CORPORATE KILLING: TRYING AGAIN

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The blame culture

1. No longer do accidents happen. Everything is somebody else’s fault. No disaster, no tragedy can happen without a strident voice calling for somebody to be held responsible. The blame culture is central to the media agenda. Almost every tragic event attracts expressions of outrage from the victim’s family and friends and sometimes “look at me” grief from those with only the remotest connection to the victim. Sentences imposed during a criminal process resulting from such events are almost invariably disparaged as an “insult” or as “disgusting”.

2. Judged from media reports alone, the perception is that the sanctions provided by the judicial process are at once limited and inadequate. Whilst the victim’s family may press for a verdict of unlawful killing at an inquest, such verdicts are extremely rare and the scope narrowly restricted\(^1\). By the same token, the fines imposed even in cases of serious criminal fault are punitive but modest\(^2\). The biggest fines in recent years have been those of £1.5 million and £2 million imposed on Great Western Trains and Thames Trains respectively following the Southall and Paddington rail crashes.

3. Many feel that the civil compensation process provides little consolation to the aggrieved since awards of damages are – save in exceptional cases – only

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\(^1\) See, for example, *R v Inner South London Coroner, ex parte Douglas-Williams* (1999) 1 All ER 344, and *R v Inner West London Coroner, ex parte Dallaglio* (1994) 4 All ER 139.

\(^2\) See *R v Howe & Son (Engineers) Limited* (1999) 2 All ER 249.
compensatory and in any case are almost always met not by the culpable defendant but by its insurers.

4. This is the background to a perception of widespread public dissatisfaction with the legal process. It has led successive governments to attempt to reform the criminal process in particular. But this search for a legal solution has an essentially political imperative which is one reason why it has proved so problematic.

**Historical background**

5. The genesis of this pressure for reform comes both from well publicised but essentially isolated tragedies such as the four children who died on a canoeing trip in Lyme Regis in 1994 to major disasters such as the capsize of the Herald of Free Enterprise and major railway accidents following which there have been public enquiries – Kings Cross, Southall, Paddington and Hatfield being the obvious examples.

6. The pressure for reform has been essentially press and political\(^3\). A good example of the political enthusiasm for reforming the law can be found in Charles Clarke’s foreword to the Corporate Manslaughter draft Bill presented to Parliament in March 2005:-

> “The Government is committed to delivering safe and secure communities, at home and in the workplace, and to a criminal justice system that commands the confidence of the public. A fundamental part of this is providing offences that are clear and effective. The current laws on corporate manslaughter are neither, as a number of unsuccessful prosecutions over the years stand testament.

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\(^3\) There are also effective pressure groups such as the Centre for Corporate Accountability in which David Bergman has been active for at least 15 years.
I am pleased to introduce the draft Corporate Manslaughter Bill setting out the Government’s proposals for reforming this important and complex area of the law. These proposals need to strike a careful balance. Companies and other organisations must be held properly to account for gross failings by their senior management which have fatal consequences. On the other hand, as an offence of homicide, corporate manslaughter charges must be reserved for the very worst cases of management failure. This offence must complement, not replace, other forms of redress such as prosecutions under health and safety legislation.

Our proposals tackle the key difficulty with the current law: the need to find a “directing mind” of a company personally guilty of gross negligence. We propose a new test that looks more widely at failings within the senior management of an organisation.”

7. Most recently, in his judgment on the Defence submissions by which he dismissed the charges of manslaughter charges in the prosecution arising out of the Hatfield rail crash ruled (on 12th July 2005), Mackay J said

“I appreciate that these decisions…will be a cause of concern, disappointment and perhaps distress to the relatives of those who died in this tragic crash. I have tried to explain why it is I am obliged by the existing law in my judgment to make these rulings. This case continues to underline the pressing need for the long delayed reform of the law in this area of unlawful killing. There are now, thankfully, at least signs that such reforms are in sight”.

8. Before we look at the terms of the proposed legislation it may be helpful to consider the present criminal sanctions and previous attempts to reform the law.
The present criminal process

9. Whenever it has been possible to identify an individual as grossly negligent, a charge of manslaughter can be made out. Nevertheless, since 1994 there have been only seven convictions out of 34 prosecutions for corporate manslaughter. In Criminal Law Review (2005) September pp 677 – 689, Professor Clarkson\(^4\) in his article “Corporate Manslaughter: Yet More Government Proposals”, notes that all of the seven companies that he listed as successfully prosecuted appear to have been small. He adds that in all, save one, a director was also convicted of manslaughter\(^5\).

