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CORPORATE MANSLAUGHTER:

New Horizon or False Dawn?

Simon Daniels

Introduction

The failure of the process of common law to deliver convictions for corporate manslaughter in the fatal casualties of the Herald of Free Enterprise and the Marchioness contributed much to the resolve of Parliament to bring a Corporate Manslaughter Act on to the Statute Books. It has been in force, now, for four years; but with only one conviction currently to its name, the shipping industry is neither very much the wiser nor better informed as to its likely effect on them in the event of another maritime disaster.

This paper examines the evolution of the 2007 Act and, given its dependence upon the concept of criminal negligence, its relationship with the concept of justice. From this viewpoint, conclusions may be drawn on certain case studies that may inform some intriguing speculation on the effect which the 2007 Act may have on maritime operations.

The Herald of Free Enterprise and the Common Law

The English Channel is one of the most crowded seaways in the world and, by the time the Herald of Free Enterprise and her sisters were bedded down by the mid-1980s, the Dover-Calais run was the most competitive crossing, because it was the shortest – just 22 miles long. The liberalisation of an already cut-throat, competitive market-place was forcing the board rooms of ferry operators to consider how best to conduct their prime function: to maximise a yield for their investors[1]. It was against this background that P & O European Ferries had to make some bold business decisions. By the summer of 1986, the boardroom of P & O Ferries was thinking hard about its long-term strategy, in order to retain its position in

[1] Daniels, S, 2007, Sea Changes, Southampton Solent University, Southampton.

the market-place and satisfy the shareholders. This was the sum of the directors' concerns; safety management was not among their job descriptions. It was surely no coincidence that, at about this time, it resolved to buy out its rival, Townsend Thoresen, thereby reducing the competition and spreading the overheads. In February of the following year, the deal was completed and the directors of P & O Ferries implemented their plans for maximising the financial yield.

Their own ferries on the Dover-Calais route were doing their job very satisfactorily; they did not need Townsend's tonnage there, so it was decided to switch the Herald of Free Enterprise to the Zeebrugge route. The only problem was that the linkspans at Zeebrugge had not been designed with the Herald in mind, so that, for the vessel's upper vehicle deck to be accessed by the ramp, it was necessary to trim the ship by the head and flood her ballast tanks, to lower the level of the vehicle deck to the linkspan.

When the Herald left Zeebrugge on the 6th March 1987, not all the water had been pumped out of the bow ballast tanks, causing her to be some three feet down at the bow. Mr Stanley, the assistant bosun, was responsible for closing the bow doors but he had been released from duties by the bosun before the sailing time. He duly went to his cabin and fell asleep; tragically, he slept through the 'Harbour Stations' call which ordered the crew to their assigned sailing positions. It was not part of anybody else's duties to ensure that the bow doors were closed before sailing, save the statutory responsibility of the Master to ensure that the vessel was in all respects safe to proceed to sea[2]. Her design of clamshell bow doors made it impossible for Captain David Lewry to see from the bridge if the doors were opened or closed, though.

The Herald sailed at 19.05 local time, with a crew of 80 and some 459 passengers, 81 cars and 50 commercial vehicles. Passing the outer mole 19 minutes later, she increased speed, when a bow wave began to build up under her prow. At 15 knots, with the bow down three feet lower than normal, water began to break over the main car deck through the open doors at the rate of 200 tons per minute.

In common with other roll on–roll off vessels, the Herald's main vehicle deck lacked transverse bulkheads and, so, the sudden flood of water through the bow doors quickly caused the vessel to become unstable. The Herald listed 30 degrees to port almost instantaneously, as water continued to pour in and fill the port wing of the vehicle deck, causing her to capsize 40 seconds later. She settled on the sea bed at slightly more than 90 degrees

[2] See particularly Section 98 Merchant Shipping Act 1995 and the applied definitions in s94.

with the starboard half of her hull above water. There had been no chance to launch any of the ship's lifeboats.

At least 150 passengers and 38 members of the crew lost their lives when the vessel capsized, the worst disaster for a British vessel in peacetime since the sinking of the Titanic in 1912. In accordance with the provisions of the Merchant Shipping Act 1970, a Formal Investigation was conducted by Mr Justice Sheen[3], who found fault with the Master, Chief Officer and assistant bosun but, in fairness, the brunt of his condemnation was taken by the management of the Owners, finding:

> All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness.

Such findings would logically lead to the question of the owner's accountability. The judge expressed his firm opinion that "The Board of Directors must accept a heavy responsibility for their lamentable lack of directions" but, however blameworthy the company was for the failure of management, there was no individual who was part of the controlling mind of the owner culpable for the manslaughter of the souls lost aboard the ship. As a result, a prosecution for corporate manslaughter was misconceived.

The test of a corporate body's criminal liability for manslaughter had for long been dependent upon whether a director or senior manager of the company – part of the 'controlling mind and will' of the company – was personally guilty of manslaughter. This 'identification' doctrine was described in HL Bolton v Grahams & Sons Ltd[4]:

> 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 agents who are nothing more than the hand to do the work and cannot be said to represent the mind and 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

[3] mv HERALD OF FREE ENTERPRISE. Report of Court No. 8074. Formal Investigation (July 1987).

[4] H.L. Bolton (Engineering) Ltd v T.J. Graham and Sons [1957] 1 QB 159.

