# Chapter 3
# Corporate Criminal Liability in England and Wales: Past, Present, and Future

**Celia Wells**

## Contents



## 3.1 Introduction

We usually think of law reform as a three-stage sequence in which an issue inadequately covered by existing law is identified, followed by proposals to fill that gap, leading to legislative change and improvement. The recent

C. Wells (✉)
Professor of Criminal Law, University of Bristol, Bristol, UK
e-mail: Celia.Wells@bristol.ac.uk

M. Pieth, R. Ivory (eds.), *Corporate Criminal Liability*, Ius Gentium: Comparative Perspectives on Law and Justice 9, DOI 10.1007/978-94-007-0674-3_3,
© Springer Science+Business Media B.V. 2011

history of corporate criminal liability in England and Wales has transposed the last two stages of this process.[1] During the period that the reform of corporate criminal liability has been under consideration by the Law Commission of England and Wales (LCEW), legislation dealing with two discrete offenses, corporate manslaughter and bribery, has introduced two more versions of corporate liability to add to the existing principles that apply to other offenses.[2] The commission's project began by looking at corporate criminal liability in general but it has metamorphosed over the period of review into "Criminal Liability in Regulatory Contexts".[3] My aim in this chapter is to shed some light on the confused and changing picture of the criminal liabilities of corporations in England and Wales. I will only be discussing the liability of the corporation or organization *as* an entity, *as* a legal person, although in many cases there may be parallel or alternative liability of directors, officers, employees, or agents.[4] The chapter is in five parts: the theoretical background, common law principles, corporate manslaughter, bribery, and reform proposals.[5]

## 3.2 Theoretical Background

Corporations are slippery subjects.[6] Images are everything: images of crime, of "criminals", of risk and safety, of business, and of government. At one level, the argument in respect of corporate criminal liability is about the metaphysical, at another about the functions, purposes, and complexity of legal responses, and at yet another about variations in procedure and enforcement mechanisms. Corporations are legal, not human, persons, it is said, and together they are the lynchpin of prosperity, the driving force behind modern life. How can it make sense to bring them kicking and screaming before a criminal court, when they can only kick and scream through their human agents? Oddly perhaps, these questions are not asked when corporations are the subject of administrative regulation or private law suits. Criminal law has some distinctive characteristics: it is pre-eminently concerned with standards of behavior, backed by a system

[1]This chapter deals mainly with England and Wales but some legislation, particularly in the regulatory field, applies across all parts of the United Kingdom and thus includes Scotland and Northern Ireland.

[2]The Law Commission's program of criminal law reform has been interrupted by specific government referrals on bribery and homicide.

[3]Consultation Paper No. 195, 2010, see further below at 3.6.

[4]Either directly or via a common statutory "consent and connivance" provision, which links directors to corporate offenses, see Stark (this volume).

[5]The chapter draws on a number of my publications: Wells 2001; 2006; 2008; 2009; 2010.

[6]Friedman 2000 likens them to poltergeists. See, generally, Wells 2001.

of state punishment, and usually requires proof of fault such as intention, knowledge, or recklessness. In contrast, tort law, which functions mainly to compensate for harm caused, has a lower standard of proof, and uses broad objective notions of negligence; a company or other person can insure against the risk of civil, but not criminal, liability.

There is, however, much in modern regulatory systems that challenges the simple functional distinction between criminal laws that punish and private (tort) laws that compensate. Health and safety, financial, and other regulation are prime examples of the blurred edges between these two visions. In some jurisdictions, health and safety regulation occupies a formal position outside criminal law, attracting administrative penalties, which to some extent sidestep the problem of corporate criminal liability. In England and Wales, health and safety laws (and other regulation) have been tacked onto criminal law, rather like an ill-fitting and unwelcome extension. These regulatory schemes share some characteristics of mainstream criminal law – not least that they use criminal procedures and impose criminal penalties – but in other ways they are quite different from, and are certainly perceived by the specialist enforcement agencies and those they regulate as quite distinct from, criminal law. There is often a close relationship between the regulators and the regulated: standards are set, warnings are issued, and formal enforcement employed as a last resort.[7] The offenses themselves are defined not in terms of results (such as causing death) but in terms of failure to comply with risk-assessed standards and are often based on strict liability since they do not require proof of fault. Although regulatory schemes are a clear response to industrialization and globalization, they do not generally distinguish between the individual entrepreneur and the incorporated company; they address "employers" or "sellers", and it is left to the courts to interpret these terms to include corporations and to devise rules of attribution, as appropriate. Somewhat ironically, given that administrative or "civil" penalties emerged in jurisdictions that did not have the option of corporate criminal liability, regulatory agencies in England and Wales have begun to use negotiated "civil" penalties.[8]

Even in jurisdictions that have long recognized corporate criminal responsibility, this concept has been treated as something of an outcast, to be tolerated rather than encouraged. That is partly because criminal law had already absorbed ideas of individualist rationality and moral autonomy by the time that corporations became significant social actors. Thus, criminal law was endowed a limited conceptual vocabulary with which to adapt to the developing dominance of business corporations. It described corporations through a dualist anthropomorphic metaphor, namely the "brains" of management and the "hands" of workers. Three key features recur in any

[7] See, generally, Hawkins 2002.
[8] Wells 2010a.

discussion of corporate criminal liability: corporate personality, corporate responsibility, and corporate culture.

