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NICOLE CARTER

CORPORATE MANSLAUGHTER:
Using the Criminal Law to Modify Corporate Behaviour

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ABSTRACT

This research paper considers how the criminal law can be used to modify corporate behaviour from both a theoretical and practical perspective. It suggests companies should be able to be indicted for manslaughter and looks at the difficulties that need to be overcome to enable this to happen. First it looks at the current law in New Zealand and suggests that the fact a company cannot be prosecuted for manslaughter is problematic as it limits the responses that can be taken against a company when a death occurs. The paper then looks at the developments that have occurred in this area in the United Kingdom and its two Law Commission Reports.

The final section considers what approach New Zealand should take. In considering this question it draws on the United Kingdom's experience and concludes that the law of manslaughter needs to apply to both corporates and individuals. It suggests that the recent Privy Council decision *Meridian Global Funds Management Asia Ltd* v *Securities Commission* [1995] 3 NZLR 7 will overcome many of the earlier problems experienced when attributing criminal liability to a corporation.

The text of this paper (excluding contents page, abstract and footnotes) comprises approximately 1294 words

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I. INTRODUCTION

A. Should a company be prosecuted for manslaughter?

New Zealand has not yet chosen to address the issue of whether corporations should be criminally liable for manslaughter.[1] However, other jurisdictions have not been so reticent. Companies like individuals, are capable of committing a large number of varied offences and the challenge for the law is how to best hold them responsible for their transgressions. This is particularly important when a company has indulged in risk taking behaviour that has caused others to suffer harm. Companies can be responsible for acts that cause death but in New Zealand this cannot constitute manslaughter.

Individuals have always faced criminal prosecutions if they fail to discharge the appropriate standard of care. Yet a company, often in the pursuit of profits, that fails to discharge the appropriate standards of safety is more likely to find itself subject to regulatory sanctions for breaches of health and safety legislation when a death occurs. These are normally strict liability regulatory offences which are not considered to be felonies. This approach has the effect of decriminalising conduct simply because it has occurred in an industrial setting.

In 1997 a young pilot who had been charged with offences under the Civil Aviation Act 1990 was represented by Les Atkins QC, a former Law Commissioner and member of the 1991 Casey Committee. Mr Atkins has expressed concern that the role of the airlines, aircraft owners and the Civil Aviation Authority are not examined closely enough when pilots are put before the criminal courts following accidents.

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[1]Casey, Report on the Crimes Consultative Committee 1991 and the Report of Sir Duncan McMullin to the Minister of Justice on sections 155 and 156 of the Crimes Act 1961, Wellington 1995. In the last seven years New Zealand's law of manslaughter has been placed under review in two reports the first of which recommended a company should be able to be convicted of homicide in certain circumstances. No action was ever taken on this recommendation. Since then debate has largely centred on what degree of negligence must be proved, either the failure to take reasonable care, or gross negligence. The debate appears to have been largely decided by Parliament's implementation of some of the recommendations of the McMullin Report which increased the degree of negligence required for manslaughter arising from a breach of duty to gross negligence.(Section 2 of the Crimes Act Amendment Act 1997).

Atkins suggests that blaming pilots who survive may help mask the true reasons for a crash and suggests that a crime similar to that of corporate killing proposed by the British Law Commission may be necessary to ensure that justice is done. He suggests that in some circumstances blaming the pilot "... may not only be unjust ... but it may turn eyes away from where the real difficulties are, which may be systems errors or organisational problems which are ultimately the responsibility of the operator."[2]

New Zealand's failure to look at law reform in this area is exacerbated by the fact that Supreme Court first looked at whether a company could be convicted of manslaughter in 1969[3]. The conclusion ultimately reached by the Court of Appeal was that technically such a prosecution was feasible but could not be proceeded with because of the wording of section 158 of the Crimes Act 1961.[4] It did not exclude the possibility of a company being prosecuted as a secondary party although this has not come to pass, nor did it rule out a prosecution taking place in circumstances in which a corporation failed to discharge its legal duties and a death occurred.

However, despite the auspicious beginning New Zealand legislators have chosen not to reopen the issue even when the dictum of Henry J in the Supreme Court was cited with approval in the landmark case *DPP v P & O European Ferries (Dover) Ltd*[5].

Given developments overseas New Zealand needs to look at corporate criminal liability in general and corporate manslaughter in particular. This essay will argue that the offence of manslaughter needs to allow prosecutors to look at the actions of the company and individuals within the company simultaneously and indict accordingly.

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[2] North and South, November 1997, 68.
[3] *R v Murray Wright Ltd* [1969] NZLR 1069, per Henry J.
[4] *R v Murray Wright Ltd* [1970] NZLR 476. The Court of Appeal did not believe the wording of s.158 allowed a corporation to be indicted for a homicide.
[5] *DPP v P & O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72 [*"P & O European Ferries"*]. This case involved the Zeebrugge Ferry which sank claiming nearly 200 lives and established that the crime of corporate manslaughter existed in the United Kingdom.

The preferred way for corporate manslaughter to be introduced into New Zealand is for the law to be amended so that a homicide can be committed by a "person" which includes a corporation rather than by a "human being"[6].

This paper will concentrate on three broad issues which are dealt with in separate sections.

New Zealand's legal response to work related and mass deaths which have involved corporate negligence will be examined in the first section. It will be argued that our approach is no longer practicable given developments in other jurisdictions.

The next section will trace the history of corporate manslaughter. The paper will then look at the recommendations contained in the United Kingdom Law Commission Reports[7] on corporate manslaughter and critically assess whether their approaches are feasible in New Zealand.

The final section looks at how a corporation in New Zealand can be held criminally responsible for its unlawful acts when death ensues and explores the likely impact of the introduction of a company being convicted of manslaughter. Also our approach to corporate criminal liability in light of the recent Privy Council decision *Meridian Global Funds Management Asia Ltd v Securities Commission*[8] will be examined. The paper concludes that the attribution approach advocated by the Privy Council will enable corporates that commit offences and culpable individuals within the company to be held accountable. Then the paper discusses the circumstances in which a prosecution should be taken and the type of penalties which can be imposed. It acknowledges that the issue of whom to prosecute and in what circumstances is an extremely complex one as there is a risk that if corporations are prosecuted, individuals within the company will not be held accountable for their wrongdoing. The conclusion reached is that

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[6] Section 158 of the Crimes Act 1961.
[7] Law Commission Consultation Paper No 139 (1994) UK *Involuntary Manslaughter* ["Law Commission Report"] Law Commission Consultation Paper No 237 (1996) UK Legislating the Criminal Code: Involuntary Manslaughter ["the Second Report"]
[8] [1995] 3 NZLR 7; [1995] 2 AC 500; [1995] 3 WLR 466; [1995] 3 All ER 918 (PC)["Meridian"]

New Zealand needs to review the issue of whether a corporation ought to be held criminally liable for causing a death.

II THE NEW ZEALAND POSITION

A. The problem

The New Zealand public expect a response when there are mass deaths which have occurred due to a company's failure to safeguard members of the public and that response has been to convene a Commission of Inquiry to investigate the incident.[9] The problem is whether that response is still appropriate.

1. Erebus

On 28 November 1979 an Air New Zealand DC 10 which was on a scenic flight over the Antarctic crashed into Mount Erebus killing all 257 people on board. The Chief Inspector of Air Accidents concluded in his report dated 31 May 1980 that the probable cause of the disaster was pilot error. This finding was disputed by the pilots' families and a second investigation, a Royal Commission, was set up to inquire into the causes of the crash. The Commissioner, Mr Justice Mahon, disagreed with the Inspector's conclusion. In exonerating the crew he found:[10]

> "... the single dominant and effective cause of the disaster was the mistake made by those airline officials who programmed the aircraft to fly directly at Mt Erebus and omitted to tell the aircrew. The mistake is directly attributable not so much to the persons who made it, but to the incompetent administrative airline procedures which made the mistake possible."

