of the B.F. Goodrich aircraft brake scandal. An examination of the facts shows that, unlike Boisjoly, his initial beliefs were altered and moulded by corporate behavior. Of the case study on the Goodrich scandal, Punch says

> "This, next to that of the Ford Pinto, is probably one of the most widely used cases in business schools because of its value in highlighting group dynamics, responsibility, ethics, and the contrasting frameworks in which managers and professionals operate in an organization."[4]

A post-script to the Challenger Disaster

It is all too easy to leave my treatment of the Challenger disaster at this stage, however, there still remain a few items that need to be resolved. It is not clear, for instance, what level of management at N.A.S.A. was aware of the O-ring situation, but most importantly, what level of N.A.S.A. management was present at the pre-launch teleconference. Under English law, this would of course be a vital question as the doctrine of identification will only imply liability for those acts committed by the directing mind and will of the corporation. Following

[4] *"Dirty Business: Exploring corporate misconduct"* Maurice Punch, Sage Publications: 1999, page 85

an inquiry into the matter an E-mail I received from Roger Boisjoly provides an interesting insight. He states:

> "The highest level managers at N.A.S.A. Headquarters in Washington were aware of the fact that the Solid Rocket Booster (SRB) joints were not performing per specification, i.e., "hot propulsion gas in excess of 5,700 degree F was not supposed to reach the O-rings in the joints". I know this because an August 19, 1985 detail presentation was given to them by MTI with managers like Larry Mulloy present at the meeting at that time
>
> Larry Mulloy reported to Stanley Reinhartz ... who in turn reported to the M.S.F.C. Center Director, Dr. Lucas. We (MTI) would give Flight Readiness Reviews to M.S.F.C. at one level lower than Larry Mulloy and then they would boil down our input to them for presentation to Lucas.
>
> As far as the telecon meeting on January 27th 1986, *no one at N.A.S.A. above M.S.F.C. knew that the meeting was held, not even the astronauts*. The original no launch decision at the telecon was changed by MTI management after receiving major pressure from Mulloy and the other M.S.F.C. managers during the telecon. The discussion content and the launch decision made *were never voiced up the chain of command to the Johnson Space Center, K.S.C. or Headquarters.*"[5]

[5] My emphasis. Quoted from an E-mail from Roger Boisjoly to myself dated Tuesday, 08 April, 2003.

It might be helpful at this stage to set out some kind of picture of the organizational structure of N.A.S.A at the time to fully get the picture of the number of people involved in the decision to launch the Challenger. At Morton Thiokol Industries there were several positions involved in reaching the original no launch decision. We have already mentioned the involvement of Roger Boisjoly (Staff Engineer), Robert Lund (Vice-President Engineering) and Jerald Mason (Senior Vice-President), but none of these people had any direct involvement with the decision to launch the Challenger. That responsibility fell to the Vice President of the Space Boosters program (Joe Kilminster). This pro-launch decision would have then been reported up the chain of command, first to Lawrence Mulloy (Manager, booster project) then up to Reinhartz and Dr. Lucas (both mentioned in Boisjoly's E-mail). All three were based at the Marshall Space Flight Center. Eventually it would have gone up to the Associate Administrator for Space Flight at N.A.S.A. Headquarters.[6]

Since the only parties to know about the original no-launch decision were involved only at the, comparatively, early stages of proceedings, then there would be no reason for N.A.S.A. to query the pro-launch

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[6] For a useful visual representation of this Chain of Command, see *http://www.me.utexas.edu/~uer/challenger/figure7.html*

recommendation by the time it reached their offices. This is clearly an unsatisfactory corporate communication system, and was identified as such by the Rogers Commission who carried out the subsequent investigation into the space shuttle explosion. Following some very detailed investigations, the Rogers Commission made several recommendations, of which only the most relevant have been selected for our purposes.[7]

Recommendation II required a review of the existing Shuttle Program Structure. This required, *inter alia*, a redefinition of the responsibilities of the Shuttle Programs manager and a broadening of his authority, as well as the rekindling of the philosophy of having astronauts involved in management positions and an elevation in the status of the Flight Crew Operations director within the organizational structure of N.A.S.A.

Recommendation IV required N.A.S.A. to establish an Office of Safety, Reliability and Quality Assurance which would be headed by an Associate Administrator who would report directly to the N.A.S.A. administrator.

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[7] Based on reading from *"Implementation of the Recommendations of the Presidential Commission on the Space Shuttle Challenger Accident"*, *http://history.nasa.gov/rogersrep/v6ch2.htm* and *http://history.nasa.gov/rogersrep/v6ch4.htm*

Finally, Recommendation V highlighted the need for improved communications within N.A.S.A.'s organizational structure. In particular the Rogers Commission pointed to "a tendency at Marshall to managerial isolation"[8] which led to the non-disclosure up the chain of command of vital information regarding the safety of the Challenger. It was recommended that:

- A policy should be developed which governs the imposition and removal of Shuttle launch constraints;
- Flight Readiness Reviews and Mission Management Team meetings should be recorded;
- The flight crew commander, or a designated representative, should attend the Flight Readiness Review, participate in acceptance of the vehicle for flight, and certify that the crew is properly prepared for flight.[9]

The lessons of the Challenger disaster have still not been learnt, or at least that is the impression that one might glean from the recent disaster involving the space shuttle Columbia.

[8] taken from *http://history.nasa.gov/rogersrep/v6ch2.htm*
[9] taken from *http://history.nasa.gov/rogersrep/v6ch2.htm*

The Columbia exploded at 8:59am on 1st February, 2003 whilst traveling at 12,000 m.p.h. The explosion occurred over Texas spreading debris across two states. Recovery teams have been scouring the landscapes for the past two months looking for debris in a bid to discover the cause of the accident. Initial investigations suggested that the explosion was the result of damaged heat resistant tiles on the left hand side of the shuttle.

The first sign that anything was wrong was discovered by Jeff Kling (from the management, mechanical arm and crew systems officer) who noticed that there was a sudden loss of data from the spacecraft sensors. Soon afterwards Mike Sarafin (guidance and navigation officer) spotted that the left wing of the Space Shuttle Columbia is experiencing increased drag although he sees nothing else out of the ordinary. Finally Jeff Kling also noticed that the tyres on the landing gear were losing pressure. Not long afterwards all contact with the Columbia was lost. It was reported that it took members of the ground team in Houston almost 10 minutes before they realized that they had lost the flight[10]

It is suggested in early reports that the damage was caused by a 1 kilogram, 20 inch chunk of insulation foam from the shuttles external

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[10] *"Tapes show shuttle exploded 10 minutes before Houston knew"*, Andrew Gumbel, The Independent, 13 February, 2003, http://news.independent.co.uk/world/americas/story.jsp?story=37785

fuel tank which became dislodged during lift off and hit the underside of the wing causing severe damage to the heating tiles located there. This line of investigation stemmed from an examination of the Columbia's takeoff which showed a piece of the insulation foam peeling away from the external tank and hitting the left wing. The fact that this piece of foam was probably covered in ice was exacerbated by the fact that during 23 of the 39 days the Columbia sat on the launch pad Cape Canaveral received four times more rain than usual, drenching the foam insulation. Sensors on the left side of the shuttle showed that there was a rise in temperature of around 60 degrees Fahrenheit in a five minute period on the left side of the shuttle. Sensors on the right side of the shuttle, during the same five minute period, showed a comparatively smaller rise of around 15 degrees Fahrenheit. The Guardian Newspaper reported:

> "The foam is a lightweight, polyurethane, spray-on material that hardens like plastic foam. Given the speed at which shuttles hurtle into space during takeoff, flyaway pieces can have a devastating effect. Moreover, the black silica glass fibre tiles that cover the underside of the shuttle are famously fragile, so much so that even a bump can cause cracks or impressions".[11]

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[11] *"Nasa warned about debris danger in 1994"*, Special Report, The Guardian Wednesday February 5, 2003, http://www.guardian.co.uk/spacedocumentary/story/0,2763,889346,00.html

Indeed, studies carried out by Stanford University, reportedly showed that, following the examination of around fifty launches, an average of 25 heat resistant tiles were damaged. The area surrounding the underside of the wings and the left side of the fuselage were found to be particularly vulnerable.[12]

Obviously N.A.S.A. is under a great deal of pressure to identify and remedy the problem which led to the loss of the Columbia. Until the problem is dealt with effectively, then all flights have been grounded. This is problematic for two main reasons. First and foremost, there are at present three cosmonauts stuck on board of the International Space Station, two Americans and one Russian. They were due to be retrieved in March but will now probably not be collected until June. Secondly, there were a total of five flights planned for this year, all of which were due to take equipment such as solar panels and a new space laboratory to the international space station.

The most concerning thing about the Space Shuttle Columbia's explosion is that, as with the Challenger, there were parties who were

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[12] *"Nasa warned about debris danger in 1994"*, Special Report, The Guardian Wednesday February 5, 2003,
http://www.guardian.co.uk/spacedocumentary/story/0,2763,889346,00.html

aware of a potential risk of damage to thermal tiles and possible flight loss before the risk finally materialized. In 1990, for example, N.A.S.A. received a warning that the thermal tiles around the wheel wells were particularly vulnerable to severe damage.[13] Furthermore a number of e-mails have emerged which were exchanged between N.A.S.A. employees and subcontractors which allegedly raise the issue of thermal tile damage, the possible dangers which might materialize, and question why nothing had been done about it sooner. [14]

An independent investigation of the Columbia disaster has since raised similar concerns about the way that the space agency is run. The board was quick to criticize the way in which management ran the organization in a manner which suggested that its attitude towards safety had not improved any since the explosion of the space shuttle *Challenger* in 1986. This was a problem that was exacerbated by the privatization of N.A.S.A in 1996 that led to Boeing taking over the supervision of safety matters and a reduction in in-house safety expertise. Blame was also extended, however, to the White House and Congress for imposing constant budgetary cut-backs and strict targets to complete the international space station. It is reported that, in a bid to cut costs, the

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[13] *"90 second nightmare of shuttle crew"*, David Teather, Thursday February 6, 2003, http://www.guardian.co.uk/columbia/story/0,12845,889669,00.html

[14] *Looking back in anger"*, Oliver Burkeman, Thursday March 6, 2003, http://www.guardian.co.uk/spacedocumentary/story/0,2763,908566,00.html

agency reduced the shuttle programme's staff from about 32,000 in 1991 to just over 19,000 in 1997 following a 40% budget cut in the course of the last decade.[15]

Despite the immediate cause of the *Columbia* explosion being the damage of a heat shield caused by a dislodged piece of insulating foam the report contains a damning criticism of the way the organization was run. The report states "Nasa's organizational culture had as much to do with this accident as foam did."[16] It seemed to the investigators as if nothing had been learnt by N.A.S.A. post the *Challenger* disaster declaring the organization to be suffering from "ineffective leadership [that] failed to fulfill the implicit contract to do whatever is possible to ensure the safety of the crew."[17] In fact N.A.S.A. management continued to place little importance on safety, to ignore concerns raised by engineers about the potential for damage to heat tiles from debris, and to allow scheduling pressures to prevent the detection of unsafe practices. The report went so far as to warn that the structure within the organization was so bad that, whilst they supported the re-launch of the shuttle which was not in itself "inherently unsafe", based "on Nasa's

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[15] *"Columbia disaster report blames Nasa and budget cuts."* Tim Reid, The Times, Wednesday 27th August 2003, page 14

[16] *"Columbia disaster report blames Nasa and budget cuts."* Tim Reid, The Times, Wednesday 27th August 2003, page 14

[17] *Columbia disaster report blames Nasa and budget cuts."* Tim Reid, The Times, Wednesday 27th August 2003, page 14

history of ignoring external recommendations or making improvements that atrophy with time" the board had no confidence "that the space shuttle can be safely operated for more than a few years based solely on renewed post-accident vigilance."[18]

It is evident that N.A.S.A. has some management deficiencies that are inherent in its organizational structure. The situation is clearly so bad that N.A.S.A. could easily be held up as a prime example of irresponsible corporate behaviour. It clearly possessed such a poor organizational structure that if it were in the United Kingdom it could be prosecuted for manslaughter under the Law Commission's "management failure" model, if the Corporate Killing Bill were to be passed into law in its current form.

The Goodrich Aircraft Brake Scandal[19]

In June 1967 Goodrich won a contract from the L.T.V. Aerospace Corporation for the supply of 202 brake assemblies for a new air force plane known as the A7D. This was an important contract for Goodrich as they had already had problems with a previous contract with L.T.V.

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[18] *"Columbia disaster report blames Nasa and budget cuts."* Tim Reid, The Times, Wednesday 27th August 2003, page 14

[19] The facts surrounding this case are taken mostly from *"Why Should My Conscience Bother Me? Hiding Aircraft Brake Hazards"*, Kermit Vandivier in *"Corporate Ethics"*, Peter French ed. (Harcourt Brace College Publishers: 1995)

after they supplied a brake which was, effectively, a failure. It was clearly important for Goodrich to impress in this instance as contracts for aircraft brakes and wheels can be worth millions of dollars.

In order to help them win the contract Goodrich did two things, both of which prove important in understanding their subsequent behavior. Firstly they tendered a bid which was incredibly low. Goodrich was not only prepared to not make a profit from this venture, they were also prepared to make a loss. This blow would be sweetened somewhat by the fact that this money would be recovered over the lifetime of the aircraft as Goodrich would have to supply all the replacement brake linings and parts. Secondly, the design which was submitted by Goodrich was for a very lightweight brake. This is a desirable feature because "the lighter a part is, the heavier the plane's payload can be".[20] It would have been foolish in this instance for L.T.V. to do anything other than accept Goodrich's tender.

The brake was designed by John Warren, one of the best engineers at Goodrich. His major fault, however, was that he was incapable of accepting *any* criticism so much so that "[as] his co-workers learned the

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[20] *Why Should My Conscience Bother Me? Hiding Aircraft Brake Hazards"*, page 119

consequences of criticizing him, they did so less readily, and when he submitted his preliminary design for the A7D brake it was accepted without question".[21] Warren was assigned the post of project manager for the A7D brake, but gave the task of producing the final production brake to Seale Lawson who was a relative newcomer to Goodrich. Indeed, this was his first "real" project.

Lawson set about undertaking the many tests that had to be undertaken before the brake could go into production to determine any adjustments that had to be made. Matters were further complicated, however, by the fact that the brake was for a military aircraft, therefore once the production brake had been created it had to undergo a rigorous "qualification test" carried out to the specifications laid out by the military. Once a production brake made it past this stage it then had to undergo flight testing.

Since L.T.V. had set out a very tight testing schedule there was a lot of work to be done, so Lawson began his testing immediately. He manufactured a prototype brake using the brake disks for a design that had already been manufactured, and placed them in the housing of a

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[21] *Why Should My Conscience Bother Me? Hiding Aircraft Brake Hazards",* page 120

brake not too dissimilar to the A7D. It quickly became obvious to Lawson, however, that he had a major problem on his hands. The main problem was that in simulated stops the brakes were running at a temperature of around 1500 degrees, whereas a "normal" temperature would have been around the 1000 degree mark. The three tests Lawson carried out all produced similar results. The brakes overheated resulted in the brake linings disintegrating. Realizing that the brake design was clearly the problem, Lawson made a number of calculations which revealed that the 4 disk design used by Warren was too small and that a new 5 disk design would have to be used. This is where the problems for Lawson began.

The 5 disk design purported by Lawson would have massive financial implications for the company since it would have to scrap all the parts which had already been manufactured. Furthermore it would take time to design and test a new brake. This was not a realistic option because there were only a few months left until flight testing was due to begin. This left Lawson in a bit of a predicament because all he could do was take this evidence to his immediate supervisor John Warren. Warren, however, dismissed Lawson's findings claiming that it was simply a matter of finding the right kind of material for the brake lining.

Why did Warren not accept Lawson's appraisal of the situation? There are a number of factors that all played a part. Firstly his reputation was at stake as he had already reassured those at L.T.V. on several occasions that the tests on the A7D brake had been successful. Secondly it would have meant having to admit that he had made a mistake in his calculations and designs. If what was said about his dislike of criticism was true, it is unsurprising that he should choose to hide this mistake from his colleagues. Finally, and perhaps most crucially, it would have also meant accepting that he had not spotted a mistake, which was picked up by somebody considerably less experienced than him. It simply became an exercise in protecting his self-interests. At this stage, therefore, Warren's supervisors were not aware of the problem.

Having had his discovery rejected by Warren, Lawson's next step was to go "over Warren's head" to Robert Sink who was the projects manager. Although he was not a qualified engineer, Sink should have been able to determine from Lawson's data and observations that there was a severe problem with the A7D brake, but he chose to do nothing. Why? Sink also would have had a great deal to lose by accepting Lawson's claims. As his supervisor Sink was responsible for Warren's activities. If he admitted that Warren was wrong then, by implication, he too would have made a mistake in trusting Warren's judgement. Secondly he had

accepted Warren's 4 disk design purely "at face value" and had already told L.T.V. that the brake was practically ready to be shipped to them. In what had clearly become an exercise in self-preservation, Sink told Lawson to trust Warren's experience and to carry on testing.

All Lawson could do was to continue testing as no one would provide the necessary support for his findings, so that is what he did. By this stage, however, things had progressed enough to allow Lawson to start testing on a production brake. Things, however, did not improve. In the attempts to fulfil the test criteria set out by the military the same overheating problems recurred. Initially efforts were made to get the brakes through the testing stage by using different materials for the linings and even bringing in specialists to mix new ones. The pressure was now well and truly on as there were only 70 days left until the scheduled flight tests. In what could be viewed objectively as a foolish move, the decision was made to try and "nurse" the brakes through the qualifying tests. This is where the fraudulent practices began as the tests were not carried out to the specifications clearly set out by the military, instead they used cooling fans to keep the temperature of the brakes down, they failed to maintain constant pressure on the brakes when simulating test stops and even miscalibrated instruments to give favourable, but false, readings. The shocking thing, which really should

have "set the alarm bells ringing", is that even by these methods the brake could not pass all the tests.

Yet still, rather than admitting there was a problem, the web of deceit at the Troy plant of Goodrich increased even further. Data analysts and technical writers were now brought into the fray. It was their job to analyse all the data generated throughout the tests and collate them in a manner, which could be used by the engineers. It was also their job to write the final "qualification report" once a new brake had passed the testing stage as a means of providing documentary proof that the product had met all of the military's specifications.

A routine examination of some of the test data by Kermit Vandivier, showed that some of the test results had been deliberately falsifies. He approached Lawson to determine what was going on and was informed, rather mysteriously "You're going to get in on the act too".[22] It had already been decided that a final attempt was going to be made to get the brake through the tests and that a qualification report was going to be written for it regardless of whether it passed the tests or not. This approach was decided in a meeting involving Lawson, Sink and Russell

[22] *Why Should My Conscience Bother Me? Hiding Aircraft Brake Hazards*", page 126

Van Horn, manager of the design engineering section. The author, rather helpfully, provides some insight into the way things worked at the Troy plant when he said, talking about Van Horn:

> "Although Van Horn ... was responsible for the entire department he was not necessarily familiar with all phases of every project, and it was not uncommon for those under him to exercise the what-he-doesn't-know-won't-hurt-him philosophy. If he was aware of the full extent of the A7D situation, it meant that matters had reached a desperate stage".[23]

What we then witness is an interesting change in the moral stance of those expected to write the report. Initially, Vandivier and Ralph Gretzinger reacted furiously to the suggestion claiming they would not compromise their professional and personal integrity by writing a falsified report. Gretzinger took the step of going as far as seeing Russell Line, manager of the Goodrich Technical Services Section, in order to protest against this outrage. On his return, however, it became apparent that he had been severely defeated. What is interesting to note at this stage is that, not only had he resigned himself to the fact that he had to follow orders, but also that he had already begun to rationalise his

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[23] *Why Should My Conscience Bother Me? Hiding Aircraft Brake Hazards"*, page 126/7

actions.[24] Gretzinger is reported as saying such things as "Hell, I've got two sons I've got to put through school" and "After all ... we're just drawing some curves, and what happens to them after they leave here, well, we're not responsible for that".[25] This "pill" was made "easier to swallow" by the fact that they only had to prepare the data, the report would be written by somebody else.[26]

Determined to protest their case, this time Vandivier went to see Russell Line. Having been told about the A7D situation, Line asked Vandivier what he wanted him to do about it. Vandivier suggested that maybe H.C.Sunderman, Chief Engineer at the Troy plant should be informed. Once again this prompted an interesting reaction. Line declined to undertake this course of action stating that:

> "...if he doesn't [know about the situation], I'm sure not going to be the one to tell him ... [because] its none of my business and it's

[24] A psychological process we will look at later in this section.
[25] *Why Should My Conscience Bother Me? Hiding Aircraft Brake Hazards"*, page 128
[26] Vandivier writes at page 128:
"[Gretzinger] was trying to persuade himself that as long as we were concerned with only one part of the puzzle and didn't see the complete picture we weren't really doing anything wrong. He didn't believe what he was saying, and he knew I didn't believe it either. It was an embarrassing and shameful moment for the both of us".

> none of yours. I learned a long time ago not to worry about things over which I had no control. I have no control over this".[27]

He continued:

> "You're just getting all upset over this thing for nothing. I just do as I'm told and I advise you to do the same".[28]

Faced with the obvious choice between doing as he was ordered and resigning or getting fired, Vandivier found himself facing a moral dilemma:

> "The report would be written by somebody anyway, but I would have the satisfaction of knowing I had had no part in the matter. But bills aren't paid with personal satisfaction, nor house payments with ethical principles".[29]

Vandivier decided to go along with his orders and set about writing the "qualification report". Since he had written one before he knew what to write in a "good" report and set about massaging figures and charts to make them appear normal to L.T.V, and the military as well as

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[27] *Why Should My Conscience Bother Me? Hiding Aircraft Brake Hazards"*, page 129

[28] *Why Should My Conscience Bother Me? Hiding Aircraft Brake Hazards"*, page 129

[29] *Why Should My Conscience Bother Me? Hiding Aircraft Brake Hazards"*, page 130

completely making up the results of some tests that had not even been carried out. Things, as is often the case, did not work out as planned though and Vandivier and Gretzinger found themselves being told at a later date that they would also be expected to write the report as well. Despite their initial protests, their reaction to this new order proves particularly important and merits further examination at a later stage. Both Vandivier and Gretzinger decided that since they had already implicated themselves in the whole fiasco they had nothing else to lose by finishing the written section of the report. It was clearly a case that they did not believe this course of action would make them any more or less guilty.

The "successful" qualification report (which unsurprisingly nobody was willing to put their name too) was finally submitted to L.T.V. and the military in June 1968. Flight tests began a week later with predictable results. Stories were relayed back to the plant by Warren (Goodrich's representative at the tests) of several near crashes and one instance where the brake disks welded together in the intense heat causing the wheel to lock and the plane to skid. Unhappy with the flight tests L.T.V. convened a meeting with Goodrich officials in which it withdrew its approval of the qualification report and made demands to see the raw test

data collated by Goodrich. In the subsequent panic a meeting was called at the Troy plant involving Lawson, Warren, Sink and Vandivier.

It was suggested by Sink at this meeting that Goodrich should level with L.T.V. about possible problems with the A7D brake. When Vandivier suggested that this entailed admitting they had lied in their report, Sink provided an intriguing reply:

> "Now wait a minute. Let's don't go off half-cocked on this thing. It's not a matter of lying. We've just interpreted the data the way we felt it should be".[30]

A subsequent examination of the report they had submitted produced 43 discrepancies where a degree of artistic license had been used in interpreting the results. Bizarrely a discussion of each of these individual points resulted in just three points to be brought to the attention of L.T.V. The rest of the points had been summarily dismissed by Sink who had suggested that some of the points would be, for example, not worth mentioning or even beyond L.T.V.'s understanding.

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[30] *Why Should My Conscience Bother Me? Hiding Aircraft Brake Hazards"*, page 134

Vandivier handed in his resignation soon after. He cited the A7D fiasco as the reason for his resignation and suggested that the company's behaviour in regard to this matter could be deemed as criminally fraudulent. This earned him a call up to Sunderman's office who was infuriated by Vandivier's accusations. Sunderman vehemently denied that anything improper had occurred and that Vandivier was clearly not aware of all of the facts. Had he been so, Sunderman suggested, he would not have made these accusations. Vandivier's resignation was accepted with immediate effect on the grounds of his "disloyalty" to the company. This is suggestive of a 'them against us' mentality which is mirrored in the views of Dennis A. Gioia with regards to the Pinto disaster. Interestingly, a subsequent investigation into the whole A7D affair was adjourned without reaching any real conclusions and, ironically Goodrich's new 5 disk brake design was used on the A7D aircraft.

It is insightful at this stage to look at Punch's interpretation of the events. He suggests that the main problem in this situation was a lack of communication up the corporate hierarchy which may have seen this chain of events brought to a speedy halt. Punch states:

> "There is ... a notable division between the engineers and the managers, between the professionals and the "politicians". The former endeavour to work to externally imposed norms and regulations, whereas the latter are conscious of making the firm look good, of keeping up appearances, of compromise and of personal survival. And individual error (Warren's) leads to institutional involvement and the necessity to cover up so that the top imposes conformity on subordinates, forcing them to shelve professional norms – and their consciences".[31]

The Pinto Fire Hazard[32]

The Ford Pinto was first released in 1970 as a car intended to compete against the smaller European cars and the threat of Japanese cars merging on the American Market. It was produced in an astoundingly quick time of 25 months "from inception to production" whereas this process would normally take closer to 43 months. As if this did not put the production team under enough pressure, they were also required to keep within the specifications that the car should not cost more than $2,000 or weigh more than 2,000 pounds. "Any decisions that threatened these targets or the timing of the cars introduction were

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[31] *"Dirty Business"*, Maurice Punch, page 93

[32] The facts of this case are largely taken from *"Why I didn't recognize Pinto Fire Hazards: How Organizational Scripts Change Managers' Thoughts and Actions"*, Dennis A. Gioia, in *"Corporate Ethics"*, Peter A. French ed., (Harcourt Brace College Publishers: 1995)

discouraged".[33] Owing to the tight schedule, manufacture of the car had already begun when routine crash testing revealed that the fuel tank of the Pinto frequently ruptured when hit from behind in a low speed impact.

Ford was faced with a number of options to redress the problem but each had its problems. One solution, for example, would have been to redesign the fuel tank and its location. This idea was shelved because, not only would it have proved "time consuming and expensive", but it would have also reduced the potential boot space "which was seen as a critical competitive sales factor".[34] The second and, to the lay-person, most sensible solution involved a production modification to the fuel tank which would have cost a mere $11. Yet even this idea was rejected, partly because it was a widely held belief in the automobile industry that small cars were inherently unsafe owing to their size anyway and secondly because there was a strong corporate belief that "safety doesn't sell". The most controversial reason for rejecting the proposal came as the result of a cost-benefit analysis. In 1970 the value of a human life was $200,000 and this figure was used in calculating the potential costs

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[33] *"Why I didn't recognize Pinto Fire Hazards: How Organizational Scripts Change Managers' Thoughts and Actions"*, Dennis A. Gioia, page 141

[34] *"Why I didn't recognize Pinto Fire Hazards: How Organizational Scripts Change Managers' Thoughts and Actions"*, Dennis A. Gioia, page 142.

of law suits against the company. A memo which was later unveiled in court revealed the calculations Ford had carried out:

> " *Costs:* *$137,000,000*
>
> Estimated as the costs of a production fix to all similarly designed cars and trucks with the gas tank aft of the axle (12,500,000 vehicles x $11/vehicle)
>
> *Benefits:* *$49,530,000*
>
> Estimated as the savings from preventing (180 projected deaths x $200,000/death) + (180 projected burn injuries x $67,000/injury) [divided by] (2,100 burned cars x $700/car)"[35]

As a result, purely on a financial basis and regardless of the ethical considerations, the decision was made not to make the adjustments.

Points to be drawn from these case studies include, amongst other things, the fact that the current basis for corporate criminal liability, that is to say the identification doctrine, looks flimsy when faced with the reality of corporate decision-making. Just a brief scanning of the facts surrounding either the *Challenger* disaster or the A7D scandal reveals a tremendous number of individual actors all of whom played some role in permitting the eventual prohibited harm to materialize. If a court were to

[35] *"Why I didn't recognize Pinto Fire Hazards: How Organizational Scripts Change Managers' Thoughts and Actions"*, Dennis A. Gioia, page 143

spend its time sifting through the evidence it would undoubtedly be forced to decide that there was not one person within the corporation who had seen "enough of the picture" (to copy a metaphor used by Ralph Gretzinger) and so there would be no one person with sufficient liability to implicate the company. Furthermore, as is evident in the Goodrich case, the identification doctrine would be incapable of dealing with large multi-national corporations. All the decisions concerning the falsification of the A7D test results were made in one small plant in Ohio. It is arguable that even the most senior manager at that plant would not be sufficiently high in the corporate hierarchy to warrant attributing liability to Goodrich.

A second thing that these examples show is that individual actors are all too willing to alter their moral standards and behaviour in order to accommodate the corporation's (their employer's) demands. It is clearly easier for an individual to make such a contentious decision if they feel they can hide behind a group or even corporate identity. Why is this so? An article entitled *"The My Lai Massacre: Crimes of Obedience and Sanctioned Massacres"*[36] provides an interesting insight into the kind of social processes which may affect and alter an individuals behaviour so

[36] Found in *"Corporate and Governmental Deviance"*

as to permit them to commit actions which they would have previously found abhorrent.