> these managers is the state of mind of the company and is treated by the law as such.

In Tesco Supermarkets Ltd v Natrass,[5] three different judges gave three slightly different interpretations of who could be defined as participating in the controlling mind. Lord Reid sated that the following individuals were controlling minds of a company:

> the board of directors, the managing director and perhaps other superior officers of a company [who] carry out the functions of management and speak and act as the company.

Viscount Dilhorne gave a more limited interpretation saying that a controlling mind is a person

> who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders.

Lord Diplock stated that the people who form the controlling mind are those

> 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.

Mr Justice Taylor had to wrestle with the concept of the controlling mind in the ensuing prosecution of P & O Ferries in the Herald case[6], when he stated,

> where a corporation, through the controlling mind of one of its agents, does an act which fulfils the pre-requisites for the crime of manslaughter, it is properly indictable for the crime of manslaughter.

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[5] Tesco Supermarkets Ltd v Nattrass [1972] AC 153 (HL).

[6] R v P & O European Ferries (Dover) Ltd [1991] 93 Cr App R 72.

Although such conclusions highlighted the difficulties of a prosecution against P & O, this did not discourage the Director of Public Prosecutions from pursuing the owners of the Herald. Judicial review of the coroner's inquest persuaded the Director of Public Prosecutions to bring manslaughter charges against P&O European Ferries and seven employees, but it was apparent that the evidence adduced by the Prosecution was insufficient to establish the elements of the common law crime of corporate manslaughter beyond reasonable doubt, which demanded that a causal link be established between the Company's controlling mind and an individual guilty of manslaughter and, thus, it would be unsafe to direct the Jury to reach a verdict on the evidence. As a result there was no case to answer and the judge ruled that the prosecution was not in a position to satisfy the essential 'doctrine of identification'[7].

Crucially, this also demonstrated the distance that lay between the Master and the accountability of their employer in the context of corporate manslaughter; while the Wreck Commissioner held the Master responsible[8] for taking the ship to sea in an unsafe condition and whose negligence contributed to the cause of the casualty, without the causal link the company itself was not criminally accountable. Naturally this was consistent with the corporate position with regard to the Master's discretion, the foundation for the nautical fault defence in the Hague-Visby Rules[9], so it all made sense.

In the light of the Law Commission's report in 2000[10] the Select Committee on Home Affairs and Work and Pensions set its face to drafting a Bill that reflected the Government's determination to enable more prosecutions to proceed by tackling the difficulties created by the identification principle[11]. The new proposals were intended to change the basis of liability, from the requirement of identifying the causal link from an individual guilty of manslaughter to the controlling mind of the company, to liability founded on accountability for the way in which an organisation's activities are managed or organised by its senior managers[12]. In this way it

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[7] See Richardson, P (Ed), 2009 ed, Archbold Criminal Pleading, Evidence and Practice, Thomson Reuters (Legal) Limited, London.

[8] mv HERALD OF FREE ENTERPRISE Report para 12.6.

[9] Article IV, Rule 2(a).

[10] Reforming the Law on Involuntary Manslaughter: The Government's Proposals (Home Office, May, 2000, CC NO77828).

[11] Home Affairs and Work and Pensions - First Report, Session 2005-06, December 2005.

[12] Home Office, Corporate Manslaughter: The Government's Draft Bill for Reform, Cm 6497, March 2005.

was the intention of Parliament to close down the possibility that a shipowner could avoid criminal liability for corporate manslaughter, in the way encountered in the case of the Herald, simply by failing to get a director found guilty of individual manslaughter.

Meanwhile, the normative ethics of society were pressing their demands for corporate accountability for manslaughter, which became ever more forceful with each successive casualty. Parliament saw P & O's position in the Herald case as highlighting an inconsistency with those normative ethics; essentially, society was demanding a corporate head to roll for manslaughter, but the question of fairness made a solution more difficult to divine and this, of course, underpinned the positions adopted by the corporate lobby and the workforce lobby respectively. The attitude adopted by Parliament was particularly noticeable in the wake of the Marchioness disaster in August 1989. The MAIB report[13] made a number of findings, the principal one being that the collision occurred because neither vessel observed the other until it was too late. Further factors, inter alia, involved design defects which seriously restricted visibility from the wheelhouse of each vessel, both vessels were using the same, middle part of the fairway and the centre arches of the bridges across the river, and clear instructions were not given to the forward look-out of the Bowbelle. That being said, the report clearly concluded:

> Both vessels were properly certificated, in sound condition, and manned in accordance with the appropriate requirements. In both vessels the bridge or wheelhouse were properly manned…. Both vessels were proceeding at a speed which was consistent with the requirements of the Collision regulations and PLA Bye-laws… There was no wilful misconduct in either vessel contributing to the collision, the foundering or the loss of life. In as much as personal fault was responsible for the accident, that fault lies with those in direct charge of the two vessels at the time and with those responsible for both the perpetration and the acceptance of their faulty design.

Before the report was published, the DPP instituted manslaughter proceedings against the Master of the Bowbelle, Captain Henderson, for failing to ensure a proper lookout and thereby causing damage to another ship and death or personal injury contrary to Section 27 Merchant Shipping

[13] Report of the Chief Inspector of Marine Accidents into the collision between the passenger launch Marchioness and mv Bowbelle, 1990, MAIB, Southampton.

