Corporate killing: dead on arrival? Proposals for reform of the law of involuntary manslaughter and the implications for directors' and officers' liability insurers *by Jonathan Dye*

The idea of corporate responsibility for killing and the criminal culpability of directors and officers inevitably becomes a keen political topic in the wake of any major disaster: the capsize of the Herald of Free Enterprise and the Kings Cross fire, both in 1987, were perhaps the best known catalysts for debate on the subject. The issue was revived again following the recent series of rail accidents, notably after the Hatfield crash in 2000 which was the third fatal rail accident in the UK in five years.

The crime of manslaughter is still a common law offence, although there are also statutory offences under health and safety legislation that can come into play following a fatal accident.

The constraints of the law, however, have often prevented successful prosecutions of individual directors and officers and of the corporation itself.

Proposals for reform have been around for some time. The Law Commission reported on the subject in 1996 and this was revisited in the aftermath of the Paddington crash. There is continuing speculation as to when these proposals might receive the force of law, exactly what shape any new offences may take and what the actual impact might be in terms of running businesses and delivering genuine improvements in safety.

Directors and officers can be prosecuted for manslaughter in their own right under the current regime and, while the proposals include various reforms in that area, the concept of criminal sanctions against senior individuals would certainly remain. Such individuals are often key witnesses in Health & Safety Executive investigations too. The recent publicity on the subject is focusing the minds of directors and officers on the insurance protection that might be available to them in defending such criminal proceedings.

This paper will look at the current legal framework that surrounds corporate responsibility for killing. The various proposals for reform will be reviewed and finally the implications for directors' and officers' liability insurers will be considered.

Common law offence of manslaughter

The criminal offence of manslaughter is currently governed by the common law in England and Wales (ie, it is not defined by legislation). It may be voluntary (such as killing under provocation or diminished responsibility) or involuntary (killing through recklessness or gross negligence). This paper is primarily concerned with involuntary manslaughter - the crime of unintended but unlawful killing.

The leading case is Adomako.[1] While a patient was undergoing an eye operation, the accused (the anaesthetist) failed to notice that an endotracheal tube had become disconnected. As a result, the patient died and the accused was indicted for manslaughter. At trial, the defence conceded that the accused had been negligent, but denied that this negligence was so gross that it should be deemed criminal. The House of Lords set out the criteria that must be satisfied before a jury can convict for manslaughter:

- the accused must owe a duty of care to the deceased;
- there must be a breach of this duty of care;
- the breach must be so grossly negligent that the accused can be deemed to have had such disregard for the life of the deceased that it should be seen as criminal and deserving of punishment by the state;
- the breach of duty must have been a 'substantial cause of death'.

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How is this concept applied in the context of unlawful killing attributed to a company and/or its directors and officers? Over the years, the courts have developed the 'doctrine of identification', whereby those who control or manage the affairs of the company are regarded as embodying the company itself.[2] For a corporation to be found criminally responsible for manslaughter, a senior individual or individuals within the corporation must be held to be similarly liable. A culpable individual with a 'directing mind' must be identified before the corporation can share their guilt.

For this reason the case against P&O European Ferries (Dover)[3] Ltd failed, following the Herald of Free Enterprise disaster. The jury was directed to acquit on the basis that none of the senior individuals identified had ignored an obvious and serious risk that vessels would sail with the bow doors open and therefore none had been reckless as to the calamity that followed. This was despite the fact that the public inquiry into the disaster found that 'from top to bottom the body corporate was infected with the disease of sloppiness'.[4]

The issue was then revisited in Great Western Trains and Larry Harrison,[5] the case that followed the Southall train crash. Both the corporation and the driver of the train were indicted for manslaughter, as well as statutory offences under the Health and Safety at Work Act 1974.