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[9] Section 2(e) Commissions of Inquiry Act 1908 allows "Any disaster or accidents (whether due to natural causes or otherwise) in which members of the public were killed or injured or were or might have been exposed to risk of death or injury. Section 27 of Health and Safety in Employment Act 1992 allows the Minister of Justice to appoint a District Court Judge who has all the powers under the Commissions of Inquiry Act 1908 to investigate work place accidents.

[10] Report of the Royal Commission into the crash on Mount Erebus, Antarctica of a DC 10 operated by Air New Zealand (1981) para 393 ["The Erebus Report"].

The Commissioner's finding turned on the Flight Operational Centre's failure to communicate the correct co-ordinates to the pilots. In his view no individuals, including the Flight Operations Centre staff, were responsible. Rather it was poor administration systems which made the incident possible. Mr Justice Mahon's report was highly critical of airline management who he accused of being involved in "a pre-determined plan of deception" and "an orchestrated litany of lies."[11] He also criticised the adversarial stance adopted by the airline at the Inquiry of "ascribing total culpability to the air crew."[12]

Air New Zealand was understandably unhappy about the Commissioner's findings and sought to have them set aside. The Court of Appeal ruled that whilst the conspiracy findings were unjustified, there was no appeal against the Commissioner's findings and his conclusions regarding the crash must stand. The Court set aside the now infamous paragraph 377 which referred to "a pre-determined plan of deception" and "an orchestrated litany of lies" on the part of the airline but the majority of the Court of Appeal were not prepared to set aside any of the other paragraphs complained of.[13]

At the time of this disaster New Zealand could only respond with a Commission of Inquiry. The criminal law did not allow, what in my submission would have been the appropriate response, the prosecution of the company and culpable individuals within the company for manslaughter. It is unclear why New Zealand has not debated whether a corporate can be convicted of manslaughter. A Commission of Inquiry is not always an appropriate response to public disasters and the law of homicide needs to be overhauled so that it reflects societal changes and attitudes. What may have been appropriate at the turn of the century is no longer appropriate as we enter a new millennium. Given developments in the United Kingdom the time has come to question whether a Commission of Inquiry is the answer.

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[11] "The Erebus Report" above n 10 para 377.
[12] Appendix to "The Erebus Report" above n 10 .
[13] Re *Erebus Royal Commission, Air New Zealand Ltd v Mahon* (No.2) [1981] 1 NZLR 618, 630.

B. The Criminal Law — Time for a Change?

The first and only prosecution of a company for manslaughter in New Zealand involved Murray Wright Ltd which operated as a chemist shop. In March 1969 Murray Wright Ltd mistakenly supplied the wrong medicine to a customer who subsequently took the dosage prescribed and died. The company was: [14]

> "charged under s.161(b) of the Crimes Act that on or about 29 March 1969 at Auckland it did by an omission on or about 13 March 1969 without lawful excuse to perform or observe a legal duty kill Cornelia Chermane Keepa and thereby commit the crime of manslaughter"

In the High Court Henry J agreed that the definition of homicide in section 158 of the Crimes Act 1961was not wide enough to include a corporate entity but that he considered the approach to be taken in the interpretation of the legislation was a different one: [15]

> The only type of killing of which the law takes cognisance is a killing of one human being by another directly or indirectly by any means whatsoever, but this does not wholly dispose of the question … The killing referred to [in s.160(2)(a), (b) and (c) of the Crimes Act 1961] is **ex facie** a killing by a human agency. There is nothing in that fact which would necessarily exclude a corporation because in all cases of corporate criminal responsibility the responsibility is for the act of some human being. But it is a special kind of human activity which constitutes an unlawful act or an omission … to perform or observe a legal duty … Corporate activities … are acts or omissions of a human being or beings, but if such acts or omissions can also properly be held to be the acts or omissions of the corporate body which is the alter ego of the … persons who do those acts or are guilty of those omissions then there is no reason why the corporate body should not be

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[14] *R v Murray Wright Ltd* [1970] NZLR 476, 479.
[15] *R v Murray Wright Ltd* [1969] NZLR 1069, 1071.

held to be responsible.

Over 20 years later this dictum was quoted with approval and applied in *P & O European Ferries* by Mr Justice Turner to help establish in the United Kingdom that a corporation could be found guilty of manslaughter.

Henry J suggested that if manslaughter in English Law is the unlawful killing of one human being by another human being, and if the person who is the embodiment of the corporation was acting on its behalf when he or she carried out the act or omission that caused the death, then the company as well as the individual can be found guilty of manslaughter. This observation encapsulates what corporate manslaughter is all about, holding the corporation and the people in the corporation who were responsible for the death accountable.

When the case went to trial the jury was unable to agree on a verdict and it was thought prudent before the second trial was held to seek the view of the Court of Appeal as to whether a corporation could be tried for manslaughter. The Court of Appeal held that it could not be and quashed the indictment.[16] Their conclusion was that the definition of homicide in section 158 of the Crimes Act 1961: "Homicide is the killing of a human being by another directly or indirectly by any means whatsoever" was not wide enough to include a corporation.[17]

The Appeal Court judges were not opposed to the concept of corporate criminal liability recognising its emergence in other jurisdictions but they were unanimous that the use of the word "human being" as opposed to "person" [18] in the Crimes Act 1961 prevented a company

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[16] *R v Murray Wright Ltd* [1970] NZLR 476.

[17] Counsel for the accused Mr Davison QC argued forcibly that the words of the New Zealand statute proscribed an indictment for corporate manslaughter unlike s.194(1) of the Canadian Crimes Act which provided that a person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

[18] Section 2 of the Crimes Act defines a "person" as "the Crown and any public body or local authority, and any board, society or company and any other body of persons, whether incorporated or not ... in relation to such Acts and things, as it or they are capable of doing." Moreover, s.6(1) of the Acts Interpretation Act 1924 provides: In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, the expression "person" shall, unless the contrary intention appears include a body corporate.

being indicted for manslaughter.[19]

The use of the word "human being" as opposed to "person" in the Crimes Act is the stumbling block which New Zealand needs to overcome so that a corporate can be convicted of manslaughter. This can be achieved by a simple amendment which would allow the acts of individuals within the company to be imputed to the company and the company to be convicted of manslaughter. The prosecution of a company should not preclude culpable individuals within the company being similarly indicted.

In order to understand why such reform is important it is necessary to look at developments in the United Kingdom.

III CORPORATE MANSLAUGHTER

A. A Historical Perspective

Historically it was not thought possible to punish a company for criminal wrongdoing as a company could not form the necessary *mens rea*, it could not be sent to prison and it could not be charged with a felony which involved personal violence.[20]

Initially corporate crime involved a failure to perform an absolute duty imposed by statute and did not require the courts to determine whether *mens rea* could be imputed to a corporate body. In order that a company could be held criminally responsible for the wrongdoing of its employees and vice versa the doctrine of vicarious liability was introduced. Through the doctrine of vicarious liability individuals and corporations became responsible for each others' acts and companies found themselves convicted of strict liability offences. Workplace deaths tended to be dealt with by health and safety legislation which did not produce the same stigma

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[19] "The fact is that it would have been possible for a differently worded Act to make a corporation amenable to charge of manslaughter, but in my opinion such a charge will not be against a company as the statute is at present worded, except possibly as party under s.66." per McCarthy J 484. "[T]he plain fact is those responsible for the drafting of the Crimes Act 1961 failed to appreciate that in defining "Homicide" a company cannot possible be described as a human being." per Turner J 482-483.

[20] *R v Cory Bros Ltd* [1927] 1 KB 810.

as being charged with a criminal offence. Health and safety offences are strict liability offences. If the facts are proven, vicarious liability can be used to attribute guilt.

