Criminal Liability for Corporations that Kill: Proposals for Reform

Two Volumes

Volume I of II

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Abstract

In 1996 the Law Commission published Report No.237 "Criminal Law: Involuntary Manslaughter - A Consultation Paper". In that document they set out their proposals for a radical new offence of "corporate killing". Seven years later and the Government is still no closer to enacting a statutory offence of corporate manslaughter than it was then despite the current Labour Government making promises to this effect in its 1997 election manifesto.

Since the Law Commission Report was published we have seen Great Western Trains prosecuted unsuccessfully for the Southall train crash in 1997. We have also heard recently that Network Rail and Balfour Beatty will be prosecuted following deaths caused by a train derailment in October 2000. Yet this prosecution also seems doomed to failure so long as the common law maintains the "doctrine of identification" as the basis of liability for corporate manslaughter.

Throughout the course of this thesis we will be examining the law governing corporate manslaughter in England and Wales. We will examine the way that the doctrine of identification has evolved in the context of the historical development of corporate criminal liability. We will also witness the way in which the doctrine of identification has been utilized by the courts in corporate manslaughter prosecutions and the problems this causes.

Having concluded that the current common law position is unsatisfactory we will proceed to examine alternative approaches to the liability problem. This includes a treatment of sections 2 and 3 of the Health and Safety at Work etc. Act, 1974, and the legal position in other jurisdictions. Before drawing some conclusions on this matter we will also look at the interesting problem of corporate punishment.
Chapter 1: Introduction

An examination of the many volumes that have been published on the subject of corporate criminal liability will show that it is traditional in ‘an introduction’ to begin by looking at the seminal work of Edwin H. Sutherland in “White Collar Crime”. Convention suggests that a considerable section should show that Sutherland is the father of corporate crime and that one is greatly indebted to him in a consideration of corporate manslaughter.

Whilst one cannot understate the importance of Sutherland’s work in bringing this area of criminal activity to the attention of the general public, it is felt that the most important moment in the development of this notion of “corporate crime” lies in a decision made almost half a century before Sutherland’s work was published.

It is inconceivable to think that Lord Macnaghten could have possibly realised the impact his ruling on the matter of corporate identity would have on the law governing corporate crime over a century later. The decision here referred to is *Salomon v Salomon & Co. Ltd.*\(^1\) which concerned claims

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\(^1\) [1897] AC 22
made by unsecured creditors against Salomon following the liquidation of his business.

Salomon owned a small but successful leather business. On the basis of this success he decided to turn his business into a limited liability corporation, which he did by fulfilling the statutory requirements set out in section 6 of the *Companies Act, 1862*. That section required seven or more members to subscribe to the memorandum of association. In this instance, the seven signatories were Salomon, his wife and their five children, all of whom were issued with a £1 share. Salomon was issued with a further £20,000 worth of shares along with £10,000 worth of debentures (secured as a floating charge against the company’s assets).

The business began to run into financial difficulties, however, so Salomon transferred his £10,000 to Broderip for £5,000 which he ploughed back into the business. Unfortunately, however, matters did not improve and when Broderip was not paid the interest on his debenture, he soon realised that the company’s financial prospects were poor. As a result, he called in a receiver who put the corporation into liquidation. This raised enough funds to settle the corporation’s debts to Broderip but did not settle the debts
owed to the company’s unsecured creditors. Hence the receiver tried to render Salomon personally accountable for the debt.

At first instance Vaughan Williams J. held that although the corporation was properly registered as a legal entity, it had been formed contrary to the “spirit” of the Companies Act, 1862 because the court felt that the seven members who signed up to the memorandum should have actively participated in the running of the corporation rather than having a merely superficial interest. As a result, the court held that the corporation was actually an agent of the principal, Salomon, and as the principal Salomon should be held personally accountable for the debts of his agent.

On appeal, the Court of Appeal agreed with the first instance decision in substance, but declared that the true basis for liability in this case was that the company held its property on trust for the beneficiary, Salomon. As such the creditors were entitled to a claim against Salomon through the corporation.

The House of Lords, however, declined to follow the approach of the lower courts. Instead they took the view that the statutory language of section 6
of the *Companies Act*, 1862 merely required that the company should have
had seven members as signatories to the memorandum in order for it to be
validly incorporated. Since A. Salomon Ltd had been incorporated in
accordance with the provisions of the 1862 Act, it was a corporate entity.

Lord Macnaghten could find no provision in the statute that required the
subscribers to take an active part in the running of the company. As his
Lordship eloquently stated “we have to interpret the law, not make it”. As
such, he stated:

> “The company is at law a different person altogether from the
subscribers to the memorandum, and though it may be that after
incorporation the business is entirely the same as it was before, and
the same persons are managers, and the same hands receive the
profits, the company in law is not the agent of the subscribers or the
trustee for them. Nor are the subscribers as members liable, in any
shape or form, except to the extent and in the manner provided by the
Act.”

The case may have principally concerned the liquidation of a corporation,
and there is little doubt that the legislature was keen to allow the easy

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2 *Salomon v Salomon & Co. Ltd* [1897] AC 22, per Lord Macnaghten at page 46
formation of limited liability companies to encourage the entrepreneurial spirit of the small businessman during the industrial revolution, but the importance of the creation of a separate legal corporate entity in relation to corporate crime cannot be understated. The courts clearly realised the potential implications of the decision in Salomon. A corporation was to be considered as a separate entity for the purposes of business decisions; it could hold property independently from its constituent members, a corollary of which being that corporations were also capable of holding independent states of mind.

In relation to corporate manslaughter, therefore, the decision of Lord Macnaghten in Salomon proved to be a pivotal moment in the history of the offence, even more so than a trio of cases decided in 1944, which will be examined later. As will be seen, discovering a corporation's criminal intent is dependent upon the prosecution being able to find a member of a corporation who is the "directing mind and will" and who possesses the necessary mens rea for the offence that the corporation has been charged with. If such a person can be found, they are identified as the embodiment

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3 Salomon v Salomon & Co. Ltd [1897] AC 22, per Lord Macnaghten at page 57
recourse for the victims once the unacceptable consequences of risky corporate activities do eventually materialise, the law finds itself ill equipped to deal with larger corporations with complex and diffuse power structures. As will be seen during the course of this thesis, the common law has developed in a way that appears to favour larger, poorly organised corporations. The "doctrine of identification" that has been devised by the courts as a basis of criminal liability for corporations has proven to be a hindrance to justice for those who have been wronged by corporations.

This problem has not, however, gone unnoticed and in 1996 the Law Commission published its proposals for a reform of the law of corporate manslaughter following the publication of its consultation paper in 1994. During the course of this document the Law Commission examined the law governing corporate manslaughter past and present and it was concluded that it was in desperate need of reform. The result was a recommendation from the Law Commission for the implementation of a new statutory offence of "corporate killing" which would be established if it could be shown that a "management failure" led to the victim's death. This new approach represented a marked change from the current law because the

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5 Tesco Supermarkets Ltd v Nattrass
basis for liability in the Law Commission's proposed offence was more "corporate" in nature. The Law Commission's approach would impose liability where it could be shown that the corporation organised its activities in a manner that failed to ensure the health and safety of those employed in or affected by those activities.

In accordance with the election manifesto promises made by the Labour Party prior to its election in 1997 about the implementation of a statutory offence of corporate manslaughter, the Home Office published a paper (with a foreword by the then Home Secretary Jack Straw) highlighting the government's commitment to the creation of such an offence. This included a treatment of the Law Commission's proposals and advancing the government's own proposals for reform. Acknowledging the necessity for a new approach to corporate manslaughter the Government largely agreed with the Law Commission's proposals. There were, however, some aspects of the proposed offence that the Government wanted to alter namely the scope of the offence to punish individuals. It is against this background that this thesis' discussion is set.
Throughout the course of this thesis it is intended to show that the current state of the law governing corporate manslaughter is unacceptable, paying particular attention to the inadequacies of the "doctrine of identification". Having identified the problems with the current offence of corporate manslaughter alternative approaches to the problem are explored it is around this basic premise that my thesis is structured.

In Chapter 2 an examination of the law of corporate manslaughter is commenced by looking at the historical development of the law of corporate manslaughter. The importance of such a discussion is that by providing a historical background to the "doctrine of identification" it sets out the context within which the offence of corporate manslaughter is to be understood. Throughout the chapter there will be an examination of important case law developments in the common law which highlight the methods used by the courts to gradually erode the immunity of corporations to the criminal law.

Having determined that the courts were willing to impose liability on corporations for crimes requiring proof of *mens rea* Chapter 3 sees us turn our attention towards the current state of the law of corporate manslaughter.
This chapter begins with an examination of the law governing individual liability for manslaughter as this provides the basis for the corporate offence. Attention is then turned to the pivotal cases of *H. M. Coroner for East Kent ex. p. Spooner*\(^5\) and *P. & O. European Ferries (Dover) Ltd.*\(^6\). The importance of these cases lies in the fact that the former case showed that the courts were willing to impose liability on a corporation for manslaughter, and the latter not only provides us with the first example of a corporation being prosecuted for manslaughter in England and Wales but also because it showed the problems that the "doctrine of identification" can create for any successful prosecution.

In Chapter 4 we begin to look at some alternative approaches to the problem of imposing liability for manslaughter on corporations. In this chapter the proposals for reform advanced by the Law Commission and the Government are examined. As with the Government's views the Law Commission's proposed new offence of "corporate killing" will be analysed and appraised which, as we will be seen, has as its central premise the notion of a "management failure". It will be suggested in the course of this section that those ideas for reform that are based on a holistic approach to

\(^5\) (1989) 88 Cr. App. R. 10
corporate behaviour should be embraced rather than one which has a heavily individualistic bias as does the present law.

In Chapter 5 it is questioned whether it is futile to seek out a means of imposing criminal liability upon a corporation. In sections 2 and 3 of the Health and Safety at Work Act 1974 we already see that duties have been imposed on corporations for causing death to employees or the general public by its undertakings. An examination of the case law relating to both sections shows that the courts are very willing to impose liability on 'corporations that kill' and take a strict view of attempts to curtail the scope of these two sections. It is noted, however, that there is a strong perception amongst the general public that regulatory crime is not "real" crime. Whilst corporations are undoubtedly punished for regulatory offences, there is an additional stigma that attaches to those who have been convicted of a criminal offence. Attempts are made in the last section of the chapter to determine whether there is some irreplaceable value to this notion of stigma.

6 (1991) 93 Cr. App. R. 72
Despite advancing the argument that if stigma does have some extra value it can be harnessed by using an adverse publicity punishment for regulatory offences, it is recognised that in the public eye, at least, there is still a much greater symbolic value attached, rightly or wrongly, to criminal prosecutions. As such it is necessary to seek alternative means to impose criminal liability. The search for an alternative basis of liability therefore leads to an examination of "tried and tested" methods that have already had a degree of success in holding corporations accountable for their actions. Therefore in Chapter 6 a more detailed examination of the decision of the Privy Council in Meridian Global Funds Management Asia Ltd. v Securities Commission is undertaken. In that case the court suggested that the decision in P & O Ferries (Dover) Ltd. was nothing more than a pronouncement on the particular statute at issue in that case. The decision in Meridian Global Funds Management Asia Ltd. if followed in later cases would have created a more flexible rule of attribution which would have varied according to the particular statute or rule of law in question. The approach in this case is dismissed, however, on the grounds that it still has its roots in an individualistic form of liability which, as has been seen in the case of the doctrine of identification, can prove troublesome for the courts.

7 [1995] 2 AC 500
With this in mind those theories of liability which have group behavioural patterns as their basis are examined. The reason for including these theories in such a discussion is that the doctrine of identification takes what is perceived to be an overly simplistic view of the corporate decision making process. This chapter aims to show that any theory of liability that relies on ascribing the liability of individuals to corporations is flawed because it fails to recognise that decisions made within a corporation will rarely be made by one person but are normally reached as a group, by voting at a board meeting for example. Its failure lies in its inability to account for the fact that individuals may reach decisions as part of a group that they would shy away from by themselves. Throughout Chapter 7 examples are provided both of such behaviour and the catastrophic consequences these courses of action can have. Furthermore some of the theories about corporate behaviour are highlighted in a bid to harness them as an alternative means of imposing liability on corporations.

Chapter 8 involves a discussion of the approach that is adopted in other jurisdiction in a bid to discover some better means of imposing corporate criminal liability. Throughout this chapter not only will the legislative
attempts of our neighbours in Scotland and of other Commonwealth jurisdictions such as Australia and Canada be examined, but also the approach of some European legislatures in Holland and Italy and in the United States will be considered. In keeping with the belief that it is better to adopt a holistic approach to the question of determining corporate liability, it is suggested that approach in Italy and that proposed in Australia will be of particular interest.

Having spent a great length of time focusing on how to impose liability the focus is then shifted to the question of punishing corporations for their crimes which is a topic of particular interest. If one is eventually able to find corporations liable for corporate manslaughter it would be catastrophic if the courts were left simply with a means of punishment that amounted to little more than “a slap on the wrist”. This would undermine the effectiveness and stature of any statutory provision that was enacted. Therefore, in Chapter 9 a number of methods for punishing corporate offenders are examined. These methods range from a simple fine to more “exotic” alternatives such as enforced self-regulation and corporate probation. Used in conjunction with an effective system of corporate criminal liability, these new forms of punishment can be used to alter
corporate behaviour in a manner which favours the development of an organizational structure which is more geared towards the promotion of workplace safety.

Finally, in Chapter 10 proposals are advanced to indicate the way in which the law should develop in future. In order to provide some form of structure to the chapter the forthcoming prosecution of Network Rail and Balfour Beatty is used as a case study. Based on the facts as disclosed in the Health and Safety Executive reports some possible predictions about how the case might progress are put forward and alternative approaches that might lead to a successful prosecution are considered.

Clearly, the current position governing corporate manslaughter is unsustainable. The inadequacy of the law in this matter should no longer be tolerated. Finally, it is expected that a detailed examination of each of these topics will help to identify the best approach for the law to take in the future and in this thesis some of the options available to us will also be examined.
Chapter 2: The Historical Development of Corporate Criminal Liability

As the foundation for the rest of the work in this thesis this chapter contains an examination of the state of the common law governing the offence of corporate manslaughter. The discussion of this area of law will be divided into two main parts: 1) a brief outline of the law relating to the development of corporate criminal liability (dealt with in this chapter); and 2) a statement of the law of corporate manslaughter as it stands today (discussed in Chapter 3). In the discussion of this topic the main intent is to merely state the law as it is rather than enter into any detailed debate about its merits. Most of my comments on this matter until the next chapter which deals with proposals for reform of the law governing corporate manslaughter.

Corporations have not always been within the ambit of the criminal law. Indeed, as will be seen, in the early stages of the development of company law the legal position of the company was unclear. In this first section of this chapter the historical development of the law of corporate manslaughter will be considered (although this is no more than a cursory examination). In the discussion of this topic area the first issue to be looked at is the early
bars to corporate liability and the means employed by the court and the legislature to circumvent them.

Having dealt with this area attention is then shifted to how the courts managed to subject corporations to the full force of the criminal law. The main item for discussion in this section is the way the courts overcame the difficulty of attributing *mens rea* to a corporation which was a fundamental obstacle to be overcome by the courts. The examination of this topic will illustrate the two main methods utilised by the courts to attribute corporations with criminal liability, namely the doctrine of identification and vicarious liability. Discussion of these two doctrines is vital as corporate manslaughter is a common law offence which requires proof of *mens rea*. Hence this discussion is not merely of historical interest, but, furthermore, it sets the context for the development of corporate liability for manslaughter and provides the basis for the offence.

Before that area of the law can be looked at, it is first necessary to consider the early bars to corporate liability as it was not easy to bring corporations within the remit of the criminal law. A number of important philosophical and practical bars faced early attempts to the prosecution of corporations, namely;
The problem of attributing the necessary criminal intent was overcome by the courts creating a legal mechanism based on the theory of organic representation. This lead to the birth of the doctrine of identification, a conceptual tool which allowed the courts to impute liability by analogy. In an oft quoted passage, Viscount Haldane LC highlighted the fact that in some cases the courts were willing to treat certain members of the company as the alter ego of the corporation itself. He stated:

"[A] corporation is an abstraction. It has no mind of its own any more than it has a body; its active and directing will must consequently be sought in the person who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation".²

The importance of the alter ego theory as a means of attributing liability to a corporation, as well as the problems associated with this use of metaphysics will be discussed more fully in the treatment of the doctrine of identification and vicarious liability in relation to the offence of corporate manslaughter.
The matter of the *ultra vires* bar was dispatched with relative ease. It was thought that a corporation could not be liable for a criminal act committed by its agents where that act could not be authorised by the corporation because it was outside the ambit of its powers. L. H. Leigh comments:

“In the law of tort ... Lord Lindley put the matter beyond doubt in *Citizen's Life Assurance Company v Brown*. The corporation civilly was to be placed in the same position as a human employer with respect to liability for the torts of his employees. All employers were liable for torts involving malice committed by his employees in the course of their employment. The corporation was in the same position. The courts thus adopted the view that the relevant enquiry was not directed to the nature of the act in question, but to whether it was done in pursuit of objects competent to the corporation”.

The position with regard to *criminal* liability for *ultra vires* acts, however, was simply dismissed by inference as it was never raised in any of the cases involving the imposition of corporate criminal liability.

The greatest bar to be overcome by the courts, however, was the particular procedural problem which corporations posed to the English justice system.

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2 *Lennards Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] AC 705, at 713
The biggest problem was the fact that corporations, as a legal person, clearly have no physical existence. In the case of indictable offences, on assize, a corporation had to appear personally in court.\(^4\) Having no physical existence this proved to be a practical impossibility, therefore a corporation was not triable at assize and indeed could not be committed for trial. How did the courts overcome this problem? Leigh states:

"The system was to prefer a bill before the grand jury ... if a true bill were returned and the matter remitted to assize it was then necessary to remove the indictment by *certiorari* to the King's Bench. There *ex gratia curia* the corporation could appear and plead by its attorney. ...When once the indictment had been preferred before the King's Bench, the court could compel the corporation to appear".\(^5\)

Despite being a very long and drawn out process its use was continued with only minor alterations until the arrival of the *Criminal Justice Act, 1925*. This Act aimed to provide a simpler mechanism with which to commit a corporation to trial. This was done by making it easier for a corporation to

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4 On trial for a summary conviction, however, it was acceptable for a corporation to be represented in court by its counsel or attorney under the provisions of the *Summary Jurisdiction Act, 1848*.
appear in court by its representative. Where the corporation was charged with an indictable offence the examining justices could make an order empowering the prosecutor to present a bill in respect of the offence named in the order, provided they were satisfied that enough evidence had been adduced. The order was deemed sufficient to constitute a committal for the purposes of any enactment referring to committal for trial. Should the Grand jury at assize or quarter sessions return a true bill against the corporation, the corporation could appear at trial and plead by its representative before the court of assize or sessions. With regard to cases falling within s.17 of the Summary Jurisdiction Act, 1879 states Leigh, a corporation could claim by its representative to be tried by a jury. This representative could be appointed, quite simply, by a statement in writing signed by the managing director of the corporation. This changed once again in 1933 with the abolition of the Grand Jury, after which:

“a bill could be preferred before the court if the corporation had been committed for trial or, if a bill had been preferred, with the consent or by direction of a justice of the High Court, or pursuant to an order made under section 9 of the Perjury Act, 1911”.6
The effect of this procedural review was to make the corporation's lack of a physical existence less of a bar to anyone seeking legal redress against it.

By the early 1930's, therefore, it was clear that a corporation could face trial in the English courts. What was not necessarily clear, however, was whether it was possible for criminal corporations to be subjected to the full force of the English criminal law. The early impetus to take steps to remedy this situation has its roots in a number of factors. Celia Wells advances the following explanation:

"The development of corporate executive structures clearly challenged a legal response. The individual entrepreneur was being replaced by more complex business arrangement, and in terms of activity, the development of the railways transformed the landscape, the economy and mobility. Corporations began to cause damage and injury both to property and person. Plaintiffs discovered that the individual at fault might not be suable or worth suing. It emerged that what was simplest for the injured party was also the safest for management; to treat the corporation as the actor".  

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How then were the courts to impose liability on corporations? Clearly the legal position of the corporation needed much clarification. Its lack of *mens rea*, its physical inability to act and the aforementioned problems created by any attempt to indict a corporation, might have suggested that the regulation of the corporate activities could be outside the ambit of the criminal courts. This was not the case, however. Early efforts to pin criminal liability on a corporation resulted in companies being held liable for failures to perform a public duty which resulted in a nuisance, for example, the blocking of a public highway\(^8\). Leigh states:

"The liability of corporations ... derives its real impetus from liability for non-feasance in cases of public nuisance. Such a prosecution was seen not as in essence a criminal proceeding but as a means of enforcing the performance of a public duty. No *mens rea* was required and, as the gist of the offence lay in a failure to eradicate the nuisance, no question of ascribing an act to the corporation arose".\(^9\)

Since the aim of any prosecution was the ultimate removal of the nuisance rather than the punishment of the defendant, the question of the corporation appearing in court was never an issue. The question of punishment was

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\(^8\) *R. v. Great North Eastern Railway Company* (1846) 9 Q.B. 315
equally unproblematic as punishment was by means of a fine, a form of penalty which could easily be imposed on a corporation. This meant that the next major conceptual step for the law to take was to impose liability on corporations for misfeasance, that is to say for a positive act rather than an omission.

In *R v Great North of England Railway Company*,\(^9\) the defendant company had built a railway line that cut through and obstructed a highway. Contrary to statutory requirements the company had failed to build a bridge over the said highway. The prosecution alleged that this was analogous to trespass to land and that an indictment could lie against the corporation in respect of it. Having had their attention drawn to both the tendency at the time to treat corporations as civilly as well as criminally responsible, and the application of vicarious liability in tort, the court found the corporation guilty. Lord Denman C.J. highlighted the difficulty in any given case of distinguishing between an act and an omission. He stated:

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\(^10\) (1846) 9 QB 315
“[It is] as easy to charge one person of a body corporate with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission”.11

There were, however, crimes that a corporation could not commit stated Lord Denman CJ, these included treason, felony, offences against the person and perjury. This is justified on the basis that “these offences derive their character from the guilty mind of the offender, and at any rate were violations of the social duties belonging to natural persons”.12 A corporation could not, therefore, be guilty of these offences as they have no such duties. They could, however, be guilty of “commanding acts to be done to the nuisance of the community at large”.13 Finally Leigh concludes, Lord Denman CJ made his decision based purely on policy grounds, suggesting that he wanted to make an example out of the defendant corporation, possibly in an attempt to show the public that the courts were capable of exercising some control over these new powerful forms of business organisation. Lord Denman CJ realised that both those who ordered the work (the company directors) and the workmen could be

11 R v Great North of England Railway Company (1846) 9 QB 315, per Lord Denman C.J. at p.326.
13 R v Great North of England Railway Company (1846) 9 QB 315, 326
prosecuted, yet he declined to impose liability solely on the human actors involved. He states at p. 327:

"[T]he public knows nothing of the former [the directors], and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make reparation for the injury. There can be no effective means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority: and there is no principle which places them beyond the reach of the law for such proceedings".

The undoubted aim of this statement was to try to place some kind of curb on the undoubtedly great powers of the corporate management. This was achieved by placing liability on the constituent members of the corporation. The suggestion is that it would be their ultimate responsibility to ensure that the company did not undertake an illegal course of action. The liability of corporations for misfeasance in cases of public nuisance was, by now, firmly established.

The introduction of legislative (or statutory) liability for corporations led to a further extension of the law’s powers. Corporations became liable for
non-compliance with the terms of the various Clauses Acts, for example, the Railway Clauses Consolidation Act 1845 which dealt with the regulation of certain undertakings carried out by bodies corporate in carrying out public utility functions. The importance of such legislative intervention lay mainly in its ability to subject "certain areas of business activity to a detailed scheme of administrative control". As the variety of corporate enterprises increased so did the volume of regulatory legislation and the number of convictions of companies who had breached their terms. Framed as strict liability offences, it became more common for corporations to appear as the accused in court cases.

At this stage, corporate liability [as in primary liability] for public nuisance offences was becoming increasingly accepted by the courts and the general public. One exception remained, however, that was cases involving mens rea. In those cases it was still preferable to hold the corporation vicariously liable as the master. The next logical step for the courts, therefore, was to try and find some mechanism by which to hold corporations personally liable. This was a necessary prerequisite before any assertion that a corporation could have a mind and will, and thus be subject to the criminal

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law, could be made. Such a mechanism was provided by the courts in the key case of *Moussell Brothers Limited v London and North Western Railway Co.* 15

It had been a long established principle of the common law that vicarious liability was not a part of the criminal law. There were, however, exceptions to this rule. The first two were the common law offences of public nuisance and criminal libel, the final exception concerned statutory offences.

In *Mousell Brothers* the appellants were charged with two complaints under sections 98-99 of the *Railway Clauses Consolidation Act, 1845* for fraudulently trying to avoid the payment of certain freight charges. The offence required proof of *mens rea*. Finding the company guilty, Atkin J. stated:

"... while *prima facie* a principal is not be made criminally responsible for the acts of his servants, yet the legislature may

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Brydone, London), p. 21

15 [1917] 2 KB 836

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prohibit an act or enforce a duty in such terms as to make the prohibition of the duty absolute".16

When then might vicarious liability arise under a statute? Atkin J. continues at p.845:

"To ascertain whether a particular Act of Parliament has that effect or not, regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom in ordinary circumstances it would be performed, and the person upon whom the penalty is imposed".

His Lordship’s view on the matter appears to follow that of Channel J.17 in *Pearks, Gunston & Tee Ltd. v Ward*18 who stated:

"By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the way of *mens rea*, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant. But there are exceptions to this rule in the case of quasi-criminal offences ... that is

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16 *Mousell Brothers Limited v London and North Western Railway Co.* [1917] 2 KB 836, 845.
17 Quoted by Viscount Reading C.J. in *Mousell Brothers Limited* at p.843.
18 *Pearks, Gunston & Tee Ltd. v Ward* [1902] 2 KB 1.
to say, where certain acts are forbidden by law under a penalty, possibly even a personal penalty, such as imprisonment, at any rate in default of a payment of a fine”.