10. The introduction to the 2005 Bill gives a slightly different statistic at paragraph 9, where it is said that since 1992 there have been “34 prosecution cases for work-related manslaughter but only six, small, organisations have been convicted… (paragraph 10)… This has given rise to public concern that the law is not delivering justice, a feeling that has been underlined by the lack of success of corporate manslaughter prosecutions following a number of public disasters”.

11. As I have already observed, the most recent example of such an unsuccessful prosecution arose out of the Hatfield rail disaster in which four people died in October 2000. On 14th July 2005 Mackay J dismissed manslaughter charges against five rail executives and the engineering group Balfour Beatty some five months into the trial\(^6\).

12. This lack of success in such prosecutions is sufficiently explained by two factors.

\(^4\) Professor of Law, University of Leicester  
\(^5\) In the English Brothers case (2001) – a workman fell through a fragile roof – Professor Clarkson notes that a plea of not guilty from the director was accepted “demonstrating that, contrary to widespread belief, conviction of a company is possible under the identification doctrine even if no director or other senior manager is actually convicted, provided that such a conviction could have been possible.”  
\(^6\) Charges of manslaughter against Railtrack and three executives including the former chief executive, Gerald Corbett, had already been dismissed in September 2004 before the trial began.
13. First, proof of fault has to be to a very high standard. In the leading authority of
Adomoko (1995) 1 AC 171, Lord Mackay L.C having stated that the ordinary laws of
negligence were to be applied to decide whether a duty of care existed went on to show
that once there was proof of duty and breach, the jury had then to decide whether that
breach could properly be characterised as gross negligence and therefore a crime. He
said (at page 187)

“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…..was such that it could be judged criminal…..(where, in
that case) ..the risk of death involved, the conduct of the defendant was so bad in all the
circumstances as to amount in their judgment to a criminal act or omission”.

14. In the Hatfield case, Mackay J put it thus (at page 67):

“If that (the allegation of negligence) is made out at the end of the case, Jeffries will
have made a bad error of judgment and will have been complacent or indolent in the
discharge of his responsibilities. That level of want of care, in my judgment, does not
approach he necessary legal threshold for a manslaughter conviction, properly
reached”.

15. Second, the only basis upon which a company can be held liable for manslaughter is
according to what the lawyers know as the doctrine of identification. This requires the
identification of an individual in the company whose own fault can be demonstrated to
a sufficient degree but who can also be regarded as part of the “directing mind” of that
company – that is, senior enough and sufficiently involved in the management of that
company to be fully identified with it.
16. The classic expression of this doctrine is Attorney-General’s Reference No. 2 of 1999 [2000] 2 Cr. App. Rep 207. In that case, two questions were referred to the Court of Appeal following the trial in relation to the Southall train crash. They were (1) whether a defendant could properly be convicted of manslaughter by gross negligence in the absence of evidence as to that defendant’s state of mind and (2) whether a non-human defendant can be convicted of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual for the same crime.

17. The Court of Appeal said that the first question had to be answered in the affirmative and went on to rule that the criminal law of negligence followed the civil law of negligence as it applied to corporations: the only difference was that for the conduct to be properly characterised as criminal, that negligence had to be gross. The Court of Appeal also made it clear that there was no basis for moving from the identification doctrine to one of personal liability as the basis for corporate liability for manslaughter. Rather, the identification principle was as relevant to the actus reus as to the mens rea. Unless an identified individual’s conduct could be characterised as gross criminal negligence and could be attributed to the company, the company could not be liable for manslaughter, hence the second question was answered in the negative.

18. Quite simply, then, for the identification principle to be made out it is necessary to identify the individual in the company, demonstrate that person’s fault to the sufficient standard, and establish that that individual is sufficiently identified with or forms part of the “directing mind” of the company. Usually this requires proof that the individual is sufficiently senior and actively involved in the company’s management.

19. Given the complex web of decision-making in most large companies, it may be thought unsurprising that prosecutions have tended to fail for manslaughter on this basis.
Hence prosecutions tend to proceed and succeed under other legislation, such as the Health and Safety at Work Act 1974.

20. Not everyone is enthusiastic about the role of the Health and Safety Executive (HSE). For example, Professor Clarkson points out that the HSE openly adopts a compliance strategy and thus regards advice and assistance to companies as rather more important than their prosecution. He suggests this may explain why the HSE brings a prosecution in only 20% of cases even where death has occurred at work and only 1 percent of cases after a major injury has been reported. He comments that these prosecutions are usually brought in the Magistrates Court and that the fines imposed are frequently modest.