Act 1970[14]; the first jury failed to reach a verdict, as did the second, and a verdict of not guilty was duly entered on the charge when the Prosecution abandoned the case.[15]

It is very apparent that the MAIB found no evidence which might have had some probative value towards the culpability of either owner for manslaughter, but this did not discourage Parliament's Home Affairs and Work and Pensions Committees taking partisan and unbalanced evidence arising out of the Marchioness disaster which was published in the First Joint Report of Session 2005-06 for the Draft Corporate Manslaughter Bill[16]. Mrs Dallaglio of the Marchioness victim support group was invited to give evidence, when she stated inter alia,

> In every respect of the Marchioness tragedy, from my own experience and what I have experienced within our committee, these companies took Francesca's life unlawfully….

The Chairman commented on the accountability of the owners thus:

> As the Bill stands at the moment, the companies would be convicted…

The Chairman clearly aspired to pursue the function of a Court; whether or not as a way to pour oil on the troubled waters of the emotive nature of the evidence which he admitted is open to question but, if that were the case, it failed. When asked whether he thought that there was evidence in the Marchioness case that the directors had taken insufficient account of health and safety, witness Mr Perks replied:

> Indeed, yes. You had people wandering about… Can I say it, Chairman? The companies? … Obviously they walked away clapping their hands. We saw them across the road.

It must be borne in mind that this evidence was being admitted as part of a process to review the current law; the admission of such evidence merely served to devalue its probative value. When pressed for her opinion on

[14] Now s58 Merchant Shipping Act 1995.

[15] Butcher L, 2010, House of Commons Standard Note SN/BT/769.

[16] HC 540-III.

whether existing health and safety legislation could be used to identify that somebody had been in breach of that, Mrs Dallaglio replied:

> I am not a lawyer. I was a woman who was highly traumatised for a lengthy period of time by the loss of my daughter. I put that in the hands of you people here.

Ivor Glogg, who had been widowed in the accident, had brought a private prosecution which failed, and Mrs Dallaglio was allowed her evidence:

> He felt very strongly about it. He had his own company. They bankrupted him, these corporate companies. They bankrupted him. He went through God knows how many courts. I attended all of them. Again, bogged down with arcs of visions, technicalities of law, points of law, they were thrown out… he was on the verge of going to the crown court then but did not have enough money. They bankrupted him.

The emotive nature of the evidence upon which condemnation was brought on the owner simply flew in the face of the MAIB report, as well as the decision of the stipendiary magistrate in Bow Street Magistrates Court, in the private prosecution brought by Mr Glogg against South Coast Shipping, owners of the Bowbelle, and four senior managers of the company, the manslaughter charges being dismissed in June 1992 on the grounds that there was insufficient evidence against any of the defendants to commit them for trial.[17]

This did not discourage Parliament in its mission to satisfy the social demand for corporate criminal accountability, in order to make it easier to get a conviction, whatever the experts might say. That mission was accomplished with the Corporate Manslaughter Act.

The Demands of Normative Ethics

In the wider terms of jurisprudence, Parliament's mission may be justified. Society has entrusted to Parliament the function of defining and controlling just what society holds to be a moral wrong; that, itself, is enforced by a power which is maintained quite separately from Parliament and vested in the Courts, which Lord Simons described in Shaw v DPP[18] as

[17] Butcher L, 2010, House of Commons Standard Note SN/BT/769.
[18] Shaw v DPP [1962] 2 All ER 446.

a residual power to conserve not only the safety and order but also the moral welfare of the state.

The normative ethics underpinning concepts of Justice bear a heavy burden in regulating criminal accountability. The fairness of criminal justice systems naturally relies on checks and balances and on good faith on the part of legislators and judges[19] to maintain society's moral standards in liability and sentencing. Bauman attaches a very high value to the effect which social and political trends have in moderating the humanity and reasonableness in punitive justice[20], and the emotive responses recorded in the working committee's inquiry in the Corporate Manslaughter Bill naturally informed Parliament's opinion on the contemporary moral standards attached to corporate accountability; whether the quality of moderation was achieved, remains to be analysed.

The normative ethics of a society naturally characterise its understanding of Justice in its own terms which, thus accords it a subjective definition; but objectively, Justice must be envisaged as a set of moral rules which depend heavily on the moderation of society's moral standards. Society evolves in response to internal change and external stimuli and, with it, the concept has evolved of a risk which might threaten the security of that society. Ericson and Carrière have defined this in terms of what they label a 'risk society', in which society has become preoccupied with the concept of risk management for the protection of public safety[21]. Naturally the solution which is developed by a democratic risk society delivers a body of legislation which satisfies those crucial normative ethics; but as the history of corporate manslaughter at Common Law so signally failed to secure convictions against the shipowners, Parliament's solution, to deliver Statute Law designed to facilitate such convictions, stands in dynamic tension with basic legal rights of fairness, which corporate bodies must share with all other bodies in the eyes of the law; but such a right is exposed to the risk of suspension in favour of the solution which meets the social demand. Hudson's analysis of the risk society can be developed to embrace the rights of all legal bodies, which must confront the risk society's need to trade such

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[19] Hudson, B, 2003, Justice in the Risk Society, Sage, London.