Wells is quick to highlight the similarity of the two decisions. In “Corporations and Criminal Responsibility”, she notes:

“The emphasis [in Mousell Brothers] then is on the offence being statutory, and in this it echoes the 1902 decision of Pearks, Gunston & Tee Ltd. v Ward, which upheld corporate vicarious liability for a statutory offence (albeit one of strict liability) on the ground that there was no reason against its imposition, since the very object of the legislature was to forbid the thing absolutely. But Channel J. indicated that a corporation could be convicted under s.3 of the same Act which does involve criminal intent or at least knowledge”\(^{19}\).

Mousell Brothers. appeared, therefore, to have taken the criminal liability of corporations a step further by imposing vicarious liability for statutory offences “beyond the realm of strict liability”\(^{20}\). A company could now be held liable for a statutory offence requiring mens rea where that statute gave rise to an absolute duty or prohibition. Whether such a duty or prohibition arose was a matter of construction resolved by referring to the dictum of

Atkin J. in *Mousell Brothers*. An opportunity for the potential widening of the ambit of corporate criminal liability using *Mousell Brothers* was presented to the courts in *Cory Brothers & Co.*. In this case the defendant company and three individuals were charged with both manslaughter and “setting up an engine calculated to destroy human life or inflict grievous bodily harm with the intent that the same should or whereby the same might destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact with it” contrary to s.31 of the *Offences Against the Person Act, 1861*. In a bid to prevent thefts from its bunkers, the defendant company erected an electrified fence around one of its power-houses. A miner on a ratting expedition stumbled against it, and was electrocuted and killed. Holding that the indictment could not lie against the corporation, Finlay J. stated:

“I am bound by authorities which show quite clearly that as the law stands an indictment will not lie against a corporation either for a felony, or for a misdemeanour of the nature set out in the second count of this indictment”.

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21 [1927] 1 KB 810
Finlay J. supported this statement with *dicta* from the case of *R v Birmingham & Gloucester Railway*\(^ {24}\); *R v Great North of England Railway*\(^ {25}\); *Pharmaceutical Society v London and Provincial Supply Association*\(^ {26}\); and *R v Tyler*\(^ {27}\). All these cases were accepted as authority for the proposition that a corporation could not be guilty of "treason or of felony ... of perjury or offences against the person"\(^ {28}\). Lord Denman C.J. in *Great North of England Railway* explained this statement by saying:

"The court of Common Pleas lately held that a corporation might be held liable in trespass; but nobody has sought to fix them with acts of immorality. These plainly derived their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases: but they may be guilty of commanding acts to be done to the nuisance of the community at large"\(^ {29}\).

\(^{22}\) *Cory Brothers & Co.* [1927] 1 KB 810, 814.

\(^{23}\) *Cory Brothers & Co.* [1927] 1 KB 810.

\(^{24}\) (1842) 3 QB 223

\(^{25}\) (1846) 9 QB 315

\(^{26}\) (1880) 5 AC 859

\(^{27}\) [1891] 2 QB 588

\(^{28}\) Per Lord Denman C.J. in *R v Great North of England Railway* (1846) 9 QB 315, 326, quoted by Finlay J. in *Cory Brothers & Co.* [1927] 1 KB 810 at 816.

\(^{29}\) Per Lord Denman C.J. in *R v Great North of England Railway* (1846) 9 QB 315, 326, quoted by Finlay J. in *Cory Brothers & Co.* [1927] 1 KB 810 at 816.
R. S. Welsh, in his article "The Criminal Liability of Corporations"\(^{30}\), points out that the decision in Cory Bros. was heavily criticised at the time by C. R. N. Winn in his article "The Criminal Responsibility of Corporations"\(^{31}\). His argument runs thus:

"In all likelihood a more detailed statement of the circumstances would reveal the fact that the moral responsibility for the erection of the fence lay with the directors ... The directors in their corporate capacity are, on such an hypothesis, the guilty parties, both morally and legally, since their command to inferiors who had no practical alternative to obedience was the originating cause of the colliers death. The directors are guilty in their corporate capacity and should have been indicted in that capacity: in their corporate capacity they constitute to all practical intents the corporation itself ... The *intra vires* decisions and commands of a board of directors are factually, and should be legally, the decisions of the corporation and not of individuals *qua* individuals; for a corporation is an entity in which individuals are united within a bond of association which modifies their mental processes"\(^{32}\).

\(^{30}\)(1946) 62 LQR 345.  
\(^{31}\)(1929) 3 CLJ 398.  
\(^{32}\)"The Criminal Responsibility of Corporations" C. R. N. Winn, (1929) 3 CLJ 398 at 405-406.
Even at this (relatively) early stage in the development of the law of corporate criminal liability, it is clear that some academic commentators were beginning to recognise the potential for the mental state of the board of directors to be attributed to the corporation. Such a development would have allowed the courts to find that "[t]he corporate will may entertain mens rea and the corporate hands, which are factually the hands of its representatives acting in their corporate capacity, may perform the actus reus, and full criminal liability should logically attach to the corporation".

Mousell's case however, was not even mentioned in the case of Cory Bros.
It is arguable that, had Finlay J. recognised the potential of Mousell Bros. to enable a court to impose vicarious liability on a corporation for an offence requiring mens rea, the courts might have found the defendant company liable for the s.31 offence at least. At that stage the doctrine of identification had not been developed, so it would have been impossible to find a company guilty of manslaughter. Indeed, Stable J. commented in ICR Haulage Ltd:\cite{34}:

\footnotesize
\begin{itemize}
  \item[33] Winn, \textit{op. cited} at 407.
  \item[34] [1944] KB 551
\end{itemize}
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"[I]nasmuch as [Cory Bros.] was decided before the decision in DPP v Kent and Sussex Contractors ... if the matter came before the court today, the result might well be different. As was pointed out by Hallett J. in DPP v Kent and Sussex Contractors, this is a branch of the law to which the attitude of the courts has in the passage of time undergone a process of development"35.

The doctrine of vicarious liability, in the context of corporate criminal liability, has been considered recently in two cases heard at appellate level36. The first of these was Seaboard Offshore Ltd. v Secretary of State for Transport37. The case concerned s.31 of the Merchant Shipping Act, 1988, which was brought into force following the findings of the Sheen inquiry into the Zeebrugge ferry disaster. The court had to consider whether a manager is vicariously liable for a breach of duty under that section, which arises from any act or omission by any of the managers servants or agents. In finding the defendant company guilty, Lord Keith of Kinkel stated:

37 [1994] 1 WLR 541
"It would be surprising if by the language used in s.31 Parliament intended that the owner of a ship should be criminally liable for any act or omission by any officer of the company or member of the crew which resulted in unsafe operation of the ship, ranging from a failure by the managing director to arrange repairs to a failure by the bosun or cabin steward to close portholes. Of particular relevance in this context are the concluding words of s.31 (4) referring to the taking of all such steps as are reasonable for him (my emphasis) to take, i.e. the owner, charterer or a manager. The steps to be taken are such as will secure that the ship is operated in a safe manner. That conveys to me the idea of laying down a safe manner of operating the ship by those involved in the actual operation of it and taking appropriate measures to bring it about that such safe manner of operation is adhered to".  

He concludes at p.546:

"[the offence under s.31] consists simply in a failure to take steps which by an objective standard are held to be reasonable steps to take in the safe operation of the ship, and the duty which it places on the owner, charterer or manager is a personal one. The owner, charterer or manager is criminally liable if he fails personally in the duty, but is not criminally liable for the acts or omissions of his subordinate employees if he himself has taken all such steps".

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38 Seaboard Offshore Ltd. v Secretary of State for Transport [1994] 1 WLR 541, per
It is clear in this case that Lord Keith of Kinkel has declined to impose vicarious liability on the company because, on a proper interpretation of the statutory provision in question, the duty imposed was solely a personal one, which prevented the imposition of vicarious liability.

The second case is that of *R v British Steel Plc.* The prosecution followed the death of an independent contractor who was carrying out work under the supervision of a British Steel employee. The House of Lords took a different approach to the court in *Seaboard Offshore Ltd.* This case involved a breach of section 3 (1) of the *Health and Safety at Work, etc. Act, 1974,* which requires employers to conduct their undertakings in a manner, which does not threaten the health and safety of “persons not in his employment who might be affected thereby.” This would cover, for example members of the general public, such as visitors to the worksite, or people living nearby. Counsel for British Steel Plc. argued, under the doctrine of identification (which will be discussed later), the company could escape criminal liability if, at directing mind level, it had taken reasonable care. Heavy reliance was placed on the House of Lords decision in *Tesco*

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39 [1995] ICR 586
40 Section 3 (1) *Health and Safety at Work, etc., Act 1974*
Supermarkets Ltd. v Nattrass\textsuperscript{41} (also to be discussed later) in which the company's defence was that the commission of the offence was due to the act of "another person\textsuperscript{42}" and that the company had taken all reasonable care and exercised due diligence in trying to prevent the commission of such an offence. Considering this defence, Lord Reid concluded:

"'They' – the board of directors – set up a chain of command through regional and district supervisors, but they remained in control. The shop managers had to obey their general directions and also take orders from their superiors. The acts or omissions of the shop manager were not the acts of the company itself\textsuperscript{43}."

Counsel for British Steel Plc. clearly hoped that the House of Lords would, in this instance, follow their earlier decision in Tesco v Nattrass. If this were the case then liability for the death would lie with Mr C. (the supervisor) for failing to operate a safe working system on site, rather than pinning liability on the company under the ordinary rules of attribution. Their Lordships refused, however, to entertain such an argument. It was possible, they suggested, to distinguish between the two cases by looking at

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{41}[1972] AC 153
\item \textsuperscript{42}That is to say, a person who was not sufficiently senior in the corporate management structure to be identified with the company. This was a statutory defence provided by s.24 (1), Trade Descriptions Act, 1968.
\end{enumerate}
\end{footnotesize}
the language of the two statutory provisions at issue in both cases. Having found, in accordance with the principles laid out in *R v Board of Trustees of the Science Museum*[^44] and *R v Associated Octel*[^45] that Section 3 (1) *Health and Safety at Work, etc. Act, 1974* creates an absolute prohibition (subject to the defence of reasonable practicability), Steyn J. stated:

> “Given the interpretation which prevailed [in the aforementioned decisions] and which we have adopted counsel for British Steel Plc. concedes that it is not easy to fit the idea of corporate liability only for acts of the “directing mind” of the company into the language of s.3 (1). We would go further. If it be accepted that parliament considered it necessary for the protection of public health and safety to impose, subject to the defence of reasonable practicability, absolute criminal liability, it would drive a juggernaut through the legislative scheme if corporate employers could avoid criminal liability where the potentially harmful offence is committed by someone who is not the directing mind of the company … If we accept British Steel Plc.’s submission, it would be particularly easy for large industrial companies engaged in multifarious hazardous operations to escape liability on the basis that the company, through

[^43]: *Tesco Supermarkets Ltd. v Nattrass* [1972] AC 153, per Lord Reid at 175.
[^44]: [1993] ICR 876
[^45]: [1995] ICR 281
it's "directing mind" or senior management, was not involved. That would emasculate the legislation."\(^{46}\)

In the British Steel case, therefore, the court rejected the doctrine of identification in favour of vicarious liability. An important and beneficial aspect of this decision is highlighted by the Law Commission who point out:

"The court added that the effect of this judgement would be to reduce the time taken up in trials on s.3 (1) by dispensing with the need to examine whether particular employees were part of senior management, and to promote a culture of guarding against risks to health and safety caused by hazardous industrial activity."\(^{47}\)

Such a judgement was ideal in the context of the *Health and Safety at Work, etc. Act, 1974*. It, arguably, reflected the spirit of the legislation and facilitated the achievement of its aims.

As a basis of corporate liability, it is clear that vicarious liability has been accepted by the courts, but it has not been so readily accepted by some

\(^{46}\) *R v British Steel Plc.* [1995] ICR 586, per Steyn J. at 593.

academic commentators. In his article "Corporate Culpability", Chris Clarkson deals with the viability of vicarious liability as a basis for such an imposition of corporate liability. The main advantage of the doctrine of vicarious liability, states Clarkson, is that it avoids the problem of having to identify a person sufficiently important in the hierarchy of the company who has committed the crime. This is advantageous, states Clarkson, because it prevents companies avoiding criminal liability by delegating illegal operations to lower managers or employees, that is to say people not sufficiently important to be caught by the doctrine of identification.

Unfortunately it appears, however, that the disadvantages of this doctrine far outweigh its benefits. This is especially the case, Clarkson states, when applied to crimes involving mens rea. The disadvantages, he claims, are two-fold. Firstly, it has not been proved that using vicarious liability as a basis for corporate liability acts as any form of incentive to conduct its affairs in a criminally responsible manner. If anything, states Clarkson:

"It has been pointed out that companies will, at most, only do what is reasonable to prevent harm and strict and vicarious liability could
actually operate as a disincentive to companies to engage in socially beneficial enterprises” 48.

The second problem, according to Clarkson, is that:

“Vicarious liability may be over inclusive in that a company could be penalised for a fault of an employee for whom the company ought not to be held responsible in that a company may have done everything within its power to prevent the wrong doing. The company may have adopted clear policies and issued express instructions to avert the wrong. If a maverick, perhaps menial, employee decides to “go it alone” it hardly seems justifiable to hold the company liable for their actions or inactions” 49.

This second criticism is clearly aimed at the approach adopted by the court in Coppen v Moore (no. 2) 50 and followed in Director General of Fair Trading v Pioneer Concrete (UK) Ltd 51 where it was stated that an employer is not prevented from being found vicariously liable for the criminal acts of an employee where they have expressly forbidden the employee from committing the criminal act in question. This was an

48 “Corporate Culpability” Chris Clarkson  
49 “Corporate Culpability” Chris Clarkson  
50 [1898] 2 QB 306
important ruling as it prevents companies from enjoying the benefits of employees' criminal acts whilst still avoiding liability purely because they had forbidden it.

Of course, vicarious liability is not the sole means of attributing liability to a corporation. The doctrine of identification, or the *alter ego* theory as it is also known, has its origins in a trio of cases in 1944. It is to the development of this doctrine that I now shift my attention in the consideration of the historical development of corporate criminal liability. In this section the rise and fall of the popularity of this doctrine in the court system of England and Wales will be examined and the application of this doctrine to the substantive law of manslaughter will be considered at a later stage.

L. H. Leigh, at an early stage noticed a particular problem. He stated:

"The existing rule of liability was [pre 1944] that corporate liability was vicarious liability. Consequently, before criminal liability could be imposed upon corporations, some method had to be found for
ascribing liability personally to the body corporate. The *alter ego* theory has been said to provide the necessary defence\(^{52}\).

Indeed, "the introduction of this doctrine", the Law Commission state, "enabled criminal liability to be imposed on a corporation, whether as perpetrator or accomplice, for virtually any offence, notwithstanding that *mens rea* was required, and without having to rely on statutory construction"\(^{53}\).

The change in the courts' attitude to the question of the criminal liability of corporations has often been identified as having its origins in the cases of *Director of Public Prosecutions v Kent and Sussex Contractors Ltd.*\(^{54}\); *R. v. ICR Haulage Ltd.*\(^{55}\); and *Moore v Bresler*\(^{56}\). These cases introduced, and developed into the criminal law, the oft-cited statement of Viscount

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\(^{54}\) [1944] 1 KB 146

\(^{55}\) [1944] KB 551

\(^{56}\) [1944] 2 All ER 515. Note "Confusion Worse Confounded: The End of the Directing Mind Theory?" R. J. Wickins and C. A. Ong, [1997] JBL 524, which questions whether the language used by the courts in these cases actually does give rise to any doctrine of identification.
Haldane L.C. who said at page 713 in *Lennards Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd.* 57.

"[A] corporation is an abstraction. It has no mind of its own anymore than it has a body; its active and directing will must consequently be sought in the person of somebody who for some purposes might be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation".

If such a person could be found then the corporation could be held liable because "his action is the very action of the company itself" 58.

In *Director of Public Prosecutions v Kent and Sussex Contractors Ltd.*, the company was charged with two offences under the *Motor Fuel Rationing (No. 3) Order, 1941*, and Regulation 82 of the *Defence (General) Regulations, 1939*, committed by the company in an attempt to fraudulently acquire petrol coupons. The magistrates court refused to convict the company on the basis that the company could not form the necessary *mens

57 [1915] AC 705,713
58 *Lennards Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd.*, [1915] AC 705, per Viscount Haldane L.C. at 714
rea required to commit these offences. The prosecution appealed.

Allowing the appeal Viscount Caldecote L.C. J. stated:

"[Counsel for the defendant company’s] argument on the question whether there can be imputed to the company the knowledge or intent of the officers of the company falls to the ground because although the directors or general manager of a company are its agents, they are something more. A company is incapable of acting or speaking or even thinking except in so far as its officers have acted, spoken or thought ... In the present case the first charge against the company was of doing something with intent to deceive, and the second was that of making a statement which the company knew to be false in a material particular. Once the ingredients of the offences are stated in that way it is unnecessary, in my view, to inquire whether it is proved that the company’s officers acted on its behalf. The officers are the company for this purpose" (my emphasis). 59

Supporting this view Macnaghten J. stated:

"It’s true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate ... If the responsible agent of a company, acting

59 Director of Public Prosecutions v Kent and Sussex Contractors Ltd., [1944] 1 KB 146, per Viscount Caldecote L.C. J. at 155.
within the scope of his authority puts forward on its behalf a
document which he knows to be false and by which he intends to
deeive, I apprehend that according to the authorities ... his
knowledge and intention must be imputed to the company”, 60

Interestingly, the case of Mousell Brothers was not applied in this case.
The statutory regulations in question in Kent and Sussex Contractors were
different from those in Mousell Brothers “in that they imposed no absolute
criminal liability upon a principal or a master for the acts of his servants”. 61

This bold new approach was followed by the Court of Criminal Appeal in R
v I. C. R. Haulage. In this case the company was charged with the common
law offence of conspiracy. The offence required proof of mens rea, thus
vicarious liability could not apply. Despite holding that there was no reason
in law why this indictment should not lie against the company, Stable J. was
keen to point out the limitations of this decision. He stated:

“We are not deciding that in every case where the agent of a limited
liability company acting in its business commits a crime, the
company is automatically to be held criminally responsible ... Where

60 Director of Public Prosecutions v Kent and Sussex Contractors Ltd., [1944] 1 KB
146, per Macnaghten J.
in any particular case there is evidence to go to a jury that the
criminal act of an agent, including his state of mind, intention,
knowledge or belief, is the act of the company and in cases where the
presiding judge so rules, whether the jury are satisfied that this has
been proved must depend on the nature of the charge, the relative
positions of the officer or agent, and the other relevant facts and
circumstances of the case". 62

So what exactly did the court decide in *I. C. R. Haulage*? L. H. Leigh
states:

"In the result the case clearly establishes two propositions. The first
is that a distinction exists between personal and vicarious liability as
respects corporations. The second is that, in the appropriate
circumstances, the state of mind and actions of an agent may be the
state of mind and acts of the company". 63

This indicates that, in following the approach of the courts in the earlier
case of *Kent and Sussex Contractors* and *I. C. R. Haulage* had established
that it was possible for a company to be held *directly* liable for criminal
offences requiring proof of *mens rea*. This meant that the courts were,

62 *R v I. C. R. Haulage* [1944] 1 KB 551, per Stable J. at 559
63 "*The Criminal Liability of Corporations in English Law*", L. H. Leigh (1969: Lowe &
Brydone, London), p. 34
seemingly, wiling to accept that a corporation could be found to hold the mens rea necessary to commit a “proper” criminal offence.

Further support for this view is to be found in the case of Moore v Bresler, the third case in the trio. This case served merely to confirm the growing acceptance of the alter ego theory by the courts, and the steady move towards accepting that a corporation could be directly liable for a criminal offence.

In this case the company and two of its officials (the secretary and manager of the Nottingham branch) were charged with publishing a document containing false information, with intent to deceive contrary to section 35 (2) of the Finance (No. 2) Act, 1940. The documents were produced with the aims of embezzling the company and avoiding the company’s purchase tax liability. The Company was convicted. The secretary and manager were deemed to have acted “within the scope of their authority” despite the fact that their acts were fraudulent, and in making the fraudulent returns they were acting as officers of the company. Humphreys J. stated:
"It is difficult to imagine two persons whose acts would more
effectually bind the company or who could be said on the terms of
their employment to be more obviously agents for the purposes of the
company than the secretary and general manager of that branch and
the sales manager of that branch".64

Clearly the courts, in the aftermath of these three cases, were willing to find
a corporation guilty of a criminal offence in those situations where the
officer holding the requisite mens rea was sufficiently senior within the
corporate structure for them to be deemed to be the embodiment of the
company itself.

With such an impetus for imposing direct corporate liability on corporations
now existing, the language of identification began appearing in other court
judgements. In H. L. Bolton (Engineering) Co. Ltd. v T. J. Graham and
Sons Ltd.65, for example, Denning L.J. famously said:

"A company may in many ways be likened to a human body. It has a
brain and nerve centre which controls what it does. It also has hands
which hold the tools and act in accordance with directions from the
centre. Some of the people in the company are mere servants and

64 Moore v Bresler [1944] 2 All ER 515, per Humphreys J. at p. 517
65 [1957] 1 QB 159,
agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such." 66

Wickins and Ong point out, however, that it was not until nearly 10 years later that the courts accepted the relevance of the judgement in *H. L. Bolton (Engineering) Co. Ltd.* to matters of criminal liability. 67 They point to the case of *John Henshall (Quarries) Ltd. v Harvey* 68 to support this assertion. The company was charged with aiding and abetting the use of over laden lorries in breach of road safety provisions. The facts are not important, but on appeal to the Queen's Bench Division it was ruled, following earlier authorities, that in the case of absolute offences there was no doubt that a master, be it an individual or a company, could be held vicariously liable for offences committed by their employees. Lord Parker, however, had to reconcile his approach with that of the courts in *H. L. Bolton (Engineering) Co. Ltd.* Lord Parker L.C.J. did this, Wickin and Ong state, "by stating that

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68 [1965] 1 All ER 725,
aiding and abetting involved a guilty intent, and thus the knowledge of the servant could not be imputed to the master”, consequently the corporation’s conviction was quashed. Under the terms of the “directing mind and will” test, the persons who had committed the offence (the weighbridge operator and the office manager) were presumably not sufficiently senior figures within the corporate structure to be “identified” with the company. They were merely to be considered as the “hands” of the operation.

The pinnacle of the development of the doctrine of identification, however, is commonly accepted as being the case of Tesco Supermarkets Ltd. v Nattrass. In this case the defendant company was charged with an offence under the Trade Descriptions Act, 1968, namely of offering goods for sale at a price less than that at which they were being sold. At trial the defendants tried to raise a defence under section 24 (1) of the Act on the grounds that the offence was due to the act or default of “another person”, namely the manager of the store where the offence was committed. Furthermore, they asserted that they had exercised all due diligence to avoid

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70 [1972] AC 153
the commission of such an offence. The justices held that the defendants had satisfied the requirement of due diligence, but the defence failed because the manager could not be said to be “another person” within the meaning of section 24 (1) (a). The defendants were convicted accordingly. On appeal, however, the Divisional Court found that, whilst the manager could be classified as “another person”, Tesco had failed to exercise all due diligence within the meaning of section 24 (1) (b) of the Act. The appeal reached the House of Lords.

The central issue in this case was clearly whether the branch manager could be regarded as the embodiment of the company under the identification doctrine. If this were so then both the manager and the company could be held liable under the provisions of section 21 of the Trade Descriptions Act, 1968. The House of Lords allowed the appeal. They held that the branch manager was not sufficiently senior within the corporate structure to be referred to as the “directing mind and will” of the company. Having explained the nature of the doctrine of identification, Lord Reid continued:

“It must be a question of law whether, once the facts have been ascertained, a person doing a particular thing is to be regarded as the company or merely as the company’s servant or agent. In that case,
any liability of the company can only be statutory or vicarious liability". 71

Lord Reid then criticises the opinion of Stable J. in I. C. R. Haulage Ltd. who suggests that whether a company could be held liable for offences requiring mens rea depended, inter alia, on the nature of the charge facing the corporation. Lord Reid states:

"I think that the true view is that the judge must direct the jury that if they find certain facts proved then, as a matter of law, they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company ... I do not see how the nature of the charge can make any difference. If the guilty man was in law identifiable with the company then, whether his offence was serious or menial, his act was the act of the company, but if he was not so identifiable then no act of his, serious or otherwise, was the act of the company itself". 72

Their Lordships clearly felt that, in committing the offence, the branch manager was acting merely as a servant or an agent. This would prevent the courts from pinning liability on the company via the doctrine of identification. Thus the company could not be convicted under the statutory

71 Tesco Supermarkets Ltd. v Nattrass [1972] AC 153, per Lord Reid at 170.
provision because, under the section 20 (1) of the *Trade Descriptions Act, 1968* the branch manager did not hold a sufficiently senior position within the company for Tesco to incur liability. Therefore, under the provisions of section 24 (1) (a) of the act the criminal offence was deemed to have been committed by "another person", so the appeal was allowed and the corporation’s conviction was quashed.

Within the context of the historical development of the doctrine of identification *Tesco Supermarkets Ltd. v Nattrass* is a very important case. Its main importance is that it clearly established that corporations could be brought within the ambit of the criminal law for offences involving *mens rea*. Secondly it proved that the *alter ego* theory had an important role to play in the criminal law. On the other hand, the "directing mind and will" test was later to be the downfall of the doctrine of identification’s usefulness in the context of corporate manslaughter. *Nattrass*, therefore, raises the important question who may constitute the "directing mind and will" of a company? Their Lordships clearly held very differing views on this matter. Lord Reid, for example, talks of a company only being held liable for the acts of "the board of directors, the managing director and

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72 *Tesco Supermarkets Ltd. v Nattrass* [1972] AC 153, per Lord Reid at 173
perhaps other superior officers of the company [who] carry out the functions of management and speak and act as the company".\textsuperscript{73} Lord Diplock, however, took a different approach. He states:

"What natural person or persons are to be treated as being the corporation for the purpose of taking precautions and exercising due diligence? My Lords a corporation incorporated under the terms of the \textit{Companies Act, 1948} owes its corporate personality and its powers to its constitution, the memorandum and articles of association. The obvious and only place to look to discover by what natural persons its powers are exercisable is in its constitution ... In my view, therefore, the [answer to this question] ... is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors or by the company in general meeting pursuant to the articles are entrusted with the exercise of the powers of the company".\textsuperscript{74}

Lord Diplock then turns his attention to the aforementioned speech of Lord Denning in \textit{H. L. Bolton (Engineering) Co. Ltd. v T. J. Graham and Sons Ltd.}.\textsuperscript{75} He states at page 200:

\textsuperscript{73} \textit{Tesco Supermarkets Ltd. v Nattrass} [1972] AC 153, per Lord Reid at 171
\textsuperscript{74} \textit{Tesco Supermarkets Ltd. v Nattrass} [1972] AC 153, per Lord Diplock at 199-200
\textsuperscript{75} [1957] 1 QB 159
"In the case in which this metaphor was first used Denning L. J. was dealing with acts and intentions of directors of the company in whom the powers of the company were vested under the articles of association. The decision in that case is not authority for extending the class of persons whose acts are to be regarded in law as the personal acts of the company itself beyond those who by, or by actions taken under its articles of association are entitled to exercise the powers of the company”.