The Law Commission: 1996

21. Corporate manslaughter was directly considered by the Law Commission in 1996. The Law Commission proposed the introduction of an offence of “corporate killing” based on a “management failure” test in circumstances in which it could be shown that the activities and organisational practices of the company in question were such as to represent a very serious falling below the required standard of reasonable care and compliance with statutory obligations.

22. The Law Commission also accepted that, as the law stood, the identification principle remained the only basis in common law for corporate liability for gross negligence manslaughter.

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7 Ironically, when the author of the present paper was instructed to prosecute the Metropolitan Police for organisational failures under the HSWA 1974 arising out of lack of training and procedures for police officers getting onto fragile roofs, the way in which the relevant legislation was drafted meant that the Metropolitan Police Commissioners had to be prosecuted personally even though this was in every respect a vicarious responsibility – *R v Condon and Stevens*, Central Criminal Court, 2003.

Following a consultation paper\(^9\) the Corporate Homicide Bill (No. 114) was introduced in April 2000. The intention was to introduce a new offence of corporate killing. That Bill was dropped but the Government’s commitment to some form of new offence of “corporate killing” formed part of its manifesto as long ago as 2001. The new draft Bill is intended to discharge that manifesto commitment.

**The philosophy behind the new Corporate Manslaughter Bill 2005**

The Government’s view is that the current law on corporate manslaughter “fails to reflect the reality of modern life, operates too restrictively and fails to deliver an effective sanction. The Government is clear that reform is required and made change a part of its manifesto in 2001. Consultation has shown strong support for reform.”

To quote from paragraph 2 of the introduction:-

“The draft Bill sets out proposals for a new, specific offence of corporate manslaughter. An organisation would be prosecuted for this if a gross failing by its senior managers to take reasonable care for the safety of their workers or members of the public caused a person’s death. The new offence would apply as now to all companies and other types of incorporated body (including many in the public sector, such as local authorities). And, for the first time, Government departments and other Crown bodies would also be liable to prosecution.”

The proposal is intended to retain “key elements of the current law”\(^9\):-

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“The need for an organisation to owe a duty of care to the victim and the high threshold that conduct must have been grossly negligent. Clear and explicit links are also built into the offence to duties that organisations must already comply with under health and safety legislation, providing clarity about the standards against which conduct will be judged.”

27. However, the new legislation is deliberately directed to corporations rather than individuals. Hence paragraph 5 of the introduction says:-

“As a corporate offence tackling the specific problem of holding organisations to account, the offence will not apply to individual directors or others. But proceedings for manslaughter, or under health and safety law, will continue to be possible against individuals where their conduct makes them liable.”

28. Whether the conviction of a company alone on this limited basis is really likely to satisfy the clamour for individuals to be held to account (and, perhaps, sent to prison in an exceptionally bad case) may be open to question. After all, even under existing health and safety legislation companies can be prosecuted and fined an unlimited amount. And yet it must be axiomatic that that sanction is perceived as inadequate if the present legislation is purposeful.

29. Certainly the text of the consultation paper threatens substantial sanctions. At paragraph 52 it is said that “the draft Bill makes provision for this (financial penalty) and organisations found guilty of corporate manslaughter would face an unlimited fine. Where the circumstances of the case merit, a fine can be set at a very high level.”

30. The Courts will also have powers to impose “remedial orders” on offending organisations which would enable a Court to require that specific remedial action
should be taken to address a problem within a specific time - see Clause 6 of the draft
Bill: these remedial orders are like those already available for health and safety
offences.

31. Thus the introduction boldly asserts that the new offence is “designed to tackle the
difficulties created by the identification principle” and addresses this through a “new
test” that “focuses on management failures at a senior level within the organisation…
drawing on the Law Commission’s proposals, the new offence would be based on
failures in the way and organisation’s activities were managed or organised – referred
to as a “management failure” – an approach that focuses on the arrangements and
practices for carrying out the organisation’s work, rather than any immediate negligent
act by an employee (or potentially someone else) causing death”\(^{10}\). However, the
offence is directed at corporate failings in the management of risk rather than to “purely
local ones” and to management failures by senior managers in particular\(^ {11}\).

32. The new Bill thus incorporates concepts of organisation or management by senior
managers, causation, the existence of a duty of care and a gross breach thereof.

33. The draft Bill also proposes that the offence will apply where the duty of care is owed
by an employer or occupier of land or by an organisation supplying goods or services
or when engaged in other commercial activities\(^ {12}\).