### *3.2.1 Corporate Personality*

Corporate liability proceeds from the assumption that a corporation is a separate legal entity, in other words that it is a *legal* person, a term that can include states, local authorities, and universities. We should clarify what it means to say that an entity is a legal person. As Hart wrote: "In law as elsewhere, we can know and yet not understand."[9] The word "corporation" does not correspond with a known fact or possess a useful synonym. Lying behind the question "What is a corporation?" is often the question "Should they be recognized in law?" It is the *context* in which we use words that matters. Sometimes we want to describe (and therefore ascribe responsibility to) a corporation as a collection or aggregation of individuals and sometimes as a unified whole. Thus, Hart suggests the better question is not "What *is* a corporation?" but "Under what conditions do we refer to numbers and sequences of men as aggregates of individuals and under what conditions do we adopt instead unifying phrases extended by analogy from individuals?"[10]

This then leads to the conclusion that we cannot deduce whether, why, or how to hold a corporation liable for criminal conduct by defining what a company is. If we state that it is a mere fiction or that it has no mind and therefore cannot intend, we "confuse the issue."[11] Nor does it help to decide whether a corporation is either a person or a thing. A corporation is neither exclusively a "person" nor a "thing".[12] As Iwai argues, the corporation is both a *subject* holder of a property right – its assets – and an *object* of property rights – the interests of its shareholders, its owners. It is the "person/thing duality" that accounts for most of the confusion about the essence of a corporation.[13]

Organizations usually begin with a single instrumental purpose; they are a means to an end.[14] But they often become more like *an end in themselves*, preserving their existence in order to survive and, importantly, acquiring an autonomous character or, as some have put it, taking on a

[9]Hart 1954. See also Hoffmann 2003, xiv.

[10]Hart 1954, 56.

[11]Hart 1954, 57.

[12]Iwai 1999. See also Note 2001 observing the categories of human person, human non-person, and non-human person.

[13]Iwai 1999, 593.

[14]Harding 2007, Ch. 2 distinguishes organizations of governance and representation from organizations of enterprise, although the categories may overlap. Here I am talking more of organizations of enterprise.

social reality. This is important because it shows us the error in seeing all corporations or organizations in the same light. It does not help to say that a corporation is "only" a shell, a nominalism, any more than to say the opposite, that a corporation is necessarily "real". Sometimes they are one, sometimes the other.

The notion of treating a collection of individuals *under one name* is neither new nor is it confined to organizations that are also separate entities. An *unincorporated* association can be a "person". An unincorporated association is not a separate entity, it does not have separate legal personality, but that does not prevent its being prosecutable. As the Court of Appeal has put it, the "simple legal dichotomy" between the separate legal personality of the corporation and the unincorporated association is deceptive, concealing a more complicated factual and legal position.[15]

### *3.2.2 Responsibility*

Harding reminds us that responsibility means accountability or answerability,[16] it is "the allocating device which attaches such obligations to particular persons or subjects of the order in question."[17] Responsibility is an umbrella term under which shelter four different senses or meanings: role-responsibility, capacity-responsibility, causal-responsibility, and liability-responsibility.[18] *Role* responsibility is a useful concept in the context of corporate liability. There are two sides to this. One aspect is that individuals within organizations have specific roles or duties or individuals "take responsibility" for the actions or mistakes of others. A second aspect is that individuals and organizations themselves may bear responsibility for an activity. An example here would be the owner of a ship or of an aeroplane. Owners of ships, planes, and trains have responsibilities.[19] Employers have responsibilities.

*Capacity* responsibility refers to the attributes, rationality, and awareness, necessary to qualify someone as a responsible agent. This is often seen as the stumbling block to corporate or organizational liability for it appears to assume human cognition and volition. If we are to accept *the idea* of corporate responsibility, we must necessarily find a different way of expressing capacity than one that immediately precludes anything other

---

[15] *R* v. *L* (*R*) *and F*(*J*) [2008] EWCA Crim 1970 (Hughes LJ).

[16] Harding 2007, Ch. 5, quoting Hart 1968, 265.

[17] Harding 2007, 103.

[18] From Hart 1968, Ch. IX. The discussion here is taken from Harding 2007, Ch. 5.

[19] Much of the jurisprudence on the "directing mind" of the company derives from civil maritime liability cases. See cases cited in *Meridian Global Funds Management Asia Ltd* v. *The Securities Commission* [1995] 3 WLR 413.

than an individual human. While this is an argument that has underpinned the work of the increasing number of scholars in the field,[20] it is raised here in headline terms in order that it can be seen for what it is – an argument about one sort of thing (human individuals) applied to another thing (corporate "persons"). For a corporate person to be liable, a form of capacity that is relevant to the corporate person is required. The fact that the capacities relevant to humans are inappropriate is neither here nor there.

The third dimension, *causal* responsibility, can be seen as the link between role and capacity responsibility and liability.[21] Thus, if car driver, X (role), has capacity (she is not attacked by a swarm of bees) and she crashes into Y's property, she has caused damage and may be liable for causing damage. But on another view, cause responsibility is more blurred, crossing into, and affecting the assessment of, capacity or role.[22] Car park attendant, P, negligently directs X to reverse into a parking place, causing her to damage another car. Has X caused that damage? Or was her role responsibility affected by the supervision of the attendant? As Harding states, such "causal complexity can be seen very clearly in a situation involving both individual and organizational actors."[23]

*Liability* responsibility is the culmination of the three senses of responsibility outlined above. Because establishing liability is the allocating device referred to earlier, it provides the *raison d'etre* for, and is the purpose behind, establishing role, capacity, and causal responsibility.