[20] Bauman, Z, 1987, Legislators and Interpreters: On Modernity, Post-Modernity and Intellectuals, Polity Press, Cambridge.

[21] Ericson, R and K Carriere, 1994, The Fragmentation of Criminology, in D Nelken (ed), The Futures of Criminology, Sage, London.

rights against the enforcement of the criminal law and consequential punishment:

> The balance between pursuit of crime control restraints and maintenance of principled limits on punishment is essentially a calculation of what rights, for how long, and with what justification, are to be suspended in the interests of security.[22]

It is this dynamic tension which led to the iniquity of facilitating convictions through the medium of applying a civil test of negligence: what are the consequences of the defendant's conduct? Rather than the criminal test: what was the defendant's guilty mind?

In the maritime context, this can be well-illustrated by the case of Captain Wolfgang Schröder[23], Master of the Zim Mexico III who was convicted of homicide. In March 2006 Captain Schröder had been in command of the vessel, in a compulsory pilotage area, when she collided with a port-side crane at Mobile, Alabama. The consequence led to the death of a dock-worker, in what mariners worldwide believed to be a mere error of judgment. Captain Schröder was indicted under the Seaman's Manslaughter Statute as Master of the ship for misconduct, negligence, or inattention to his duties on the vessel, resulting in the death of the dock worker. The jury convicted him and he faced a sentence of imprisonment of up to 16 months. At his sentencing, said Judge Callie Granade, District Judge for the United States District Court for the Southern District of Alabama, noted that the law required jurors to find that Schröder was guilty of simple negligence, a lower standard of unlawfulness more commonly associated with civil disputes. Her comment is worth repeating:

> While I certainly do not discount the terrible consequences that have resulted from this negligence, what he has been convicted of is really a civil offense.

The problem arises in that the characteristics which define guilt in criminal law are very different from those for establishing liability in civil law. That said, however, the laws of the twentieth century evolved in a process of criminalisation to make a defendant guilty of a crime based on the principles

[22] Hudson, B, 2003, Justice in the Risk Society, Sage, London.

[23] United States of America v Wolfgang Schröder [2007] United States District Court, Alabama Southern District (currently unreported).

upon which liability in negligence is founded. It is axiomatic, therefore, that the modern tort of negligence came first.

Street on Torts presents a good starting point for a definition[24]. The key question which must be addressed in civil law is how the law must reconcile competing interests. The objective of civil law is to compensate the Claimant for the consequence of the unlawful act or omission. The mental element is irrelevant: the civil law confines itself to the question as to whether the defendant was to blame for the consequence which occurred. An act, even though it is malicious, will not incur tortious liability unless the interest violated is protected in tort.

In contrast to the civil law, crimes are wrongs which threaten the well-being of Society to the extent that compensation to the victim is not enough; Society must be protected[25]. Save for offences of strict liability, every crime demands the satisfaction of two elements:

1 The actus reus contains all the elements in the definition of the crime except the defendant's mental element. It is generally, but not invariably, made up of the defendant's conduct and sometimes the consequences of that conduct, as well as the circumstances in which the conduct took place.

2 The Prosecution must also establish the defendant's Guilty Mind, or mens rea. The primary function of the Prosecution case therefore must be to establish the defendant's intention to commit the crime[26]. A result is intended when it is established beyond reasonable doubt as the defendant's purpose - that is, that it was the intended result.

The requirement of mens rea remains the key issue in determining criminal accountability; this most ancient of bastions in criminal law was upheld by Lord Reid in Sweet v Parsley[27], in the presumption that Parliament does not intend to make criminals of people who are not blameworthy for what they did[28], quoting the venerable Brett J in R v Prince[29]:

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[24] Murphy, J, 2007, Street on Torts, 12th ed, Oxford University Press, Oxford.

[25] Allen, C K, 1931, Legal Duties and other Essays in Jurisprudence, The Clarendon Press, Oxford.

[26] See R v Moloney [1985] 1 All ER 1025; R v Nedrick [1986] 3 All ER .1.

[27] Actus non facit reum nisi mens sit rea.

[28] Sweet v Parsley [1970] AC 132, at p 148.

[29] R v Prince (1875) LR 2 CCR 154.

> Upon all the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or mens rea.

The demands made by the requirement of mens rea on criminal liability require some qualification of the general principle, if a person, who does not intend to cause a harmful result, takes an unjustifiable risk of causing it. Such is the foundation of recklessness, in which either the defendant was aware of its existence or, in the case of an obvious risk, the defendant failed to give any thought to the possibility of its existence[30].

The constant factor touches upon the defendant's state of mind. In R v G[31] Lord Bingham articulated the point beyond any doubt that conviction of a serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. Taking an obvious and significant risk by intention or recklessness would satisfy Lord Bingham of a guilty mind but not if the defendant did not perceive the risk. In his words:

> Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.