The prosecution submitted in relation to the corporate manslaughter charge that (following Adomako) there was no longer any need to look for the 'directing mind' and that an objective test should be applied. The company had objectively failed to reach the appropriate standard of care through an overall management failure or an aggregation of individual mistakes, which amounted to gross negligence and should lead to criminal guilt. The judge disagreed: '... it is still necessary to look for such a directing mind and identify where gross negligence is that fixes the company with criminal responsibility... accordingly I conclude that the doctrine of identification which is both clear, certain and established is the relevant doctrine by which a corporate may be fixed for manslaughter by gross negligence...'.[6]

This case was a graphic demonstration of the major problem that faces the prosecution in any case of corporate manslaughter: how can the requisite knowledge of a 'directing mind' be established beyond reasonable doubt, so that such culpability may be identified with the corporation? Convictions for corporate manslaughter have been few and far between for this very reason.

One rather perverse result of this problem is that successful convictions against individual directors and/or corporations are far more likely in cases involving small companies. If the corporate organisation involves few people, it is relatively straightforward to establish the requisite knowledge on the part of the 'directing mind' and therefore achieve convictions against both the director and/or the corporation itself.

The first successful conviction for corporate manslaughter was obtained in 1994 against OLL Ltd,[7] resulting in a £60,000 fine against the company. Peter Kite, the managing director, was also convicted of manslaughter and given an immediate custodial sentence. The case was brought after four teenage school children drowned in Lyme Bay in March 1993 while taking part in a canoe expedition organised by the accused. Mr Kite was responsible for supervising a broad range of the company's activities. Eight months before the accident occurred, two instructors had resigned from the firm and had told Mr Kite that '... you should have a very careful look at standards of safety. Otherwise you might find yourselves trying to explain why someone's son or daughter will not be coming home'. This was a key piece of evidence in securing the convictions against Mr Kite and the corporation.

Jackson Transport (Ossett) Ltd[8] and its director Alan Jackson were similarly convicted of corporate manslaughter and manslaughter respectively in 1996. Again, this was a relatively small company where the knowledge and responsibilities of the directors were easy to establish. The deceased was a 21-year-old employee who was killed while carrying out a dangerous cleaning job involving lethal chemicals. Protective equipment was available but entirely inadequate.

As these examples demonstrate, it is possible for the Crown Prosecution Service (CPS) to secure convictions for corporate manslaughter. The reality of the matter is that such convictions are rare. The CPS recognises the difficulties in obtaining the evidence necessary to implicate the 'directing mind'. This is reflected in an understandable reluctance in pursuing cases of corporate manslaughter; to date there have been only two successful prosecutions.

There are other examples of successful convictions for manslaughter against individual directors (as opposed to corporate manslaughter against their companies). Two directors were convicted of manslaughter in 1999 after a driver in their employ caused a seven-car pile-up having driven for an excessive number of hours.[9] The prosecution was able to establish that the directors routinely required their drivers to work far in excess of the legal maximum for driving hours. Similarly, the owner of a small gardening company was convicted of manslaughter when an employee was killed at work.[10] The court found that the

accused had put employees at risk by allowing the use of badly maintained and antiquated equipment.

Recently there have been a number of attempts to challenge the decision where no prosecution has been made. The case of R v. DPP ex parte Timothy Jones[11] involved an untrained casual worker who was killed while unloading a ship in Shoreham docks. The family of the deceased sought judicial review of the original decision not to prosecute the employing corporation and its general manager for manslaughter. In a landmark decision, it was held that the CPS had behaved 'irrationally' and failed 'properly to address the relevant law' when it decided against prosecution on the grounds that there was no realistic prospect of conviction. Following a further review, the director of public prosecutions (DPP) later announced that he had now decided there was a 'realistic prospect of conviction and it is in the public interest to prosecute'. The subsequent prosecution ended in acquittal however.[12]

Contrast that with the case of Ryan Preece, a council worker who was killed when a lethal chemical leaked into a sewer where he was engaged in his work. The DPP ruled that there was insufficient evidence to justify prosecution for corporate manslaughter. The High Court refused his family permission to seek judicial review.

So although there are signs that the CPS is being forced to look more carefully at the criminal law sanctions that are available, the reality is that the current common law provisions are perceived to be ineffective. Thanks to the 'doctrine of identification', they have proved to be virtually impossible to use against companies of any reasonable size.