1. Direct Liability - The Emergence of the Identification Doctrine

As it became apparent that companies were committing serious crimes, for example fraud and manslaughter, there was a move in the 1940s to directly attribute liability to the corporate body. This meant that direct liability could be imputed to corporate bodies and is what is now known as the principle of identification. The three cases which established that a corporation could be found directly liable for a criminal offence without the doctrine of vicarious liability were *DDP v Kent and Sussex Contractors Ltd* [21], *R v ICR Haulage Ltd* [22] and *Moore v Bresler.*[23] In the first of this trio of cases, which all involved fraudulent wrongdoing, the Court on appeal found the company to be guilty of fraud and rejected the argument that it could not impute the required *mens rea* to the company only to officers of the company. Lord Caldecote CJ said: [24]

> "A company is incapable of acting or speaking or even of thinking except in so far as its officers have acted, spoken or thought ... In the present case the first charge against the company was of doing something with intent to deceive, and the second was that of making a statement which the company knew to be false in a material particular. Once the ingredients of the offences are stated in that way it is unnecessary, in my view, to inquire whether it is proved that the company's officers acted on its behalf. The officers are the company for this purpose."

In the second case the company was held to be guilty of a conspiracy to defraud. Conspiracy to defraud requires *mens rea.* As vicarious liability was not applicable, the company could not

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[21] [1944] KB 146.
[22] [1944] KB 551.
[23] [1944] 2 All ER 515.
[24] [1944] KB 146, 155.

be held liable for the acts carried out by its agents, only the acts which could be directly attributed to it.

In the third case the company was convicted of furnishing false tax returns. The returns were completed by the Company Secretary and General Manager to conceal their own wrongdoing. Despite that the Court held their acts were the acts of the company.[25]

When the second case involving a prosecution of a company for manslaughter *R v Northern Strip Mining Construction Ltd*[26] was heard, nearly 38 years after the manslaughter indictment in *R v Cory Bros Ltd*[27] was quashed, there was no discussion on whether a company could be charged with manslaughter as the defence counsel conceded that the indictment could proceed. The issue had shifted from whether corporations could commit conventional offences to a preoccupation with the conditions of liability necessary to charge a corporation with a criminal offence.

2. The Development of Corporate Criminal Liability

a). Tesco

The catalyst for the development of corporate criminal liability was *Tesco Supermarkets Ltd v Nattrass*[28] in which the House of Lords tried to attribute direct liability to a company by looking at whether the company could be responsible for the price description errors of its employees. Tesco was charged under the Trade Descriptions Act 1968 for wrongly advertising the price of one of its products. Discussion centred on which senior office holders would need to be identified with the company for it to be found guilty of the offence. The majority in the

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[25] [1944] 2 All ER 515, 516 - 517 per Viscount Caldecote CJ.
[26] The Times 2,4 and 5 February 1965.
[27] [1927] 1 KB 810, The indictment was quashed only because there was no precedent for charging a company with manslaughter.
[28] [1971] 2 ALL ER 127.

House of Lords approved the anthropomorphic dictum of Denning LJ in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd,* [29]

> "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 the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands 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 these managers is the state of mind of the company and is treated by the law as such."

Tesco is one of the leading cases in defining the parameters for corporate liability yet the offence the company was charged with cannot be categorised into either a strict liability or direct liability offence. It was a hybrid wherein there was strict liability unless a defence such as due diligence could be made out. The ability to re-categorise offences means it is no longer possible to assume that the liability in regulatory offences will be vicarious.

However it was not until the litigation following the Zeebrugge Ferry disaster in the late 1980s that the issue of whether a corporation could be indicted for manslaughter came before the courts for discussion.

B. Establishing Corporate Manslaughter in the United Kingdom

By the late 1980s, criminal liability could be imposed on a corporate body by vicarious liability (which generally means the offence is one of strict liability) or by direct liability for non-regulatory *mens rea* offences committed by senior office holders.

After *Tesco* it appeared all that should have been required to convict a corporation was to identify one of the company's controlling officers who had the necessary *mens rea*. However,

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[29] [1957] 1 QB 159, 172.

the diversity of company forms and the myriad of defences that could be invoked meant this was not the case.

1. The Zeebrugge Ferry Disaster

In 1989, when the Zeebrugge Ferry sank because its hold doors were left open killing nearly 200 people, there was no offence of corporate manslaughter. However, public pressure over the ensuing eighteen months resulted in prosecutions for manslaughter being brought against several individuals and the company.[30] *P & O European Ferries*[31] was the third case in which a corporation had been put on trial for manslaughter.

During the trial of those indicted as a result of the sinking of the ferry Herald of Free Enterprise in Zeebrugge harbour the trial judge Turner J had to decide the question whether the eighth defendant, the company that owned the ferry, P & O European Ferries Ltd, could be indicted for manslaughter. After hearing extensive argument that traversed two centuries of English law he determined that a company could be indicted for manslaughter and established conclusively that the crime of corporate manslaughter existed in the United Kingdom.[32]

In summing up the developments that had occurred in English law since the Nineteenth Century as companies began to play an ever increasing role in society, he surmised that: [33]

> A clear case can be made for imputing to such corporations social duties including the duty not to offend all relevant parts of the criminal law. By tracing the history of cases decided by English Courts over the period of the last 150 years, it can be seen how first tentatively and finally confidently the Courts have been able to ascribe to corporations a

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[30] In *R v HM Coroner* for *East Kent ex parte Spooner* (1989) 88 Cr App R 10 the findings of the coroner who determined that no indictments could be laid against the company who owned the ferry was successfully reviewed.
[31] *"P & O European Ferries"* above n 5.
[32] Prior to this the doctrine of corporate criminal liability had not recognised that a company could be indicted for a felony as it was thought a company could not receive the appropriate penalty nor form the type of corrupt mind required to do anti-social acts. The advent of the identification doctrine changed this.
[33] *"P & O European Ferries"* above n 5, 83.

> "mind" which is generally one of the essential ingredients of common law and statutory offences.

Turner J rejected defence counsel's argument that the inclusion of the word 'human being' in the definition of homicide precluded a corporation being indicted for murder. He concluded that "where a corporation, through the controlling mind of one of its agents, does an act which fulfils the pre-requisites of the crime of manslaughter, it is properly indictable for the crime of manslaughter."[34]

In reaching this conclusion his Honour considered the dictum of Bingham CJ in *HM Coroner for East Kent, ex parte, Spooner*[35] who in overturning the Coroner's decision not to prosecute either individuals or the company involved in the ferry sinking had not ruled out the possibility of the company being indicted for the deaths and reached the conclusion that: [36]

> "[T]he inclusion in the definition of the expression 'human being' as the author of the killing was either tautologous or, as I think more probable, intended to differentiate those cases of death in which a human being played no direct part and which would have led to forfeiture of the inanimate, or if animate non human, object which caused the death *(deoband)* from those in which the cause of death was initiated by human activity albeit the instrument of death was inanimate or if animate non-human."

He also applied the dictum of Henry J in *R v Murray Wright Ltd*[37] that if a person is the embodiment of a corporation and acts or fails to act on the company's behalf causing a death, both the company and the individual can be found guilty of manslaughter. This dictum captures the essence of corporate manslaughter and is what the law needs to be able to achieve to control corporate risk taking. Unfortunately in 1970 New Zealand's law did not allow that to happen and there has been no change since then.

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[34] *"P & O European Ferries"* above n 5,4.
[35] [1989] 88 Cr. App. R 10, 16.
[36] *"P & O European Ferries" above n 5, 84.*
[37] *R v Murray Wright Ltd* [1969] NZLR 1069.

Despite Mr Justice Turner's decision that the crime of corporate manslaughter existed in British law when the matter proceeded to trial, the prosecution against P & O European Ferries Ltd failed[38]. The jury was directed that there was insufficient evidence to convict six of the eight defendants, which included the company, two directors and a senior manager. The judge took the view that the company's knowledge could be established by examining its director's knowledge through the test: if the ferry's hold was not closed, was there an "obvious and serious risk" that the ferry would sink? He concluded after hearing the evidence of company employees and those working in the industry that there was not an obvious and serious risk. As there was insufficient evidence against any individual defendant identified with the company to obtain a manslaughter conviction there could be no case against the company.