It is clear that, even at this early stage the doctrine of identification was presenting the courts with some conceptual difficulties. G. R. Sullivan highlights the problems created by the decision of the House of Lords in Nattrass in his article “The Attribution of Culpability to Limited Companies”. He states:

“If findings of identification are confined to those corporate officials with plenary authority across a sphere of strategic corporate management – the minimum condition for Lord Diplock in Tesco Supermarkets Ltd. v Nattrass – at least a measure of doctrinal certainty is maintained. That certainty is lost when courts take a wider view in the interests of policy. Inconsistency inevitably arises. We are then confronted with cases where, for example, a non-executive director with no involvement in the company’s management is nonetheless identified with the company yet the
European sales manager of Dunlop (Aircraft) Ltd. is found to be too junior for identification with his employing company. Uncertainty is increased when courts depart altogether from the doctrine of identification where precedent would indicate that the doctrine was germane”.  

It was not until twenty years later, however, “that a crack began to appear in the whole edifice of the directing mind theory”.  In the case of Tesco Stores v Brent London Borough Council Tesco was prosecuted for selling an age restricted video to a person under the age of eighteen contrary to the provisions of the Video Recordings Act, 1984. The prosecution had to prove that Tesco knew or had reasonable grounds to believe that the purchaser of the said restricted video was under the age of eighteen. Seemingly, this issue could have been resolved using the doctrine of identification. Under the rule in Nattrass it would have been absurd to find that a cashier was sufficiently senior in the corporate management structure to be viewed as part of the “directing mind and will” of the company so as to have their knowledge attributed to Tesco. Yet this is effectively what both the Magistrates and the Divisional Courts held. Nattrass was

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distinguished and dismissed on the grounds that it dealt with a different statutory provision. As a matter of construction it was felt that the relevant provision of the Video Recordings Act 1984 suggested that the intent and knowledge of the cashier was clearly intended to be attributed to the company itself. Whilst the decision in Nattrass was not criticised in Tesco v Brent L. B. C. there seemed to be an indication that the principle established in Nattrass was nothing more than an interpretative pronouncement restricted to a particular statutory provision, a view advanced by G. R. Sullivan in his aforementioned article.

Further inroads into the usefulness of the doctrine of identification were made by the Court of Appeal in R v Redfern and Dunlop Ltd. (Aircraft Division). The appellants were charged with knowingly attempting to supply tyres designed for combat aircraft in Iran contrary to section 68 (2) of the Customs and Excise Management Act, 1979 and Article 2 (v) of the Export of Goods (Control) Order, 1987. The appellants had applied for an export license falsely identifying the consignee as a Swiss firm. The Department of Trade and Industry stated that they would have refused the license had they known the actual destination of the tyres. Furthermore,

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78 [1993] 2 All ER 718
they claimed that the appellants knew that the said tyres were actually intended for supply to Iran, despite the fact that the appellants denied this claim. The appellants were convicted. On appeal Redfern claimed, *inter alia*, that the license, and thus the export, was lawful as it had not been revoked under any of the available statutory provisions. This very fact, he claimed, meant there was no charge to answer. Dunlop, on the other hand, claimed that Redfern was not a sufficiently senior employee within their corporate structure to be identified as part of the controlling mind. This, they claimed, meant that no criminal liability could be attributed to the company. The Court of Appeal dismissed Redfern’s appeal but allowed Dunlop’s on the grounds that in order to fix Dunlop with criminal liability it would have to be shown that:

“... the individual whose conduct was under question [could be] identified with the company to the extent of being one of its directing minds or its very embodiment. That [means any] one of the persons in actual control by virtue of the company’s constitutional documents, or a person to whom had been delegated the control of some part of the company or its management functions so that he could be said to have acted as the company’s directing mind ... Clearly not every delegation of function would render the company

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79 [1993] Crim L. R. 43

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criminally liable for its delegate's acts. Administrative or executive functions which did not confer true power of management and control would be insufficient”\(^\text{80}\).

At first instance the trial judge had directed the jury that:

"... before they convicted the company they must be sure that the board had delegated to [Redfern] its functions in relation to the exportations, including the function of applying for licenses, so that he had full authority to act without reference to any body above him. He said that if [the jury] were sure that the board had delegated those functions to [Redfern] then the company was guilty”.\(^\text{81}\)

Redfern was four steps down the reporting ladder from the Chief Executive which might suggest that he was a sufficiently senior figure in the corporate management structure for liability to be attributed to Dunlop. The Court of Appeal, however, allowed Dunlop’s appeal on the grounds that the trial judge had misdirected the jury with regard to: 1) the type of delegated functions that would have made said delegate part of the “directing mind and will”; and 2) the level of management and control that the appellant would have to operate at to render the company liable.”

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\(^{80}\) *R v Redfern and Dunlop Ltd. (Aircraft Division)* [1993] Crim. L. R. 43, 44–45

\(^{81}\) *R v Redfern and Dunlop Ltd. (Aircraft Division)* [1993] Crim. L. R. 43, 45
This verdict lies in very stark contrast with the Courts' approach in the case of *El Ajou v Dollar Land Holdings Plc.*\(^{82}\). The facts of the case are complicated. The plaintiff was a wealthy Arab businessman who had lost a great deal of money in a share fraud. The disputed funds were invested by a company incorporated in England (Dollar Land Holdings), but whose shares belonged to a foundation in Liechtenstein. Wickins and Ong continue:

"The question arose whether a constructive trust could be imposed on the company with regard to the misappropriated funds which had been invested in its property. This, in turn, depended on whether the knowledge of the Chairman of the Board of Directors could be imputed to the company. At first sight this would seem to have been a foregone conclusion, but the facts were unusual. The Liechtenstein foundation was set up to shield the identity of the real owners who lived in America. The American owners appointed three Swiss financial agents to be directors of the company. One of these agents acted as the Chairman, and attended to the paperwork and other matters needed to carry out the owner's instructions. The directors regarded themselves as being simply nominees of the owners and their only function being to carry out the instructions of the owners. The actual property investments and management decisions were carried out by the owners in consultation with the managing director."

\(^{82}\) [1994] 2 All E. R. 685

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of a subsidiary company. This individual was an experienced property developer, but had suffered a spectacular bankruptcy. This was convenient if he remained in the background. The defrauded investor [the Arab businessman] sought to fix the company with the knowledge of the fraud on the basis that the Chairman was a directing mind of the company, and alternatively on the basis of simple agency”. 83

All three judges involved in the appeal agreed that, in accordance with the findings of the trial judge, the Chairman’s knowledge could not be imputed to Dollar Land Holdings on the grounds that he was the company’s agent. However, they all agreed that the Chairman’s knowledge could be imputed to the corporation on the basis that he formed part of the directing mind and will of the company. Their Lordships reached the same conclusion, however, on very different grounds. Nourse L. J., for example, stated:

"[The doctrine of identification] attributes to the company the mind and will of the natural person or persons who manage and control its actions ... It is important to emphasise that management and control is not something to be considered generally or in the round. It is

necessary to identify the natural person or persons having management and control in relation to the act or omission in point".  

In applying this reasoning to the case in hand, Nourse L.J. concluded:

"I start from the position that the transactions to be considered are those who by which DLH received assets representing the money fraudulently misapplied. The responsibility for the management and control of those transactions is not to be determined by identifying those who were responsible for deciding that DLH would participate in the Nine Elms project and the nature and extent of the participation, far less by identifying those who were responsible for business decisions generally ... Each of the steps taken by Mr Ferdman were taken without the authority of a resolution of the Board of DLH. That demonstrates that as between Mr Ferdman on the one hand and Mr Favre and Mr Jaton on the other it was Mr Ferdman who had the de facto management and control of the transaction ... In my view the directing mind and will of DLH in relation to the relevant transactions ... were the mind and will of Mr Ferdman and no other".  

Lord Justice Nourse appears, in this speech, to be advocating a more stringent interpretation of the directing mind and will test suggesting that it

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84 *El Ajou v Dollar Land Holdings Plc.* [1994] 2 All E. R. 685, per Nourse L. J. at 676
is necessary to look not for those who have general managerial power and control, but rather to identify those who hold such power in relation to the criminal wrong committed by the corporation. This seems to be a narrower interpretation of the doctrine of identification than that adopted by the courts in Tesco v Nattrass. In that instance the courts were, seemingly, willing to attribute liability to the corporation for criminal acts committed by a natural person or persons who held general managerial control.

Rose L. J. adopted a slightly different view of matters. Having looked at Lennards Carrying Co. Ltd. and Tesco v Nattrass Lord Justice Rose concluded:

"There are it seems to me, two points implicit, if not explicit, in [the speeches of their Lordships in Tesco v Nattrass]. First, the directors of the company are, prima facie, likely to be regarded as its directing mind and will, whereas particular circumstances may confer the status on non-directors. Secondly, a company’s directing mind and will may be found in different persons for different activities of the company." 86

85 El Ajou v Dollar Land Holdings Plc. [1994] 2 All E. R. 685, per Nourse L. J. at 676-678
86 El Ajou v Dollar Land Holdings Plc. [1994] 2 All E. R. 685, per Rose L. J. at 680
Rose L. J. appeared to be advancing a wider view of the doctrine of identification than that advanced by Nourse L. J. His Lordship was prepared to accept that people who held general management powers and functions *could* be found to constitute the directing mind and will although, in some circumstances, a non-director may be found to be part of the directing mind and will. Had he stopped there it is arguable that the Chairman’s knowledge would not have been attributed to the company. His principle function was the management of the company’s finances and he only held real managerial power and authority in that respect. The actual “day to day” management and investment decisions of the company were left to the real owners of the company. It was the duty of the directors of Dollar Land Holdings to carry out their wishes. Lord Justice Rose’s approach, however, went further. He stated:

“In the present case, the company’s activity to which Ferdman’s knowledge was potentially pertinent was the receipt of over one million pounds for investment ... Having regard to [the powers] he had in relation to the disputed funds, all carried out without the need for a resolution from the board of directors], it seems to me plain that, for the limited purposes here relevant, i.e. the receipt of money and the execution of the Yulara agreement, he was the directing mind and
will of the company. In consequence, his knowledge of the fraud was DLH’s knowledge”. 87

Even though the Chairman exercised no independent judgement and could only use these powers in a limited capacity to carry out the wishes of the American owners, Lord Justice Rose was still willing to attribute the Chairman’s knowledge to the company where precedent might suggest that he wasn’t sufficiently senior in the corporate management structure. Indeed, Lord Justice Hoffinan dealt with this matter. He stated:

“[The trial judge] did not accept that Mr Ferdman was the directing mind and will of DLH because he exercised an independent judgement. As a fiduciary he acted upon the directions of the American beneficial owners and their consultant Mr Stern. All that he did was sign the necessary documents and ensure that the company’s paper work was in order. This involved seeing that the decisions which had really been taken by the Americans and Mr Stern were duly minuted as decisions of the board made in Switzerland”. 88

87 El Ajou v Dollar Land Holdings Plc. [1994] 2 All E. R. 685, per Rose L. J. at 681
88 El Ajou v Dollar Land Holdings Plc. [1994] 2 All E. R. 685, per Hoffinan L. J. at 686-687
This did not prevent Lord Justice Hoffinan from also finding Mr Ferdman to be part of the directing mind and will of Dollar Land Holdings.

Reflecting the view of Lord Diplock in *Nattrass*, Lord Justice Hoffinan opted to approach the question from the issue of the powers held under the company's constitution. He held:

"...neither the Americans nor Mr Stern held any position under the constitution of the company. Nor were they held out as doing so. They signed no documents on behalf of the company and carried on no business in its name. As a holding company DLH had no independent business of its own. It entered into various transactions and on those occasions the persons who acted on its behalf were the board or one or more of the directors ... It seems to me that if the criterion is whether the candidate for being the directing mind and will was exercising independent judgement, as opposed to acting upon off-stage instructions, not even the board of directors acting collectively would in this case have qualified. It also did what it was told ... The authorities show clearly that different persons may for different purposes satisfy the requirement of being the company's directing mind and will. Therefore, the question in my judgement is whether, in relation to the Yulara transaction, Mr Ferdman as an individual exercised powers on behalf of the company which so identified him".89
Lord Justice Hoffinan concluded that Mr Ferdman could constitute the directing mind and will in this instance. Having examined the position of Mr Ferdman compared to that of the other directors and the powers he exercised, Hoffinan L. J. had no option but to hold that “as far as the constitution of DLH was concerned, he committed the company to the [Yulara] transaction as an autonomous act which the company adopted by performing the agreement ... this was sufficient to justify Mr Ferdman being treated, in relation to the Yulara transaction as the directing mind and will”.

At this stage the scope of the doctrine of identification appears to have become ever more uncertain. In Redfern the Court of Appeal was not willing to impute the liability of the European sales manager of Dunlop to the company, yet in El Ajou a director with very limited management functions finds his knowledge imputed to the corporation. This new approach to the doctrine of identification seemed to be based on the notion of delegation.

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89 El Ajou v Dollar Land Holdings Plc. [1994] 2 All E. R. 685, per Hoffman L. J. at 687
90 El Ajou v Dollar Land Holdings Plc. [1994] 2 All E. R. 685, per Lord Hoffinan L. J. at 687
Matters were further confused by the House of Lords in *Re Supply of Ready Mixed Concrete (no. 2)*. Some of the local managers of four cement companies entered into price fixing and market sharing agreements contrary to s.35 (1) of the *Restrictive Trade Practices Act 1976*. They entered into these agreements contrary to express orders from the board of directors and without their knowledge. These practices continued despite restraining orders issued by the Restrictive Trade Practices Court. The House of Lords discussed *Nattrass* in great detail and paid considerable attention to the case of *Director General of Fair Trading v Smith’s Concrete Ltd.* in which the court found that the company was not party to a price fixing agreement entered into by a unit manager. In that case the court dismissed the principle in *Nattrass* stating that it could not be applied to the law of contempt. In *Re Supply of Ready Mixed Concrete (no. 2)*, therefore, their Lordships might have been expected to resolve the matter on similar grounds. Instead their Lordships opted to enter into a detailed discussion of *Tesco v Nattrass*.

Lord Templeman held that the *Smith’s Concrete Ltd.* case was inapplicable in this instance because it would allow the company to benefit from a

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91 [1995] 1 All E. R. 135
practise outlawed by Parliament providing that a member of higher management had prohibited it. He continued:

"The decisions of the Court of Appeal in Smith's case and in the instant case infringe two principles. The first principle is that a company is an entity separate from its members, but, not being a physical person, is only capable of acting by its agents. The second principle is that a company, in its capacity of a tax-payer, landlord or in any other capacity, falls to be judged by its actions and not by its language. An employee who acts for the company within the scope of his employment is the company. Directors may give instructions, top management may exhort, middle managers may question and workers may listen attentively. But if a worker makes a defective product or a lower manager accepts or rejects an order he is the company." 93

This appears to directly contradict the principles set out by the courts in Tesco v Nattrass. Lord Templeman's pronouncement effectively means that in Re Supply of Ready Mixed Concrete (no. 2), and in Smith's case the company could be treated as a party to the local manager's conspiracy and to the contempt of court. This is because, in those instances, the local

92 [1992] Q. B. 213
93 Re Supply of Ready Mixed Concrete (no. 2) [1995] 1 All E. R. 135, per Lord Templeman at 141-142
manager and unit manager respectively were the company for the purpose of the relevant legislation.

Lord Nolan on the other hand thought that the main issue was one of statutory construction. The statutory provision at issue in *Nattrass* had a due diligence defence, but the *Restrictive Trade Practices Act 1976* in question had more in common with those provisions which imposed strict liability. The Act could only achieve its intended purpose if the company could be held liable for the actions of the individuals who carried out the prohibited actions. On the liability of the corporation generally Lord Nolan said:

"A limited company, as such, cannot carry on business. It can only do so by employing human beings to act on its behalf. The actions of its employees, acting in the course of their employment, are what constitute the carrying on of a business by the company. When the roll was called at a public house meeting at which the Bichester agreement was concluded the employees attending did not respond as individuals, they did so as representatives of their respective companies, fully competent as a practical matter of fact to make the agreement on behalf of their companies, and to see that it was carried out. A consensual element was required because it takes at least two parties to make a restrictive practice, but the consent required for the
Bichester agreement was not that of senior management or the board, all that was needed was the consent of the employees who could and did make the agreement effective”. 94

The potential effect of Lord Nolan’s pronouncement on this matter was far reaching. Wickins and Ong saw the matter thus:

“Lord Nolan’s approach seems to consign the directing mind and will theory, in most cases of criminal liability at least, to oblivion. Furthermore, his statement seems to give powerful support to the approach in El Ajou’s case of basing liability on de facto rather than de jure management. This is more clearly seen when it is realised that it was conceded in Smith’s case and apparently also in Re Supply of Ready Mixed Concrete (no. 2) ... that the managers acted without any actual or even ostensible authority in entering into the agreement. The rather surprising result is that the actions of a group of local managers informally meeting in the local public house and entering into an illegal agreement in defiance of the legally constituted directors, and without their knowledge, bind their companies and create criminal liability for them, even though all concerned knew that they had no authority whatsoever to act for their companies and that such agreements are illegal. Furthermore, such a result follows even if, as in Smith’s case the directors have taken all reasonable

94 Re Supply of Ready Mixed Concrete (no. 2) [1995] 1 All E. R. 135, per Lord Nolan at 150-151
steps to institute a system of management which will prevent such agreements being signed". 95

Furthermore, they continue:

"[I]t is suggested that the House of Lords could have applied the directing mind theory to the facts of the case without any difficulty if they had so wished and thus followed the Tesco Supermarket's case rather than distinguishing it. The refusal to do this is thus significant, and seems to show that the liberal attitudes to criminal liability of corporations adopted in the 1970's no longer have any appeal". 96

The direction that these cases appeared to be taking suggested, therefore, that the doctrine of identification set out in Tesco v Nattrass no longer existed, or, if it was still recognised by the courts, then it existed, by now, in a very different form.

This alternative approach to corporate liability reached its pinnacle in the Privy Council case of Meridian Global Funds Management Asia Ltd. v

In this case Koo, the Chief Investment officer of an investment management company and Ng, its senior portfolio manager, used funds managed by the company to purchase shares in ENC (a company registered in New Zealand). This was done with the authority of the Board of Directors. This meant that, for a short period of time, their company became a substantial stakeholder in ENC, but Meridian failed to notify ENC of this fact contrary to section 20 (3) of the New Zealand Securities Amendment Act, 1988. Koo and Ng of course knew that the company held these shares, but the Board of Directors and its Managing Director did not.

At first instance the High Court of New Zealand held that the company was in breach of its duty to give notice under section 20 (3) and that, for the purposes of section 20 (4) (e), the knowledge of Koo and Ng should be attributed to the company. The Court of Appeal in New Zealand upheld the decision resolving the matter on the reasoning that Koo was the directing mind and will of the company hence his knowledge could be attributed to the company.

97 [1995] 2 AC 500
On appeal to the Privy Council two questions of law were raised:

1) Could Koo's actions be attributed to the company; and

2) Having regard to the policy of section 20 of the 1988 Act and on the true construction of section 20 (4) (e) what was the appropriate rule of attribution to be applied?

Lord Hoffman set about discussing the doctrine of identification. Mirroring the view of Lord Diplock in *Tesco v Nattrass* he begins:

"[T]he company's primary rules of attribution will generally be found in its constitution, typically the articles of association ... There are also primary rules of attribution which are not expressly stated in the articles, but implied by company law ... These primary rules of attribution are ... not enough to enable a company to go out in the world and do business ... The company therefore builds upon the primary rules of attribution, which are equally available to natural persons, namely the principles of agency ... [H]aving done so, it will also make itself subject to the general rules by which acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract, and vicarious liability in tort".98

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98 *Meridian Global Funds Management Asia Ltd. v Securities Commission* [1995] 2 AC 500, per Lord Hoffman at 506-507
Lord Hoffman recognises that there may be circumstances in which the aforementioned methods of attribution will not allow a company to "determine its rights and obligations". This may occur where these rules of attribution are excluded, for example where \textit{mens rea} is required or the rule in question is only applicable to natural persons. Lord Hoffman therefore ponders how such rules are to be applied to a corporation:

"[1] The Court may come to the conclusion that the rule was not intended to apply to the company at all (e.g. where the only penalty for that offence is community service)... [2] The Court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the Board or a unanimous agreement of the shareholders. But there will be cases in which neither of these solutions is satisfactory, in which the Court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution for the substantive rule. This is always a matter of interpretation, given that it was intended to apply to a company ... how was it intended to apply? Whose act or knowledge or state of mind was for this purpose intended to count as the act, etc. of the company? One finds this by applying the usual canons of

\footnote{Meridian Global Funds Management Asia Ltd. v Securities Commission[1995] 2 AC 500, per Lord Hoffinan at 507}
interpretation, taking into account the language of the rule (if it is a statute) and its content and policy".  

On the basis of this pronouncement Lord Hoffinan had no problem pinning liability on the corporation. He stated:

"Once it appears that the question is one of construction rather than metaphysics, the answer to this case seems to be as straightforward to their Lordships as it did to Heron J. The policy of section 20 of the Securities Amendment Act is to compel ... the immediate disclosure of the identity of persons who become substantial security holders in public issuers. Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge is for this purpose to count as the knowledge of the company? Surely the person who, with the knowledge of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf, which made them substantial security holders, but would not have to report them until the Board or someone in senior management got to know about

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100 Meridian Global Funds Management Asia Ltd. v Securities Commission [1995] 2 AC 500, per Lord Hoffman at 507
it. This would put a premium on a Board paying as little attention as possible to what its investment managers were doing”\textsuperscript{101}. 

Therefore, at this stage, there is no one all encompassing test for identifying the directing mind and will of a company. What Meridian Global Funds Management Asia Ltd. v Securities Commission left us with is a rule of attribution which will vary according to the statute or rule of law at issue in each case. It will be a matter of interpretation for the courts to decide whose actus reus or mens rea is intended for that purpose to be that of the company.

Furthermore, Lord Hoffman tried to reconcile the result in Meridian with that in Nattrass and Re Supply of Ready Mixed Concrete(No. 2) by claiming that both cases were reconcilable on the grounds that the outcome of these cases depended on the intent of the relevant legislation. Turning his attention to Lennards Carrying Co. Ltd. Lord Hoffman denied that Viscount Haldane’s oft quoted passage was intended to create any general rule of attribution, but rather its effect was limited to creating a narrow rule

\textsuperscript{101} Meridian Global Funds Management Asia Ltd. v Securities Commission [1995] 2 AC 500, per Lord Hoffman at 511
of attribution restricted in its ambit to section 502 of the *Merchant Shipping Act, 1894*. He states:

"[T]he anthropomorphism, by the very power of the image, distracts attention from the purpose for which Viscount Haldane L. C. said at p. 713, he was using the notion of a directing mind and will, namely, to apply the attribution rule from s. 502 to the particular defendant in the case:

"for if Mr Lennard was the directing mind of the company then his action must, unless a corporation is not to be held liable at all, have been an action which was the action of the company itself within the meaning of s. 502". 102

By the time British Steel Plc. were cleared by the House of Lords in the case of *R v British Steel Plc.* 103 it appeared that the retreat from the principles laid out in *Nattrass* was complete.

It is suggested that this new flexible approach to criminal liability is to be commended. By reducing the matter to one of interpretation the courts


103 [1995] 1 WLR 1356
were able to look at the purpose of the legislation then determine whose actions may be treated as those of the company for that purpose in order to give best effect to the rule of law at issue. It appeared at that stage that the death knell had sounded for the doctrine of identification.

On September 19, 1997 the 1:15pm Swansea to London Paddington train was involved in a collision at Southall which left seven passengers dead and one hundred and fifty one injured. At the start of the ensuing manslaughter trial Lord Justice Scott Baker ruled that it was a condition precedent to a conviction for manslaughter by gross negligence for a guilty mind to be proved, and that where a non-human defendant was prosecuted it may only be convicted via “the guilt of a human being with whom it may be identified”. The following questions of law arose:

1) Can a defendant be properly convicted of manslaughter by gross negligence in the absence of the defendant’s state of mind?
2) Can a non-human defendant be convicted of the crime of manslaughter by gross negligence in the absence of evidence

establishing the guilt of an identified human individual for the same crime?

It is only the second question which is pertinent at this stage of my work.

