Does the criminal law have a role in the corporate setting?

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Abstract: The use of criminal law in the corporate setting has risen in the Corporate Governance agenda in recent months. Compelled by the prosecutions of six former Railtrack plc senior managers the paper discusses the relevance of criminal law as a disciplining force on directors and managers. The paper provides a detailed case study of Railtrack plc drawing out the major issues of relevance in applying the criminal law to a large complex company such as Railtrack plc.

Keywords: corporate governance; director prosecution.

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1 Introduction

On 17 October 2000, a GNER express train derailed half a mile outside Hatfield station in Hertfordshire, killing four people. Almost three years later it was announced that six senior managers from Railtrack’s successor company, Network Rail, and construction firm Balfour Beatty, would face manslaughter charges in connection with the incident (see Appendix). A further six were summoned over health and safety offences under the Health and Safety at Work Act of 1974. The case was committed to trial on 13 July 2003. However, at a subsequent pre-trial hearing, Judge Michael Findlay Baker was told that the trial, originally forecast to last three months, would probably take a year. Further, a prospective start date of Autumn 2004 has been pushed into 2005. The mountain of witness statements, exhibits and interviews already runs to tens of thousands of pages, resulting in the advice from the judge that ‘serious thought has to be given to breaking this trial down’.

Hatfield is the biggest and most high-profile corporate manslaughter trial in the English courts for many years, and it is already demonstrating the problems that corporate manslaughter prosecutions face. It comes just as the Government is finalising plans for draft legislation that will create a new ‘corporate killing’ offence in an attempt to make such prosecutions more workable. These prosecutions raise important questions about the applicability of criminal law to corporate bodies. The next section provides the backdrop to the paper in the form of a rich case study of Railtrack. We then go on to consider principles underlying criminal law with reference to Railtrack and the application of criminal law within a corporate setting, concentrating on the backdrop to the manslaughter charges levied against senior managers. The final section evaluates recent British government proposals within the context of international trends.

2 The case of Railtrack

British Rail was systematically privatised by the Conservative government over the period 1992 to 1996. Railtrack was formally established in April 1994 as the private owner of the UK’s whole rail infrastructure and was floated on the London Stock Exchange in May 1996. Five years later, in October 2001, it was placed under administration by the New Labour government. The replacement structure was to be a not-for-profit private company without shareholders. The following case study shows how the ideology of shareholder value changes managerial mindsets to a clear focus on profit and economic efficiency and shapes their attitudes towards health and safety with the consequence of offsetting deaths against company overheads.

2.1 Shareholder value and monetary incentive

British Rail’s privatisation was undertaken amidst the backdrop of the worldwide storm of privatisation and a paradigm shift towards market fundamentalism, profit maximisation and shareholder interest. For the British Rail privatisation, this shift was embedded in a political device designed to prevent any future nationalisation of the rail industry (in 1996 the Conservative government expected the Party would lose its national election in the following year). The terms of this so-called ‘financial trap’ were that Railtrack borrowed £2.35 billion for its working capital from a consortium of 22 banks
led by Barclays de Zoete Wedd, by agreeing that the bank had the right to terminate the loan and demand repayment if there were ‘a material change’ in Railtrack’s regulatory regime. Railtrack could in turn take legal action against the government for damages on its profits and financial interest (Economist, 1996a). This device contributed to justifying Railtrack’s profit-seeking behaviour, even at the expense of its service quality and safety. For example, Railtrack was reluctant to improve the infrastructure network, as investment in infrastructure did not increase profits. This is because the vast majority of its revenue (97%) was fixed by the regulator regardless of the number of trains run (Economist, 1999). As a result, Railtrack’s capital investment rates were worse than those of British Rail (Harper, 1999). Two thirds of the future investment of £27 billion promised by Railtrack were for routine maintenance only, rather than for renewal (Haubrich, 2001). Even infrastructure maintenance did not show an increasing trend after privatisation, but rather a constant decrease between 1996 and 2000. The figures were £732 million in 1996/97, £702 million in 1997/98, £694 million in 1998/99 and £663 million in 1999/2000, an annual decrease of 3.2% (see Figure 1). Infrastructure problems caused many train delays and accidents. For example, 35% of all delayed minutes was due to infrastructure problems in 1998 (Modern Railways, 1998). Shortly after the Hatfield crash, the former Railtrack CEO, Gerald Corbett, admitted that the privatisation of the railways was ‘not a structure designed to optimise safety’ because of the misalignment of financial incentives (Jowit, 2000). Monetary incentives also affected Railtrack’s routine services. For instance, Railtrack was reluctant to increase more services into the timetable because doing so would increase the risk of delays that Railtrack had to pay for (Economist, 1999).