The main thing this article illustrates is a social process referred to as "Authorization". The main thrust of this idea is that people will be more willing to commit an act of violence (or indeed any criminal act) if the action has been expressly ordered or even implicitly encouraged or approved by legitimate authorities. In a corporate context this would suggest that individual actors are more likely to commit a crime in a corporation that was criminogenic as it would implicitly be permissive of such behaviour. Furthermore, if a particular course of conduct is authorised, it seems that this "appears to [obviate] the necessity of making judgements or choices".[37] Indeed where a course of action is authorised, it is suggested by the author, the morality which normally operates in these situations is different, it becomes mutated by "the duty to obey superior orders"[38] which will take precedence.

This obligation which is felt by individuals to obey orders of their superiors seems to make it easier for them to embark on courses of conduct which they would ordinarily disapprove of. How often has the

[37] *"The My Lai Massacre: Crimes of Obedience and Sanctioned Massacres"* at page 200

[38] *"The My Lai Massacre: Crimes of Obedience and Sanctioned Massacres"* at page 200

excuse "I was just doing my job" been used? As a result of the basic structure of the authority situation, it is also revealed that individual actors, rather bizarrely, do not see themselves as being personally responsible for their actions. This is largely because, having accepted the authority structure they felt they had no choice but to carry out their orders. This feeling of "helplessness" also aids their rationalization of their behaviour at a later date and their suppression of any feelings of guilt.

Giving the My Lai massacre as an example of Authority situation, the author suggests that it may have been easier for the soldiers involved to carry out those atrocities because they believed that violence against the Vietnamese people was not only expected, furthermore, it was permitted. Those who committed the massacres at My Lai may not have had any specific orders from their superior officers but it is arguable that their behaviour had been implicitly approved by the U.S. military not only because they had failed to punish such acts of brutality in the past, but also because the very tactics they employed suggested that the entirety of the Vietnamese populace was expendable. In the military situation it is not hard to see why it is important that the authority situation works. It is vitally important that soldiers learn to obey orders as the lives of many others may be dependent on their actions. The ability to follow

commands without question is something that is conditioned into soldiers through intensive military training programmes. The army has little use for soldiers who stop and think. Indeed on the battlefield that moment of hesitation where a soldier considers the morality of killing his enemy could cost him his life.

In the corporate context the position is clearly not quite so dramatic. Certainly the corporate world can be described as "dog-eat-dog" at times, but hesitation in the case of corporations usually costs money not lives. Since money is the very lifeblood of a corporation it is not difficult to see why, in certain situations, individuals may cast their normal morality aside in order to ensure financial productivity.

How then might we use these ideas to create a coherent theory of corporate liability? Perhaps one of the simplest ideas is that which has been advanced by Fisse and Braithwaite on a regular basis, the theory of "reactive fault". They state:

> "Reactive corporate fault may be broadly defined as unreasonable corporate failure to devise and undertake satisfactory preventive or corrective measures in response to the commission of the *actus*

reus of an offence by personnel acting on behalf of the organization."[39]

Fisse and Braithwaite's Theory of Reactive Corporate Fault.

The theory they have advanced is based on three main premises. Firstly it is supposed to provide an accurate reflection of the public's disapproval of those corporations who fail to take positive steps after they have been made aware of the harm their activities cause. Secondly it is intended to counteract the practise amongst some members of senior management of delegating responsibility for safety management because they view it as an unimportant part of day to day life. Finally it is intended to counteract a belief that criminal actions, because of the difficulty in prosecuting corporations, should be used solely as a last resort where civil sanctions have failed.

Fisse and Braithwaite assert that the concept of reactive corporate fault allows a "way of attributing intentionality to a corporation in a manner that is both workable and corporate in orientation".[40] They suggest, as have other academic commentators, that corporations can show their own brand of intentionality, which comes in the form of corporate

[39] *"Corporations, Crime and Accountability"*, Brent Fisse and John Braithwaite (Cambridge University Press: 1995)
[40] *"Corporations, Crime and Accountability"*, Brent Fisse and John Braithwaite (Cambridge University Press: 1995) page 47.

policy. It is unlikely, however that a company will openly adopt a criminal policy "at or before the time of commission *actus reus* of an offence".[41] The way that we can get round this problem is by shifting the "timeframe of enquiry".[42] That way we have a means of getting around whatever façade of compliance a corporation may have adopted. Instead our focus would be on how a corporation reacts to whatever crime they may have committed. By this Fisse and Braithwaite mean that we would have to look at any programmes for reform that may have been implemented, such as "a program of internal discipline, structural reform or compensation".[43]

To a degree this appears reflective of the regulatory approach which is adopted under the *Health and Safety at Work etc., Act 1974*. By this it is meant that health and safety inspectors will only use prosecution as a last resort. Ultimately their goal is to ensure compliance with the provisions of the 1974 Act, thereby ensuring the safety of employees and the general public. It is questionable, however, whether "reactive fault" provides us with true corporate guilt. If a person runs away from the scene of a crime, is it just to automatically impose guilt? Does a person's actions after the original offence make them any more or less

[41] *"Corporations, Crime and Accountability"*, *op. cit.* page 48
[42] *"Corporations, Crime and Accountability"*, *op. cit.* page 48
[43] *"Corporations, Crime and Accountability"*, *op. cit.* page 48

guilty? An added problem is that it is an uneasy situation where society is asked to impose liability in a situation where the *actus reus* and *mens rea* of the offence do not coincide.

It is a fundamental principle of the English criminal law that the necessary *mens rea* must be present at the time of the commission of the *actus reus*. In this present situation Fisse and Braithwaite ask that the necessary *mens rea* be found in a corporation's failure to make amends for the initial *actus reus*. This is further complicated by the fact that we may be dealing with a time frame of months to years if we are realistic about how long it might take a corporation to implement necessary changes. There are, however, exceptions to this rule. The first of these is found in the case of *Fagan*.[44]

In *Fagan* the defendant found himself on the wrong end of the court's attempts to stretch the law to fit the facts. He was charged with battery. Having been asked to move his car by a policeman, the defendant inadvertently reversed on to the officer's foot. He failed, however, to remove the car. Whilst the court might have been prepared to accept that the initial action was an accident there would not have been the

[44] *Fagan* [1969] 1 QB 439.

necessary *mens rea* at that stage to convict the defendant. The solution they adopted was to hold that the offence of battery could be an ongoing act. By failing to remove his car from the policeman's foot he demonstrated intentionality. It was at that stage that there was a coincidence of the two elements and therefore the defendant was found guilty.

In *Miller*[45], however, it was suggested that the principle of *Fagan* had been over ruled and that it now fell into a new category of offences. A defendant could be found guilty where, by their actions they had inadvertently created a dangerous situation then realised what they had done, but failed to take steps to remedy the dangerous consequences. For our purposes this means that there is common law support for the idea that a corporation could indeed be held liable for failing to deal effectively with a situation it had created by its wrongdoing.

[45] *Miller* [1983] 2 AC 161

An alternative approach is advocated by Sugawara in his thesis *"Corporate Criminal Liability for Manslaughter"*.[46]

Sugawara's Risk Oriented Model

Sugawara adopts a, seemingly, more elaborate approach to the problem of corporate criminal liability than that advanced by Fisse and Braithwaite. Sugawara suggests that a number of models of corporate liability which have been recommended in the past each have a number of points to commend them. There is not, however, one all encompassing theory of corporate criminal liability which would serve to impose liability on corporations with a greater efficiency than any existing model. The "Risk-Oriented Model" devised by Sugawara is an attempt at creating a hybrid offence which would bring together all the desirable traits of other models of corporate liability. This would not be a thoroughly novel idea, however, as Sugawara points to the example of section 12 of the Australian Criminal Code as a pre-existing (if not particularly successful) example of a hybrid form of liability. The statutory model Sugawara advances looks like this.

[46] Masayuki Sugawara (1997, Ph.D. University of Bristol)

1- (1) A corporation which, by the lack of a sufficient safety system, causes the death of a person is guilty of reckless manslaughter if: -

(a) it is aware, through its decision making officers, of a risk that its lack of a sufficient safety system will cause death or serious injury; and

(b) it is unreasonable for it to take that risk having regard to the circumstances as it, through its decision making officers, knows or believes them to be.

(2) The corporation's awareness of the risk may be established by proving that its decision making officers failed to make a suitable and sufficient assessment of:-

(a) the risk to the health and safety of its employees to which they are exposed whilst they are at work; and

(b) the risk to the health and safety of persons not in its employment arising out of or in connection with the operation by it of its undertaking.

(3) The corporation's failure to make a suitable and sufficient assessment of the risk may be established by proving that, if by its decision making officers, fails to take reasonable steps to

avert the risk after its receipt of notice as to the existence of the risk, issued by a court or administrative agency.

2- (1) A corporation which, by its lack of a sufficient safety system, causes the death of a person is guilty of killing by gross carelessness if:-

(a) a risk that its lack of a sufficient safety system will cause death or serious injury of a person would be obvious to a reasonable corporation in its position;

(b) it is capable, through its decision making officers, of appreciating that risk at the material time; and

(c) the relevant safety system falls far below what can reasonably be expected of the corporation in the circumstances.

As is stated at a later stage in this thesis, encouragement should be given to the development of those approaches to the question of corporate manslaughter that focus on utilising corporate behaviour to indicate criminal *mens rea*. The benefit of a theory of corporate liability that focused attention on corporate working and safety practices should, in theory, have the further benefit of triggering internal corporate reform by

those companies that wish to show that they have a corporate culture which encourages safe working practices.

Irvine Janis and the concept of "Groupthink"

As has already been asserted elsewhere in this thesis individuals will often behave differently in groups than they would as isolated beings. As a result of this altered behaviour, the individual may often find themselves concurring with a decision which they do not actually support or even have strong moral objections against. This theory has also been identified as forming a vital strand of thought in organizational theory literature. This section of the thesis, therefore, looks at two such theories that aim to explain why these processes occur. If it can be understood how groups can reach potentially criminal decisions, for example, in applying these discoveries to the corporate context we might learn how to, prevent/reduce the instances of corporate criminal decision making.

Groupthink is defined by Irvine Janis as:

> "a mode of thinking that people engage in when they are deeply involved in a cohesive group, when the members' strivings for

unanimity override their motivation to realistically appraise alternative courses of action".[47]

His interest in group behaviour stemmed from such tragic decisions as the escalation of the Vietnam War and Harold Truman's decision. He wanted to try and understand why groups of intelligent people, supposed experts in their fields (Truman, for example, was President of the United States), can make such terrible decisions. As a result of his studies he identifies eight "symptoms" of "groupthink", all of which point to the fact that a harmonization of beliefs has permeated the groups decision making process, they are:

1) An illusion of invulnerability: the members of the group grow to believe that they can do nothing wrong;
2) A belief in the inherent morality of the group: the group feels that it is doing the right thing in embarking on a particular course of conduct; and that their decision is morally sound;
3) Collective rationalization: A good explanation of this would be a belief that "we are good guys and our decisions are in everyone's best interests"[48]

[47] *"Group Think and Risky Shift"*, Chris Jarvis, http://sol.brunel.ac.uk/~jarvis/bola/communications/groupthink.html
[48] *"Group Think and Risky Shift"*, Chris Jarvis, http://sol.brunel.ac.uk/~jarvis/bola/communications/groupthink.html

4) The stereotyping of outsiders: members of the group will tend to adopt a stereotyped view of outsiders (and occasionally members of the group itself) who slow down the decision making process by failing to concur with the majority viewpoint. "When combined with the illusion of invulnerability –an outsider' views (even though expert) may be discounted or even discredited in conversation".[49]

5) Self-censorship: this is arguably the greatest cause of conformity. In a group situation the fear of confrontation may lead to an individual choosing to say nothing and go along with the decision of the group because everyone else seems to be in agreement. This is reflected in the cliché "I didn't want to upset the apple-cart".

6) A direct pressure on dissenters: this bears some similarity to the "stereotyping of outsiders" symptom. If a person begins to show an opinion that contradicts the views of the rest of the group then the group will put pressure on the individual to "fall into line";

7) An illusion of unanimity: the suggestion will be advanced by members of the group that they were all in agreement about the course of conduct they embarked upon;

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[49] "*Group Think and Risky Shift*", Chris Jarvis, http://sol.brunel.ac.uk/~jarvis/bola/communications/groupthink.html

8) Mindguards: member(s) of the group may take it upon themselves to shelter the leaders of the group from opinions that do not concur with those of the rest of the group. This is similar to the self-censorship symptom.[50]

"Groupthink" may be more prevalent than is known. It is suggested in the article *"Groupthink – The Dark Side of Teaming and How to Counteract it!"*, for example, that Asian companies are particularly susceptible to the intrusion of "groupthink". This is because there are a number of traits of Asian culture which are conducive to its adoption like an unquestioning respect for authority and a strong personal desire to conform, to not stand out from the crowd. Daut says:

> "There is an Asian saying "the nail that sticks up gets hammered down". [This is] indicative of the need to conform and not stick out within this culture noted for group cooperation. The Japanese style of management is noted for reliance on collaborative behavior. Collaborative behavior certainly contributes to achieving consensus; however, it is just that tendency that can also result in Groupthink, where each member is not bringing all his/her intellectual power to the table because they are mentally backing off to achieve a communal objective. Group thinking is a

[50] See *"Groupthink of Irvine Jarvis"*, http://www.afirstlook.com/archive/groupthink.cfm?source=archther; and *Group Think and Risky Shift"*, Chris Jarvis, http://sol.brunel.ac.uk/~jarvis/bola/communications/groupthink.html

negative phenomenon that can result from group behavior when the dynamics are such that members are consciously or unconsciously not expressing their true views".[51]

It is generally suggested by Janis that decisions reached by those groups who have "fallen foul" to "groupthink" are bad, inefficient decisions. A desire to avoid conflict and the subsequent failure to critically evaluate the group's decisions lead to an undesirable outcome. Indeed Janis identified six symptoms of defective decision making. These are:

1) An incomplete survey of the alternatives;
2) A failure to examine the risks of the preferred choice;
3) A failure to reappraise the initially rejected alternatives;
4) A poor information search;
5) A selective bias in processing the information at hand; and
6) A failure to work out contingency plans.[52]

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[51] *"Groupthink – The Dark Side of Teaming and How to Counteract it!"*, http://www.pica.army.mil/tqm/qualitylink/mar98/groupthink.htm

[52] *"The use of the social science concept of "Groupthink" as partial antidote for the managerial embrace of teamwork"*, M. Neil Browne, Andrea Giampetro-Meyer, and Melanie Myers, http://claxton.apsu.edu/NSSAJ/NSSAJ132/NSSAJ132htm/NSSAJ13_2_4.htm

It is not necessarily the case, however, that all bad decisions are made as a result of "groupthink" permeating the decision making process. Neither is it necessarily the case that all decisions made as a result of "groupthink" are bad. Finally it is also a folly to believe that "groupthink" will be rife in all groups. Not only is a high degree of cohesiveness amongst the members of the group required, but there are also other factors which, when present within an organization, will increase the likelihood of groupthink occurring. These include the fact that the decision is being made during highly stressful times or that the group leader has an overbearing personality, the kind which prevents open and frank discussion.

The notion of "groupthink", and the need to properly understand it, will undoubtedly increase alongside the growing popularity of "teamwork" within the business community. Business literature generally tends to support the idea of teamwork, that is to say involving lower level employees and management in the decision making process. It is deemed beneficial because it "empowers" workers by allowing them to "feel actively involved in both the production and decision making process"[53] and benefits managers because the newly "empowered"

[53] *"The use of the social science concept of "Groupthink" as partial antidote for the managerial embrace of teamwork"*, M. Neil Browne, Andrea Giampetro-Meyer, and

workforce demonstrates a greater desire to help management to create a better working environment.

One interesting criticism of the concept of "teamwork" is raised by Hallander. He argues firstly that groups are not democratic, they inevitably have a leader amongst the team members and this leads us to question the power the other members of a group might have to influence the final outcome of any group decision. Secondly he raises the question of "distribution", although all members of a team may contribute towards a good or bad decision, not all members are necessarily rewarded or punished proportionally. A popular example of the kind of decision that can be reached if we concur with Hallander's theory is found in the tale of the *"Abilene Paradox"*.

Jerry Harvey and "The Abilene Paradox"[54]

"Four adults are sitting on a porch in 104-degree heat in the small town of Coleman, Texas, some 53 miles away from Abilene. They are engaging in as little motion as possible, drinking lemonade, watching the fan spin lazily and occasionally playing the odd game of dominoes. The characters are a married couple and the wife's parents. At some point

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Melanie Myers,
http://claxton.apsu.edu/NSSAJ/NSSAJ132/NSSAJ132htm/NSSAJ13_2_4.htm

[54] See *"Revisiting the Abilene Paradox: Is Management of Agreement Still an Issue?"*, Kathryn J. Deiss, http://www.arl.org/diversity/leading/issue8/abilene.html

the wife's father suggests they drive to Abilene to eat in a cafeteria there. The son-in-law thinks this is a crazy idea but doesn't see any need to upset the apple cart, so he goes along with it as do the two women. They get in their un-air conditioned Buick and drive through a dust storm to Abilene. They eat a mediocre lunch at the cafeteria and return to Coleman exhausted, hot and generally unhappy with the experience. It is not until they return home that it is revealed that *none* of them wanted to go to Abilene – they were just going along because they thought the others were eager to go. Naturally everyone sees this miss in communication as someone else's problem".[55]

The point of this colourful anecdote is to highlight another facet of organizational behaviour. Whereas "groupthink" can be construed as a matter of dealing with conflict, the "Abilene Paradox" is more about the management of agreement and how "we do or do not engage in deep inquiry and in self disclosure when attempting to come to agreement with others".[56]

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[55] *"Revisiting the Abilene Paradox: Is Management of Agreement Still an Issue?"*, Kathryn J. Deiss, http://www.arl.org/diversity/leading/issue8/abilene.html, taken from Jerry B. Harvey, *"The Abilene Paradox and other Meditations on Management"* (San Fransisco, Jessey Bass, 1988)
[56] *"Revisiting the Abilene Paradox: Is Management of Agreement Still an Issue?"*, Kathryn J. Deiss, http://www.arl.org/diversity/leading/issue8/abilene.html

Jerry Harvey identifies six different characteristics of behavior which are indicative of a group about to fall foul of the "Abilene Paradox", these are:

1) Members individually, but privately, agree about their current situation;

2) Members agree, again in private, about what it would take to deal with the situation;

3) Members fail to communicate their desires and/or beliefs to one another, and, most importantly, sometimes communicate the very opposite of their wishes based on what they assume are the desires and opinions of others;

4) Based on inaccurate perceptions and assumptions, members make a collective decision that leads to action. It is in the action that it becomes apparent that the decision is contrary to individual desires. They thereby arrive at a destination they did not want to go to in the first place;

5) Members experience frustration, anger, and dissatisfaction with the organization;

6) Finally, members are destined to repeat this unsatisfying and dysfunctional behavior if they do not begin to understand the genesis of mismanaged agreement.[57]

Unlike in the groupthink scenario, the main contributing factor is the fear of the unknown rather than a desire to avoid confrontation. Deiss, based on Harvey's work states:

> "we know what we are afraid of and that it generally has to do with loneliness, being left out, separation, and alienation [to] avoid these we will actually act against our best interests hoping to be "part" of something, members of the whole".[58]

The situation is exacerbated by our uncontrollable need to act rather than letting things stay as they are.

The solution to this problem, it is suggested by the author, is to improve communications within the group. Steps need to be taken to remedy the problem of the group members trying to "second guess" what each other is thinking. Clearly in the tale of the "trip to Abilene", once one party

[57] *"Revisiting the Abilene Paradox: Is Management of Agreement Still an Issue?"*, Kathryn J. Deiss, http://www.arl.org/diversity/leading/issue8/abilene.html
[58] *"Revisiting the Abilene Paradox: Is Management of Agreement Still an Issue?"*, Kathryn J. Deiss, http://www.arl.org/diversity/leading/issue8/abilene.html

member voiced their dissatisfaction with the decision then everyone's true feelings were revealed. By that stage, however, it was too late.

Chapter 8: The Approach to Imposing Corporate Criminal Liability in Other Jurisdictions.

This section of the thesis examines the approach that has been adopted by other jurisdictions world wide to tackle the problem of corporate criminal liability, focusing on the offence of manslaughter. Firstly, there is a consideration of the approach taken by our neighbours in Scotland as their courts, though close in a geographical sense, are not bound to follow English precedent.

Obviously, there will be some discussion of the approach adopted by the United States as it is the largest industrialised nation in the world and so has had much experience with criminal corporations. There will also be an analysis of the approaches adopted by Canada and Australia as they are both members of the Commonwealth and have a legal system strongly driven by the common law as is the case in England and Wales. Finally, there will be a treatment of the approaches adopted in Holland and Italy, both of which have statutory provisions directed at dealing with corporate manslaughter but neither seems to have been dealt with particularly zeal by the academic community. It is with the approaches of the smaller nations that this section begins.

The Approach in Scotland[1]

The criminal liability of corporations in Scottish Law is dealt with under the *Criminal Procedure (Scotland) Act, 1995*. Under section 70 of the Act a prosecution may be brought against the corporation. Furthermore, section 143 (3) allows a prosecution to be brought against individual members of the corporation (namely the managing director or company secretary), and allows for their actions to be construed as the actions of the corporation.

The Scottish courts have found the issue of corporate *mens rea* just as troublesome as their English counterparts. In the case of offences requiring the proof of *mens rea*, the doctrine of identification set out in *Tesco Supermarkets Ltd. v Nattrass* is not binding on Scottish courts. Instead Scottish courts are bound by the cases of *Dean v John Menzies Ltd.*[2], and *Purcell Meats (Scotland) Ltd v Mcleod*[3].

It seems that the court's decision in *Dean v John Menzies* created more questions than it answered. In that case the corporation had been charged with the common law offence of shamelessly indecent conduct by selling, exposing for sale and having for sale pornographic magazines

[1] See generally "*The Criminal Liability of Corporations and Scots Law: Learning the Lessons of Anglo-American Jurisprudence*", Richard Mays, ELR Vol. 4 p. 46
[2] 1981 SLT 50
[3] 1981 SLT 50

which were likely to corrupt the minds of those who viewed them. The corporation contended on appeal, *inter alia*, that a company could not be charged under Scottish law with common law offences requiring proof of *mens rea*. In the preliminary plea on the question of the competency of the charge this contention was upheld by Sheriff Jardine who held:

> "I have reached the conclusion that I am bound to sustain the view that, under the law as at present developed in Scotland, such a charge at common law cannot be maintained against a company".[4]

On Appeal this approach was upheld by Lord Stott and Lord Maxwell, but problems were created by the dissenting opinion of Lord Cameron. Whilst agreeing that a corporation could, in some instances be guilty of some degree of criminal intent, Lord Stott focused his attention solely on the particular offence in question. He stated:

> "Counsel for the prosecution … pointed out, as appears to be the fact, that in all the history of incorporated bodies there is no recorded instance in Scots law of a prosecution of a company for a crime or offence at common law … I think it is self-evident that there are certain crimes and offences which cannot be committed by a corporate body. Murder is such a crime, not only as the advocate-depute conceded, because a company cannot be

[4]*Dean v John Menzies Ltd.* 1981 SLT 50, page 51

> imprisoned but it is incapable of having that wicked intent or recklessness of mind necessary to constitute the crime of murder … In my opinion the offence of conducting oneself in a shamelessly indecent manner falls into the same category."[5]

Lord Maxwell also chose to focus his judgement on the question of whether a corporate entity was capable of committing the particular alleged offence, rather than whether a corporation was capable generally of committing a common law offence under Scottish law. Indeed, he began his decision by stating:

> "The crime charged in my opinion has certain characteristics which have a bearing on the present problem. It is a charge of "shameless and indecent conduct". This involves … the doing of something which is defined by reference to a type of behaviour of which human beings alone are capable … Whatever may be the position as regards other common law crimes it is perfectly apparent that the company as a legal abstraction could not, as matter of fact have the knowledge, exercise the judgement and conduct itself in the manner alleged in the complaint."[6]

Having decided that the act of "shameless indecency" was not one which could be committed by the corporation *per se* Lord Maxwell noted it was necessary to seek to attribute the conduct of an individual to the

[5] *Dean v John Menzies Ltd.* 1981 SLT 50, page 59
[6] *Dean v John Menzies Ltd.* 1981 SLT 50, per Lord Maxwell at page 60 - 61

corporation via the legal fiction of identification. Following an extensive treatment of the relevant Scottish and English case law cited by counsel, including Tesco v Nattrass, his Lordship concluded that the doctrine of identification was inapplicable in Scottish Law. He stated:

> "In the light of the authorities cited to us I am not satisfied that the common law of Scotland recognises any clear single fiction which would for purposes of criminal responsibility in all matter attribute to a company the kind of human characteristics and conduct alleged in this complaint. It appears to me unrealistic to suggest that the accused company will be guilty if, but only if, some individuals or individual, whose status is not precisely defined but who must be vaguely at or near director level had knowledge of the content of the magazines in question and acted in a shameless and indecent manner in deciding to sell them. That, however, seems to me to be the result of applying the controlling mind fiction."[7]

As has been mentioned, however, their Lordships were not unanimous in their verdicts. An opposite view was advanced by Lord Cameron who opted to focus on the broader question of whether corporations could be charged with any offence at common law. Having established that corporate entities were capable of being subject to liability for breach of statutes, his Lordship pointed to section 333 of the *Criminal Procedures*

[7] Dean v John Menzies Ltd. 1981 SLT 50, per Lord Maxwell at page 64.

(Scotland) Act, 1975 (which allowed for the prosecution of individuals within the corporation) noting that it did not distinguish between statutory and common law offences and neither did it specifically limit liability to statutory breaches. He then stated that if it had been the intention of Parliament for corporations not to be held liable for criminal offences, then it could have made this clear in the statutory provision but it did not do so. Having also concluded that a corporation was capable of forming a state of mind, he stated:

> "[T]he bald submission that a company cannot in Scotland in any circumstances be guilty of a common law offence does not commend itself to me as sound in principle. It is without authority and if it be argued that a company cannot posses the capacity to exhibit mens rea it can be sufficiently answered that mens rea is no more than that "wicked intent" which is the presumed element in all acts which are criminal at common law."[8]

He continued:

> "If a company can by law – by legal fiction if you will – be endowed with a mind and will exercisable by natural persons acting within the confines of the company's legal competence, and be held responsible for actings in pursuance of the exercise of that mind and will, then if those actings are contrary to the common

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[8] *Dean v John Menzies Ltd.* 1981 SLT 50, per Lord Cameron at page 55

criminal law, I find it difficult to see upon what basis of principle it can be said that the company is free of criminal intent."[9]

Having determined that there was no sound basis for denying that corporations could be liable for common law offences, Lord Cameron concluded that the basis for determining corporate liability in such instances should be the doctrine of identification as laid out in _Tesco v Nattrass_. The argument he used to justify the applicability of that case to Scottish law was, however, somewhat tentative.

Lord Cameron argued that the principles of that case should be applicable in Scotland since the decision in _Nattrass_ concerned a statutory provision which was brought under a United Kingdom statute that was also effective in Scotland. Furthermore, the English and Scottish approaches to corporate liability were the same with regard to statutory offences. Since his Lordship could think of no good reason why the approaches of the two separate jurisdictions should not concur in relation to corporate liability for criminal offences he suggested that _Nattrass_, though not technically binding on Scottish courts, should act as persuasive authority.

[9] _Dean v John Menzies Ltd._ 1981 SLT 50, per Lord Cameron at page 56

Surely it does not necessarily follow that the Scottish approach to common law offences should mirror that of the courts in England and Wales simply because the relevant legal principles derive from a case concerning a statutory provision adopted by both jurisdictions. If anything, it is suggested that the result should be more like that in *Meridian Global Funds* (although that case had not been decided at this point), that is to say that the decision *Nattrass* was merely a pronouncement on a particular statutory provision rather than creating some general rule of attribution. Therefore it would have been open for the courts to follow the decision in *Nattrass* in a case involving the shared statutory provision, but it should have been left open to the Scottish judiciary to develop their own general rule of attribution.

At that stage, therefore, it wasn't certain whether the courts would be willing to impose liability on corporations for common law offences. The situation was rectified by the decision in *Purcell Meats (Scotland) Ltd v McLeod*[10] which appears to suggest that the common law in Scotland does actually support the doctrine of identification as the basis for attributing liability for common law offences requiring proof of *mens rea*. The corporation was charged with fraud for trying to evade duties on beef carcasses by falsifying Exemption Stamps. An added problem in

[10] 1987 SLT 528

this case is that it had not been possible to identify who had carried out the fraud, so Counsel for the corporation contested that if it could not be determined that the action was carried out by a member of the directing mind of the corporation then liability could not be attributed to it.

In this instance Lord Robertson and Lord McDonald took the view that <u>Nattrass</u> *could* be used to impute liability for common law offences. Their Lordships stated:

> "Having regard to what Lord Reid said [in <u>*Nattrass*</u>] we are of opinion that in the present case it will only be once the facts have emerged that it will be possible to conclude whether the persons by whose hands the particular acts were performed were of such a status and at such a level in the company's employment that it would be open to the sheriff to draw the conclusion that the acts fell to be regarded as acts of the company rather than acts of the individual."[11]

The Scottish courts have recently dealt with the issue of whether a corporation may be found guilty of corporate manslaughter for the very first time under Scottish law[12]. Transco Plc (formerly British Gas) was

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[11] <u>*Purcell Meats (Scotland) Ltd v McLeod*</u>, 1987 SLT 528, at page 530

[12] See press release *"News Update: Transco Homicide Prosecution Collapses"*, Centre for Corporate Accountability, http://www.corporateaccountability.org/press_releases/2003/3Jun.htm

recently cleared of culpable homicide charges by the Scottish Court of Appeal in a prosecution following the deaths of four people who were killed when a gas explosion destroyed their house in December 1999. The allegations against Transco Plc included a claim that they had failed to devise or implement an effective policy of inspection and maintenance. It is alleged that the company had kept inaccurate records about the gas pipe that served the destroyed property and that it had failed to sufficiently investigate its computer records which highlighted complaints about leaks and gas escapes in that area on several previous occasions.