C. Failure of the Prosecution

1. The Identification Doctrine

The main reason for the collapse of the prosecution case was the strict adherence by Mr Justice Turner to the identification doctrine. It now appears that the strict application of the principle of identification, developed to find corporations liable outside the regulatory sphere is paradoxically being used by corporations to escape liability.[39] To counteract this trend and to hold corporates responsible for their acts, a systems-based theory of corporate responsibility has started to emerge which hold corporates responsible for the way they operate their businesses. The need for change was recognised by Lord Hoffman in *Meridian Global Funds Management Asia Ltd v Securities Commission*[40] when he advocated attributing knowledge to a company rather than seeking out the "directing mind" of a company.

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[38] *R v Stanley and Others 1990* (CCC No 900160), unreported — cited in the *"Law Commission Report"* above n 7, 101.
[39] Wells C "A Quiet Revolution in Corporate Liability for Crimes" [1995] New Law Jnl 1326. The first example of this occurred in *Tesco* and in what Wells saw as *"an even stranger twist"* that same appellant in *Tesco Stores Ltd v Brent LBC* [1993] 2 All ER 718 QBD, DC tried to argue that none of its controlling officers knew that a video with an R18 classification had been sold to someone under the age of 18, therefore, the company could not be prosecuted. This argument was rejected by the trial judge on the basis that it was absurd to suggest the knowledge required for a conviction must be that of a controlling officer as if it was no large company could ever commit the offence.
[40] Meridian above n 8.

A fixation by courts on requiring a suitable individual within a company to be guilty of wrongdoing often ignores *"corporate risk taking"* which has been described as the *"corporateness"* of corporate conduct.[41] This concept of corporateness began its life in the Sheen Report[42] into the Zeebrugge disaster which was highly critical of P & O's attitude to safety. It identified a liability which was categorised as a systems-based liability and began a shift in focus from viewing liability as being either vicarious or direct.

The emphasis in systems-based liability is no longer on identification of a culpable individual but on a company's policies or systems[43] to identify corporate blameworthiness. It tries to understand that companies do not always use their powers appropriately and that the criminal law can be an effective mechanism to control them. The advantage of this approach is it recognises that despite the shape and size of the company, a corporate culture exists within which individuals are required to operate and the blame for a particular incident cannot be confined to one or two individuals. This theme has been explored further by the United Kingdom's Law Commission,[44] the Privy Council[45] and the House of Lords[46].

In the House of Lords decision *Seaboard Offshore v Secretary* of *State for Transport ("The Safe Carrier")*[47] the relevant statutory provision required owners of ships to take all reasonable steps to ensure that a vessel is operated in a safe manner. The House of Lords held the offence did not impose vicarious liability on employers for all the acts of their employees.[48] While the House of Lords followed the identification principle in *Tesco* it took an unprecedented step and suggested that the company could be liable if it failed to establish a system for ensuring that the ship was operated in a safe manner. Unfortunately because the prosecution had not led evidence on this it was not able to be taken into consideration on this occasion and the

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[41] Fisse B & Braithwaite J "Corporations Crime and Accountability", Sydney, Cambridge University Press (1993) 19 - 31.
[42] HMS Herald of Free Enterprise, Report of the (Sheen) Court, No.8074, Department of Transport 1987.
[43] Systemic failure was identified by the Cave Creek Inquiry as the pre-eminent secondary cause of the Cave Creek platform collapse in New Zealand.
[44] Law Commission Report and the Second Law Commission Report above n 7.
[45] *Meridian* above n 8.
[46] *Seaboard offshore Ltd v Secretary of State for Transport* ("The Safe Carrier") [1994] All ER 99.
[47] [1994] All ER 99, 104.
[48] In *Seaboard Offshore Ltd v Secretary of State for Transport ("The Safe Carrier")* [1994] All ER 99, the Divisional Court had held that unless a senior employee knew that the ship had set sail with an inadequately briefed Chief Engineer the company would not be liable. This reasoning was also upheld by the House of Lords.

conviction was quashed. The Court signalled that in the future ship owners will need to have an appropriate safety system in place to avoid prosecution. This can only be of benefit to those they employ. This new approach should help prevent direct liability encroaching on matters that can be dealt with by the simple application of vicarious liability.

2. Rejection of the Principle of Aggregation

The rejection of the principle of aggregation in *P & O European Ferries* has made it extremely difficult to prosecute a company as rarely will any individual have the necessary knowledge required for a conviction. The Law Commission Report concluded that one of the reasons the *P & O European Ferries* prosecution failed was because the principle of aggregation had not been applied. In its view the:[49]

> "[P]rinciple (of aggregation) would have enabled the faults of a number of different individuals, none of whose faults would have individually have amounted to the mental element of manslaughter, to be aggregated, so that in their totality they might amount to such a high degree of fault that the company could have been convicted of manslaughter."

In the United States this principle has been used to successfully impute knowledge or intent to a corporation[50]. Company structures often mean that responsibilities and knowledge are distributed throughout a company and unless that knowledge is able to be pooled a successful prosecution will be difficult.

G Slapper has argued that a company's knowledge should not be compared with the knowledge an individual has as companies gain benefits from being able to have many minds

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[49] "Law Commission Report" above n 7, 101. The report also noted the similarities between the aggregation principle and the civil rules which govern the attribution of knowledge to a corporation.
[50] Bergman D "Recklessness in the Boardroom" [1990] New Law Jnl 1108.

pool their knowledge to devise corporate systems, practices and policies. A company benefits from an aggregation of knowledge and should be held accountable for that aggregation of knowledge[51]. This approach is quite unlike that taken in *Tesco* which limits the responsibility of a corporation to the knowledge and actions of senior officials within the company. Anyone further down the chain of command whose actions are subject to the intervention of someone more senior was not held to have the capacity to impute the necessary knowledge to the corporation making it very difficult to secure a conviction.

3. The Obvious and Serious Risk Test

The third reason that can be identified as contributing to the failure to achieve a successful prosecution was that the confusion between gross negligence manslaughter and manslaughter caused by reckless acts was at its height during the *P & O European Ferries* trial.[52] Subsequent cases have moved away from the "obvious and serious risk" test to that of gross negligence. This was allegedly to overcome the problems in the *P & O European Ferries* but it is in some respects a matter of semantics: if the failure to close the bow doors was not regarded as an obvious risk, it is scarcely likely that a person would be found grossly negligent for failing to close them. What the gross negligence test does achieve is to overcome the problem of finding a single person with the required degree of knowledge and instead opens the way for finding a company liable. [53]

It is clear that in the United Kingdom by the late 1980's there was clear dissatisfaction with both the vicarious liability and identification approach and that there was a real need to develop a new model of corporate criminal liability that overcame the problems inherent in the above approaches. This was the challenge that faced the United Kingdom's Law Commission.

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[51] G Slapper "Crime without Conviction" [1992] New Law Jnl 192.
[52] The Court adopted the objective recklessness test "... what the hypothetically prudent master or mariner or whosoever would have perceived as obvious and serious." and found there was insufficient prosecution evidence to justify a conviction. This test was based on Lord Diplock's definition of "recklessness" in *R v Caldwell* [1982] AC 341.
[53] See *Seaboard Offshore Ltd v Secretary of State* [1994] 2 ALL ER 99 and *R v Kite & OLL Ltd*, The Times, 13 December 1994.

D. The United Kingdom Law Commission Reports

1. The Societal Context

One of the precursors for change in the United Kingdom was the number of mass deaths in the area of public transport. In the last 25 years there have been changes in societal and legal perceptions to corporate acts and corporate responsibility when mass deaths occurs. Celia Wells attributes these changes to:

1. Compensation now being sought for incidents which once individuals or fate would have been blamed for.

2. Society's increased awareness of safety issues, and a general scepticism that companies always regard safety as paramount.[54]

As public perception is changing so is the response expected by the public in cases where corporate negligence is apparent. The Law Commission Report was cognisant of this phenomenon when it prepared its first report on corporate manslaughter. It reported that there was: [55]

> "a widespread feeling among the public in cases where death has been caused by the acts or omissions of comparatively junior employees of a large organisation, such as the crew of a ferry boat owned by a leading public company, it would be wrong if the criminal law placed all the blame on those junior employees and did not fix responsibility in appropriate cases on their employers who are operating and profiting from the service being provided to the public."