![Figure 1](image_url)  
**Figure 1** Railtrack infrastructure maintenance expenditure

For both accountants and economists, cutting costs is a major way of improving efficiency. Railtrack adopted a heavy cost-cutting programme under the auspices of maximising efficiency. As revenues were fixed, this was the only possible way for Railtrack to maximise profits. Cutting the annual cost of infrastructure maintenance by 16% doubled Railtrack’s pre-tax profits to £189 million in 1994/95 (Economist, 1996b). Not only did Railtrack reduce infrastructure maintenance to make profits, but, in order to maximise profit, it also took great risks by changing the method of renewing the network from asset renewal to life extension (an outdated technology). It did so even though it
knew the practice to be not only a shortsighted policy but also dangerous (Economist, 1999). Cutting staff numbers is another way to boost profits. Those employed to maintain and renew infrastructure were reduced from 31,000 in 1992 to 19,000 in 1997 (38.7%) (New Statesman, 2001). Since safety is a labour-intensive process, over-cutting labour simply means a trade-off for safety. Not only has there been a significant drain of know-how, but this has resulted in the associated drain of do-how (unwritten knowledge and expertise) in the network resulting from many experienced people leaving (Haubrich, 2001).

Profit maximisation was logically legitimised in the interests of shareholders. In order to attract potential shareholders, in its prospectus for the privatisation published in April 1996, Railtrack promised a special dividend and a further bonus for longtime shareholdings (Economist, 1996b). Furthermore, in order to butter up its shareholders Railtrack targeted a rate of return of 8% in real terms, six points higher than the government’s borrowing rate (Kay, 2001a). With a mindset toward shareholder interest, Railtrack maintained ‘a progressive dividend policy’ raising dividends from £69 million in 1996 to £138 million in 2001, doubling within five years (Railtrack Group PLC, 2001) (see Table 1). Dividends were increased even in the face of the company’s huge loss of £534 million in 2000/01. Simultaneously, Railtrack asked the government for more money to improve the infrastructure network (see Table 1).

Table 1  Railtrack financial summary

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<tr>
<td>Turnover £m</td>
<td>2,275</td>
<td>2,300</td>
<td>2,437</td>
<td>2,485</td>
<td>2,573</td>
<td>2,547</td>
<td>1,890</td>
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<td>Operating profit £m</td>
<td>296</td>
<td>339</td>
<td>398</td>
<td>471</td>
<td>363</td>
<td>–472</td>
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<tr>
<td>Profit before taxation £m</td>
<td>189</td>
<td>190</td>
<td>346</td>
<td>406</td>
<td>428</td>
<td>360</td>
<td>–534</td>
</tr>
<tr>
<td>Earnings per share (p)</td>
<td>42.8</td>
<td>58.4</td>
<td>43</td>
<td>84</td>
<td>58</td>
<td>–59.6</td>
<td></td>
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<tr>
<td>Dividends £m</td>
<td>69</td>
<td>111</td>
<td>121</td>
<td>133</td>
<td>137</td>
<td>138</td>
<td></td>
</tr>
<tr>
<td>Net debt £m</td>
<td>499</td>
<td>838</td>
<td>1,271</td>
<td>1,731</td>
<td>3,362</td>
<td></td>
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<tr>
<td>Equity shareholders’ funds £m</td>
<td>1,479</td>
<td>2,482</td>
<td>2,665</td>
<td>2,872</td>
<td>3,213</td>
<td>3,073</td>
<td>2,648</td>
</tr>
<tr>
<td>Net Debt/Equity %</td>
<td>18.7</td>
<td>29.2</td>
<td>39.6</td>
<td>56.3</td>
<td>127</td>
<td></td>
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<tr>
<td>Infrastructure maintenance £m</td>
<td>695</td>
<td>725</td>
<td>732</td>
<td>702</td>
<td>694</td>
<td>663</td>
<td>715</td>
</tr>
<tr>
<td>Directors remuneration £K</td>
<td>930</td>
<td>1,180</td>
<td>1,910</td>
<td>2,167</td>
<td>2,046</td>
<td>2,153</td>
<td>2,669</td>
</tr>
<tr>
<td>Remuneration of chairman and executive directors £K</td>
<td>1,013</td>
<td>1,688</td>
<td>1,824</td>
<td>1,835</td>
<td>1,898</td>
<td>2,437</td>
<td></td>
</tr>
<tr>
<td>Average number of employees</td>
<td>11,340</td>
<td>11,358</td>
<td>11,298</td>
<td>10,700</td>
<td>10,704</td>
<td>10,961</td>
<td>11,530</td>
</tr>
<tr>
<td>Number of deaths in rail disasters</td>
<td>4</td>
<td>7</td>
<td>31</td>
<td>4</td>
<td></td>
<td></td>
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</tbody>
</table>

Notes:  Figures were based on (a) calculations after the exceptional items, and (b) restated figures