### *3.2.3 Corporate Actors and Corporate Culture*

The third key feature is that of the organization as an autonomous actor, one that "transcends specific individual contributions."[24] "Theories of organizations tend to confirm that it is right to think of the corporation as a real entity; they tell us something about how decisions are made and the relationship between the individual, the organization, and wider social structures."[25]

Acceptance of the corporation as an organizational actor in its own right is similar to that of the state in international law.[26] Harding suggests four

[20] Fisse/Braithwaite 1993; Gobert/Punch 2003; Leigh 1969; Wells 2001.
[21] Broadly the view of Hart/Honore 1968, see Harding 2007, 111.
[22] Broadly the view of Norrie 1991.
[23] Harding 2007, 111.
[24] See Harding 2007, 226 et seq.; Wells 2001, Ch. 4.
[25] Wells 2001, 151.
[26] Wells/Elias 2005, 155.

conditions for autonomous action: an organizational rationality (decision-making); an irrelevance of persons (that human actors occupy roles and can be replaced in those roles); a structure and capacity for autonomous action (physical infrastructure and a recognizable identity); and a representative role (that it exists for a purpose, the pursuit of common goals).[27]

## 3.3 Common Law Principles

Criminal offenses in England and Wales first developed through the common law (in the sense of decided cases), although many have since been partly or wholly defined by statute and yet more are creatures of statute. Under successive Interpretation Acts the word "person" in a statute includes corporations.[28] The general principles of criminal law are also a mixture of common law and statute. This creates the possibility – as has occurred with corporate liability – of a complex and not necessarily consistent set of rules. The *general* principles in relation to corporate liability are not in statutory form. They apply to all criminal offenses unless a statute specifically provides otherwise, as is the case with corporate manslaughter and bribery. Two main types of corporate liability evolved applying to different groups of offenses. The history has been patchy, subject to the ebbs and flows of ideological and judicial preferences, and any attempt to see it as in any way logical or incremental is likely to be unrewarding. Very roughly, we can say that agency or vicarious liability applies only to regulatory offenses, many of which are offenses of strict liability and do not require proof of fault, and identification liability applies only to non-regulatory offenses, most of which require proof of fault. Where the vicarious route applies, the corporate entity will be liable for any offenses committed by its employees or agents. The company could be summonsed and fined if, for example, one of its employees sold food that was unfit for consumption. The reasoning was that the company/employer was the contracting party in the transaction, the employee merely the means through which the sale was concluded. This also fitted with a reluctant acceptance of the need for regulation; as these were not "really" criminal offenses in the true sense, the defendant corporations were not "really" criminal.

The idea that corporations might be able to commit "proper" offenses, ones that required proof of intention or knowledge or subjective recklessness, was resisted until the mid-twentieth century. The perceived difficulty

[27] Harding 2007, Ch. 9.

[28] Since 1827, Interpretation Acts have stated that, in the absence of contrary intention, the word "person" includes corporations: see now Interpretation Act 1978 c. 30. Courts in fact were generous in finding contrary intention and rarely did so when the offense required proof of fault.

of attributing *mens rea* to a soulless body was overcome by the invention of the doctrine of identification (or controlling mind). Applying to non-regulatory fault-based offenses, this attributes to the corporation only the acts and *mens rea* of the top echelon senior officers of the company. As the so-called mind or "brain" of the company, the directors and other senior officers are "identified" with it. More significantly, of course, a company is then *not* liable for offenses carried out by any managers or groups of employees lower down the chain. While radical in extending corporate liability to serious offenses, this development later served a sceptical judiciary with a perfect alibi in their distaste for criminal liability applied to businesses. In the third quarter of the twentieth century the mood was pro business; financial fraud was one thing, holding businesses criminally liable beyond that was another.

In contrast, courts have been increasingly sympathetic to a broad and more punitive corporate liability in regulatory areas such as health and safety and environmental protection over the last 20 years. The Health and Safety at Work etc. Act 1974 c. 37 (HSW Act) imposes on employers a duty "to ensure, so far as is reasonably practicable, the health, safety and welfare at work, of all his employees."[29] It is an offense "to fail to discharge" this duty.[30] Ruling on the respective burdens on the prosecution and defense in such cases, the House of Lords made clear that the onus is on the employer, which will often be a corporation, to show that it was not reasonably practicable to prevent a breach of the duty; there is no obligation on the prosecution to give chapter and verse on the particulars of the breach of duty so long as a *prima facie* breach is established.[31] Lord Hope pointed to three factors: that the act's purpose was both social and economic; that duty holders were persons who had chosen to engage in work or commercial activity and were in charge of it; and that, in choosing to operate in a regulated sphere, they must be taken to have accepted the regulatory controls that went with it.[32]

Prosecution of non-regulatory criminal offenses is undertaken by the Crown Prosecution Service (CPS). There is an evidential threshold (a realistic prospect of conviction) and a public interest threshold.[33] Specific guidance on corporate prosecutions states that prosecution of a company

[29]HSW Act, s. 3.

[30]HSW Act, s. 33. Section 40 provides that the onus is on the employer to show that all reasonably practicable steps have been taken. Weismann 2007 argues that liability should follow where corporation lacks adequate compliance.

[31]*R* v. *Chargot Ltd* [2008] UKHL 73, para. 21. The Supreme Court has now replaced the House of Lords as the final appellate court.

[32][2008] UKHL 73, para. 29.

[33]CPS 2010a, paras. 4.1 et seq.

should not be a substitute for individual liability.[34] In assessing the public interest, prosecutors should take into account the value of gain or loss, the risk of harm to the public and unidentified victims, to shareholders, employees and creditors, and the stability of financial markets and international trade: "A prosecution will usually take place unless there are public interest factors against prosecution which clearly outweigh those tending in favor of prosecution."[35] Factors in favor of prosecution include: the existence of previous criminal, civil, and regulatory enforcement actions against the company; evidence that the alleged conduct is part of the established business practices of the company; the ineffectiveness of any corporate compliance programs; the issuance of previous warnings to the company; and the company's failure to self-report within a reasonable time of its learning of the wrongdoing. Factors against prosecution include: proactive responses by the company, such as self-reporting and remedial actions; a clean record; the existence of a good compliance program; and "the availability of civil or regulatory remedies that are likely to be effective and more proportionate." This last factor suggests that, where there is an alternative regulatory offense, suspected corporate offenders continue to attract a hands off, or a kid glove protective hand, prosecution policy.

