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LITIGATION AND CORPORATE CRIME

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The number of annual deaths and serious injuries for which companies are to blame is high and apparently rising. The law has recently taken a much sterner attitude to violent corporate crime and the Law Commission has proposed changes that would greatly facilitate corporate convictions. Where there is a crime of gross negligence there is inevitably a civil wrong of negligence, and the Civil Evidence Act 1968 allows for the criminal conviction to be used as evidence in the civil proceedings. This article examines the current developmental state of the law and argues that the Civil Evidence Act mechanism is probably underused because corporate crime is under-prosecuted.

The scale of commercially-related death and injury

During the 1993-1994 period of review, the Health and Safety Executive recorded 379 deaths at work, and over 28,900 non-fatal major injuries.¹ By 1995-6, the fatalities figure had fallen a little to 344, but the major injuries (involving amputations, loss of an eye, etc.) had risen to 30,968.² The 1996-97 figures are more alarming - in the categories "employed" and "self-employed", a total of 44 more people were killed than the previous year. Apart, however, from that real rise using the same categories as the previous year, the overall annual death and major injury levels rose very sharply because new categories of death and injury (like railway deaths, and offshore oil and gas industry incidents) were also included. The actual figures for 1996-97 are 679 deaths and 63,937 major injuries.³ There is now considerable evidence that about 70 per cent of deaths and serious injuries at work to employees or members of the public result from managerial and systemic faults in operations.⁴

¹ *HSE Annual Report, 1993-4, Statistics*, London: HMSO

² 1995-96 Health and Safety Executive figures, as revised to account for matters occurring within the period of review but not reported until after the close of annual information-gathering: Statistical Service Department, HSE, Bootle, 1997.

³ *Ibid.* 1996-97 Annual figures.

⁴ See HEALTH AND SAFETY EXECUTIVE, (1985), *Deadly Maintenance*, London: HMSO; (1986), *Agricultural Blackspot*, London: HMSO; (1987) *Safety in Roofwork*, London: HMSO (1988) 1987/88, (1988) *Blackspot Construction*, London: HMSO; Blood in the Bank: commercially-related deaths, G. Slapper, Aldershot: Ashgate (forthcoming).

There is also evidence of a sea-change in attitude towards negligent employers. Recent times have witnessed a number of interesting developments, including: the first cases where a company director has been disqualified following conviction for a health and safety offence; the first cases of companies being convicted of manslaughter; the first cases of a company directors being sent to prison for manslaughter; and a sequence of record-breaking fines against companies whose negligence has resulted in death and injury.

The Civil Evidence Act 1968

In 1943 it was decided in *Hollington v Hewthorn & Co Ltd*⁵ that where a defendant had been convicted of careless driving, evidence of that criminal conviction could not be admitted at the request of a plaintiff in subsequent civil proceedings in respect of the same car accident. This Court of Appeal decision was the source of much dismay. It was based upon the notion that the civil court would not know of the evidence adduced before the criminal court. That can be seen as a strange sort of mistrust by one part of the justice system for another part of the same system. The onus of proof is higher in criminal proceedings than it is in civil proceedings, and it is more difficult to prove

⁵ [1943] KB 587 CA

careless driving in a criminal court than to prove civil evidence. Accepting that point, the Law Reform Committee described the decision as offensive to a sense of justice⁶. The recommendation of the Committee to abolish the rule was adopted in the Civil Evidence Act 1968. Section 11 reads:

(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom...shall...be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence..."

The areas of law discussed below all involve scenarios in which victims have suffered as the result of behaviour which could be deemed violation of the criminal law.

Corporate Manslaughter

The main points in this area should be noted at the outset of this examination. They are as follows. A company can be liable for involuntary manslaughter

⁶ 15th Report (1967) Cmnd 3391, para 3

today if, in breach of a duty of care to a person or persons, it acts in a grossly negligent way in circumstances where death is a risk of its behaviour, and death results. This was established by the House of Lords in *R v Adomako* [1994] 2 All ER 79. Critically, in the context of the arguments presented in this articles, Lord Mackay LC said (at 86H):

"..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."

Whether the breach was grossly negligent is a matter for the jury (see below).

On December 8, 1994, OLL Ltd became the first company in English legal history to be convicted of homicide.⁷ Peter Kite, 45, its managing director, also became the first director to be given an immediate custodial sentence for a manslaughter conviction arising from the operation of a business. Both defendants were found guilty on four counts of manslaughter arising from the death of four teenagers who drowned off Lyme Regis while on a canoe trip, on March 22, 1993, organised by the defendant leisure activity company. OLL Ltd (formerly Active Leisure and Learning Limited) was the company that ran the centre. The same charges were brought against Joseph Stoddart, manager of

⁷ Gary Slapper, 'A Corporate Killing' *New Law Journal, Practitioner*, [1994] 1735, December 16; 'PLC What's Your Plea?' *The Times (Law)*, December 13, 1994.

the centre, although he was acquitted on the direction of the judge when the jury at Winchester Crown court failed to reach a verdict after deliberating for 9½ hours.