Giving the leading judgement, Lord MacLean announced that the culpable homicide charge should be dismissed as "irrelevant". This went against a ruling in a lower court that suggested that the doctrine of identification was not adopted in Scottish law in the case of manslaughter charges. This serves to show us that the law governing corporate manslaughter in Scotland may well be similar if not identical to the law governing corporate manslaughter in England and Wales. As such this would mean that the Scottish courts will inevitably be faced with the same problems experienced by their English counterparts and all considerations in this thesis apply to Scots law as well. This might also mean that the Scottish authorities will seek an alternative approach

to the problem that may not bear any similarity to the English approach. It is for this reason that we should be sure to pay close attention to the way in which our neighbours deal with the problem.

The Dutch Approach[13]

The Dutch position with regard to the offence of corporate manslaughter is found laid out in section 51 of the Dutch Criminal Code. This states that "offences can be committed by human beings and corporations".[14] Furthermore, Article 51 tells us that both charges and penalties can be brought against a corporation. The explanatory memorandum that was issued following "the reformulation of the article"[15] set out a list of offences that could be committed by a corporation. The offence of manslaughter was included in that list.

There has already been a successful prosecution of a corporation for manslaughter in Holland. This can be found in *the Hospital Case*[16] (which is interesting because it involves a public organization). In this case the defendant Hospital was charged "with grossly negligently

[13] Based on the article *"Corporate Liability and Manslaughter: Should We Be Going Dutch?"*, S. Field and N. Jörg, [1991] Crim L.R. 156
[14] *"Corporate Liability and Manslaughter: Should We Be Going Dutch?"*, *op. cit.*, page 157
[15] *"Corporate Liability and Manslaughter: Should We Be Going Dutch?"*, *op. cit.*, page 157
[16] Rechtbank Leguwarden, December 23, 1987

failing to ensure properly that old, redundant anaesthetic equipment was removed from the hospital or made unusable".[17] Because the equipment was no longer listed in the hospital's itinerary the equipment was not properly maintained. Furthermore, the hospital did not have in place a safety system to ensure that technicians carried out a proper servicing/replacement of old machinery. This led to an old, poorly maintained, and supposedly non-existent piece of equipment being used in an operation. In one final act of negligence, the lack of a proper system of supervision resulted in the hospital technicians connecting the tubes up wrongly. This mistake was not discovered until it was too late. As a result, a patient died.

In England, it seems safe to say that such a case may well have been decided along similar guidelines to that adopted by the courts in Adomako, which we dealt with earlier. The incredibly individualistic bias of English law would have arguably resulted in either the technicians or the anaesthetist being pursued through the courts. This would have not resulted in the courts getting to the root of the problem, the hospital's unsafe working practices, and no changes would have been made.

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[17] *"Corporate Liability and Manslaughter: Should We Be Going Dutch?"*, *op. cit.*, page 164

Field and Jörg suggest that, in Holland, corporate criminal liability is based on two main notions: that of "power" and "acceptance.[18] The question which must be asked is "did the defendant have the power to determine whether the employees did or did not do the act in question, and did the corporation usually "accept" such acts? Field and Jörg's understanding of this position is that "power" refers to the corporate monitoring of risky or illegal behaviour and that "acceptance" would involve looking at the corporation dealt with the risks.

The management of the hospital claimed, in their defence, that they could not be held liable because they were not aware of the circumstances that led up to the unfortunate death, but the court gave this claim no support. It was the courts belief that it was this very same lack of awareness of the practices in their hospital that provided the *foundation* for liability in this case. The management should have taken a more proactive approach to informing themselves about the day to day running of the hospital. This broadens the scope of the offence somewhat since, as Field and Jörg point out, liability (and indeed "acceptance") might not be limited to the relevant risk in question but

[18] Field and Jörg cite the Kabeljauw Case Hogg Raad, July 1, 1981, N.J. 1982, 80, and the Ijzerdraad Case Hoge Raad, February 23, 1954, N.J. 1954, 378, as support for this proposition.

may also extend to other risks "that *ought* to have been discovered".[19] A corporation may be able to evade liability under the notion of "power", however, if it can be shown that there was nothing it could have done to eliminate the risks, that is to say if the events that unfolded were outside of its sphere of influence. Supposedly this would ensure that the corporation would not be liable for the actions of a renegade ("go it alone") employee. This is important in the interests of both justice and fairness.

The benefits of the notions of "power" and "acceptance", according to Field and Jörg, is that it moves away from the troublesome approach of targeting the actions of individuals, and focuses instead on the corporate decision making process. The kind of corporate behaviour that would be covered by the Dutch approach would range from the routinely tolerated to the explicitly sanctioned. This is important because it shows a recognition that a corporation may be run utilising both "formal rules and informal practices". That is to say that a corporation would be unlikely to openly adopt a criminal stance in its constitution or policies, so whilst it may give the external appearance of being law-abiding, the reality of the situation may be very different.

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[19] *"Corporate Liability and Manslaughter: Should We Be Going Dutch?"*, *op. cit.*, page 165

This approach, based on a holistic view of corporate activities is an important step forward in recognizing the "corporateness" of corporate behaviour. Field and Jörg cite a report published by the Accident Prevention Unit of the Health and Safety Executive in 1989 which stated:

> "The report notes that in organizations where safety is not considered paramount individuals may be unwilling to follow good safety procedures for fear of being criticized or even disciplined. Furthermore, where priorities are confused, safety is likely to come into conflict with commercial pressures. Thus even individual acts of negligence are often identifiable as a product of collective responses".[20]

This is similar to the argument that has been advanced elsewhere in this thesis that individual actions may often be shaped and moulded by corporate pressures so much so that they suppress their personal beliefs and ethics and follow the corporate line.

Dutch Law differs from the English approach, therefore in its recognition of the usefulness of adopting group theories of liability, but it does also differ in two other respects. Firstly, Dutch law rejects the doctrine of

[20] *"Corporate Liability and Manslaughter: Should We Be Going Dutch?"*, *op. cit.*

identification; this is because liability rests on the actions of those who have the power to control corporate actions. This means that, by necessity, emphasis is placed on the actions of those in the upper levels of the corporate command chain. It would therefore, be redundant to determine whether the actions were carried out by a member of the "directing mind". Secondly, the Dutch approach embraces the doctrine of aggregation as it allows liability to be imposed for the collective failure of the corporation, rather than focusing on the actions of particular individuals.

The primary benefit of the Dutch approach, therefore, is that it recognizes that corporations act as a collective. In large, particularly multi-national, organizations, there will never be one individual who single-handedly runs the corporation. The British approach undoubtedly fails in this regard as it is based on a very individualistic view of justice and is not indicative of the realities of corporate actions.

The Italian Approach[21]

The Italian approach to the problem of corporate criminal liability is dealt with in a statute enacted in 2001 (law 366/2001). The statute was

[21] Based on the article *"Coping with Corporate Criminality: Some Lessons from Italy"*, J. Gobert and E.Mugnai, [2002] Crim L.R. 619

enacted to rectify a problem created by the Italian constitution. Under Article 27 of the Constitution it was codified that "Criminal responsibility is individual".[22] This meant that only natural persons could be held liable under the criminal law. The Italians got around this problem by classifying the statutory corporate liability as an "administrative" offence. Gobert and Mugnai, however, point out that this label is somewhat misleading:

> "... companies will be liable for criminal offences and not just administrative misdemeanours, the fact that case will be heard by criminal courts rather than administrative tribunals, and the fact criminal rather than administrative procedures will be in force, all suggest that the contemplated liability is more criminal than administrative in nature. Significantly, under Article 8 of the statute, a company can be held responsible even if it is not possible to identify or convict the human perpetrator of the offence".[23]

In some regards the Italian approach is narrower than that in England and Wales. Under Article 1, for instance, it is stated that the statute does not apply to public bodies that are not engaged in profit making activities, this is in stark contrast to the recommendations of the Law Commission in their proposed new offence of "Corporate Killing". In

[22] *"Coping with Corporate Criminality: Some Lessons from Italy"*, *op. cit.*, page 624
[23] *"Coping with Corporate Criminality: Some Lessons from Italy"*, *op. cit.*, page 624

other respects, however, the Italian statute is much broader. Article 4, for example, allows the prosecution of parent companies for the actions of its subsidiaries providing the parent company's head-quarters were in Italy, and that no legal proceedings had been initiated in the host state of the subsidiary. Following an amendment to the statute in March 2002, the statute applies to offences committed by corporations against private parties as well as against the state.

The Italian statute creates two forms of liability. The first form arises where the crime is committed by the head of the corporation. The second form of liability "is based on the negligence of a corporate body in not considering the possibility of the offence which has occurred, and in not having in place a mechanism to avert its commission".[24] Article 8 provides that a corporation can be guilty of an offence even though no guilty human actor can be identified although it does still require there to be an underlying human offence. Both forms of liability are subject to the defence of due diligence.

Article 5 creates a further distinction between acts that are committed by subordinate staff (Article 5(1)(b)) and those committed by the heads of a corporation, the directors or managers for example (Article 5(1)(a)).

[24] *"Coping with Corporate Criminality: Some Lessons from Italy"*, *op. cit.*, page 625

Article 5(1)(b) allows liability to be imposed on a corporation for those actions committed by someone who is not in a decision making position within the corporation. Regardless of whether the corporation is prosecuted under Article 5(1)(a) or (b), their must still be evidence of the requisite mental state. This requires proof that the offence either (a) was "an expression of corporate policy", or (b) that it "[stemmed] from structural negligence within the corporation".[25] Furthermore, under Article 5(2), it must also be shown that the offence was committed "in the interest and for the benefit of the corporation"[26] which means that a corporation would not be held liable for the activities of an individual who used the corporate persona to commit offences for their personal gain.

The interesting part of this approach is the reference to "structural negligence". Once again this is indicative of an approach which is heavily based on organizational theories of liability. What constitutes "structural negligence" will vary from case to case depending on whether the crime is committed by the head of the organization or a subordinate, but in either case the corporation will still have to show that it had in place a control system "that [takes] into account the risk of

[25] *"Coping with Corporate Criminality: Some Lessons from Italy", op. cit.*, page 625
[26] *"Coping with Corporate Criminality: Some Lessons from Italy", op. cit.*, page 626

offences being committed".[27] Furthermore, it is not sufficient for the corporation to have a merely generic control system in place, rather it must be "detailed and tailored to specific risks"[28] although the exact details will be left to the corporation itself as they will be in the best position to know their personal requirements and circumstances.

Article 6 sets out the due diligence defence which is to be used when the offence is committed by those in positions of power within the corporation. A defence will be allowed where it can be shown that a safe and efficient control system was in place before the offence was committed. This could be established by showing:

(a) the directing board has enacted and effectively applied, before the offence was committed, organisational and managerial schemes appropriate for the prevention of offences of the kind that was committed;

(b) the supervision and updating of the schemes has been allocated to a body with autonomous powers of initiating controls;

(c) the offenders have committed the crimes by deliberately evading the organisational and managerial schemes;

[27] *"Coping with Corporate Criminality: Some Lessons from Italy"*, *op. cit.*, page 626

[28] *"Coping with Corporate Criminality: Some Lessons from Italy"*, *op. cit.*, page 626

(d) there has been a lack of supervision by the body listed under (b)[29]

Article 6(2) imposes further requirements that must be satisfied in order for this defence to be invoked validly. This section sets out a number of criteria that must be fulfilled with regards to dealing with the delegation of powers and governing the management of the risk of committing offences. Taken in conjunction the multiple elements of Article 6 are deemed to "provide guidance to corporations as to the "procedures" or "structures" that need to be put in place, and how to go about achieving that end".[30] They serve as good guidelines to a corporation on how to run its business in a safe manner.

Article 7 sets out the due diligence defence which is to be used when the offence is committed by a subordinate. Once again liability can be proved via the existence of "structural negligence". In this instance the imposition of liability depends on proving that the corporation has failed to set up an effective system of control and supervision over its employees. The kind of system implemented need not, however, fulfil the kind of strict criteria that must be satisfied with regards Article 6.

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[29] *"Coping with Corporate Criminality: Some Lessons from Italy"*, *op. cit.*, page 626
[30] *"Coping with Corporate Criminality: Some Lessons from Italy"*, *op. cit.*, page 627

Article 7(3) states that the control system must appropriate to ensure that the corporation can act in accordance with the law and that it is set up in such a manner as to ensure that any potential breaches of the law can be discovered and dealt with in a reasonable time-frame. Any control system set up by a corporation must be reviewed periodically in accordance with Article 7(4). This is particularly vital in those instances where there has been a breach of the law or where the structure/activities of the organization changes. Interestingly, in the event of a breach of the law, Article 4(b) requires the corporation to set up internal disciplinary procedures in order to punish the individuals responsible.

In accordance with the defences of due diligence found in Articles 6 and 7, if a corporation shows that it had an appropriate control system in place, the burden of proof then falls on the prosecution who must show that the system was either "inadequate or ineffective to prevent offences of the kind that occurred".[31]

Gobert and Mugnai highlight two main advantages of the Italian approach. The first advantage is that it provides fair notice to corporations of the type of control system they would have to implement

[31] *"Coping with Corporate Criminality: Some Lessons from Italy"*, *op. cit.*, page 628

in order to evade liability. Secondly, the scope of the liability found in the statute is broad enough to produce some degree of deterrence.

The imposition of criminal liability on a corporation is a major step for the Italian Legislature, particularly since as a civil law country it had previously refused, alongside companies such as Germany and Spain, to accept that a corporation was capable of being held accountable for criminal offences. It is hoped that this development will help in future to impose liability on corporations such as the Italian petrochemical firm Montedison

In 1998, 38 former executives of Montedison were brought before the courts on criminal charges following the deaths, caused by cancer, of over 150 former workers since 1973 in Porto Marghera, Venice, Italy. It was alleged that the cancers were caused by working with vinyl chloride, a key component used in the manufacture of P.V.C. Furthermore, Montedison had ample evidence of the potential dangers of over exposure to vinyl chloride as it was one of four sponsors of animal research back in the 1970's that showed carcinogenic effects even at low levels of exposure.

The corporation involved was clearly concerned about its potential liability, so much so that it reached a settlement with most of the 500 workers who had contracted the illness and relatives of the deceased of $36.5 million. The courts, however, failed to convict any of the company managers on trial. The court took the view that the dead workers had contracted the illness before the real dangers of working with vinyl chloride became known in 1973

The Approach in the United States of America

As will be seen in the case of the Australian approach to the crime of corporate manslaughter, the approach to corporate manslaughter in the United States is governed by state law. This has not always been the case, however. The first case in which the courts held that a corporation could be held liable for criminal offences is generally deemed to be *United States v Van Schaick*[32]. The corporation was prosecuted for causing the death of 900 people when a steamship they owned caught fire and sank. The defendants (members of the company management) failed to provide properly functioning life preservers contrary to statutory provisions, and as such they were indicted for aiding and abetting the corporation in committing the offence of manslaughter. The defendants claimed that they could not be indicted for aiding and

[32] (1904, C.C. N.Y.) 134F 592

abetting an offence which a company was incapable of committing. The court faced a problem in that the offence for which the company was indicted could only be punished by imprisonment. This approach was justified on the grounds that the social utility of allowing the prosecution of corporations for criminal offences far outweighed the "inadvertent oversight" of Congress to legislate for such an eventuality.

This approach was then followed five years later in the United States Supreme Court in the case of *New York Central R.R. v United States*[33]. The court realised that many offences would simply go unpunished if only individuals were capable of being subjected to the criminal law so they got around the problem of attributing liability to the corporation by relying on the tort law doctrine of *respondeat superior* (vicarious liability) for prosecutions brought under federal criminal statutes. The problem is/was that the last federal homicide statute was repealed by congress a long time ago. As a result all prosecutions for corporate manslaughter had to be brought under state laws. In the early cases this produced mixed results.

[33] (1909) 212 US 481

In the case of *State v Lehigh Valley R. Co*[34] it was held that a corporation could be prosecuted for the offence of negligent homicide. It was said:

> "A corporation may be held liable for criminal acts of misfeasance or non feasance unless there is something in the nature of the crime, the character of the punishment prescribed therefore, or the essential ingredients of the crime which makes it impossible for a corporation to be held. Involuntary manslaughter does not come within any of these exceptions".

In the case of *People v Rochester Railway & Light Co*[35], on the other hand, the court rejected the idea that a corporation could be held liable for the offence of homicide based on a restrictive interpretation of the statutory provision governing homicide in the state of New York. The offence was defined in terms of the killing of one *human being* by another human being. This clearly precluded corporations from the ambit of the offence. The court did, however, adopt a similar approach to that taken in *Commonwealth v Illinois Central Railway Co*[36] in the State of Kentucky in which the court declared that their was no good reason why the legislature could not enact a piece of legislation defined in such a manner as to allow corporations to be found guilty of homicide.

[34] (1917) 90 NJL 372, 103 A. 685
[35] (1908) 195 NY 102, 88 NE 22
[36] (1913) 152 Ky 320, 153 SW 459

In the early stages it meant that the approach taken to prosecuting corporations was quite sporadic. This was a trend that was reversed mainly by the creation of the Model Penal Code in the early 1960's. This was a Code devised by the American Law Institute which took several years to devise and was developed for consideration by State Legislatures. The Model Penal Code justified corporate accountability on the grounds of "deterrence efficiency" and offered a more systematic approach to the imposition of criminal liability on corporations for offences such as manslaughter. The "alter ego" doctrine, as adopted by English Law, had a significant influence on the formulation of the Code in this regard, limiting prosecutions for corporate homicide to those instances where direct "high level" involvement could be shown. The Model Penal Code was adopted by most of the State Legislatures and has been applied in many cases mostly adopting similar approaches.

An examination of some of the case law shows that the courts, in dealing with the question of corporate homicide, have faced three major problems, namely the definition of the offence, establishing that a corporation possessed the necessary intention to be held liable for the offence, the lack of an appropriate punishment for the offence.

In relation to the first problem we will see that in some States, the offence of homicide is defined in terms of the killing of one "human being by another human being". This is problematic because this clearly excludes corporations from the ambit of the offence. This problem is remedies in other States by defining the offence in terms of the killing of one "person" by another person. This is further supported by providing that the definition of "person" can include both natural and legal persons, i.e. humans and corporations.

With regard to the punishment question, corporations present a problem if the only prescribed form of punishment is death or imprisonment, or any other punishment which is inapplicable to a corporation. This has proved problematic in some States because the courts have seen this lack of an "appropriate" form of punishment as indicative of a lack of legislative intent to hold corporations liable for criminal offences. This has been dealt with in some jurisdictions by setting out the penalty for homicide in terms of both a fine and imprisonment. In other jurisdictions the Legislature have enacted specific penalty provisions applicable to corporations.

It may be helpful at this stage to look at the approach which has been taken in some of the States which recognize that a corporation can be convicted of corporate manslaughter.

In New York State there is the case of *The People of the State of New York v Ebasco Services Incorporated*[37]. In this case the defendant corporation was charged with negligent homicide and initiated a motion to dismiss the indictment. The prosecution resulted from the death of two construction workers who died when a cofferdam they were working in collapsed and flooded. On appeal the court held that corporation *could* be indicted for the offence of corporate homicide under section 125.10 of the New York State Penal Code. That section provided that:

> "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person".

However, under the homicide article of the Penal Code, section 125.05(1), a person, when referring to the victim of a homicide, was defined as "a human being who has been born and alive". The defendants contended that since that definition of "person" was worded in terms of "human beings", this meant that a corporation could not

[37] (1974) 77 Misc.2d 784, 354 N.Y.S.2d 807

commit homicide. Louis Wallace J. refused to accept this contention, however. He claimed that such a definition "flies in the face of the statute which equates "person" with human being only in regard to the victim of the homicide. This statute does not require that the person committing the act of homicide be a human being and the reference to human being is of limited application".

Since there was no other definition of "person" included by the Legislature in the homicide offence, the next step was to look elsewhere in the Penal Code, to the overall definitional article. In section 10.00(7) the definition of person included corporations, except in those circumstances where it would be inappropriate. Since it had already been stated in *People v Rochester Railway & Light Co* that it was entirely appropriate to indict a corporation for manslaughter, then the defendant corporation was clearly within the ambit of the homicide offence. The case was dismissed, however, on a technicality, namely that the indictment was defective in that it was not particular enough in the alleged facts.

In Kentucky the position was originally set out in the case of *Commonwealth v Illinois Central Railway Co.* (cited above). In this case the courts refused to allow the prosecution of a corporation for homicide

because the offence was defined in terms of the killing of one human being by another human being. Corporations clearly did not fall within this definition. A subsequent attempt to rely on this ruling was denied by the court in *Commonwealth of Kentucky v Fortner LP Gas Company Inc.*[38]. In that case a corporation was prosecuted following the death of two schoolchildren who were run over by a truck owned by the corporation whilst getting off the school bus. The driver had slowed down and applied the brakes but the truck failed to stop. A subsequent examination of the truck showed that its brakes were defective. The defendants claimed the indictment against them should be dismissed following the pronouncement of the court in *Illinois Central Railway*[39] that "corporations cannot be indicted for offences which derive their criminality from evil intention or which consist in a violation of those social duties".

Gant J. held that the aforementioned case was no longer applicable in light of the subsequent statutory developments, and given the age of that case. The Kentucky Penal Code 1974 provided that a corporation could be held liable for criminal offences. Furthermore, it defined the term "person" as including corporations. Gant J. took the view that this

[38] 1980 610 S.W..2d 941 (Kentucky Court of Appeals)
[39] 1913 152 Ky. 320, 153 SW 459

showed a strong legislative intent to hold corporations liable for criminal offences. His opinion was given greater weight by section 502.050 of the Kansas State Penal Code which sets out the provisions on corporate criminal liability, and section 534.050 which sets out the penalties to be imposed on corporate offenders.

In the State of Pennsylvania we find the case of *Commonwealth v McIllwain School Bus Lines Inc.*[40], in which the company was found guilty of vehicular manslaughter, despite that fact that the legislature had "inadvertently" failed to provide a suitable punishment for a corporate offender.

Then in 1985, *Commonwealth of Pennsylvania v Penn Valley Resorts, Inc.*[41] there is an interesting situation in which a corporation is convicted, *inter alia*, of involuntary manslaughter following the death of an underage drinker in a road accident. It was alleged that the president of the defendant corporation had knowingly served drink to an underage patron at a college students' dinner held at his resort. Furthermore he was accused of failing to require proof of the patron's age and of serving him alcohol whilst he was visibly intoxicated, all of which were done

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[40] (1980) 283 Pa. Super 350, 443 A.2d 1157
[41] 343 Pa.Super.387, 494 A.2d. 1139,

contrary to State law. According to the court, this all pointed the fact that he had acted in "a reckless or grossly negligent manner".

In its defence, the corporation claimed that a corporation was not a "person" and as such could not be convicted of involuntary manslaughter or reckless manslaughter. Furthermore it claimed that it could not be liable because the president's actions were not "condoned, sanctioned or recklessly disregarded by the Board of Directors".

Under section 307(a)(3) of the Pennsylvanian Criminal Code a corporation could be convicted of manslaughter if the actions which caused the death were those of "a high managerial agent". Furthermore it could be convicted of an offence:

> "If … the commission of the offence was authorised, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office of employment."

The earlier case of _Commonwealth v Schomaker_[42] established that the provisions of section 307(a)(3) applied to all offences in the Criminal Code. However, the court in this instance held that the question was

[42] (1981) 293 Pa.Super. 78, 437 A.2d.999

simply one of agency and did not rely on the corporation condoning the officer's actions. As such, the corporation was deemed a person for the purposes of the homicide offence and could be convicted accordingly.

In the State of California we have the case of Granite Construction Co. v The Superior Court of Fresno County[43]. In that case the corporation was prosecuted following the death of seven workers during the construction of a power plant by the corporation. The court was faced with an interesting barrier to imposing liability for manslaughter in this instance. Section 7 of the Californian Penal Code provided that the term "person" could include corporations. Furthermore, the offence as set out under section 192 was not restricted in its scope solely to natural persons. The problem was created by section 193 which sets out the punishment for manslaughter as imprisonment. It made no provision for the imposition of fines. This indicated that section 192 was not intended to apply to corporations. The court got around this problem by turning its attention to section 672 of the Californian Penal Code, which provided an alternative source of punishing corporations for criminal offences, a catchall fine system enacted in 1872.

[43] (1983) 149 Cal.App.3d 465

Finally, in the State of Texas, we have _Vaughan and Sons Inc v The State of Texas_[44]. In this case it was alleged that the defendant corporation, through two of its agents, had caused the death of two individuals in a car crash. The corporation claimed that the court had erred in finding that a corporation could be guilty of criminal homicide under the provisions of the Texas Penal Code. As a result the Court of Appeal reversed the conviction of the lower court. The case reached the Court of Criminal Appeals on the State's contention that the Court of Appeal was wrong in holding that the Legislature did not intend for section 19.07 (governing homicide) to apply to corporations.

Before the enactment of the 1974 Penal Code and its subsequent alterations, the State of Texas only recognised corporate criminal liability in very limited circumstances. Under section 107(a)(27) the term "person" was defined as including corporations. Under section 7.22 it was stated that corporation could be convicted for any of the criminal offences set out in the Penal Code. Finally, section 12.51 deals with the punishment of corporations and permits the imposition of fines in those cases where only imprisonment is the sole sentence provided for the offence.

[44] (1987) 737 S.W.2d 805

The court took the view that, since so many statutory provisions had been enacted which allowed corporations to be held liable for criminal offences in the State of Texas it was indicative of a clear legislative intention to allow the prosecution of corporations for the offence of homicide. Thus, since the statutory definition of a "person" included a corporation, and since the offence of criminally negligent homicide could be committed by a "person", logic dictated that a corporation could commit the offence of homicide. The corporation was convicted accordingly.

It is clear from the substantial number of cases which have imposed liability on corporations for manslaughter that there was/is a strong legislative desire to ensure that corporations should not be allowed to benefit from activities which they have carried out with little or no regard for the safety of those who might be affected by their operations. There remained one major hurdle, however, as highlighted by Miester, namely the views of society had to be changed.[45] Some factions of society still faced great difficulty in accepting that corporations were capable of intentional homicide. This was a major obstacle to

[45] *"Criminal Liability for Corporations that Kill"*, Donald J. Miester, (1990) 64 Tulane Law Review 919

prosecuting corporations which was largely overcome by the Ford Pinto prosecution.[46]

It will be recalled that in that case Ford was prosecuted following the death of three teenage girls in Indiana. They died when the car they were in caught fire and exploded following a rear-end collision. Ford was aware that there was a serious design defect in the Pinto with regards to the position of its fuel tank which caused the Pinto to "light up" following relatively low speed collisions. The prosecution failed, but its symbolic importance should not be played down. It was a clear indication that the boundaries of acceptable corporate behaviour were shifting.

This was followed by another major prosecution in the case of Film Recovery Systems Inc. and its sister company, Metallic Mining Systems who were found guilty of involuntary manslaughter. The prosecution followed the death of Stefan Golab, an immigrant worker whose job it was to clean out vats of cyanide. The conviction was made easier following evidence that the corporation had gone out of its way to hide evidence of the potential hazards of working with cyanide from its

[46] *State v Ford Motor Co.* No. 5324 (Ind. Super Ct. Sept. 3 1978)

workers. Apparently it had even gone so far as to scrape off the skull and crossbones warning labels on the cyanide vats.[47]

The Canadian Approach.

As is the case in other common law jurisdictions, there are two main strands of criminal liability that have emerged in Canada, vicarious liability and the doctrine of identification. An examination of the Canadian authorities shows that the case law is heavily influenced by the approach of the English courts.

The primary case in the field of corporate criminal liability in Canada is *Canadian Dredge & Dock Co. v The Queen*[48] in which four corporate defendants were appealing against their conviction for entering into an illegal price fixing agreement. The court examined the earlier case law and extrapolated the following principle: "... the identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind was (a) within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company".[49]

47 *"Criminal Liability for Corporations that Kill"*, Donald J. Miester, (1990) 64 Tulane Law Review 919, page 931.
48 [1985] 1 S.C.R. 662
49 *Canadian Dredge & Dock Co. v The Queen* [1985] 1 S.C.R. 662

This case highlights the fact that under Canadian law, despite the fact that it has been rejected by the courts, it is clearly the case that any form of corporate criminal liability must necessarily derive from a broad application of the doctrine of vicarious liability. This is because corporations can, by its very nature, only carry out actions through its agents.

Canadian Dredge and Dock also identifies the primary basis of criminal liability for corporations in Canadian law as the doctrine of identification as laid out in the English case of *Tesco v Nattrass*. The form of the identification doctrine the Canadian courts adopted was slightly modified from that used by their English counterparts and is referred to as the delegation theory. Under this theory:

> "The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation".[50]

The importance of this approach, as highlighted by Boisvert, is that it recognizes that a corporation may have more than one "directing mind".

[50] *"Corporate Criminal Liability: A Discussion Paper"*, Anne-Marie Boisvert, http://www.ulcc.ca/en/criminal/index.cfm?sec=3&sub=3e

She states "This is particularly so in a country such as Canada where corporate operations are frequently geographically widespread".[51]

The primary concern of the courts in amending the identification doctrine in Canadian Dredge & Dock was to try and deal with the limitations and problems which have arisen in attempts to utilise it in the English courts. It appears from the case of Rhône (The) v Peter A.B. Widener (The)[52], however, that the delegation theory also has its limits.