## 3.4 Corporate Manslaughter

The first attempted prosecution of a company for manslaughter arose from the 1926 strike by miners. In a pattern repeated even now, the company employed the best lawyers of the day to challenge the legal basis of the indictment. At the trial, the case was dismissed on the ground that it was not possible to prosecute a company for a serious offense, such as manslaughter.[36] This was consistent with the idea that companies could be regulated but they were not "real" criminals. They might avoid tax but they were not fraudsters, for example. They might cause death to their workers or to the public but this was a price to pay for legitimate commerce. Over time and in areas such as revenue fraud, the courts became less tolerant and eventually developed the narrow identification route for holding corporations liable for offenses requiring intention or knowledge.[37] But the idea that a corporation might commit an offense of violence, such as manslaughter, was a step too far and lay dormant until the early 1990s. Why did it revive then? Disasters such as rail crashes, ferry capsizes, and industrial plant explosions led to calls for enterprises to be prosecuted for manslaughter. The

[34] CPS 2010b, para. 8.
[35] CPS 2010b, para. 30.
[36] *R* v. *Cory Bros Ltd* [1927] 1 KB 810.
[37] Wells 2001, 93 et seq.

campaign for corporate accountability reflected changes in risk perception and a more secular blaming culture to which factors such as twenty-four hour news as events unfold and the politicization of crime in the last 20 years have contributed.

This "cultural shift" towards blaming collective institutions for the misfortunes that befall us[38] led to a quantum leap in legal discourse and the changed perception of health and safety laws already described. There is a confusion in many of the contemporary arguments about corporate manslaughter. It is viewed by some proponents as reinforcing health and safety at work legislation, ensuring that companies take safety more seriously. For others, however, it has more symbolic and less instrumental appeal. Unlike health and safety regulation (which operates through a model of shared responsibility between employers and employees, and a partnership between the specialist regulators and the industries they oversee) the use of mainstream criminal law represents a clear denunciation in the form of naming and shaming where corporate negligence has caused death.[39]

There are multiple potential targets of blame in relation to negligently-caused disasters or work-related deaths. Blame can be placed on one, or a combination of, three potential defendants: the frontline operator; individual directors and officers; and the company or employing organization. It is now more likely that professional negligence will lead to the prosecution of an individual for manslaughter.[40] There has been an increase in the fines imposed for health and safety offenses that are brought against employers, who may or may not be companies, and also an increase in the number of fatal cases referred to the Crown Prosecution Service for parallel manslaughter investigations.[41] As a result, there have been more work-related manslaughter prosecutions against both individuals and companies. Although running at two or three a year, this represents a significant increase from the total of ten in the 50 years up to 1998.[42] Yet, the courts continued to demonstrate reluctance to embrace corporate manslaughter, resisting opportunities to mold the identification principle into something more appropriate for large-scale corporations, suggesting this must be a matter for the legislature. The result was that the few successful manslaughter prosecutions have been confined to small enterprises or sole traders. This is ironic in two respects: the conviction of a very small company achieves little since the legal separation of the legal person from those who

[38] See, generally, Douglas 1992.

[39] This is, of course, a caricature of a much more complex picture.

[40] Quick 2006.

[41] The *Work Related Deaths Protocol for Liaison*, which was introduced in 1998, has improved inter-agency cooperation.

[42] As reported by the Centre for Corporate Accountability 2002.

run it is notional; and the courts' unwillingness to adapt the identification principle belied the fact that it was their own invention in the first place.

The Corporate Manslaughter and Corporate Homicide Act 2007 c. 19 (CMCH Act) (applying to the whole of the UK) introduced a stand-alone offense of corporate manslaughter, which in Scotland will be known as corporate homicide.[43] For deaths after April 2008, organizations can no longer be prosecuted under common law gross negligence manslaughter.[44] Neither individual directors nor senior managers can be liable for this offense.[45] The organization's culpability builds on that of senior management but only the organization can be charged with corporate manslaughter.[46] The act is complex and the offense definition itself is full of ambiguities and interpretive uncertainty.[47] It appeared as the result of an unwanted pregnancy. The government had begun the reproductive process with promises made at the start of Labour's period in office in 1997. By the time the egg was fertilized, a strong case of parental cold feet had set in and the infant by no means received the loving care that would nurture its full potential.[48] The discussion is ordered as follows: the offense itself; the threshold question ("To which organizations does the CMCH Act apply?"); the relevant duty of care; the conduct element (causing death); the culpability element (gross breach); the role of senior management; the exemptions for public activities; penalties and prosecution policy.

### *3.4.1 The Offense*

An *organization* will commit the offense *if the way in which it manages or organizes its activities* both *causes a death* and amounts to *a gross breach of a relevant duty of care* owed by the organization to the deceased.[49] The offense is only committed if the way senior management have managed or organized activities has played a substantial role in the gross breach.[50]

### *3.4.2 The Threshold Question*

All corporations and some unincorporated bodies (such as trade unions, employers' organizations, and partnerships that are also employers), police

[43] CMCH Act (UK), s. 1(5)(b).
[44] CMCH Act (UK), s. 20.
[45] CMCH Act (UK), s. 18.
[46] CMCH Act (UK), s. 18.
[47] Ormerod/Taylor 2008.
[48] Wells 2001 and 2005.
[49] CMCH Act (UK), s. 1(1).
[50] CMCH Act (UK), s. 1(3).

forces, and most Crown bodies are covered.[51] The death (or the harm which led to the death) has to occur in the UK.[52]

### *3.4.3 The Relevant Duty of Care*

The core of the definition relates the relevant duty to the private law of negligence.[53] The notion of breach of duty of care appeared in the leading House of Lords case on common law manslaughter.[54] Under the CMCH Act it includes the duties owed to employees, as occupier of premises, as a supplier of goods or services, construction or maintenance or other commercial activity, and to those detained in custody.