Mr. Kite was sentenced to three years imprisonment, the company was fined £60,000. Mr. Stoddart, who had denied all four charges of manslaughter,

An appalling catalogue of errors led to the deaths of the four teenagers who drowned having been in the sea for over four hours after their canoes capsized. According to those familiar with canoeing the trip should never have taken place. Prior to the trip, the teenagers had received only one hour of tuition in a swimming pool by unqualified staff. The weather forecast on the day of the trip had not been checked properly, distress flares were not provided by the company, and the only safety equipment possessed by the instructors was a whistle. The students' canoes did not have "spray decks" to keep out water. Nine months before the disaster two instructors had left the company because they were not satisfied with its safety policy. One wrote a letter to the managing director, Mr Kite, urging him to take a "careful look" at safety otherwise he might find himself explaining "why someone's son or daughter will not be coming home".

Giving evidence, one witness, a former instructor at the company, testified that the safety standards were "practically non-existent". First aid kits, flares, hooded waterproofs, and tow ropes were not provided.

Saving on these costs, although endangering children, clearly benefited those who enjoyed the company's profits: OLL Ltd made a profit of £242,603 in the year ending October 1992 (20 weeks before the drownings), 13 per cent up on previous figures.

The activity centre did not alert the rescue services when the canoeists failed to arrive at their destination on time, as the centre was unaware of what time the students had departed. The planned trip - two miles on open sea - was alarmingly unsuitable for such novices, and the coastguard had not been alerted. The court was told that the instructors were barely competent to make the trip themselves, let alone supervise the eight children and their teacher.

When, very belatedly, Mr. Stoddart did begin to worry about the safety of those on the trip, he tried to look for them himself by driving a car along coastal roads before he alerted the coastguards, and then, when he did alert the rescue services he wrongly told them that the children had flares.

The Lyme Regis conviction may well have symbolic significance, and have a chastening effect on businesses which currently adopt a cavalier attitude to

safety. How far it will affect the number of prosecutions in future is questionable.

Under current law, a company is guilty of manslaughter if death results from its "gross negligence". This is a vague concept whose definition is ultimately a matter for a jury. It is they who will have to decide whether the corporate carelessness in question went

"beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment." (*per* Lord Hewart CJ in *R v. Bateman*, quoted with approval by Lord Mackay in *R v. Adomako* [1994] 2 All ER 79 at 84d).

Lord Mackay has said that the decision whether the negligence is culpable at a criminal level is "supremely a jury question" (*ibid.* p.87c).

It is worthy of note, however, that there is evidence that the public are increasingly anxious about people being exposed to unnecessary risk from companies compromising on safety for commercial reasons. This point is acknowledged by the Law Commission in its consultation paper (1994, No. 135) on involuntary manslaughter.

In answer to the question which company personnel can incriminate their employer, the doctrine of "identification" was developed by which a corporation can be found criminally liable through the conduct and mental state of only certain personnel -those who represent its "controlling mind". In a case in 1957, Lord Justice Denning (as he then was) encapsulated the idea in a renowned anthropomorphic metaphor:

"A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre." ([1957] 1 QB 159 at 172)

Who are the people representing the "controlling minds" of the corporation? They would normally be directors, or superior officers of the company. The state of mind of these people is the state of mind of the company and it is treated by the law as such.

One abiding difficulty in this area of law, and possibly one of the chief reasons why no company before now has been convicted of manslaughter, is the rule against the "aggregation of fault". Thus, if several directors were each aware of on a few jig-saw pieces in the overall picture of an "obvious risk", the company cannot be blamed. Many of the companies implicated in work fatalities and public transport disasters operate with diffuse management systems and much

delegated power; systems which entail that no single "controlling mind" of the company has, as the law requires, the full *mens rea* i.e. the mental element for the crime.

The Lyme Regis case was however arguably atypical of corporate homicide scenarios. The company OLL Ltd was small (Kite and Stoddart were the only people with directorial and managerial control over the company's affairs), so it was relatively easy to find the "controlling minds"; the risks to which the students were exposed were serious and obvious and also, critically, they were not technical or esoteric in any way (anyone can see the dereliction of duty involved in not providing competent supervisors, flares, a lookout boat, in not notifying the harbour authority etc.). For the prosecution there was also the serendipitous evidence of the letter from the former employees which indisputably made the managing director aware of the risks in question; risks which, as the prosecution was able to show, were not subsequently addressed with any seriousness.

