By Karen Wheelwright

CORPORATE OPERATIONS CAUSING DEATH

The legal response now and in the future?

This article sets out the current state of play with respect to corporate liability for deaths, with a focus on deaths at work, both with respect to companies and their officers. It discusses the model *Work Health and Safety Act* 2009 and reflects on some of the difficulties with both existing and proposed laws dealing with deaths from corporate operations.

THE DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY

It is a very long time since companies, as artificial persons, were regarded as unsuitable subjects for the criminal law. From the second half of the 19th century onwards, companies were being held vicariously liable for regulatory offences such as those under factory Acts and other public welfare legislation. However, legal principles enabling companies to be held liable *directly* for criminal offences that required proof of a fault element, such as manslaughter or recklessly causing serious injury, took much longer to develop. By the 1970s, the English and Canadian courts had developed the identification theory, by which companies could be held liable directly for statutory offences requiring a fault element if a senior representative of the company who could be regarded as its 'directing mind and will' had committed the offence.[1] The High Court has since affirmed that the identification theory applies in Australia.[2]

From the late 1980s onwards, the debate about corporate criminal liability intensified, focusing on whether companies could be indicted for manslaughter, and whether the identification theory was adequate and appropriate to fix companies with liability for serious common law crimes. The debate was fuelled by a number of high-profile disasters in Britain and Canada, in which many workers and members of the public were killed, and by the inquiries and legal proceedings that followed.[3] In Australia, the Esso Longford explosion in 1998 in Victoria and a number of high-profile deaths of young workers, particularly in NSW, also fuelled the debate, and prompted the call by unions and victims' families for changes to the laws covering corporate criminal liability.[4]

Prosecution for occupational health and safety offences was available in most if not all of these cases and has the distinct advantage that, as strict or absolute liability offences, there is no need to prove that the company intended to cause harm or to identify any particular individual who 'represented' the company for the purposes of the offence. The duty is a personal duty on the company to provide and maintain a healthy and safe working environment, so far as it is reasonably practicable to do so.[5] Nevertheless, many considered that such offences did not reflect the moral abhorrence felt by the community when corporate negligence leads to loss of life, that penalties following breach of OH&S laws were inadequate and that sentences were too lenient.

Australia (at a federal level) and Canada led the way with new provisions for determining corporate criminal liability that moved beyond the narrow identification theory.[6] After a long period of development and consultation, and substantial delays, Britain also passed new legislation in 2007.[7] These Acts introduced new concepts for determining both the physical and fault elements of a crime when the defendant is a company. These include considerations such as whether the company had a corporate culture that tolerated or led to non-compliance, whether the board tacitly or impliedly authorised the offence,[8] or whether the way the company's activities were managed by its senior managers was a substantial cause of the breach.[9] While these newer approaches to corporate criminal liability appear to overcome at least some of the shortcomings of the identification theory, they have yet to be tested in practice.

In Australia, serious offences like manslaughter are a matter for state and territory law. As the Commonwealth Criminal Code has not generally been adopted, the Code's principles of corporate criminal responsibility do not apply to crimes such as manslaughter, except in the ACT. In the late 1990s and early 2000s, the question of whether state corporate manslaughter legislation should be introduced was formally examined, or at least debated, in most jurisdictions.[10] Only Victoria and the ACT ultimately drafted industrial manslaughter bills, with the *Crimes (Industrial Manslaughter) Bill 2001* (Vic) failing to pass the Legislative Council. Only the ACT succeeded in enacting industrial manslaughter legislation. This means that the principles of identification, with all their attendant difficulties, remain the means of determining corporate liability for manslaughter in all other jurisdictions.

DIRECTORS' LIABILITY FOR CORPORATE CRIMES CAUSING DEATH

The need to promote safety in corporate operations might well be met by making the directors liable as well as (or instead of) the company, in appropriate circumstances. The company's policies, safety culture and operations are determined largely by those individuals who direct and manage it. It seems logical to bring responsibility home to those individuals, where they have contributed to corporate operations causing avoidable deaths. Focusing on officers may have advantages in respect of corporate compliance, given the evidence that individual directors and managers are effectively deterred by the possibility of criminal prosecution and of imprisonment.[11] Holding human individuals rather than an artificial person responsible in appropriate circumstances can also better provide a sense of justice for the victims of corporate negligence.