### *3.4.4 Causing Death*

There needs to be a death of a person to whom a duty was owed. Taken from the prosecutor's standpoint, the CMCH Act does not make things easy in terms of causation. It requires proof that a death was caused "by the way that an organization managed or organized its activities". The difficulty is that, of course, organizations act through individuals, through frontline workers as well as through managers. In anticipation of the potential difficulties in showing how an organization *causes* a result, the LCEW, in its draft bill on corporate killing, included an explanatory provision that a management 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*."[55] The government argued that causation is no longer a difficult issue in criminal law.[56] This was an extraordinary statement. Both in civil and in criminal law causation is fraught with problems. The House of Lords, in quashing a conviction for manslaughter, commented that, "Causation is not a single unvarying concept to be mechanically applied without regard to the context in which the question arises."[57] The causation notes in the CPS Guidelines on corporate manslaughter state that although it will not be necessary for the management failure to have been the sole cause of death, "the prosecution will need to show that 'but for' the management failure *(including the substantial element attributable to senior management),*

[51] CMCH Act (UK), s. 1(2).
[52] CMCH Act (UK), s. 28(3).
[53] CMCH Act (UK), s. 2.
[54] *R* v. *Adomako* [1995] 1 AC 171.
[55] LCEW 1996, cl. 4 (2)(b), emphasis added.
[56] During the scrutiny of the Draft Corporate Manslaughter Bill in 2005.
[57] *R* v. *Kennedy* [2007] UKHL 38.

the death would not have occurred."[58] But what s. 1(1) CMCH Act in fact states is that the organization is guilty if the way its activities are managed "(a) causes a person's death and (b) amounts to a gross breach of a relevant duty of care…". The qualification in relation to senior management in s. 1(3) refers to the "breach". The guidelines have conflated the two elements of causation and breach of duty of care. Causation may be difficult to prove – and will certainly give rise to legal argument – in large public authorities or corporations. Nonetheless it is curiously under-defined in an act which over-defines, as we have seen, in relation to threshold and also, as will now be shown, to culpability issues.

### *3.4.5 The Culpability Element*

Suppose, then, that a death has occurred and that it can be said to have been caused by the way that the organization's activities were managed or organized. In addition, it must be shown that there was *a gross* breach of a relevant duty. Most commentators regard it as appropriate to limit any corporate manslaughter offense to *gross* breaches. A departure from a standard of care is "gross" if the "conduct… falls far below what can reasonably be expected of the organization in the circumstances."[59] This builds on the common law definition of gross negligence but avoids the circularity of saying that the *criminal* standard for negligence is met when the jury thinks the breach was *criminal*.[60] The CMCH Act goes further, providing some factors for the jury to take into account. Again, these seem to complicate rather than clarify.

To begin with, the "the jury must consider whether the evidence shows that the organization failed to comply with any health and safety legislation that relates to the alleged breach…" and, if so, how serious the failure was and how much of a risk it posed.[61] Section 8 continues that a jury *may* also consider the extent to which the evidence shows that there were "attitudes, policies, systems or accepted practices within the organization" that were likely to have encouraged, or produced tolerance of, the failure to comply with such legislation. They may also have regard to any health and safety guidance relating to the breach. These are effective instructions to the trial judge. She must instruct the jury to take into account breaches of health and safety legislation. But how that is taken into account will be left to the mysteries of the jury room. She must instruct the jury that they may take into account company culture and/or breaches of guidance. It is also

[58] CPS Guidelines (emphasis added).
[59] CMCH Act (UK), s. 1(4)(b).
[60] *R* v. *Adomako* [1995] 1 AC 171.
[61] CMCH Act (UK), s. 8(2).

explicitly stated that none of this prevents the jury from having regard to other matters they consider relevant. This is odd. In one sense, s. 8 states the obvious for it must be reasonable to expect an organization to have regard to health and safety legislation and guidance. The rest is not mandatory. And none of this actually helps the jury decide whether the failure is "gross" or falls "far below" what can be reasonably expected.

### *3.4.6 Senior Management*

The offense is only committed if the way senior management have managed or organized activities has played a substantial role in the gross breach.[62] This in turn means we need to know to whom or what "senior management" refers. "Senior management" means the persons who play "significant roles" in making decisions about, or in actually managing, the "whole or a substantial part" of the organization's activities.[63] It might appear that the more definitions we are given the better except that the adjectives "significant" and "substantial" leave much room for debate. What does "substantial" mean? It is used twice – once to define the extent to which senior management is involved in the breach and once to define those within an organization who might be regarded as "senior" management. Often in criminal law, the word, "substantial", is broad denoting *de minimis* – not much more than a minimum. In common usage, it can mean something much more restrictive, more like "a large part of". In relation to its use to define those within an organization who might be regarded as part of the *senior* management, it could well be interpreted as including only a narrow range of people whose responsibilities are central to the organization's decision-making. The reasoning here is that "substantial" supplements "the whole", suggesting that it means something close to the whole if not the whole itself. And this still leaves the question of "significant" role. Far from addressing the difficulties in capturing organizational fault, the CMCH Act slips between two grammatical uses of the word "management". The term "management" can mean either "the action or manner of managing", or the "power of managing", or it could function as a collective noun for "a governing body".[64] By requiring the substantial involvement of "senior management" and then defining this body as "those persons who play significant roles", the act gives the lie to the government's claimed commitment to an organizational version of fault that is not derivative on the actions of specified individuals.

---

[62] CMCH Act (UK), s. 1(3).

[63] S. 1(4)(c).

[64] That is, it can be an adjectival or collective noun, Shorter Oxford English Dictionary 1977.