Lord Justice Rose set about reviewing most of the case law I have already covered in my discussion of the development of this area of the law, but he begins his discussion of the doctrine of identification by stating:

"The identification theory, attributing to the company the mind and will of senior directors and managers, was developed in order to avoid injustice: it would bring the law into disrepute if every act and state of mind of an individual employee was attributed to a company which was entirely blameless".105

More importantly though, having considered the relevant case law, Lord Justice Rose finds that the theory of identification had not been replaced by the more flexible rules of attribution laid out in Meridian et al. He states:

"None of the authorities since Tesco v Nattrass relied on by Mr Lissack supports the demise of the doctrine of identification: all are concerned with statutory construction of different substantive offences and the appropriate rule of attribution was decided having regard to the legislative intent, namely whether Parliament intended companies to be liable. There is a sound reason for a special rule of attribution in relation to statutory offences, namely there is, subject to a defence of reasonable practicability, an absolute duty imposed by the statutes. The authorities on statutory offences do not bear on the common law principle in relation to manslaughter. Lord Hoffman's speech in Meridian is a restatement, not an abandonment of existing principles: see, for example, Lord Diplock in Tesco v Nattrass at page 200 H: "There may be criminal statutes which upon their true construction ascribe to the corporation criminal responsibility for the acts of servants and agents who would be excluded by the test that I have stated" (namely those exercising the powers of the company under its articles of association). The Law Commission's proposals were made after the Meridian and British Steel cases. Identification is necessary in relation to actus reus, i.e. whose acts or omissions are to be attributed to the company, and Adomako's objective test in relation to gross negligence in no way affects this. Furthermore, the civil negligence rule of liability for the acts of servants or agents has no place in the criminal law ... which is why the identification principle was developed. That principle is still the rule of attribution in criminal law whether or not mens rea needs to be proved". 106

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Bearing all of these considerations in mind Lord Justice Rose concluded that the doctrine of identification had not been made redundant in relation to common law offences. He stated:

"None of the authorities relied on by Mr Lissack as pointing to the personal liability for manslaughter by a company supports that contention. In each case the decision was dependent on the purposive construction that the particular statute imposed, subject to a defence of reasonable practicability, on a company for conducting its undertaking in a manner exposing employees or members of the public to health and safety risks. In each case there was an identified employee whose conduct was held to be that of the company. In each case it was held that the concept of a directing mind and will had no application when construing the statute. But it was not suggested or implied that the concept of identification is dead or moribund in relation to common law offences. Indeed, if that were so, it might have been expected that Lord Hoffinan in Associated Octel would have referred to the ill health of the doctrine in the light of his own speech, less than a year before, in Meridian. He made no such reference, nor was Meridian cited in Associated Octel. Indeed Lord Hoffman's speech in Meridian in fashioning an additional special rule of attribution geared to the purpose of the statute proceeded on the basis that the primary "directing mind and will"
rule still applies, although it is not determinative in all cases. In other words, he was not departing from the identification theory but reaffirming its existence".\textsuperscript{107}

This is an interesting outcome as it appears to take a completely opposite direction to that in which the other case law pointed. Contrary to some academic opinion Lord Justice Rose explicitly stated that Meridian did not show that the courts had moved away from the doctrine of identification. Instead, in the course of his judgement, it appears that Rose L. J. has reduced Meridian from a significant milestone in the development of corporate criminal liability to a mere judicial pronouncement on a particular statute. This leaves us with two possible outcomes of Attorney General's Reference (No. 2 of 1999). Firstly, it could mean that there are now two alternative approaches to corporate criminal liability. That is to say that the appropriate test to be applied will depend on whether the offence charged is statutory, in which case the approach in Meridian would apply, or common law, where the directing mind and will theory of Nattrass will apply. Alternatively, whist this was not explicitly stated in Attorney General's Reference (No. 2 of 1999), it could be the case that Meridian has been

\textsuperscript{107} Attorney General's Reference (No. 2 of 1999), [2000] Cr. App. R. 207, per Rose L. J. at 218
overruled and now the doctrine of identification as set out in *Nattrass* is the sole means by which the court may impose primary liability on a corporation for offences requiring proof of *mens rea*.

It is clearly the case, however, that at this stage there are two methods of attribution which have been developed over the centuries to allow the courts to "pin" criminal liability on a corporation. On the one hand there is vicarious liability. This will be the appropriate method of attribution in those cases where the corporation is charged with a statutory offence which imposes an *absolute* duty on the defendant corporation. On the other hand there is the doctrine of identification (primary liability) which will be the appropriate rule of attribution when the company is charged with an offence (statutory or common law) which requires proof of *mens rea*.

Having looked at the two alternative basis of corporate criminal liability attention can now be turned to the development of the law of corporate manslaughter. In this examination of corporate manslaughter we will see that the doctrine of identification has proven to be a great hindrance to the development to this offence. This can be demonstrated by looking at the
milestone case of *R v P. & O. European Ferries (Dover) Ltd.*\(^{108}\) and the judgments therein.

\(^{108}\) (1991) Cr. App. R. 72a
Chapter 3: The Current State of the Law Governing Corporate Manslaughter

In the previous chapter we have dealt with the various obstacles, both procedural and conceptual which have faced both the judiciary and legislature in any attempt to hold corporations accountable for breaches of the criminal law. We have also considered the various statutory and common law tools which have been used to overcome these obstacles. But the most important outcome of all the case law which has been discussed up to now, is that the doctrine of identification became the basis for any attempts to impose criminal liability upon a corporation for offences requiring proof of mens rea, and consequently also forms the legal basis for the offence of corporate manslaughter.

In this chapter we will look more specifically at the development of the common law offence of corporate manslaughter focusing particularly on those cases which have resulted in a trial that has failed spectacularly to bring anyone to justice. The benefit of such failures is that they have served to highlight time and time again the inadequacies of the doctrine of identification when attempting to impute mens rea to a corporation in the case of manslaughter. These cases all serve to support a central premise of
this thesis, namely that the current state of the law governing corporate homicide is unacceptable and that a new alternative basis needs to be sought.

It may be helpful to increase our understanding of the corporate offence of manslaughter, however, to first look at the individual common law offence of gross negligence manslaughter, as it is this offence which has been adapted to create an offence of corporate manslaughter. It will be easier to understand why the courts have such difficulties imposing liability for manslaughter on a corporation once it is realised that the individual offence of gross manslaughter has caused more than its fair share of problems for the courts.

What constitutes gross negligence? The starting point is the classic statement of the law in this field made by Lord Hewart C.J. in *R v Bateman*.

He stated at pages 10-12:

“If A has caused the death of B by alleged negligence, then, in order to establish civil liability, the plaintiff must prove ... that A owed a duty to B to take care, that that duty was not discharged, and that the

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1 (1925) Cr. App. R. 8
default caused the death of B. To convict A of manslaughter, the prosecution must prove the three things above mentioned and must satisfy the jury, in addition, that A’s negligence amounted to a crime... [I]n order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state, and conduct deserving punishment”.

This formulation obviously owes much to the civil law test for negligence (liability for which requires proof of a lower level of negligence than its criminal counterpart). It was approved by the House of Lords in Andrews v Director of Public Prosecutions².

In Andrews the defendant ran over a pedestrian and drove off. He was convicted at first instance but appealed on the grounds that the judge had misdirected the jury. The Court of Appeal dismissed Andrews’ appeal, but the Attorney General certified that the case involved a point of law of general public interest. Despite their disapproval of the trial judges direction the House of Lords dismissed the appeal on the grounds that on the facts, even with their new direction, Andrews would still be found guilty

² [1937] AC 576
of manslaughter. Of Lord Hewart C.J.'s direction, Lord Atkin said at page 583:

"I think, with respect, that the expressions used are not, indeed they probably were not intended to be, a precise definition of the crime. I do not myself find the considerations of mens rea helpful in distinguishing between degrees of negligence, nor do the ideas of crime and punishment in themselves carry a jury much further in deciding whether in a particular case the degree of negligence shown is a crime and deserves punishment. But the substance of the judgement is most valuable and, in my opinion, is correct".

Hence, upon deciding the matter of the correct direction for the jury, Lord Atkin states:

"It would appear that in directing the jury in a case of manslaughter, the judge should in the first instance charge them substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in Bateman's case and then explain that such a degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving, and then indicate to them the conditions under which they may acquit of manslaughter and dangerous driving".

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3 Andrews v Director of Public Prosecutions [1937] AC 576, per Lord Atkin at 584-585
Following *Andrews*, therefore, it seems that the basis of this breed of manslaughter was gross negligence. In order to prove the defendant guilty of this offence it had to be shown that:

1) that the defendant owed a duty of care to the deceased;
2) that the defendant breached this duty;
3) that the breach caused the death of the deceased; and
4) that the defendant's negligence was gross (that is to say that it showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment).

The offence of gross negligence was briefly thrown into disarray by the case of *R v Seymour*. In this case the House of Lords adopted a wider test than that used in *Andrews* by relying on recklessness rather than gross negligence as the basis for this offence. The effect of this meant that it was open to the jury to find a defendant guilty of manslaughter regardless of the nature of their conduct once it had been shown that the defendant had
created an obvious and serious risk of harm by said conduct. It was no longer open to a defendant to protest their innocence on the grounds that their negligence was not "gross". On the other hand the House of Lord's direction in Seymour did not cover those cases where the death was caused by an omission or (as happened in some cases) by medical negligence. Furthermore, as pointed out by the Law Commission, the Seymour test incorporated what has now become known as the 'Caldwell lacuna'. By this lacuna in the law a defendant who realised there was a risk but believed he had done enough to neutralise it would escape conviction.5

The balance was redressed by the Court of Appeal case of R v Prentice and others6 and the subsequent House of Lords case of R v Adomako7. In Prentice the Court of Appeal declined to follow the guidance of the House of Lords in Seymour. Instead the Court of Appeal accepted the continued existence of gross negligence manslaughter. Lord Taylor justified the need for such an offence on the grounds that, whilst reckless manslaughter was based largely on a risk taken by the defendant, in some cases the defendant will have created no risk but rather had acted negligently in cases where

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5 Law Commission Report No 237 (HMSO:1994) at pages 67-68

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care was required because the risk of death still existed. The test for gross negligence manslaughter, it was stated, was the same as that found in the *Bateman/Andrews* formulation.

Having considered *Bateman* and *Andrews*, Lord Mackay concluded that the law of involuntary manslaughter should be based on the test of gross negligence manslaughter laid out in those cases. He states at page 295:

"... In my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterized as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant’s conduct departed from the proper standard of care incumbent on him involving as it might have done a risk of death to the patient, was such that it should be judged criminal."

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6 [1994] QB 302  
7 [1994] 3 WLR 288
In dismissing the appeal, Lord Mackay answered the question of law (at page 297) as follows:

"In cases of manslaughter by criminal negligence involving a breach of duty, it is a sufficient direction to the jury to adopt the gross negligence test set out by the Court of Appeal in the present case following *R v Bateman* ... and *Andrews* ... and that is not necessary to refer to the definition of recklessness in *R v Lawrence* ... although it is perfectly open to the trial judge to use the word "reckless" in its ordinary meaning as part of his exposition of the law if he deems it appropriate in the particular circumstances of the particular case".

It is clear that the correct test for this branch of the offence of manslaughter is that laid out by the courts in *R v Bateman* and *Andrews*. How then are the individual elements of the offence to be established?

In the law of tort there has been much consideration of whether a duty of care exists in any given case. The situation with the criminal law is not, however, so clear cut. The criminal law has, however, developed the notion of a duty of care in two instances. The first of these is where the defendant has failed to act in a particular set of circumstances, namely: where the
defendant is closely related to the victim (see Stone and Dobinson⁹); where
the defendant is under a contractual duty (see Pittwood¹⁰) or where the
defendant has undertaken to care for the deceased either by way of a
promise or simply by embarking on a particular course of action (see Stone
and Dobinson). Failure to act in these instances may lead to the imposition
of liability in the event of death. The second instance is where the
defendant has held themselves out as possessing some special skill or
knowledge (particularly in cases of death arising from medical negligence).
In these situations liability arises not because of some failure to act, but
because the defendant has performed an action badly. The duty in these
instances stems from the reliance the patient/victim/etc. has placed on the
defendant by virtue of the very nature of the relationship between the
parties (e.g. doctor/patient, bank-manager/client).

The second requirement of the Bateman formulation is that the accused
breached the duty of care. This established in law by determining whether
the defendant’s conduct fell below the standard of care that might be
expected of him. Only then can there be such a breach. How does the law

⁸ See Donoghue v Stevenson [1932] AC 562 and the infamous “neighbour principle” laid
out by Lord Atkin in that case.
⁹ [1977] 1 QB 354
attempt to determine the standard of care that is to be expected of the defendant? In the law of negligence, the standard of care differs according to the type of defendant. In the case of the unqualified defendant the standard expected of him is that of the reasonable man ("the man on the Clapham omnibus")\textsuperscript{11}. The test is objective although there is a subjective element to the test in that it is for the judge to determine what is reasonable or foreseen\textsuperscript{12}. The position is different where the defendant has or professes to have some special skill or knowledge\textsuperscript{13}. It appears that the standard required of professionals is that of the reasonably prudent professional who has the same skills/knowledge as the defendant. The defendant's conduct cannot be measured against that of the reasonable man or the man on the Clapham omnibus because he does not possess those skills.

In \textit{Bolam v Friern Hospital Management Committee} [1957] 1 WLR 582, Mr. Justice McNair put the test thus:

"Counsel for the plaintiff put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the

\textsuperscript{10}(1902) 19 TLR 37 \textsuperscript{11}See \textit{Hall v Brooklands Auto Racing Club} [1933] 1 KB 205 \textsuperscript{12}See the cases of \textit{Glasgow Corporation v Muir} [1943] AC 448, 457, and \textit{Nettleship v Weston} [1971] 2 QB 691 for examples of this test in action. \textsuperscript{13}See \textit{Wells v Cooper} [1958] 2 QB 265

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standards of reasonably competent medical men at the time. That is a perfectly accurate statement as long as it is remembered that there may be one or more perfectly proper standards, and if a medical man conforms with one of those proper standards, then he is not negligent. Counsel for the plaintiff was also right, in my judgement, in saying that a mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds. That again is unexceptionable. But the emphasis which is laid by counsel for the defendants is on this aspect of negligence: he submitted to you that the real question on which you have to make up your minds on each of the three major points to be considered is whether the defendants, in acting in the way they did, were acting in accordance with a practice of competent, respected medical opinion ... I myself would ... put it this way: a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that art" 14

Obviously this approach causes some conceptual problems. In the case if Bolam, for example, the defendant engaged in a course of conduct which was held reasonable by a “responsible body of medical opinion”, but not by the entire medical profession. Furthermore, under the Bolam formulation the standard of care to be expected of the defendant is clearly set by the medical profession. This means that the legal standard to be expected of the

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14 Bolam [1957] 1 WLR 582, per McNair J. at 586-587.
defendant is established by non-legal persons. Staying with the medical profession, this effectively means that they are allowed to police their own sector and reduces the scope of the public to question medical opinions or practices. Whilst this matter has been discussed in relation to the medical profession, this situation is true for all professions (except for those that are immune from prosecution).

The notion of a "duty of care" has been subjected to some criticism from C.M.V. Clarkson, who states:

"As defined, manslaughter by gross negligence is dependent upon the finding that there has been a "breach of duty". The most that can be hoped is that this phrase is redundant, and that the jury will focus on whether the defendant has been sufficiently negligent or careless. However, the phrase has the potential to cause confusion. It is difficult to see how it can be helpful to the jury to import civil concepts into the criminal law and it is not clear whether terms such as "duty of care" and "breach" mean the same under the criminal law as in the law of tort" 15

The third requirement is that the defendant’s conduct must have caused the death of the victim. This is clearly a question of causation and is not dealt with by the Law Commission or any of the articles which have been considered thus far. Presumably it is felt that there is nothing to be gained by a further discussion of this matter in this context.

The fourth and final requirement is the most problematic. It must be shown that the defendant’s negligence was "gross". Under the Bateman formulation the level of negligence that must be proved is greater in the criminal law than under the civil law. This is made clear by Lord Hewart C.J. in Bateman. He states:

"[I]n order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment".

In the later case of Andrews, however, Lord Atkin, whilst accepting the substance of Lord Hewart C.J’s ruling, doubted whether this direction
would aid the jury at all in their determination of whether the necessary
gross negligence was present in any given case.

It is here that we encounter real problems with the *Bateman/Andrews*
formulation of the individual offence of manslaughter. Firstly, the test is
somewhat circular in its nature. In effect, the jury is directed that they must
convict the defendant of a crime if they feel that a crime has been
committed. "This amounts to little more than telling the jury to determine
guilt on the basis of how they feel about it"\(^{16}\). The Law Commission points
out in Report No. 237 that this effectively means that the jury is left to
decide a question of law. Since juries do not give reasons for their
decisions, for they say, it would be impossible to determine what criteria
will be applied in an individual case and that this would lead to uncertainty
in the law. Clarkson and Keating state at page 657:

> "This is a vague formulation which provides the jury with little by
way of a yardstick against which to test their gut reaction. This
renders the law uncertain to an alarming degree and increases the
chance of inconsistent verdicts".
This statement raises the issue of ambiguity. Lord Mackay’s formulation requires that the defendant’s conduct be so bad as to amount to criminal conduct, but how bad is “so bad”? Gardner puts the problem thus:

“There is some potential ambiguity here. Imagine, as a simple instance of this kind, that a jury is asked to decide whether a person is tall. The jury’s task is to attend to a single factor, height, and to draw a line. Assessing badness is not quite like that. Certainly, it requires line drawing too, but it may well involve looking to more than one factor. Moreover, there is room for debate over what the relevant factors are. His Lordship does not make clear whether this debate too is to be remitted to juries, so that each jury may take into account whatever factors it deems relevant (and then settle the questions of degree involved in those factors), or whether the debate is settled as a matter of law, so that judges should instruct juries as to the proper factors to take into account (the juries then again, settling the questions of degree involved in these factors). Nor, if the latter be right, does his Lordship make clear what are those proper factors”?17

It appears, therefore that there is little guidance provided by the courts as to when the law should find a defendant guilty of gross negligence. One approach purported by Lord Atkin in *Andrews* is the use of “recklessness”

as a good way of describing negligence. An examination of the courts
treatment of the issue of recklessness, however, shows that this approach is
also flawed. Effectively the courts adopted two different approaches to the
question of recklessness. The first was to suggest that recklessness was a
degree rather than a species of negligence. Indeed Lord Atkin stated in
Andrews that:

"Simple lack of care such as will constitute civil liability is not
enough; for the purposes of criminal law there are degrees, and a very
high degree of negligence is required to be proved before the felony
is established. Probably of all the epithets that can be applied
"reckless" most nearly covers the case".

The second approach taken by the courts, despite receiving warnings
against embarking on such a course, was to attempt to define recklessness.
In Stone and Dobinson, for example, Lord Justice Geoffrey Lane
formulated a two-limbed test to identify recklessness. He stated:

"Mere inadvertence is not enough. The defendant must be proved to
have been indifferent to an obvious risk of injury to health, or

actually to have foreseen the risk but to have determined nevertheless to run it"\(^{18}\).

This test had two main effects. The first was to provide support for the idea that recklessness was merely a degree of negligence. The second was to suggest that recklessness was a separate heading of manslaughter from gross negligence, a view that was clearly shared by the House of Lords in *Seymour*. What the courts had done was to place great importance on establishing the defendant’s state of mind in order to determine guilt. The test for recklessness was subjective. The Law Commission points out, however, that these cases which rely on subjective recklessness\(^ {19}\) were gone against expressly by Lord Hewart C.J. in *Bateman* who “explicitly stated the test to be capable of involving both advertence and inadvertence of risk: the defendant was at fault if he “recklessly undertook a case which he knew, or should have known, to be beyond his powers”\(^ {20}\). This suggests that the test envisaged in *Bateman* is an objective test, and that no alternative formulation would suffice.


\(^{19}\) See for example *Lamb* [1967] 2 QB 981, and *Cato* [1976] 1 WLR 110.

It is clear that in any case where the jury is faced with a case of gross negligence manslaughter they have an unenviable task. How can a jury be expected to carry out their task properly when even the courts appear uncertain about the true basis of this offence. Virgo puts the matter thus:

"The greatest difficulty with gross negligence manslaughter arises from the fact that there can be no definite conclusions as to what constitutes gross negligence, this being a matter for the jury to determine by reference to all the circumstances of the case. This is a major weakness of this head of manslaughter in that too much is left for the determination of the jury with little assistance from the judge in directing them as to the law. If the essence of liability is something as vague as gross negligence then a degree of uncertainty cannot be avoided, but there is clearly a need for more detailed legal guidance as to what is meant by gross negligence" 21

It is clear that far too much is left to the jury under the Bateman/Andrews formulation. This cannot help but lead to uncertainty and inconsistency in the law. Different jurors will hold different views on the appropriate standards that may properly be expected of individuals, particularly professionals. This could easily lead to juries in two cases with near

identical facts coming to different conclusions on the question of gross negligence. In the meantime, however, gross negligence is still the correct basis for this branch of manslaughter despite the problems the question of gross negligence raises. This brings us to consider the offence of corporate manslaughter.

As can be seen in the case of Cory Brothers Ltd. it was once felt that a corporation could not be charged with the common law offence of manslaughter. In H. M. Coroner for East Kent ex. p. Spooner22 the families of two victims of the Zeebrugge ferry disaster made applications for judicial review proceedings to be brought challenging the coroner’s decision not to press manslaughter charges against P. & O. Ferries Ltd. or its directors. In that case Mr Justice Bingham stated:

"The first question is whether a corporation can be indicted for manslaughter. The coroner originally ruled that it could not. In the course of argument in this court we indicated at an early stage that we were prepared to assume for the purposes of this hearing that it could. As a result the question has not been fully argued and I have not found it necessary to reach a final conclusion. I am, however,

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22 (1989) 88 Cr. App. R. 10
tentatively of the opinion that on appropriate facts the *mens rea*
required for manslaughter can be established against a corporation.\(^{23}\)

This pronouncement clearly went against the views of Mr Justice Finlay in
*Cory Brothers Ltd.* who felt that a corporation could not be indicted for a
felony or offences involving personal violence. Furthermore, Mr Justice
Bingham’s statement paved the way for manslaughter proceedings to be
instigated against P. & O. Ferries Ltd.

The ensuing case of *R v P. & O. European Ferries (Dover) Ltd.* was to
prove a landmark case in the historical development of the law of corporate
manslaughter. The trial highlighted both the weaknesses of the substantive
laws of manslaughter when applied to corporations, and the particular
problem that the doctrine of identification created in any attempt to attribute
liability to a company for corporate manslaughter.

The facts of the case make grim reading.\(^{24}\) Having crossed over from
Dover earlier on the morning of 6 March 1987, the roll-on roll-off (ro-ro)


ferry the *Herald of Free Enterprise* was due to depart from Zeebrugge at 18:00 hours. With the car deck already being loaded, the First Officer went to inspect proceedings. Whilst on the car deck he, mistakenly, believed he had seen the Bosun heading towards the control panel used for closing the bow doors. Believing that things were proceeding normally, the First Officer headed back to the bridge to prepare for departure. The bow doors had recently been changed from a visor style to a clam type so that, when the ship set sail with the bow doors still open, they were out of sight of the bridge. The ship passed the inner-harbour breakwater at approximately 18:20 and accelerated out towards the open sea. Having reached a speed of 15 to 18 knots the ship began to take on water through the open bow doors at a rate of two hundred tons per minute. At 18:25 the ship turned round and rolled over onto a sandbank less than a mile from the harbour with only the starboard side of the ship remaining above water. 192 people lost their lives.

At the outset Mr Justice Turner held that in order to find the company guilty of manslaughter it was necessary to find some officer who could be identified with the company who was guilty of the individual offence of manslaughter. It is important to note that at that time the appropriate test
for manslaughter was that laid out by Lord Roskill in *R v Seymour*\textsuperscript{25} which was based on the notion of "recklessness" as defined in *Caldwell*\textsuperscript{26}, and in *Lawrence*\textsuperscript{27}.

The *Seymour* test for manslaughter stated that a defendant would be guilty of the offence of manslaughter where:

1) The defendant, by their actions, created an obvious and serious risk of causing physical injury (or death) to another person: and

2) That in creating the risk the defendant, having recognised that some risk was involved, nevertheless went on to take it.

It was for the jury to decide whether the risk was "obvious and serious", but "obvious and serious" to who? Turner J. ruled that the "obvious and serious risk" had to be have been evident to "a reasonably prudent person engaged in the same kind of activity as that of the defendant whose conduct is being called into question". This proved to be a major stumbling block for the prosecution.

\textsuperscript{25} [1983] 2 AC 493
\textsuperscript{26} [1982] AC 341
\textsuperscript{27} [1981] 1 All E. R. 974
Mr Justice Turner was in no doubt that a corporation could be guilty of manslaughter. He stated:

"... I would be minded to follow a route close to that adopted by Henry J. in *Murray Wright*’s case ... in New Zealand who ruled that if it be accepted that manslaughter in English Law is the unlawful killing of one human being by another human being (which must include both direct and indirect acts) and that a person who is the embodiment of a corporation and acting for purposes of the corporation is doing the act or omission which caused the death, the corporation as well as the person may also be found guilty of manslaughter". 28

Yet his Lordship effectively demolished the prosecution’s case by ruling that the prosecution had to prove that the risk of the ship sailing with its bow doors open should have been obvious to a person engaged in the same kind of activity as that of the defendant. The prosecution had already called several P. & O. ship’s Masters, all of whom had testified that the risk of sailing with the bow doors open had not occurred to them. This effectively reinforced the defence’s claim that any risks inherent in the operating system were not obvious. After all, these were professionals who had

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28 *R v P. & O. European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72, per Turner J. at 89
worked with the same operating system as the *Herald of Free Enterprise* without incident. Indeed “the system had worked without mishap for years ... in which there had been upwards of over 60,000 sailings .... about 5,000 on the Zeebrugge run”.\(^{29}\) It also became apparent that this was not the first time a Townsend Thoresen ship had set sail with its bow doors open, but it appears that these incidents were never reported to the shore based management so the operating system was never revised. It was clearly a risk that was never obvious to anyone until it happened. Mr Justice Turner, therefore, was left with no option but to direct the jury to find all but the Assistant Bosun and Chief Officer not guilty after little over three weeks. The prosecution decided not to pursue a conviction against them on the grounds that it would be against the public interest to do so.

It is respectfully submitted that this was an unacceptable result. There were, to the layperson, clearly a number of faults inherent in the operating system that may have created an “obvious and serious” risk. First, and foremost, the door closing procedure operated on a system of negative reporting. In basic terms, the captain assumed that if he heard nothing then

the doors were shut. Indeed, this system was criticised by both the prosecution and the Sheen Inquiry. Further confusion was created by the fact that it was not uncommon for people other than the Assistant Bosun to close the bow doors. The Assistant Bosun was, in fact, quoted as saying that he often arrived at the car deck to find that someone had already closed the bow doors. This shambles of a system may well have operated without incident until that fateful day, but it is suggested that the danger should still have been obvious to the reasonable ordinary person. So how could the court fail to reach such a conclusion?

Celia Wells blames Mr Justice Turner’s overly simplistic approach to the question of risk. She states:

“Three points can be raised about Turner J.’s interpretation of recklessness: the obvious risk question; the prudent person question; and the prior knowledge question. The prosecution had not alleged that the defendant’s had foreseen the risk themselves. The question then was whether they had failed to realise an obvious and serious risk of physical injury ... [Bergman] explains the trial judge’s approach in these terms: “Evidence that the ships had, in the past, sailed safely was the main reason for the failure of the prosecution. The system “had worked without mishap for over seven years”
during which there had been "upwards of over 50,000 sailings". This approach demonstrates a clear failure to consider what he meant by risk. It is reminiscent of the small child who, having survived crossing a road without looking, disputes the risk in such a strategy with the statement "But it was safe; I didn’t get run over". 30

A detailed study of what would have been an appropriate approach to risk and recklessness is not appropriate or necessary at this stage for, as we will see, the basis for corporate manslaughter is now gross negligence.