A succession of cases over decades exposed the need to define just how evidence of the defendant's state of mind should underpin gross negligence, until, in 1995, the case of R v Adomako[32] established that the defendant can be convicted of gross negligence manslaughter in the absence of evidence to his state of mind. In this case the defendant was the anaesthetist during an eye operation on a patient. in the course of the operation the tube from the ventilator supplying oxygen to the patient became disconnected. the defendant failed to notice the disconnection for some six minutes before the patient suffered a cardiac arrest, from which he subsequently died. The defendant was charged with manslaughter. At his trial it was conceded on behalf of the defendant that he had been negligent in the tortious understanding of the word and medical evidence was called by the Crown

[30] See R v Caldwell [1981] 1 All ER 961; R v Lawrence [1981] 1 All ER 974.

[31] R v G [2004] 1 AC 1034.

[32] R v Adomako [1995] 1 AC 171.

that the defendant had shown a gross dereliction of care. The judge directed the jury that the test to be applied was whether the defendant had been guilty of gross negligence. The defendant was convicted.

Hearing the Appeal, the Lord Chancellor, Lord MacKay, referred to the opinion of Lord Hewart CJ in R v Bateman[33] in underpinning his conclusion that the criminal law requires a fair and reasonable standard of care and competence in individuals in the position of Mr Adomako, according to the evidence required to establish liability in the civil tort of negligence. This alone creates a serious problem in the judicial process, for, in civil cases, the Claimant must persuade the Court that it has proved on the Balance of Probabilities the requisites for establishing liability, whereas in criminal cases, the Prosecution must persuade the Court that the case against the defendant is proved Beyond Reasonable Doubt, by applying the evidence to the body of criminal law with all those characteristics special to it; that is, including the mens rea.

As if the mischief in the Court's decision was not clear enough, however, the judge further held that

> …in order to support an indictment for manslaughter the Prosecution must prove the matters necessary to establish civil liability (except pecuniary loss), and, in addition, must satisfy the jury that the negligence or incompetence of the Accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

The judge's observations on the application of civil liability massively outweigh that devoted to criminal liability; but, to summarise the principle in this case, the jury needs to consider whether

- the defendant owed a duty of care to the deceased; and
- he was in breach of that duty; and
- the breach was so grossly negligent that it should be seen as criminal; in Lord MacKay's words:

> …gross negligence…depends…on the seriousness of the breach of the duty committed by the defendant in all the circumstances in which he was placed when it occurred and whether, having regard

[33] R v Bateman (1925) 19 Cr App R 8 (at p12-13).

> to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in the jury's judgment to a criminal act or omission.

The whole issue of the defendant's state of mind, his mens rea for the crime, has therefore been put into the form of an objective test determined by the circumstances and grafted on to the evidential test required for liability in civil proceedings. At least, that is, for manslaughter; the requirements to establish guilt for Criminal Damage bring us back to the logic of the House of Lords decision in R v G, which demanded that the subjective standard should apply; but in the case of corporate manslaughter you need an individual to whom the standard must be applied, and that would not suit Parliament's needs at all.

Ultimately, the yawning gap between civil and criminal liability was, and remains, the burden of proving the essential elements; if put to the test in criminal proceedings, the jury must consider some ethereal concept which criminalises what is essentially a tortfeasor, but in this case is the criminal defendant, and the only way in which the law has developed that, as seen in Adomako, obliges the jury to apply an objective standard to a test for establishing a guilty mind. At the very least, the concept of criminal negligence is vague and open to interpretation; that is, its very definition is subjective. To establish such culpability by an objective test invites its rejection.

Speaking in the London Shipping Law Centre's 8th Cadwallader Memorial Lecture in 2005, Epaminondas Embiricos took the part of advocate for the industry, making a valid point in a critical analysis of the EU Directive on Criminal Sanctions for Ship Source Pollution:

> The term 'serious negligence' is vague, subjective and ill defined. Yet, it is a fundamental principle that criminal law must be clear and specific. Thus, the term 'serious negligence' is legally defective and inconsistent with the global regime. It is imprecise, subjective and lacks clarity and will therefore be most prejudicial to the accused in the climate of public sentiment commonly experienced after a pollution incident[34].

[34] See Transcript of the Eighth Cadwallader Annual Memorial Lecture: The Extra-Territorial Jurisdiction in Criminalisation Cases: Sovereign Rights in Legislation and New Risks for the Shipping Industry, 2005, The London Shipping Law Centre, UCL, London.

If behaviour is to be the subject of control by criminal law, it is essential that the law in question is, at the very least, precise. The Courts must apply the definition of the crime according to the intention of the body that legislated it and, so, they are presented with an exceptional problem when the Intention of Parliament is impossible to fathom in a given circumstance, such as with a term that is vague and whose defining principles were founded on decisions in civil proceedings whose process is different from that in question – as we find in the situation in which the modern law of negligence, stemming from a claim for damages arising out of a bottle of contaminated ginger beer[35] that must be determined on the balance of probabilities according to civil evidence procedures, has driven the criminal law in which criminal evidence procedures must deliver a verdict beyond reasonable doubt. This scenario takes us firmly into the realm of Jurisprudence, which is the foundation stone of good governance. Kelsen expressed the Pure Theory of Law simply[36]:

> As a theory it is exclusively concerned with accurate definition of its subject-matter.

It is against this background that we must consider how Parliament has met the demands of jurisprudence with its legislation for corporate manslaughter.

What normative ethics wanted, and what it got: The Corporate Manslaughter and Corporate Homicide Act 2007

The 2007 Act represents Parliament's intention to avoid the hazards to a successful prosecution illustrated by the Herald and Marchioness casualties. The problem is that the mechanism for this process is dependent upon the very ill which was articulated by Judge Grenade in the Schröder case.