### 3.4.7 The Exemptions

The CMCH Act does, however, circumscribe when a public authority, as opposed to a commercial organization, may be liable. Section 3(1) states that a "duty of care owed by a public authority in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests) is not a 'relevant duty of care'." An exclusively public function is one that either falls within the Crown prerogative or is "by its nature, exercisable only with authority conferred by or under a statutory provision".[65] This means, "the *nature* of the activity involved must be one that requires a statutory or prerogative basis, for example, licensing drugs or conducting international diplomacy."[66] It would not cover an activity "simply because it was one that required a license or took place on a statutory basis."[67] In other words, merely because a function is carried out by a public body or free of charge to the public does not make it "exclusively public". Indeed, if the CMCH Act is interpreted to mean anything else it would render almost nugatory any role in relation to public authorities acting in any capacity other than as employers or occupiers. Emergencies provide a further set of (complicated) exceptions that would be relevant in the health care context.[68]

### 3.4.8 Penalties

The CMCH Act provides for three types of penalty: a fine, a publicity order, and/or a remedial order. The maximum fine is unlimited as it is for offenses under the HSW Act when sentenced in the Crown Court. Combined sentencing guidelines for corporate manslaughter *and* health and safety offenses causing death were published in January 2010.[69] The factors that courts should consider in assessing the financial consequences of a fine include: the effect on the employment of the innocent; the effect upon the provision of services to the public.

A *publicity order* would require an organization convicted of corporate manslaughter to advertise the fact of its conviction, specify particulars of the offense, the amount of any fine imposed, and the terms of any remedial order that has been made. The purpose of the *remedial order* under which an organization may be ordered to take steps to remedy the breach is unclear. This is another example of confusing the underlying aims of an

[65] CMCH Act (UK), s. 3(4).
[66] CPS Guidelines.
[67] Ministry of Justice, Explanatory Notes, para. 27.
[68] CMCH Act (UK), s. 6
[69] Sentencing Guidance Council 2010. See Davies 2010.

offense of corporate manslaughter. Rather than minimizing risk directly, which is the main function of health and safety regulation, the aim of this offense is to punish in a retributive sense. It may secondarily act as a general deterrent or encouragement to take safety compliance more seriously but the time lag between the event and the trial renders the idea of relevant remedial action impractical. A manslaughter trial would not, in any case, be the most effective forum in which to decide on appropriate remedial action. The penalty for failing to comply with any remedial order, a fine, would again only be enforceable against the organization itself. The government has rejected the suggestion that company directors should be liable for failing to take the specified steps.

### *3.4.9 Prosecution Policy*

The CPS guidance[70] draws attention to many of the points of uncertainty in the CMCH Act. It also deals explicitly with the relationship between prosecutions for the new offense and those under health and safety legislation, which are prosecuted by the Health and Safety Executive (HSE). Any organization that is an employer could be liable for HSW Act offenses as well as for manslaughter. The guidance refers to the existing protocol for liaison agreed between the CPS, the HSE, and other regulatory agencies under which each agency will investigate within its own area of operation (the police will conduct the investigation into any possible manslaughter, the HSE for health and safety breaches) but any prosecution arising should be managed jointly.[71] The CMCH Act itself states that where an organization is charged both under the CMCH Act and HSW Act, the jury may return a verdict on both charges.[72] The guidance comments: "As a jury may take into account whether, and the extent to which, the organization has breached H&S, it is unlikely that the defense will plead guilty to HSW Act unless the prosecution agrees not to pursue the corporate manslaughter charge."

## 3.5 Bribery

The UK has been under much pressure from the Organization for Economic Cooperation and Development's Working Group on Bribery, which has recognized that the identification route to corporate liability – which could

[70] <www.cps.gov.uk/legal/a_to_c/corporate_manslaughter>.

[71] See above n. 41.

[72] CMCH Act (UK), s. 15.

otherwise apply to bribery offenses – is wholly inadequate in meeting the UK's obligations under the OECD's anti-bribery convention.[73]

In considering the reform of bribery offenses, the LCEW was initially unwilling to introduce a new corporate provision ahead of its general review of corporate liability. A stand-alone corporate offense of *negligently failing to prevent bribery* was bolted onto the government's Draft Bribery Bill in 2009.[74] This was rejected by the Parliamentary scrutiny committee[75] and the eventual Bribery Act 2010 c. 23 renders a company liable for bribery offenses committed by its employees and agents unless it can show that it has adequate procedures.[76] The importance of this concession for the development of corporate liability in England and Wales cannot be over emphasized. From the frying pan of identification – and the curdled sauce of the CMCH Act – we were in danger of consigning corporate accountability for bribery to the fire of negligent failure. Bribery is the first "proper" offense (one that requires proof of intention or knowledge) to have a strict form of corporate liability, an approach which is consistent with employers' liability for breaches of health and safety duties under the HSW Act. This may not mean that corporate liability for all offenses will follow the Bribery Act model in the future. It is more likely that both bribery and health and safety offenses will be treated as *sui generis*.

## 3.6 Reforming the General Principles

The LCEW has been considering the reform of corporate liability principles for some time but has been sidetracked by more pressing projects. The original project was pursued under three heads: the scope of the consent and connivance doctrine, which imposes liability on individual directors for crimes committed by companies; the identification doctrine; and the status of the doctrine of delegation.[77] This slow moving vessel was subsumed in 2009 into the mainstream of the government's regulatory reform agenda. Under this, the LCEW agreed to examine "the use of the criminal law as

[73] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, in force February 15, 1999.

[74] See Wells 2009.

[75] Parliament 2009.

[76] Bribery Act 2010, s. 7. The commercial organization is liable for the actions of those associated with it, including those who perform services for it, employees, agents, and subsidiaries (s. 8).