It is difficult to avoid feeling P. & O. have, in some way, been "rewarded" for adopting sloppy practices and their questionable management skills. It is plausible that a revision to the system as simple as requiring the Assistant Bosun to make a positive report to the captain the bow doors were closed could have saved 192 lives. We have also seen that poor communication within the company meant that the shore managers were unaware of the other open door sailing incidents and thus had no reason to revise the system. Why should it be that the Sheen Inquiry found that "from top to bottom the body corporate was infected with the disease of sloppiness", yet

the court was unable or unwilling to point the finger of blame when, presumably, the same facts were available to them.

It is questionable whether Mr Justice Turner would have reached the same conclusion had the basis for the offence of corporate manslaughter been gross negligence as defined by the courts in *Andrews v D. P. P.*\(^{31}\) and in *R v Adomako*\(^{32}\). The company clearly owed a duty of care to their passengers by virtue of the nature of their relationship. By failing to transport their passengers safely from A to B they had breached that duty, and that breach caused the death of 192 people. It is a matter for academic debate whether the company’s negligence should be characterized as gross. I do not intend to discuss this question any further here, but I feel it is worthy of further contemplation at a future date. The fact of the matter is, however, that justice simply was not done in this case.

Not all prosecutions against corporations for manslaughter are destined to fail however. In 1994 the English Justice System saw the first successful prosecution of a corporation for manslaughter. *O. L. L. Limited* and its director, Peter Kite, were both successfully prosecuted for manslaughter

\(^{31}\)[1937] AC 576

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following the death of four teenagers during a canoe expedition from an activity centre in Lyme Regis\textsuperscript{33}. In this instance Peter Kite was shown, as Managing Director of the company, to owe a duty of care to those who utilised the centres facilities and engaged in their activities to ensure their safety. The breach of this duty, it was alleged, consisted of:

\begin{quote}
\textquote{\textit{(i) failing to devise, institute, enforce and maintain a safe system for the execution of an outdoor leisure activity, namely canoeing, by students attending the St. Albans Centre, Lyme Regis, Dorset... (ii) failing to procure the employment by O. L. L. of an adequate number of staff, suitably qualified to give safe instructions in canoeing. (iii) failing to procure the provision by O. L. L. at the centre of all equipment necessary for the safe instruction of canoeing. (iv) failing to heed, either adequately or at all, the content of an undated letter sent to O. L. L. by Pamela Joy Crawthorne and Richard Retallick in or about late June 1992 [which made complaints about the absence of safety and failing to supervise the Centre Manager]. (v) failing to supervise the Manager of the centre (namely Joseph Thomas Stoddart) so as to ensure that canoeing was being safely taught at the centre}.} \textsuperscript{34}
\end{quote}

\textsuperscript{32}[1995] 1 AC 171

\textsuperscript{33}\textit{Kite and O. L. L. Ltd} Winchester Crown Court, 8 December, 1994 unreported

\textsuperscript{34}\textit{Peter Bayliss Kite} [1996] 2 Cr. App. R. (S.) 295, per Swinton Thomas L. J. at 296
The deaths occurred during an open sea canoeing trip involving a teacher, eight students and two instructors. The teacher got into difficulties early on in the trip so one of the instructors, Mr Mann, stayed with him. The second instructor, Miss Gardner, proceeded on the journey across the bay with the children. They got swept out to sea and got into trouble. The canoes got swamped and four children drowned. Whilst the Managing Director clearly had no criminal intent (he did not even know that novices were taking part in open sea trips, and was not present at the time of the accident), his failure to implement an adequate safety system proved decisive. It will be noted, in this instance, that the court had no difficulty in attributing Kite’s liability to the company. This was a one man company, it was easy to identify the directing mind and will of the company, he had sole responsibility for these matters, he was guilty of gross negligence manslaughter.

In 1999 two directors of a haulage company were found guilty of corporate manslaughter after one of their drivers fell asleep at the wheel and caused a fatal crash. It was alleged that Roy Bowles Transport Ltd. had ignored the excessively long working hours of this driver who often worked 60+ hours without taking proper breaks.35

35 The Times, 20 November, 1999
In the same year the courts allowed leave to seek judicial appeal to the family of Simon Jones. They wanted to challenge the Director of Public Prosecution’s decision not to bring manslaughter charges against the Directors of Euromin after Simon, a 24 year old casual dock worker, was crushed when a crane’s grab bucket closed suddenly as he was unloading cobbles from a ship. In March 2000 the High Court overturned the decision of the Director of Public Prosecutions and the Crown Prosecution Service not to prosecute. In the subsequent hearing at the Old Bailey in 2001 however Euromin Ltd and its general manager, Richard Martell were acquitted of manslaughter in a jury trial.

More recently English Brothers Ltd. of Wisbech were convicted of causing the death of gang foreman Bill Larkman. The company was fined thirty thousand pounds plus twelve and a half thousand pounds costs after pleading guilty to separate charges of corporate manslaughter and breaching health and safety regulations. Mr Larkman fell to his death whilst erecting an onion store at a farm.

36 The Times, 21 September, 1999
These cases all point to two things. Firstly it is arguable that we are witnessing a climate in which the courts are becoming more willing to accept that a company can be guilty of manslaughter. Secondly it is apparent that the law is weighted heavily in favour of the larger corporations. The larger a company is, and the more diffuse its power structure, the harder it is going to be to identify one person who is sufficiently culpable of manslaughter. But, even if such a person is found, there is little likelihood that they will be sufficiently senior within the corporate chain of command to be deemed part of the directing mind and will of that company. Yet in the case of the one man company this is not a problem. Is it just that a two-tiered justice system is developing? Why should it be that a company is rewarded for adopting a stance where no one takes responsibility for their actions? This is the main problem with the identification theory in Nattrass when applied to corporate manslaughter. Fisse and Braithwaite put the problem thus:

"[The principle in Tesco v Nattrass is highly unsatisfactory], namely because it fails to reflect corporate blameworthiness. To prove fault on the part of one managerial representative of a company is not to show that the company is at fault as a company but merely that one representative was at fault; the Tesco principle does not reflect
personal fault but amounts to vicarious liability for the fault of a restrictive range of representatives exercising corporate functions. This compromised form of vicarious liability is doubly unsatisfactory because the compromise is *struck in a way that makes it difficult to establish corporate criminal liability against large companies*. Offences committed on behalf of large concerns are often only visible at the level of middle management whereas the *Tesco* principle requires proof of fault on the part of a top-level manager. By contrast fault on the part of a top-level manager is easier to prove in the context of small companies. Yet that is the context where there is usually little need to impose corporate criminal liability in addition to or in lieu of individual criminal liability".  

This problem is all too evident in the recent case of *R v Great Western Trains Co. Ltd.* In September 1997 one of Great Western Trains' (GWT) trains passed a red light at 125 mph and collided with a freight train at Southall. The crash left seven people dead. Gary Slapper highlights counsel for the Prosecution, Mr Lissack Q. C.'s, novel approach to the question of corporate manslaughter. He argued that, following the decision of the House of Lords in *Adomako*, Mr. Justice Turner's ruling in the P. & O. case was no longer good law. The appropriate test for manslaughter was

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37 My emphasis
now, he claimed, purely objective, that is to say that the question is now “was the defendant grossly negligent, that is, criminally careless judged by ordinary reasonable standards”. There was no need, he argued, to look for a guilty directing mind and will of the company because the defendant’s state of mind was not in question. Despite the lucid and logical approach adopted by Mr Lissack Q. C. Mr. Justice Scott-Baker rejected his argument on the grounds that Adomako did not deal with the situation under which a corporation could be found guilty of manslaughter. Furthermore, he stated that even if a Director for Safety had been brought into the dock to face manslaughter charges such a prosecution would have failed. This statement was based on Scott-Baker J.’s belief that the Director was not sufficiently culpable.

Upon the conclusion of this case, Richard Lissack Q. C. is quoted as saying:

“If a company is large with responsibility for safety assumed by no one and avoided by everyone, it may conduct its undertaking as negligently as it wishes, knowing that, unless the prosecution can prove beyond doubt that a directing mind of the company personally authorised, procured or directed the specific wrong, that neither that

\[39\text{(Central Criminal Court 27/07/99)}\]
\[40\text{“Corporate Homicide and Legal Chaos” Gary Slapper, (1999) 149 NLJ 1031}\]
individual nor the company could ever be convicted for manslaughter, with all that a conviction for that offence conveys".  

GWT were convicted of a health and safety offence and fined a record £1.5 million. This is still a relatively small amount though when compared to the annual turnover of some of these companies. Railtrack, for example, announced profits of £236 million for the first six months of the year, just three months after the prosecution of GWT. It is difficult not to feel that Great Western Trains Limited got off lightly. The case made it to the Court of Appeal as an Attorney General’s Reference on the corporate manslaughter question.

Lord Justice Rose accepted Mr Lissack Q. C.’s submission that “large companies should be as susceptible to prosecution for manslaughter as one man companies ... and the public interest requires the more emphatic denunciation of a company inherent in a conviction for manslaughter”. Whilst accepting gross negligence as the basis of manslaughter, the court refused to impose liability on Great Western Trains. Mr Lissack Q. C. for the prosecution placed great reliance on his earlier argument relating to

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41 "Corporate Homicide and Legal Chaos" Gary Slapper, (1999) 149 NLJ 1031
gross negligence. It was, he submitted, "unnecessary and inappropriate to enquire whether there is an employee in the company who is guilty of the offence of manslaughter who can be properly said to be acting as the company". Instead, he submitted, a company was perfectly capable of being "personally liable". Cases such as Meridian, British Steel Plc. and Re Supply of Ready Mixed Concrete (all of which I have already discussed) were advanced in support of this argument. This approach was firmly rejected by Lord Justice Rose who stated, quite clearly:

"Identification is necessary in relation to the actus reus, i.e. whose acts or omissions are to be attributed to the company, and Adomako's objective test in relation to gross negligence in no way affects this. Furthermore, the civil negligence rule of liability for the acts of servants or agents has no place in the criminal law – which is why the identification principle was developed. That principle is still the rule of attribution in criminal law whether or not mens rea needs to be proved". 43

He continues at page 217:

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42 Attorney-General's Reference (No. 2 of 1999) [2000] 2 Cr. App. R. 207, per Rose L. J. at 211
"There is, it seems to us, no sound basis for suggesting that by their recent decisions the courts have started a process of moving from identification to personal liability as the basis for corporate liability for manslaughter ... In our judgement, unless an identified individual’s conduct, identifiable as gross criminal negligence, can be attributed to the company, the company is not, in the present state of the common law, liable for manslaughter”.

The prosecution’s case therefore failed.

The benefit of such pronouncements is that at least we are certain about the true basis of a company’s liability for manslaughter. However, matters still have not improved. We are still left in a situation where it is far too easy for the larger companies to avoid liability for manslaughter because the current methods for attributing liability are particularly inept in those situations where the courts seek to impose liability on large corporate bodies with complex power structures. The next chapter of this thesis therefore concerns the search for alternative methods of imposing liability on corporations for deaths caused by their activities by looking at the proposals for reform of this area of the law advanced by the Law Commission and the Government.

Chapter 4: Proposals for Reform: The Views of the Law

Commission and the Government.

In the previous chapter we saw how corporate criminal liability was developed through the years by the courts of England and Wales. The different methods of attribution utilised by the courts to impose criminal liability on a corporation were discussed. Finally we examined how the courts utilised these rules of attribution to try to attribute liability for manslaughter to a corporation. What were also evident, however, was the gross inadequacies of the doctrines of vicarious liability and identification when trying to determine corporate criminal liability. In the case of manslaughter in particular we saw that the courts were unable to impose criminal liability on P. & O. ferries following the Zeebrugge disaster because the only people who could properly be said to be liable for the individual offence (the Assistant Bosun and the Chief Officer) could not properly be described as forming part of the directing mind and will of the corporation.

In this section of the thesis, therefore, it is proposed to look at alternative means for imposing liability on a corporation for the offence of corporate manslaughter. The first step that will be undertaken is an examination of the Law Commission’s proposed offence of “corporate killing” laid out
in Consultation Paper no. 135\textsuperscript{1} and Report no. 237\textsuperscript{2}. Secondly there is a
discussion of the Governments proposals regarding the law of
involuntary manslaughter (including corporate manslaughter) and their
response to the Law Commissions proposals\textsuperscript{3}. It is also intended to look
at the private members bill, put forward by the Labour Back-bencher Mr
Andrew Dismore as a ten minute rule bill,\textsuperscript{4} which was presented to the
House of Commons in April 2000.\textsuperscript{5} It was not adopted as law but it is a
pertinent example of the steady show of support that is developing for
any moves to create a statutory offence of corporate killing.

Having concluded an examination of these resources I the focus will then
be on alternative approaches to the problem of creating an offence of
corporate homicide. This will involve dealing with resources from other
jurisdictions, for example the approach adopted by the courts in the
United States (see Chapter 8), and from other disciplines, for example
sociology when dealing with issue of criminological group decision

\textsuperscript{1} "Criminal Law: Involuntary Manslaughter - A Consultation Paper", Law
Commission Consultation Paper no. 135 (HMSO: 1994)
\textsuperscript{2} "Legislating the Criminal Code: Involuntary Manslaughter", Law Commission
\textsuperscript{3} "Reforming the Law on Involuntary Manslaughter: The Government's Proposals"
http://www.homeoffice.gov.uk/consult/invmans.com
\textsuperscript{4} See "The Francis Bennion Website: In Parliament"
http://www.francisbennion.com/page155.html
\textsuperscript{5} "Corporate Homicide Bill". presented to the House of Commons on 18\textsuperscript{th} April,
2000
http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmbills/114/2000114.htm
making (see Chapter 7). It is also proposed to deal with the alternative approach to corporate killing embodied in sections 2 and 3 of the Health and Safety at Work etc., Act 1974 (see Chapter 5).

It is submitted that a detailed examination of these differing approaches to a common problem will help provide a better rounded solution to the corporate homicide problem. The search for a satisfactory alternative basis for corporate manslaughter begins with a discussion of the Law Commission’s proposals for reform in this area of the law.

In February 1994 the Law Commission published its consultation paper "Criminal Law: Involuntary Manslaughter". In it the Law Commission put forward for discussion its ideas for reform of the law governing involuntary manslaughter. Owing to a number of high profile public disasters the Law Commission decided to pay particular attention in its proposals for reform to the law of corporate manslaughter. They state:

"...we should not ignore what appears to be a widespread feeling among the public that in cases where death has been caused by the acts or omissions of comparatively junior employees of a large organisation ... it would be wrong if the criminal law placed all the

\[\text{6 Namely the capsize of the \textit{Herald of Free Enterprise} and the sinking of the pleasure boat the \textit{Marchioness}.}\]
blame on those junior employees and did not also fix responsibility in appropriate cases on their employers who are operating, and profiting from, the service being provided to the public".7

Having undertaken an examination of the law governing the imposition of criminal liability on corporations (similar to that laid out in the previous chapter) the Law Commission set out its options for reform of the law in this field. The Law Commission’s initial recommendation was that any proposed new corporate offence should not differ from any new proposed individual offence. The question to be answered they say is:

"...how the general law of manslaughter may be applied in the particular circumstances of a corporation, and not whether standards and requirements should apply to corporations which are different from those that apply generally, that is to say to individuals".8

Furthermore, the Law Commission realises the usual basics of criminal liability, that is to say conscious risk taking or mens rea for example, make it too complex for any attempts to impose corporate criminal

liability to succeed. What is needed instead, they realised, was an alternative means of judging corporate fault. Indeed the Law Commission even hints at the notion of, what Fisse and Braithwaite would call, "reactive fault", which will be considered later.

The Law Commission pointed out that these problems with determining culpability were particularly evident in the case of corporate manslaughter. Hence, they provisionally recommended the creation of a special regime applying to corporate liability for manslaughter. The main question would be:

"... whether the corporation fell within the criteria for liability for that offence."\(^9\)

The "awareness of risk" question, the Law Commission argues, could be answered by looking at the decision making structure of the defendant corporation. Corporations undertake activities which are organised by the corporate decision makers. Inevitably, in this instance, there is some recourse to the doctrine of identification. The question becomes whether those involved in the decision making process should have been (not necessarily actually) aware of the risk that those activities might result in

death or serious injury. This would entail making value judgements about the company's approach, amongst other things, to safety in organising its activities.

On the other hand, in order to answer the question of whether the company's conduct "fell seriously and significantly below what could be demanded of it in dealing with that risk", the Law Commission abandons the doctrine of identification. The Law Commission state:

"The basic premise is that the company is required to arrange its affairs in a way which is reasonable granted the presence of the risk. This requires investigation of how the company operates to prevent death or injury ... If a corporation has chosen to enter a field of activity it has a clear duty to those affected by that field of activity to take steps to avoid the creation of serious risks". 10

Juries should not assume that there had been a deviation from the reasonable standard purely because a death had occurred however. It is still possible for a death to occur even where all reasonable steps have been taken to neutralize all possible risks. The question is whether, having analysed the corporation's approach to the issue of workplace

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safety, it had taken “steps to discharge that duty of safety\textsuperscript{11}, and that the systems which it had put in place to run its business” were satisfactory in the current workplace climate.

The Law Commission put forward these proposals for discussion and invited comments from concerned groups. The results of this consultation process were set out in Report no. 237 "Legislating the Criminal Code: Involuntary Manslaughter". From their report it appears that there was a fair degree of support for a reform of this area of the law. Reasons adduced in favour of reform included:

1) The need to give practical effect to the recently established principle that an indictment lies against a corporation for manslaughter.

2) The need to maintain public confidence in industry and enforcement bodies by making it harder for corporations to escape culpability on a technicality.

3) The need to punish corporations for adopting unsafe working practices as a contributing factor to the death rather than the carelessness of an individual.

4) The need to deter corporations from adopting sloppy and unsafe working practices.

5) The need to adopt new kinds of sentence in a bid to move away from the overly simplistic approach of imposing fines

6) The inadequacy of the regulatory offences in the Health and Safety at Work etc., Act 1974.\textsuperscript{12}

On the other hand some people were against the concept of criminal manslaughter giving reasons including:

1) Practical considerations

2) In the event of a major disaster there would be an inquiry. Introducing an offence of corporate manslaughter may result in potential witnesses refusing to appear for fear of being prosecuted.

3) It would be harsh to punish a corporation for failing to reach a particular standard of safety where so many other corporations in the same field have also failed to recognise the need.

4) Punishing a corporation would result in innocent shareholders being penalised for no fault of their own – the “overspill” problem.\textsuperscript{13}

The Law Commission, however decided to go ahead and try and extend corporate liability. They were faced with four possible avenues of approach, namely vicarious liability, the principle of aggregation, the creation of a radically new corporate regime or to adapt the individual offence of "killing by gross carelessness" to make it applicable to corporations whilst veering away from the doctrine of identification. What the Law Commission finally recommended was the creation of a new offence of "Corporate Killing" set out in the following terms:

"4.- (1) A corporation is guilty of corporate killing if –

(a) a management failure by the corporation is the cause or one of the causes of a person's death; and

(b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.

(2) For the purposes of subsection (1) above –

(a) there is a management failure by a corporation if the way in which its activities are managed or organised fails to

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ensure the health and safety of persons employed in or affected by those activities; and

(b) 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”.14

This differs in quite some degree from the Law Commission’s proposal for reform of the individual offence of gross negligence manslaughter. The formulation the Law Commission adopted provisionally was that a defendant would be liable where:

1. The accused ought to have been aware of a significant risk that his conduct could result in death or serious injury; and

2. His conduct fell seriously and significantly below what could reasonably have been demanded of him in preventing that risk from occurring or in preventing that risk, once in being, from resulting in the prohibited harm”.

It is said that the first element is something of a formality, if the accused could not reasonably have been expected to be aware of the risk, then he

could not be expected to do anything about it. On the other hand, the second limb of this test has numerous elements. Firstly, the accused’s conduct must fall short of what can reasonably be expected of him: “That is, he is to be judged according to what might be expected of a doctor, a train driver or, in the alternative case, ordinary citizen”\(^{15}\).

Secondly, where the accused acts in a manner which is not accepted by their profession they will, most likely, be found not to have acted in the manner expected of him. However, even if the accused does follow the standard practice, the jury should not be prevented, in situations where there is a high risk of death or serious injury, from finding that this practice is unacceptable. Thirdly, the accused’s conduct must fall below the standard expected of him by a “substantial and significant degree”. This reflects the idea conveyed by the label “gross negligence”\(^{16}\).

This provisional formulation received a mixed response on consultation. Some reservation was expressed, for example, with regard to the use of the words “seriously and significantly” in the second limb of this test. Some of those consulted believed that too much court time would be taken up by legal argument in attempting to distinguish between them, favouring instead the use of words such as “substantially” or “far”.

\(^{15}\) (HMSO: 1994) page 124
\(^{16}\) (HMSO: 1994) page 124
Further concerns were expressed by members of the medical profession who felt that the provisional formulation did not reflect the realities of medical practice and that it would be difficult to categorise medical conduct in the manner suggested in the second limb of the test. Other concerns included the belief that, under this formulation, it will no longer be open to the jury to consider all the surrounding circumstances in determining ability (which is felt to be one advantage of the present test for gross negligence). Furthermore, there was concern that the proposed formulation was too vague, leaving the jury to categorise conduct as criminal or not.

The final formulation the Law Commission adopted for the new offence of “killing by gross carelessness” reads like this:

2 (1) – A person who by his conduct causes the death of another is guilty of killing by gross carelessness if –

(a) a risk that his conduct will cause death or serious injury would be obvious to a reasonable person in his position;

(b) he is capable of appreciating that risk at the material time; and

(c) either –

(i) his conduct falls far below what can reasonably be expected of him in the circumstances; or

(ii) he intends by his conduct to cause some injury or is aware of, and unreasonably takes, the risk that it might do so.

In the first limb of the test it will up to the jury to decide whether the risk in question would have been “obvious to a reasonable person in the defendant’s position”. In making this determination the jury will be asked to take into account all the relevant facts known to the defendant at the time (including any special skills or knowledge the defendant may have claimed to possess). The defendant must also have been capable of appreciating the risk at the material time, a disability which leads to a temporary or permanent impairment to this ability may be used as a valid defence. The most important element is the third limb as the same phrasing is used in the corporate offence, that is to say, “that the accused’s conduct fell far below what could reasonably have been expected of him in the circumstances or ... that he intended by his conduct to cause some injury or was aware of, or unreasonably took the risk that, it might do so”.

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This element of the offence may be satisfied in one of two ways. The first alternative (clause 2(1)(c)(i)) is similar to the test of dangerousness in road traffic offences. The defendant’s conduct must fall far below what could be expected of him. Whilst avoiding the circularity of the Adomako formulation, states the Law Commission, it still suffers from leaving much to the determination of the jury which still leaves the danger of inconsistency in the application of the law. It is felt that the alternative of creating a rigidly defined offence would be unworkable and hence, they can find no way around this problem. On the other hand, it retains one desirable element from the Adomako gross negligence test in that juries would still be required to consider all the surrounding circumstances when evaluating the defendant’s conduct.

The alternative (clause 2(1)(c)(ii)) is to prove that the defendant intended to cause some injury to another or was aware of the risk of doing so, and he nevertheless took it. It is said that this provision was included on the advice that it was easier to explain the principles of unlawful act manslaughter to juries and it was easier for them to understand than the vagaries of gross negligent manslaughter. Furthermore, the Law Commission feels that it would be easier for juries to decide whether the defendant acted intentionally or recklessly in respect of causing some
injury rather than deciding whether the defendant's conduct fell below what could reasonably be expected of him. It has been said that this alternative adds nothing to the scope of the offence, indeed, the kind of conduct which this clause is designed to cover, states the Law Commission, will frequently fall under both alternatives. Rather, clause 2(1)(c)(i) is intended to simplify the task for the jury by dispensing with the need for the jury to consider clause 2(1)(c)(ii) which is viewed as a more complicated, and mainly academic, question. This leads us into our discussion of the offence of corporate killing.

The novel element this provision introduces is the concept of a "management failure". The Law Commission could not avoid the fact that the doctrine of identification is particularly problematic when trying to impose liability on a corporation for manslaughter. The logical step to counteracting this problem would be to adopt a means of attributing liability to a corporation which does not require the courts to identify the mental state of any individual. What the Law Commission has tried to do instead is to concentrate on getting closer to establishing "true" corporate guilt. Whereas under the doctrine of identification the courts would attribute the mental state of a sufficiently senior employee to a corporation, the notion of a "management failure" suggests that the court would be able to examine, for example, the corporate decision making
structures and its operating systems. Whilst, ultimately, these systems and procedures were devised by individuals they were devised and adopted as a collective consciousness which we may call the corporation. Thus instead of finding a company liable for manslaughter caused by the unsafe actions of an employee, the courts would be punishing the corporation for failing to take sufficient steps to prevent those dangerous acts from occurring in the first place.

Indeed, the Law Commission point to the collapse of the P. & O. trial as an example of where the new proposed offence might have secured a conviction. As we saw in the previous chapter, the case against P. & O. failed because the two people whose actions ultimately caused the capsize of the Herald of Free Enterprise (the Assistant Bosun and Chief Officer) were not sufficiently senior employees within the corporate structure to attribute liability to the corporation. The Law Commission suggest that, using the concept of a “management failure” it would have been easy for the courts to find P. & O. ferries guilty of corporate manslaughter on the grounds that they had failed to instigate a safe operating system for their ferries and that this failure fell far below what could reasonably have been expected of them.¹⁸

These ideas of collective responsibility are not new and this thesis contains a discussion of some other work carried out by philosophers and criminologists regarding the collective accountability of groups. It is felt, however, that the Law Commission has taken a step in the right direction. It is clear that the criminal laws which apply to individuals struggle to cope when presented with corporate offenders. It is always going to be necessary for the law to evolve in order to cope with the new challenges brought by corporate offenders. The Law Commission should be commended for trying to embody in its offence a more accurate representation of corporate criminal liability.