In Rhône (The) the owners of the ship *Rhône*, following a collision with the barge *Widener* sued its owners, and the owners of the four tugs that were towing the *Widener* at the time of the collision in the Port of Montreal. The owners of the *Rhône* also sued Great Lakes Towing Company for breaching its towing contract. Great Lakes owned two of the tugs involved in the towing of the *Widener*, namely the *South Carolina* and the *Ohio*. Captain Kelch, who was on the *Ohio* acted as the *de facto* master of the flotilla. It was a combination of his navigational errors and the defective towing apparatus on the *Ohio* that caused the collision.

[51] *"Corporate Criminal Liability: A Discussion Paper"*, Anne-Marie Boisvert, http://www.ulcc.ca/en/criminal/index.cfm?sec=3&sub=3e
[52] [1993] 1 S.C.R. 497

The lower court (the Federal Court of Appeal) held, rather interestingly, that Captain Kelch was a directing mind of Great Lakes Towing Company, at least for the purpose of carrying out Great Lakes' obligations in relation to the towing of the *Widener*. Great Lakes appealed against that decision because it meant they could not limit their liability on the grounds that the damage did not occur with its actual privity or fault. On appeal, however the result was rather different.

Turning his attention to the decision in Canadian Dredge & Dock Iacobucci J. observed:

> "As Estey J's reasons demonstrate, the focus of the inquiry must be whether the impugned individual has been delegated the "governing executive authority" of the company within the scope of his or her authority. I interpret this to mean that one must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the court must consider who has been left with the decision-making power in a relevant sphere of corporate activity".[53]

[53] *Rhône (The) v Peter A.B. Widener (The)* [1993] 1 S.C.R. 497, per Iacobucci J.

Having considered the approach of Denault J. in the lower court, Iacobucci J. held:

> "The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect such policy on an operational basis, whether at head office or across the sea. While Captain Kelch no doubt had certain decision-making authority on navigational matters as an incident of his role as master of the tug *Ohio* and was given important operational duties, he did not have governing authority over the management and operation of Great Lakes' tugs."[54]

In *R v Safety-Kleen Canada Inc.*[55] the Ontario Court of Appeal applied similar reasoning to that of *Rhône (The) v Peter A.B. Widener (The)* in acquitting a corporation of the offence of filing a false shipping manifest involving hazardous waste. The false manifest was provided by a truck driver who was the company's sole representative in this particular, very large, geographical area. Furthermore, the driver was the only person responsible for the collection of waste materials; he was responsible for the company's book-keeping in the area; and he was responsible for customer relations in his area. Perhaps the most interesting feature of

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[54] *Rhône (The) v Peter A.B. Widener (The)* [1993] 1 S.C.R. 497, per Iacobucci J.
[55] (1998) 16 C.R. (5th) 90

this case though was that when the defendant left the company's employment, the corporation ceased its activities in his area.

It was apparent that the truck driver in question had many responsibilities. It was also clear that he had wide discretion in the exercise of these responsibilities. Furthermore, those customers who had dealings with the truck driver clearly viewed him as the corporation. This was not enough, however. Whilst the driver had obviously been delegated sufficient authority to allow him to carry out the many tasks and responsibilities he had to perform, his position was not such as to allow him to formulate corporate policies. As such, following the principles of *Canadian Dredge & Dock* and *Rhône (The)*, he could not be identified with the corporation for he was not part of the "directing mind".

A final, but important, feature of *Canadian Dredge & Dock* is that it also contains a discussion of the defences which might be relied upon by corporate defendants in order to evade criminal liability under Canadian law. As is the case under English law, and as seen in *Re Supply of Ready Mixed Concrete (no. 2)*, it is no defence under Canadian law for a corporation to claim that the prohibited act was carried out in direct contravention of corporate instructions aimed at preventing the forbidden

harm from arising. The only defence available to Canadian corporations is where the individual who carries out the prohibited act does so wholly in fraud of the company without the company gaining any benefits from their actions. In this instance, since the individual would be acting in their own interests and against the best interest of the company, they are precluded from being viewed as constituting the directing mind and will of the corporation. The court put the matter thus:

> "The outer limit of the delegation doctrine is ... reached and exceeded when the directing mind ceases completely to act, in fact or in substance, in the interests of the corporation. The identification theory ceases to operate when the directing mind intentionally defrauds the corporation and when his wrongful actions form the substantial part of the regular activities of his office. In such a case, where his entire energies are directed to the destruction of the undertaking of the corporation, the manager cannot realistically be considered to be the directing mind of the corporation. The same reasoning can be applied to the concept of benefits ... Where the criminal act is totally in fraud of the corporate employer and where the act is intended to and does result in benefit exclusively to the employee-manager, the employee-directing mind, from the outset of the design and execution of the criminal plan, ceases to be the directing mind of the corporation and consequently his acts cannot be attributed to the corporation under the identification doctrine."[56]

[56] _Canadian Dredge & Dock Co. v The Queen_ [1985] 1 S.C.R. 662

The approach adopted by the courts in Canada is very interesting in that it bears a great deal of similarity to the approach of the Privy Council in _Meridian Global Funds_. In fact what we have is a halfway point between the approach in _Meridian_ and _Tesco v Nattrass_. It may be recalled, Lord Hoffman decided that the question of whose knowledge and actions could be attributed to the company was to be determined by the courts looking at the meaning of the words used and examining the policy of the act. It was a question of "construction rather than metaphysics". But the basic underlying principles in _Meridian_ and _Canadian Dredge_ are the same. The courts in both instances held that the most appropriate person to look for when trying to determine the company's directing mind is the person who had direct control over the area of corporate activity in which the criminal act was committed. As has been suggested earlier, this kind of approach can be beneficial to any legal attempts to impose criminal liability on corporations because it takes account of the fact that large corporations may have very diffuse organizational structures. Furthermore, it makes it harder for a corporation to evade liability by delegating potentially criminal activities to low level workers who, ordinarily, would not be sufficiently senior within the corporation to qualify as the directing mind.

The Australian Approach

Like Canada, Australia is a Commonwealth country. As such, the Australian position with regards corporate manslaughter also, unsurprisingly, largely mirrors the approach adopted by the courts in the United Kingdom. In some respects, however, it also shares the State/Federal law approach adopted by the United States.

As is the case in England and Wales, in order for a corporation to be found guilty of manslaughter the prosecution must show that it has the requisite *mens rea*. As is the case in English law it is held that a corporation has no mind of its own, so under Australian law the mental state of an individual has to be attributed to establish the requisite guilty state of mind. This may be done in one of two ways.

The first method is via the agency model, that is to say vicarious liability. Under this model the corporation may be held liable for the actions of its employees (agents). The requisite *mens rea* for corporate manslaughter can only be established via the second method, namely the doctrine of identification.

The identification model utilised by the Australian courts is derived from the case of *Tesco Supermarkets Limited v Nattrass* [1972] AC 153,

which we will recall allowed both the actions and the mental state of a member of the "directing mind and will" to be attributed to the corporation. The requisite state of mind for corporate manslaughter is gross negligence, which may be proven by showing;

> "that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or causing grievous bodily harm, but in circumstances which involved falling short of the standard of care which a reasonable person would have exercised and which involved such a high degree of risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment"[57]

Therefore, under the doctrine of identification, in order for a corporation to be held liable for manslaughter under Australian law, the prosecution must show that one of the members of the "directing mind" committed the negligent act or omission, and possessed the requisite state of mind under the Nydam definition.

There have been a number of prosecutions for corporate manslaughter in Australia to date. The first was the prosecution in the State of Victoria

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[57] Nydam v R [1977] V.R. 430 at 435. Extract taken from *"Corporate Killers: A "Republican" Alternative to Corporate Manslaughter Prosecutions"*, Anthony Coles, Paper submitted for the Research Unit, Faculty of Law, the Australian National University, October 1998

of the construction firm Civil & Civic in 1992. In a result not too dissimilar from that of the prosecution of the ferry operators P & O following the Zeebrugge disaster the charges were dropped. In this instance, however, they were dropped as a result of the corporation agreeing to plead guilty to a series of lesser offences set out in the *Occupational Health and Safety Act, 1985.* As was the case with the P & O trial, it appears to have indicated the dawn of a new approach to the way the law dealt with corporations that kill.

In 1994, another construction company, Denbo Pty Ltd. pleaded guilty in the Victoria Supreme Court to manslaughter charges following the death of one of its employees.[58] The victim was killed when the truck he was driving overturned on a steep track. The cause of the accident was attributed to faulty brakes, a problem which one of the two company directors (Timothy Ian Nadenbousch) was well aware of but allowed the truck to be used nevertheless. As a result the court fined the corporation a record A$120,000. Interestingly, Coles[59] points out that the corporation never paid the fine, it was already A$2,000,000 in debt and

[58] The Queen v Denby Pty Ltd and Timothy Ian Nadenbousch (1994) 6 V.R. 157. Facts taken from *"Corporate Killers: A "Republican" Alternative to Corporate Manslaughter Prosecutions"*, Anthony Coles, Paper submitted for the Research Unit, Faculty of Law, the Australian National University, October 1998.

[59] See note 28. In relation to the winding-up of Denbo Pty Ltd, Coles also notes that a new construction company (Tooronga Constructions) was set up, its address was registered to the same address as that of Denbo and it carried out the same type of work.

was wound up six months before sentencing. This is a problem we will deal with later which has been labelled the "deterrence trap".

The problems of the identification doctrine remain, however. Denbo Pty Ltd, although successfully prosecuted for manslaughter was still just a small enterprise (two directors). Thus, it would still be possible for larger corporations to avoid liability for manslaughter in those situations where a complex and diffuse power structure existed. Attempts have been made, however to try and counteract these problems by enacting legislation that relies on the notion of organisational blameworthiness as the means for establishing corporate guilt, namely, the *Australian Criminal Code Act, 1995 (C'th)*, and the *Crimes (Workplace Deaths & Serious Injuries) Bill* (also referred to as the Bracks Bill 2001[60]).

The *Australian Criminal Code Act, 1995 (C'th)* was the result of proposals for a Model Criminal Code advanced by the Criminal Law Officers Committee of the Standing Committee of Attorney's General in 1992, in a move not too dissimilar to that of the American Law Institute who, we will remember developed the American Model Penal Code in

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[60] *"Corporate Killers: A "Republican" Alternative to Corporate Manslaughter Prosecutions"*, Anthony Coles, Paper submitted for the Research Unit, Faculty of Law, the Australian National University, October 1998.

the 1960's. Under the Model Criminal Code a corporation would be guilty of an offence where:

> a)[The] physical element of the offence [is] committed by a servant, agent, employee or officer of a body corporate acting within the scope of his or her employment or within his or her actual or apparent authority
>
> b) If intention or knowledge is a required fault element of an offence, that fault element exists on the part of a body corporate that expressly, tacitly or impliedly authorized the commission of the offence.
>
> The test in relation to the mental element will be satisfied if:
>
> c) The board of directors or a high managerial agent ... engaged in that conduct or authorised or permitted it; [or]
>
> d) A corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision.[61]

This approach to establishing the mental element of the crime bears some similarity to the notion of a "management failure" enshrined in the

[61] *"Corporate Killers: A "Republican" Alternative to Corporate Manslaughter Prosecutions"*, Anthony Coles, Paper submitted for the Research Unit, Faculty of Law, the Australian National University, October 1998

Law Commissions proposals for reform discussed earlier. The belief was that the notion of organisational blameworthiness would be somewhat wider than that of the doctrine of identification, which should make it easier to secure a conviction against a corporate offender.

The concept of a "corporate state of mind" was followed in the subsequent *Australian Criminal Code Act, 1995 (C'th)*. Section 12.1 (1) of the Criminal Code makes it clear that the Code is applicable to corporations as well as individuals. Furthermore, section 12.1 (2) states that corporations can even be prosecuted for offences where the only available punishment is imprisonment.[62] Most importantly, however, section 12.3 deals with attributing the mental element of offence to a corporate body.

Section 12.3(1) states that if the offence requires proof of a mental element, such as intent or recklessness for example, then:

> "that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence."[63]

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[62] In these circumstances the punishment would instead be replaced by a fine, as permitted by the provisions of section 48 of the *Crimes Act, 1914*.
[63] *Australian Criminal Code Act, 1995 (C'th)*, section 12.3 (1)

This may be established, under the provisions of section 12.3 (2) by showing that the act was either committed or authorised (expressly, tacitly or impliedly) or permitted by a member of the board of directors,[64] a high managerial agent,[65] or , most intriguingly, by proving:

> "that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
> proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision."[66]

As with the "management fault" requirement set out in the Law Commission's proposed new offence of "Corporate Killing", this approach should be commended. By abandoning the individualistic bias that is rife in the doctrine of identification we can begin looking for fault that is truly "corporate" in its nature. Whilst the principles set out in _Nattrass_ practically encourage "sloppy" working practices, corporations would instead be punished under the provisions of the Criminal Code for having a criminal corporate culture. Since defendant corporations could evade liability by implementing a corporate structure that encouraged awareness/promotion of safety issues, then the provisions of the

[64] *Australian Criminal Code Act, 1995 (C'th)*, section 12.3 (2)(a)
[65] *Australian Criminal Code Act, 1995 (C'th)*, section 12.3 (2)(b)
[66] *Australian Criminal Code Act, 1995 (C'th)*, section 12.3 (2)(c) – (d)

Criminal Code could be used to trigger greater internal accountability and reforms. As will be seen in the context of Braithwaite's notion of enforced self-regulation later in this thesis, promoting the use of the corporation's "internal justice systems" could provide us the best means of tackling corporate crime in the future.

The *Australian Criminal Code Act, 1995 (C'th)* is, however, designed mainly as a model code for the other States to follow when devising legislation to deal with corporate crime. One such attempt was the *Crimes (Workplace Deaths & Serious Injuries) Bill* introduced by the Bracks Government into the Victorian Parliament.[67] Under the proposed legislation a corporation could be prosecuted for causing death or serious injury, and was based on the test of gross negligence (not too dissimilar to that advanced in *Adomako*). A corporation could be shown to have been grossly negligent where it had implemented inadequate operating systems to ensure the supervision of employee's activities, to ensure compliance with the relevant safety provisions, to ensure adequate communication of information to the relevant officers within the corporation, and to ensure that dangerous situations were dealt with. In order to establish this the court would be required to look at the conduct

[67] See *"Legislative Attempts to Imprison those prosecuted for Criminal Manslaughter in the Workplace"*, Rick Sarre, University of South Australia, http://www.murdoch.edu.au/elaw/issues/v9n3/sarre93_text.html

required to look at the conduct of the corporation as a whole rather than focusing on that of a few individuals.

In the event of a corporation being found guilty of manslaughter, the maximum fine they would face was A$5 million, or A$2 million in the case of serious injury. This may be in addition to an adverse publicity order of the kind discussed in the section on punishment later in the thesis. Interestingly, the Bill also allowed for the prosecution of individual senior corporate officers (even if the corporation is acquitted) where it can be shown that they were aware of the risk of death or serious injury but they did nothing to prevent it. Unfortunately, however, the experience of the State of Victoria somewhat mirrors that of the United Kingdom. The Bill was rejected in the Upper House of Parliament in 2002 following a great deal of pressure by industrial lobbyists.

Chapter 9: The Problem of Effectively Punishing Corporations for Breaches of the Law.

It is clear that there is a desire to hold corporations accountable for the unacceptable consequences of their actions. The major problem, however, is that the law lacks "bite" when it comes to punishing corporations. There have been some good examples in the media recently of regulatory authorities taking drastic measures to punish corporations for failure to meet certain standards. In June 2003, for example, the Strategic Rail Authority stripped Connex South Eastern of its franchise following its constant failure to meet timetable targets and financial irregularities (it had received over £452 million in subsidies since 1996, but still results had not improved). As a result the Strategic Rail Authority ordered the termination of the company's franchise within six months.[1] Such a bold form of punishment is important. There are many different ways that a corporation can be penalised for its wrongdoings, and it is to this matter that we now turn our attention.

This chapter is dedicated to the problems that face the criminal justice system when it comes to punishing a corporation effectively. It is not intended to provide anything more than a general overview of the

[1] See *"Connex Sacked to 'Stop Gravy Train'"*, David Millward, The Daily Telegraph, Saturday, June 28, 2003, page 1

opinions of a few academic commentators in this field. Nor is it intended to formulate some all-encompassing 'super-penalty', but it is clearly an important matter for consideration nevertheless. Even if develop some outstanding new means for attributing criminal liability to corporations could be developed, all the hard work would be undone if the corporation could only be punished in pitiful terms. This is the situation that is presented under the present punishment regime. This chapter considers the options available to the courts under English law for punishing corporations. Furthermore alternative approaches to this issue will be examined as recommended by a variety of academic commentators, in particular Coffee, Fisse and Braithwaite. The first of these is the fine.

Fines

The mainstay of the British justice for punishing corporations is the fine. It is a central premise of this chapter that the fine, as the sole means of punishing a corporation is thoroughly inadequate and particularly unimaginative. Hence the problems created by relying on this form of punishment will be analysed and then some suggestions for alternative approaches to the problem will be considered.

All criminal offences are categorized as either summary offences, offences triable on indictment or either way offences. The level of punishment that can be issued depends on the categorization of the offence. Summary offences are dealt with by the magistrate's court; as such the maximum punishment available for a corporation was £5,000 or £20,000 for breaches of sections 2-6 of the *Health and Safety at Work etc., Act 1974*. Offences triable on indictment are heard in the crown court, there is no limit on the level of financial penalty that can be issued. Either way offences can be heard by either the magistrates court or the crown court.

The position in relation to sentencing for health and safety offences has changed somewhat following the case of R v F. Howe and Son (Engineers) Ltd.[2] In this case the Court of Appeal recognized that the level of fines set by the courts in the case of breaches of health and safety law were far to low. What the Court of Appeal then did was to issue guidelines for setting the level of fines for breaches of the *Health and Safety at Work Act 1974*. Their Lordships provided us with a list of aggravating and mitigating factors as well as some other relevant matters, all of which need to be considered and taken into account by the

[2] [1999] 2 All ER 249. See *"Sentencing for Health and Safety Offences"*, (2000) 164 J.P. 1011, F.B. Wright and V. Howes.

sentencing judge. Aggravating factors would include where the breach resulted in a death, or where safety standards were deliberately sacrificed to save money. Mitigating factors would include having a good safety record prior to the commission of the offence or admitting responsibility for the breach. Finally, other relevant factors would include the seriousness of the breach, and the resources available to the defendant to pay a large fine.

Having borne all these considerations in mind, when setting the level of the fine, the Court of Appeal declared:

> "the fine needs to be large enough to bring that message home, where the defendant is a company, not only to those who manage it but also its shareholders." [3]

R v F. Howe has been followed in subsequent cases. In R v Brintons Limited[4], for example, the defendant corporation was fined £100,000 after 90 of its employees were exposed to asbestos. The importance of this case is said to be that "[this] was one of the first cases where there was some suggestion of a formula with the fine of £100,000 said to

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[3] *"Sentencing for Health and Safety Offences"*, (2000) 164 J.P. 1011, F.B. Wright and V. Howes. Page 1012.

[4] (Court of Appeal; June 22) (Unreported)

represent the profit on £1 million of company sales."[5] The importance of such a consideration will be seen later in this chapter.

In *R v Supremeplan Ltd.*[6] the company was fined £25,000 and was also ordered to pay £3,000 in compensation by the magistrate's court. The company appealed against this sentence. The interest of this case is the way in which the Court of Appeal clearly took into account the list of aggravating and mitigating factors set out in *Howe*. The Court of Appeal found numerous aggravating factors such as failing to heed previous warnings, that they had not taken steps to remedy the problem, and that this was not an isolated incident. However, they were also very aware of the fact that the corporation simply could not afford to pay the fine, it had only made modest profits and its directors only had limited resources. The Court of Appeal took the approach that the priority should be to ensure that the victim was properly compensated for their loss. Hence they reduced the fine to £2,500, but increased the victim's compensation to £7,500. They also declared that the compensation should be paid first, and that everything should be paid for within a strict time frame set out by the courts.

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[5] *"Sentencing for Health and Safety Offences"*, (2000) 164 J.P. 1011, F.B. Wright and V. Howes, page 1012

[6] (Court of Appeal, June 20, 2000) (unreported)

The most enduring legacy of the decision in _R v F. Howe and Son (Engineers) Ltd_, however, is clearly the record fine of £1.5 million imposed on Great Western Trains following the death of seven people in the Southall train crash in September 1997. This is still only a mere fraction of the company's profits that year which stood at £236 million for the first six months. This means that, despite the Court of Appeal's declaration that fines should be set at a high enough level to send a message to the corporation that their behaviour will not be tolerated, the fines that are currently being issued, particularly to the larger corporations, are still too small. The obvious solution might be therefore to recommend that the courts implement even larger fines, but it is here that we begin to encounter problems with the fine as a method of punishment.

It is a widely held view in that corporations can be viewed as rational actors who make decisions based on a simple cost-benefit analysis. The argument runs that in order to sufficiently deter a corporation from engaging in criminal activity we would need to set the fine for breaching the relevant law at a level higher than any expected gain to the corporation from the forbidden course of conduct. Therefore, if we were to subscribe to this view, logic dictates that if the expected gain from breaking the law is £1,000 then the punishment would have to be set at,

for example, £2,000. That is to say that we must make any temptation to breach the law an "uneconomical" proposition.

Unfortunately, this formula is deemed overly simplistic as the amount of profit to be made is generally not the only consideration a corporation will take into account when deciding whether or not to comply. In any formula we might devise to try and determine the optimal level of fine to deter a corporation from criminal activity we would also have to take into account the likelihood of detection and conviction. Coffee advances the following formula:

> "[If] the expected gain were $1 million and the risk of apprehension were 25%, the penalty would have to be raised to $4 million in order to make the expected punishment cost equal the expected gain."[7]

Therefore, if the likelihood of apprehension was merely 1 in 10 (10%), then the fine would need to be set at a level ten times greater than that of the expected gain so as to increase the risk in order to ensure that a corporation was deterred. Obviously it would be difficult to make such a formulation truly workable because it assumes that both the corporation

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[7] *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386, John C. Coffee Jr., page 389.

and the courts are capable of accurately establishing such variables. Furthermore, as the level of the fine increases accordingly we become increasingly more likely to fall into what has become labelled the "deterrence trap". Coffee states:

> "[The] crux of the dilemma arises from the fact that the maximum meaningful fine that can be levied against any corporate offender is necessarily bounded by its wealth."[8]

Therefore, as Coffee points out later, if the defendant simply does not have the resources to pay the fine he "is no more threatened by a $5 million fine than by a $500,000 fine".[9] In the case of the individual the deterrence trap is less of a problem because we always have the alternative sanction of imprisonment as a back up threat. Since corporations have no physical form, however, this simply is not a viable option in the case of corporate offenders. As a result, the corporation will not be deterred as they have nothing to lose by breaking the law. Yet this is but one boundary on the level of fine which can realistically be imposed on a corporation.

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[8] *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386, John C. Coffee Jr., page 390

[9] *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386, John C. Coffee Jr., page 390.

We are also faced with the problem of displacement. Justice demands that the burden of the punishment should fall on the offender, a convicted criminal cannot ask someone else to serve their prison term for them, for example. But this simply is not the case with corporate offenders. In the case of the corporation who is fined for their crimes we witness a spill-over effect where the burden of the punishment actually falls on innocent outsiders, namely the shareholders who will lose some of their securities, but they are not the sole victims.

Larger fines could mean that we are setting the punishment at a level that could threaten the solvency of the defendant corporation. In order to ensure its survival in a competitive world it may be forced to take cost cutting measures. This might mean closing plants or having to make thousands of employees redundant. In this instance the burden of punishment would be falling on morally unblameworthy people who could in no way be construed as the "directing mind and will" of the corporation. Indeed, as Gobert highlights, following *Tesco Supermarkets Limited v Nattrass*[10] a corporation can only be held liable for the criminal actions of a member of senior management. Yet it is the very same corporate executives whose crimes are attributed to the

[10] [1971] 2 All ER 127

corporation under the doctrine of identification that are less likely to be made redundant if their corporation has to make cost cutting measures.[11] Furthermore, in order to recuperate its losses, the burden of punishment might even be passed on to the consumer via increased prices. Since it is not really the corporation who suffers, it is unsurprising that fines are sometime viewed as a licence to break the law.

The effect of the deterrence trap and the problem of over-spill have become all too evident in what has been labelled by Coffee as the "nullification problem. Put simply, judges and juries are all too aware of the potential consequences of any punishment imposed on a corporation. As such, it is hardly surprising that they have been reluctant to impose heavy fines on corporations for their actions. Furthermore, corporations have also been able to use the over-spill argument as a mitigating factor at the sentencing stage. A corporation facing a heavy fine may be able to paint a vivid picture of the potential consequences of such a punishment which, in turn, puts a great deal of pressure on the judge to show some leniency. Unfortunately, affording convicted corporations a lenient sentence serves simply to reinforce the widely held view that corporate

[11] *"Controlling Corporate Criminality: Penal Sanctions and Beyond"*, James Gobert [1998] 2 Web Journal of Current Legal Issues, http://webjcli.ncl.ac.uk/1998/issue2/gobert2.html

crime is not deserving of the full force of the criminal law and is, therefore, not "real crime".

All these factors combine to prevent the fine being used by itself as an effective form of punishment. Yet fines are not the only option available, alternative approaches to this problem have been suggested by a number of academic commentators and it is to these suggestions that we should now turn our attention.

Equity Fines

As we have seen, a major problem with the fine is its potential spill-over effect. A corporation may have been benefiting from small illegal gains over a period of many years which have probably been reinvested in the company. Yet a fine is payable in a lump sum and this has a huge and immediate impact on a corporation which puts its solvency in great peril. One potential solution to this problem is the equity fine.

In devising the equity fine, Coffee took the approach that the most effective means of deterring individual managers, and thus the corporation, from partaking in criminal activities, would be to tailor the punishment so that it played on the worst fears of management. These were identified as the threat of a hostile takeover, anything which

affected the manager's self-interests (such as a depletion in the value of the company's stock), anything which threatens the manager's future career prospects, and a loss of autonomy. Coffee felt that any penalty that was devised specifically to play on these fears would be particularly effective in increasing deterrence. This is why he believed the equity fine would be so effective. But what does it entail? Coffee states:

> "The convicted corporation should be required to authorize and issue such number of shares to the states' crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity. The fund should then be able to liquidate the securities in whatever manner maximizes its return."[12]

Such a form of punishment would have several identifiable benefits. In those situations where a large cash fine is necessary, the equity fine would prove useful because the impact of the fine is not immediate since what is targeted is the company's future market value. Furthermore "the market valuation of the typical corporation vastly exceeds the cash resources available to it."[13] Since it is from these immediate resources

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[12] *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386, John C. Coffee Jr., page 413
[13] *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386, John C. Coffee Jr., page 413

that any cash fines would ordinarily be paid, this means that the courts could more readily impose a larger fine on the corporation without risking making the corporation bankrupt. This means that we have avoided the problems created by the deterrence trap and therefore also reduced the effects of the nullification problem identified earlier.

There are, however, some claims that the problem of over-spill has not been entirely remedied by the equity fine. Indeed, the burden of the fine falls squarely on the shoulders of the shareholder which it might be claimed is unfair. Miester, however, raises a pertinent objection to this argument. He suggests that since it is the shareholders who ultimately benefit from the corporation's criminal activity in the form of increased profits and therefore greater dividend payouts, "the court should not feel sorry for their having to suffer the loss of some of their unjust enrichment."[14] Shareholders can, after all, only suffer a limited financial burden. Under English company law a shareholder's liability is limited to the value of his holding.

There is also support for Coffee's theory that punishments, which play on management's fears, will increase the deterrent effect provided by the

[14] *"Criminal Liability for Corporations that Kill"*, (1990) 64 Tulane Law Review 919. Donald J. Miester, Jr., page 938

equity fine. Firstly, since a large block of shares will be issued, this will inevitably dilute the value of management's shareholdings somewhat, thereby "hitting them where it hurts", financially. If their activities would have repercussions on their personal finances human nature dictates that it is increasingly likely that management will reconsider before engaging in criminal conduct. This is in direct contrast to the situation under a regular fine where the individual manager is so far removed from the consequences of their actions and the impact of punishment that they give their conduct little thought. Secondly, if a large number of shares is issued to a trustee in charge of the victim's compensation fund who is free to dispose of them in the manner which maximizes the return for the fund, it increases the prospect of a takeover bid. Such a large block of shares would provide the ideal purchase for any corporation to initiate a campaign for control. Thus:

> "to the extent that the equity fine raises the probability of a takeover, we create a sanction – which is virtually costless to society – by which to dissuade corporate managers from criminal behaviour ... [and] since this threatens, to a degree, the interests of senior management then this should provide a greater incentive for increased internal control than a simple cash fine."[15]

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[15] *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386, John C. Coffee Jr., page 418

Another way in which the equity fine might trigger increased internal accountability is via the corporation's shareholders. As is perceived to be the case with management, individual shareholders would be keen to avoid sanctions which might lead to a reduction in the value of their shares. The result of this is put by Miester thus:

> "Equity fines would force shareholders to take a more active interest in their corporations and vote against perceived risk-taking management personnel."[16]

Therefore, we are presented with a tool for punishing corporations which is far more refined than the simple fine as there is a distinct possibility that it may trigger some kind of internal reform, however, we should not forget that it is still, after all just a fine. As such it is still susceptible to a cost-benefit analysis and may still be perceived as a mere "cost of doing business" rather than actual punishment.

Enforced Self-Regulation

One factor that should have become evident from issues such as the over-spill problem is that it has proven difficult to deter corporations by

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[16] *"Criminal Liability for Corporations that Kill"*, (1990) 64 Tulane Law Review 919. Donald J. Miester, Jr., page 938

punishing them with a fine. One alternative approach might be to shift the focus of the punishment from the corporation to the individual. It is, after all, the individuals who constitute the corporation who make the decision to commit the crime.