It should be noted that civil claims against OLL Ltd for death and personal injury were settled by the company after the successful prosecution.⁸

⁸ *New Law Journal/Practitioner* [1994] 1099 (No. 6802) July 25

Since the Lyme Regis case, another company, Jackson Transport (Ossett) Ltd has been convicted of manslaughter, along with a director of it, James Hodgson. The latter was imprisoned for 12 months and fined £1500, and the former fined £22,000. The case arose from the death of a 21-year-old employee who died after being sprayed in the face with a toxic chemical while cleaning chemical residues from a road tanker. The case centred on allegations of inadequate supervision, training, and protective equipment.⁹

A New Offence of Corporate Killing

In its report *Legislating the Criminal Code: Involuntary Manslaughter*¹⁰, the Law Commission recommends a new offence of "corporate killing". In 1846, Lord Denman C.J. remarked that:

"There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by indictment against those who truly commit it, that is the corporation, acting by its majority; and there is no principle that places them beyond the reach of the law for such proceedings."¹¹

⁹ *The Health and Safety Practitioner*, December, 1996, p.3

¹⁰ Law Com No 237 (1996)

¹¹ *R v Great North of England Rly. Co. (1846) 9 QB 315 at 327*

That was at the very beginnings of the process by which companies were brought within the jurisdiction of the ordinary criminal law. The process, however, has been very slow with key developments separated by periods of thirty or forty years. Between 1965 and 1995, 20,000 people were killed in incidents at work or in disasters like the capsizing of the *Herald of Free Enterprise* and the King's Cross underground fire. In most of these cases companies have been to blame for allowing unnecessary danger, yet there have only ever been five prosecutions for corporate manslaughter and only two convictions.¹²

The main reason for this is that under current law the "aggregation of fault" (above) amongst directors of a company is not allowed. To gain a conviction, the prosecution must prove that the necessary gross negligence in respect of an obvious risk to life resided in at least one person who was a "controlling mind" of the company. If several directors were each aware of part of a picture which, overall, presented significant danger, this will be insufficient. In the single conviction of corporate manslaughter the defendant company had only one director so the question of knowledge fragmented in several "controlling minds" did not arise.

¹² *R v OLL Ltd, NLJ [1994] 1714, December 8; The Safety and Health Practitioner* December 8, 1996, p.3

In its report, the Law Commission states that it sees no reason for companies to effectively remain exempt from the law of manslaughter. It recommends that there should be a specific offence of "corporate killing" broadly comparable to "killing by gross negligence" on the part of an individual. If the proposals are implemented, a company would become liable for prosecution if a "management failure" by the corporation results in death, and that failure constitutes conduct falling "far below what can reasonably be expected of the corporation in the circumstances". There is a "management failure" if the way in which the corporation's activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities. Thus, rather than use the ancient principle *actus non facit reum nisi mens sit rea*, and require a search for at least one person with a culpable mind, the new law would judge the corporation by the results of its collective efforts.

Interestingly, the report suggests that where a company is convicted of corporate killing the judge should have the power to both fine the company an unlimited sum, and order it to remedy the cause of death. It also suggests that the offence should apply to foreign corporations operating in this country.

It was reported in October 1997¹³ that in the wake of yet another major disaster (a train accident in which seven people were killed and scores injured) the

¹³ *The Independent*, 2 October, 1997

government is committed to introduce legislation to facilitate charges of manslaughter being brought against companies.

Statutory Prosecutions

The Company Directors Disqualification Act 1986 provides for a court to make a disqualification order against a person convicted of an indictable offence connected with the promotion, formation, management or liquidation of a company. It was perhaps thought, in some quarters, that the conduct at which the legislation was aimed, defined in S. 2, was financial in nature. It is now clear, however, that the Act will also apply in respect of health and safety matters.

Speaking in the House of Lords in 1991, Viscount Ullswater, then Parliamentary Secretary for Employment said:

"In our view Section 2 of the Company Directors Disqualification Act 1986 is capable of applying to health and safety matters...We believe that the potential scope of Section 2 (1) of that Act is very broad and that "management" includes the management of health and safety." ¹⁴

¹⁴ *Hansard - House of Commons - 22 November, 1991, col. 1429-30*

The foregoing interpretation of the Act has now been followed judicially. Having been found guilty of an offence under the Health and Safety at Work etc. Act 1974 (HSWA) on June 28 at Lewes Crown Court, Mr. Rodney James Chapman became the first director to be disqualified in connection with this sort of crime.

Mr. Chapman was prosecuted by the Health and Safety Executive (HSE) under Section 37 of HSWA 1974. This enables proceedings to be taken against a director of a company which with his consent, connivance or due to his negligence, committed an offence - in this case Mr. Chapman's company had contravened a Prohibition Notice.