The Law Commission received support for their proposals, particularly the "management failure" construction, from the Health and Safety Commission. In a letter to Mr Edward Pegg at the Sentencing and Offences Unit in the Home Office, they expressed their support. They suggested, however, that it should be slightly wider in its ambit than that probably envisaged by the Law Commission. They stated:

"In principle the Commission supports the application of the offence to work related deaths caused by occupational ill-health as well as accidents which is implicit in the way the offence is drafted. This will have the effect of applying the offence to deaths caused by exposure to health damaging agents such as pathogens, chemicals or certain fibres. However, there are significant practical implications in applying the new offence to long latency illnesses and these will need to be considered carefully." 20

This is a potentially interesting and undoubtedly unexpected outcome of the Law Commission's formulation. One only has to look at the number of cases that have been brought by individuals against companies for long term illness caused by exposure to, for example, asbestos. This would really widen the scope of the offence, though this in itself presents a number of problems. The Health and Safety Commission recognise this and suggest that the law should not be applicable retrospectively, that is to deaths caused by exposures before the enactment of this new offence. Even so, they state, this may a difficult cut off to enforce in the case of illnesses caused by cumulative exposure. This would certainly eliminate the main problem that is perceived with this potential expansion to the clause, namely the reasonable practicability test.

20 Extract from a letter to Mr. Pegg at the Sentencing and Offences Unit in the Home Office, dated 7th September 2000. See also, H.S.E. press release CD47:00 – 13 September 2000
Technological, medical and research developments have shown us the error and ignorance of some of the working practices of the past which have been adopted to handle hazardous materials. It would be unfair, however, to impose modern safety standards on earlier incidents. What might be reasonably practicable in these times would not have been plausible, or indeed possible, in years gone by.

Not everyone agrees, however, that the Law Commission's approach is to be praised. In his article "Manslaughter and Corporate Immunity," David Bergman, for instance, feels that the Law Commission is still relying on the identification theory, albeit in a different form, to determine liability. Furthermore he suggests that they have adopted a very blinkered and uninspired approach to the attribution of liability problem. The Law Commission proposal requires the proof of "subjective recklessness" on the part of the company. Bergman states:

"What this meant was that the Law Commission believed that the only way in which the courts can determine whether companies are guilty of offences requiring a "subjective state of mind" — in effect any offence requiring evidence of recklessness or intention — is through consideration of the state of mind of an individual within the company. Once the Commission had made up its mind that "subjective" manslaughter, in so far as it affects companies,
will continue to be adjudicated on according to the general principle of "identification", there was no question that the Commission would consider amending the general test of liability". 21

Bergman has a fair point. The Law Commission has, possibly, taken a relatively conservative approach to the question of attributing liability to corporations, but his interpretation of the proposed offence cannot be endorsed. Certainly the actions that are being judged by the courts are the actions of individuals within the company but it is not necessarily solely these actions that are being punished. What the corporations are being punished for is for allowing a climate to develop in which sloppy working practices permeate the organisation of the corporation's activities.

It is hoped that an examination of the theories of collective responsibility will show that individuals will reach different solutions when considering the same problem both as an individual and as part of a group. In its most basic form a corporation is a group of individuals utilising a corporate identity to achieve maximum return for their investments whilst being protected from individual financial liability by

corporate law concepts as “limited liability” and the “veil of incorporation”. The decisions of the corporation are the decision of these individuals expressed as corporate policies and actions. By concentrating on imposing liability on corporations for adopting unsafe working practices as part of its decision making procedures, for example, the Law Commission is focusing on, is viewed as, the closest representation of a corporate state of mind (that is to say a corporate decision) yet. It is submitted that it is impossible for the element of the individual to be completely removed from any test to attribute liability to a corporation.

Since it is Parliament which would eventually legislate for any statutory offence of corporate manslaughter, it is also important to consider the Government’s view on this topic. In “Reforming the Law on Involuntary Manslaughter: The Government’s Proposals”22 the Government sets out its views on the Law Commission’s proposals for reform. Although dubious about the ease with which a “management failure” could be proved, the Government recognized the usefulness of a new offence of corporate killing. They state:

22http://www.homeoffice.gov.uk/consult/invmans.com
"The Government believes the creation of a new offence of corporate killing would give useful emphasis to the seriousness of health and safety offences and would give force to the need to consider health and safety management as an issue". 23

Whilst not disagreeing with the substantive elements of the offence, there are two main areas where the Government’s approach to the offence of corporate killing differs from that of the Law Commission. These are with respect to the potential defendants to any charge of corporate killing, and punishing company officers in the event of a successful prosecution for that offence.

The Law Commission recommended in Report No. 237 that its proposed new offence should not be extended to apply to unincorporated bodies, but rather it should focus solely on “the kind of organisation for which it is primarily designed – namely the commercial corporation”. 24 This was justified, partly, on the basis that those persons who comprise the unincorporated body would still be liable for the individual offence. The Government, however, declined to follow this approach. Both parties recognised that, in effect, it may often be difficult to distinguish between an incorporated and unincorporated body. What the Government

23 "Reforming the Law on Involuntary Manslaughter: The Government’s Proposals"
http://www.homeoffice.gov.uk/consult/invmans.com (page 13 of 29)
recommended, therefore, was that the offence should be made applicable

to “undertakings”, as defined in the Local Employment Act, 1960 as “any
trade or business or other activity providing employment”. This would,
the Government envisaged, increase the scope of the offence,\(^{25}\) to
include, for examples, schools and hospital trusts. Such an extension
was justified on the grounds that such enterprises were already subject to
liability within the scope of the Health and Safety at Work etc., Act 1974.
No major objections can be made to this proposal but it does seem that
the distinction between incorporated and unincorporated bodies is
somewhat arbitrary. Surely justice demands that if an organisation has
conducted its affairs in such a way that a death has resulted, why should
it be protected from the full force of the criminal law merely because it is
unincorporated. As a proviso, however, it is important to consider some
of the financial implications of such an extension. It would certainly be
very serious if the National Health Service were to be subject to
prosecution and punishment for corporate manslaughter. Any fine which
was imposed on it would necessarily affect the provision of effective
medical treatment for the general public. The Government is
consequently urged to consider such a matter with great care.

\(^{25}\) Indeed, the Government estimated that this would make approximately 3 ½ million enterprises potentially liable to a charge of corporate killing.
The second major difference between the two approaches is found within the question of enforcement against secondary parties. The Law Commission recommended that the corporate offence should not be used to indirectly extend the liability of individuals. Despite the fact that section 37 (1) of the *Health and Safety at Work etc., Act 1974* provides additional liability to be pinned on individual directors where their conduct has contributed to a breach of sections 2 and 3 of that Act, the Law Commission stated:

"There will no doubt be cases in which one or more of the company's employees will amount to the commission of one of the two "individual" offences; but where that conduct does not fulfill the requirements of liability for one of those two offences, we would not wish an individual employee to be caught by the corporate offence".  

The Government did not favour this approach. They were concerned that such an approach:

(a) could fail to provide a sufficient deterrent, particularly in large or wealthy companies or within groups of corporations; and

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(b) would not prevent culpable individuals from setting up new businesses or managing other companies or businesses, thereby leaving the public vulnerable to the consequences of similar conduct in future by the same individuals. 27

What the Government recommended therefore is:

"[T]hat any individual who could be shown to have had some influence on, or responsibility for, the circumstances in which a management failure falling far below what could reasonably be expected was a cause of a person's death, should be subject to disqualification from acting in a management role in any undertaking carrying on a business or activity in Great Britain". 28

It is submitted that such an extension may indeed add something to the offence of corporate killing in terms of increasing the deterrent effect of this offence. By threatening the individual directors with disqualification it reinforces the idea that the veil of incorporation is no defence against criminal liability. A threat to an individual's personal livelihood is arguably likely to encourage directors to take greater care when implementing safety policies and procedures. On the other hand

the Government may be heading into controversial territory. Firstly there is the danger of encouraging companies to put forward a scapegoat for prosecution. Whilst the inconvenience and potential stigma of being temporarily disqualified from being a director are obvious, it is suggested that the financial benefits offered to the individual who accepted such a post would prove an effective counterbalance to such inconvenience. Whilst the Government’s efforts to seek out new forms of punishment are to be commended, such a notion would, it is suggested lead to the demeaning of this sanction.

Nevertheless, the Health and Safety Commission also supported moves to ensure that individual officers of a culpable company were disqualified from holding a directors post, upon conviction, “for unlimited periods in the most serious cases” Breach of such a disqualification order, argues the Health and Safety Commission, should be punishable by imprisonment. It is undoubtable that, whatever the formulation, committing corporate manslaughter should receive a heavy punishment. This is a matter which will be dealt with later in this thesis.

29 Extract from a letter to Mr. Pegg at the Sentencing and Offences Unit in the Home Office, dated 7th September 2000.
Secondly, whilst the Government accepts that the doctrine of identification is unacceptable in the context of attributing liability for corporate killing, it is arguable that they are risking venturing back within the realms of this doctrine with this proposal. As I have argued, the Law Commission’s proposed offence of corporate killing seems to aim to identify liability in the corporate collective consciousness. Yet, whilst accepting the main thrust of the Law Commission’s offence of corporation, the Government reverts, to a degree, to the concept of a “directing mind and will” in order to find a means of punishing individual directors. Furthermore, it is questionable whether it is just to extend indirect liability to an individual where they have committed no criminal offence. Caution is urged before making any further moves in this direction.

Unfortunately this proposed new offence did not get any further than the discussion stage. Speculation was rife that moves towards creating a Corporate Homicide Bill would be announced in the Queens Speech in November 2002. For reasons not yet established, however, these proposals disappeared without trace. This meant that the closest we have come to a statutory offence of corporate manslaughter so far is Mr. Andrew Dismore’s “Corporate Homicide Bill”.

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This Bill was initially presented to the House of Commons on the 18th April, 2000 and was scheduled for a second reading. The proposal was, however, dropped. Looking at the provisions therein it is apparent that this Bill simply adopts the proposals made by the Law Commission in Report No. 237 without implementing any of the changes proposed by the government. This is somewhat disappointing as it does not really contribute anything to the corporate homicide debate. What this does mean, however, this presents a "clean slate" on which to consider further alternatives to the doctrine of identification as a basis of liability. Chapter 6, for example, contains an examination of those group oriented theories of corporate liability that believe that there is such a thing as truly "corporate" fault, and in chapter 7 consideration will be given to the approaches to this problem adopted by other jurisdictions. Firstly, however, we will look at the Health and Safety at Work etc., Act 1974.

It will be seen that sections 2 and 3 of said Act should be considered as a serious alternative to any moves to create a corporate killing offence. Judicial support for its provisions are fast resulting in an increasing number of companies being successfully prosecuted and punished for workplace deaths, a process that is eased by its relatively straightforward approach to corporate liability. The Courts are not faced with complicated legal doctrines which seek to establish a potentially
fictitious corporate *mens rea*. Rather liability is absolute and the burden of proof is on the defendant companies to show that they did all that they could to discharge their duties under the 1974 Act.
Chapter 5: A Ready Made Solution? Sections 2 and 3 of the

*Health and Safety at Work etc., Act 1974.*

As was seen in the previous chapter, the stage is still set for the introduction of a statutory provision governing the offence of corporate manslaughter.

There is a growing feeling amongst some members of the academic community that any attempt to provide such an offence is fraught with such difficulties that it is almost certain to fail. These same academic commentators also question the need for the creation of a statutory offence of corporate killing when there are, so they claim, adequate statutory provisions in place to deal with deaths caused by corporate activities.¹ The provisions they point to are sections 2 and 3 of the *Health and Safety at Work etc., Act 1974.*

This section of the thesis, therefore, contains an examination of these provisions and identifies the duties laid out therein. Subsequently there is a discussion of the way the Courts have interpreted these duties and punished companies for breaching them. Finally, on the basis of these considerations, it is questioned whether it is acceptable to leave the

provisions of the *Health and Safety at Work etc., Act 1974*, as the sole statutory provisions with which to punish corporations for causing deaths.

An example of this academic support can be found in "*Manslaughter and Corporate Immunity*", an article written by J. Daniels and I. Smith. In this article they advocate more academic and popular support being given to sections 2-3 of the *Health and Safety at Work etc., Act 1974* and deal with some of the similarities between them and the new proposed corporate killing offence. The main thrust of this article is the commentator's view that it is pointless to create this offence of corporate killing because sections 2-3 are perfectly adequate substitutes. The first argument is that the offence of corporate killing and contravention of the general duties of the *Health and Safety at Work etc., Act 1974* both carry a similar penalty, namely an unlimited fine. This means that the main aim of the new offence has to be achieving retribution "by way of the stigma associated with a conviction for killing". If it is not accepted that this is a legitimate aim then we must question whether the deterrence issue can be satisfied by the provisions of

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2 "*Manslaughter and Corporate Immunity*", (200) 150 N.L.J. 656, J. Daniels and I. Smith
3 "*Manslaughter and Corporate Immunity*", (200) 150 N.L.J. 656, at 656

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the Health and Safety at Work etc., Act 1974, contravention of which, in the eyes of the authors, is more likely to lead to a successful prosecution.

The two offences clearly have different aims. The criminal offence of corporate killing clearly has retribution as its aim. On the other hand, the general duties found in sections 2-3 have more of a deterrent aim. The authors state:

"This argument manifests itself in the view that regulatory crime is not "real" crime. To that extent the notion of stigma veers more towards an offence where the culprit is found to be morally culpable. In short, there more stigma attached to the crime of manslaughter than a regulatory offence".5

Once the ambit of section 2 and section 3 have been determined we realise that they have been quite effective in successfully punishing corporations for dangerous working practices which have caused deaths. This is largely, as will be seen, down to the court’s recognition of the intent behind the Health and Safety at Work etc., Act 1974, and the judiciary’s reluctance to

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4 This matter is not quite so "black and white". There is no doubting, for example that the Corporate Killing offence also has a degree of deterrence inherent in it, it is just that it is not identified as its primary goal.

5 "Manslaughter and Corporate Immunity", (200) 150 N.L.J. 656, at 656
let companies side-step these general duties. In *R v British Steel Plc.*\(^6\) and *R v Gateway Foodmarkets Ltd.*\(^7\) for example, we will see the courts refusing to accept the companies' defence that they had done everything that was reasonably practicable at directing mind level to nullify risks to health and safety in the workplace. Accepting this construction would have left it open to companies to avoid liability by delegating dangerous tasks to lower level employees. Another example will be seen in *R v Board of Trustees of the Science Museum*\(^8\) where the courts were willing to adopt a wide construction of the general duties in order to bring a variety of conduct within their ambit. What then do sections 2 and 3 provide?

Section 2(1) of the *Health and Safety at Work etc., Act 1974*, imposes liability on an employer for putting employees under unnecessary risk. This can include those situations where dangerous working practices have resulted in the death of an employee in the workplace. Section 2(1) states:

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\(^6\) [1995] 1 W.L.R 1356  
\(^7\) [1997] IRLR 189  
\(^8\) [1993] I.C.R. 876
"It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees".

The term "employees" encompasses those who have been employed under a contract of employment or apprenticeship, and also covers all those persons "who have been provided with the relevant training or work experience in the workplace".

The question of when an employee may be considered to be "at work" was considered by the Courts in Bolton Metropolitan Borough Council v Malrod Insulations Ltd. As was said by the courts, "it was unique to prosecute for a breach when work had not begun or before it was suggested anyone was at risk". Malrod Insulations were originally charged with breaching the duty under section 2 for using a decontamination unit with defects which were liable to result in anyone using said unit receiving a severe electric shock. They appealed on the grounds that the duty under section 2 was only owed to an employee at work. Under section 52(b)

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9 The general duty under section 2(1) of the Health and Safety at Work etc. Act, 1974, is further extended by the Management of Health and Safety at Work Regulations, 1992, which require that the employer carry out a proper risk assessment in the workplace, and that he takes steps nullify the risks.


11 Bolton Metropolitan Borough Council v Malrod Insulations Ltd. [1993] I.R.L.R., 274,
"an employee is only at work throughout the time when he is in the course of his employment".\textsuperscript{12}

"the essence of the submission was that, on a proper construction of the statute, before the defendant could be found guilty of the offence charged, its employees had in fact to be at work in the removal of the asbestos whereas, on the evidence, at the time the alleged offence no one was at work. It was submitted that the statutory duty only arose when the defendant's employees were at work".\textsuperscript{13}

The Court, however, did not share this view. It was held that on no common sense basis could the words "at work" mean that the duty to provide a safe plant arose only when men were actually at work:

"Such a construction would lead to the conclusion that the duty came to life when the employees reported for work in the morning, that it existed throughout the working day but would then fall in limbo at the end of the day, only to be revived the next morning. Under this construction if an inspector went on site at the end of the working day and found a defect in the plant, he would be powerless to institute proceedings for a breach of duty ... Moreover the employer's duty under section 2 is not confined to employees who are engaged in a

\textsuperscript{13} Bolton Metropolitan Borough Council v Malrod Insulations Ltd. [1993] I.C.R. 358
specific process. It applies to all "employees" of an employer. Accordingly, there can be a breach of duty if any employee is exposed to risk of injury from an unsafe plant even though not engaged in the work in question".  

It should be noted that the employer's duty is to "ensure" the safety of their employees. Subject to the defence of reasonable practicability, set out in section 40 of the Health and Safety at Work etc. Act, 1974, an employer is therefore in breach of this duty if an employee is injured, however caused, at work. It is worth noting, however, that the Courts have also held in cases such as R v British Steel Plc. that the corporation can only be held liable where the act complained of was committed by a senior member of the company's "directing mind and will". Professor F. B. Wright, however, feels this is wrong. Instead he suggests that the prosecution should first prove the breach of the duty. The burden of proof would then shift to the defence to show that they did everything that was reasonably practicable within their power to discharge the duty. If, for example, it could be shown that the task had been delegated to an employee who had no relevant training or instruction, then the company could be found liable for

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15 [1995] 1 W.L.R. 1356
16 Private communication with Professor Wright.
breaching section 2 even if the employee was only a junior. This suggestion makes sense in light of the criticism of the doctrine of identification set out earlier in this thesis. The ultimate aim of this section is to ensure that the companies do everything in their power to ensure the safety of their employees. It would render the statutory provision useless if companies could circumvent this duty by delegating potentially risky tasks to junior and unskilled employees.

An opposing result, and a good example of section 2 (1) of the *Health and Safety at work etc., Act 1974* being applied by the courts is to be found in the Court of Appeal case of *R v Gateway Foodmarkets Ltd*. In this case Gateway was prosecuted following the death of a duty manager who fell nearly 30 feet through a trapdoor on the roof of their Broomhill store. This store had a goods lift which jammed frequently. Without the knowledge or consent of Gateway’s Head-Office, the company contracted to maintain the lift had told the store personnel how to remedy the problem without calling them out. This involved going on to the store roof and freeing an electrical contract. On the day of the fatal accident the contractors had carried out

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17 [1997] IRLR 189
some routine maintenance and unexplainably left the trapdoor open. Mr Finn ventured on to the roof to free up the jammed lift but going from darkness to sunshine his vision was affected and he did not see the trapdoor open. The company was charged with an offence under section 2(1).

One of the main areas of contention was that Head-Office had not authorised this course of conduct and so Gateway claimed in their defence that since the act was carried out at store management level Gateway, as a company, could not be held liable because they were the acts of people who weren’t part of the “directing mind and will” of the company. Lord Justice Evans began by holding that section 2 (1), as decided by Lord Hoffman in R v Associated Octel in relation to section 3(1), imposed a direct duty on the employer, “the company, as employer, is liable when the necessary conditions for liability are fulfilled”18. Thus the liability imposed by sections 2 and 3 was a primary, rather than vicarious, liability. Referring to the case of R v British Steel Plc. Lord Justice Evans stated:

“The appellants’ submission is that [imposing liability on an employer for a section 2 offence whenever the relevant event occurs would lead] to what has been called the “absurd” consequence that

18 R v Gateway Foodmarkets Ltd. [1997] IRLR 189, Evans L.J. at page 191
the employer is criminally liable under the section for the acts or omissions of even its most junior employees ... The "absurdity" argument was considered in *R v British Steel Plc.* ... when Steyn LJ said that it had proved troublesome for the court ... The court concluded that "there may be circumstances in which it might be regarded as absurd that an employer should even be technically guilty of a criminal offence", but that "in any event, so called absurdities are not peculiar to this corner of the law ... That circumstance is inherent in the adoption of general rules to govern an infinity of particular circumstances."\(^{19}\)

Lord Justice Evans reached his conclusion by reference to the reasonable practicability defence made available by the disputed section. He worked on the logic that the defence could be satisfied by actions carried out by precautions taken by both the company and its servants and agents, that is to say by the company or on its behalf. In his view "the concept of the "directing mind" of the company would have no application here".\(^{20}\) Thus Lord Justice Evans concludes:

"First, there is no clear legal basis for distinguishing between "management" and (other) employees. Secondly, if the test is whether all reasonable precautions have been taken by the company

\(^{19}\) *R v Gateway Foodmarkets Ltd.* [1997] IRLR 189, Lord Justice Evans at page 191-2
\(^{20}\) *R v Gateway Foodmarkets Ltd.* [1997] IRLR 189, Lord Justice Evans at page 192
or on its behalf then it would not seem to be material to consider whether the individual concerned, who acted or was authorised to act on behalf of the company, was a senior or a junior employee ... a failure at store management level is certainly attributable to the employer, whilst leaving open the question whether the employer is liable in circumstances where the only negligence or failure to take reasonable precautions has taken place at some more junior level."

Whilst not actually providing a definitive answer on the "directing mind" question Lord Justice Evans indicated that the courts were not really willing to entertain this kind of defence. This is not that surprising since, after all, the offence created by sections 2 and 3 are absolute. The mental state of the offender is not relevant. The issue of whose actions have lead to the commission of the offence creates problems for manslaughter prosecutions because the offence requires the proof of a suitably guilty state of mind. It has already been seen that the courts will only consider the company guilty if the acts were committed by part of the directing mind and will of the offending company. Since the main issue with sections 2 and 3 is solely that an unsatisfactory state of affairs has arisen, caused by the defendants, regardless of their state of mind, the "directing mind and will" defence should not be accepted by the courts.

21 R v Gateway Foodmarkets Ltd. [1997] IRLR 189, Lord Justice Evans at page 192
Section 3(1), on the other hand, is intended to protect those members of the general public (or visitors to a worksite for example) who may be adversely affected by the unsafe working practices of an undertaking. For my purposes this provision would be relevant in those instances where members of the public have been killed in train crashes or even capsizing ferries. Section 3(1) states:

“It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety”.

This duty is extended to self-employed persons under section 3(2) and both must inform those people, not in their employment, whose health or safety may be affected by their undertaking of this risk under section 3(3). Section 3 is effectively an extension of the duty laid out in section 2 and its scope has been shown to be very broad. Furthermore, in R v British Steel Plc the Court highlighted the fact that section 3(1) creates an absolute prohibition.
An example of the broad scope of section 3(1) can be seen in *R v Board of Trustees of the Science Museum* 22. In this case the appellant’s water cooling tower was found on inspection to contain the bacteria which causes legionnaire’s disease. The appellants were charged with failing to discharge their duty under section 3(1) in that they exposed the general public to the “risk” of contracting the disease by failing to ensure the adequate maintenance of their water cooling tower. At first instance the defendants claimed there was no case to answer on the basis that there was no evidence that any bacteria had left the building or even that it had been inhaled by anyone. The trial judge, however, stated that it was sufficient that the risk was present. On appeal the question was whether the mere risk of the bacteria escaping was sufficient or whether it had to be proved that the bacteria did in fact escape.

Mr. Justice Steyn found that the former was the case. He stated:

“In the context [of section 3] the word “risk” conveys the idea of a possibility of danger. Indeed a degree of verbal manipulation is needed to introduce the idea of actual danger which the defendants put forward. The ordinary meaning of the word “risks” therefore

22 [1993] I.C.R. 876
supports the prosecution’s interpretation and there is nothing in section 3, or indeed in the context of the Act, which supports a narrowing down of the ordinary meaning ... The adoption of the restrictive interpretation argued for by the defence would make enforcement of section 3(1), and to some extent also sections 20, 21 and 22 more difficult and would in our view result in a substantial emasculation of a central part of the Act of 1974".  

A second, and more recent, case where a prosecution under section 3 has been brought before the Courts is R v Nelson Group Services. The Court’s decision in Nelson “is important for indicating clearly the correct approach to the section and the role of the defence of reasonable practicability”. Lord Justice Roch stated:

“[I]f persons not in the employment of the employer are exposed to risks to their health or safety by the conduct of the employer’s undertaking, the employer will be in breach of section 3(1) and will be guilty of an offence under section 33(1) (a) of the Act unless the employer can prove on the balance of probability that all that was reasonably practicable had been done by the employer or on the employer’s behalf to ensure that such persons were not exposed to

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23 R v Board of Trustees of the Science Museum [1993] I.C.R. 876, per Steyn J. at page 882

24 [1998] 4 All E.R. 331

such risks. It will be a question of fact for the jury in each case whether it was the conduct of the employer’s undertaking which exposed the third persons to risks to their health and safety. The question what was reasonably practicable is also a question of fact for the jury depending on the circumstances of each case. The fact that the employee who was carrying out the work ... has done the work carelessly or omitted to take a precaution he should have taken does not of itself preclude the employer from establishing that everything that was reasonably practicable in the conduct of the employer’s undertaking to ensure its employees were not exposed to risks to their health and safety had been done.” 26

Finally in *R v Associated Octel*27 the Courts dealt with the question of what comes within the definition of a company’s undertaking. In this case the appellants argued that the activities carried out by an independent contractor, hired for their expertise in the field, did not fall within the ambit of their undertaking. The argument was that they had employed a specialist who was competent to decide how best to carry out the work and that the job in question was the *contractor’s* undertaking. On the basis of this argument they claimed that any risks caused by the contractor’s activities did not put them in breach of the duty under section 3 and that they did not


27 [1994] 4 All E.R. 1051
owe a duty to the independent contractor’s employees or the member of the
general public. This view did not carry any favour with judges. They held
that the word “undertaking” meant “enterprise” or “business” and that “the
cleaning of a plant was necessary for the business and so was part of Octel’s
undertaking, whether the work was carried out by the employer or by an
independent contractor”\textsuperscript{28}. The appellants also claimed that the fact they
had no control over the conduct of the independent contractors also
prevented them from being in breach of the duty under section 3. The
Court, however, held that the question of control was not relevant in
determining what constitutes the conduct of an undertaking.