The legal principles applicable to manslaughter and allied crimes have developed in the context of individual rather than corporate offending. In all jurisdictions except the ACT, a director will be liable for negligent manslaughter under the same principles as any other individual: there must be proof that he or she owed a duty to the deceased, that the acts (and in very limited circumstances, the omissions) of the director were the legal cause of the death, and that the director's conduct fell so far below the standard expected of a reasonable person that criminal punishment is warranted.[12] Obviously, under the identification theory, it is only if all of these elements are satisfied that the company *itself* can be convicted of manslaughter.

There have been a number of successful prosecutions of directors for manslaughter in the UK over the last decade, mostly involving workplace deaths.[13] In those cases, the accused was inevitably the director of a small company, had a hands-on role in day-to-day business operations and was directly involved in the circumstances of the death. Such prosecutions are extremely rare in Australia. In 1995 in Victoria, a managing director ordered a worker to drive a truck with faulty brakes. The truck overturned and the driver was killed. The company pleaded guilty to manslaughter and the director pleaded guilty to offences under OH&S legislation, apparently to avoid a prosecution for manslaughter.[14]

Much more recently, a company director, Alex Cittadini, was prosecuted in NSW in 2008 after the yacht *Excalibur*, which had been built by his company, sank with the loss of four lives. The cause of the sinking was that the keel sheared off. During manufacture, the yacht's keel had been cut and re-welded, causing it to fail. The case was an unusual one in a number of respects. First, the prosecution was based on an omission rather than a commission, being the director's 'failure to put in place a system of adequate visual examination of the various stages of construction'.[15] The sentencing judge described this case as apparently 'almost a unique example of manslaughter by omission'.[16] Secondly, there was no 'temporal proximity of the offender to the relevant events contributing to the death, knowledge of them and even an opportunity before the event to intervene to prevent the death occurring'.[17] Thirdly, although the boat contract was apparently with Cittadini's company, it was generally accepted that he owed a duty of care to those who sailed on the yacht to ensure that it was constructed so as to be safe. This is no doubt explained by the fact that he supervised and controlled most aspects of the construction. The NSW Court of Appeal overturned Cittadini's conviction. The Court found that there was no evidence before the jury establishing an objective standard of safe construction for the vessel. Secondly, there was no evidence that the director knew that the keel had been cut and re-welded.[18] >>

An employee of the company was also acquitted of manslaughter.

There are even greater difficulties in proving the elements of manslaughter in respect of directors of larger companies. Firstly, there is no general principle that an individual director owes a duty to a person killed by negligent corporate operations. The duty of care is owed by the company, rather than by any individual person who directs the company's business.[19] This is problematic where the key cause of deaths is an omission, such as failure to identify and manage risks, or a failure to respond to a known safety hazard. Omissions can support a manslaughter prosecution only where the accused has a duty to act.[20] Even if the death is caused by positive acts, it is likely that the directors will be in the boardroom and not at the scene of the accident, making it difficult to prove legal causation. Finally, most industrial accidents have complex causes, making it difficult if not impossible to say that any particular act or omission of a particular director was the direct cause of a death.

CHANGING THE GENERAL CRIMINAL LAW

Most attempts to introduce new laws with respect to both companies and their officers that better reflect the realities of corporate manslaughter have faced both conceptual and political difficulties, with strong opposition from many business groups.[21] The Victorian Bill that was introduced by a Labor government was subject to concerted opposition, and was rejected by the Coalition-dominated Legislative Council. The Labor government chose not to re-introduce the Bill, even after it attained an upper house majority following a state election.