In June 1990 a prohibition notice was served on Chapman Chalk Supplies Ltd at Filching Quarry, Jevington. It was alleged that the quarry had been worked in an unsafe manner resulting in significant danger from falls of rock. The HSE inspectors had good reason to be concerned about this sort of danger. The previous year 11 people had been killed in quarry work and there were 160 reported cases of major injuries to quarry workers.

In September, 1990 the company appealed to an Industrial Tribunal for the lifting of the prohibition notice. An order was made that the prohibition notice would only be lifted on condition that the HSE was satisfied with the steps that had been taken to make the quarry safe. Nevertheless, employees were back at

work on 12 August 1991 without prior approval of the HSE and so the company was in contravention of the Tribunal order and Section 33 of the HSWA which makes it an offence to contravene the terms of a Prohibition Notice served under Section 22 of the Act.

Mr. Chapman was fined £5000. The company was fined the same amount and ordered to pay costs of £3,553. Beryl Cooper QC, assistant recorder at Lewes Crown Court, observed that Mr. Chapman had exposed his employees to great danger. She used the power under Section 2(1) of the Company Directors Disqualification Act 1986 to ban Mr. Chapman from being a company director for two years. Prosecutions under Section 37 - there were 3909 immediate prohibition notices issued in the 1993-4 period.

Personal Responsibility

The idea of personal punishment against individual directors is not new. An attempt was made by social reformers in the early nineteenth century to establish some symbolic identity between the offending factory occupier and the ordinary criminal. This was often attempted by calling for draconian penalties. Richard Oastler, addressing the early factory legislation, told a select committee in 1831,

"I think it would be a very good thing, instead of having fines as the punishment for breach of the law, to make it imprisonment, and flogging, and pillory; I have no doubt that would keep them to it."¹⁵

This type of idea has never succeeded in becoming established policy. Only two people have ever been imprisoned for any breach, however grave, of the HSWA 1974. The custodial sentences followed an incident at Calder Felts Limited of Sowerby Bridge when 19-year-old Michael Pollard had his arm ripped off at the shoulder and shredded by high speed rollers. Health and Safety Executive inspectors had previously served a prohibition notice on the machine which injured Mr Pollard but the notice had been ignored.¹⁶ In an earlier case, a 12 month suspended sentence was imposed on the director of a small construction company for failing to have an asbestos licence and ignoring a Prohibition Notice.¹⁷ The position is similar in the common law: two imprisonments but one case of manslaughter found against a director of a small plastics company following the death at work of an employee.¹⁸ The Construction Safety Campaign, supported by rank and file building workers,

¹⁵ cited in W. Carson, (1979), 'The Conventionalization of Early Factory Crime' *International Journal for the Sociology of Law* 1979, Vol. 7 pp.37-60, at p. 41.

¹⁶ *Hazards Bulletin* No. 55 (1996), p.12

¹⁷ *Health and Safety Information Bulletin*, June, 1987, p.14-15

¹⁸ *R v Holt Plastics Ltd*, *Health and Safety Information Bulletin*, January 1990, p.20-21.

has demanded mandatory prison sentences for employers where gross negligence is proven to be the cause of death at work and the construction union UCATT also favour the wider imposition of gaol sentences. Other unions, including the Transport and General Workers Union (TGWU) and the National Union of Railwaymen have urged caution in the demand for prison sentences, fearing that union members could become scapegoats. This view was perhaps vindicated by the imprisonment in September, 1990, of Robert Morgan the BR driver who was convicted of manslaughter after the Purley train crash (4 March, 1989) in which five people died.

David Bergman has argued for legal changes which would ensure that all prosecutions after workplace deaths are triable only on indictment and that the court is given the option of imposing a custodial sentence on a director or manager who seriously injures or kills a worker.¹⁹ There are several other moves to facilitate criminal proceedings against companies. Louise Christian, of Christian Fisher & Co., who acted for the private prosecutor in the *Marchioness* case, has argued that the only really effective deterrent to corporate manslaughter is criminal proceedings against individual directors.²⁰ Phil Jones has recently suggested the introduction of a form of strict liability where companies are found to have recklessly exposed employees to risks to

¹⁹ (1991) *Deaths at Work: Accidents or Corporate Crime*, London: Workers' Educational Association.