Since Railtrack’s managerial mindset was apparently preoccupied with the incentive to serve shareholder interests, one might expect that its problems were being exacerbated by direct pressure for short-term profit maximisation from its shareholders. However, this is in fact not necessarily the case. It is correct to say that shareholders buy shares for the purpose of their returns. However the majority of shares are in the hands of institutional investors which, by and large, hold long-term investments. For example, the average length of a pension investment is 18 years, therefore, \textit{a priori}, one might expect that pension companies would mirror their clients’ investment strategy in taking a long-term view. Shareholders are usually reasonable in thinking about the \textit{appropriate} return on investment and their primary concern is more on safety than on short-term profit if there is a conflict between the two. Shareholders in Railtrack clearly stated that they bought the shares “on the understanding that there was hidden value in the company because its property assets were not reflected in the share price and that the government would always back Railtrack as a safe investment” (quoted in Martin, 2001). If the real thinking of shareholders was “long-term commitment to the national infrastructure” (Riley, 2001), then the drive for short-term profits, under the pretext of representing shareholders interests to which the directors of Railtrack allegedly subscribed, was mistaken. In practice shareholders’ direct pressure on Railtrack was minor due to several factors. Firstly, after privatisation, the board of directors of Railtrack did not significantly change its constituent elements and the executive directors were still appointed by the government. Secondly, the initial shareholders were quite diverse (individual private owners accounted for 58% of all shares when Railtrack was floated in 1996, see Haubrich, 2001) and consequently governance by shareholder involvement was always going to be difficult. Furthermore, takeover as the mechanism of market discipline was restricted due to the requirement of government approval of acquisition of 15% or more of shares in a privatised company (Cragg and Dyck, 1999). So, the question has to be asked: where did the claimed pressure on the management for short-term profits come from?

By interviewing senior executives in 13 UK privatised firms in 1996 and 1997, Cragg and Dyck (1999) reveal that the pressure on privatised firms for short-term profit and shareholder interest does not originate directly from shareholders, but from financial analysts. The most influential financial analysts were employed in more than ten main merchant banks to generate reports on all privatised companies. Those reports were circulated to current and prospective shareholders and board members of privatised firms. These reports were updated weekly. Because financial analysts (market analysts) made national and international comparisons of the same industry or similar area/projects in terms of market benchmarks and financial performances (cash flow for example), their opinions are key in influencing stock market prices. Under fear of damage to personal reputation, executive managers have to adjust or reset corporate objectives in line with analysts’ expectations in order to increase financial performance within a relatively short period. What is noted here is that pressure from financial analysts was a common phenomenon in the 1980s and 1990s takeover movement when the finance model was prevalent. This essentially indicates that the perceived power switched from shareholders to managers and further to financial analysts. This mirrors the public’s perceived paradigm shift towards short-term financial performance. Given that the justification and legitimacy for privatisation itself is preoccupied with the expectation of financial performance improvement, it is hardly surprising to find that managers and directors
of privatised companies have focused on profit, efficiency and shareholder interest, despite the general shift towards stakeholding during the 1990s. It is ironic that the drive for profit was not only made by the managers inside privatised firms, but also by many others including financial analysts. The pressure, both internally and externally drove the management of Railtrack to focus on short-term profit and shareholder dividends, even at the expense of service quality and safety, leaving them open to potential criminal prosecution.

2.2 A culture of greed

Privatisation and a shift towards the profit and shareholder interest paradigm have deeply shaped individual values and attitudes, codes of behaviour, norms, rules, and social structures over the two decades from 1980 to 2000 in the UK. A culture of self-interest, self-discipline, self-responsibility and dynamism, a kind of enterprise and business culture has resulted. However, an over-emphasis on such orientations inevitably delivers a culture of selfishness, alienation and ruthlessness as human mind-sets are preoccupied and biased with the pursuit of money and wealth as ‘basic values’. This leads to a kind of human failing in ethical and moral consequence (Letza and Smallman, 2001). For example, the most obvious behavioural model or motivating factor in the 1980s and 1990s might be described as ‘greed’, evidenced by a series of political and commercial corruptions, mismanagements, criminal charges, fraud and corporate collapses. In total this has been perceived as a fundamental corporate problem and one of serious concern to the public-at-large. Public pressure was building for the government to act. A way forward would be to revive the corporate-criminal debate of 1996–1997 and adjust corporate behaviour in the sense of making it more responsible and accountable.

What was the prevalent culture in Railtrack? In his investigation of the Hatfield crash, Jack (2001) observes that the accident:

“Arrose from a quagmire of divided responsibility and incompetence, inspired by an ideology that placed adversarial money bargaining over human and technical cooperation, in which ‘the contract’ was divine.” (quoted in New Statesman, 2001)

The same conclusion is shown in Lord Cullen’s public inquiry report on the Paddington (Ladbroke Grove) rail disaster of 1999. It was revealed that a culture of greed was associated with a culture of arrogance (irresponsibility and possible negligence).

Self-interest is sometimes like a double-headed coin: benefits are always assumed to be one’s own and responsibilities to be others’. The railway sector after privatisation has been beset by a blame culture. For example, in order to attribute blame for train delays to others, Railtrack and the operators employed more than 300 staff to argue over who caused which delays (Financial Times, 2001). In its southern zone alone, Railtrack hired more than 50 staff engaged in the argument and blame activities (Economist, 2001):

“Railtrack employees at various levels failed to take action that they knew was necessary, because no instructions had been received from above.” “Action groups’, as they were laughably called, proliferated; the members of any one group always assumed that action was the responsibility of some other group.” (New Statesman, 2001)
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Worse still, Railtrack “was found guilty of a ‘lamentable failure’ in not responding to the recommendations of inquiries into two previous accidents in the same area – including one at the same signal 18 months before”. Moreover, Railtrack “ignored three written warnings made by First Great Western before the crash – even though the signal had been passed at danger eight times in the previous six years by different drivers” (This Is London, 29 October 2001). It is not uncommon, as the operations and safety director for First Great Western found, for Railtrack to be ‘unresponsive to our requests for information, for action’ and communication between signallers and drivers ‘was sometimes non-existent, sometimes ineffective’ (New Statesman, 2001). Such indifference could be classed as gross negligence, thus leaving Railtrack open to potential criminal charges.