It has been suggested that some managers might be tempted to utilise the corporation as a means for furthering their own interests. This is without forgetting, of course, that some corporations may be structured in such a way as to practically encourage criminal activity. Coffee states:

> "Increasingly, a central corporate headquarters monitors operationally autonomous divisions, but its review is focused on budgetary matters and strategic planning."[17]

Corporate headquarters is largely remote from the "sharp end" of the corporate operations. To speak in anthropomorphic terms, as is so common in discussions of corporate liability, 'central office' does not have "to get its hands dirty". Yet 'central office' can still exert pressure and impose accountability on divisional branches via a system of financial targets backed up by a system of rewards and incentives. The problem arises because 'central office' will demand possibly unrealistic

[17] *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386, John C. Coffee Jr., page 397.

results from divisional branches, but they do not want to know, or care, about how they are achieved.

This vast amount of pressure put on middle/lower level management alongside a fair degree of flexibility in reaching these targets is what creates the problems.

> "The middle manager is acutely aware that he can easily be replaced; he knows that if he cannot achieve a quick fix, another manager is waiting in the wings, eager to assume operational control over a division. The results of such a structure are predictable: when pressure is intensified, illegal or irresponsible means become attractive to a desperate middle manager who has no recourse against a stern but myopic notion of accountability that looks only to the bottom line of the income statement."[18]

Should we choose to try and prevent corporate crime by focusing our deterrent efforts at this level, we are faced, however, with a further problem. The simple cost-benefit analysis that we can apply to corporations as a means of setting the right level for a fine is overly simplistic when applied to individual managers. This is because the individual might be motivated to break the law for reasons other than

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[18] *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386, John C. Coffee Jr., page 398

profit. For example, the individual will probably gain no financial benefit from embarking on a course of criminal conduct (at least not directly), however, increased productivity and profitability in their division as a result of "cutting corners" on safety may lead to the indirect benefit of bonuses or promotion.

One regard in which the corporation and the individual may adopt a similar approaches would be in considering the likelihood of apprehension and conviction. Since it is unlikely that middle management will be held directly accountable for the criminal activities of a corporation, particularly under the identification principle, the manager is presented with a dilemma:

> "which risk is greater – the criminal conviction of the company or his own dismissal for failure to meet targets set by an unsympathetically demanding senior management.[19]"

Clearly in this situation the cost of losing his job is a more imposing threat than the remote possibility of falling foul of the criminal law, so the individual will most likely choose to break the law. It has been suggested, therefore, that the threat of private sanctions imposed on the

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[19] *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386, John C. Coffee Jr., page 399

individual might be an effective method of deterring the individual from a criminal course of conduct. One such proponent of this view is Braithwaite who suggests that we could harness the potential benefits of this private justice system by imposing enforced self-regulation.

Braithwaite states:

> "Self-regulation, whether or not fortified with the refinements proposed by this article, is an attractive alternative to direct governmental regulation because the state simply cannot afford to do an adequate job on its own".[20]

Several advantages of a strategy of self-regulation are advanced. The first is that it would increase the coverage of regulatory enforcement activities. Inspectors are inevitably confined in their activities by both time and financial considerations. This means that they simply will not be able to inspect everywhere and will probably only have their attention drawn to a company's unsafe working practices by a serious accident or death in the work place. Furthermore, inspections carried out by corporate investigators have the potential to be more thorough (because

[20] *"Enforced Self-Regulation: A New Strategy for Corporate Crime Control"*, page 1467

they can spend more time on site than an agency inspector who may have to visit several sites in a week) and more frequent.

Another major advantage of having corporate inspectors is that they will probably be more effective in detecting potential problem areas than their government counterparts. This is because they will probably possess a greater technical expertise and understand the company's activities better. They will also be more likely to gain the information they require as they would be accepted more readily as a "part of the family" by their corporate colleagues.

Whilst a corporation may be more capable of detecting problems within the business environment, there are weaknesses in this theory. Braithwaite highlights the fact that a system of *voluntary* self-regulation might well produce results in those instances where the harm is costing the corporation money or can be remedied by measures which cost little or no money. This can be remedied, Braithwaite suggests, by enacting a system of *enforced* self-regulation. Under such a system the corporate compliance manager would be expected to report those instances where a corporation refuses to implement the compliance group's recommendation. Failure to do so would result in criminal action against them. This would allow a more efficient and effective use of

government regulatory agency's money as the agency would only pursue those companies who consistently fail to follow its compliance group's recommendations. How would a model of enforced self-regulation work?

The first step would be to require corporations to "write a set of rules tailored to the unique set of contingencies facing the firm".[21] This list would be submitted to the regulatory agency that would then either accept it, or require certain revisions to be made, and they would not accept the list unless it complied with "legislatively enacted minimum standards".[22] The corporation would be responsible for bearing the burden of the duties and cost (which is only fair since it is ultimately the corporation who benefits from any illegal conduct) of enforcement and would have to set up an independent inspectorial group. The governmental inspectors would have the task of monitoring both the independence of the group and its efficiency and toughness.[23] In the event of a breach of the rules written by the corporation, there would be recourse to legal punishment.

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[21] *"Enforced Self-Regulation: A New Strategy for Corporate Crime Control"*, page 1470

[22] *"Enforced Self-Regulation: A New Strategy for Corporate Crime Control"*, page 1471

[23] "Naturally, old-style direct government monitoring would still be necessary for firms too small to afford their own compliance group", *"Enforced Self-Regulation: A New Strategy for Corporate Crime Control"*, page 1471

Braithwaite proceeds later on in his article to highlight a number of benefits inherent in a system of self-regulation. The current regulatory system is too rigid to properly account for variety of "business types and sizes"[24] that exist in the modern corporate climate. The approaches adopted so far have either tried to be overly specific, which has proved to be to restricting on corporate activities, or overly inclusive, which cannot be adapted to cover economic and technological changes for fear of restricting the all inclusive scope of the regulation. Obviously there is no plausible way that the law can keep up with the speed at which businesses and business practices/activities evolve and develop. A system which is based on particularistic rules rather than general ones would be easier to alter and would have less profound ramifications. This would counter the danger of, whenever "all-encompassing" rules are adopted, that some event occurs which was outside the contemplation of the legislators at the time that the law cannot cover. Rules designed by the corporation, furthermore, can be altered without the worry of precedent leading to an opening of the "floodgates" to claims from other corporations.

[24] *"Enforced Self-Regulation: A New Strategy for Corporate Crime Control"*, page 1474

Further advantages of a system of enforced self-regulation include the fact that any rules devised by a corporation will probably be more comprehensive in their coverage and probably cover serious forms of dangerous corporate behaviour that government enacted legislation simply does not. In addition corporations are notoriously antagonized by what they view as "governmental meddling" which can sometimes lead to corporations almost daring governmental inspectors to discover their wrongdoings. It is suggested by Braithwaite that there will be a greater degree of compliance to self-generated rules, he states "when the company writes the laws it is more difficult for it to rationalize illegality by reference to the law's being an ass". A further corollary of this is identified as being that it will clarify the position of the corporation who may find itself faced with two conflicting sets of rules, the existing governmental rules or rules that have been set out by 'central office'.

The ultimate benefit of enforced corporate self-regulation, lies in the fact that an effective system of compliance monitoring should catch more offenders, identifies more problems and therefore (in theory) should lead to a reduction in the number of corporate offences. It is also the case that it would create a means of allowing the individual to be brought to justice, it should be easier for the corporation to identify those members who are responsible for the prohibited action and as such the corporation

should deal with them accordingly. The corporation is encouraged to actively deal with individual offenders, because a perceived failure to take necessary steps will result in greater attention from government regulatory agencies.

Such an approach is, however, far from unproblematic. The major danger inherent in such a system is clearly the risk of "scapegoating", that is to say, it does not matter who is punished as long as somebody is punished. As has already been seen in an earlier quote from Coffee, middle management is generally viewed as a highly expendable (and easily replaceable) commodity. Consequently this presents the possibility of being left with a number of highly unjust outcomes.

Another major problem is identified by Bratihwaite who states at page 1495:

> "Companies have a long history of deviousness at finding ways of evading their public responsibilities. By giving them control over the rule-writing process, one might give full reign to their ingenuity at pulling the wool over the eyes of governments."[25]

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[25] *"Enforced Self-Regulation: A New Strategy for Corporate Crime Control"*, page 1475

Admittedly this is also the case in relation to the more general rules devised by the government. Company lawyers, after all, do make their living by finding ways for their corporate employers to bend and exploit the law to their advantage. It may be possible for corporations to "manage to sneak provisions into their rules without the regulatory agency realizing the full implications of the provisions."[26] Furthermore, it will be necessary for the regulatory authorities to pay particular attention to ensuring that the rules written by the corporation comply with certain overarching governmental standards. Indeed, it may be necessary for the agencies to require the inclusion of some absolute minimum standards to be met by corporations to counter this.

The final, and undoubtedly major problem, that Braithwaite identifies with the imposition of enforced self-regulation as a punishment is that it would be impossible to absolutely guarantee the independence of the Internal Compliance Group, which would compromise the system of enforced self-regulation. Possible dangers include the group deciding to curtail its powers in order to ensure better corporate productivity out of loyalty to the corporation. A further problem might be created if the corporation's middle management decided not to act upon the

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[26] *"Enforced Self-Regulation: A New Strategy for Corporate Crime Control"*, page 1476

Compliance Group's recommendations on the grounds that they perceived them to be against the long-term best interests of the corporation. Such problems might be counteracted by encouraging corporations to reward the compliance group for effective monitoring in the former instance, or ensuring that the compliance group has to deal directly with senior management. Corporate management may even impose indirect influence on the Compliance Group by imposing strict budgetary controls. Ultimately, however, the best way to ensure the independence of the Compliance Group (although not an immediate solution) is to punish corporations for ineffective reporting of corporate violations. Braithwaite states:

> "Regulatory agencies would continually audit to determine whether the group was discovering and reporting violations as it should. Once an offence has been discovered, the agency would subpoena the relevant compliance unit reports and uncover any failure of the compliance director to report an unrectified violation. Even a small number of prosecutions for this offence would probably be sufficient to encourage compliance directors to put the company's head on the chopping block – instead of their own."[27]

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[27] *"Enforced Self-Regulation: A New Strategy for Corporate Crime Control"*, page 1499

Despite these problems, however, it is suggested that the path of internal auditing is the best route to pursue. The benefits of such an approach far outweigh the disadvantages; however, it is a fallacy to suggest that it could work in isolation.

Corporate Probation

> "The term "probation" ... may be a misnomer. In individual criminal law, probation is tied to the goals of rehabilitation and (to some degree) incapacitation. In the corporate context, it would be a means of deterrence and retribution. In this context, probation may be thought of as a punitive injunction."[28]

There are two main forms that probation can take, intrusive and non-intrusive. Non-intrusive probation comes in the guise of community service orders, which we will deal with later. In this section, however, we are highlighting the belief that it may be possible to regulate corporate behaviour by forcing them to accept "strangers" into their midst to monitor their activities.

This is a different form of punishment from the fine, or "market based" sanction[29], which is based entirely on the simplistic cost-benefit analysis.

[28] *"Criminal Liability for Corporations that Kill"*, (1990) 64 Tulane Law Review 919. Donald J. Miester, Jr., page 940

[29] See Slapper and Toombs page 211

Corporate probation, on the other hand is "founded upon the assumption that corporations are couples, differentiated entities, simultaneously in pursuit of different and often conflicting goals".[30] This, so called "politics based", sanction takes the view that corporate crime occurs as emanating from the very structural characteristics of the organization. As such, the view is that the best way of preventing or reducing corporate crime is to alter the corporation's organizational structure in such a way "as to ensure internal accountability".[31]

Corporate probation is not a new idea; it has been available as a sanction in the United States since 1987 and was first used in the case of *U.S. v Atlantic Richfield Co.*[32]. As punishment the defendant corporation was put on probation and required to implement an Oil Spill Response Programme. Under the provisions of the *U.S. Sentencing Reform Act, 1984* and subsequent guidelines issued by the Sentencing Commission in May 1991, however, a probation sanction has become mandatory in some instances. Situations that require a mandatory probation sentence include situations where either the organization or high-level personnel participating in the offence have been convicted of a similar offence in the past five years.

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[30] See Slapper and Toombs page 211
[31] Lofqvuist, 1993 page165, see Slapper and Toombs page 211
[32] (465F. 2d 58). Cited in Slapper and Toombs

In devising a probationary scheme, the courts should seek to consult with the regulatory agencies and get them to act as probation officers.

There are, of course, both advantages and disadvantages to a system of probation sanctions. Obviously the loss of autonomy that will be experienced by any corporation subject to such an order is clearly going to be a major issue. On the other hand, the threat of such a loss may have considerable deterrent value. This is a view espoused by Coffee who believes:

> "... corporations will resist the legislative authorization of such a sanction. This suggests, however, that there are deterrent as well as preventative benefits to be gained from such a plan. Ultimately, the relatively modest loss of managerial autonomy involved in such a temporary period of probation might prove as effective a deterrent as the financial penalties today imposed on corporations."[33]

A second advantage of corporate probation is that it also allows the judiciary a degree of flexibility and creativity in devising the form that the corporation's probation should take. One form, suggested by Coffee

[33] *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386, John C. Coffee Jr.

would require the court to appoint a "probation officer" in the form of a management consultancy firm or even an academic to carry out an internal investigation to help determine why the corporation embarked on a course of criminal conduct. The investigator would then write a follow up report containing recommendations for improvement that the offending corporation would have to implement. Alternatively, in a bid to improve internal communications, the court could require the creation of a permanent position within the firm to allow for the monitoring of potentially dangerous activities.[34] In this regard, however, it is respectfully suggested that Braithwaite's sanction of enforced self-regulation is better. As we have seen earlier in this chapter, Braithwaite felt that a report undertaken by the corporation itself would be more likely to establish the crucial facts than any inquiries made by "outsiders". This was partly because the loyalty of employees to their corporate employer would make them refuse to collaborate with externally appointed officers.

It was also suggested that an investigator appointed by the corporation would be more likely to have the requisite technical knowledge to understand the potentially complex nature of the target corporation and

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[34] *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386, John C. Coffee Jr., page 451

its undertakings. This brings us to a further problem, namely that it may be difficult for the courts to actually monitor a corporation's compliance with a probation order. Monitoring a corporation's activities is undoubtedly outside of the judiciary's sphere of competence. In this scenario it may be desirable to try and utilise the regulatory agencies as probation officers, but this presents further problems. As we have already seen, the aims of the criminal law, and the aims of the regulatory bodies are very different. Although progress has been made with regards the investigation of workplace accidents that might also warrant a manslaughter charge being brought against the employer, the potential for complications is still there. Furthermore, it is unlikely that the regulatory agencies will be willing to accept yet another drain on their already incredibly stretched financial and human resources.

Community Service Orders

A less intrusive form of corporate probation, as we have already seen, is the corporate community service order. A major proponent of such a sanction is Gobert who states:

> "By providing a constructive benefit to the community, the criminal repays society for the harm which he or she has caused. In the case of convicted companies, a community service order

likewise would provide the company the opportunity to make amends for its crimes."[35]

The community service order provides us with an interesting alternative to the fine, as its aims are somewhat different. The potential deterrent value of the community service order could be described as minimum at best. Rather, it embodies the dual aims of retribution and restitution, which is to say that the corporation is not simply "made to pay" for its crimes, but it is also given the opportunity to make amends for its wrongdoings by trying to return things to the way they were before the offence occurred.

The potential of the community service order is undoubtedly huge. As with the corporate probation sanction, there remains an inherent degree of flexibility in the kind of sentence that the court could impose. Gobert suggests, for example, that the community service order could be tailored in such a way as to take into account the corporation's area of expertise in order to help out some worthy community project. Such skills mean that the offending corporation could be involved in more ambitious projects than may be the case with the individual offender. Even if the corporation did not posses the requisite skills to help out in

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[35] See generally *"Controlling Corporate Criminality: Penal Sanctions and Beyond"*, [1998] 2 Web Journal of Current Legal Issues, James Gobert

local schemes, they might instead be required to pay for the services of those who did posses such skills. Obviously the corporation would be required to provide the necessary human resources alongside such a payment because otherwise they will have simply been made to pay a fine by another name. Gobert also suggests that it should be senior management who should be involved in such schemes as it is usually they who will be responsible for the crime occurring in the first place.

The community service order is not, however, without disadvantages. The main danger is that a corporation involved in such a scheme may not suffer the necessary denunciation and stigma that is a normal requisite of most forms of punishment. Instead, there is a real danger that the corporation may be portrayed in a positive light for its actions. Gobert states, for example:

> "If a library or hospital were to be named after the company that financed it (...not that uncommon) the offender would benefit from the association of the building with the company ... It is ironic indeed when criminal punishment serves to enhance an offender's public image."[36]

[36] *"Controlling Corporate Criminality: Penal Sanctions and Beyond"*, [1998] 2 Web Journal of Current Legal Issues, James Gobert

Indeed Gobert points the case of United States v Danilow Pastry Corp.[37] which might be viewed as an example of such a problem. In that case a New York court required convicted bakeries to supply fresh baked products to needy organizations for free. The potential for this being used by an unscrupulous corporation as a positive public relations exercise is immense. Great care would have to be taken, therefore, to ensure that corporations do not use such orders to their advantage.

Secondly, Gobert identifies the potential for this sanction to be "hijacked" by both the Government and courts as a means to further their own ends. In the case of the courts, for example, it is not implausible to think of a judge utilising such a sanction to benefit a particular "pet" project. On the other hand, the Government could potentially use the community service order "as a means for co-opting private industry into undertaking projects which it is unwilling to pay for itself."

Adverse Publicity

The creation of this form of sanction is largely attributed to Fisse[38] and works on a fairly simple premise. Above all else corporations treasure their reputation. It is in the fear of a blemished reputation that the

[37] (1983) 563F. Supp 1159 (SDNY)
[38] *"The Use of Publicity as a Criminal Sanction Against Business Corporations"*, Brent Fisse, (1971) 8 Melbourne University Law Review, 107

adverse publicity sanction has its greatest deterrent value. As Meister highlights:

> "Firms carefully cultivate a manicured public image that they strive to maintain for their creditors, stockholders, consumers and employees, they do not want this image sullied. Corporations are willing to spend vast amounts to avoid even miniscule criminal penalties. Ford, for example, spent over one million dollars to defend the Pinto suit, although the maximum possible fine was $30,000"[39]

The suggestion has, therefore, been made that it should be possible to force corporations to publicise their conviction in their company prospectus, as well as paying for the government to publicise their conviction in the national media. There are previous examples of such a sanction being utilised by the legislature and the judiciary in the Bread Acts of the nineteenth century that allowed magistrates to order the publication of the names of those who were found guilty of selling adulterated bread.[40] Furthermore, section 124 of the *Fair Trading Act, 1973* allows the Director General of Fair Trading to publish information and advice to protect consumers, which might include details of criminal

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[39] *"Criminal Liability for Corporations that Kill"*, (1990) 64 Tulane Law Review 919. Donald J. Miester, Jr. page 943.

[40] *"Controlling Corporate Criminality: Penal Sanctions and Beyond"*, [1998] 2 Web Journal of Current Legal Issues, James Gobert, citing examples taken from *"Sentencing Options Against Criminals"*, (1990) 1 Criminal Law Forum, Brent Fisse

activities/convictions.[41] The use of adverse publicity as a sanction, therefore, is not without precedent.

There have been problems identified by Coffee with the use of adverse publicity as a formal punishment. He suggests, for example, that it might fail because the government is a poor publicist. Not only are they not very good at getting their message across in terms that are accessible to the average person, thus reducing the effectiveness of their negative message, but also we are presented with a constant stream of criticism directed at corporations, as Coffee states:

> "The criminal conviction of the corporation should be a unique event, but it loses its special force when the public constantly receives an implicit message that all corporations are corrupt or amoral."[42]

We must not forget, however, that the corporation may be much more effective in fighting any adverse publicity via a campaign of positive propaganda. If we are realistic we will realise that few people pay much heed to the negative messages issued by the media. In this consumer society we are more concerned with value for money than ethical

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[41] See note 27

[42] *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386, John C. Coffee Jr., page 426

principles. Certainly some people will have been outraged by the unscrupulous way in which major corporations like Nestlé have marketed their powdered baby milk products in Africa[43], and indeed some people will have chosen to boycott Nestlé products as a means of showing their anger[44] yet the impact of such a campaign has proven minimal if non existent. In 2001 for example, Nestlé posted Net Profits of 6,681 million Swiss Francs (CHF), yet in 2002 that annual net profit had increased to 7,564 million Swiss Francs (approximately £3,550 million).[45] If nothing else, here we have a clear indication that the impact of adverse publicity on large multi-national corporations in particular is uncertain.

A corollary of this is Slapper's argument that it is uncertain what the aim of this sanction is. If the aim of the sanction is solely to cause a financial loss, then surely, he claims, there is nothing further to be gained from an adverse publicity sanction than from a fine.[46]

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[43] See for example *"Baby Milk Marketing 'Breaks Rules'"*, Friday, 17th January, 2003,
http://news.bbc.co.uk/1/hi/world/africa/2667401.stm

[44] See *"Baby Food Action – Nestlé Boycott (Australia)* http://danny.oz.au/BFAG/ for example. This site also highlights the problems that have been caused by donations by Nestlé of free powdered milk to African hospitals.

[45] See Nestlé's Financial Statements at
http://www.ir.nestle.com/Html/ManagementReport/p_financial_statement.asp?idleft=2002

[46] Slapper and Toombs page 216

A further problem would be created, however, if the adverse publicity campaign *was* successful. Effectively we would have a re-emergence of the over-spill and nullification problems that arise from large cash fines. Should the public decide to extensively boycott a corporations products this would have severe financial implications for that corporation. This would, in turn, lead to the familiar problem of having to take cost cutting measures in order to counter this loss of resources. This has led to Coffee labelling the adverse publicity sanction a "loose cannon".

On the other hand, the adverse publicity sanction might prove more effective if we shift its focus to the individual. By identifying responsible individuals in the public eye the individual is left facing a two-fold punishment. The first is a loss of self respect and public image. We are all too aware of corporate directors in the dock claiming that they are not "real criminals", this is because their image is important to them. Secondly, no corporation is going to want to have an individual who has been identified as a "criminal" in the higher echelons of the management structure as it would be bad for their image. Thus we have threatened their future career prospects. In these regards, the approach is similar to an equity fine in that it plays on some of the fears we identified earlier.

Corporate Capital Punishment

By ordering the liquidation/closure of a corporation, the courts would have effectively sentenced the corporate offender to "death". Clearly the "death penalty", as is the case with individual offenders, is the most extreme form of punishment that could be available to the courts. It would undoubtedly be reserved for the most serious and flagrant of offenders for whom, in the opinion of the courts, there was little chance of successful rehabilitation.

Its usefulness as an effective a viable form of sanction is dubious, and its problems are manifold. All the problems that we identified earlier in our discussion of the fine would arise once again, but in a much more extreme form. The spillover from the enforced closure of a corporation, for example, would be catastrophic. As Gobert states:

> "From the Government's perspective, there is a double whammy – the redundant employees will swell the ranks of the unemployed at the same time as the state is losing the benefit of the taxes paid by the company."[47]

[47] *"Controlling Corporate Criminality: Penal Sanctions and Beyond"*, [1998] 2 Web Journal of Current Legal Issues, James Gobert

Whilst it is important to highlight this sanction as an option for the sake of completeness, the author does not feel that it would be wise to allow the judiciary to wield such a dangerous weapon.

A Pyramidal System of Enforcement

It should, by now, have become apparent that the English justice system has proven to be fairly unimaginative when it comes to punishing corporate offenders. There are a myriad of potential sanctions, each with their own strengths and weaknesses, which might be utilised in a bid to create an effective deterrent to would-be criminal corporations. The difficulty, however, would then lie in devising an enforcement scheme that could be used in order to make the best use of the potential of the different sanctions that have been addressed.

In *"Corporations, Crime and Accountability"*[48], Fisse and Braithwaite advance what they refer to as a system of pyramidal enforcement "whereby the legal response to non-compliance can be escalated progressively if necessary"[49]. The idea behind the enforcement pyramid is that it would have several layers each layer having a number of potential sanctions. The severity of the offence determines the level at

[48] *"Corporations, Crime and Accountability"*, Brent Fisse and John Braithwaite (1993: Cambridge University Press)
[49] *"Corporations, Crime and Accountability"*, Brent Fisse and John Braithwaite (1993: Cambridge University Press), page 140

which the punishment would be set. Relatively informal methods of punishment would be at the base of pyramid (utilised in those instances where the breach is minor) whereas more severe forms of punishment would be found near the apex (save for those offenders who deliberately and persistently break the law with potentially dangerous results). They advance the following pyramid as a commendable example:

LEVEL 1

Persuasion, warnings, advice and other informal methods of promoting compliance.

LEVEL 2

Civil monetary penalties (corporate and individual)

LEVEL 3

Disciplinary or remedial investigation undertaken upon agreement with an enforcement agency (accountability agreements) and court approved assurance of an effective program of disciplinary or remedial action (accountability assurances) coupled with publication of an accountability report.

LEVEL 4

Court ordered disciplinary or remedial investigation (accountability orders) or court approved assurance of an effective

programme of disciplinary or remedial action (accountability assurances), coupled with publication of an accountability report.

LEVEL 5

Criminal liability (individual and corporate), with community service, fines and probation authorised for individual offenders, and adverse publicity orders, community service, fines and probation for corporate offenders.

LEVEL 6

Escalated criminal liability (individual and corporate), with jail authorised for individual offenders, and liquidation (corporate capital punishment), punitive injunctions, and adverse publicity orders for corporate offenders.[50]

It is not the content of each of the levels proposed by Fisse and Braithwaite that is of the most interest (it is only intended to illustrate the level at which different sanctions may be set), since the authors envisage that the pyramid could be adapted for use by different jurisdictions. Rather, it is the underlying theory that is indicative of the enforcement pyramid's potential usefulness that should grab the reformers' attention. Fisse and Braithwaite state:

[50] *"Corporations, Crime and Accountability"*, Brent Fisse and John Braithwaite (1993: Cambridge University Press), page 141

"A central idea behind pyramidal enforcement is the game rhetoric postulate that actors, individual or corporate, are most likely to comply if they know that enforcement is backed by sanctions which can be escalated in response to any given level of non-compliance, whether minor or egregious. The pyramid proposed is tall rather than squat, the theory being that the taller the enforcement pyramid, the more the levels of possible escalation, then the greater the pressure that can be exerted to ensure "voluntary" compliance at the base of the pyramid. Compliance is then understood within a dynamic enforcement game where enforcers try to get commitment from corporations to comply with the law and can back up their negotiations with credible threats about the dangers faced by defendants if they choose to go down the path of non-compliance."[51]

Fisse and Braithwaite, therefore, view the enforcement pyramid as a means of providing enforcement agencies with a degree of leverage not only to encourage compliance, but also as a means of triggering greater internal accountability, something that we have seen may prove to be our greatest asset in the fight against corporate crime.

The fine, therefore, might not yet have outlived its usefulness in the corporate crime context. As Sugawara suggested in his thesis mentioned

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[51] *"Corporations, Crime and Accountability"*, Brent Fisse and John Braithwaite (1993: Cambridge University Press), page 143

in an earlier chapter, the best strategy may well be to utilise these different sanctions in combination with one another. That way one sanction's strengths may be used to counteract another's weakness, for example, using a community service order in conjunction with an adverse publicity order. Some difficulty remains, however, in determining which sanction should sit at which level in the enforcement pyramid, a problem which the author believes is best left to government.

Chapter 10: Proposals for Future Developments in the field of Corporate Manslaughter

On July 4th 2003 the Times revealed that the Crown Prosecution Service was on the verge of pressing manslaughter and Health and Safety charges against Network Rail (Government backed company in charge of running the nation's railways formerly known as Railtrack), Balfour Beatty (subcontracted to carry out maintenance work on the stretch of rail in question) and several individual directors.[1] Six days later it was announced that both the companies and the directors were due to appear at Hertfordshire Magistrate's Court on Monday 14th July 2003.

It is widely believed that the prosecution of these companies for manslaughter is one final attempt to make use of current common law position to successfully obtain a conviction for manslaughter. This is a belief that has been lent some credibility following a recent announcement from the present Home Secretary David Blunkett M.P. that the Labour Party is once again making moves to deliver on its 1997 election manifesto promise to introduce a law governing corporate manslaughter. In a press

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[1] See *"Rail bosses face manslaughter charges"*, Angela Jameson, The Times, Friday 4th July 2003, page 1 and *"Hatfield crash rail chiefs charged with manslaughter"*, Angela Jameson, Thursday, July 10th 2003, page 1

release from the Home Office on 21st May 2003 David Blunkett announced that the Government would be publishing a draft Bill on corporate manslaughter in the autumn. He stated:

> "There is great public concern at the criminal law's lack of success in convicting companies of manslaughter where a death has occurred due to gross negligence by the corporation as a whole
>
> The law needs to be clear and effective in order to secure public confidence and must bite properly on large corporations whose failure to set or maintain standards causes a death. It is not targeted at conscientious companies that take their health and safety responsibilities seriously."[2]

Indeed there is evidence that steps have been taken by the government, in the form of a Regulatory Impact Assessment, to determine Industry's reaction to any proposed new offence.[3] This all points towards a new wave

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[2] *"Government to tighten laws on Corporate Killing"*, Home Office Press Release, 21st May 2003
http://www.homeoffice.gov.uk/n_story.asp?item_id=482
See also *"'Clear and effective' corporate killing law promised"*, 10 Downing Street Press Release, 20th April 2003,
http://www.number-10.gov.uk/output/page3737.asp

[3] Copy of a letter sent out by the Home Office to sample corporations in those industries in the privates sector who had high injury/death rates over the previous five years. See http://www.corporate-accountability.org/d/HOlet.doc

of support for the belief that corporations should be held accountable for their actions by the criminal law.