²⁰ See, for example, *The Guardian*, letter, 4 October, 1997

their health and safety. The focus of this liability, he argues, could be the senior director with overall responsibility for health and safety or the companies chief executive.²¹

Sentencing

It is clearly in the interests of those acting for plaintiffs in litigation arising from corporate negligence that where there is also a crime arising from the relevant incident that those responsible are prosecuted. One of the chief determinants of prosecutorial policy in relation to corporate crime is the range of sentences available to the court and current judicial thinking about how the available sentences should be used. There is a view, for example, that the introduction of criminal proceedings to many areas (like the recent railway disasters) is, in the mission to try to find out what happened and to stop a repeat disaster, counter productive. It has been argued²² that criminal proceedings encourage parties to become defensive and reticent. It is thus important to look at recent developments in this area.

²¹ 'Reforming British Health and Safety Law', *Industrial Law Journal* Vol 21, No. 2, p.103

²² Prof. W P Bradshaw, *The Independent*, letter 4 October, 1997

Fines against companies found responsible for the death or injury of employees or members of the public have traditionally been low but are gradually becoming more severe reflecting an increased public awareness of and outrage at corporate risk-taking in respect of human safety. Largely owing to the expense of prosecuting companies in the Crown Courts, most proceedings against companies take place in Magistrates Courts where the maximum fine is £5000. The Offshore Safety Act, 1992, sets a £20,000 limit in respect of safety offences but even proposals to raise the general limit to such a level might not be too menacing for some companies. The average fine levied in HSE prosecutions in 1993-94 was £3061. The average fine following from a death at work in the construction industry in London (1988-90) was £1,282.

In 1987, British Petroleum Ltd was fined £750,000 in Scotland for the failure to take safety precautions at Grangemouth which resulted in the loss of three lives. The HSE report for that year stated that the fine marked "the seriousness with which the judiciary are prepared to regard serious breaches by firms with the heaviest responsibilities..". This fine, however, should be evaluated in its proper context. When we turn from the HSE's Annual Report to that of BP for the same year, we see that the £750,000 fine should be judged against BP's profit (after taxation but before extraordinary items) which was £1,391,000,000. The fine therefore amounts to 0.05% of the companies profit after taxation. This is the equivalent of an £808 fine for a person whose net earnings are £15,000,

an unlikely disposal for someone whose culpable conduct has resulted in several deaths.

There is, however, evidence of a recent judicial inclination to increase the severity of fines imposed on companies following convictions for offences arising from death and injury. The record for the largest fine ever imposed on a construction company for a health and safety offence was broken in April 1993 when a London firm was fined a total of £160,000 and ordered to pay £28,000 costs at Knightsbridge Crown Court, following the electrocution of a worker on the London Water Ring Main Project. The record was broken again in November 1993 at Maidstone Crown Court when a fine of £200,000 was imposed on the Channel Tunnel consortium TML after it pleaded guilty to failing to ensure the safety of a worker crushed to death between two trains. The five UK construction companies in the Transmanche-Link consortium were each ordered to pay £40,000.

Are heavy fines an appropriate way to deal with corporate wrong? It can be argued, for example, that the burden of such fines is inappropriately borne by shareholders or, if the fine affects the company very badly, by employees who are eventually made redundant, or by consumers. A dramatic illustration of this effect arose recently. Manchester City Council was fined £25,000 for a "disastrous programme" of ineptitude in wrongly fitting gas heaters into council

properties resulting in one resident's death and the imperilment of over 800 others.²³ Who will ultimately bear the burden of that £25,000 fine (remembering one cannot insure against criminal liability)? The answer is: the people who paid a community charge to Manchester City Council, including the relatives of the killed man and the 800 people mortally endangered by the council. Even local government funds from central government are taken from tax revenue. The fine was necessary to register the gravity of the offence but could the money have been better used to fund improved safety training or equipment?

Companies are enormously powerful social actors. Virtually everything we eat, drink, wear, travel on, live and work in is designed, produced and maintained by people working for companies. Increasingly, therefore, when damage, loss or injury is suffered it can be traced back to corporate fault. When this fault is criminally culpable the question arises as to the most suitable sanction against a company.

A cogent case for an improved system of fining companies has been put by David Bergman.²⁴ He noted that presently, when sentencing convicted companies, magistrates and judges do not have the same detailed information of the offender as they do for individuals awaiting sentence; in the case of the

²³ *The Independent*, August 7, 1993, p.3

²⁴ 'Corporate Sanctions and Corporate Prohibition', *New Law Journal*, [1992] September 25, 1312.

latter educational details, income, expenditure, and antecedents are known and often social inquiry reports will also be furnished with an assessment of the offender's likely response to probation. Whereas:

"No such care is taken in relation to corporate offenders. No police officer or similar person gives evidence and there is no document available to the court similar to the social inquiry report. The court remains unaware of the most basic information on the company - its turnover, annual profits, history of relationship with the regulatory agency or its general health and safety record."