34. Clause 4(1) is also designed to exempt what are regarded as “core public functions”:
paragraph 22 of the introduction identifies these as:

\(^{10}\) See paragraphs 13 and 14 of the introduction.
\(^{11}\) Clause 1(1) “An organisation to which this section applies is guilty of the offence of corporate
manslaughter if the way in which any of the organisation’s activities are managed or organised by its
senior managers –
(a) Causes a person’s death, and
(b) Amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.”
\(^{12}\) See clause 4: “relevant duty of care”.
“…activities performed by the Government under the prerogative or those that are a type of activity (whether performed by a private or public sector body) that requires a statutory or prerogative basis. Examples of this might include the Government providing services in a civil emergency or functions relating to the custody of prisoners. The personal liability of individuals undertaking such functions will remain, as is proper, under the criminal law. However, organisational failings in these areas are more appropriately matters for wider forms of public and democratic accountability.”

Management failure

35. Clause 1(1) seeks to frame an offence of management failure on the part of senior management in place of the identification principle. Paragraphs 25 to 27 of the introduction suggest that:

“This is intended to replace the identification principle with a basis for corporate liability that better reflects the complexities of decision taking and management within modern large organisations, but which is also relevant for smaller bodies.

The test for management failure focuses on the way in which a particular activity was being managed or organised. This means that organisations are not liable on the basis of any immediate, operational negligence causing death, or in deed on the unpredictable, maverick acts of its employees. Indeed, it focuses responsibility on the working practices of the organisation. It also ensures that the offence is not limited to questions about the individual responsibility of senior managers, but instead considers wider questions about how, at a senior management level, activities were organised and managed.
In particular, this allows senior management conduct to be considered collectively, as well as individually.”

36. What is meant by a “senior manager”? Clause 2 identifies a senior manager of an organisation as one who “plays a significant role in –

(1) The making of decisions about how the whole or a substantial part of its (an organisation’s) activities are to be managed or organised, or

(2) The actual managing or organising of the whole or a substantial part of those activities”.

37. It may be anticipated that there will be considerable scope for debate about this definition. Particularly, what will be held to amount to a “significant role” and/or as to what constitutes a “substantial part” of the organisation’s activities? How far that sort of issue would be one resolved by the jury rather than the judge at any trial remains to be seen.

Gross breach

38. Clause 1(1) incorporated “gross breach” as an ingredient of the offence. “Gross breach” is defined at clause 3 as:

(1) A breach of a duty of care by an organisation is a “gross” breach if the failure in question constitutes conduct falling far below what can reasonably be expected of the organisation in the circumstances.
(2) In deciding that question the jury must consider whether the evidence shows that the organisation failed to comply with any relevant health and safety legislation or guidance, and if so –

(a) How serious was the failure to comply;

(b) Whether or not senior managers of the organisation –

(i) Knew, or ought to have known, that the organisation was failing to comply with that legislation or guidance;

(ii) Were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply;

(iii) Sought to cause the organisation to profit from that failure.

Application

39. We have already seen that clause 4 provides that the “relevant duty of care” must be one owed by an organisation under the law of negligence. On that basis, the draft Bill will apply the new offence to all corporations and to a wide range of Crown bodies but not to unincorporated bodies.\(^\text{13}\)

\(^{13}\) Clause 1(2) “The organisations to which this section applies are –
(a) A corporation;
(b) A Government department or other body listed in the Schedule”. 

Causation

40. Clause 1(1)(a) specifically incorporates the concept of causation. The introduction asserts (at paragraph 49) that:

“The ordinary rules of causation will apply to determine this question. This means that the management failure must have made more than a minimal contribution to the death and that an intervening act did not breach the chain of events linking the management failure to death.”

41. The introduction also discusses the problems that might arise where an intervening act might break the chain of causation. At paragraph 51 it is said that “an intervening act will only break the chain of causation if it is extraordinary”.

Some concerns

42. Prosecutions where alleged failures have resulted in death are almost invariably conducted in a highly charged, emotional atmosphere. A jury may instinctively feel sympathy with the victim's family and it is arguable that sympathy may colour what should otherwise be a dispassionate analysis of some of the ingredients of the crime that the Crown would have to prove. For example, it remains to be seen whether judges would regard it as their job or that of the jury to decide who is a “senior management”, what amounts to a “significant role” and the legally difficult concept of causation.