Clearly, what Lord Cullen and others revealed is more than management incompetence and blunders, and a ‘slack and complacent regime’ among employees. It is a culture of placing money and profit over service quality and safety, an ideology of ‘greed’. Such systemic human failings are a common feature in the privatised public sector in the UK.

2.3 The collapse of Railtrack

The insolvency of Railtrack in 2001 was directly due to huge losses and massive debts. In the financial year 2000/2001, Railtrack’s losses amounted to £534 million (after exceptional items and before taxation), with a surprising net debt/equity ratio of 127% (see Table 1 for the financial summary). According to the Transport Secretary, Railtrack’s operating costs were £2 billion at the time of administration; the overruns of investment programs exceeded £4 billion; and poor service penalties added costs of £500 million (DTLR, 2001). It was estimated that Railtrack was left with a £4.35 billion shortfall, a huge financial “black hole” (Thomas, 2001).

The failure of Railtrack directly resulted from its poor quality of service and performance, which not only brought about huge losses, but also, more significantly, severely affected public confidence and trust. What characterises the rail industry’s quality are two indicators: reliability and punctuality. After the railways were privatised, these two indicators exhibited a worsening trend (DETR, 1999). Service quality reached its low point between October 2000 and May 2001, when the fatal train derailment at Hatfield, which led to the ultimate prosecution of Railtrack, resulted in a railway recovery programme and caused 2000 sites to be checked for cracked rails, 463 speed restrictions to be imposed, thousands of trains to be cancelled and all trains to record delays (Haubrich, 2001). The Rail Passengers Council said that rail users experienced the worst disruption of services since the Second World War (Financial Times, 2001). Whilst some of this was due to the train operating companies, the overwhelming majority of problems rested with Railtrack. Before this disaster, there had already been two accidents on the railway: a train collision at Southall in September 1997 and another at Ladbroke Grove in London in October 1999. While the former resulted in seven deaths, the latter killed 31 people and injured 400 (This Is London, 2001) and was the most serious train accident for more than a decade (Evans, 2000). According to the International Union of Railways, Britain’s railways are less safe than their European counterparts. The death numbers per billion kilometres are: Britain 0.36, Germany 0.31, France 0.27, and Italy 0.10. In Japan, the same statistic, surprisingly, is zero on any express line since 1964 (Economist, 2000).
After the Hatfield crash, public confidence was thoroughly shaken and public and political hostility increased dramatically. Railtrack’s share price declined sharply and fell to 280p immediately before administration, compared with £18 at its peak in 1998 and with its flotation price of 390p in 1996 (Economist, 2001). In December 2000, a House of Commons motion backed by 69 backbench MPs called for the renationalisation of Railtrack (Rail, 2001). A March 2001 poll shows that among 1001 adults 76% thought that Railtrack should be taken back into the public sector (Western Daily Press, 2001). The burgeoning lack of cash together with the weight of both public and political pressure made the dissolution of Railtrack inevitable. Renationalisation was not on the political agenda and so the pressure was on to transform Railtrack into a new form of corporate entity, neither privately owned nor fully government controlled. A new ownership structure giving more emphasis to the wider stakeholder needs emerged. However, the perception of the public ‘still being hungry for blood’ loomed large and the Crown Prosecution Service (CPS) decided to press criminal charges against individual employees of Railtrack and Railtrack’s outsourced company, Balfour Beatty.

From the above Railtrack case study we can draw out the following key drivers. Railtrack’s short-term profit motive and lack of investment in the infrastructure resulted in concerns about the safety of the UK’s rail network. There was increasing evidence of irresponsible corporate behaviour with major actors failing to take responsibility and instead shifting the blame elsewhere. Public confidence in Railtrack was shattered following a series of major rail disasters and the consequential outrage resulted in public demand for retribution. In an attempt to alleviate the mounting pressure the government revisited the 1996–1997 sidelined proposals on the use of criminal law to prosecute in cases of corporate manslaughter. The difficulties of the use of criminal law are considered next.

3 The principles and applicability of criminal law

A defendant is not generally criminally liable for his conduct, the actus reus, unless he also has the required wrongful state of mind, the mens rea, be it intention, recklessness or negligence (save in the case of strict liability offences where no mens rea is required, see below). This is a concept represented by the Latin maxim actus non facit reum nisi mens sit rea, literally translated to mean that “an act does not make a man guilty of a crime, unless his mind be also guilty”.

Figure 2 General principles of criminal liability

| ACTUS REUS | MENS REA | CRIMINAL OFFENCE |
This is where the first problem in using criminal law to govern corporate activity arises. Criminal law is based on the premise of one defendant with both \textit{mens rea} and \textit{actus reus} elements allegedly present. This is a difficult concept to apply to a corporate entity where potentially many individuals are likely to be involved.