Bergman, in arguing for higher fines, advocates the use of "corporate enquiry" reports detailing essential financial and safety information. He cites as a model the system in the United States under which a federal probation officer is required to undertake a pre-sentencing investigation into each convicted company to help the court decide an appropriate level of fine. Since this argument was published, the average penalty imposed on companies guilty of health and safety offences has risen: from £783 (1989/90) to £1384 (1992/93), to £3061 (1993-94).²⁵ Largely, this seems to reflect the introduction in 1992 in the lower courts of the increase from £2,000 to £5,000 of the maximum fine for health and safety offences.

²⁵ *Annual Report*, 1992-3 Health and Safety Commission, Appendix 6; 1993-94 report Annex 5; both London: HMSO.

How far this added severity of punishment is responsible for a reduction in companies committing health and safety offences is very difficult to say. Certainly, during the period of increased fining levels there was a reduction in the number of deaths and serious injuries²⁶ but it would probably be wrong to correlate these two sets of data in any causative way. If any significant number of companies were adjusting their safety policies as a direct result of being worried by the new fining levels and emerging judicial sentencing policy, there would most likely be a time lag: new safety measures would not actually be in place until months after the new, high fines were making the news. We can conclude, therefore, that if the new more stringent fines are to have any salutary effect on companies' safety policies, it has not yet impacted on the statistics.

It has been suggested that legal sanctions are better directed against the corporation itself rather than any of its senior personnel. Aside from the issue of how far fines have any discernable impact upon the conduct of company business, there is the matter of publicity. Do companies fear the adverse

²⁶ There were 379 fatalities and 28,924 major injuries during 1993/4; 430 fatalities in workplace incidents and 28,018 major injuries during 1992/3; and 473 fatalities and 29,707 during 1991/2. *Statistical Services Unit, HSE, and Annual Reports 1991-4*. The fall in deaths is also probably attributable in some measure to the changing patterns in employment away from higher risk industries to the service sector: see HSC annual report 1992-3, annex, p.84.

publicity consequent upon conviction of a health and safety offence? This can depend upon their size. Union Carbide Corporation (UCC) were not convicted following the escape of gas from their plant in Bhopal in 1984 which has resulted in the death of 2,600 people. Of significance here, though, is the enormous trouble and quite often disturbing techniques used by UCC (the 47th most wealthy corporation in the USA) to protect its image. Robert Hager, a lawyer working for the families of the victims, has stated that "Carbide has convinced the American public that Indians, not Americans, are to blame and that is their greatest victory." The Ford Motor Company were not convicted of manslaughter in the USA following a prosecution for that crime in 1987 arising from the highly dangerous vehicle, the Pinto.²⁷ Nonetheless, the case revealed that the company's concern for safety was alarmingly less rigorous than it could have been. Perhaps as many as 500 people died or received serious burn injuries as a result of Pintos exploding into flames after only minor rear-end collisions. There was written evidence that the company, having recognised that the Pinto had been dangerously designed, had calculated that it would be cheaper to leave the vehicle on the roads and pay compensation to predicted numbers of crash victims and their bereaved than it would to recall the vehicle and adapt it. Acquittal can be seen as in some ways technical - the defence were able to raise a doubt about the driving of the girls who died in the incident leading to the prosecution. Despite the awful publicity, however, there is no

²⁷ See FT Cullen, W Maakestad, G Cavender, (1987), *Corporate Crime Under Attack*. New York: Anderson Publishing;

evidence that, since the case, the profits of Fords in the USA have been adversely affected by the courtroom exposure of the company's cold and callous attitude to the safety of its customers.

The Construction Safety Campaign (CSC) is an independent campaigning group which, to quote from its journal:

"was set up by rank-and-file building workers to stop the massacre on building sites. It demands changes in the law to: jail employers whose gross negligence is proven to be the cause of death or serious injury; end victimisation, blacklist and sackings...[etc.]"²⁸

More workers from this industry are killed at work each year than in any category of work. The latest statistics²⁹ show that during 1992/3 there were 92 deaths (almost 2 per week) and 2840 major injuries (i.e "...amputations, loss of sight in an eye and injuries resulting in the person being admitted immediately to hospital for more than 24 hours)³⁰ During the last ten years, 1347

²⁸ *Construction Safety Campaign News*, June, 1992, p.1

²⁹ Health and Safety Commission Annual Report, 1992-3, p.95. The 1993/4 report offers provisional statistics, to be revised in the next annual report. The final figures for 1993-4 are expected to be higher than those of 1992-3 (HSE, 1994: 92).