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[54] Wells Celia "Corporate Manslaughter: A Cultural and Legal Form" (1996) http://wwwcamlaw.rutgers.edu/publications/crimlawforum/vol6 num/wells.html.
[55] "*Law Commission Report*" above n 7, 89.

The New Zealand public has also expressed similar concerns indicating the issues raised in the United Kingdom Law Commission Reports need to be considered here.

If, as I have suggested, the aim of any prosecution should be the indictment of both the company and culpable individuals within the company for the offence of manslaughter, then the approach initially advocated by the Law Commission in its first report is preferable.

2. The First Report

The Law Commission's 1994 Report concluded that the adoption of a gross negligence formula[56] would overcome the need to establish or identify any particular officer of the company as having the *mens rea* required for the offence and allows the emphasis to be placed on a company's attitude to safety.[57] This was to help ameliorate public concern that junior employees who were seen as dispensable by their employers would become scapegoats and the organisational problems that had allowed the tragedy to occur would go unchecked.

The Commission's view was that it was necessary for criminal and regulatory systems to co-exist as the safety of workers could only be achieved by the day-to-day enforcement of safety requirements, not by one or two criminal prosecutions each year. The law of manslaughter should apply to both individuals and corporations[58] but that only the company should be indicted. It did not see it was also necessary to prosecute or incarcerate any

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[56] In *R v Prentice* [1993] WLR 927 the professional conduct of three doctors was examined but only that of Dr Adomako was found to be far below what could be expected of an anaesthetist. Therefore following *Prentice* the Commission considered the expression "gross" negligence to be "vague and undefined" and formulated a two stage test. This test is discussed over the page. Subsequently Dr Adomako appealed and the difficulties have been qualified by the introduction of the following test for gross negligence "The jury will have to decide whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, ..., and was such that it should be judged criminal." [1995] 1 A C 171 at 187. New Zealand has adopted a similar approach see above n 1.

[57] The recent adoption of the gross negligence approach undoubtedly helped bring about the first successful prosecution of a company in *R v Kite and OLL Ltd*; The Times, 13 December 1994 in which a jury found the outdoor company which ran an outdoors pursuits course guilty of the manslaughter of 4 school students whose canoes capsized in the English Channel. The students were found to be ill-equipped and the expedition leaders without the necessary expertise to lead an expedition of that type.

[58] The Commission was aware but choose not to adopt proposals outlined by Fisse B & Braithwaite J in the "Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Sydney LR 468 which advocated a completely new legal regime for corporations in which liability would be determined by the steps taken by the company after the accident to prevent a reoccurrence.

company officials.

This is problematic because if company officials are able to evade prosecution there is little incentive for them to change their behaviour and the criminal law will have failed to modify errant behaviour.

The corporate liability advocated in the case of manslaughter was that the[59]

> "crime of neglect or omission, albeit neglect or omission occurring in a context of serious (objective) culpability. It is in our view much easier to say that a *corporation*, as such, has failed to do something, or has failed to meet a particular standard of conduct than it is to say that a corporation has done a positive act, or has entertained a particular subjective state of mind."

This stance is further evidence of the criminal law not being applied as readily to corporate crime as to an individual's wrongdoing[60] because the criminal law requires *mens rea* or conscious intention on the part of the wrongdoer. Risk taking cannot be applied as readily to corporate actions as to human behaviour.

3. The Proposed Test

It was no longer thought appropriate to label the behaviour as "gross" negligence, instead the focus was placed on the culpability of the accused. The test formulated was that:

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

[59] "Law Commission Report" above n 7, 129.
[60] Bergman D "Weak on Crime—Weak on Causes of Crime" [1997] New Law Jnl 1652, reported that the police and safety authorities do not perceive corporate crime to be real crime and are generally reluctant to prosecute culpable companies even when a death has occurred.

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2. His conduct fell seriously and significantly below what could reasonably have been demanded of him in preventing that risk from occurring or in preventing the risk, once in being, from resulting in prohibited harm.[61]

The first limb of "the proposed test would require ... an investigation of how the company operates to prevent death or injury".[62] The inquiry would then turn to look at the systems a company had put in place to allow its business to run and the way in which it had discharged its duty of safety.

The proposed test would enable the operational structures of an organisation to be examined. The report gave the example of Drs Prentice and Sullman who found themselves working without adequate support in a system which allowed the presence of drugs which were safe and unsafe for lumber injections on the same trolley at the same time.[63] The Court of Appeal concluded that the two doctors' conduct had not fallen seriously and significantly below what could be expected of them but that it did raise questions about the hospital administration.

Under this test even if the conduct met the standards of a particular industry it would not preclude a jury from finding the conduct fell seriously and significantly below what could be expected and that the industry's practise would need to be improved.[64]

The test would only be applied after all other sanctions, such as civil negligence actions, professional condemnation and the health and safety legislation, were considered to be inappropriate for behaviour which was seriously at fault. The purpose of a prosecution was seen as not to censure a corporation but to hold it accountable for a serious criminal offence.

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[61] "Law Commission Report" above n 7, 123.
[62] "Law Commission Report" above n 7, 131.
[63] See *R v Prentice* [1993] 3 WLR 927. In *R v Ramsted*, 12 May 1997, CA 428/96 the Christchurch Crown Health Enterprise ('CHE') appointed a relatively inexperienced British registrar to be the sole Thorasic Surgeon for the region. It could be argued that the CHE's appointment processes rather than just the surgeon where responsible for the death of the patients.
[64] The evidence given in *DPP v P & O European Ferries (Dover) Ltd* [1991] 93 Cr App R 73 by both the employees of the defendant company and those in the industry were that they did not believe there was a risk let alone an obvious one that if the Ferry sailed with it's bow door open it would sink. This was despite the findings of a judicial inquiry in the Sheen Report, MV Herald of Free Enterprise: Report of the Court No.8074, Department of Transport 1987 that *"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 ..."* The Commission believed the two stage test would prevent such an absurd result occurring again.

Under the above test a corporation could not find itself liable by accident but only because it chose to engage in profitable activities where there was a significant risk. Those responsible for the decision making would vary but would be able to be determined as a question of fact. The question that would need to be asked is[65]

> "whether those responsible for taking these decisions should have been (not actually were) aware of a significant risk that those operations, either at their commencement or during their confirmed pursuit, could result in death or serious injury."

With regard to penalty, the authors of the report believed that a monetary penalty and the stigma of a conviction for homicide would be enough to bring home to those who control companies the need to be a good corporate citizen. As the report's emphasis was on the liability of a corporation punitive sanctions such as imprisonment were not recommended for company officers. This means the deterrent value introduced into the criminal law by this approach would be minimal.

The civil principal of attribution was favoured, which would allow individual knowledge or negligence present in different parts of a corporation to be aggregated so that a corporation could be convicted of manslaughter. The doctrine of identification would no longer be relevant to determine those responsible for decision making. If a company owed a duty of care, even if the breach of the required standard was caused by a number of officers, the company would still be found grossly negligent.[66] This approach would mean that it would be possible to bring an indictment against a company if its senior office holders did not know what was going on as it allows the knowledge of several officers within the company to be pooled to enable an indictment to be brought. No longer would companies be able to hide behind poor organisational structures to evade a conviction.

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[65] "Law Commission Report" above n 7, 130.
[66] "Law Commission Report" above n 7, 103.