In Britain, the corporate homicide legislation was more than a decade in the making. The Bill originally contemplated secondary offences for directors. In its 2000 consultation paper on the Bill, the government suggested that 'without punitive sanctions against company officers, the proposed new offence [of corporate manslaughter] might not provide a sufficient deterrent'.[22] It was suggested that the legislation might contain an offence for individual directors and managers of 'contributing to a management failure that caused death'. This part of the proposed new laws was ultimately abandoned. The government acknowledged the strength of opinion on both sides and was heavily lobbied by business groups.[23]

The corporate manslaughter debate in Australia and the numerous reports about the need for more effective laws did prompt most states to amend their occupational health and safety legislation to either introduce new culpability offences for companies (and in most cases, their officers),[24] or to provide higher penalties where breaches resulted in deaths or serious injuries. It seems that the political sensitivity of corporate manslaughter laws and the influence of the corporate lobby made changing existing OHS legislation a more politically viable response.

OFFICER LIABILITY UNDER OH&S LEGISLATION

The provisions of occupational health and safety legislation recognise that directors and managers may be complicit in the safety failures of their companies. All state and territory OHS Acts have officer liability provisions, and breaches are criminal offences. The necessary connection between corporate and officer offending differs significantly across the jurisdictions, showing that this is a contested policy area. The approaches to liability range from requiring proof of knowing involvement in the company's offence, to deeming officers to be liable for the company's offence, unless he or she can prove on the balance of probabilities that they were not in a position to influence the company with respect to that offence, or that they exercised due diligence to prevent the offence from occurring. Where the officer is reckless and the offence results in death, some Acts provide for heavier penalties, including imprisonment.

These offences are rarely prosecuted, although NSW has been more active than the other jurisdictions and its prosecution of officers following the Gretley mine deaths generated substantial controversy, particularly with respect to requiring the officer rather than the prosecution to prove some elements of the offence.

THE NEW DUE DILIGENCE DUTY IN OH&S LEGISLATION

The current system of OH&S regulation is soon to change as a result of the agreement of the Workplace Relations Ministers Council to that all Australian jurisdictions adopt standardised health and safety legislation, based on a model Work Health and Safety Bill. Section 19 of the 2009 Bill places the primary duty on those in control of businesses and undertakings to provide an environment that is, as far as reasonably practicable, safe and without risks to health, for both workers and other persons. The Bill also places a duty on officers to exercise due diligence to ensure that the business fulfils its safety duties. Clause 27 defines due diligence in detail. It includes ensuring that the business uses appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business, and that the business reviews incidents and has more safety information available. Three levels of criminal penalties are available for breach of the duties in the Bill.

The new harmonised legislation is due to commence in each jurisdiction from 1 January 2012. There are already some potential difficulties, with Western Australia unwilling to adopt the higher penalties in the model legislation, and NSW expressing an intention to retain union prosecutions and the reverse burden of proof for central offences. The extent of the NSW commitment to harmonised laws may not be clear until after the election, due in March 2011.[25]

CONCLUSIONS

In spite of considerable debate over the past two decades, the principles for determining manslaughter by companies remain narrowly defined by the identification theory of corporate liability in all jurisdictions except the ACT. This leaves an 'accountability gap' in the general criminal law where deaths result from safety failures by companies.

Occupational health and safety legislation fills the gap to

some extent, although there has been a longstanding debate about whether breaches of regulatory offences, although criminal, adequately reflect the moral condemnation felt by the community when avoidable deaths result from corporate activities. Recent amendments to OH&S legislation to add new offences have their limitations. One such limitation is the need to prove recklessness on the part of a company and/or its officers to secure the higher penalties attached to some of the newer offences. The NSW Law Reform Commission considered that recklessness may be a threshold that is too difficult to establish in the workplace context, as it requires proof of 'foresight of, or advertence to, the consequences of an act as either probable or possible and a willingness to take the risk of the occurrence of those consequences'.[26] The highest penalties in the proposed model Bill require proof of recklessness, as well as proof of a number of other elements.[27]

The recent national review into current OH&S laws proposed that the highest penalties also apply to companies and officers guilty of gross negligence, a recommendation that was rejected by the Workplace Relations Ministers Council. Proof of gross negligence is arguably a more realistic standard, with companies whose operations fall far below the standards expected of a reasonable company being liable for higher penalties.