Statutory offences

The Health and Safety at Work Act 1974 contains a number of provisions on which prosecutions following deaths at work may be based. Section 2 imposes a general duty on every employer to ensure the health, safety and welfare at work of employees. Section 3 imposes a duty on every employer to conduct its undertaking in such a way as to ensure that persons not in its employment are not exposed to risks. Both duties are subject to a defence that the employer has done all that is reasonably practicable.

Section 37 of the Act allows for directors and officers to be prosecuted too if it can be shown that the charge brought against the company can be attributed to their own neglect. On this basis, the statutory offences can be prosecuted against both the company and its directors and officers, in the same way as the common law offence of manslaughter.

Successful convictions lead to potentially unlimited fines. As a rule, the majority of fines following a single death have been between £100,000 and £300,000. Figures for the period up to the end of March 2000 show that at that time only two fines had exceeded £1m. - £1.5m. against Great Western Trains (GWT) following the Southall rail accident and £1.2m. against Balfour Beatty following the Heathrow Tunnel collapse.[13] One commentator[14] has pointed out that the fine of £1.5m. against GWT could be said to be roughly equivalent to a fine of £572 against a private individual. The families of those injured and killed in the disaster certainly felt that it was inadequate.

Only 19 per cent of workplace deaths result in a prosecution under health and safety law,[15] yet the provisions of the 1974 Act are widely phrased and have been construed as such by the courts. It is often argued that the Health & Safety Executive is insufficiently resourced to properly investigate and assist in the prosecution of offences under the statutory regime. The legal framework for prosecution and an unlimited fine is, however, already available.

Outline of proposals for reform

The Law Commission published its paper 'Legislating the criminal code - involuntary manslaughter' on 4 March 1996. This paper was the subject of wide-ranging academic debate and media comment, but its proposals were not placed before Parliament.

A general frustration at the lack of progress found particular focus in the wake of the Southall rail disaster: 'There is no purpose in the Law Commission making recommendations if they are allowed to lie for years on a shelf gathering dust.'[16]

The Ladbroke Grove rail crash in October 1999 was doubtless one of the factors that prompted a further review of the issues. On 23 May 2000, the Home Office published a paper entitled 'Reforming the law on involuntary manslaughter: the Government's proposals'. This developed the Law Commission's initial proposals and was intended to prompt a further round of consultation and comment.

The proposals conceived of three new offences:

1. Reckless killing - an individual commits reckless killing if:

- his or her conduct causes the death of another;
- he or she is aware of a risk that his or her conduct will cause death or serious injury; and
- it is unreasonable for him or her to take that risk having regard to the circumstances as he or she knows or believes them to be.

2. Killing by gross carelessness - an individual commits killing by gross carelessness if:
- his or her conduct causes the death of another;
- a risk that his or her conduct will cause death or serious injury would be obvious to a reasonable person in his or her position;
- he or she is capable of appreciating a risk at this material time (but did not in fact do so)
 and either
- his or her conduct falls far below what can be reasonably expected in the circumstances; or
- he or she intends by his or her conduct to cause some injury, or is aware of, and unreasonably takes, the risk that it may do so, and the conduct causing (or intended to cause) the injury constitutes an offence.

3. Corporate killing - a corporation is guilty of corporate killing if:
- a management failure by the corporation is the cause or one of the causes of a person's 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 by a corporation if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities; and
- such a failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual.

The new offence of corporate killing broadly corresponds to the proposed offence of killing by gross carelessness. The penalty available is an unlimited fine.

As with the individual offence, corporate killing is only committed when the corporation's conduct in causing death falls far below what could reasonably be expected. Unlike the individual offence, however, there is no requirement that the risk is obvious or that the defendant is capable of appreciating the risk. The concept of 'management failure' is introduced, allowing the possible aggregation of a series of acts and/or omissions that would not be possible under the current law.

Individuals within the company, such as directors and officers, can still be liable for the offences of reckless killing and killing by gross carelessness at the same time as the company is liable for the offence of corporate killing.

The Government's paper largely adopts the proposals of the Law Commission, but it does suggest contrary views in some key areas. Firstly, the Government proposes that the offence of corporate killing should apply to 'undertakings', which would include schools, hospital trusts, partnerships, unincorporated charities and small businesses as well as corporations in the conventional sense.