In cases of homicide where no intention to kill or cause grievous bodily harm can be proven, a verdict of involuntary manslaughter can be found. There are two definitive categories of this type of manslaughter which can be outlined as follows: Constructive manslaughter can occur where a defendant commits an unlawful act (Franklin\cite{1}) which can be classed as being objectively dangerous in that reasonable people would recognise that another would be subjected to the risk of at least some harm (Church\cite{2}). Death must be legally attributed to this unlawful act following the general principles of causation, both factually (the ‘but for’ test, White\cite{3}) and legally (‘operating and substantive cause of death’, Cato\cite{4}). Gross negligence manslaughter, on the other hand, represents an extension of civil law principles of negligence into the criminal arena, with the onus of finding a criminal element resting on the jury. A breach of a duty of care must be found in order to satisfy the civil elements of negligence. The conduct must then show such disregard for life and safety that is considered by the jury to be so severe that it goes beyond a matter of compensation and becomes a crime against the state (Adomako\cite{5}).

3.1 Why criminalise conduct?

A starting point is the suggestion that the purpose of criminal law is to try and prevent the causing of harm and, arguably, to promote the upholding of social values and morality (Clarkson, 2000). Smith suggests that the provisions governing the definition of offences in the American Law Institute’s Model Penal Code could be taken as a statement of the objectives of the substantive law of crime in any modern legal system (Smith, 2002). In summary, these provisions state that the criminal law exists to prohibit such conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests and control those individuals whose conduct suggests a criminal disposition.

It is also widely accepted that the aims and objectives of the English criminal legal framework are diverse and often conflicting in that “…social institutions typically contain within themselves traces of the contradictions and pluralities of interest which they seek to regulate” (Garland, 1990). Punishment and deterrence are obvious aims from a crime control perspective (for detailed discussion on models of criminal justice, see Packer, 1969). From a victim’s point of view, retribution is a key aspect. From a more human rights based perspective, rehabilitation forms a major part of any sentencing strategy at the very least.

So why then is conduct criminalised? As suggested by the case of Adomako conduct which would normally be seen as a civil wrong becomes a criminal offence when it is deemed to be a crime against the state. This would seem to endorse Smith’s view that criminal liability is invoked where a ‘public wrong’ is committed (Smith, 2002) which goes further than merely affecting private rights. Coupled with this is the view that criminal liability reflects the moral standards at the time of criminalisation where it could be argued that the legal system is a social construct dealing with socially determined judgements that some forms of behaviour should be proscribed (see further, Hart, 1968). However, this is not a view endorsed by the House of Lords (see for example Knuller (Publishing, Printing and Promotions) Ltd v DPP\cite{6} where the House of Lords rejected the suggestion that it had the power to extend the criminal law to enforce good morals).
It could be suggested that the levying of manslaughter charges against companies such as Railtrack does little more than focus on the retribution side of the equation. While incarceration of a company itself is of course impossible, a senior manager could be sentenced to anything up to life imprisonment if found guilty of manslaughter in his own right. A fine on the other hand may have a higher deterrent value, provided of course that the fine is suitably higher than the profits that could be made by circumventing the safety measures in the first place. Otherwise there runs the risk of such fines becoming a running cost of the company.

With these underlying principles in mind we can now explore the corporate setting to manslaughter.

3.2 Background to corporate manslaughter

This section will examine firstly the legal background to the criminal prosecution of companies whose acts result in a death and the doctrine of identification and secondly an exploration of recent proposals. The paper will then move on to take a more theoretical perspective, asking whether reliance on the criminal law is in reality the answer.

Recently, there has been much debate centred around the use of criminal law to punish individuals within a company and their subsequent punishment for corporate crime. The debate is well-rehearsed in the literature (e.g., Parsons, 2003; Clarkson, 1996; Wells, 1993a; 1993b) and it is not intended to open them again here in any detail, save for contextualisation. The debate centres around the inevitable difficulties in attributing the concept of a guilty mind to a corporation. With no “soul to kick” (Slapper and Tombs, 1990), the targeting of company directors may mean that the acts of the actual wrongdoer are ignored which goes against concepts of traditional criminal liability. Commentators to date have recognised the difficulties associated with the assimilation of corporate wrongdoing into the criminal law and it will be argued here that the underlying aims and objectives of the criminal process are such that they are simply irreconcilable with the ascription of criminal liability to ‘killer companies’. It is now the case that, while historically the criminal law has developed around the notion of individuals as the bearers of rights and duties, the present theory is that corporate responsibility can be attached to companies in the same way that personal responsibility attaches to individuals (Ashworth, 2003). Over the past 20 years there have been corporate-related disasters resulting in significant losses of life for which, public policy at least would demand, it has been felt that companies should be made to pay. As a result, the courts have started to recognise a form of corporate manslaughter based on gross negligence principles outlined above. However, as argued by Ashworth (2003), this recognition is limited to fitting these concepts into existing frameworks of criminal liability rather than starting afresh. This is another indication that the current criminal law is simply not suitable for dealing with corporate manslaughter. Corporations can also attract criminal liability by way of vicarious liability in that it can be liable for the crimes of its employees; see National Rivers Authority v Alfred McAlpine Homes East. While this attracts criticism of its own, see for example Wells (1996), the problems of identification referred to below are not relevant as liability is not limited to those who actually control the company. However, vicarious liability only applies to offences of strict liability, those where no mens rea is required, and so is not applicable to the common law manslaughter offence.
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Current thinking regarding corporate manslaughter is centred around the doctrine of identification, which allows senior managers within a company to be identified as the company’s legal personality and thus incur criminal liability. Prior to the House of Lords decision in *Tesco Supermarkets Ltd v Nattrass* a liberal approach was advocated by the courts when determining which individuals could be identified in order to ascribe liability for the acts of the company. In this case however, it was held that only individuals with some power of control within the company, including discretion relating to the activity with which the offence in question was concerned, could be covered by this doctrine:

“...He is an embodiment of the company...he hears and speaks through the persona of the company...his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.” (quoting Lord Reid,p.171)

3.3 Manslaughter prosecutions

The prosecution of Railtrack represents only the third time that a large company has been indicted for manslaughter. Both previous prosecutions were unsuccessful. The first of these related to the capsizing of the ferry, the Herald of Free Enterprise, just after it left the port of Zeebrugge with its bow doors open in March 1987. One hundred ninety-two people died. Charges were brought against eight defendants, including P&O Ferries, the successor company of the firm that had owned the Herald of Free Enterprise. While it was acknowledged that a company could in theory be convicted of manslaughter, the trial collapsed in its early stages when the jury were directed that there was no case to answer in that there was insufficient evidence to convict any individual defendant (*P&O European Ferries (Dover) Ltd.*).

The second unsuccessful prosecution followed the Southall rail crash where seven people died after a train travelling from Swansea to London passed through a red light at 125 mph and subsequently collided with a freight train. There was no second driver and both the automatic warning system and the train protective system were inoperative. While South Western Trains plc were convicted under the Health and Safety at Work Act of 1974 in that it had not done all that was reasonably practicable to ensure the safety of...
passengers, the company was acquitted of corporate manslaughter due to a ruling that liability could only be imposed under the principle of identification. This ruling was referred to the Court of Appeal by the Attorney-General where the trial judge’s ruling was approved by Rose LJ. This is argued by Simester and Sullivan (2000) to:

“Confound expectations that the Privy Council’s advice in Meridian Global Funds Management Asia Ltd v Securities Commission might presage a general departure from the narrow identification doctrine when attributing criminal liability to companies.”

Parsons (2003) further argues that the Court of Appeal could have taken the opportunity to make the identification doctrine more workable or alternatively redefine corporate liability for manslaughter by drawing on the existing common law duty of care.

It can be seen that a strict adherence to the identification principle makes it notoriously difficult to convict a large company of manslaughter due to subcontracting to outside companies and the delegation of safety decisions to managers lower down the hierarchy (see Kirkbride and Letza, 2003). To date, the only successful corporate manslaughter prosecutions have been against small companies where it is, generally, far easier to identify the controlling mind. In Kite and OLL Ltd., a prosecution following the death of four teenagers on a canoeing trip in Lyme Bay, both the organising company and its managing director were convicted of manslaughter. The company was fined £60,000, which represented its entire assets and Kite himself was sentenced to three years imprisonment, later reduced on appeal to two. The controlling mind of the company was clearly that of the managing director as it was a one-man company and therefore the company’s liability could be automatically established.

The problem with corporate manslaughter therefore is establishing an identifiable employee and attributable conduct in prosecutions involving anything but very small companies. Issues of causation are also relevant here. As stated above, under criminal law it is generally the case that a causal link must be established between the acts of the defendant and the forbidden outcome. In addition to this, there must be contemporaneity of actus reus and mens rea in order to establish criminal liability in that they must coincide at the same point in time or have the mens rea coinciding at some point on a series of continuing acts (Thabo Meli). Applying these principles for a moment to the ‘actions’ of a corporation, it is clear that unless the controlling mind of the company is also the individual who performs the critical act or omission, highly unlikely in the circumstances, criminal liability in the traditional sense cannot be ascribed. Another indication perhaps that criminal law is not the appropriate route?

In 1994, the Law Commission proposed changes to the identification doctrine (Law Com No. 135 (1994)). Two years later it then advocated a different approach (Law Com No. 237 (1996)). Rather than focussing on the wrongdoing of a particular employee, it suggested looking at a company’s systems, practices and policies thus using the concept of ‘management failure’ to underpin a prosecution for manslaughter. The senior management of negligent companies could be prosecuted for the indictable-only offence of ‘corporate killing’ where a death had been caused “by a failure in the way in which the corporation’s activities are managed or organised, to ensure the health and safety of persons employed in or affected by those activities”. Despite the Labour Party’s promises in its 1997 election manifesto, at the time of writing, no steps have been taken to implement these or any other proposals relating to the reform of corporate manslaughter laws.
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3.4 Recent proposals

In May 2000, the government made further proposals relating to corporate manslaughter. In May 2003, the government then announced that it would publish a draft bill on corporate manslaughter. In introducing this legislation, the Home Secretary stated that there was great public concern at the criminal law’s lack of success in convicting companies of manslaughter where a death has occurred due to gross negligence on the part of the organisation as a whole. It was felt that the law needed to be clear and effective in order to secure public confidence and target large corporations who cause death through failure to set or maintain suitable safety standards. So does this mean the end of the identification doctrine and another way of identifying those culpable? If the Law Commission proposals (above) were to be adopted, ‘management failure’ would be the key. But surely, the question would still arise as to who exactly was the ‘management’ and could they be expected to take responsibility for the actions of, for example, a sub-contractor?