[77] The commission proposes that directors' liability should be limited to proof of consent or connivance with the company's offense and not, as in some regulatory statutes, inclusive of mere "neglect". The delegation doctrine is of limited application where, for example, a license holder delegates performance of duties to another, see LCEW 2010, Pt. 10.

a way of promoting regulatory objectives and public interest goals." The consultation paper published in August 2010 leads on from, and is dominated by, the two broad aims of this new project: to introduce rationality and principle into the structure of criminal law, as it is employed against business enterprises, and to consider a general defense of due diligence.[78]

The commission's focus has shifted from the recognition that criminal law was both incoherent and unresponsive to corporate wrongdoing to the (misplaced) perception that business entities are disproportionately targeted by criminal law. As a result of the context-specific reforms in relation to manslaughter and bribery, both of which were driven and molded by political considerations, the opportunity to develop a general doctrine of corporate criminal liability has probably been lost. The consultation paper takes a pragmatic view and, skating lightly over generic provisions, such as those in Australia's Criminal Code Act 1995,[79] concludes that having one basis for corporate liability is unlikely to be workable or desirable.[80] Legislation, it proposes, should include specific provisions in criminal offenses to indicate the basis on which companies may be found liable; but, in the absence of such provisions, the question should be a matter of statutory interpretation. This frankly conservative approach is tempered by the entreaty that, "we encourage courts not to presume that the identification doctrine applies when interpreting the scope of statutory criminal offenses applicable to companies."[81] When it comes to protecting companies from strict liability offenses, which are mainly found in the regulatory sphere, the consultation paper speaks in much stronger terms, proposing an across-the-board statutory power to apply a reverse onus defense of due diligence to any existing strict liability offense.[82] The favored form of this defense is "showing that due diligence was exercised in all the circumstances to avoid the commission of the offense."[83]

## 3.7 Concluding Comments

With the exception of the Bribery Act 2010, the "bark" of corporate liability has generally been much worse than its "bite" (because of reluctance to prosecute, limitations of the identification doctrine, relatively low level of fines, and so on). It is going to be fascinating to see how the commission's final proposals reconcile the rhetoric of needing to be fair to businesses and

[78] This chapter draws on Appendix C of the Consultation Paper, 'Corporate Criminal Liability: Exploring Some Models', Wells 2010b.

[79] Criminal Code Act 1995, Act No. 12 of 1995 as amended, Pt. 2.5, Div. 12.

[80] Para. 5.91.

[81] Proposal 13, para. 5.110.

[82] Proposal 14, para. 6.95.

[83] Proposal 14, para. 6.96.

release them from the (alleged) restrictions of regulatory offenses with the reality that compliance is well within the grasp of the corporations with the greatest opportunities for wrongdoing: the large national and multinational enterprises. Due diligence makes sense as a way of tempering vicarious or strict liability, and the Bribery Act provision is a good example of a stricter form of liability attaching to a serious *mens rea* offense that, under common law principles, would be subject to the identification doctrine. But to add due diligence to offenses that come within the regulatory sphere would be to narrow their existing liability.

Dissatisfaction with both the vicarious and identification routes has led to an emerging principle based on company culture that exploits instead the dissimilarities between individual human beings and group entities. Vicarious liability is regarded as too rough and ready for the delicate task of attributing blame for serious harms. It has been criticized for including too little by demanding that liability flow through an individual, however great the fault of the corporation, and for including too much by blaming the corporation whenever the individual employee is at fault, even in the absence of corporate fault. This of course begs the question of how to conceptualize "corporate" fault. The company-culture principle owes its philosophical heritage to Peter A. French, who identified three elements in company decision-making structures: a responsibility flowchart, procedural rules, and policies.[84] A legislative example of this approach can be found in the Australian Criminal Code Act 1995.[85] Under the code, intention, knowledge, or recklessness will be attributed to a body corporate whenever it expressly, tacitly, or impliedly authorized or permitted the commission of an offense. Such authorization or permission may be established, inter alia, where the corporation's culture encourages situations leading to an offense. "Corporate culture" is defined "as an attitude, policy, rule, course of conduct, or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place."[86] Thus, evidence of tacit authorization or toleration of non-compliance or failure to create a culture of compliance will be admissible. The CMCH Act adopts a flawed version of it occupying an uneasy no man's land between the identification and culture (or system) approaches.

Corporate criminal liability in England and Wales is volatile, unpredictable, and disorderly. The question of how criminal law can accommodate the corporation has been taxing lawyers for well over a century. When it was first asked the business corporation was a much less sophisticated instrument than now and played a less central role in national

[84] French 1984, 1 et seq.

[85] Criminal Code Act 1995, Act No. 12 of 1995 as amended. The Australian Capital Territory has incorporated it in the Criminal Code Act 2002, including workplace manslaughter in Pt. 2A of the Crimes Act 1900.

[86] Criminal Code Act 1995, s. 12.3(6).

and global economies. Nonetheless, the legal adaptation has not kept pace. There remains, in the UK at least, a patchwork of answers, in fact more of a collection of cut-out pieces waiting to be sorted before being sewn together to make a coherent structure than a joined-up article. In respect of full-blown criminal liability, the vicarious model assumes that all employees contribute to the corporate goal. This is a good starting point but a blunt instrument in terms of encouraging or rewarding the development of effective compliance policies. In theory, it is better combined with a due diligence defense; in practice, multinational companies can hide behind this sort of defense while smaller businesses may be caught. This would replicate the differential application of the identification model, which works best against small companies where it is least needed.[87] The identification model is not appropriate as a single model. On their own, neither of these models is a solution. They are better conceived as part of a broader organizational model that is responsive to different forms of criminal offenses. At the same time, we have a box-set of mechanisms in the form of regulatory/civil and criminal penalties enforceable against the corporation itself and/or against its directors, the use of which reveals contradictory messages from different prosecution and regulatory agencies.[88]

We tend to talk quite loosely about regulation and crime, with the result that techniques developed for molding behavior through regulatory standards have been applied in the pursuit of serious white collar and corporate crime such as fraud and bribery. While the Law Commission's consultation paper states that corporate fraud should be dealt with under the Fraud Act 2006 rather than through context-specific financial services regulatory provisions, the key questions lie in enforcement policies and practices. The distinctions between the different types and forms of control are perhaps more apparent than real – again much enforcement of crime against individuals deploys negotiation, discretion, and selectivity.[89]

There is increased recognition that regulatory offenses are concerned to prevent harms and that they are just as, and perhaps more, threatening to health and welfare than many so-called "real" crimes. An unsafe mine or steelworks can damage employees and the public, a corrupt corporation can similarly wreak damage to the economy that places a professional shoplifter in the shade. There remains, however, a serious lack of clarity about the harm or culpability inherent in what might be broadly called "economic offenses". The opposing forces of regulatory and crime rhetoric have produced some interesting microclimates in which corporate crime enforcement has grown at different rates and in different forms.