Secondly, the Government believes that punitive sanctions against individual company officers are essential to provide sufficient deterrent, particularly where large or wealthy companies are involved. As a protection against further offence, it is also therefore proposed that any individual who can be shown to have influence on or responsibility for the circumstances causing death should be subject to disqualification from acting in a management role in any undertaking carrying on business activity.[17] Separate proceedings would be brought in relation to disqualification after the company had been convicted of corporate killing. These proceedings could be issued in addition to an indictment against the individual director or officer for manslaughter. The further idea of an additional action against individuals for contributing to the management failure that resulted in death is also considered in the paper.

Further proposals for reform were put forward in June 2000 by Deputy Prime Minister John Prescott in a Department of the Environment, Transport and the Regions (DETR) strategy statement entitled 'Revitalising health and safety'. This contained a raft of proposals designed to 'give a new impetus to health and safety at work'. Among the changes envisaged was the possibility of custodial sentences for individuals convicted of health and safety offences.

The Government continues to express its commitment to introducing legislation on this subject, but no firm timetable has been announced.

There is no shortage of ideas for reform, then, but how much difference would these proposals make?

Potential impact of reform

Not surprisingly, there has been considerable academic debate, press speculation and legal commentary on the content of the new proposals and their likely effect. Two particular issues have been widely discussed:

1. Should the new proposals impose positive safety duties and punitive sanctions against individual directors and officers?

2. Will the new proposals make progress which could not be achieved through a more rigorous application of the existing health and safety legislation?

Should it be the corporation that is the target of these sanctions or should individual directors and officers be the focus of attention themselves? The Financial Times,[18] applauding the Home Office and encouraging the Home Secretary to follow the Law Commission's proposals, commented: 'Mr Straw wants to go further, giving powers to disqualify directors, or to charge individuals under the

corporate killing law. Although disqualification might sometimes be justified, he must not confuse corporate killing with offences committed by individuals.'

If Mr Straw was indeed guilty of such confusion, then he is certainly not alone. Much of the reporting on the subject confuses the creation of a corporate offence with the punishment of individual directors. When a broadsheet newspaper reports that 'two company directors were found guilty of corporate manslaughter', the extent of the misunderstanding of the subject is obvious.[19]

As one commentator[20] pointed out, 'the odd thing is that media reports of the Government's proposals in relation to a corporate killing offence have all been accompanied by talk of aiming to ensure that directors are held responsible'. This comment was made in 1997, but the same confusion also ran through the barrage of press commentary that followed the recent rail disasters. It seems that to a large extent the press believes that the creation of the corporate killing offence will hold directors to account. While that may be the indirect consequence, corporate killing is a corporate offence. It is the company that is found guilty and the company that will pay the fine.

Another commentator[21] has observed that corporate killing would have advantages in that the charge could be proved merely by showing a management failure of the system, but that 'contrary to the views which have been expressed frequently in the press, directors will not be personally liable and any fines will be borne by the shareholders'.

A senior business figure[22] agreed that it is right that 'flagrant breaches of legislation and good practice do enter into a criminal arena', but expressed some concern that senior managers might become fearful of making mistakes that could result in criminal proceedings, with a consequent loss of leadership and efficiency. Similarly, a leading expert in the aviation industry[23] has suggested that the interests of safety are best served through maintaining an open reporting culture. Punitive measures would tend to encourage people not to report and 'an even greater tragedy than an accident would be that the threat of litigation destroys the open reporting culture and drives safety reporting underground'.

There is no doubt, however, that public opinion demands that those responsible for significant safety failures which lead to death are held accountable. Concerns as to potential loss of leadership or damage to the reporting culture will not be perceived as primary considerations by those directly affected by major disasters.

For an individual to be convicted, the prosecution's task under the new proposals would remain as significant as under the old regime. It might be more straightforward to penalise the corporation than in times past, but the individuals at the top of the organisation are arguably no more likely to find themselves in the dock than they are now.

It remains to be seen whether the Home Office proposals for disqualification are adopted and, if so, whether they have significant impact.