It is significant to note that the May 2003 announcements displayed a change of approach to that identified in May 2000. In 2000 Jack Straw, then Home Secretary, provoked protests from business leaders when he announced a shake-up in the corporate manslaughter laws, claiming:

“Anyone with a management responsibility for safety will bear the risk of personal criminal liability in a way they don’t at the moment.”

By May 2003, the Home Office had decided that ‘targeting individual directors or managers would just create scapegoats and that would not be in the interests of justice.’

This shift away from individual liability has been welcomed by the Confederation of British Industry (CBI) who believe that the law should not focus on specific individuals for fear of creating a blame culture and undermining the principle that responsibility for safety issues should be shared across an organisation. It has been suggested that a new corporate killing offence would encourage cover-ups and buck-passing rather than foster positive action to reduce accidents.

Why not wait until any new legislation comes into force before starting proceedings against Railtrack? Under Article 7 of the European Convention on Human Rights, as given effect in English law by the Human Rights Act of 1998, it would be impossible to prosecute Railtrack for the alleged offence in question under any new provisions. Article 7 proscribes punishment without law and any prosecution resulting out of an offence committed prior to the new law coming into force would have to be done under the law as it stood at the time. One might argue that, given the fact that the Law Commission’s proposals have existed since 1996, a change in the law was foreseeable (see for example R v R; SW and CR v Uk); however any action against Railtrack under new legislation would be likely to be struck out as an abuse of process.

The UK is not alone in reviewing criminal law as an accountability mechanism. There is a global trend towards the use of criminal penalties in this regard. In Australia for example, the law provides for both individual and corporate liability for corporate crime by way of the Criminal Code Act of 1995: “A body corporate may be found guilty of any offence, including one punishable by imprisonment” (s12.1). This Act gives the idea of ‘corporate culture’ – an attitude, policy, rule, course of conduct or practice – specific recognition. Intention, knowledge or recklessness will be attributed to a corporate body whenever it expressly, tacitly or impliedly authorises or permits the commission of an
offence (s12.3(1)). In the USA, there is a growing trend of criminalisation of conduct previously considered under civil jurisdictions (see for example the Sarbanes-Oxley Act of 2002) and notions of vicarious liability similar to those used in the UK are employed in the sense that companies are criminally liable for offences committed by their employees within the course of their employment with ‘corporate probation’ used in addition to or as an alternative to fines (Wells, 1993b). Within Europe, the Council of Europe has encouraged the move towards corporate liability. It was suggested that a company would be considered vicariously liable for all offences committed by its employees but afforded a due diligence defence if it could establish that the management of the company was not implicated in the offence and that it had taken all necessary steps to prevent the commission of the offence (Council of Europe, 1990).

4 Conclusion

Cynics could suggest that the recent developments, firstly in prosecuting Railtrack and secondly in announcing legislative changes relating to the law on corporate manslaughter have only occurred with the view of appeasing the public. Since the start of privatisation in 1992 there have been 184 rail deaths. Of these, 56 (see Appendix) could be related to the alleged negligence of Railtrack in one way or another. Looking at the number of deaths in relation to the number of passenger kilometres (see Table 1) travelled on the railways each year, especially compared for example to those on the roads, the figures are not overwhelmingly disproportionate. However, when you consider the fact that these deaths occur in highly publicised accidents where allegations of lack of consideration of health and safety issues are made and that often a large number of deaths occur at the same time (for example, 31 in the Ladbroke Grove disaster) the picture begins to look slightly different and is sufficient to affect public confidence. It could be argued that the Government’s recent revival of the dormant proposals relating to the revamp of current laws did not come out of any kind of burning desire to suddenly reform the law on corporate manslaughter. If indeed the proposals of the 1996 Law Commission report, with corporate killing based on management failure, are adopted, one might ask why has it taken so long. Legislation can be introduced very quickly if it is deemed to be in the public interest to do so. It could be surmised that the announcements of a draft bill is a knee-jerk reaction to the prosecution of Railtrack, especially given the fact that it was only in November 2002 that it was announced that any plans for legislative change were to be postponed (Guardian, 8 November 2002).