In this section it is intended to utilise the Hatfield prosecution as a starting point from which to advance my views about the way the law should progress in order to obtain results. This also entails putting forward submissions regarding the way the Hatfield prosecution will unfold.

Hatfield[4]

On the 17th October 2000, the 12.10pm train from Kings Cross to Leeds derailed approximately half a mile from Hatfield station travelling at an estimated speed of 115mph. The front two coaches stayed on the tracks but the remaining eight coaches derailed. Two of them were almost on their side and the buffet car was completely on its side with its roof ripped off following a collision with an overhead power line stanchion. This was probably aggravated by the fact that two of the trains couplers parted leading to secondary vehicle collisions. As a result four people were killed and many others injured. The subsequent investigation resulted in the

[4] There have been two interim reports and one set of interim recommendations published by the Health and Safety Executive to date from which the details above have been extracted. The final report concerning the derailment at Hatfield will not be published until all legal proceedings have been concluded. See *"Hatfield"*, Health and Safety Executive, 11th July 2003, http://www.hse.gov.uk/railways/hatfield.htm

collection of over 1,500 witness statements, over a million pages of documentary evidence and 54 people being interviewed whilst under caution in an investigation lasting more than two and a half years.[5]

Although the driver of the train had only seven weeks' experience, and was driving under supervision, the error of an inexperienced driver (as happened at Ladbroke Grove) was discounted as a contributory factor in the accident. Neither were there any signals or points (as happened at Potters Bar) nearby. Rather, the sole cause of the derailment was quickly identified as a fractured rail which had shattered into over 300 pieces over a distance of around 35 metres. Subsequently Railtrack attributed the cause of the fracture to a phenomenon described by the Health and Safety Executive as "rolling contact fatigue".

A visual examination of the fragmented section of rail showed that Spalling (flaking of metal) had occurred. This had weakened the rail somewhat and had caused cracks of varying sizes and angle to develop in the rail. The manufacturers of the rail were clearly not to blame as the rail was deemed

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[5] Figures taken from *"CPS advises charges following Hatfield rail crash"*, Crown Prosecution Service Press Release, 9th July 2003 http://www.cps.gov.uk/home/RecentPressReleases/120-03.htm

to have been manufactured in accordance with standards that were in force at the time (the rail in question was laid in 1995). Blame then began to be directed at Railtrack and Balfour-Beatty who were responsible for maintaining the rails in question.

It was noted by an earlier investigation carried out by the Transportation Technology Centre Inc.[6] that Railtrack's handling of the "rolling contact fatigue" problem and its general management of broken rails was seriously defective. Indeed it has been reported that management at both Railtrack and Balfour Beatty had conceded that they had been aware of the cracked rail at the crash site 11 months before the incident which had been identified as needing replacement but had failed to take action.[7]

Further problems were identified by the Health and Safety Executive in the manner utilised to detect rolling contact fatigue. The process used is a form of non-destructive testing using Ultrasonic techniques. The problems identified are twofold. Firstly it is noted that the Ultrasonic testing was not devised specifically for identifying rolling contact fatigue cracks. This

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[6] These specialist consultants were commissioned to carry out an investigation by the Rail Regulator and the Health and Safety Executive in 2000.
[7] See *"Hatfield rail crash inquiry may name names"*, Keith Harper, Monday 22nd January 2001

results in a secondary problem, namely that it does not detect cracks of certain depths or in certain locations. Furthermore, where spalling has occurred on a rail then the rail may be deemed untestable. This means that there is at least a slight chance that fatigue cracks in some stretches of track might go unnoticed.

These facts, along with other factors lead the Crown Prosecution Service to advise the police to press charges against the defendants, but will the prosecution against them succeed? Previous case law would seem to indicate that the prosecution's case is destined to fail, but let us consider how the case might proceed.

As we have already determined from our consideration of the current law governing corporate manslaughter in Chapter 3, in order for a corporation to be found guilty it is first necessary to show that a member of the "directing mind and will" of the corporation had committed the individual offence. If this could be shown then the liability of the individual would be attributed to the corporation. This is in accordance with the common law position as stated by Lord Reid in *Tesco Supermarkets Ltd. v Nattrass*, [1972] AC 153. In the case of the Hatfield prosecution six individuals have been charged

alongside the companies for manslaughter including Charles Nicholas Pollard (Director of the London North East Zone of Railtrack Plc) and Sean Brett Fugill (Area Asset Manager if the London North East Zone). Gerald Michael Nolan Corbett (the then Chief Executive of Railtrack Plc.) faces charges under section 3(1), section 33(1)(a) and section 37 of the *Health and Safety at Work Act, 1974*. Yet whilst the prosecution have so many potentially big "scalps" in the dock, I see no reason to believe that the court case will not resolve itself in a manner similar to the prosecution of Great Western Trains following the Southall crash in 1997.

Is it possible for us to identify any individual as being culpable of the individual offence of gross negligence manslaughter as laid out in *R v Adomako*.[8] Notwithstanding the very obvious obstacle of trying to determine whether the individuals in question were sufficiently senior within the corporate ladder as to be considered a member of the directing mind and will, how might the prosecution show that they had committed the individual offence? Under the *Bateman/Andrews* formulation as set out in *Adomako* the prosecution will have to show:

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[8] R.v.Adomako [1994] 3 WLR 288 *supra*.

1) that the defendant owed a duty of care to the deceased;
2) that the defendant breached this duty;
3) that the breach caused the death of the deceased; and
4) the defendant's negligence was gross (that is to say that it showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment).

The real problem in this instance lies with the final requirement of "gross negligence". Obviously the standard of care to be expected of both Railtrack and Balfour Beatty should be quite high. Both companies were after all "experts" in their field, Balfour Beatty in particular having been contracted by Railtrack for their expertise. It is submitted that in order to find the respective corporations culpable of manslaughter it is probably going to be necessary to show that senior management within each of the companies had failed to devise or implement a suitable system for detecting and replacing damaged rails. This would appear to be consistent with the approach adopted in the prosecution of OLL Ltd. in *Kite and OLL Ltd.*, Winchester Crown Court, 8th December, Unreported. Since the test of recklessness devised in *R v Seymour*, [1983] 2 AC 576, is no longer good law, it would seem to be irrelevant whether senior management within

either company were aware of the risk of those rails suffering from rolling contact fatigue fracturing.

From the objective viewpoint required by the *Bateman/Andrews* formulation it is apparent that a degree of negligence exists. As has been noted, Railtrack had been criticised in the past for its failure to ensure adequate maintenance of the rail infrastructure. Also, both companies have admitted to having knowledge of the existence of rolling contact fatigue in that section of the track up to 11 months prior to the incident yet nothing had been done to deal with the problem. It has also been noted that the methods employed to detect faults in the track are potentially ineffective in detecting rolling contact fatigue. All these factors can be taken as indicative of Railtrack failing to safely carry out its undertaking, namely the transport of passengers. Furthermore, Balfour Beatty is clearly in breach of a contractual duty to ensure the proper maintenance of that section of rail in particular. But there are also potential problems.

A potentially major stumbling block could be the relationship that existed between Railtrack and Balfour Beatty. It will be remembered that the latter company had been sub-contracted the task of fulfilling Railtrack's

responsibility to ensure the proper maintenance of the railways. It is seemingly an unprecedented situation in a corporate manslaughter prosecution. In the case of prosecutions for breaches of sections 2 and 3 of the *Health and Safety at Work Act 1974* the courts will not allow this defence. In cases such as *R v Associated Octel*[9] and *R v Swan Hunter Shipbuilders Ltd. and another*[10],for example, the courts had no problem with finding a corporation liable for the activities carried out by an independent contractor. Furthermore it was held in the latter case that the contractor did not have to exercise total control over the sub-contractor's activities in order to incur liability. It is not hard to understand why the courts adopted this approach with regards to health and safety offences as allowing such a defence would undermine the effectiveness of the Act. In the case of the criminal law, however, things might be very different.

Could Railtrack conceivably be held liable for what was effectively the sub-contractor's failure to carry out the necessary repairs on the relevant section of track? There are a number of factors that need to be considered, for example, is it possible that Railtrack had discharged its duty of care with regard to ensuring the proper maintenance of the railways by sub-

[9] R. v. Associated Octel [1994] 4 All ER 101

[10] *R v Swan Hunter Shipbuilders Ltd. and another* [1982] 1 All ER 264

contracting the responsibility for maintenance to a third party? Railtrack knew that the section of track was faulty but what if it had instructed Balfour Beatty to replace the faulty track immediately and Balfour Beatty had listed the work as a low priority and had put it off to a later date. On the other hand, what if Balfour Beatty had informed Railtrack of the need to replace that section of track immediately but, having provided Balfour Beatty with limited funds, Railtrack did not concur with their findings and informed them that they should divert their resources towards a more important project/stretch of track. The possible connotations are endless and it will be interesting to see the prosecutions approach to establishing gross negligence. It will also be interesting to see whether both companies present a united front or if there is continuous claim and counter-claim on where the blame lies.

Interestingly a similar problem would face the courts should the decision be made to mount a prosecution following the crash at Potters Bar.[11] On 10th May 2002 a train derailed whilst passing over points at Potters Bar station killing 7 people and injuring approximately 70 others. The immediate

[11] Facts taken from *"Train Derailment at Potters Bar 10 May 2002: A Progress Report by the HSE Investigation Board May 2003"*, HSE Potters Bar Investigation Board http://www.hse.gov.uk/railways/pottersbar/may03progrep.pdf

cause of the crash was the failure of points 2182A, a failure caused by the poor maintenance of the points. The poor set-up of the point rendered some of the nuts prone to be loosening. As a result of the missing nuts the point in question was not functioning properly. This lead to certain parts of the mechanism performing functions and bearing loads they were not designed to do. In turn this caused "the lock stretcher bar [to be] subject to fatigue stresses and [it] eventually failed at one of its right-hand bolt holes, causing it to withdraw from its insulating jacket as the train passed over the points."[12] The culmination of these factors was the left-hand and right-hand switch rails heading in different directions as the third carriage was travelling over the points. The wheels on each axle were forced in different directions derailing the rear of the third carriage and the entirety of the fourth carriage. In one final twist the rear of the fourth carriage re-railed, slid-out and struck a parapet on Darkes Lane Bridge rendering the carriage airborne and causing it to separate from the rest of the train. The carriage then slid across the station platform hitting a waiting room and finally rolling on to its roof.

[12] *"Train Derailment at Potters Bar 10 May 2002: A Progress Report by the HSE Investigation Board May 2003"*, HSE Potters Bar Investigation Board, page ii http://www.hse.gov.uk/railways/pottersbar/may03progrep.pdf

An investigation by Her Majesty's Rail Inspectorate highlighted a number of deficiencies in the management of systems for inspection and maintenance. For example, it was discovered that inspection personnel weren't necessarily adequately trained meaning that defects weren't necessarily identified or reported. Furthermore two separate systems for the inspection and maintenance of points 2128A applied to permanent way personnel and signalling staff potentially leading to a misunderstanding about each others respective roles and responsibilities. Finally it was noted that there had been reports of a "rough ride" in the area of the points south of Potters Bar the evening before the crash but nothing had been done to identify any possible faults. As with Hatfield, responsibility for track maintenance in that area had been sub-contracted to a third party, in this case Jarvis.

Despite everything that has been discussed it seems that this prosecution is destined to fail. Precedent suggests that the courts will be unable to find the requisite levels of negligence in the upper echelons of the corporation utilising the current test for corporate manslaughter. It may even be that the contractor/sub-contractor relationship might prove to be an insurmountable conceptual obstacle in establishing the necessary *mens rea*. The likely

outcome is that some plea bargaining will take place and that the manslaughter charges will be dropped on exchange for the companies and individuals pleading guilty to the charges under the *Health and Safety at Work Act 1974*. This would be consistent with the outcome of the prosecution in *R v Great Western Trains Co. Ltd.* (Central Criminal Court 27th July 1999) and *Attorney-General's Reference (No 2 of 1999)*, [2000] 2 Cr. App. R. 207 where Great Western Trains were fined £1.5million. It will also be recalled that that company announced record profits in the six months following the Southall train crash leading to the perception by the public that the fine was little more than a "slap on the wrist". The truth is that "gross negligence" is already a nebulous concept in the context of establishing the liability of an individual. This problem is simply further compounded in the case of the more complex and opaque corporation. If the Hatfield prosecution does fail then the death knell will truly have sounded for identification as the basis of corporate manslaughter, but what is the best way forward for the law?

Reviving the Law Commission's Proposals for Reform

There is perhaps some hope for the Law Commission's concept of "management failure" as a successful basis of liability for corporate manslaughter in this instance. This claim is based on the work carried out by the Health and Safety Executive Investigation Board following Potters Bar[13] and Lord Cullen following Ladbroke Grove[14]. Reports published by the respective authors following those train crashes focus on the management and culture of safety within Railtrack at the time of those incidents and make interesting reading for anyone trying to establish a management failure.

Reading both these reports would suggest that management failures could best be viewed as a failure to implement adequate management systems to ensure the safe conduct of one's undertaking. The existence of a "management failure" might be indicative of a lapse attitude towards safety. Furthermore, though this might be considered a simplistic view, it could be said that something must be wrong with the system otherwise these

[13] HSE Potters Bar Investigation Board, *"Train derailment at Potters Bar 10 May 2002: A progress report by the HSE investigation Board"*, Health and Safety Executive http://www.hse.gov.uk/railways/pottersbar/may03progrep.pdf

[14] The Rt. Hon. Lord Cullen, *"The Ladbroke Grove inquiry: Part 2 Report"*, Health and Safety Commission, http://www.rail-reg.gov.uk/filestore/docs/lgri2.pdf

accidents would never have happened. But even if it was accepted that there may well be accidents which occur due to circumstances which could not reasonably have been expected to be within the ambit of any management system, the fact that train crashes and derailments continue to happen should suggest that something is clearly wrong with the manner in which the railways are managed.

The second Cullen report into Ladbroke Grove advances some interesting examples of the type of behaviour that might constitute a management failure. The report states at page 60:

> "The relevant accidents provide examples of problems associated with people and management behaviour, whether it be, for example, acts of omission or commission; poor decision-making; poor communications arising from a lack of clarity; as to responsibilities and accountabilities; conflicts between safety and performance; failure to identify risks and develop controls; poor follow-up of recommendations; and lack of training and competency."[15]

[15] The Rt. Hon. Lord Cullen, *"The Ladbroke Grove inquiry: Part 2 Report"*, Health and Safety Commission, page 60, http://www.rail-reg.gov.uk/filestore/docs/lgri2.pdf

In his consideration of the underlying causes of Ladbroke Grove, Lord Cullen identified a number of problems inherent in the management systems of Railtrack at the time which was preventing them from effectively obtaining the necessary level of safety on the railway network. The first of these was the lack of clear safety leadership, both within the industry as a whole and within the individual companies. The lack of a clear industry wide direction on the matter of safety resulted in a confusion about the respective safety responsibilities and the proliferation of a "blame culture". This culture of blame in particular was identified as problematic as it was preventing the industry from moving on and learning from its mistakes. Focusing on SPADs (Signals Passed At Danger) in particular, the report notes:

> "The existence of multiple SPADs at a particular signal is a clear example of what is effectively an unsafe condition. Whatever the cause of the SPADs the repeated occurrence indicates an underlying problem, which, if not identified and solved, represents an acceptance of that unsafe condition."[16]

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[16] The Rt. Hon. Lord Cullen, *"The Ladbroke Grove inquiry: Part 2 Report"*, Health and Safety Commission, page 71
http://www.rail-reg.gov.uk/filestore/docs/lgri2.pdf

The "blame culture" contributes to the inability to make effective determinations about the underlying causes as it leads to reluctance on the staff's behalf to be open and share information in the course of any subsequent investigation. Consequently no lessons are learnt and no steps are taken to remedy the problem.

A further major problem identified post Ladbroke Grove was the lack of adequate communication at all levels within the industry. Lord Cullen highlighted the particular need for management to communicate to all employees "the clearest possible message of their safety goals and objectives."[17] He advanced a number of suggestions which might help to alleviate the problem, for example devising a clear mission statement with regard to the company's safety objectives. This might be done by devising and implementing a set of "golden rules" which would govern the behaviour of employees at all levels. It would be vital, however, to ensure that these rules must be actively enforced as codes that employees are committed to follow rather than just paying "lip-service" to the ideals of safety at work.

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[17] The Rt. Hon. Lord Cullen, *"The Ladbroke Grove inquiry: Part 2 Report"*, Health and Safety Commission, page 71
http://www.rail-reg.gov.uk/filestore/docs/lgri2.pdf

A second concern in relation to the issue of communication was that the adage "communication is a two-way thing" had been forgotten. The report states:

> "Concern was expressed ... that the commitment of senior management to safety was not felt on the ground, and that employees' concerns were not adequately relayed to senior management."[18]

This is clearly an important failure to address as information from the front line is a good source for determining the effectiveness of the safety systems that are in place since these employees are at the "sharp end" after all. The solution offered to this problem was two-fold. Firstly it was suggested that management should make a more concerted effort to be seen on the "shop floor" which is a more effective manner of ensuring the safety message is reaching the lower level workers. The second solution was the introduction of regular safety meetings involving senior management and front-line

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[18] The Rt. Hon. Lord Cullen, *"The Ladbroke Grove inquiry: Part 2 Report"*, Health and Safety Commission, page 71
http://www.rail-reg.gov.uk/filestore/docs/lgri2.pdf

personnel as a forum for highlighting any concerns about the way these systems operate.

One final problem identified by the Cullen inquiry was the particular problem with training. The major issue seemed to be that whilst the training received by new recruits was good, the level of training received by those employees who had been with the company for a length of time simply were not subject to a programme of further training. It is arguable that an industry that has no regime of continuous learning simply cannot be geared towards learning from its mistake

As if the problems identified by the Cullen report were not enough, the Potters Bar report highlighted further issues. Of particular concern was the realization that the points that caused the derailment (points 2182A) were subject to two separate regimes for managing its inspection and maintenance (permanent way – or track – and signalling).

The permanent way regime was governed by Railtrack's standards which set out an inspection hierarchy of three levels. Jarvis had taken these standards and had adopted them and implemented them into their own

inspection regime. The three levels were "basic patrolling at weekly intervals; supervisory level checks at two monthly intervals; and, a track engineer examination every two years."[19] An inspection of the maintenance records indicated that no relevant defects had been found with points 2182A in an inspection carried out prior to the derailment, however further investigation was required as certain matters remained unresolved. It was not made clear, for example, how strictly the inspection regime was followed particularly with regard to the standards of record keeping and secondary level supervision,

With regard to the signalling regime it was a basic requirement that only competent staff should be allowed to carry out the inspection and maintenance of the points, yet the Health and Safety Executive's report highlighted a number of concerns. Of particular concern included the fact that the maintenance regime in force at the time did not cater specifically for the type of mechanism employed by points 2182A. Secondly it was noted that records of maintenance work on points might not be accurate as work that was supposedly finished was not always completed. Thirdly, it

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[19] HSE Potters Bar Investigation Board, *"Train derailment at Potters Bar 10 May 2002: A progress report by the HSE investigation Board"*, Health and Safety Executive, page 27
http://www.hse.gov.uk/railways/pottersbar/may03progrep.pdf

was also noted that a number of the signalling personnel had transferred to Jarvis from another contractor, yet it was not clear whether Jarvis had taken any steps to assess their competency.

Also worthy of note is the fact that the Health and Safety Executive's report also highlighted the issue of communication as a particular area of concern. The evening prior to the crash at Potters Bar a report was made by a railway worker of a "rough ride" in the area south of the Potters Bar points. A subsequent investigation showed that the relevant procedures were simply not followed. This led to the message becoming confused which led to the permanent way inspection team being sent to investigate the wrong section of track. Since nothing out of the ordinary was found the team, unsurprisingly, called off the inspection. Furthermore it was shown that the rules on "Red Zone" working in the dark had not been followed by the inspection team. The report took the view that this would have resulted in the workmen being concerned for their safety and in their hurry they would have carried out a less thorough investigation. Whilst it cannot be proved conclusively that the Potters Bar crash would have been prevented if either of these procedures been followed properly, it raised a great deal of concern nevertheless.

It is important to highlight some of the major findings for these reports as it is exactly these kinds of flaws within the management systems of a corporation that would be used to indicate that a management failure had occurred. In the case of the Hatfield prosecution, for example, it would be necessary to carry out a thorough examination of the systems adopted by both Network Rail and Balfour Beatty to govern the inspection of tracks for defects. It has already been established that the techniques used by the contractors to identify rolling contact fatigue were all too fallible. It was a technique devised for another purpose adapted to identify rolling contact fatigue and simply could not detect certain types of cracks. One approach for the prosecution might seek to show that it was unreasonable for Balfour Beatty to rely on this old system in favour of trying to identify and devise new techniques.

It should also be questioned whether the inspections that were carried out were subject to secondary level supervision (a fresh perspective might have identified a potential problem that had been missed), how often inspections were carried out and possibly even if the number of inspections on any section of track increased the longer the track is in service (the fractured

track at Hatfield was laid in 1995). The corollary of this is that it should be questioned whether the inspection regime that was in place was indicative of an attitude that suggested that safety was a secondary concern, that is to say that nothing more than "lip-service" was paid to the ideals of safety.

Removing the Individualistic bias of corporate liability

The simple truth is that a means of imposing liability on corporate criminal offenders that does not rely on the notion of attributing the conduct of an individual offender needs to be found. Such an approach is too simplistic and completely fails to recognise that corporations are complex institutions. As such, approaches such as that adopted by the Law Commission and the Australian Criminal Code are to be applauded.

Perhaps the time has come for us to be realistic and realise that corporations *are* different from humans and accordingly they should be treated differently. It is not being suggested that we should simply excuse a corporation whenever it has breached the criminal law. There is no disputing that it is difficult to hold a corporation liable, but simply giving up is defeatist and not acceptable. What is instead being suggested is that it should be accepted that corporations behave differently from human

individuals and that they reach decisions in a different manner (that is to say through Board Meetings, Annual General Meetings, focus groups, etc.).

A corporation, it is arguable, is capable of making better and more informed decisions than individuals. As they have greater resources available to them they are more capable of accumulating and assimilating information and thus have a greater ability to identify the best way to ensure compliance with the criminal law. It is also true that the best course of action for a corporation is not necessarily the most legal, but corporations are more capable of finding means and ways to evade the full force of the law. As such they should be held to higher standards.

A corporation's decision is the result of a complex process of human interactions, group dynamics and individual ambition that are the domain of sociologists and not lawyers. It is an aggregate of the views of a number of "players". This does not condone the use of the concept of aggregation as a means of establishing corporate guilt. That would make the mistake of returning to the individualistic bias that plagues the doctrine of identification, when what we should really be doing is adopting a more holistic approach to the problem.

It is because they have adopted an alternative approach that a potentially great success for the kind of approach condoned by the Law Commission ("management failure"), the Australian Criminal Code ("corporate culture") and even the Italian approach ("structural negligence") is foreseen. They have recognised that, although it may have been one or more individuals' actions that were the immediate cause of the breach, there may well be a corporate culture within the corporation that simply does not favour the promotion of workplace safety. Of course it is going to be increasingly likely that a corporation's activities will cause a death if the corporation as a whole adopts an approach that is geared towards profit making, and a board of management that "turns a blind-eye" to working practices that cut corners because large dividends keep their investors happy.

There has been ample evidence throughout this thesis of corporations where profitability blatantly appears to be the driving force which governs corporate decision making above all else (the For Pinto disaster is a particularly good example). In other instances it is simply the case that there are underlying problems that have not been identified or resolved. We have seen, for example, that N.A.S.A. has found itself under increasing

public scrutiny following two major shuttle disasters in the space of ten years. An examination of the events leading up to these incidents (The *Challenger* disaster in particular) showed an organisation that had a very cavalier attitude towards safety. Niggling doubts within the organisation over the safety of space shuttles are suppressed in order to preserve the notion of America's supremacy in the "space-race". Furthermore, any individual who had the audacity to "step out-of-line" and question the majority view faced criticism and the end of their career. It cannot reasonably be suggested that a culture of safety was prevalent at N.A.S.A. As has been suggested earlier, the fact that these accidents continue to occur shows that something is wrong.

In cases such as these it is suggested that reactive fault has a role to play. It should not be used as a means of establishing corporate criminal intentionality as suggested by Fisse and Braithwaite, but rather as a mitigating/aggravating factor. The defence of "reasonable practicability", as utilised in strict-liability offences, allows a defence to corporations who can show that they did everything that was "reasonably practicable" in the circumstances to prevent the commission of the offence. Obviously this provides some form of incentive to corporations to ensure that they conduct

their undertaking in a safe manner prior to the commission of the offence, but it doesn't really encourage corporations to learn from their mistakes. Let's not forget that "reasonable practicability" is a concept utilised in regulatory offences to ensure compliance with safe working standards, but the benefits of such a defence could be brought within the ambit of the criminal law by the concept of reactive fault.

Under the notion of "reactive fault" a corporation's guilt would be determined by the manner in which it behaved after the commission of the original offence. It is envisaged that this concept will be most useful in the case of "serial offenders", for example, Railtrack (now Network Rail). Incidents such as Southall, Ladbroke Grove, Hatfield and Potters Bar will occur with alarming regularity so long as the underlying inadequate management systems are still in operation. Introducing an element of "reactive fault" to the sentencing stage would allow us to punish repeat offenders more severely and allow the courts to impose higher standards of care as the fact that a death has occurred should put the corporation on notice that their management system is deficient and therefore needs revising.

In the case of the Potters Bar incident, for example, it was noted that there had been a subsequent inspection of a sample of points of the 2182A type across the network by Her Majesty's Rail Inspectorate that had identified "conditions that weren't consistent with good engineering practice, and indicated to HMRI that there may have been a wider problem. The deficiencies were, however, less serious than those at Potters Bar".[20] Railtrack also inspected 850 points across the country looking for faults similar to those found in points 2182A. Whilst it was recognised that there had been a general improvement of conditions, the investigation still identified a number of faults, particularly in the older points. Similarly the immediate cause of the Paddington train crash was an inexperienced driver who passed a signal at danger.

Surely it is not implausible to suggest that corporations could be punished more severely for failing to learn from their mistakes. Let us imagine that another incident similar to Hatfield were to occur. Network Rail will have been put on notice about a potential problem with the rails that are currently used (particularly older ones) that could be remedied by simply

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[20] HSE Potters Bar Investigation Board, *"Train derailment at Potters Bar 10 May 2002: A progress report by the HSE investigation Board"*, Health and Safety Executive, page iv
http://www.hse.gov.uk/railways/pottersbar/may03progrep.pdf

implementing a system that required the replacement of rails that were more than 3 years old. If Network Rail chooses to put such a programme of replacing older rails "on the back-burner" or just ignores the problem altogether, the courts should be allowed to consider such a failure to be indicative of a corporate mentality that simply is not geared towards the safe operation of the business and should find the corporate offender guilty accordingly.

The underlying theme of these suggestions is that the criminal law has a great deal to learn from the regulatory approach adopted in the *Health and Safety at Work etc., Act, 1974*. Obviously there is a lot to be said for the regulatory approach in that it demands change on the behalf of the corporation, in the same sort of way that the criminal justice system seeks to make the convicted criminal repent and reform. It also does not require the proof of some complicated mental element as it practically implies guilt on the basis that a crime has occurred in the first place. The corporation is afforded a defence if it can be shown it satisfied the test of reasonable practicability. The corporation's behaviour is assessed as a whole. This makes that primary aim of reform a lot easier to achieve. In the case of corporate manslaughter, however, the primary aim is retribution.

Retribution would be easier to obtain if the criminal law took a similar line. This is not to suggest that we presume a criminal state of mind exists because a crime has been committed, that approach would be overly simplistic. It should be the case, however, that we seek to make it easier to impose liability on corporations but also to encourage them to alter their behaviour which is something that is simply unacceptable in modern society.

Obviously using the reactive fault suggestion in tandem with the concept of "management failure" is one possible avenue. Another might be to suggest the creation of a list (not an exclusive list) of the kind of behaviour that is indicative of a management failure. One possible inclusion on such a list might be the failure of management to adequately fulfil its responsibilities towards safety, examples of which might include a failure of management to keep abreast of current developments in safety. This would encourage companies to adopt a continuously developing rather than reactive and sporadic approach to safety.

Chapter 11: Conclusion

Throughout the course of this thesis there have been numerous examples of corporate actors taking an irresponsible attitude to the health and safety of others, yet despite mounting public outrage little has been done to facilitate attempts to impose liability on corporations that kill. This is an unacceptable situation and steps need to be taken to ensure that corporations no longer flaunt the criminal law.

It has been noted that the Labour Government made representations in its election manifesto in 1997 that it would seek to implement a new law governing "Corporate Killing". Since this research began in 1999 there has been little to convince me that this is anything other than an empty promise. The Home Secretary David Blunkett has announced that the Government will seek to implement the Law Commission's proposals in the autumn of 2003, but it is hard not to be cynical in light of their progress so far. Previous attempts by the Government to bring corporate manslaughter reforms into force, have been withdrawn these proposals in the face of strong opposition from industry.

It must never be forgotten that developments in this field may have severe economic consequences for Britain. We have already seen in these times of economic instability that corporations are willing to relocate all or part of their operations to developing countries because of the availability of cheaper resources and manpower. Imposing tougher safety regulations and criminal liability may increase public support for the Government but it is a two-edged sword. No corporation is going to voluntarily submit to expensive new safety regimes when it is economically feasible to relocate in countries which adopt a more lapse approach to safety. Such an exodus would cripple the British economy. It is within this context that the Government has to evaluate its course of action. The danger is that this will lead to a somewhat "fudged" attempt at legislating in this field that will create more problems than it solves.