David Bergman, director of the Centre for Corporate Accountability, has underlined this point:[24] 'while reform of the law of corporate manslaughter is terribly overdue, it should not be used as an excuse to allow company directors to escape accountability as individuals when it is they, rather than (or in addition to) the company, who are culpable.' He argued that it was necessary for specific safety duties to be imposed on directors. This bold step has not been taken and, as a consequence, there are those who wonder to what extent senior managers will change their behaviour in considering options which involve both profit and safety.

Since the proposals apparently fail to create a regime that specifically targets the individuals in a more effective manner, would it not be simpler to re-enforce the existing framework of health and safety legislation? Some commentators[25] have argued that the proposals on the table are nothing more than 'quick fix, politically motivated legislative plugs' and that a more rigorous application of the sanctions already available under the Health and Safety at Work Act 1974 would be more desirable and effective.

If the new proposals do not provide a stronger remedy against individuals, but refocus culpability on the corporation, then what does the creation of the corporate killing offence actually achieve? The penalty against the company is an unlimited fine, which is already available under the 1974 Act. Perhaps the question should be why the financial penalties under the existing legislation have been so small in most cases?

The 1974 Act imposes onerous duties and the courts have been happy to interpret the legislation broadly and rigorously in terms of establishing liability. The legislation is perceived to fail simply because in the eyes of the public the weight of punishment in terms of fines has not matched the crime.

Maybe the preferable solution would be to give the Health & Safety Executive more teeth, as John Prescott's strategy statement of June 2000 suggests. The sanctions would then be very much in line with the more heavyweight areas of the criminal law.

The debate as to which authority should prosecute such cases has yet to be satisfactorily resolved however.

Should it be the police; a Crown Prosecution Service which is painfully aware of the difficulties in securing convictions in such cases; a Health & Safety Executive which is under-funded and over-stretched?

Implications for directors' and officers' liability insurers

Much of the commentary in the insurance press on the issue of corporate manslaughter has suggested that the new proposals are a good reason for an urgent review of directors' and officers' liability coverages.[26] But is this actually the case? If the new proposals are eventually enacted, will they have any real bearing on the application of directors' and officers' liability insurance?

A standard directors' and officers' liability policy covers losses arising from 'wrongful acts' committed by a director or officer in that capacity. The term 'wrongful act' is usually very broadly defined to include any actual or alleged wrongful act or omission by directors and officers, individually or collectively.

As the name suggests, it is the individual directors and officers who are the 'insured persons' under the policy. The company is a beneficiary in that it will be reimbursed for amounts for which it has provided indemnity to a director or officer in respect of a claim.

The policy covers the amount for which an insured person is legally and personally liable following a claim arising from a wrongful act, usually extending to damages awards, settlements and defence costs and expenses. Some policies are further extended to cover legal fees, professional charges and expenses which an insured person is personally liable to pay as a result of a formal administrative or investigative inquiry which requires his or her attendance.

Fines, penalties and matters uninsurable under English law are not insured, which would preclude any recovery for fines imposed as a result of a conviction for manslaughter.

The policy may respond to provide defence costs for a director or officer who is prosecuted during the currency of the investigation unless/until a conviction is secured. Any policy extension that covers legal fees, professional charges and expenses in respect of a formal investigative enquiry could also be brought into play. The precise policy wording will determine the basis on which such legal expenses will be payable.

Some policies allow for the reimbursement of defence costs, which may mean that the policy will only respond after the director has been acquitted and the company has paid the legal costs. Other policies provide for the advancement of defence costs, in which case insurers may well fund the defence of the matter. Again, the terms of the policy (and the law of insurance contracts) will establish whether insurers will attempt to recoup the costs in the event that the director or officer is convicted.

A directors' and officers' liability policy will typically contain exclusions for bodily injury, death and property damage. Such claims would be considered under general liability or employers' liability policies. This provision may serve to exclude many claims relating to proceedings for manslaughter, depending on the precise policy terms.

Cases against directors can often be constructed in terms of breach of Health and Safety Regulations rather than from causing death, however, so some form of contribution between insurers may be required, depending on policy terms on contribution and other insurance.