³⁰ *Ibid.* p.91

construction workers have been killed at work. No construction company director has ever been sentenced to immediate custody in respect of any site death even although many of those fatalities have resulted from irresponsibility far grosser than that for which many drivers or 'ordinary' criminals have exhibited. There is even evidence of judicial concern that crime of this sort is going unpunished. Giving judgement in a case involving the prosecution of a company for HSWA violations, Judge Andrew Brookes stated:

"If there is evidence against the company there must be evidence against the directors, mustn't there? I can't send the company to prison can I? The trouble is a great number of construction workers meet their deaths in this country because the employer doesn't provide a safe place to work. They get away with it. The law must be a great deal stricter. It must be made clearer to employers they will face prison."³¹

The perceived leniency in the way companies are treated was recently exposed when five construction workers were killed in two days.³² In a climate where there are only 120 construction inspectors to cover Britain's 100,000 building

³¹ Demolition UK, of Birkenhead, Merseyside, were prosecuted by the HSE following the death of John Rowland (58) who fell 18 storeys down an unguarded lift shaft of a tower block in east London. *The Independent*, 28 September, 1994; *The Times*, 28 September, 1994; HSIB 1993.

³² *The Independent* 2, 3 August 1995.

sites, are where there is a growing public concern for the law to be seen to be taking corporate negligence seriously, there is a likelihood that the indulgence shown by the HSE and the courts to some employers in the past will not obtain in future.

Absolute liability

In *R v. British Steel plc* [1995] 1WLR 1356 CA, the Court of Appeal held that a corporate employer was not able to avoid liability for an offence under s. 3(1) of the Health and Safety at Work etc. Act 1974 on the basis that the company at "directing mind" or senior management level was not involved in the offence, having taken all reasonable care to delegate supervision of the work in question. Subject to the defence of reasonable practicality, section 3(1) imposed absolute criminal liability.

The case arose from the death of a worker at a British Steel (BS) plant on 29 July, 1990. The man was one of two subcontracted by BS to re-position a 7.5 tonne section of steel platform. The contract was on a labour only basis, with equipment and supervision being provided by BS. The platform had been cut free of nearly all its supports but not secured by a crane when one of the men was working underneath it. When the other man walked on the platform it crashed down crushing the worker below. British Steel argued that since it had

delegated supervision of the work to a senior engineer in its employment, it had done all that was "reasonably practicable" to ensure the safety of the two sub-contractors. Section 3 of the 1974 Act provides:

"(1) 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 all persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."

BS were convicted of the offence at the Crown Court. Noting one of the general points argued in this paper - that the judicial attitude to health and safety matters is becoming less sympathetic to employers - it is interesting to note something that occurred at trial. Whereas counsel for both sides had agreed that the company would have a defence if a senior manager had taken all reasonable care to delegate supervision of the operation to a senior engineer, this point was rejected by the judge. Judge Crabtree gave section 3 a stricter interpretation. He ruled that the defence of proper delegation did not arise.

On appeal, the company argued that, properly construed, s.3 (1) permitted a company to escape criminal liability if at directing mind level it had taken reasonable care. Their Lordships were invited to read s. 3 as if the words "through senior management" appeared immediately after the word

"employer" in the section. Counsel relied on the decision in *Tesco Supermarkets v. Natrass* [1972] AC 153, a case involving a charge under the Trades Description Act 1968; a decision which assisted BS because it turned on an important distinction between wrongdoing by those controlling the company at director level and those merely working as employees. Section 24(1) of the 1968 Act provided that it should be a defence for a person charged with an offence under the Act to prove:

"... (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence..."

The question arose whether the acts of the shop managers were the acts of the company itself. Lord Reid had concluded that:

"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 shop managers were not acts of the company itself." (at p 175A)

Thus, in that case, the company was able to establish a defence that the commission of the offence was due to a mistake, or to the act or default of another person, namely the store manager, himself an employee.

The presence of the "due diligence" defence was a powerful indication that the purpose of the 1968 Act must have been to penalise those at fault, not those who were in no way to blame. In the court of appeal in *British Steel*, Lord Justice Steyn thought it significant that there was no "due diligence" defence in the 1974 Act.

The Court of Appeal in BS thus rejected the applicability of *Tesco* on the grounds that (a) the earlier case, unlike the later one, swung on legislation which afforded a "due diligence" defence; and (b) the *Tesco* decision involved consumer protection, whereas the instant case involved health and safety, which, *prima facie*, required more stringent protection.

The absolute nature of the prohibition in s.3(1) had been confirmed in earlier Court of Appeal decisions like *R v. Board of Trustees of the Science Museum* [1993] 1 WLR 1171; and *R v. Associated Octel Co Ltd* ([1994] 4 All ER 1051, confirmed by the HL [1996] 4 All ER 846). The court in *British Steel* took argument on the earlier decisions but ultimately followed the precedents by which, in normal circumstances, it would be bound. Accepting British Steel's argument would have driven a juggernaut through the legislative scheme as it would have followed that an employer could avoid criminal liability where the potentially harmful event was committed by someone other than a company director. As to the defence of "reasonable practicality", the Court of Appeal

held that, following *Taylor v Coalite Oils & Chemicals Ltd* [1967] KIR 315 CA, it was a narrow one, analogous to the defence under s 29(1) of the Factories Act 1961, which simply comprehended the idea of measures taken to avert the risks to health and safety.