With a commitment to model OH&S laws, from most jurisdictions at least, it seems unlikely that the debate about the need for separate corporate manslaughter legislation will be revived any time soon. However, the new harmonised laws will need careful monitoring to assess whether they appropriately deter and punish corporate and individual offenders and thereby reduce the number of workplace deaths and injuries in Australia in the medium and longer term. From the compliance perspective, the new due diligence duty on officers has the potential to raise the awareness of officers about their vital contribution to corporate compliance, and it is hoped that the regulators will direct their activities to the vital issue of officer compliance in the interests of better corporate compliance. ■

Notes: **1** *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153. **2** *Hamilton v Whitehead* (1988) 166 CLR 121. **3** See, for example, Justice K Peter Richard, *The Westray Story: A Predictable Path to Disaster Report of the Westray Mine Public Inquiry* (1997); Department of Transport, *The Merchant Shipping Act* 1894, MV Herald of Free Enterprise, *Report of Court No. 8074*,1987; Health and Safety Commission, *The Southall Rail Accident Inquiry Report* (Prof John Uff QC), (2000). **4** See, for example, The Hon Sir Daryl Dawson and Brian Brooks, *The Esso Longford Gas Plant Accident Report of the Longford Royal Commission* (1999); General Purpose Standing Committee No. 1, NSW Legislative Council, *Serious Injury and Death in the Workplace* (Report No. 24, 2004). **5** See, for example, s8, *OHS Act* 2000 (NSW); s21 *OHS Act* 2004 (Vic). **6** See Commonwealth Criminal Code Part 2.5 *Corporate Liability*; Bill C-45 (Canada), discussed in Todd Archibold, Kenneth Jull and Kent Roach, Kent, 'The Changed Face of Corporate Criminal Liability' [2004] 48 *Criminal Law Quarterly* 367. **7** *Corporate Manslaughter and Corporate Homicide Act* 2007. **8** Commonwealth Criminal Code, s12.3. **9** *Corporate Manslaughter and Corporate Homicide Act* 2007, s1(3). **10** *Crimes (Industrial Manslaughter) Act* 2003 (ACT). **11** Neil Gunningham, *CEO and Supervisor Drivers: Review of Current Literature and Practice*, National Occupational Health and Safety Commission, (1999). **12** See, generally, A Hall, R Johnstone, and A Ridgway, *Reflection On Reforms: Developing Criminal Accountability for Industrial Deaths*, Working Paper 33, National Research Centre for Occupational Health and Safety Regulation, The Australian National University (April 2004). **13** Neil Foster, 'Manslaughter by Managers: The Personal Liability of Company Officers for Death Flowing from Company Workplace Safety Breach' (2006) 9 *Flinders Journal of Law Reform* 79. **14** Simon Chesterman, 'The Corporate Veil, Crime and Punishment: *The Queen v Denbo Pty Ltd and Timothy Ian Nadenbousch*' (1994) 19 *Melbourne University Law Review* 1064. **15** *R v Cittadini* [2009] NSWDC 179, [19]. **16** [2009] NSWDC 179, [25]. **17** *Ibid* [22]. **18** *Cittadini v R* [2009] NSWCCA 302. **19** *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424. In very limited circumstances, a director may be found to have assumed a personal duty, although there is no case law on the principle in the corporate manslaughter context. **20** *R v Taktak* (1988) 14 NSWLR 226. **21** For an excellent discussion, see James Gobert, 'The Politics of Corporate Manslaughter – The British Experience', (2005) 8 *Flinders Journal of Law Reform* 1. **22** Home Office, *Reforming the Law of Corporate Manslaughter The Government's proposals* (May 2000),[3.4.8.] **23** House of Commons Library Research Paper 06/46, *The Corporate Manslaughter and Corporate Homicide Bill* (2006). **24** See, for example, Part 3A, *OHS Act* 2000 (NSW). **25** See *Minter Ellison Newsletter*, 20 October 2010, available at www.minterellison.com/public. **26** NSW Law Reform Commission, Report 122, *Workplace Deaths* (July 2009), [4.16]. **27** Model Work Health and Safety Bill 2009 (May 2010), ss30-33.

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