The offence is described in Section 1, by which an organisation is guilty of an offence if the way in which its activities are managed or organised (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. But it is guilty of an offence only if the way in which its activities are managed or organised by its senior management is a substantial element in that breach.

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[35] Donoghue (or McAlister) v Stevenson, [1932] All ER Rep 1; [1932] AC 562.

[36] Kelsen, H, 1934, The Pure Theory of Law, Law Quarterly Review, Sweet & Maxwell, London.

For the purposes of this Act, a 'relevant duty of care' for the shipowner means any of the following duties owed by it 'under the law of negligence', namely a duty owed to its employees or to other persons working for the organisation or performing services for it; a duty owed as occupier of premises; or a duty owed in connection with the supply of goods or services, the carrying on by the organisation of any construction or maintenance operations, the carrying on by the organisation of any other activity on a commercial basis, or the use or keeping by the organisation of any plant, vehicle or other thing. As if that were not enough, it can be understood that duties of care commonly owed by shipowners include the duty owed by an employer to his employees to provide a safe system of work, whether that be shipboard or shoreside, and will include dock workers or others working on the ship. Naturally, duties of care also arise out of the activities that are conducted by shipowners transporting passengers and lawful – as well as unlawful – visitors. A breach of a duty of care by an organisation is a 'gross' breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances; 'senior management' means the persons who play significant rôles in the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities.

The explanatory notes state that this reflects the position under the common law offence of gross negligence manslaughter and, by defining the necessary relationship between the defendant organisation and victim, sets out the broad scope of the offence. Thus, while the common law offence of manslaughter by gross negligence is abolished in its application to corporations, the key mischief of applying the principles of civil liability modified for criminal accountability remains.

Section 8 addresses factors for the jury to consider if it is established that an organisation owed a relevant duty of care to a person, and it falls to the jury to decide whether there was a gross breach of that duty. The jury must consider, for example, whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so, how serious that failure was and how much of a risk of death it posed. Of course, the complexity arises in this respect in that 'failure to comply' must be isolated from 'liability', for the strict liability required in health and safety offences turns the burden of proof on to the defendant to prove due diligence, an alien concept in the establishment of negligence at Common Law, which is demanded by

Section 2(1). As a result, statutory duties owed under health and safety law are not relevant duties for the purpose of the 2007 Act[37].

Subsection 3 allows the jury also to consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it; and to have regard to any health and safety guidance that relates to the alleged breach. The need for expert evidence to enlighten the jury's understanding must be applied to the eye-witness evidence, particularly in the case of a large shipowning company with complex management structures; at least such a prosecution will provide gainful employment to maritime consultants, whose opinions must, yet, be explained with clarity to jurors whose knowledge of shipboard management is unlikely to embrace rapid comprehension. But then subsection 4 states that the jury may still consider any other matters they feel to be relevant – and in a case in which emotive issues are admitted in evidence, such vague guidance presses hard on the concept of fairness, indeed, on the chance of an appeal against conviction if the judge misdirected it.

In order to keep the matter in sharp focus, the Sentencing Guidelines Council emphasised the obligation on the Prosecution to prove each of these elements to the criminal standard required of this Act, as well as pointing out the contrast between corporate manslaughter and strict liability offences enacted under health and safety laws, which require the establishment of a due diligence defence if liability is to be avoided.[38]

The glaring issue, then, compels the Prosecution in a corporate manslaughter case to establish beyond reasonable doubt that the breach of duty of care was a significant cause of death, although it need not be the only cause, while the more modest demands upon an indictment containing health and safety counts allow the Prosecution to establish guilt against a company without having to adduce evidence that injury was caused by the failure to ensure safety; it would then be for the company to establish a due diligence defence. The issue turns on the requirement under corporate manslaughter to establish both a gross breach of duty of care and some senior management failure as a substantial element in that breach, the effect of which demands that the Prosecution will generally need to establish a failure in the management system; by contrast the strict liability raised in

[37] See Ministry of Justice, 2007, A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007, HM Government, London.

[38] Sentencing Guidelines Council, 2010, Corporate Manslaughter & Health and Safety Offences Causing Death – Definitive Guideline, SGC, London.

health and safety offences demands that the successful defendant must show that it was not reasonably practicable with due diligence to avoid a risk of injury or lack of safety. If, in this circumstance, the management failure is at an operational rather than systemic level, then, for example, the Master's negligence may only lead to a minimal failure to reach the standard of reasonable practicability demanded by the Act. In this case the Company will not be held accountable for manslaughter.

For the bewildered shipowner, the serious issue underlying the new Statute can be epitomised in that there need no longer be a causal link between the fatality and the controlling mind of the company; now the Master's behaviour may incriminate their employer even though they are not part of the controlling mind of the company, because the death must have been caused merely by a management failure; it need not even have been the sole cause of death, but if the Master who, after all, plays significant strategic or regulatory compliance rôles in the management of the whole or a substantial part of the organisation's activities, behaves in such a way that their conduct falls far below what could reasonably have been expected, then the shipowner will be guilty of the offence[39]. It must be said, that this introduces an inconsistency with the legal theory which underlies corporate responsibility for the Master's unassailable discretion which is currently enshrined in SOLAS V Regulation 34 and duly amended very slightly in English law by 2011 Regulations[40].[41] If the shipowner is now to be responsible criminally for the exercise of the Master's discretion, then it must logically demand that the shipowner must have the power to override the Master in the exercise of that discretion, which of course offends SOLAS as well as the provisions of Code 5 of ISM[42].