As Lord Justice Stewart-Smith observes in *Octel*, s3(1) was framed to achieve a result, namely that persons not employed were not exposed to risks to their health and safety by the conduct of the undertaking. If British Steel's argument was accepted, it would be particularly easy for large industrial companies, engaged in multifarious hazardous operations, to escape liability on the basis that the company had, through its directing mind or senior management was not involved. That, observed, Lord Justice Steyn would "emasculate the legislation". In fact, he ruled, it would not be necessary in cases such as this to discover whether employees were part of senior management or not. Another factor which weighed with the Court was the observation that if a company could only be liable under s3(1) for acts or omissions of senior management would greatly prolong many prosecutions. Interestingly, this thinking is comparable to that of the Law Commission's proposal to facilitate prosecutions for corporate manslaughter.³³

³³ Law Commission (1994) *Involuntary Manslaughter*, Consultation Paper No. 135. London: HMSO

In confirming the Court of Appeal's decision in *Octel*, the House of Lords in that case held that an employer's vicarious liability for the tortious act of another was not to be confused with the duty imposed by s 3 of the 1974 Act upon the employer himself, since vicarious liability depended on the nature of the contractual relationship between the employer and the tortfeasor and whether the tortfeasor was acting within the scope of his duties under a contract of employment, whereas the statutory duty was defined by reference to a certain kind of activity, namely the conduct by the employer of his undertaking irrespective of the nature of the contractual relationships by which he chose to conduct it. Section 3 imposed a duty on the employer to conduct his undertaking in such a way that, subject to reasonable practicability, it did not create risks to people's health and safety. If the employer engaged an independent contractor to do work which formed part of the conduct of his undertaking, he was required by s 3(1) to stipulate for whatever conditions were reasonably practicable to avoid employees of the independent contractor being exposed to such risks. In doing so he had to take reasonably practical steps to avoid risk to the contractor's employees which arose not merely from the physical state of the premises but also from the inadequacy of the arrangements made with the contractors for carrying out the work, and if he omitted to do so he could not claim that he was not in a position to exercise any control. The decisive question in determining culpability under s 3, therefore, was not whether the employer was vicariously liable or in a position to exercise control over work carried out by an independent contractor but simply whether

the activity in question could be described as part of the employer's undertaking. That was a question of fact in each case. Key questions will often be whether (*per* Lord Hoffmann at 852a) the activity took place on the employer's premises and whether the activity was "integrated within the general conduct of his business".

Clearly, these developments facilitate the conviction of employers and are thus encouraging to lawyers representing plaintiffs in actions arising from the same incidents.

Conclusion

The law has come a long way since the eighteenth-century Lord Chancellor, Baron Thurlow, denying that corporations could be criminally liable, is reported to have asked: "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?".³⁴ Equally, we have

³⁴ cited in Coffee, (1981) "No soul to damn, No body to kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich L. R. 386 at n1. See also L. Leigh *The Criminal Liability of Corporations in English Law*. London: Weidenfeld and Nicolson, at p4.

come a long way since 1974 when Lord Justice Denning said of the Treaty of Rome that "it is like an incoming tide. It flows into the Estuaries and up the rivers. It cannot be held back."³⁵ In fact, we have even come a fair distance in the last five years. In 1990, Lord Denning delivered a second thought on his tidal simile:

"No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses - to the dismay of all".³⁶

Writing in October 1997, Pamela Dix, Vice-Chairman of the group Disaster Action, expressed hope that the government will provide parliamentary time to enable the Law Commission's proposed new offence of 'corporate killing' to be legislated. She stated that Disaster Action looked forward to a time "when a corporation's actions are tempered by the knowledge that it will be held fully responsible for the consequences".³⁷ Whether or not the Law Commission's proposals are implemented, the legal stance against businesses operating in a reckless way has become more serious. Now that European and criminal law are taking a sterner attitude to reckless companies, it remains to be seen

³⁵ *H.P. Bulmer Ltd v Bollinger SA* [1974 Ch 401 at 418.

³⁶ *The Independent*, 16 July 1990.

³⁷ *The Independent*, letter, 3 October, 1997

whether this engenders corporate consciences strong enough to prevail over the commercial pressures to put profit before prudence.

If there are more prosecutions and convictions then this will assist those acting for plaintiffs in actions arising from conduct which has been deemed by the courts as criminal.