It is clear that the current use of involuntary manslaughter charges against companies by way of the identification doctrine is unworkable. From the case discussed above, it would appear that it is virtually impossible to establish a controlling mind in the case of large companies such as Railtrack. These companies have complex hierarchical structures with different levels of management responsible for different areas. The outsourcing of maintenance and other activities further exacerbates the problem. Even if the aims and objectives of the criminal process did support this kind of prosecution, the highly publicised acquittals of corporations will do little to boost public confidence in the judicial system. If only small companies can be successfully prosecuted under the current law, it is clear that there is a significant gap and that reform is long overdue (Parsons, 2003). If the Law Commission proposals are accepted by the government the same debates, this time centred around the concept of ‘management failure’, are likely to take the place of those relating to the identification doctrine.
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It is suggested that it is evident when looking at these difficulties that fitting this kind of concept into a traditional criminal law framework and existing concepts of manslaughter simply does not work. As stated above, criminal liability rests on the proposition that there is one defendant who not only performs the guilty act, but does so with a guilty mind. An individual may be a criminal and an individual within a company may be a criminal. However, it would seem to be stretching these principles too far to make a company a criminal. It is further suggested that to do so merely for the retributive effect this may have ignores the other aims and objectives of a traditional criminal justice process.

So what is the solution? As noted above in relation to the unsuccessful prosecution for manslaughter following the Southall rail crash, Health and Safety legislation may often provide a remedy where manslaughter laws do not. Asking whether a company has, in the light of all the facts, done all that was reasonably practicable to ensure safety does not hinge on the identification of any particular individual nor does it depend on the finding of management failure. While companies are quite clearly legal entities, at the end of the day what penalties can be imposed for wrongdoing? Directors’ individual liability aside, clearly companies cannot be incarcerated. If all that can be done is to punish a company by way of a fine, then boosting current Health and Safety legislation to provide for harsher financial penalties may be the way forward. Accepting this is as a Health and Safety issue is, arguably, the preferable solution if the only rationale for suggesting otherwise is the public pacification ramifications of labelling a company a ‘killer’.

It has been reported that the current Home Secretary, David Blunkett, has raised proposals in Cabinet (with draft legislation expected later in the year) for a new offence that would result in companies found guilty of corporate killing being subject to unlimited fines. But health and safety laws already offer the sanction of unlimited fines. This proposal, therefore, appears unnecessary. Even the CBI acknowledges that existing health and safety laws are adequate to punish negligent behaviour, but accept that there is ‘a political drive to do something in this field’. That ‘something’ is likely to be a new offence of corporate killing, despite its difficulties. It would compensate for the health and safety anomalies where the law is lacking in its failure to impose positive duties on directors. It is currently only the corporate entity that has such a duty, allowing directors to delegate safety decisions to mere juniors. However, as more revision of the health and safety regime by imposing positive, non-delegable, safety duties on directors together with revisions to the prosecuting powers would raise the status and nature of the offence. This is a point not lost on the Centre for Corporate Accountability with its proposals that a new health and safety duty should be imposed on directors to ‘take all reasonable steps to ensure compliance with health and safety laws’. This would introduce individual accountability based on established and well-known expectations and standards, supported by investigation by the police and prosecution by the Crown Prosecution Service (CPS) rather than any regulatory body in order to raise the nature and profile of the wrongdoing. This seems a more sensible and workable solution to the current practical difficulties of a corporate killing criminal offence – albeit a politically ‘dull’ outcome.
References
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Notes
1 (1883) 15 Cox CC 163 where it was determined that this unlawful act must be a crime rather than a tort. Further, the unlawful act must be a criminal act in itself notwithstanding the fact that a death has occurred.
2 (1965) 1 QB 59 at 62.
3 (1910) 2 KB 124.
4 (1976) 1 All ER 260.
5 (1994) 2 All ER 79 as per Lord Mackay of Clashfern.
6 (1973) AC 435.
7 (1994) 4 All ER 286.
8 (1972) AC 153.
12 Winchester Crown Court, 8th December 1994.
13 (1954) 1 All ER 373; see also Le Brun [1992] 4 All ER 673; Church [1966] 1 QB 59.
14 www.homeoffice.gov.uk/docs/invmans.html
15 (1992) 1 AC 599.
17 http://www.igreens.org.uk/uk_rail_accident_deaths.htm
18 http://www.igreens.org.uk/uk_rail_accident_deaths.htm
Appendix

Charged with manslaughter

- Charles Pollard – director of the London North East Zone of Railtrack
- Alistair Cook – infrastructure contracts manager of the London North East Zone of Railtrack
- Sean Fugill – area asset manager on the London North East Zone (South) of Railtrack
- Anthony Walker – regional director of Balfour Beatty until August 2000 Nicholas Jeffries – civil engineer, Balfour Beatty
- Keith Lea – track engineer of the London North East Zone of Railtrack.

Charged with health and safety offences

- Gerald Corbett – chief executive of Railtrack
- Christopher Leah – director of safety and operations of Railtrack
- Stephen Huxley – managing director of Balfour Beatty until August 2000
- Kenneth Hedley – track engineer for Balfour Beatty
- Vernon Bullen – Kings Cross area maintenance engineer for Balfour Beatty
- Keith Hughes – acting track engineer for Balfour Beatty.

(The Times, 2003)

Rail deaths

- Potters Bar – 10 (May 2002)
- Hatfield – 4 (October 2000)
- Paddington – 31 (October 1999)
- Southall – 7 (September 1997)
- Cowden – 4 (October 1994)