This question of control has also been discussed in the cases of \textit{R.M.C. Roadstone Products Ltd. v Jester}\textsuperscript{29}; \textit{R v Mara}\textsuperscript{30}; and \textit{R v Swan Hunter Shipbuilders Ltd. and Another}\textsuperscript{31}. In \textit{R.M.C. Roadstone Products} the
defendants had also engaged an independent contractor to carry out repairs
on its premises. Arrangements were made to remove certain asbestos sheets
from an adjacent disused factory to aid in these repairs. Whilst it was open
to the company to give directions to the contractors about how best to carry

\begin{footnotesize}
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\item [28] “\textit{Corporate Liability for the Health and Safety of Others}”, Irene Mackay, (1996) 146 N.L.J., 438
\item [29] [1994] I.C.R. 456
\item [30] [1987] 1 W.L.R. 87
\item [31] [1982] 1 All ER 264
\end{itemize}
\end{footnotesize}
out their work (despite the fact that they were under no common law duty to lay down a safe system of work for them) the independent contractors were left to do their work in any way they chose. In the course of the removal of said sheets a Mr Derhum ventured onto the asbestos roof, which had no real load bearing capacity, and fell through a sky light to his death. The defendant company was prosecuted under section 3 (1) of the *Health and Safety at Work etc., Act 1974*. In its defence the company contended, amongst other things, that the removal of the asbestos sheets by the independent contractors did not fall within the ambit of the of the company’s conduct of its undertaking. Mr. Justice Smith took an interesting approach to defining “undertaking”. He stated:

“A defendant’s undertaking is its business or enterprise ... [T]he company’s business of manufacturing road-making materials carried out at its premises ... included as part of the undertaking, the maintenance and repair of the premises. The activity of obtaining asbestos sheets for the repair of their premises, whether they were to be obtained by purchase from suppliers or by arranging for the removal and collection of second hand sheets from other premises, was for the benefit of the company’s undertaking”.

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Mr. Justice Smith went on to conclude that if the removal work had been carried out by employee’s of the defendant company then there could be no doubt that the removal of the asbestos sheets was an activity being carried out as part of the defendant’s undertaking. The fact that the defendant’s chose to have the work carried out by independent contractors was not a defence. He stated:

“If it was conducting its undertaking through contractors it owed a duty to ensure the safety of Mr. Dehun, and it was properly convicted”.

Mr. Justice Smith also had a few words to say on the question of control. He disagreed with the courts view in *R v Associated Octel* that the matter of control was completely irrelevant. Instead he was willing to follow counsel for the prosecution’s argument that total control was unnecessary, but rather partial control would suffice relying on the Scottish authority of *Carmichael v Rosehill Engineering Works Ltd.* which suggested that “a defendant’s

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34 1984 S.L.T. 40
conduct of his undertaking is not limited to those activities over which he has complete control". Mr. Justice Smith stated:

"I find myself attracted to Mr Hoskin's alternative submission and, with great hesitation, I have come to the conclusion that it is well founded ... [there are many situations where] a person may share control of an activity which may still be described as the conduct of his undertaking ... [including for example where] a main contractor and his subcontractor may both be said to be conducting their undertakings in respect of the subcontract work".

Mr. Justice Smith then went on to announce that it was necessary in this situation to prove that there was a degree of shared control in this instance so that it could properly be said that the removal of those asbestos sheets was part of the company's undertaking. What level of control would be considered satisfactory? Justice Smith stated:

"Before he can say that an activity is within the conduct of his undertaking, the employer must ... either exercise some actual control over it or be under a duty to do so. If, where the employer is a

35 R.M.C. Roadstone Products Ltd. v Jester, [1994] I.C.R. 456, per Justice Smith at page 100
36 R.M.C. Roadstone Products Ltd. v Jester, [1994] I.C.R. 456, per Justice Smith at page 100
principal, he chooses to leave the independent contractor to do the work in the way he thinks fit, I consider that the work is not within the ambit of the principal’s conduct of his undertaking. It is wholly the contractor’s undertaking. If the principal does involve himself, albeit voluntarily – as, for example, by instructing the contractor’s to adopt a certain method of work, or by lending a piece of equipment – then it may be that his involvement would be within the ambit of his undertaking. If the system of work proved to be unsafe, or the equipment proved to be defective and gave rise to a risk”.

Mr. Justice Smith proceeded to find that the defendant had left the subcontractors to their own devices and was under no duty to lay down a safe system of work. They did not try in any way to exert a degree of control over the subcontractor’s activities thus it could not possibly be concluded that the removing of the asbestos sheets fell within the conduct of their undertaking.

It is important to note in relation to Justice Smith’s verdict, however, that what R v Associated Octel did decide in relation to the issue of control, was that the degree of control a principal exerts over an independent contractor is important when considering the matter of reasonable practicability. It is

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37 R.M.C. Roadstone Products Ltd. v Jester, [1994] I.C.R. 456, per Mr. Justice Smith at page 101
often the case, as with *Associated Octel*, that the principal has employed the independent contractor especially for their expertise in a particular field. In these instances it may not be reasonably practicable for the principal to do anything other than to "leave them to it". It was stated at page 1063:

"In most cases the employer has no control over how a competent or expert contractor does the work. It is one of the reasons why he employs such a person – that he has a skill and expertise, including the knowledge of appropriate safety precautions which he himself may not have". 38

This is not, however, the end of the matter. The question of what may be "reasonably practicable" is a matter of fact and degree to be considered in each case. In the *Associated Octel* case there was evidence that the principal company had recommended the safety equipment that should be used to carry out the cleaning work. In so advising the subcontractors they had assumed some control over the way the work was carried out. This, it was held, shifted the burden of proving that everything that was reasonably practicable to neutralise the risk had been done shifted to the principal.

38 *R v Associated Octel* [1994] 4 All ER 1051 at page 1063.
In *R v Mara*\(^{39}\) the courts also had to decide whether the acts of the subcontractor could be brought within the ambit of the company’s undertaking. In this case the defendant company had contracted a cleaning company to clean the premises of their Solihull branch. The contract included a provision which allowed the employees of the principal company to utilise the cleaning equipment provided by the subcontractors which were left at the principal’s premises. The equipment included a polisher/scrubber for cleaning the loading bay. This machine had a defective cable which revealed some of the wiring beneath the insulation. The floor of the loading bay was normally wet which rendered the machine unsafe. An employee of the principal company used the machinery on this wet floor and received an electric shock which killed him. The defendant company was charged with an offence under section 3 (1).

They were convicted at trial but appealed, *inter alia*, on the grounds that the judge had ruled wrongly in deciding that where a cleaning company accepts a contract to clean certain parts of a premises and allowed employees on those premises to use their equipment to clean other parts at other times the use of said equipment came within their undertaking. Effectively C.M.S.

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\(^{39}\) *R. v. Mara [1987] 1W.L.R. 87*
(the defendant company) claimed in their defence that, since the accident happened on a day when they were not contracted to work, and it occurred outside of their supervision, the only undertaking being conducted was that of the principal company. Consequently, they claimed they were not in breach of section 3 (1) and had consented to no such breach. Lord Justice Parker, however, dismissed the appeal. He stated:

"... it is not permissible to treat the section as being applicable only where an undertaking is in the process of being actively carried on. A factory, for example, may shut down on Saturdays and Sundays for manufacturing purposes, but the employer may have the premises cleaned by a contractor over the weekend. If the contractor's employee's are exposed to risks to health or safety because machinery is left unsecured, or vats containing noxious substances are left unfenced, it is, in our judgement clear that the factory owner is in breach of his duty under s.3(1)". 40

Lord Justice Parker concluded that providing cleaning services was part of C.M.S.'s undertaking, and the manner in which they conducted there undertaking was to clean the principal's premises on weekdays and to leave their equipment on the premises which could be used by the principal's employers on weekends. This equipment included a faulty piece of

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40 R v Mara [1987] 1 W.L.R. 87, per Parker L.J. at page 90
machinery. In doing so they were carrying out their undertaking in a way which meant they weren’t providing or maintaining a safe plant for its own employee’s. Since C.M.S. were aware that this equipment would also be used by the principal’s employees they were placed under a duty to ensure that these employees weren’t exposed to risks by the way in which C.M.S. conducted their undertaking. C.M.S.’s conviction was, therefore, upheld.

Finally in *R v Swan Hunter Shipbuilders Ltd. and Another*\(^4^1\) the defendant company was prosecuted following a fire on a ship that was being worked on in a shipbuilder’s yard. The fire was caused by an employee of a subcontractor failing to remove oxygen hoses they were using from the lower, poorly ventilated, decks to the open top deck at the end of the day. This led to the atmosphere below deck becoming oxygen enriched and, when a welder lit his torch the following day this oxygen enriched atmosphere resulted in a fierce fire starting. Eight workers died. Employees of Swan Hunter were well aware of the dangers of such an event occurring and had compiled and distributed a rule book which was given to its employees. The rules demanded that at meal times and at the end of the day the oxygen hoses should be taken to a ventilated area (one of the upper

\(^4^1\) [1982] 1 All ER 264
decks) or that the hose should be switched off at the manifold. This rule book was not, however, made available to the subcontractors. The defendants were charged with breaching their duty under section 2(1) of the Health and Safety at Work etc., Act 1974, for failing to provide a safe system of work to ensure the safety of their employees.

Swan Hunter were appealing against an earlier conviction on the question whether section 2(1) placed them under a duty to provide the employees of the subcontractor with information on the dangers of oxygen enriched atmospheres and instructions to ensure the safety of both their and the subcontractors employees on their ship. The court adopted a narrow interpretation of sections 2 and 3 and decided that this situation could be covered by the general duties laid out in section 2(1). Lord Justice Dunn stated:

"As the judge said, that is a strict duty. If the provision of a safe system of work for the benefit of his own employees involves information and instruction as to potential dangers being given to persons other than the employer’s own employees, then the employer is under a duty to provide such information and instruction. His protection is contained in the words “as far as is reasonably practicable” which appear in all the relevant provisions. The onus is
on the defendant to prove on a balance of probabilities that it was not
reasonably practicable in the circumstances of the case.\textsuperscript{42}

The question of what conduct might prove to be "reasonable practicable"
has also been cleared up to a degree. What is reasonably practicable will be
a matter of degree for each case. Furthermore, in determining what is
reasonably practicable it is permissible to weigh up the risk of the accident
occurring against the cost of eliminating it.\textsuperscript{43} The following of a universal
standard will not be enough, though failing to follow industry standards
may prove damaging. Evidence that employees have been properly trained
may also help to discharge the duty under section 3 (1). Finally, where the
disputed activity was carried out by, or under the supervision of, a
competent employee who had been properly delegated the responsibility by
the "directing mind and will" of a corporation, the fact that the activity went
wrong whilst under their supervision will not absolve the defendant
corporation of liability. This is because the duty under section 3(1) is

\textsuperscript{42} R v Swan Hunter Shipbuilders Ltd. and Another [1982] 1 All ER 264, per Dunn L.J. at
page 271

\textsuperscript{43} "If... the risk is small but... the measures necessary to eliminate it are great, [the
defendant] may be held to be exonerated from taking steps to eliminate the risks on the
grounds that it may not be reasonably practicable for him to do so". Per Lord Goff in
Austin Rover v H. M. Inspectorate for Factories [1989] 3 W.L.R. 520, quoted in
"Conducting an Undertaking and Criminal Liability under the Health and Safety at
absolute. Allowing a narrow construction of the issue of control would have severely curtailed the scope of sections 2 and 3.

There is no disputing the fact that sections 2-3 of the *Health and Safety at Work etc., Act 1974* provide an interesting and plausible alternative to the corporate manslaughter problem. The main benefit of these two provisions is the fact that the courts do not have to concern themselves with the problematic matter of establishing the necessary *mens rea* at the directing mind level. In that respect they are similar to strict liability offences. This means that reliance on these provisions has seen a number of companies prosecuted and punished for deaths caused by their irresponsible actions, which is something severely lacking from prosecutions citing corporate manslaughter. Thus it is not surprising that people are “highlighting the virtues” of sections 2 and 3 of the *Health and Safety at Work etc., Act 1974* rather than that of the Law Commission’s proposed offence of corporate killing.

This can be attributed to a number of factors. Firstly, the duties laid out in the 1974 Act are, by now, long established. Consequently they have been discussed extensively in the courts and have resulted in the establishment of
settled principles. The concept of “management failure”, on the other hand, relies on questions of standards of care to be expected and could create a degree of uncertainty and result in a great deal of unnecessary litigation.

Secondly, the provisions of the 1974 Act have a wider scope than the proposed corporate killing offence. Daniels and Smith point to the fact, for example, to the fact that the Law Commission’s offence cannot deal with those situations where only a “serious” injury occurs. Under sections 2 and 3, however, a company may be successfully prosecuted regardless of the outcome of their breach. They also point to the Court of Appeal in *R v F. Howe & Sons* as an example of this broad scope. As will be seen later when discussing the issue of corporate punishment, the Court of Appeal directed that serious injury and death should be considered aggravating factors when sentencing a corporation. In some cases, they stated furthermore, a court may deem the offence so serious that they should consider whether the defendant should still be in business. This is a good step because it encourages the sentencing court to consider the degree of

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44 "Manslaughter and Corporate Immunity", (2000) 150 N.L.J. 656, J. Daniels and I. Smith. See also David Bergman’s proposals which I mention in the previous section.
45 [1999] IRLR 434
seriousness of the breach and to punish accordingly by setting a fine which
should properly illustrate society’s disapproval of their actions.

Further insights into the possible advantages of relying solely on a
regulatory approach can be gained by looking very basically at some of the
background to the Health and Safety at Work etc., Act 1974. By
understanding its aims and goals we can see that the provisions therein
clearly have a role to play in combating corporate killers. In an
examination of the state of safety laws some thirty years ago, the Robens
Committee concluded that the main problem was that there was simply too
much law in this field. This led to confusion amongst employers and a
view developed that safety laws were nothing more than “detailed rules
imposed by external agencies”.

In a bid to get industry more involved in
the creation of safer working environments the Robens Committee opted for
a more self-regulating system of safety law. This emphasized a belief that
the main responsibility for dealing with workplace safety matters should lie
with those who create the risks and those who have to work with them.
This belief was later encapsulated in the Health and Safety at Work etc.,
Act, 1974 a statutory provision which had a number of key underlying

46 “Law, Resistance and Reform, ‘Regulating’ Safety Crimes in the UK”, Steve Tombs,
philosophies. Firstly it was stressed that any regulatory bodies set up under the 1974 Act should not be regarded as a police force for the industry. Instead their job was to be the giving out of safety advice and ensuring compliance with the Act’s provisions. Secondly the approach to ensuring compliance which the Act favoured was prevention rather than punishment. A gradual improvement of safety standards was achieved initially by bargaining with employers to persuade them of the effectiveness of following safety regulations rather than by dragging them through the courts. That is not to say, however, that blatant breaches of the law would not lead to rigorous enforcement of the relevant provisions.

If the argument that prevention is better than a cure is accepted, then we quickly realise that a regulatory approach to dealing with corporations that kill has a number of advantages. The prime aim of the criminal law in pursuing a corporation on a charge of manslaughter is clearly retribution. Society demands that the perpetrator be punished for their wrong doing. This is important not only because justice must be seen to be done, but also because a prosecution of an offender shows society that the law will not tolerate such behaviour and subsequent punishment will clearly have a deterrent effect. On the other hand, the Health and Safety at Work etc.,
Act, 1974 has as its primary aim the promotion of workplace safety.

Depending on an individual's personal view about which aim society should pursue in seeking to punish corporations that kill, they will favour either the criminal or the regulatory approach. It is apparent that the 1974 Act provides possibly the greatest benefits to society, punishing a corporation for killing an employee is a worthwhile course of action, but the criminal law is somewhat limited in its ambit. Surely it is better to ensure that the death never occurred in the first place or, where death has occurred, that it never happens again.

It is this potentially greater ambit that should put the general provisions laid out in the 1974 Act ahead of any proposed new offence governing corporate manslaughter. It should not be forgotten that the Health and Safety at Work etc., Act 1974 provides a means for the Health and Safety Commission to try and ensure compliance with the relevant statutory provisions via a series of administrative sanctions, namely the issue of notices. The Robens Committee was keen to implement a quick and effective system of achieving results that did not require taking the offender through the courts. The system of notices was designed as a constructive means of exerting pressure on employers to achieve minimum safety standards. There are two
types of notice, an improvement notice and the prohibition notice, both of which shall be considered briefly.

The improvement notice is laid out under section 21 of the 1974 Act which is issued by an inspector who requires the remedying of a particular defect within a definite time frame. Upon inspecting a site an inspector may find that a statutory provision has been breached in circumstances which the inspector believes will mean the breach will continue or may be repeated. Upon making such a decision the inspector may issue an improvement notice. Within that notice the inspector must state that they are of the opinion that a particular statutory provision has been broken, which provision has been broken, why they have reached that belief and the steps to be taken to remedy the breach within a set time period. The notice may also set out a specific course of action to be undertaken in order to remedy the breach. It may not, however, require an employer to be subject to a more onerous burden than that he would normally be placed under in the law.

The prohibition notice, on the other hand, is laid out in section 22 of the Health and Safety at Work Act 1974. This may be issued by an inspector
where the inspector discovers some breach of the relevant statutory provision which is likely to create the risk of some serious personal injury. As with the improvement notice the notice must set out the fact that the inspector believes there to have been a breach, what that breach consists of and which provision has been breached. The notice will include an order to discontinue the dangerous activity until all steps have been taken to remedy the situation which has given rise to the risk. Under section 22(4) of the 1974 Act, the notice may be issued with immediate effect or to come into effect at the end of a defined period. It will normally be issued in those situations where the employer or other person refuses to comply with the inspector’s advice, or where the person in charge of the operation does not have the necessary authority to act on that advice or where no one is apparently in effective control.

What is clear is that the Health and Safety Executive are not afraid to use their powers. In the year 2000/2001 alone the Health and Safety Executive issued 11,009 notices, 6,687 of which were improvement notices and 4,225 were prohibition notices.47 When these factors combined are considered, it is clear that the Health and Safety at Work etc., Act, 1974 has strong

potential and in theory could render it unnecessary for the Government to enact alternative legislation to deal with corporate killing.

Why then has Parliament, and indeed more of the academic community, not supported this campaign and placed greater emphasis on pursuing corporations that kill via these provisions? An examination of academic and popular opinion suggests that "labelling" is a real hurdle to increasing popular support for this alternative approach. Many feel that the offences under sections 2-3 of the Health and Safety at Work etc., Act 1974 are not "real crimes" and believe strongly that the criminal stigma attached to any conviction for corporate manslaughter is an important deterrent factor. Furthermore, the fact that the Health and Safety Inspectorate are ill equipped to pursue large companies through the courts cannot be ignored. They are clearly limited in terms of their resources, both monetary and personnel, and they are not trained to deal with deaths in the workplace in the same way as the police. Tombs claims, furthermore, that the very nature of the regulatory approach to health and safety means that it will be ineffective because "such regulation is fundamentally antagonistic to the
logic of firms within a capitalist economy"\textsuperscript{48}. All these matters need to be considered further in this section.

The second issue, of resources, has been dealt with by Bergman in his article "Boardroom G.B.H."\textsuperscript{49} In a shift from focusing on workplace deaths he highlights the large number of serious workplace injuries that remain uninvestigated by the Health and Safety Executive. Furthermore he suggests that the Health and Safety Executive have not gone far enough in their attempts to impose liability on corporations for their harmful actions where these actions have not resulted in death. Bergman advances a number of figures in support of this claim, including the fact that, between 1996-1998, the Health and Safety Executive:

- investigated 555 sudden workplace deaths; but
- failed to investigate some 90\% of 47,803 workplace major injuries
  - this amounts to 42,438 injuries remaining un-investigated.\textsuperscript{50}

\textsuperscript{49} Boardroom G.B.H., David Bergman, (1999) 149 N.L.J. 1656
\textsuperscript{50} Boardroom G.B.H., David Bergman, (1999) 149 N.L.J. 1656, page 1656

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Obviously the Health and Safety Executive have only limited resources, indeed they advance this as a defence for failing to investigate in these cases deciding to concentrate on their preventative work. Bergman, however, cannot accept this and feels that their failures lead to too many companies escaping prosecution too easily. He advances the following calculation to support this view:

"The H.S.E. investigated 5,365 of the 47,803 reported injuries and as a result prosecuted in 10.4% of the cases – that’s 558 companies. Since there is no reason to believe that the prosecution rate would be any different had the H.S.E. investigated the remaining 42,438 injuries, around 4,413 companies will have avoided prosecution for health and safety offences involving a major injury". 51

Bergman makes the further suggestion that the Health and Safety Executive should seriously consider the possibility of working more closely with the police in a bid to investigate any possible commission of an offence under the *Offences Against the Person Act, 1861*, specifically, Bergman suggests, section 20 of the Act. This section prohibits the "unlawful and malicious wounding" or "commission of grievous bodily harm" against a person "with or without a weapon". It is impossible to support such a suggestion.

Bergman seems to be working on an idealised view of inter-agency work. It is a well documented fact, particularly in the case of the police and social services, that different agencies do not always work well together. This is unsurprising since such investigations would involve two sets of people from different disciplines, both with different aims and goals, and both with different views on how such an investigation would best be conducted. Secondly, such a suggestion makes the mistake of trying, once again, to pin liability on a corporation for offences requiring mens rea, a mistake that the Health and Safety at Work etc., Act 1974 thankfully does not make. It seems that Bergman has conveniently glossed over these problems and, accordingly, appears not to understand the complications his suggestion would create. It is respectfully suggested that this suggestion should be discarded.

Bergman's proposals received what might be aptly described as an "irate" response from Richard Clifton in his position as Head of the Health and Safety Executive Policy Unit.\textsuperscript{52} His first concern was to point out that the Health and Safety Executive also wanted to see increased rates of investigation for workplace accidents, but this would indeed draw resources

\textsuperscript{52} Boardroom G.B.H., Richard Clifton, (2000) 150 NLJ 104
away from their important preventative work. Clifton also puts forward some reasons why he feels Bergman's proposal is fruitless. He highlights the fact, for example that, in the event of the H.S.E. passing more work to the police in the form of workplace accidents, the police may also be reluctant to divert resources from other fields to cope with this increased workload. Furthermore, Clifton rejects Bergman's claim that pursuing convictions for breaches of the *Offences Against the Person Act, 1861* is the only way of persuading the courts of the seriousness of these corporate offences. On the contrary, he claims, the Health and Safety Executive have made a point of emphasizing to the courts the seriousness of breaches of health and safety legislation and have encouraged the courts to adopt more adequate penalties for these breaches. If Bergman's proposal were adopted, Clifton claims, the Health & Safety Executive's good work would be undone. Finally there is no indication that the courts would impose any higher penalties than they would under the *Health and Safety at Work etc., Act 1974* this would render Bergman's suggestion superfluous.

Before advancing any further, there is a bit more to be said on the subject of inter-agency work. In April 1998 a protocol was agreed to ensure effective
liaison between the enforcing and prosecuting authorities\textsuperscript{53} in the event of a workplace fatality. Obviously the Health and Safety Executive cannot investigate the commission of a general criminal offence such as manslaughter. These are matters for the police and the Crown Prosecution Service. Under this protocol, however, the Health and Safety Executive are not prevented from assisting the police in any such investigation by providing them with their expertise on workplace matters and by passing on information they have gained in their investigative work. The agreed procedure in the event of a workplace death runs thus:

"When H.S.E. is the enforcing authority both the police and H.S.E. will attend the scene of a work related death and the police will conduct an investigation where there is an indication of manslaughter ... H.S.E. will also investigate possible offences under the \textit{H.S.W.A.}, but will not lay an information until the police and C.P.S. have reached a decision. Where the police decide that a charge of manslaughter, or other serious offence outside the \textit{H.S.W.A.}, cannot be justified, H.S.E. will continue with its own investigation. If evidence examined during the course of their investigation indicates that an offence of manslaughter may have been committed, H.S.E.

\textsuperscript{53} These consist of the Health and Safety Executive, the Local Authorities, the police and the Crown Prosecution Service.
will refer the matter to the police without delay. Exceptionally the H.S.E. solicitor's office may also contact the C.P.S." \(^{54}\)

There still remains a lot to be said on the matter of deterrence and stigma. Do the provisions of the *Health and Safety at Work etc., Act 1974* provide an effective deterrent to corporate wrongdoers? To some commentators the answer is clearly no. When he considers the effectiveness of regulation Tomb suggests that the very nature of corporations make it difficult for the regulation to have much effect. Companies, he claims, fail to understand the cost accidents and, even when they do they fail to act on this understanding. This is partly because the corporations have too much of a blinkered view of effective safety management. Because these corporations are geared towards maximizing their profits they regard compliance with safety regulations solely as a short term cost. Instead they should learn to appreciate the long term benefits of such an investment such as fewer fines, or not having to pay benefits to sick employees. Furthermore, employers are less reluctant to accept any further developments in safety regulations on the grounds that it creates unfair competition. This view is based on a perception that larger companies are at a greater disadvantage to small companies: a) because they are subject to more regulations; and b) because

\(^{54}\) *"Work Related Deaths"*, Barry Ecclestone (1994) 148 NLJ 910
the breaches of smaller companies are less likely to be detected. This unfair competition argument is further supported when one views corporations as competing on a global scale. It is clearly the case that U.K. based companies are competing against other corporations based in countries where there is a weaker regulatory regime, thus they can cut costs and price their services more competitively.

On the other hand, corporate behaviour does show signs that it is susceptible to deterrence based offences. A corporation which rigorously upholds the safety standards required of it has an obvious interest in ensuring that its competitors also maintain such high standards of compliance in the interests of fair competition. This suggests "that effective forms of deterrence constitute a condition of existence for law abiding behaviour on the part of corporations: that is, the existence of a likelihood of detection and credible sanctions following successful prosecution makes it possible for corporations to obey the law". Secondly, Sutherland's views on corporate crime are accepted, that corporations make decisions based on cost effectiveness which is to say that when considering whether to embark on a criminal course of conduct they will do so if, on balance, the

potential financial benefits outweigh the chances of getting caught, then it is possible that this calculating side to corporations adds some legitimacy to the idea that deterrence based sanctions may be effective against corporations.

It should also not be forgotten that not all companies may have the same standards in complying with existing health and safety regulations. In a study entitled "Business Responses to the Regulation of Health and Safety in England"\textsuperscript{56} its author contends that the philosophy of self-regulation that underpins the 1974 Act does not lend itself well to equal application to all corporations. Different corporations have different priorities when it comes to ensuring compliance with the necessary safety standards. As was noted earlier, the recommendations of the Robens report, encapsulated in the 1974 Act, were based on the assumption that there would always be a coincidence of the interests of the employers and of the workforce, namely that they would all want to ensure the promotion of health and safety in the workplace. Once this positive attitude was given some support and direction in the form of information and advice and information from the

\textsuperscript{56} "Business Responses to the Regulation of Health and Safety in England" Hazel Genn, Journal of Law and Policy, Volume 15, July 1993
inspectors, it was hoped that this would lead to a gradual improvement in workplace safety. This assumption was, however, faulty.