Blame for the lack of progress in this area of the law should not, however, rest entirely with the Government. On numerous occasions the judiciary have been faced with opportunities to toughen the courts' stance on corporate criminal offenders. It was seen in *Meridian Global Funds* and the cases that followed a bold new approach to the issue of corporate criminal liability. The potential benefits of such an approach have been discussed in

an earlier chapter, but eventually the courts proved to be unwilling to make such a "radical" departure from the doctrine of identification which it held dearly. Whilst the benefits of a system based on precedent are clear, namely consistency and certainty in the law, it can also promote a blinkered approach to legal problems. In modern times there are many aspects of our day to day lives that are constantly evolving. In order to maintain its relevance and keep abreast with current developments the law needs to be flexible enough to adapt. The judiciary clearly has an important role to play in this regard, particularly in relation to the common law, perhaps this fact needs to be reiterated to them.

There is no doubting that any attempt to reform the law governing corporate manslaughter is faced with a number of challenges. Obviously the potential financial implications I have mentioned are a major concern, but the conceptual difficulties in discovering corporate *mens rea* is clearly going to prove a major hurdle. From its initial conception, prosecutions for the offence of corporate manslaughter have been hampered by difficulties in identifying someone sufficiently senior in the corporate ladder that possesses the necessary *mens rea*. It is submitted that we should fall into the trap, however, of assuming that this is an area that is too complex for

the law to be able to deal with adequately. Neither should we assume that the criminal law is the only means by which we should seek to address this problem.

In order for there to be any real progress in this field there needs to be a definite change of attitude on behalf of a number of parties. This task becomes easier if we change our goal from retribution to reform and rehabilitation. Ultimately our aim should be to ensure that steps are taken to reduce the number of "corporate killings" whatever form they take. This goal is not achieved by the criminal law. In the case of the general public, for example, a positive step might be to attempt to address the perception that regulatory crime is not "real crime". We have discussed the issue of stigma in the course of this thesis and concluded that, whilst it has little tangible value, it held some benefit. This issue of stigma is perceived to be a major reason for adopting a criminal law approach to this problem. If the public could be convinced that regulatory offences are as worthy of their denunciation as criminal offences this will have a number of benefits. Since the consequences of a breach of safety regulations may often be fatal and since it is generally easier to find a corporation of a regulatory offence,

increased public acceptance of such an approach would surely impact on corporate behaviour.

Corporate attitudes to safety also need redressing. It should no longer be acceptable for the majority of corporations to adopt a reactive approach to safety. This would require the majority of corporations to change their safety motto to "prevention is better than cure". This is clearly the approach adopted by the Health and Safety Executive. Yet there are still corporations who don't accept that their system is flawed until it's too late, that is to say once an "incident" has occurred. It has been noted that different corporations adopt different strategies to promoting safety according to their respective size and monetary resources. As a broad "rule of thumb" the larger the corporation (the more it is in the public eye) the more proactive its approach to workplace safety will be. It has been suggested in Chapter 10 that this imbalance in approaches might be redressed by construing a proactive approach as a mitigating factor at the sentencing stage. Similarly a failure to take steps to redress a failure in the safety management system should be viewed by the courts as an aggravating factor. It is unrealistic to expect most corporations to actively

improve its safety standards without a degree of encouragement and such an approach would provide this.

Even if we were able to achieve this change in attitude towards safety it is hoped that any reader of this thesis will have realised that the law still has a role to play. In order to for any further progress to be made in this regard, however, it is first vital for the judiciary to realise that the doctrine of identification needs to be abandoned. As a basis for corporate manslaughter it is an unworkable concept, yet it appears to have a "stranglehold" over the common law in this area. It has been a recurrent criticism in this thesis that this approach to establishing corporate *mens rea* is overly simplistic in that it fails to account for the realities of corporate decision making. Whilst we continue to utilise a doctrine with such a severe individualistic bias to the question of liability we are destined to witness the continuing inability of the courts to hold corporations guilty for manslaughter. Despite this we still occasionally find support for theories of liability such as aggregation or vicarious liability, theories that still rely on identifying individuals whose conduct can be attributed to the defendant corporation. The larger the corporation, and the more complex and diffuse its power structure the more

inadequate these theories of liability will be made to look when we attempt to utilise them in a prosecution.

The research that has been carried out during the course of this thesis has presented two workable approaches to the question of corporate liability for manslaughter. Firstly there are the regulatory offences set out in sections 2 and 3 of the *Health and Safety at Work etc., Act, 1974*. This basis of liability works well because it does not rely on the proof of some criminal state of mind. Instead the corporation is presumed to have committed a crime but will be able to evade liability if it can show it had done everything reasonably practicable to prevent the offence from occurring. It is noted that to allow trials to be complicated by arguments over the existence (or otherwise) of *mens rea* would undermine the effectiveness of the Act. Secondly there are those theories of liability that seek to identify a state of mind that is truly corporate in nature. These theories, which we have dealt with in an earlier chapter, recognize that corporate conduct should be considered as a whole, that no one person can truly embody the will of the corporation. This is particularly true in large multi-national corporations.

Should the Government take the simple option and just revive the Law Commission's proposals in Report No.237 outlined earlier we should not be too disappointed. Since we are already at a stage "where things can't get any worse" we have nothing to lose by welcoming such a move. Doing nothing is not an option. It is submitted that we will see a statutory provision governing corporate manslaughter in the near future. This submission is based on the prediction that the Hatfield prosecution will not be successful. Subsequently if the Government fails to deliver corporate manslaughter provisions in the autumn as promised we should witness unprecedented levels of public pressure. This will probably lead to corporate manslaughter provisions being rushed through Parliament.

I would be pleasing, however, to see a statutory provision which went a step further. There is a lot to commend the suggestion in the previous chapter about an alternative use of the notion of reactive fault in the sentencing stage. The use of a management failure as a basis for corporate liability for manslaughter should ensure that more corporations are convicted for the offence. We have already seen in the discussion of the issue of stigma, however, that a corporation is not that necessarily adversely affected by it following a conviction for a criminal offence. Apart from drastic measures

such as changing the company's name (not that uncommon, Railtrack having become Network Rail quite recently), corporations may embark on a publicity campaign to try and promote a positive image. Even without such publicity, it has also been noted elsewhere that public boycotts of a corporation's products rarely makes much of an impact against global corporations. Even "record" fines fade into insignificance when compared to the annual turnover of some of these companies. This means, in practical terms that there is no real incentive for corporations to alter or improve their attitude to safety in the workplace. This state of affairs can no longer be allowed to continue.

Punishing offenders more severely for persistently breaking the law is already a reality in the case of the individual offender but extending it to corporations might encourage them to "learn from their mistakes". This would go some way to bringing a degree of harmony between the approaches in the regulatory and criminal offences. This would also bring a more rounded approach to any statutory offence of corporate manslaughter enacted by Parliament.

Whatever approach the Government finally settles on there have to be changes in the way in which the law approaches corporations that kill. Whilst corporations must necessarily be treated differently from individual offenders by their very nature, they should not be considered to be above the law. It is a reality of capitalism that "money talks" and that large corporations "hold all the cards" but this does not mean that we should treat them any more favourably. As long as the law continues to adopt a blinkered approach to the issue corporations will continue to flout safety procedures. Ineffective legal intervention in this field is akin to handing corporations "a license to kill". Corporations must be held accountable for their actions and justice must be done.

BIBLIOGRAPHY

Adams, John, (1999) *"The Most Effective Safety Measures Are Rarely the Most Expensive: Vigilant Pilots and Train Drivers are Usually Paid as much as Careless Ones"*, The Times, Thursday 7th October, page 24

Afirstlook.com, *"Groupthink of Irving Janis"*, http://www.afirstlook.com/archive/groupthink.cfm?source=archther

Allen, Micheal J. (1996) *"Textbook on Criminal Law"*, 3rd edition, Blackstone Publishing

Allen, Sue, *"Train Crash Call"*, (1999) 96 Law Society Gazette 4

Allyn & Bacon Communication Studies, *"Small Group Communication"*, http://www.abacon.com/commstudies/groups/groupthink.html

Anderson, Douglas S, *"Corporate Homicide: The Stark Realities of Artificial Beings and Legal Fictions"*, (1981) 8 Pepperdine Law Review 367

Andrews, John, (1973) *Reform in the Law of Corporate Liability"*, [1973] Criminal Law Review 91

Annual Symonds Safety Lecture, *"Corporate and Personal Manslaughter"* http://www.ice.org.uk/specialisms/specialpage.asp?table=Health&name=14

Anonymous (1999) *"Challenge agreed on dock death decision"*, The Times, Tuesday 21st September

Anonymous (1999) *"Business as usual"*, The Times, Thursday 7th October, page 3

Anonymous (1999) *"How B.R. decided the price of a life"*, The Times, Friday 8th October, page 4

Anonymous (1999) *"Countdown to preventable crash"*, The Times, Saturday 9th October, page 5

Anonymous (1999) *"How figures ran out of control"*, The Times, Tuesday 12th October, page 15

Anonymous (1999) *"Survivors trackside reunion"*, The Times, Tuesday 12th October, page 15

Anonymous (1999) *"Commuter train crash"*, The Times, Tuesday 16th October

Anonymous (1999) *"Student is 31st victim of crash"*, The Times, Thursday 4th November
Anonymous (2001) *"Hatfield inspection failed to spot cracks"*, The Times, Wednesday 14th February 2001

Anonymous, *"Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions"*, (1978) 92 Harvard Law Review 1227

Anonymous, *"Corporate Responsibility for Employees Offence: R v British Steel Plc. Case Note"*, (1996) 60 Journal of Criminal Law 64

Anonymous, *"Criminal Liability of Corporations for Acts of their Agents"*, (1946) 60 Harvard Law Review 283

Anonymous, *"Due Diligence for 3rd Millennium Readiness, and the Implications for Personal as well as Corporate Liability"* http://www.wtlaw.demon.co.uk/y2k-dye.htm

Anonymous, *"Groupthink – The dark side of teaming and how to counteract it!"* *http://www.pica.army.mil/tqm/qualitylink/mar98/groupthink.htm*

Appleby, Mike, *"Corporate Manslaughter: Is there a Directing Mind?"* http://www.hardwicke.co.uk/crime/articles/00030201.html

Ashworth, Andrew & Mitchell, Andrew & Barry (eds.), *"Rethinking English Homicide Law"*, (2000) Oxford University Press

Baker, Sian, (2001) *"Should Culpability Lead to Conviction"*, The Times, Tuesday 13th March

Baldwin, Tom & Ford, Richard, (1999) *"Mowlam Adviser in Ulster Peace Among the Dead"*, The Times, Friday 8th October, page 3

Baldwin, Tom & Watson, Rowland, (1999) *"Bill in Doubt as Safety of Air Traffic Sale Questioned"*, The Times, Saturday 9th October, page 4

Bale, Joanna & Johnston, Chris, (2002) *"Taiwan Friends' Reunion Ended in Tragedy"*, the Times, Monday 13th May, page 4

Barker, Ian, *"Involuntary Manslaughter"*, (1994) 138 Sol. J.796

Barret, Brenda, *"Trends in Occupational Health and Safety"*, (1994) 23 Industrial Law Journal 60

BBC News, *"Baby milk marketing 'breaks rules'"*, Friday 17th January 2003
http://danny.oz.au/BFAC

BBC News, *"Potters Bar crash report: At a glance"*, Thursday 4th July 2002
http://news.bbc.co.uk/1/hi/uk/2093076.stm

Bennion, Francis *"The Francis Bennion website: In Parliament"*
http://www.francisbennion.com/page155.html
Bergman, David, *"Manslaughter in the Tunnel"*, (1990) New Law Journal 1108

Bergman, David, *"Recklessness in the Boardroom"*,(1990) 140 New Law Journal 1496

Bergman, David, (1995) *"The Perfect Crime? How Companies Escape Manslaughter Prosecutions"*, West Midlands H.A.S.A.C.

Bergman, David, *"Weak on Crime – Weak on the Causes of Crime"*, (1997) 147New Law Journal 1652

Bergman, David, *"Boardroom G.B.H."*, (1999) 149 New Law Journal 1656

Bergman, David, *"Manslaughter and Corporate Immunity"*, (2000) 150 New Law Journal 316

Bevan, Stephen, (1999) *"Rail Drivers Admit to Nodding Off"*, The Sunday Times, Sunday 31st October, page 5

B. F. Goodrich, *"Organizational Chart"*, http://www.goodrich.com/transformation2/imageLibrary/downloads/org_charts_names.pdf

B. F. Goodrich, *"Senior Management"* http://www.goodrich.com/CDA/GeneralContent/0,1277,4,00.html

B. F. Goodrich, *"Press Release: Goodrich Announces Strategic Shift in Organization"*, http://ir.thomsonfn.com/Investor/Relations/PubNewsStroy.aspx?partner=MzgOTVRBc

Bindman, Dan, *"Crash Victims to Sue"*, (1999) 96 Law Society Gazette 5

Binyon, Micheal, (2000) *"From Public Hate Figure to Industry's Humble Friend"*, The Times, Thursday 19th October, page 4

Bird, Steve, (2000) *"Soho Pub Bomb Survivor Cheats Death Again"*, The Times, Thursday 19th October, page 5

Blume, Lawrence, *"Stigma and Social Control: The Dynamics of Social Norms"*, http://www.afsnrm.aem.cornell.edu/pew/Papers/Blume/ Blume.pdf

B.N.A./A.C.C.A. *"Justice Department Guidance on Prosecutions of Corporations"*, http://www.bna.com/prodhome/leg/guidance.html

Boisvert, Anne-Marie *"Corporate criminal liability: A discussion paper"* http://www.ulcc.ca/en/criminal/index.cfm?sec=3&sub=3e

Boisjoly, Roger; Curtis Ellen Foster & Mellican, Eugene *"The Challenger Disaster: Organizational Demands and Personal Ethics"* – in Ermann, David M. & Lundman, Richard J. (eds.), (1996) *"Corporate and*

Governmental Deviance – Problems of Organizational Behaviour in Contemporary Society", 5th edition New York: Oxford University Press

Boyles, A. J. & Birds, J. (1995) *"Company Law"*, 3rd edition, Jordans

Braithwaite, John, *"Enforced Self-Regulation: A New Strategy for Corporate Crime"*, (1982) 80 Michigan Law Review 1466

Braithwaite, John, (1989) *"Crime, Shame and Reintegration"*, Cambridge University Press

Bright, Martin, (2002) *"Fury Over Delay to Corporate Killing Law"*, http://www.observer.co.uk/politics/story/0,6903,75917,00.html

Brown, Colin & Dillon, Jo, (2002) *"The Deadly Secret of Points 2182"*, The Independent on Sunday, Sunday 12th May 2002, page 1

Browne, M. Neil, Gianpietro-Meyer, Andrea, & Myers, Melanie, *"The Use of the Social Science Concept of "Groupthink" as Partial Antidote for the Managerial Embrace of Teamwork"*, http://Claxton.apson.edu/NSSAJ/NSSAJ132/NSSAJ132htm/NSSAJ13_2_4.htm

Box, Steven, (1998) *"Power, Crime and Mystification"*, Routledge

Buncombe, Andrew, (1999) *"The Exhumation of Carriage H"*, The Independent on Sunday, Sunday 10th October, page 1

Buncombe, Andrew & Dillon, Jo, (1999) *"Railtrack to be Stripped of Control Over Safety"*, The Independent on Sunday, Sunday 10th October, page 1

Burkeman, Oliver, (2003) *"Looking Back in Anger"*, The Guardian, Thursday 6th March, http://www.guardian.co.uk/spacedocumentary/story/0,2763,908566,00.html

Burles, David, *"The Criminal Liability of Corporations"*, (1991) 141 New Law Journal 609

Busuttil, Andrew & McCall Smith, Alexander, *"Fright, Stress and Homicide"*, (1990) 54 Journal of Criminal Law 257

Buxton, R. J. *"By Any Unlawful Act"*, (1966) 82 Law Quarterly Review 174

Cannon, Tom, (1994) *"Corporate Responsibility"*, Pitman Publishing
Cassy, John *"D.T.I. price check in war against rip-off Britain"*
http://www.guardian.co.uk/business/story/0,3604,257060.00.html

Centre for Corporate Accountability, *"News Update: Transco Homicide Prosecution Collapses"*
http://www.corporateaccountability.org/press_releases/2003/3Jun.htm

Clark, Andrew, *"12 men in court over Hatfield crash"*, The Guardian, Tuesday 15th July

Clarkson, Chris M. V. *"Law Commission Report on Offences Against the Person and General Principles: 1) Violence and the Law Commission"*, [1994] Criminal Law Review 324

Clarkson, Chris M. V. *"Kicking Corporate Bodies and Damning their Souls"*, (1996) 59 Modern Law Review 557

Clarkson, Chris M. V., (1998) *"Corporate Culpability"*, Web Journal of Current Legal Issues
http://webjcli.ncl.ac.uk/1998/issue2/clarkson2.html

Clarkson, Chris M. V. *"Context and Culpability in Involuntary Manslaughter: Principle or Instinct?"* – in Ashworth, Andrew & Mitchell, Andrew & Barry (eds.), *"Rethinking English Homicide Law"*, (2000) Oxford University Press

Clarkson, Chris M. V. & Keating, H. M. (1998) *"Criminal Law: Text and Materials"*, 4th edition, Sweet & Maxwell

Clement, Barrie, (2002) *"Rail Nuts Were Found Loose 10 Days Before Disaster"*, The Independent, Wednesday 15th May, page 1

Clifton, Richard, *"Boardroom G.B.H."*, (2000) 150 New Law Journal 104

Cobain, Ian & Webster, Phillip, (2000) *"Railways Have 100 Danger Tracks"*, The Times, Thursday 19th October

Cobain, Ian; Horsnell, Micheal & Binyon, Micheal, (2000) *"Railtrack knew about Faulty Line"*, The Times, Thursday 19th October, page 1

Coffee, John C. *"No Soul to Damn No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment"*, (1981) 79 Michigan Law Review 386

Coles, A. *"Corporate Killers: A 'Republican' Alternative to Corporate Manslaughter Prosecutions"*, Paper submitted for the Research Unit, Faculty of Law, The Australian National University, October 1998 http://law.anu.edu.au/crimnet/Coles.html

College of St. Scholastica (Mn, USA), *"Cohesion-Norms – Conformity - Groupthink"*
http://www.css.edu/users/dswenson/web/6300-OBOD/cohesionnorms.htm

College of St. Scholastica (Mn, USA), *"Preventing or Reducing Groupthink"*
http://ww.css.edu/users/dswenson/web/TWAssoc/reducinggroupthink.htm

Collins, Hugh, *"Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration"*, (1990) 53 Modern Law Review 731

Cook, Emma, (1999) *"The Horror Stays With You Forever"*, The Independent, Sunday 10th October, page 18

"Corporate Homicide Bill", (2000) 18th April
http://194.128.65.4/pa/cm199900/cmbills/114/2000114.htm

Crainer, Stuart, (1993) *"Zeebrugge: Learning from Disaster – Lessons in Corporate Responsibility"*, Herald Charitable Trust: London

Croall, Hazel, (1992) *"White Collar Crime"*, Open University Press

Croall, Hazel, (1999) *"Crime and Society in Britain"*, Longman Publishing

Croall, Hazel, (2001) *"Understanding Corporate Crime"*, Open University Press

Crown Prosecution Service, *"DPP calls for change in law after Euromin manager acquitted of manslaughter"*, Thursday 29th November 2001 http://www.cps.gov.uk/Home/Press/Archive/137-01.htm

Daniels, Jason & Smith, Ian, *"Manslaughter and Corporate Immunity"*, (2000) 150 New Law Journal 656

Davies, F. G. *"Comment – Where Have We Got to With Recklessness"*, (1990) 58 Journal of Criminal Law 370

Daut, Kathryn, *"Groupthink – The Dark Side of Teaming and How to Counteract It?"* http://www.pica.army.mil/tqm/qualitylink/mar98/groupthink.htm

Davern, Finlan, (2002) *"How to Avoid Rail Disruption"*, The Times, Monday 13th May, page 4

Davies, Mitchell C. *"Constructive Manslaughter – A Not So Basic, Basic Intent Crime"*, (1994) 58 Journal of Criminal Law 398

Dawson, S. (1998) *"Safety at Work: The limits of Self-Regulation"*, Cambridge

De Bruxelles, Simon, (1999) *"Empty Frost Covered Cars That Tell the Tale"*, The Times, Thursday 7th October, page 1

Deiss, Kathryn J. *"Leading Ideas – Revisiting the Abilene Paradox: Is Management of Agreement Still an Issue?"* http://www.arl.org/diversity/leading/issue/abilene.html

Delong, Ann & Shewmake, Tiffin, *"Criminal Enforcement Role in Environment"*, 4th International Conference on Environmental Enforcement http://www.ssc.wisc.edu/econ/Durlauf/networkweb1/wpapers/es.779.pdf

Dennis, Ian, *"The Critical Condition of the Criminal Law"*, (1997) 50 Current Legal Problems 213

Department of Philosophy and Department of Mechanical Engineering, *"Engineering Ethics – The Space Shuttle Challenger Disaster"* http://ethics.tamu.edu/ethics/shuttle/shuttle1.htm

Department of Philosophy and Department of Mechanical Engineering, *"Engineering Ethics – B. F. Goodrich Air Force A7-D Brake Problem Case and the Whistle-Blowing Debate"* http://ethics.tamu.edu/ethics/goodrich/goodric1.htm

Dewey, John, *"The Historic Background of Corporate Legal Personality"*, (1926) 35 Yale Law Journal 655

Dillon, Jo, (1999) *"Blair Orders Railtrack Safety Inquiry"*, The Independent on Sunday, Sunday 10th October, page 5

Duff, R. A. *"Intention, Mens Rea and the Law Commission"*, [1980] Criminal Law Review 147

Duff, R. A. *"Intention, Recklessness and Probable Consequences"*, [1980] Criminal Law Review 404

Duff, R. A. *"Recklessness"*, [1980] Criminal Law Review 282

Ecclestone, Barry, *"Work Related Deaths"*, (1998) 148 New Law Journal 910

Edgerton, Henry W. *"Corporate Criminal Responsibility"*, (1926) 36 Yale Law Journal 827

Editorial, *"Corporate Manslaughter"*, (1989) 139 New Law Journal 889

Editorial, *"Involuntary Manslaughter"*, [1994] Criminal Law Review 397

Editorial, *"Chain of Command"*, The Times, Monday 13th May, page 19

Editorial, (2002) *"Blame for Potters Bar"*, the Daily Telegraph, Tuesday 14th May, page 21

Ermann, David M. & Lundman, Richard J. (eds.), (1992) *"Corporate and Governmental Deviance – Problems of Organizational Behaviour in Contemporary Society"*, 4th edition New York: Oxford University Press

Ermann, David M. & Lundman, Richard J. (eds.), (1996) *"Corporate and Governmental Deviance – Problems of Organizational Behaviour in Contemporary Society"*, 5th edition New York: Oxford University Press

Etzioni, Amitas, *"The U. S. Sentencing Commission on Corporate Crime: A Critique"*, in *"The Annals of the American Academy of Political and Social Science: White Collar Crime"*, January 1993

Eves, David, (1998) *"Prosecution – The Ultimate Sanction?"*, Conference Paper, Oriel College: University of Oxford

Farrar, J. H. *"Personal Liability of Directors for Torts of the Company"*, (1997) 71 Australian Law Journal 20

Farrar, J. H. & Linnigan, B. M. (1998) *"Farrar's Company Law"*, 4th edition, Butterworths

Farrell, Stephen, (1999) *"Grim Search Through the Ashes"*, The Times, Thursday 7th October, page 4

Farrell, Stephen, (1999) *"United in Grief Relatives See the Carriage of Death"*, The Times, Friday 8th October, page 1

Farrell, Stephen, (1999) *"Relief for Searchers as Phones Fall Silent"*, The Times, Friday 8th October, page 5

Farrell, Stephen, (1999) *"Uncovering the Grim Secrets of Carriage H"*, The Times, Saturday 9th October, page 4

Farrell, Stephen & Leathley, Arthur, (1999) *"Grim Secrets of Carriage H"*, The Times, Thursday 7th October

Farrell, Stephen & Leathley, Arthur, (1999) *"Miracle of Lone Body in Carriage H"*, The Times, Monday 11th October

Field, Stuart & Jörg, Nico, *"Corporate Liability and Manslaughter: Should We Be Going Dutch?"*, [1991] Criminal Law Review 156

Fisse, Brent, *"Sentencing options against criminals"*, (1990) 1 Criminal Law Forum

Fisse, Brent, *"The Attribution of Criminal Liability to Corporations: A Statutory Model"*, (1991) 13 Sydney Law Review 277

Fisse, Brent, *"The Social Policy of Corporate Criminal Responsibility"*, (1978) 6 Adelaide Law Review 361

Fisse, Brent *"The use of publicity as a criminal sanction against business corporations"*, (1971) 8 Melbourne University Law Review 107

Fisse, Brent & Braithwaite, John. *"The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability"*, (1988) 11 Sydney Law Review 468

Fisse, Brent & Braithwaite, John, (1993) *"Corporations, Crime and Accountability"*, Cambridge University Press

Fisse, W. B., *"The Distinction Between Primary and Vicarious Liability"*, (1967) 41 Australian Law Journal 203

Frank, Nancy, *"Maiming and Killing: Occupational Health Crimes"* – in *"The Annals of the American Academy of Political and Social Science: White Collar Crime"*, January 1993

French, Peter A. (1995) *"Corporate Ethics"*, Harcourt Brace College Publishers

French, Peter A. (ed.) (1972) *"Individual and collective responsibility: The massacre at My Lai"*, Shenkman Publishing: Massachusetts

French, Peter A. *"The responsibility of monsters and their makers"* – in French, Peter A. (ed.) (1972) *"Individual and collective responsibility: The massacre at My Lai"*, Shenkman Publishing: Massachusetts

Funk, Patricia, *"On the Effective Use of Formal and Informal Punishment"*

http://www.iaes.org/conferences/past/montreal_48/prelim_program/i30-l/funk.htm

Gardner, Simon, *"Manslaughter by Gross Negligence"*, (1995) 111 Law Quarterly Review 22

Geiss, Gilbert & Meier, Robert F. (1997) *"White Collar Crime"*, The Free Press

Genn, Hazel, *"Business Response to the Regulation of Health and Safety in England"*, [1993] Volume 15, Issue 3 Law and Policy

George Mason University, *"Leadership Tips – 5 Stages of Group Development"*
http://www.gmu.edu/student/csl/5stages.html

Gibb, Frances, (1999) *"Lawyers Call for Faster Enquiry System to Avoid Tragedies"*, The Times, Thursday 7th October, page 2

Gibb, Frances, (1999) *"Inquiry Judge Unflappable"*, The Times, Friday 8th October, page 4

Gibb, Frances, (1999) *"Lawyers Seek Swift Payout to Claimants"*, The Times, Friday 8th October, page 4

Gioia, Dennis A. *"Why I didn't recognize Pinto fire hazards: How organizational scripts change managers' thoughts and actions"* – in French, Peter, (1995) *"Corporate Ethics"*, Harcourt Brace College Publishers

Gledhill, Dan, (1999) *"Insurance Bill May Reach £1 Billion"*, Independent on Sunday, Sunday 10th October, page 5

Gledhill, Ruth, (1999) *"Preachers Give Counsel to the Angry and Grieving"*, The Times, Monday 11th October, page 4

Gobert, James, *"Corporate Criminality: Four Models of Corporate Fault"*, (1994) 14 Legal Studies 393

Gobert, James, *"Corporate Criminality: New Crimes for the Times"*, [1994] Criminal Law Review 722

Gobert, James, *"Controlling Corporate Criminality: Penal Sanctions and Beyond"*, [1998] Web Journal of Current Legal Issues http://webjcli.ncl.ac.uk/1998/issue2/gobert2.html

Gobert, James, & Mugnai, Emilia, *"Coping with Corporate Criminality: Some Lessons from Italy"*, [2002] Criminal Law Review 69

Goh, Jeffrey, *"Dawn in a New Era in Air Carrier Liability"*, (1999) 149 New Law Journal 83

Goodchild, Sophie, (1999) *"Fingerprints, Teeth and Bones the Only Way to Identify Some Victims"*, Independent on Sunday, Sunday 10th October, page 5

Goodchild, Sophie, *"Bleeps, Bells and Warning Lights"*, Independent on Sunday, Sunday 10th October, page 17

Guardian, Comment, *"Napster still alive and kicking"* http://www.guardian.co.uk/today/articles/0,6729,471893,00.html

Guardian: Special Report, (2003) *"'Lock the Doors' – Words that Marked Loss of Hope for Shuttle"*, The Guardian, Thursday 13th February http://www.guardian.co.uk/columbia/story/0,12845,894522,00.html

Guardian: Special Report, (2003) *"N.A.S.A. Warned About Debris Danger in 1994"*, The Guardian, Wednesday 5th February http://www.guardian.co.uk/spacedocumentary/story/0,2763,889346,00.html

Gumbel, Andrew, (2003) *"Tapes Show Shuttle Exploded 10 Minutes Before Houston Knew"*, The Independent, Thursday 13th February http://news.independent.co.uk/world/americas/story.jsp?story=377855

Gumbel, Andrew, (2003) *"Columbia Inquiry says Hull Breach was Most Likely Cause"*, The Independent, Saturday 15th February http://news.independent.co.uk/world/americas/story.jsp?story=378402

