



Corporate Killing - what is the problem?

By Celia Wells

Every so often there is a major rail crash. Every so often companies are charged with gross negligence manslaughter. Every so often the government announces that it proposes to introduce a new offence of corporate killing to replace the narrow and restricted common law version. No major company has yet been convicted. And no new offence has been introduced.

Where do things stand now?

Network Rail and Balfour Beatty both currently face manslaughter charges over the four deaths in the October 2000 Hatfield rail crash (charges announced 9 July 2003). Great Western Trains were also charged with gross negligence manslaughter following the Southall rail crash in 1997, in which seven passengers died. The company was acquitted on the trial judge's direction. It appears there is still the possibility that manslaughter charges will be brought against Network Rail for its part in the Paddington (Ladbroke Grove) crash in October 1999, in which 31 people died. Thames Trains are currently being tried for health and safety offences for failures in its driver training that contributed to that crash, but will not face manslaughter charges.

The government first announced its intention to legislate a new corporate killing offence shortly after the Southall crash in 1997. It was not until 2000 that the Home Office produced a Consultation Paper, adopting in the main, the 1996 Law Commission proposals. (Report 237, 1996). This coincided with the unsuccessful challenge in the Court of Appeal to the narrow interpretation of the common law principles of corporate liability in the GWT trial, a ruling that confirmed the need for legislative intervention if this area of law were to be reformed. Ladbroke Grove had already happened, Hatfield was about happen and since then Potters Bar has happened (2002). In a carefully worded statement in May 2003, the Government appeared both to promise and to postpone action, announcing that a 'timetable' for introducing a draft bill would be announced in the autumn. Some interpreted this as a commitment to introduce the draft Bill in the 2003-4 Session, but mention of it was noticeably absent from the Queen's Speech.

What does this mean?

It would be surprising if corporations, such a central feature of social and economic life, were to have escaped the ever-increasing grasp of criminal law. They haven't. But until recently corporate liability has been at the margins, largely ignored by major theorists. All jurisdictions have a raft of provisions that specifically regulate aspects of business, such as health and safety at work, trading standards, control of financial institutions and so on. What differs between jurisdictions is the legal mechanism selected. In most common law jurisdictions (such as England and Wales, Australia, and USA) regulation of this sort is partly enforced as a branch of criminal law. Specialist agencies pursue prosecutions- this partly explains the Cinderella status of corporate liability principles. At the same time, there has been a growing expectation that corporations will be liable for 'classic' criminal law offences as well.

The creation and enforcement of regulatory schemes tends to *decriminalise* the harmful activities of business corporations, with relatively low levels of enforcement, with proceedings concentrated in the magistrates court and often resulting in low penalties. It is not always easy to say which comes first – the reluctance to use criminal law leading to specific regulation, or the existence of special regulation diverting attention from the possibility of prosecution for offences such as manslaughter, murder or assault. Either way, there is no doubt that many more deaths caused by corporations could (in theory) be prosecuted as manslaughter. However, the debate about corporate criminality in general and corporate manslaughter in particular has become considerably more focused over the last 20 years. Penalties for health and safety offences have increased (Balfour Beatty was fined £1.5 million in 1994 for offences during the construction of Heathrow Express, for example) and there are now guidelines on corporate manslaughter for inspectors.(HSE Document OC 165/5, 1993).

This attention was triggered by the sinking of the *Herald of Free Enterprise* in 1987. While P&O's prosecution for manslaughter was ultimately unsuccessful, and few companies have since been convicted of manslaughter, the *idea* of corporate manslaughter has acquired cultural recognition. It would be a mistake to think that the possibility of a manslaughter charge is an *exclusively* modern phenomenon. Cory Brothers were prosecuted in 1927 following the electrocution of an unemployed miner during the 1926 strike. The judge held that a corporation could not be indicted for an offence against the person, a ruling that was overturned in the P&O prosecution.(*R v Cory Bros*, 1927). And in the mid 19th century a Yorkshire inquest jury expressed regret that a water board could not be prosecuted for manslaughter following 78 deaths when a reservoir burst.

Why the need for reform?

In principle it is easy to find a corporation liable for a health and safety offence. The employer is liable for the actions of any employees. For offences such as manslaughter a different rule applies. The corporation is only liable if one of its senior

officers (for example a director) can be shown to have caused the deaths through their gross negligence. Proof of this can be problematic (although not impossible). Most reform proposals seek to replace this limited individual route to liability with one reflecting the role of management as a whole in allowing negligent systems of work. The Home Office may be running into business objections to the vagueness in the Law Commission's formula of management failure. Under this a corporation is guilty of corporate killing if it is caused by a management failure and that failure constitutes 'conduct falling far below what can reasonably be expected of the corporation in the circumstances.' There is management failure if the way in which a company's activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities. The 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. [Clause 4, draft *Involuntary Homicide Bill 2000*, Home Office *Reforming the Law of Involuntary Manslaughter: The Government's Proposals: 2000*]

An analogous approach is found in the concept of 'corporate culture' pioneered by the Australian Law Reform Commission in the Criminal Code Act 1995(C'th). The ACT this year became the first state to introduce an offence of Industrial Manslaughter relying on this new rule of attribution. (<http://www.cmd.act.gov.au/mediareleases/media/MR29IIM.doc>)

'Corporate culture' can be found in 'an attitude, policy, rule, course of conduct or practice within the corporate body generally or in the part of the body corporate where the offence occurred. Evidence may be led that the company's unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance.'

What about individuals?

Another question left unclear by these debates is the relationship between the liability of a corporation itself and of individuals within it. Should it be either/ or, or both? Some of the relatives of those who drowned at Zeebrugge were concerned at the time of the inquest that the blame should not be borne by those who operated the ship but by the company who managed both them and the ship. But the experience of the Health and Safety Executive suggests that corporate liability allows companies and their directors to evade rather than to take responsibility. The HSE has recently published its policy on the prosecution of individuals (OC 130/8 2003)

How do we reconcile these two arguments – that corporations should be pursued more often, and that, where they are prosecuted, the individual directors generally escape responsibility? The answer lies partly in the nature of the offences concerned and partly in differentiating between directors and more lowly employees. The relatives at Zeebrugge did not want ship-level operatives to take the blame for *management* failure, while the HSE is concerned that

management does not hide behind the corporation which, as the 'employer' is the most obvious defendant in health and safety prosecutions.

The Law Commission did not think that individual directors should be liable under the new corporate killing offence (although the existing manslaughter offence would still be available). The Home Office originally disagreed (2000) but the latest indication is that they have succumbed to pressure to exclude directorial connivance in the new offence. (Centre for Corporate Accountability http://www.corporateaccountability.org/rb/co/mans_offence.htm)

From which we might conclude that

There have been significant changes in the landscape of corporate manslaughter in the UK- more awareness, more investigations, more prosecutions. But as yet, no new offence and no conviction of a major company.