43. Then there is the question of “gross breach”. As now, one might expect the judge to rule whether or not the particular failure is capable of amounting to a “gross breach” and then allow the jury to decide whether it was in the circumstances. But that may not
be to tell us very much about whether that really will be the position under the new law. Clause 3(2) of the Bill emphasises the pre-eminent function of the jury in deciding this question and, at least as the proposed legislation is currently framed, judges may feel compelled to allow the jury a very free rein – and to a greater extent than they do now.

44. A further criticism is of the vagueness in the definition of “gross breach”. Indeed, criticisms both of the Law Commission and 2000 proposals castigated the “falling far below” test as too vague. Whether they are any less vague because of the guidance provided by clause 3(2), 3(3) and 3(4) remains open to doubt.

45. This is the typical problem with findings of fault. Once you have found that someone is negligent it may not be difficult for a layman to say that they were very negligent. And of course the terms of clause 3 are not exhaustive. Indeed, clause 3(4) says in terms that “subsection (2) does not prevent the jury from having regard to any other matters they consider relevant to the question” (of whether or not it is a gross breach).

46. The next question, raised amongst others by Professor Clarkson, is why the new offence should depend upon death as a necessary ingredient. Usually – as with the rest of the health and safety legislation – the offence results from the creation of a danger regardless of the consequences. The fact that death has resulted is essentially relevant only to the sanction imposed by the Court.\(^\text{14}\)

47. But Professor Clarkson points out that between 2003 and 2004 whilst 235 people were killed at work, as many as 30,636 sustained serious injuries and 129,143 people suffered lesser injuries at work. The level of guilt (in terms of gross breach of the management failure) may be exactly the same in those cases albeit, for example, the

\(^{14}\) See \textit{R v Howe}.\n
end result was that the worker was paralysed rather than killed. Why should the same criminal process not apply to each set of facts?

48. Third, there are concerns about the need to prove the existence of a “relevant duty of care”. Such a precondition was absent from the Law Commission’s recommendations and from the 2000 Bill. Although, at first sight, the requirement might seem uncontroversial, Professor Clarkson reminds us that the issue of duty of care is not without its difficulties. For example, in \textit{R v Wacker} [2003] 1 Cr. App. R. 22 the defence argued that the lorry driver owed no duty of care to 58 illegal immigrants who died in his lorry\textsuperscript{15}.

49. Although the Court of Appeal rejected that argument upon the basis that tort and criminal law have different objectives. Even so, it is conceivable that such duty of care arguments might be revived in the future.

50. Next, there are obvious difficulties with the concept of identifying who is or is not a senior manager, regardless of whether this task falls to the judge and/or the jury. It may be thought that the Law Commission’s proposal which required only the identification of “management” rather than “senior management” and which concentrated on the activities of the company was rather more straightforward. In support of that argument, Professor Clarkson suggests that the terms of the proposed legislation constitute “an endorsement of a version of the aggregation doctrine where, instead of identifying one senior directing mind, one aggregates the actions and culpability of several senior persons.” He points out that much of the modern literature has rejected this model and argues that “the focus should be on corporate structures and systems and/or practices and policies.”

\textsuperscript{15} Because they were illegal immigrants and had no action because of the tortious doctrine of ex turpi causa.
51. There will also be controversy about the exemption from liability where the organisation is exercising an “exclusively public function”\(^{16}\) and the other immunities to which the Crown is entitled\(^{17}\). Otherwise, the most controversial part of the new Bill is the exemption from liability of individuals and unincorporated bodies. Whilst such individuals would still be open to prosecution under the Health and Safety legislation or, in an extreme case, at common law for the offence of gross negligence manslaughter, there must be a risk that once the proposed corporate manslaughter offence is introduced, prosecuting authorities will be even less inclined to bring prosecutions against individuals\(^ {18}\).

Conclusions

52. There can be little doubt that legislation to provide for an offence of corporate manslaughter is coming in one form or another, sooner or later.

53. Recent (and sometimes bitter) experience of the Government’s reaction to the consultation process might lead many to expect that the legislation will not look very different in its final form. If so, it may be some time before the Courts have provided sufficient guidance so that the present uncertainties that commentators have identified are resolved.

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\(^{16}\) See clause 4(1).
\(^{17}\) As to which see paragraphs 38 to 40 of the introduction.
\(^{18}\) Professor Clarkson says that the statistics for such prosecutions “make grim reading: between April 1999 and January 2003 only 16 company directors (mostly in small companies) were personally convicted under Health and Safety legislation and only 13 have been convicted of manslaughter… only eight company directors have been disqualified on health and safety grounds since the Directors Disqualification Act 1986”.