The Commission's approach is a good one which is readily able to be applied in New Zealand and parallels the approach subsequently taken by the Privy Council in *Meridian*[67]. The test is one which can be applied to individuals at all levels within the company and to the company itself. It is broad enough to allow knowledge to be aggregated or attributed to the company and enables a court to take into consideration any safety systems, practises and policies which a corporation has in place. This approach is a positive advance that enables criminal liability to be imputed to a company by a court lifting the corporate veil and examining the actions of all culpable individuals within the company.

4. The Report's Flaws

One of the aims of the criminal law is to punish conscious wrongdoing. The major flaw with the report is that it does not always view corporate wrongdoing as conscious. Therefore administrative sanctions such as professional condemnation are thought to be appropriate in the first instance. The criminal law is viewed as a last resort in the punishment of corporate wrongdoing, despite the fact that the Commission's stated intention is to apply the same law to both individuals and corporations.

The underlying premise of the Law Commission Report is that corporate wrongdoing is inadvertent and caused by incompetence so it is not as serious as offences committed by individuals. The irony is that administrative thoughtlessness can have just as serious consequences, it can kill, just as individual thoughtlessness can. There is no reason to treat corporates differently. A company cannot not go to prison but its officials can. The criminal law is supposed to be the ultimate deterrent yet a financial penalty as advocated by the Law Commission will not always be enough to convince companies to put in place appropriate

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[67] Above n 8.

safety systems that will prevent tragedies. The proposed offence allows directors to hide behind their company and the company only receive a fine if convicted. A fine may not provide much of a deterrent or incentive to a company to change its ways. A company can only act through its directors and senior management and they need to be targeted too. For a prosecution to be successful it must be punitive enough to bring about change in the corporate environment and encourage the corporate to have as its paramount goal safety not profits.

Any transgressions should see not only the company punished but also the corporate managers and directors who were responsible for the act or omission that caused the tragedy. Smith has argued that the sole advantage of criminal prosecutions over civil ones is the ability to incarcerate and suggests that "there is little point to criminal prosecution of corporates except in conjunction with the prosecution of responsible corporate managers and directors."[68]

E. The Second Report

Following consultation after the publication of its 1994 report the Law Commission substantially altered it's recommendations in a second report published in March 1996.[69] It recommended that a trio of offences replace the crime of manslaughter, reckless killing, gross carelessness and corporate killing. A company would remain liable for the first two offences via the identification route but liable for the third offence only if "management failure" could be established.[70] In order to secure a conviction against a corporation when a death occurred it would be necessary to show that the company's "conduct must have fallen far below what could reasonably have been expected of them in the circumstances"[71]. In determining whether the conduct was culpable the crucial question would be whether the conduct in question

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[68] Smith SL "An Iron Fist in the Velvet Glove: Redefining the Role of Criminal Prosecution in Creating an Effective Environment Enforcement System" [1995] Vol.19 Criminal Law journal 12.
[69] "The Second Report" above n 7.
[70] "The Second Report" above n 7.
[71] Ridley A Dunford L "Corporate Killing - Legislating for Unlawful Death" (1997) Vol 26 Industrial Law Journal 99, 109.

amounted to a failure to ensure safety ***in the management or organisation of the corporation's activities*** (referred to as a "management failure" for short)[72].

The report distinguishes between "management failure" and operational negligence, differentiating between the conduct of the corporation and the conduct of employees. A company can find itself being charged with the offence of "corporate killing" either alone or in conjunction with an individual who would be charged under a separate enactment because "management failure" can still contribute to the cause of death even if an individual's action was the immediate cause of it.

The type of "management failure" envisaged relates to the employers duty to provide a safe system of work which is similar to the common law duty on employers to provide a safe work environment and health and safety legislative requirements. However, its scope is conceivably wider and could include the "failure to provide safe premises or equipment, or competent staff"[73].

The Commission feared the use of the identification principle to determine liability for manslaughter would virtually make a corporation liable every time the acts or omissions of its employees caused a death. Therefore it proposed a separate offence of "corporate killing" specific to corporations.[74] The proposal requires the elements of gross carelessness to be proved against the corporate without using the principle of identification. As a corporation cannot think like a human being it removed the requirement to find that the risk of death or serious injury was obvious to a reasonable person in the accused corporation's position.

An offence of "corporate killing" eliminates "the legal requirement under the present law to

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[72] "The Second Report" above n 7, 100.
[73] "The Second Report" above n 7, 110.
[74] "The Second Report" above n 7. See clause 4(1) & 4(2) Draft Involuntary Homicide Bill. 4.—(1) A corporation is guilty of corporate killing if—(a) "a management failure" by the corporation is the cause or one of the causes of a person's death, and (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances. (2) For the purposes of subsection(1) above—(a) there is a management failure by a corporation if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities; and (b) such a failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual.

identify individuals within the company whose conduct is to be attributed to the company itself"[75]. Whether any jury would ignore the perception of risk that individuals within the company had if the proposal was enacted is still an open question.

Corporate killing appears to be a catch-all offence applicable to both workplace deaths and deaths occurring outside the workplace which are caused either in whole or part by a corporation. The ordinary principles of corporate criminal liability are not applicable to it.

In 1994 the Law Commission was of the view that a fine was an adequate remedy against a corporation for causing an unlawful death. This has fortunately been broadened to allow the court the power to order a convicted company to take steps to remedy the failures which contributed to the death[76].

1. The Second Report's Flaws

The proposals represent contemporary public views on the importance of corporate accountability and the British Government has indicated that they intend to implement the proposals.[77] The Second Report is a bold step to criminalise culpable corporate behaviour by legislation. It attempts to overcome the difficulties in the identification doctrine when it is used to impute corporate criminal liability to manslaughter. The proposal is a pragmatic one which will make it easier to prosecute and convict a corporation and even recommends laying a charge in the alternative under health and safety legislation so that if a jury does not convict a corporation of corporate killing a conviction is still possible.

However, it is not all good news. Wells has suggested that if an indictment can be laid easily against a company it is unlikely that the prosecution will pursue separate charges against

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[75] "The Second Report" above n 7, 100.
[76] "The Second Report" above n 7, 124 -125.
[77] Wells C "*Corporate Killing*" [1997] New Law Jnl 1467.

individuals within the company.[78] This creates a real risk that the company will become a scapegoat for the wrongdoing of individuals within it. No distinction should be made between risk taking that is inadvertent as opposed to advertent. This would not occur if the law of manslaughter was applied as readily to companies as it is to individuals. The criminal law should not be seen as a last resort.

Also, a conviction for corporate killing may not be a simple as the Law Commission believes. If the risk is not perceived as "an obvious and serious one" why would a company devise a system to prevent the risk? It is suggested that a jury would be unlikely to convict a company of failing to safeguard against a risk it was not aware of, or claimed not to be aware existed.

Whilst the Commission has recommended the introduction of a new penalty of corporate probation that will enable the court to make remedial orders, it still has not recommended the use of the ultimate deterrent in criminal law, imprisonment for culpable individuals within the company. In my view without this deterrent corporates will not modify their behaviour.

The creation of a separate offence applicable only to a corporation is a move away from seeing the offence for what it is: manslaughter. If the focus is shifted from the wrongdoing of individuals to the systems operated by the company there is a real risk that the company[79]

> "may come off more lightly as a result of the introduction of a separate corporate offence, than they would under a strategy of extending corporate liability generally by adding a third route based on a organisational or systems model."

In reality there is a very fine line between operational failure and systems failure. For that reason it is preferable to charge both the corporate and culpable individuals within the

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[78] Wells C *"Law Commission on Involuntary Manslaughter: The Corporate manslaughter Proposals: Pragmatism, Paradox and Peninsularity"* [1996] Crim. L.R 545, 550. See also Foerschler A "Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct" (1990) 78. California Law Review 1287, 1290-1 who reports that in the US when individuals and a corporate are jointly charged juries tend to only convict the corporate.

[79] Wells C *"Law Commission of Involuntary Manslaughter: The Corporate Manslaughter Proposals: Pragmatism, Paradox and Penisularity"* [1996] Crim. L.R 545, 550.

corporate with the same offence at the same time.