As if to remove any lingering doubt or loophole in the application of the 2007 Act, Section 28 specifically applies the offence to the UK's territorial sea as well as to any UK-registered ship anywhere in the world, whether or not any mishap occurred which led to the foundering of the ship. Overall, the drafting experts made a thorough job of ensuring that the Act would be applied vigorously to the maritime scenario; and there is no doubt

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[39] Ibid.

[40] The Merchant Shipping (Safety of Navigation)(Amendment) Regulations 2011, SI 2011 No. 2978, in force from February 2012.

[41] Of course, while the Master's discretion is unassailable, their personal accountability is not.

[42] International Safety management Code 2002, 5.2: The Company should establish in the safety management system that the master has the overriding authority and the responsibility to make decisions with respect to safety and pollution prevention and to request the Company's assistance as may be necessary.

that companies are understandably shy of exposing themselves any more than is absolutely essential to such a risk. The Master's conduct is not necessarily fatal to the company's position – but the potential for criminal litigation is obvious. For example, there is no doubt that Tasman Orient Line had excellent company standing orders in place in the case of the Tasman Pioneer[43], demonstrating a management system which would successfully pass any test of reasonableness; what would be open to issue, was how the Master's conduct in that case might have incriminated the company had there been a fatality as a result.

The 2007 Act - a matter of Justice

The evolution of the modern law of corporate manslaughter has brought us from the Herald to the case of Cotswold Geotechnical Holdings Limited[44] ('CG').

The case arose out of the death of a geologist who was killed in 2008 when a trial pit in which he was working collapsed on top of him. Alexander Wright was employed by CG as a junior geologist, when he was taking soil samples from inside a pit which had been excavated as part of a site survey when the sides of the pit collapsed, crushing him. In addition to the charge under the 1007 Act, he was charged with failing to discharge a duty contrary to Section 33 of the Health and Safety at Work etc. Act 1974.

The Prosecution case was that CG had failed to update and comply with its own risk assessments, and had failed to take all reasonably practicable steps to prevent the deceased from working in a dangerous way.

By virtue of Section 1 of the Act, the Company prima facie would be guilty if the way in which its activities were managed or organised (a) caused Mr Wright's death and (b) amounted to a gross breach of a relevant duty of care owed by the company to the deceased. The demands of Section 1(3) required that, once this had been established, the Prosecution to prove that the way in which the Company's activities were managed or organised by its senior management was a substantial element in the breach of the relevant duty of care.

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[43] Tasman Orient Line CV v New Zealand China Clays Ltd and Others [2010] 2 Ll R 13. In this case, the Master took the original decision to proceed with the deviation in order to protect the owner's position in maritime commerce, and the first grounding may have involved a mere error of judgment let alone having any criminal culpability; his recklessness did not arise until after the initial grounding, when he tried to protect his own position rather than the owner's.

[44] R v Cotswold Geotechnical Holdings Limited, Winchester Crown Court, 15th February 2011, unreported.

The jury returned a verdict of guilty.

Taking the step beyond the question of liability, sentencing has been addressed, in the guidelines published by the Sentencing Guidelines Council in 2010 which ominously counselled the sentencing judge to look carefully at both turnover and profit, and also at assets, in order to gauge the resources of the defendant. CG arguably escaped lightly with a fine of just £385,000 which was to be paid over ten years at a rate of £38,500 per annum. It was certainly less than the starting point of £500,000 recommended by the Sentencing Guidelines Council - and the plea in mitigation of a shipowner with significant assets and cash reserves might not be received so sympathetically. Not that CG found it particularly sympathetic, but Mr Justice Field concluded:

> It may well be that the fine in the terms of its payment will put this company into liquidation. If that is the case it's unfortunate but unavoidable. But it's a consequence of the serious breach.

Individuals cannot be prosecuted under the Act, and Peter Eaton, the Company's sole Director, was charged separately with the common law offence of gross negligence manslaughter[45]. But there was the rub, as well, for this was clearly a small company, the sort of entity (and the only sort of entity) which had previously been successfully prosecuted under the common law, in which it was easier for the Prosecution to incriminate senior management and their rôle within the Company. A larger company has yet to face prosecution; as a result, the conviction in this case sheds very little light on just how more effective the 2007 Act will be in securing convictions, than the old common law requirement for an individual to be convicted whose causal link with the company's controlling mind can be established. It was, in effect, just as simple as the case of R v OLL and Kite[46].