Hamilton, Alan, (1999) *"The Morning After"*, The Times, Thursday 7th October, page 37

Hamilton, Alan, (1999) *"Town that is Braced for the Worst"*, The Times, Friday 8th October, page 2

Hamilton, Alan, (1999) *"Bishop Leads Car Park Vigil for Bereaved"*, The Times, Monday 11th October, page 4

Haniff, Selina, *"Corporate Manslaughter"* http://www.lovellwhitedurrant.com/NewsSite/ARTICLES/CorpMan/8560_1.HTM

Harding, Chris, *"The Criminalization of Corporate Behaviour (2)"*, University of Wales Aberystwyth

Harper, Keith, *"Hatfield rail crash inquiry may name names"*, The Guardian, Monday 22nd January 2001

Harris, Trudy, (1999) *"Red Light Driver Settles Claim"*, The Times, Thursday 28th October

Harrison, David, (2002) *"Potters Bar Crash Not Sabotage Say Inspectors"*, The Sunday Telegraph, 19th May, page 1

Harrison, Kate, *"Manslaughter by Breach of Employment Contract"*, (1992) 21 Industrial Law Journal 31

Harvey, Jerry B., *"The Abilene paradox and other meditations in management"*, San Francisco: Jessey Bass, 1988

Harvey, Micheal, (1999) *"How Japan's Bullet Trains Avoid Danger"*, The Times, Thursday 7th October, page 5

Harvey, Micheal, (1999) *"City's PR Brains Fail to Save Railtrack"*, The Times, Wednesday 13th October

Hawkes, Nigel, (1999) *"Many Clues to Identification"*, The Times, Thursday 7th October

Health and Safety Executive, Statistics
http://www.hse.gov.uk/statistics/pdf/tableef1.pdf
Health & Safety Review, *"Feature: Corporate Manslaughter on the safety agenda"*
http://www.healthandsafetyreview.ie/sample/sample/30.html

Henderson, Mark, (1999) *"Prescott Orders Rethink on Rail Safety"*, The Times, Thursday 7th October, page 2

Henderson, Mark, (1999) *"Train took One-Way Track to Disaster"*, The Times, Saturday 9th October, page 2

Henderson, Mark, (1999) *"Prescott Launches Rail Safety Agenda"*, The Times, Thursday 26th October

Henderson, Mark & Leathley, Arthur, (1999) *"Inspectors to Test all Danger Signals"*, The Times, Friday 8th October, page 4

Hodge, Neil, *"Britain: Labour Abandons Planned Corporate Killing Legislation"*
http://www.wsws.org/articles/2002/nov2002/corp-n22.shtml

Hofstetter, Karl, *"The Ecological Liability of Corporate Groups: Comparing U.S. and European Trends"*
http://www.hotopos.com/harvard1/ecological_liability_of_corporat.htm

Holgate, Geoff, *"Reforming the Law on Involuntary Manslaughter"*, (2000) 164 (46) Justice of the Peace Reports 894

Home Office, *"Letters to Organisations, re: Involuntary Manslaughter Impact Assessment"*, Tuesday 10th September 2002
http://www.corporateaccountability.org/d/HOlet.doc

Home Office, *"Press Release: Government to tighten laws on corporate killing"*, Wednesday 21st May 2003
http://www.homeoffice.gov.uk/n_story.asp?item_id=482

Home Office, *"Reforming the Law on Involuntary Manslaughter: The Government's Proposals"*
http://www.homeoffice.gov.uk/consult.invmans.htm

HSE *"Train derailment at Hatfield 17October 2000: First HSE interim report"*
http://www.hse.gov.uk/railways/hatfield/interim1.htm

HSE *"Train derailment at Hatfield 17 October 2000: Second HSE interim report"*
http://www.hse.gov.uk/railways/hatfield/interim2.htm

HSE Potters Bar Investigation Board, *"Train Derailment at Potters Bar 10 May 2002: A progress Investigation by the HSE Investigation Board"*, http://www.hse.gov.uk/railways/pottersbar/may03progrep.pdf

Hughes,Jane, (1999) *"Twenty-One Crash Victims Named"*, The Independent on Sunday, Sunday 10th October, page 2

Hutter, Bridget M. & Lloyd-Bostock, Sally, *"The Power of Accidents: The Social and Psychological Impact of Accidents and the Enforcement of Safety Regulations"*, [1990] 30 (4) British Journal of Criminology 409

Hutter, Bridget M. & Manning P. K. *"The Contexts of Regulation: The Impact Upon Health and Safety Inspectorates in Britain"*, [1990] Volume 12, Issue 2, Law & Policy

Insight, *"Railtrack Says Faulty Installation was Cause of Potters Bar Crash"*, The Sunday Times, Sunday 26th May, page 7

Jameson, Angela, (2003) *"Rail bosses face manslaughter charges"*, The Times, Friday 4th July, page 1

Janis, Irving L. (1982) *"Groupthink"*, 2nd edition, Yale University

Jarvis, Chris, *"Groupthink and Riskyshift"*
http://sol.brunel.ac.uk/_jarvis/bola/communications/groupthink.html

Jefferson, Micheal, *"Recent Developments in Corporate Criminal Responsibility"* (1995) 16 Company Lawyer 146

Jefferson, Micheal, *"Recklessness: The Objectivity of the Caldwell Test"*, (1999) Journal of Criminal Law 57

Jefferson, Micheal, *"Corporate Criminal Liability in the 1990's"*, (2000) 64 Journal of Criminal Law 106

Johnston, Chris, (2002) *"Impact Crushed Metal Barrier"*, The Times, Monday 13th May, page 4

Johnstone, Helen, (1999) *"Empty Seats on the 6:03 Tell Their Story"*, The Times, Thursday 7th October, page 3

Johnstone, Helen, (1999) *"Queen Sends Message"*, The Times, Saturday 9th October, page 3

Johnstone, Howard, (1999) *"Safety Must Now Rule Over Profit"*, Independent on Sunday, Sunday 10th October, page 16

Jones, Adam, (1999) *"Gunmakers Over a Barrel as Lawyers Open Fire"*, The Times, Friday 29th October

Jones, George, (2002) *"Rail Safety Fears Over Contractors"*, The Daily Telegraph, Tuesday 14th May, page 1

Jones, Micheal A. (1996) *"Textbook on Torts"*, 5th edition Blackstones
Keating, Heather, *"The Law Commission Report on Involuntary Manslaughter: (1) The Restoration of a Serious Crime"*, [1996] Criminal Law Review 535

Klelinger, Thomas, (1999) *"The Sorry State of Your Railways"*, The Times, Thursday 7th October, page 23

Korgoankor, Gill & Tribe, Diana, *"Involuntary Manslaughter: The Mental Element"* (1993) 137 Sol. J. 639

Khanna, V. S. *"Corporate Criminal Liability: What Purpose Does It Serve?"*, (1996) 109 Harvard Law Review 1477

Lai, Stanley, *"The Law of Reckless Manslaughter – Swept by a Tide of Change?"*, (1994) 58 Journal of Criminal Law 303

Lashmar, Paul, (1999) *"Why I Decided to Take a Stand Against Buck Passing"*, The Independent on Sunday, Sunday 10th October, page 5

Law Society Gazette, *"Crash Victims to Sue"*, (1999) 96 Law Society Gazette 5

Law Society Gazette, *"Train Crash Call"*, (1999) 96 Law Society Gazette 4

Lawrence, John, *"Constructive Manslaughter – Causation and Direct Acts"*, (1983) 42 Criminal Law Journal 190

Lawson, Anthea, (1999) *"Grim Roll-Call at Opening of Inquest"*, The Times, Saturday 9th October, page 2

Leathley, Arthur, (1999) *"Inquiry to Open with Rail Footage"*, The Times, Monday 20th September

Leathley, Arthur, (1999) *"Southall Driver 'Had Feet on Dashboard'"*, The Times, Tuesday 21st September, page 7

Leathley, Arthur, (1999) *"High-Speed Rail Safety System to go Inquiry Told"*, The Times, Wednesday 22nd September

Leathley, Arthur, (1999) *"Survivors Angry at Inquiry Delay"*, The Times, Tuesday 21st September, page 7

Leathley, Arthur, (1999) *"Technical Fix Sought for Human Error"*, The Times, Thursday 7th October, page 5

Leathley, Arthur, (1999) *"Railtrack was Told of Signal Danger"*, The Times, Friday 8th October, page 1

Leathley, Arthur, (1999) *"Train Drivers Learn to Cope with Leaves"*, The Times, Saturday 9th October

Leathley, Arthur, (1999) *"Sell-Off of Air-Traffic Control will go ahead"*, The Times Monday 11th October, page 5

Leathley, Arthur, (1999) *"Intercity Will be Fitted with A.T.P. System"*, The Times, Monday 11th October, page 6

Leathley, Arthur, (1999) *"Railtrack and Train Firms Face Licences Threat"*, The Times, Tuesday 12th October, page 15

Leathley, Arthur, (1999) *"Southall Crash Bereaved Call for Support"*, The Times, Tuesday 12th October, page 15

Leathley, Arthur, (1999) *"Errors to go on a Central Record"*, The Times, Wednesday 13th October, page 12

Leathley, Arthur, (1999) *"Rail Firms Put More Strain on Old Trains"*, The Times, Wednesday 13th October, page 12

Leathley, Arthur, (1999) *"Thames Driver Accelerated Before Crash"*, The Times, Saturday October 30th, page 4

Leathley, Arthur, (1999) *"Safety Fears as Railtrack Posts Record Profits"*, The Times, Friday 5th November

Leathley, Arthur, (1999) *"Railtrack Set to Lift Investment"*, TheTimes 2, Friday 5th November

Leathley, Arthur, (1999) *"Railtrack Chiefs Criticised over High-Speed Line"*, The Times, Saturday 6th November, page 4

Leathley, Arthur, (1999) *"2 Trains a Day go through Red Lights"*, The Times, Monday 15th November, page 1

Leathley, Arthur, (1999) *"Firms Directors Convicted over Fatal Crash"*, The Times, Saturday 20th November

Leathley, Arthur, (2000) *"Riverboat Crash was 'Waiting to Happen'"*, The Times, Thursday 3 October

Leathley, Arthur, (2000) *"Railtrack to Face Tough Efficiency Targets"*, The Times, Thursday 19th October

Leathley, Arthur & Farrell, Stephen, (1999) *"Queen Visits Paddington"*, The Times, Tuesday 12th October

Leathley, Arthur & Mathieson, Olive, (1999) *"Give Railtrack £133m Windfall to Families"*, The Times, Monday 11th October, page 5

Leathley, Arthur; Farrell, Stephen & Henderson, Mark (1999) *"Urgent Overhaul for Danger Signals"*, The Times, Saturday 9th October, page 1

Lee, Adrian & De Bruxelles, Simon, (1999) *"First-Class Ticket Marked Caretaker's Promotion"*, The Times, Friday 8th October, page 3

Leigh, L. H. (1969) *"The Criminal Liability of Corporations in English Law"*, Lowe & Brydone: London

Leigh, L. H. *"The Criminal Liability of Corporations and Other Groups: A Comparative View"*, (1982) 80 Michigan Law Review 1508

Lister, Sam, (2002) *"Rail Sabotage Blamed for Fatal Crash"*, The Times, Saturday 18th May, page 1

Lofquist, William S. *"Organizational Probation and The U.S. Sentencing Commission"* – in *"The Annals of the American Academy of Political and Social Science: White Collar Crime"*, January 1993

Lord Cullen (The Rt. Hon.), *"The Ladbroke Grove inquiry: Part 2 Report"*, Health and Safety Commission, http://www.rail-reg.gov.uk/filestore/docs/lgri2.pdf

Maakestad, William J. *"Corporate Homicide"*, (1990) 140 New Law Journal 356

Mackay, Irene, *"Corporate Liability for the Health and Safety of Others"*, (1996) 146 New Law Journal 438

Mannheim, Hermann, (1955) *"Group Problems in Crime and Punishment – and other Studies in Criminology and Criminal Law"*, Routledge & Kegan Paul Limited

Marston, John, *"Conducting an Undertaking and Criminal Liability under the Health and Safety at Work Act 1974"*, (1999) 163 (21) Justice of the Peace Reports 404

Marston, Paul, *"Connex 'shot to encourage others'"*, The Daily Telegraph, Saturday 28th June 2003, page 8

Matthews, Paul, *"Involuntary Manslaughter: A View from the Coroner's Court"*, (1996) 60 Journal of Criminal Law 189

May, Larry & Hoffman, Stacey, (eds.) (1991) *"Collective Responsibility – Five Decades of Debate in Theoretical and Applied Ethics"*, Rowman & Littlefield Publishers Inc.

Mays, Richard *"The criminal liability of corporations and scots law: Learning the lessons of Anglo-American jurisprudence"*, E.L.R. Vol. 4, 46

Mayson, S. W.; French, D. & Ryan, C. (1999) *"Company Law"*, 16th edition, Blackstone

McColgan, A. *"The Law Commission Consultation Document on Involuntary Manslaughter – Heralding Corporate Liability?"*, [1994] Criminal Law Review 547

McGrory, Daniel, (1999) *"Novice Driver Blamed for Signal Error"*, The Times, Thursday 7th October, page 3

McGrory, Daniel, (1999) *"Survivors Return to Condemn Rail Firms"*, The Times, Thursday 7th October, page 3

McGrory, Daniel, (1999) *"Vigil of Misery for Families and Friends"*, TheTimes, Friday 8th October, page 2

McGrory, Daniel, (1999) *"Santa Claus who rode 8:06 to Death"*, The Times, Saturday 9th October, page 3

Miester, Donald J. *"Criminal Liability for Corporations that Kill"*, (1990)64 Tulane Law Review 919

Milgate, H. P. *"Frightening to Death – A Case of Constructive Manslaughter?"*, (1986) 45 Criminal Law Journal 17

Miller, Kenneth, *"Piper Alpha and the Cullen Report"*, (1991) 20 Industrial Law Journal 176

Millward, David, *"Connex sacked to stop 'gravy train'"*, The Daily Telegraph, Saturday 28th June 2003, page 1

Milne, Seumas, *"CPS told to think again on dockside death"*, The Guardian, Friday 24th March 2000
http://www.guardian.co.uk/Archive/Article/0,4273,3977776,00.html

Moreton, Cole, (1999) *"Dozens of Families without Hope for the Missing to Return"*, The Independent on Sunday, Sunday 10th October, page 3

National Aeronautics and Space Administration, *"Charter: George C. Marshall Space Flight Centre – Space Shuttle Projects Officer"*
http://hrd.msfc.nasa.gov/charts/mpo1.html

National Aeronautics and Space Administration, *"Implementation of the Recommendations of the Presidential Commission on the Space Shuttle Challenger Accident"*
http://history.nasa.gov/rogersrep/v6ch4.htm

National Aeronautics and Space Administration, *"N.A.S.A. Head Quarters Organization Chart"*
http://www.hq.nasa.gov/hq/orgchart.htm

National Aeronautics and Space Administration, *"Official George C. Marshall Space Flight Centre Organization Chart"*
http://hrd.msfc.nasa.gov/charts/officialchart.html

National Aeronautics and Space Administration, *"Report to the President: Action to Implement the Recommendations of the Presidential Commission on the Space Shuttle Challenger Accident"*
http://history.nasa.gov/rogersrep/actions.pdf

Nelken, David, *"White Collar Crime"* – in Maguire, Mike; Morgan, Rod & Reiner, Robert, (1997) *"The Oxford Handbook of Criminology"*, 2nd edition Oxford University Press

Nestlé. Financial Statement
http://www.ir.nestle.com/Html/ManagementReport/p_financial_statement.asp?idleft=
2002

News, *"Hatfield Inquest Adjourned as Police may Press Charges"*
http://danger-ahead.railfan.net/reports/rep2000/hatfield20001017_05.html

News, *"Southall: Judge Declares Train Company Prosecution Unsafe – Full Details"*
http://danger-ahead.railfan.net/reports/rep99/southall_99_o2q.html

News Digest, *"Commission Proposes New Offence of Corporate Killing"*, (1996) 17 Company Lawyer 147

News Digest, *"Company Liable for Deaths through Breach of Duty by Servants"*, (19997) 18 Company Lawyer 89

Norfolk, Andrew, (2000) *"Directors Meet for Crisis Talks"*, The Times, Thursday 19th October

Norfolk, Andrew, (2002) *"Track Team spotted flaw but failed to report it"*, The Times, Wednesday 15th May

Note, *"Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions"*, (1978) 92 Harvard Law Review 1227

O'Connell, Alex (1999) *"I wasn't crying, I had dirt in my eyes"*, The Times, Friday 8th October, page 5

O'Connell, Alex (1999) *"Picture will help to rebuild the face of burns victim"*, The Times, Saturday 9th October, page 3

O'Connell, Alex (1999) *"Foreign chiefs condemn UK under-funding"*, The Times, Saturday 9th October, page 4

O'Connell, Alex, (1999) *"We are just left hoping against hope"*, The Times, Monday 11th October, page 6

O'Connell, Alex & Johnstone, Helen (1999) *"Numbed families search for missing victims"*, The Times, Thursday 7th October, page 2

O'Doherty, Stephen *"Corporations, manslaughter and the Titanic"*, (1999) 163 (40) Justice of the Peace Reports, 787

O'Doherty, Stephen *"Manslaughter and the duty of care"*, (1999) 163 Justice of the Peace Reports 104

O'Doherty, Stephen *"Manslaughter: Dalby revisited"*, (1999) 163 (19) Justice of the Peace Reports, 368

O'Doherty, Stephen *"Corporate Manslaughter revisited"*, (2000) 164 (13) Justice of the Peace Reports, 236

O'Reilly, J. K. *"Enforcing Health and Safety Law: The lawyers contribution"*, Conference Paper, university of Oxford, September 1998

Oliver, Mark, (2003) *"Shuttle Investigators Focus on Heat Rise"*, The Guardian, Monday 3rd February
http://
www.guardian.co.uk/spacedocumentary/stroy/0,2763,888125,00.html

Osborne, Alistair (2002) *"Liability fear undermines Jarvis"*, The Daily Telegraph, Business, Tuesday 14th May, page 27

Padfield, Nicola *"Manslaughter: The dilemma facing the law reformer"*, (1995) 59 Journal of Criminal Law, 291

Patten, Sally (1999) *"When tragedy strikes who takes the blame?"*, The Times, Wednesday 13th October

Payne, Jennifer *"Corporate Killing"*, (1997) 18 Company Lawyer, 332

Payne, Jennifer *"Who's minding the company?"* (1996) 146 New Law Journal, 1365

Pollock, F. *"Has the common law received the fiction theory of corporations?"*, (1911) 27 Law Quarterly Review, 219

Power, Helen & Dowrick, Brian *"Issues in corporate crime: An introduction"*
http://webjcli.ncl.ac.uk/1998/issue2/power2.html

Prevezer, Sidney *"2) Criminal homicides other than murder"*, [1980] Criminal Law Review, 530

Punch, Maurice *"Dirty Business: Exploring corporate misconduct"* Maurice Punch, Sage Publications: 1999, page 85

Radford, Tim (2003), *"N.A.S.A. must keep faith with ageing work-horse"*, The Guardian, Monday 3rd February
http://education..guardian.co.uk/higher/research/story/0,9865,887823,00.html

Radford, Tim (2003) *"Orbiting debris may have brought down Columbia"*, The Guardian, Tuesday 11th February
http://www.guardian.co.uk/columbia/story/0,12845,893135,00.html

Rasmusen, Eric *"Stigma and self-fulfilling expectations of criminality"*
http://econwpa.wustl.edu:8089/eps/le/papers/9506/9506001.pdf

Reid, Tim *"Columbia disaster report blames Nasa and budget cuts."*, The Times, Wednesday 27th August 2003, page 14

Reville, N. J. *"The shifting sands of manslaughter"*, (1991) 55 Journal of Criminal Law, 228

Richardson, Genevra *"Strict Liability for regulatory crime: The empirical research"*, [1987] Criminal Law Review, 295

Ridley, Ann & Dunford, Louise *"Corporate killing – Legislating for unlawful killing?"*, (1997) 26 Industrial Law Journal, 99

Robb, George (1992), *"White Collar crime in modern England"*, Cambridge University Press

Rose, Stephen *"Corporate manslaughter – A big threat to small business?"* http://www.newbusiness.co.uk/magazine/issue6/6-corporateman.html

Rowan-Robinson, Jeremy; Watchman, Paul Q. & Barker, Christine. R. *"Crime and regulation"*, [1988] Criminal Law Review, 211

Rowan-Robinson, Jeremy; Watchman, Paul Q. & Barker, Christine. R. (1990), *"Crime and regulation"*, T&T Clark, Edinburgh

Ruggiero, Vicenzo (1996), *"Organised and corporate crime in Europe: offers that can't be refused"*, Dartmouth Publishing Company Limited

Sarre, Rick *"Legislative attempts to imprison those prosecuted for criminal manslaughter in the workplace"*, University of South Australia http://www.murdoch.edu.au/elaw/issues/v9n3/sarre93_text.html

Scrutton, Roger (2000) *"Bring back stigma"*, City Journal, autumn edition http://www.city-journal.org/html/10_4_bring_back_stigma.html

Sealy, L. S. *"The corporate ego and agency intertwined"*, (1995) 54 C.L.J., 507

Seddon, Judith *Carrying the corporate can"*, (1999) 96 Law Society Gazette, 15

Seward, Allen *"The group process: groupthink and managing agreement"* http://business.baylor.edu/Allen_Seward/swhompage/sw2000/GROUPTHINKAGREEMENT

Sherwin, Adam (1999) *"Trains collide after 'passing red signal'"*, The Times, Tuesday 19th October

Sherwin, Adam (1999) *"Anarchists plan station protest to hit Railtrack"*, the Times, Thursday 11th November, page 2

Simmonds, Suzanne *"The veil of incorporation: Can it be a shroud?"*, (1986) 7 Company Lawyer 206

Simpkins, Edward (2002) *"Contractors left counting the cost of safety"*, The Sunday Telegraph, Sunday 19th May, page 8

Slapper, Gary *"Involuntary manslaughter"*, (1996) 146 New Law Journal, 342

Slapper, Gary *"Corporate homicide and legal chaos"*, (1999) 149 New Law Journal, 1031

Slapper, Gary *"Getting away with corporate murder"* http://www.wsws.org/articles/2000/jan2000/back-j24.shtml

Slapper, Gary & Tombs, Steve (1999) *"Corporate Crime"*, Longman Publishing

Smerin, Jessica (2000) *"Taking the blame"*, The Solicitor's Gazette, Thursday 18th May

Smith, J. C. *"R v P & O European Ferries (Dover) Ltd. – Case Note"*, [1991] Criminal Law Review, 694

Smith, J. C. *"R v British Steel Plc. – Case Note"*, [1995] Criminal Law Review, 654

Smith, John *"Case Note – R v Adomako"*, [1994] Criminal Law Review, 757

Smith, John *"Case Note – R v Holloway; R v Adomako; R v Prentice and Sullman"*, [1994] Criminal Law Review, 598

Smith, John *"Case Note – National Rivers Authority v Alfred McAlpine Homes East Ltd."*, [1994] Criminal Law Review, 760

Smith, John *" Case Note – Prentice and others"*, [1994] Criminal Law Review, 292

Smith, John *"Case Note – R v Scarlett"*, [1994] Criminal Law Review, 238

Smith, John & Hogan, Brian (1996) *"Criminal law: Cases & materials"*, 6th edition, Butterworths

Smith, Lewis (2000) *"Doctor was on hand to help injured"*, The Times, Thursday 19th October, page 5

Special Report *"Nasa warned about debris danger in 1994"*, The Guardian, Wednesday 5th February, 2003
http://www.guardian.co.uk/spacedocumentary/story/0,2763,889346,00.html

Stallworthy, Mark *"Rationalising the law of manslaughter and dabbling in corporate crime"*, (1997) 61 Journal of Criminal Law, 324

Stauch, W.; Wheat K. & Tingle, J. (1998) *"Source-book on medical law"*, Cavendish Publishers

Stessens, Guy *"Corporate liability: A comparative perspective"*, (1994) 43 International Comparative Law Quarterly, 493

Stuttaford, Dr. Thomas (1999) *"Visits can ease the grief"*, The Times, Friday 8th October, page 2

Sullivan, Bob *"Corporate killing: Some government proposals"*, [2001] Criminal Law Review, 31

Sullivan, G. R. *"The attribution of culpability to limited companies"*, (1996) 55 C.L.J., 515

Sutherland, Edwin H. (1967) *"White Collar Crime"*, Holt; Reinhart & Winston Publishing

Thornton, Phillip (1999) *"State run railways: Why there will be no return"*, The Independent on Sunday, Sunday 10th October, page 17

Teather, David (2003) *"N.A.S.A. vows to rebuild shuttle in hunt for fault"*, The guardian, Monday 3rd February
http://education.guardian.co.uk/higher/research/story/0,9865,887825,00.ht,l

Teather, David (2003) *"90 second nightmare of shuttle crew"*, The Guardian, Thursday 6th February
http://www.guardian.co.uk/columbia/story/0,12845,889669,00.html

Temkin, Jennifer *"Pre-natal injury, homicide and the draft criminal code"*, (1986) 4 C.L.J., 414

Tombs, Steve *"Law resistance and reform: Regulating safety crimes in the U.K."*, [1995] 4 (3) Social & Legal Studies, page 343

Trotter, Stephanie *"Safety and Profit"*, (1999) 149 New Law Journal, 1279

Trotter, Stephanie *"Corporate manslaughter"*, (2000) 150 New Law Journal, 454

United States Department of Justice *"Justice Department guidance on prosecutions of corporations"*
http://www.bna.com/prodhome/leglguidance.html

Vandivier, Kermit *"Why should my conscience bother me? Hiding aircraft brake hazards"*, in French, Peter, (1995) *"Corporate Ethics"*, Harcourt Brace College Publishers

Vickers, Amy *"Napster offers £690m to settle copyright cases"*
http://media.guardian.co.uk/newmedia/story/0,7496,440941,00.html

Virgo, Graham *"Back to basics – Reconstructing manslaughter"*, (1994) 53 C.L.J., 44

Virgo, Graham *"reconstructing manslaughter on defective foundations"*, [1995] C.L.J., 14

Walker, Helen *"Criminalising companies – Will corporate killing make a difference?"*, (2001) 151 New Law Journal, 1494

Walker, Nigel (1980) *"Punishment, danger and stigma: The morality of criminal justice"*, Basil Blackwell Publisher

Waller, Martin (1999) *"Railtrack chief is an old city hand"*, The Times, Saturday 9th October, page 4

Wasik, Martin *"Form and function in the law of involuntary manslaughter"*, [1994] Criminal Law Review, 883

Webster, Ben (2002) *"300 miles of line should be closed"*, the Times, Monday 13th May, page 4

Webster, Ben & Brown, David (2002) *"Rail chief had safety fear over casual labour"*, the Times, Monday 13th May, page 1

Webster, Ben & Brown, David (2002) *"Points were checked the day before rail disaster"*, The Times, Monday 13th May, page 4

Wells, Celia *"The decline and rise of English murder: Corporate crime and individual responsibility"*, [1988] Criminal Law Review, 788

Wells, Celia *"Manslaughter and corporate crime"*, (1989) 139 New Law Journal, 931

Wells, Celia (1993) *"Corporations and criminal responsibility"*, Oxford: Clarendon Press

Wells, Celia *"Corporations: Culture, risk and criminal liability"*, [1993] Criminal Law Review, 551

Wells, Celia *"Corporate liability and consumer protection: Tesco v Nattrass revisited"*, (1994) 57 Modern Law Review, 817

Wells, Celia *"A quiet revolution in corporate liability for crime"*, (1995) 145 New Law Journal, 1326

Wells, Celia *"The Law Commission report on involuntary manslaughter: 2) The corporate manslaughter provisions: Pragmatism, paradox and penninsularity"*, [1996] Criminal Law Review, 545

Wells, Celia *"Corporate Killing"*, (1997) 147 New Law Journal, 1467

Wells, Celia *"Prosecuting safety: A cautionary tale"*, (2000) 150 New Law Journal, 1648

Welsh, R. S. *"The criminal liability of corporations"*, (1946) 62 Law Quarterly Review, 345

Wenham, David *"Recent Developments in corporate homicide"*, (2000) 29 Industrial Law Journal, 378

Wickins, R. J. & Ong, C. A. *"Confusion worse confounded, the end of the directing mind theory?"*, [1997] Journal of Business Law, 524

William, Micheal G. *"Manslaughter at work present and future – An H.S.E. inspector perspective"*

Williams, Glanville *"Misadventures of manslaughter"*, (1993) 143 New Law Journal, 1413

Williams, Micheal (2002) *"How the big rail break-up led to a breakdown in safety"*, The Independent on Sunday, Sunday 12th May, page 19

Winn, C. N. *"The criminal responsibility of corporations"*, (1929) 3 C.L.J., 398

Wong, Darlene R, *"Stigma: A more efficient alternative to fines in deterring corporate misconduct"*
http://www.boalt.org/CCLR/v3/v3wongnf.htm

Wright, Frank (1997) *"Law of health and safety at work"*, Sweet & Maxwell

Wright, Frank B. & Howes, Victoria *"Sentencing for health and safety offences"*, (2000) 164 (52) J.B., 1011
Wright, Oliver (1999) *"The man who escaped carriage H"*, The Times, Thursday 7th October, page 7

Wright, Oliver (1999) *"Personal effects used to identify the dead"*, The Times, Saturday 9th October, page 3

Wright, Oliver (2001) *"Bakery staff sent to deaths in giant oven"*, The Times, Thursday 17th July

Zimring, Franklin E. & Hawkins, Gordon J. (1973) *"Deterrence – The legal threat in crime control"*, University of Chicago Press