What needs to be decided is whether to target the company through its directors or the directors through the company. In my view the later is preferable but it is important to remember both need to be targeted. Wells has suggested that it is not always the company that the public wishes to punish but the individuals within the company that have shown a blatant disregard for the safety and wellbeing of others. She writes:[80]

> "Accepting that disasters are more likely to trigger calls for blame, and for criminal prosecutions, it still may not be the separated and dehumanised company on which people have trained their sights. Perhaps it is the directors, those who take the money for making decisions which have far reaching implications for thousands of employees and even more consumers, to whom the blame is being attached."

In my opinion attributing the knowledge of individuals within the company to the company was a step in that direction, it allowed companies to be convicted of manslaughter and the conduct of those within the company to be put under the microscope. The introduction of a separate offence that looks only at systems failure does not achieve this.

Statistics show that it is extremely unlikely that a company will be prosecuted under health and safety legislation in the United Kingdom for a workplace death and there is little reason to think this would change if an offence of corporate killing was introduced.[81]

Wells has expressed a concern that a separate offence may "lead to more marginalisation of corporate killing rather than less".[82] To some extent marginalisation has already occurred by treating workplace deaths as accidents under health and safety legislation and there is a real risk that the introduction of a separate offence of corporate killing will only exacerbate that trend.

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[80] Wells C *"Corporate Killing"* [1997] New Law Jnl 1467, 1468.
[81] Bergman D "Weak on Crime—Weak on Causes of Crime" [1997] New Law Jnl 1652.
[82] Wells C "Law Commission on Involuntary Manslaughter: The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity" *[1996] Crim. L.R 545, 553.*

Ultimately a separate offence under either health and safety or criminal legislation is not what is needed. Wrongful deaths need to be treated as manslaughter, investigated and proceeded with accordingly. A new offence should only be considered if a company cannot be convicted of manslaughter. Given the relatively few prosecutions to date I do not believe we have yet reached that position.

F. The Prosecution of a Company for Manslaughter

To date the only successful prosecutions of a company for manslaughter in the United Kingdom and Australia are *R v Kite & OLL Ltd*[83] and *R v Denbo Pty Ltd*[84] which have both involved companies in which the directors are also responsible for the day-to-day operations of the company. This suggests that it is easy to obtain a conviction when the company is very small and the company structures are not diffuse. The prosecution of a small company is more likely to be able to target the actual perpetrator of the wrongdoing in conjunction with the prosecution of the company. In the above cases the director and the company were initially charged with manslaughter.

The Australian company Denbo Pty Ltd operated an earth moving firm which was found to have been criminally negligent in causing the death of one of its employees. The company (run by a father and son) knew that its truck had faulty brakes; yet it allowed its employee to drive it. The brakes failed and the truck overturned pinning the employee underneath.

Originally the company and one of its two directors were charged with manslaughter, however in exchange for a guilty plea from the company the charges against the director were dropped.[85] The trial judge imposed a fine of $120,000 (the only penalty being a fine not exceeding $180,000) on the company in the full realisation that it would not be paid as the

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[83] The Times 9 & 13 December 1994.
[84] *R v Denbo Pty Ltd & Timothy N Nadenbousch* (Supreme Court of Victoria, Teague J, 14 June 1994).
[85] In addition the director faced two charges under the Occupational Health and Safety Act (1985) for which he was fined $10,000.

company had gone into receivership one month before the trial.

The conviction of the company for manslaughter initially appeared to be an uncontroversial decision.[86] However, the extensive use of prosecutorial discretion in determining which party charges would be laid against and the fact a monetary penalty was imposed on the company that was not paid indicate that on this occasion the criminal law did not achieve its stated aim of deterrence, which is of paramount importance to deter future offenders.[87]

The Crown has been criticised for taking the path of least resistance in proceeding with the charges against the company: [88]

> "If company directors are able to reallocate liability during pre-trial negotiations onto a corporation, dispersing any penalty amongst the shareholders of the company, this not only diminishes the deterrent effect of the punishment, but ultimately shifts it on to those who may be entirely innocent."

In order to avoid the situation where either the company or individuals are seen as expendable prosecutions for manslaughter need to be brought against both the company and responsible individuals within the company This should prevent one being offered as a scapegoat so that the other can avoid prosecution.

In the second case of *OLL Ltd*, the company and its managing director faced charges as a result of four teenagers losing their lives when they drowned on a canoe trip organised by the company. Both accused were found guilty on four counts of manslaughter, the company was fined £60,000 and the company's manager was sentenced to three years imprisonment. The company put profits before safety. Its failings included: no first aid kits, flares, or spray decks to keep out the water, not checking on weather conditions and employing inexperienced

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[86] *R v Denbo Pty Ltd & Timothy N Nadenbousch* (Supreme Court of Victoria, Teague J, 14 June 1994)
[87] Chesterman S "The Corporate Veil, Crime & Punishment: *R v Denbo Pty Ltd*" [1994] Melb U LR Vol 19 1064, 1065.
[88] Chesterman S "The Corporate Veil, Crime and Punishment: *R v Denbo Pty Ltd*" [1994] Melb U LR Vol 19 1064, 1070.

instructors.[89] This appalling catalogue of shortcomings caused the students to be in the water for over four hours before rescue crafts appeared by which time four students had drowned.

These two cases indicate that it is possible to impute criminal liability to a company in conjunction with prosecuting individuals within the company. In *OLL Ltd* the company and the director were prosecuted and convicted of manslaughter which in my opinion is the result that needs to be achieved when a company and its organisational systems are responsible for a wrongful death. As a result of the prosecutions these companies went out of business and no longer continue to trade. Ongoing public safety was not an issue. It is probably fair to say these companies are not the ones the public want to see held accountable, the large household name companies that have frequently shown a complete disregard for the safety of the public and their employees and which continue to trade despite the havoc they have wrecked. That is precisely the type of company that has proved elusive to prosecution, "the big corporate names which people may want to blame are those which are most difficult to target under the identification rule (or possibly any other)".[90]

IV. A WAY FORWARD

A. The New Zealand Dilemma

Erebus was not the last time in New Zealand that a company and it's management managed to evade criminal charges. When a viewing platform collapsed at Cave Creek near Punakaiki, killing fourteen people, the response of the Government was to again set up a Commission of Inquiry. It found neither the Department of Conservation nor its employees were negligent, despite the fact they had not acted competently or in an appropriate manner. The Commissioner determined that it was not within his brief to determine if any individuals should

[89] There is a full discussion of this case, including the evidence given at the trial in *Slapper G* "The Corporate Body", Gazette (1995) 92/07.
[90] Wells C *"Corporate Killing"* [1997] New Law Jnl 1467, 1468.

be prosecuted under criminal law. Instead the focus of the report quickly moves from identification of the dominant cause of the collapse (not building the platform in accordance with sound building practice) to the secondary causes of the collapse which included failure to provide guaranteed engineering input into the design, poor management systems and lack of inspections. There appears to have been no true accountability for the deaths assigned to the Department of Conservation which built the platform, despite the Commissioner's conclusion "that substantial systemic failure was the pre-eminent secondary cause of the collapse."[91]

No individual or corporate body has ever faced charges over the platform collapse. This has been the subject of much criticism.[92] It appears to many observers that fourteen young people can simply fall to their deaths because of a poorly constructed platform and no one is held legally responsible or accountable.

B. A Possible Solution

1. A Systems-Based Approach

What the two Commissions of Inquiry indicate is that the deaths were not solely attributable to the actions of the employees directly involved and that underlying organisational dysfunction was largely responsible for the tragedies.