In November 1994, OLL Limited, an outdoor activity company, and its managing director Peter Kite were convicted of the manslaughter of four students of Southway Comprehensive School in Plymouth, aged between 16 and 17, who died during a canoeing trip in Lyme Regis, Dorset in March 1993. OLL had organised and managed the basic canoe course; but the two instructors who OLL had sent out to sea with the students on the course were

[45] He was also charged with an offence under the Health and safety at Work Act 1974 but, in the event, the Court held that he was too ill to stand trial.
[46] R v Kite and OLL Ltd (the "Lyme Bay" case) Winchester Crown Court, 8 December 1994, unreported.

little wiser than the students, for their expertise had been limited to a three-day training assessment, just one week earlier, in which they had received the basic canoe instructions that they were expected to pass on to the teenagers. They had both been placed in the novice group and were barely competent to undertake the journey themselves, let alone put in charge of the students. Nine months earlier, two experienced instructors had written to the centre about levels of safety and warned that unless standards of safety were improved*, you may find yourselves trying to explain why someone's* son or daughter will not be coming home. They resigned; Mr Kite carried on regardless.

With the inevitability of Greek tragedy, the group was swept out to sea, and subsequently capsized. The Centre had not provided any distress flares and had not informed the coastguard of the expedition. OLL was convicted of corporate manslaughter under the prevailing common law and was fined £60,000. Mr Kite was sentenced to three years imprisonment (reduced to two on appeal); the Centre's manager Joseph Stoddart was acquitted of manslaughter.

The key issue in this study is that size matters. OLL Limited was a small company and proving that Mr Kite was its 'controlling mind' and had acted negligently was easily achieved. CG was an equally small company and the Prosecution would have been able to establish that Mr Eaton had been its 'controlling mind' just as easily as it had been able to prove a 'management failure' resulting in Mr Wright's death. Writing in the Law Society's Gazette on the 3rd March 2011, David McCluskey expressed the sage opinion that the test of the new law has not yet come, and will not come until a large company with a large board of directors, faces prosecution[47].

Such a prosecution, though, is a long time coming. Lion Steel Equipment Ltd is a large company, with capital of some £1.5 million[48], and has been indicted following the death of an employee who fell through the roof of an industrial unit at the company's Hyde headquarters in 2008. The company has also been charged under Sections 2 and 33 of the Health and Safety at Work Act 1974 (HSWA) for failing to ensure the safety at work of its employees.

In addition, three of the company's directors have each been charged with gross negligence manslaughter and also face charges under Section 37 of the 1974 Act for failing to ensure the safety at work of their employees. But

[47] McCluskey, D, 2011, The Law Society's Gazette, The Law Society, London.

[48] Annual Return of Company Information (ARO1) 15 February 2012.

the trial has been scheduled for the summer of 2012. We burn with anticipation.

So far, therefore, analysis of the effect of the new Act upon shipowners can be little more than speculation; but it may be worth speculating with a case study based on a recent casualty. Mature and reflective analysis must await the publication of an accident report before rushing to judgment in the case of the Costa Concordia, which resulted in the deaths of 28 people. When the death toll had reached only six, and before the primary sources of evidence had been analysed, Costa's chief executive, Pier Luigi Foschi categorically put the blame on the Master, emphasising the Master's absolute discretion in matters of navigation (presumably under SOLAS V), although confirming that deviations from the passage plan would be made with company approval during bad weather or if a vessel faced other navigational dangers[49]. Somewhat damningly, Mr Foschi described as rash the Master's decision to showboat the ship within 500 metres of the island of Giglio.

In February 2012, Nautilus International cautioned against such rush to judgment[50] and General Secretary Mark Dickinson emphasised, rather, the importance of addressing safe manning and associated issues of hours of work, competence of crew and training issues, all of which are fundamental points addressed by the STCW Convention[51]. Notwithstanding the corporate manslaughter legislation adopted by Italy in 2008, we need to confine ourselves to the relevance of an intriguing question: what if the Costa Concordia had foundered in UK territorial waters?

By virtue of Section 1 of the 2007 Act, the owner of the vessel would be accountable for corporate manslaughter if the way in which its activities were managed or organised by its senior management – be it a senior director or the Master of the vessel whose responsibility was highlighted by Mr Foschi – caused, or contributed a substantial part in the deaths of the innocent people, and amounted to a gross breach of a relevant duty of care owed by the organisation to the deceased. The relevant duty of care would be that owed by the company under the law of negligence. If the Master, with the absolute discretion at his disposal, had indeed pursued a frolic of his own, contrary to the Company's shipboard management system, then would it be fair that this Company, with its massive size and highly complex

[49] Eason, C, Lloyd's List, 16 January 2012, Informa plc, London.

[50] Anon, Telegraph, February 2012, Nautilus International, London.

[51] International Convention on Standards of Training, Certification and Watch Keeping for Seafarers, 1978, with special reference to the Manila Amendments 2010

management structure, should be held accountable for the deaths of the 28 people on board? Whatever the answer, in order to discharge its function under Section 8, the jury would have to consider, firstly, whether there had been a management failure and, if so, whether the conduct that constituted this failure fell far below what could reasonably have been expected of that management. The evidence which they will consider, however, may be wider than one might expect if its probative value allows them to consider the extent to which there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure, or to have produced tolerance of it, particularly if Convention issues from SOLAS to STCW are held to be relevant.

For the lawyer who must advise shipowners on their corporate accountability under the new 2007 Act, such speculation will, of course, have to wait upon further decisions such as that in Lion Steel, which inevitably will precede the conclusions on evidence in the Costa Concordia casualty. And speculation is always a dangerous thing: but it is intriguing, nevertheless.

Dr. Simon Daniels
Southampton Solent University