In her study, Genn identified a number of different compliance strategies adopted by corporations. It was suggested that the level of motivation found within a corporation was directly related, for example, to the priority given to health and safety compliance, the corporation's compliance strategies, and their efforts to educate themselves about their statutory duties. In general terms they were labelled "high motivation corporations" and "low motivation companies". Their approaches to health and safety can be broadly summed up.

The "high motivation" company will generally represent the embodiment of the ideal advanced by the Robens committee, namely that there will be a concordance in the attitudes of employers and employees alike with regard to safety matters. These companies will generally be large and well established, they will be involved in hazardous activities and they will place great value on their public image. Even where the company is not engaged in hazardous operations, compliance with safety regulations may still be given a high priority because the sheer size of the workplace makes it very
noticeable to the health and safety inspectorate and the local community. This would mean that poor standards in workplace safety would be more likely to be detected which would, in turn, affect public relations. The highly motivated company will often have appointed specialized safety personnel and many sources of information on safety matters. They found no problem in collating the necessary information and disseminating it to management and understood the need to keep up to date. These companies would generally have a good relationship with the inspectors and have a very proactive approach to safety compliance, often adopting internal review procedures and personal safety standards which often exceeded the requirements made of it by the law.

The "low motivation" company adopts a very different stance with regards to its compliance strategies. These companies tend to be smaller in size and do not tend to be engaged in particularly hazardous activities; subsequently they give health and safety monitoring a low priority and do not tend to have any specially appointed safety personnel. These corporations do not appear to have a particularly strong interest in maintaining high levels of compliance and often appear to have adopted the attitude that it is simply cheaper not to comply, particularly where compliance is not vital to the
continued existence of the corporation. Thus compliance with safety regulations is given a low priority when compared to the need to ensure production on time at a low cost. Furthermore, this type of company will rarely have the necessary motivation to seek out any information it needs, never mind read it. Little effort is made to ensure that it keeps up to date with relevant safety developments and these companies are often reluctant to utilise the safety inspector in his advisory role in order to aid them in their self-education. This is, Genn suggests, because these companies probably have such low safety standards that they regard reminding the inspectors of their presence as sheer madness. Finally they will generally adopt a very reactive approach to maintaining safety standards. That is to say that they will only tend to deal with those obvious risks that have been pointed out to them on previous visits by inspectors.

This sort of study suggests that whilst the health and safety regulations do have some deterrent effect it is clearly not that great. This is evidenced in the fact that not all companies are keen to invest a great deal of funds in the promotion of workplace safety when it is perfectly acceptable for them to carry out the very minimum levels compliance required of them by law. This view, whilst not stated explicitly made in the 1974 Act (it would after
all be counter productive if the Act encouraged employers to do no more than the minimum expected of them by law) is reinforced by the fact that inspectors, when issuing improvement notices, cannot require anything of an employer which they would not be expected to do under the law. This may begin to raise questions about whether the provisions of the health and safety regulations actually have enough “teeth” to become an effective alternative for the Law Commission’s proposals. Regulatory crime has often been criticised on the grounds that it does not constitute “real crime”. Could it be that we ought to place our faith in the criminal law to ensure the most effective means of dealing with corporate wrongdoers?

Such doubts have been raised by Bergman in “The Perfect Crime? How Companies Escape Manslaughter Prosecutions”\textsuperscript{57}. Indeed Bergman, a clear advocate of the need to prosecute companies for manslaughter, suggests that it is not entirely implausible for the aims of the 1974 Act, namely prevention rather than punishment, to be achieved via the criminal law. In the meantime, however, we are more concerned with the exact opposite of this view, that is to say that we should be questioning whether the deterrent effect of the criminal law can be achieved via regulation. One

aspect of this question is the issue of “stigmatization”. As has already been seen, it is contested in some academic circles that one of the principal reasons why regulation is not a suitable alternative to criminal law, when prosecuting corporations for manslaughter, is because a regulatory offence does not have the necessary “stigma” attached to it to dissuade future offenders. This suggests that this notion of “stigma” has some irreplaceable deterrent value, a matter which merits some discussion.

Punishment versus Persuasion and the Question of “Stigma”

The two main questions to be answered in this section are:

1) Does the imposition of “stigma” on a convicted offender a sufficient deterrent to potential future offenders?

2) Can the regulatory approach to regulating potential offenders provide a sufficient deterrent to make it an effective alternative to the criminal law?

It is important to consider these issues because if we were to reach the conclusion that our needs could be satisfied via the regulatory route, then the need for a criminal offence of corporate killing could, effectively, be rendered obsolete. In our discussion we will look at both the views for and
against the "stigma" approach to deterrence. It is important to remember that this is by no means a fully comprehensive review of the debate in this field because it is largely outside the ambit of this thesis, rather it is merely intended to advance some of the views of the academic community with a view to reaching a reasoned and informed conclusion.

The stigmatizing of an offender may exhibit itself in a number of ways. It is not uncommon for those convicted of a criminal offence to be ostracised by their family and friends or for them to find it difficult to obtain meaningful employment. These forms of behaviour are basic examples of society expressing their disapproval of the offenders conduct and are the result of the individual becoming "labelled" as a "criminal" or a "deviant". This "informal" punishment is imposed on the offender in addition to any formal sanctions meted out by the courts. There are some situations, however, in which the supposed stigma has no bearing on an offender, as is the case with some copyright offences. One only has to look as far back as 2001 and the story of the internet based music swapping site "Napster"58 to see that there are generally law abiding citizens who see no problem with

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58 See for example "Comment: Napster still alive and kicking", http://www.guardian.co.uk/today/articles/0,6729,471893,00.html and "Napster offers £690m to settle copyright cases", Amy Vickers, http://media.guardian.co.uk/newmedia/story/0,7496,440941,00.html
illegally downloading copyrighted material from the web, because it has
come a view amongst the British public that we are being overcharged for
many of our goods\textsuperscript{59}. In those situations where the law is generally held to
be “unpopular” the normal ostracizing and stigmatizing of an offender
associated with the commission of a criminal offence does not occur. How
can an offender’s conduct be labelled as “deviant” when everybody is doing
it?

These questions aside the ultimate aim of this section is to determine
whether the imposition of criminal stigma has some additional deterrent
value which cannot be achieved via alternative routes. The true deterrent
value of any punishment is something that will be discussed in greater depth
in my treatment of the problems of effectively punishing corporations for
breaking the law.

In his book \textit{“Crime, Shame and Reintegration”}\textsuperscript{60} J. Braithwaite is dubious
about whether the imposition of stigma on an offender has any beneficial
deterrent effects at all. Indeed it appears in his discussion of the subject that
Braithwaite feels that a heavy reliance on the imposition of stigma will

\textsuperscript{59} The phrase “rip-off Britain” was coined around the end of the nineties. It reflects the
public’s view that the British consumer is being overcharged for goods when compared
to our continental counterparts. See for example \textit{“DTI price check in war against rip-off
Britain”}, John Cassy, \url{http://www.guardian.co.uk/business/story/0,3604,257060,00.html}

\textsuperscript{60} John Braithwaite, (Cambridge University Press: 1989)
actually lead to an *increase* in the national crime rate. Instead he recommends an approach which he calls "reintegrative shaming". What then is Braithwaite’s reasoning behind this recommendation?

The stigmatization of an offender, or "disintegrative shaming" as Braithwaite labels it, may have a negative impact on those members of society who have been labelled as "criminals". There is a distinct chance, he suggests that those who have become so ostracised from the community may feel that they no longer have anything to lose by failing to comply with the law in future. A corollary of this view is that the shamed offender, in turn, feels that they no longer have anything to gain by being a law-abiding member of the community. The result of this is that these people may seek to fraternize with other members of the community who have been similarly labelled because they may find that they are accepted into the group more easily. However, by becoming involved with these "criminal subcultures" it dramatically increases the opportunity that an individual will go on to commit further crimes because it may make available to them a number of attractive criminal opportunities which they may be tempted to take.
On the other hand, "reintegrative shaming" is the process by which the offender is shamed followed by the reintegration of the offender into the community of law-abiding citizens. The reintegrative shaming approach advanced by Braithwaite is based on a "family model" of reintegration; it is based on the belief that families are "the most effective agents of social control in most societies" because "family life teaches us that shaming and punishment are possible while maintaining bonds of respect". This method of social control, asserts Braithwaite, is best achieved in those societies which are "communitarian" and have high rates of "interdependency". For a society to be communitarian, states Braithwaite:

"... its heavily enmeshed fabric of interdependencies ... must have a special kind of symbolic significance to the populace. Interdependencies must be attachments which invoke personal obligations to others within a community of concern. They are not perceived as isolated exchange relationships of convenience, but as matters of profound group obligations. Thus a communitarian

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62 Braithwaite states at page 85: "Communitarianism and interdependency are highly related concepts. While Communitarianism is a characteristic of societies, interdependency is a variable applied to the individual level of analysis ... The aggregation of individual interdependency is the basis for societal communitarianism."
society combines a dense network of individual interdependencies with strong cultural commitments to mutuality of obligations."  

Japan is advanced as a country whose justice system best embodies the "family model" of shaming. The Japanese individual places heavy reliance on being accepted by society, a need which is fostered from the family environment right the way through school and into the workplace. Each group aims to create a "family like ethos" which psychologically raises the cost of becoming excluded or ostracised from the group. Japan, it seems, is a country committed to the reintegration of its offenders, for example, the ceremony of apology plays a big part in any legal conflict in a bid to re-establish harmony between the two parties. The best way to achieve this, Braithwaite states:

"... is through mutual apology, where even a party who is relatively unblameworthy will find some way in which he contributed to the conflict to form the basis of his apology."  

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This kind of shaming works on the underlying acceptance of the idea that every individual necessarily seeks the approval of their peers. An individual it is claimed is more concerned, and thus more likely to be deterred by, the potential loss of reputation amongst friends, family and colleagues than the opinions of seemingly remote officers and institutions of the law.

This theory does, however, have its problems. Perhaps the largest is that Western societies and cultures are not really geared towards an effective implementation of such a theory. This is because Western societies are generally more individualistic than their Eastern counterparts. Braithwaite recognises this problem by stating that "[the] ideology of individualism dismantles the sanctioning capacities of those intermediate groups between the individual and the state". 66 This means that in these societies, responsibility for shaming the offender falls solely on the state which obstructs the re-integrative aspect of shaming. Secondly it does recognise the value of shaming via stigma.

It is not unavoidable, states Braithwaite, that an individual who has been labelled as a criminal will necessarily get involved with criminal subcultures. Even if they do, however, there is no guarantee that an individual faced with a criminal opportunity presented to them by association with these subcultures is going to find the opportunity attractive. In the event of no attractive opportunities presenting themselves, there is an equally good chance that they may tire of being ostracised by the community and seek to prove that they are worthy of acceptance back into the law-abiding community. In such a situation, Braithwaite recognises, stigmatization will have had a rehabilitative effect. Thirdly, it is obvious that the concept of reintegrative shaming is not entirely effective in preventing the emergence of criminal subcultures in Eastern societies.

Perhaps it can be explained by the apparently increasing invasion of Western cultures and belief systems into these communities, but it would be misleading to believe that Japan, for example, does not have a gang problem. It just so happens that the criminal underbelly of Japan does not receive quite so much attention as it does in “corrupt” Western societies.

Does Bratithwaite’s theory of reintegrative shaming work in a corporate context? The method he recommends to implement this theory in the field
of white-collar crime is the increased use of self-regulation. This persuasion rather than punishment based approach to corporate crime would necessarily have to be backed up with the threat of punishment to ensure effective compliance with the law. An examination of 5 self-regulating companies in the U.S.A. with the best safety records threw up some interesting surprises. Rather than finding a system in which those who breach corporate safety procedures are faced with a system of harsh penalties (such as dismissal or demotion), Braithwaite found clear systems of internal accountability and regular reporting which fostered good communication amongst members of the corporation in the event of a safety failure. These systems worked best when attention was drawn to those who had failed to reach the standards required of them (shaming) backed up with advice and encouragement to aid improvement (reintegration).

A practical example of such a system can be found in the approach of the sports fashion retailers “J.D. Sports”. It has become a regular occurrence for branch managers to receive “Heroes & Villains” bulletins which identify and praise individuals for positive results such as stopping a stolen credit card, but name and shame branches whose failure to follow company procedures has resulted in a loss to the store, for example, shop-lifting.
Similarly they encourage the publication of weekly area performance league tables. Both approaches are clearly intended to play on the branches’ (and the individuals therein) sense of pride to ensure good results.

What then is recommended in the case of corporations? Braithwaite points to making corporations more integrated into the wider community as a key factor in ensuring greater corporate compliance because this would make them more susceptible to external pressure from society to comply. This cannot be done in isolation however. What is also needed, according to Braithwaite is for corporations to become socially integrated internally. What this requires is the removal of a system which isolates individuals and various subunits of a company from the other corporate players. This system facilitates organizational crime because it effectively encourages wilful blindness to deviant corporate behaviour. What is required by Braithwaite is an “internal moral community” in which an individual with a concern does not report it to their superiors then assume that they have “done their bit” and do no more, but rather that they pursue the matter as far as is necessary to ensure it is dealt with. As Braithwaite puts it:
"Crime flourishes best in organizations that isolate people into sealed domains of social responsibility; crime is controlled in organizations where shady individuals and crooked subunits are exposed to shame by a responsible majority in the organization. Even if the majority are less than responsible, exposure gives maximum scope to such pangs of conscience as are in the offing, and increases the vulnerability to control from without." 67

Walker68 is another proponent of the belief that stigma is not necessarily an effective weapon in the crime control armoury. In fact he appears to share the belief that has permeated some legal thinking that efforts should be made to reduce the amount of stigma attached to offenders. Walker points to a number of legislative provisions which have been enacted in a number of countries which have this as their goal, for example those provisions which are intended to limit the period of time for which a conviction can officially be remembered. In Britain we have the Rehabilitation of Offenders Act 1974 which applies to offences which resulted in not more than 30 months imprisonment. After a period varying between 6 months to 10 years, depending on the sentence, the offender’s conviction is to be

regarded as “spent”. As a result they will be treated in law as if they had never even committed never mind been convicted of the offence in question. It is important that offenders be given “a second chance” if they are ever to become valuable members of society once more. Such a provision helps prevent the risk, identified by Braithwaite, of an increasing membership of criminal subcultures which would inevitably result from the creation of a large number of social outcasts.

Another phenomenon noted by Walker, which was identified earlier, is that some offences are less stigmatised than others because they are perceived by society as less criminal, for example some of the traffic offences such as speeding. This is not to suggest that the offender has not committed a crime but merely that the public will sometimes sympathise or in some cases identify with people who have, in the offenders eyes, been the victims of harsh bureaucracy on the part of the law enforcing authorities. This is consistent with the view held by some parties, which has been noted previously, that breaches of regulatory offences are not real crime. As a result the treatment received by those who have breached these “quasi-criminal” offences is in stark contrast to that which is generally expected.
Clarkson is dubious of the impact of stigma in the case of some corporate defendants. This is particularly so in the case of small companies which, to quote Clarkson "comprise about 45% of all companies in the UK"\(^{69}\) because they don't really have a reputation to lose if they are punished.

Walker also identifies some further problems with stigmatising offenders. From the retributivist point of view, he asserts, it is crucial that any punishment dealt out by the courts must be proportionate to the gravity of the offence. Any additional hardship suffered by the offender as a result of stigmatisation, therefore, unfairly shifts the balance and renders the punishment disproportionate. It would be impracticable to expect judges to take any potential detrimental effects of stigma into account however. This is because stigma is not really a tangible idea with strictly defined boundaries. A judge is ill equipped to determine what level of stigma should be imposed on an offender because different individuals will react to the convict in different ways. No court in the land can completely govern the way an individual is meant to behave in relation to an offender. One only has to look at the recent outcry following the death of Sarah Payne every person registered on the Sex Offenders Register must have been

\(^{69}\) "Corporate Culpability" C.M.V. Clarkson [1998] 2 Web JCLI
petrified that the lynch mobs which sprung up around the country would target them next. Despite opinions to the contrary, and regardless of the merits of such an approach, an offender still has the same legal rights as any other citizen. Thus if their property is damaged or they are assaulted, the perpetrators must be punished but the views or opinions which the perpetrator holds about the offender cannot be changed by force even if their behavior can be regulated once it crosses the boundaries of what is legally acceptable.

On the other hand, there is recognition that there is a degree of deterrence inherent in the notion of stigma which would reduce the net frequency of similar offences. This may exhibit in itself in a number of ways. For example a potential victim of a financial fraudster will most likely be put on their guard if they are aware of this person's previous convictions for similar offences. Secondly, Walker suggests that the stigma associated with a court appearance may be a greater deterrent than any potential punishment which they may receive, particularly where the penalties available for the offence in question are relatively minor. Finally he points to the theory that the punishing and stigmatization of the offender may serve to increase the
community’s “moral cohesiveness” by uniting the law-abiders to speak out against the deviants.

Next we come to a paper entitled “Stigma and Social Control: The Dynamics of Social Norms” written by Blume. In it he suggests that stigma may well be too unwieldy for us to use it effectively as a tool of social control. He shares Braithwaite’s concern that individuals who find themselves stigmatized as criminals may choose to become part of “‘counter-communities’ - communities in which the stigmatised activity is ignored or even becomes a source of status”. In Britain, furthermore, it may well be the case that we simply do not have a sufficiently “cohesive [and] well-organised” society to ensure effective social control of individual behaviour”. Evidence of this fact, as viewed in a study cited by Blume, is not hard to find. It was found that in Britain those neighbourhoods with the lowest levels of social organization were those which also had the highest levels of violent and property crimes. This could partly account for the success that “Neighbourhood Watch” schemes have in reducing crime rates.

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Another view which has been identified in the literature is that the stigma attached to a criminal offence will gain the best deterrent effect as a result of the vast amount of publicity which would accompany any high profile conviction. However, whilst the criminal approach is deemed to be the toughest response to any breach of the law because it carries the greatest amount of stigma, it is also the most problematic because it is the most resource intensive approach.\footnote{See "Criminal Enforcement Role in Environment" based on papers presented at the Fourth International Conference on Environmental Enforcement, \url{http://www.ssc.wisc.edu/econ/Durlauf/networkweb1/wpapers/es779.pdf} "Stigma and Self-Fulfilling Expectations of Criminality", Eric Rasmussen, \url{http://ecomwpa.wustl.edu:8089/eps/le/papers/9506/9506001.pdf}}

In contrast to commentators such as Braithwaite and Walker, Rasmussen is a commentator who believes that the notion of stigma has a legitimate role to play in the punishment process. This is because it provides us with useful information about a person, it renders people reluctant to deal with offenders either economically or socially, and this in turn serves to represent society’s contempt for their criminal behaviour.

Rasmussen points towards an economic approach as a good explanation of why people refrain from committing crime. This approach believes that,
although internal motivations such as conscience are important in determining whether an individual will commit a criminal offence, it is better to search for an explanation which focuses "on more easily measured and manipulated external incentives such as criminal penalties".

According to Rasmussen stigma is an external incentive not to commit crime and as such "standard economic modelling" can be used to determine the "how the criminal will respond to stigma and why people find it in their self interest to treat criminals differently from non-criminals".

Furthermore, economic stigma, that is to say the reluctance of employers to employ convicts or a lower wage, for example, is easy to measure.

In his article, Rasmussen does identify some advantages that relying on the informal punishment embodied in stigma has over formal punishment issued by the courts, namely cost effectiveness. The argument he advances is that the policy of punishing via the medium of fines is overly problematic. As we will see when dealing with the topic of punishment, in some cases it may be necessary for a particularly large penalty to be imposed on the offender in order to achieve an adequate level of deterrence. This can be a problem because it might be that the offender has insufficient resources to pay the level of fine that is necessary to obtain the required
level of deterrence. This is a problem that is avoided by the imposition of stigma. An offender does not have to be in possession of any material assets to be subject to criminal stigma because the said stigma is effectively "a fine drawn on ...future rents [i.e. the future market value of their labour] ... which can be collected regardless of regardless of the criminal's present wealth". Further benefits of relying on stigma include the fact that it is not costly for the government like imprisonment. Stigma may also be deemed to have an incapacitating effect on the criminal in that his conviction will remove him from jobs which would have otherwise presented him with further opportunities to commit crime.

Further support for increasing the amount of stigma attached to criminal offences is found in Scruton's article in the City Journal\textsuperscript{72} entitled "Bring Back Stigma". Scruton advances the proposition that the importance of stigma has largely faded in modern society "and along with it most of the constant small-scale self-regulation of the community which depends on each individual's respect for, and fear of, other people's judgement". This he claims has lead to an increase of the number of official laws aimed at governing behaviour intended to fill the void left behind by abandoning

\textsuperscript{72} "Bring Back Stigma", Roger Scruton, in the City Journal Autumn 2000, see http://www.city-journal.org/html/10_4_bring_back_stigma.html
stigma as a legitimate means of regulating behaviour. This is an unsatisfactory solution, he suggests, because “there is no evidence that the law can really compensate for the loss of social sanctions”. The approach adopted by the law in combating crime is to increase the risks associated with the crime rather than “creating people who have no criminal schemes in the first place” which is one of the benefits associated with stigma.

On the other hand Scruton points to the harsh result that stigmatization may have on an individual. Whilst not a criminal offence illegitimacy resulted in the imposition of harsh social stigma from society, because it was the social norm for children to be born to married parents. The use of stigma may have, however been beneficial to a degree. In this case the damaging stigma of being born illegitimately was intended to “prevent people from breeding in socially destructive ways”. But now that the stigma of illegitimacy has largely been removed due to a change in the views and moral values of a large portion of modern society, we are faced with an increasing number of “gym-slip” mums and single parent families. These in turn place a greater burden on the benefit system which costs the government more money and reduces the funding available for alternative projects. A similar argument is advanced in relation to divorce, namely that
the gradual removal of the stigma attached to divorce has led to an increase in “sexual polygamy” which is detrimental to the fabric of society.

Why then has there been this move away from the reliance on the use of stigma in order to regulate the conduct of individuals? It is Scruton’s belief that this is due largely to the apparent shift in penal theory with regards to the treatment of offenders. Previously the aim of the law was to punish those who breached its provisions. In modern times, however, the main priority for the justice system seems to have become the rehabilitation and care of offenders. Effectively the law requires society to “forgive and forget, to “rehabilitate”, on the assumption that the debt [to society] has been paid”. The necessary result of this is that it is no longer “fashionable” to stigmatize and that it is not politically correct to hold what are viewed as “outdated” views regarding what constitutes appropriate behaviour so much so that the labellers become labelled.

Finally we come to the work of Wong who also looks to stigma rather than fines as a more efficient means of punishing a corporation. Punishment by

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73 Scruton cites the example of people who oppose homosexuality, whilst it might be a legitimate view, being labelled as “homophobic”, a label which has undesirable and damaging stigma attached to it.
way of stigma is more efficient than via fines because it provides a more accurate depiction of "the true cost of corporate crime." It is apparent, Wong claims, that a punishment system which relies entirely on fines is inefficient in that it appears to accommodate the undesirable social behaviour of corporations by expressing the message that the criminal justice system is nothing more than an inconvenient cost which can be budgeted for. This does not accurately depict society’s disapproval; indeed it actually places a greater burden on society.

What remains consistent throughout this very limited sample of some of the literature in this field is the belief that an individual, or indeed a corporation for our purposes, may be deterred from committing a crime where the cost of being caught outweighs the benefits of breaching the law. It is clear from these articles that the term "cost" is not limited to pure economic loss but also extends to a loss of respect and status in the eyes of the offenders peers, and in some cases even a loss of self-esteem. The question remains, however, whether the imposition of stigma can provide a sufficient and effective deterrent to a corporation.

It is anticipated that a discussion of the use of adverse publicity as an alternative punishment to fines will show that stigma may be an effective tool against corporations. A corporation, arguably more so than is the case with individuals, is vastly concerned with their public image and reputation. This is largely because a good reputation has great financial value to a corporation. Any punishment which has as its main aim the intention of damaging this reputation is going to have a far greater deterrent effect than a mere fine. This is partly because a corporation can calculate (or at least estimate) how much it will cost them if they are caught breaking the law. This means that not only can they make a more accurate cost-benefit analysis in any given situation, but it also increases the likelihood that a company will simply write off fines as necessary business expenses. On the other hand, whilst it undoubtedly has a value, the potential cost of any loss of reputation through breaking the law and the associated stigma is uncertain. Above all else a corporation values certainty. If an uncertain factor is present in the cost-benefit analysis it renders it more unlikely that a corporation will embark on a criminal course of action.

Whilst it has become clear that the use of stigma in relation to corporations has some definite deterrent benefits it remains to be decided whether that
stigma must be “criminal” in order to reap the maximum benefits. Rightly or wrongly, it is not uncommon to find the view that regulatory offences are merely “quasi-criminal”, however, it is doubtful that criminal stigma, with regards to corporations, has any unique benefits. It is perfectly plausible to achieve the same results regardless of which approach we take. Whilst punishment for serious breaches of the Health and Safety at Work etc., Act 1974 has traditionally come in the form of fines, why should society be forced to accept that this blinkered approach to punishing corporations continue without question? Obviously the danger remains if the legislature opted to utilise the stigma approach to punishing corporations that labelled corporations may form criminal subcultures. Since corporations are undoubtedly more powerful than individuals, the potential damage to society is much greater. It should not be the case, however, that we are precluded from encouraging the use of more creative forms of punishment for breaches of health and safety offences. As has already been mentioned, it is arguably easier to prove a regulatory offence than a criminal offence in the corporate context because we don’t have to prove a criminal state of mind. If the law can harness the beneficial aspects of stigma in punishing breaches of regulatory offences then it is arguable that no greater benefits
would accrue from punishing corporations for manslaughter under the criminal law.

It is undeniable, however, that as long as the public continues to perceive regulatory crime not as "real crime" then there is still, in the public opinion at least, a much greater symbolic value attached to a criminal prosecution, regardless of how accurate this view may be. Since the current law proposed by the Law Commission will not be implemented in the foreseeable future then it is still plausible to search for an alternative approach which utilises the criminal law. It is hoped that a solution may be presented by looking at the law governing corporate criminal liability in other jurisdictions, and also by looking at group oriented theories of liability as an alternative means of attributing culpability to a corporation.