This interplay between the directors' and officers' liability insurers and the employers' or general liability insurers may be an important feature in the handling of any claim relating to the investigation into a major accident.

Some directors' and officers' liability policies state that 100 per cent of defence costs will be paid as long as part of the 'loss' is within the terms of the policy. In such circumstances, the directors' and officers' liability insurer might foot the whole defence bill, assuming that the same lawyers represent both the corporation and the individual directors. This situation can give rise to particular tensions in claims handling, where there might be underlying conflicts between the corporation and the individual directors that are difficult to resolve without separate representation.

What about a prosecution against the company for corporate manslaughter if/when the new proposals come into effect? As was mentioned earlier, the policy is designed to protect the directors and officers, not the company itself. If the case were prosecuted against the corporation alone, therefore, there would be no cover under the standard directors' and officers' liability policy. If the policy was extended to include legal representation expenses, however, cover could be available for the legal costs of individual directors and officers who are required to attend a formal investigation or inquiry.

It is questionable whether the new proposals would actually increase the number of claims under directors' and officers' liability insurance, however. While the new proposals would make it easier to secure convictions against the corporation (in theory at least), the problems in proving recklessness or gross negligence would still prevail in terms of prosecutions against individual directors and officers.

Some commentators[27] have argued that if there is a significant upturn in the conviction rate for corporate killing, the change in public awareness might generate an increased incidence of civil liability claims against directors and officers by their shareholders. While this is clearly a possibility, there are practical difficulties in mounting a shareholder action against directors and officers in the UK. There are signs that the liability regime for directors and officers will be tested ever more frequently, however, and a major disaster could provide a further catalyst for an increase in civil claims.

The possibility of a new regime in corporate responsibility for killing has occupied a number of column inches in legal and insurance journals, replacing Y2K as the vogue topic in directors' and officers' liability. In reality the creation of these new offences would probably have little, if any, impact in terms of claim numbers.

Perhaps the increasing number of prosecutions under the existing health and safety legislation, together with the clear political desire to make such proceedings bite, may be the greater threat in terms of claims incidence.

The costs of any major enquiry are so prohibitive that appropriate insurance to protect both the company and directors and officers in such circumstances is clearly a sensible precaution.

Many underwriters of directors' and officers' liability insurance are carefully considering the extent to which they should provide cover for the astronomical costs that can be incurred.

Conclusion

Many feel that the current law of manslaughter is ineffective in bringing corporations and their directors and officers to account. There have been some signs of late that public opinion (and judicial review) will force the CPS to take a more aggressive role in pursuing cases of individual and corporate manslaughter, but the existing legal framework still throws up significant obstacles.

The statutory regime for enforcing health and safety is not seen as effective and is under review. In the meantime, modest fines for massive corporations and the occasional conviction of a small business and/or its directors are unlikely to produce the sense that justice is being done.[28]

Proposals for reform continue to accumulate. Over the last five years, the Law Commission, Home Office and DETR have all looked at the problem and have come up with an inter-linked series of proposals. There is broad support for the raft of solutions, including the creation of a statutory framework for manslaughter and the new offence of corporate killing.

None of this will be appearing on the statute books in the immediate future, however. Corporate killing may sound more serious than a health and safety conviction, but the punishment available is not in fact any greater than that which is currently available under the 1974 Act. This will create new law that 'seems' more punitive, but in fact is not.

As for the individual directors and officers, the obstacles to proving their personal guilt will not be removed by the proposed changes. Unless they are running a small organisation where their individual knowledge and responsibilities can be readily identified, the risks of a conviction for manslaughter will remain largely unaltered.

As a consequence, the new proposals seem to hold little to fear for directors' and officers' liability insurers. Perhaps the creation of the new offences may lead to a greater number of cases being pursued; perhaps the proposed toughening up of the sanctions available under the health and safety legislation may increase the number of claims for defence costs. The proverbial floodgates are unlikely to be prised open, however. That said, the industry will doubtless be faced with some significant claims in respect of the major enquiries that follow any disaster.

Despite the furore around this issue in recent months, it seems more than likely that the current proposals will have very limited impact. Corporate killing may well be dead on arrival.

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