---

[87] Gobert/Punch 2003.

[88] The Regulatory Enforcement and Sanctions Act 2008 empowers regulatory agencies to impose civil penalties.

[89] Bussman/Werle 2006.

## References


Bussman, K.-D. and M. Werle (2006), 'Addressing Crime in Companies: First Findings from a Global Survey of Economic Crime', British Journal of Criminology 46, 1128.

Centre for Corporate Accountability (2002), 'New Statistics Show Sharp Increase in Death', Newsletter: Corporate Crime Update 1, <www.corporateaccountability.org/Newsletter/Spring%202002.htm>.

Crown Prosecution Service (2010), 'The Code for Crown Prosecutors', <www.cps.gov.uk/publications/code_for_crown_prosecutors>. [cited as Crown Prosecution Service 2010a]

Crown Prosecution Service (2010), 'Corporate Prosecutions', <www.cps.gov.uk/legal/a_to_c/corporate_prosecutions>. [cited as Crown Prosecution Service 2010b]

Davies, N. (2010), 'Sentencing Guidance: Corporate Manslaughter and Health and Safety Offences Causing Death – Maintaining the Status Quo?', Criminal Law Review, 402.

Douglas, M. (1992), Risk and Blame: Essays in Cultural Theory, London.

Fisse, B. and J. Braithwaite (1993), Corporations, Crime and Accountability, Cambridge.

French, P. (1984), Collective and Corporate Responsibility, New York.

Friedman, L. (2000), 'In Defense of Corporate Criminal Liability', Harvard Journal of Law and Public Policy 23, 833.

Gobert, J. and M. Punch (2003), Rethinking Corporate Crime, Cambridge.

Harding, C. (2007), Criminal Enterprise: Individuals, Organisations and Criminal Responsibility, Cullompton, UK.

Hart, H. (1954), 'Definition and Theory in Jurisprudence', Law Quarterly Review 70, 37.

Hart, H. (1968), Punishment and Responsibility: Essays in the Philosophy of Law, Oxford.

Hart, H. and T. Honore (1968), Causation in the Law, Oxford.

Hawkins, K. (2002), Law as Last Resort: Prosecution Decision-making in a Regulatory Agency, Oxford.

Hoffmann, L. (2003), 'Foreword', in: A. Pinto and M. Evans, Corporate Criminal Liability, London, xiii.

Iwai, K. (1999), 'Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance', American Journal of Comparative Law 47, 583.

Law Commission of England and Wales (1996), 'Appendix A: Draft Involuntary Homicide Bill', Legislating the Criminal Code: Involuntary Manslaughter, Report No. 237, London.

Law Commission of England and Wales (2010), Criminal Liability in Regulatory Contexts: A Consultation Paper, Consultation Paper No. 195, London.

Leigh, L. (1969), The Criminal Liability of Corporations, London.

Ministry of Justice (2007), Explanatory Notes, Corporate Manslaughter and Corporate Homicide Act 2007, <www.opsi.gov.uk/acts/acts2007/en/ukpgaen_20070019_en_1.htm>.

Norrie, A. (1991), 'A Critique of Criminal Causation', Modern Law Review 54, 685.

Note, D. (2001), 'What We Talk About When We Talk about Persons: The Language of a Legal Fiction', Harvard Law Review 114, 1245.

Ormerod, D. and R. Taylor (2008), 'The Corporate Manslaughter and Corporate Homicide Act 2007', Criminal Law Review, 589.

Parliament (2009), Joint Committee on the Draft Bribery Bill: First Report of Session 2008–09: Volume 1 together with Formal Minutes, HL Paper 115-I, HC 430-I, July 28, 2009, London.

Quick, O. (2006), 'Prosecuting "Gross" Medical Negligence: Manslaughter, Discretion and the Crown Prosecution Service', Journal of Law and Society 33, 421.

Reason, J.T. (1990), Human Error, Cambridge.

Sentencing Guidance Council (2010), Corporate Manslaughter and Health and Safety Offences Causing Death, Definitive Guideline, London.
Stark, F. (2011), 'Corporate Criminal Liability in Scotland: The Problems with a Piecemeal Approach', in this volume.
Weismann, M. (2007), 'Why Punish? A New Approach to Corporate Criminal Liability', American Criminal Law Review 44, 1319.
Wells, C. (2001), Corporations and Criminal Responsibility, 2nd edn, Oxford.
Wells, C. (2005), 'Corporate Criminal Responsibility', in: S. Tully (ed.), Research Handbook on Corporate Responsibility, London, 147.
Wells, C. (2006), 'Corporate Manslaughter: Why Does Reform Matter?', South African Law Journal 123, 646.
Wells, C. (2008), 'Corporate Criminal Liability in the UK: Much Ado About Nothing', in: M. Nihoul, N. Colette-Basecqz, and S. Adam (éds.), La responsabilité pénale des personnes morales en Europe. Corporate Criminal Liability in Europe, Bruges, 283.
Wells, C. (2009), 'Bribery: Corporate Liability under the Draft Bill 2009', Criminal Law Review, 479.
Wells, C. (2010), 'Corporate Crime: Opening the Eyes of the Sentry', Legal Studies 30, 370. [cited as Wells 2010a]
Wells, C. (2010), 'Appendix C: Corporate Criminal Liability: Exploring Some Models', in: Law Commission of England and Wales, Criminal Liability in Regulatory Contexts: A Consultation Paper, Consultation Paper No. 195, London, 187. [cited as Wells 2010b]
Wells, C. and J. Elias (2005), 'Catching the Conscience of the King: Corporate Players on the International Stage', in: P. Alston (ed.), Non State Actors in International Law, Collected Courses of the Academy of European Law, vol. XIII, Oxford, 141.