Whenever there is a death for which a company appears responsible the investigation needs to look at more than just the actions of those involved, the company's operational structures need to be examined. The two-stage test proposed by the first Law Commission Report[93] permits this type of inquiry to be carried out before any company is convicted of manslaughter. It requires an investigation into how a company operates to prevent accidents and at the systems

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[91] "Report of the Royal Commission. The Collapse of a Viewing Platform at Cave Creek Punakakai on the West Coast on 28 April 1985 (report dated 10 November 1995) NZ 77.
[92] Hunt G "Scandal at Cave Creek: A Shocking Failure in Public Accountability" Waddington Publications 1996, Auckland.
[93] "Law Commission Report" above n 7.

it has in place to achieve that goal.

The approach taken by the two Commissions of Inquiry confirm that the two stage test proposed in the Law Commission Report would have been appropriate for New Zealand, at the time of each disaster and remains equally appropriate at the present time.

In the case of mass death New Zealand has resorted to a Commission of Inquiry which does not have the ability to punish the wrongdoer(s). This is not a satisfactory resolution for the victims families and as has been seen the Commissioner's findings in the Erebus crash were reviewed prolonging the horror as Air New Zealand management tried to ensure the company's good name was untarnished. It is possible to prosecute a company under the Crimes Act 1961 for a wrongful death but a conviction under those sections or under health and safety legislation does not attract the same stigma as a conviction for manslaughter.

If a Commission of Inquiry indicates that there are systemic or organisational failures that caused a death then a further investigation needs to take place and those responsible need to face charges if their conduct is below what could be expected in the circumstances. This would require the intervention of the criminal law as a Commission of Inquiry's powers are limited to making recommendations. To ensure responsibility is apportioned correctly the post Commission of Inquiry investigation would need to examine whether the actions of the company, it's directors, senior management and employees constituted manslaughter. The law needs to be changed to enable this to happen.

Currently in New Zealand the response when a corporation causes a death is most likely to be an investigation under the Health and Safety in Employment Act where the chance of a prosecution being brought is slight.

C. Health and Safety Legislation

In New Zealand the Health and Safety in Employment Act 1992 ('the Act') deals with workplace accidents and deaths. Other jurisdictions have similar enactments. The legislation is regulatory and requires an employer's compliance. Prosecutions under the Act are the exception rather than the norm as the Act's aim is to educate employers and to bring about higher safety standards. When the Act was first introduced Courts were lenient but that 'honeymoon period' is now over and fines under the Act have increased.[94] However the maximum which a company can still be fined for causing the death of an employee is $100,000.[95] One of the reasons for this is that prosecutions under regulatory legislation are still considered quasi criminal and not considered as serious as those that are criminal. Further the language used in the legislation is rather vague, lessening the impact of strict liability.[96] As a result a charge does not really reflect the seriousness of what has occurred. Moreover Occupational Safety and Health ('OSH') inspectors do not have the same powers as the police to conduct an investigation.

Prosecutions have dropped by a third for workplace fatalities at the same time as workplace fatalities are on the increase. It has been estimated that each year in New Zealand 650 people die as a result of work related accidents.[97] This is approximately ten times the number investigated by OSH, around one person per week and does not include maritime, transport and mining fatalities nor work related road fatalities or occupational disease. Figures released by OSH indicate a 25% increase in fatal injuries in the 1997-98 year from 1996-97.[98] However, prosecutions for workplace fatalities have steadily fallen — from 34% in 1995 to 16% in 1996-97 to a provisional 11% for the year ended March 1998. These figures combined

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[94] Department of Labour 1996 prosecution statistics indicate that the highest fine to date has been $30,000.
[95] Section 49 Health and Safety in Employment Act 1992.
[96] Part II of the Health and Safety in Employment Act 1992 talks of taking "all practicable steps" to ensure the safety of employees.
[97] NZCTU Health and Safety Update June 1998. This figure includes those investigated by OSH plus those involving water mines and air, road deaths and occupational disease.
[98] OSH, 1998 The State of New Zealand's Occupational Safety and Health. *Stirling P* "Deaths on The Job — The Number of Workplace Deaths is Rising but Prosecutions are dropping. Is OSH Doing It's Job?" Listener June 6, 1998.

with an average fine of $4,023[99] under the Act do not provide much of an incentive for employers to provide the safe work environment which is supposed to be the aim of the Act. The trend reported in the United Kingdom of a reluctance by the authorities to prosecute in the case of workplace deaths[100] is also apparent in New Zealand. Whether this would be changed by allowing a corporate to be charged with manslaughter is uncertain but it would send a strong message to companies that the New Zealand public will not tolerate sloppy safety practices.

D. A Law Change

The law in New Zealand needs to change to enable a corporation to be liable for manslaughter when there has been a wrongful death. There are three ways in which this can occur. First the Court of Appeal can overturn its decision in *R v Murray Wright,*[101] second our current law can be amended so that a homicide can be committed by a "person" which includes a corporation[102] rather than a "human being" or thirdly, a new and separate offence can be created specifically covering corporations.

The second approach is preferable as it treats a wrongful death as what it is manslaughter. It makes no distinction between a wrongful act committed by a company or an individual. In my submission the approach taken in *Meridian* has overcome most of the problems experienced in *P & O European Ferries* and would enable a corporation to be convicted of manslaughter if our law allowed it.

The way ahead is not easy, any change would require the concerted efforts of politicians and all those involved in the justice system.

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[99] Department of Labour Prosecution Statistics. 4 November 1997 reported in Horn et al Employment Contracts Wellington, Brookers 1991.
[100] Bergman D "Weak on Crime—Weak on Causes of Crime" [1997] New Law Jnl 1652.
[101] *R v Murray Wright Ltd* [1970] NZLR 476, An indictment is unlikely to be brought against a corporation as the law currently stands to enable an appeal to be taken.
[102] Section 158 The Crimes Act 1961.

E. THE ATTRIBUTION APPROACH

For New Zealand the leading case on corporate criminal liability is the recent Privy Council decision *Meridian Global Funds Management Asia Ltd v The Securities Commission*[103] which rejected the identification approach and suggested that "a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company."[104]

The New Zealand Court of Appeal[105] had earlier contended that for the purposes of establishing the company's knowledge the acts of Mr Koo, a Director and the Chief Investment Officer were to be identified as those of the company. The Court followed the approached taken in *Tesco*[106] whereby a company is held to have the knowledge of the person who is the "directing mind and will"[107] of the company. The Court viewed Mr Koo as being the *alter ego* of the company and held the company was bound by Mr Koo's knowledge of the acquisition of shares contrary to section 20 of the Securities Amendment Act 1988 even though its Board of Directors had no knowledge of the transaction. Mr Koo was not part of the senior hierarchy but he had the autonomy to buy and sell shares without direct supervision.

On appeal, Lord Hoffman who delivered the judgment of the Privy Council concluded that the primary rules of attribution are a company's constitution, namely, its articles of association. These rules are supplemented with the general principles that apply to individuals including agency and vicarious liability. However, their Lordships foresaw that there could be situations where a particular rule of law excluded attribution[108]

> "In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of

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[103] *Meridian* above n 8.
[104] *Meridian* above n 8, 12
[105] *Meridian Global Funds Management Asian Ltd v The Securities Commission* [1994] 2 NZLR 291.
[106] *Tesco Super Markets Ltd v Nattrass* [1972] AC 153; [1971] 2 All ER 127.
[107] From the famous speech of Viscount Haldane L.C. in *Lennard's Carrying Co. Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713.
[108] *Meridian* above n 8, 12.

> mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

The judgment indicates a movement away from anthropomorphism and the identification of senior individuals within the company who had the requisite knowledge and now makes it necessary to examine the functions carried out by employees at all levels within the company. Previously the criterion dictated that the person with the desired level of knowledge would, almost invariably, occupy a senior position within the company.

In the end the Privy Council saw the ultimate test as being [109]

> " ... a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company."

Previously the application of the identification doctrine had led to no person or organisation being identified who had the necessary knowledge to be held accountable for acts which were clearly culpable[110]. This new approach takes into account the diversity of company organisational structures and is prepared to attribute the acts of individuals at all levels within the company to the company which means it will no longer be as easy for companies to elude prosecution as it was under the direct liability test.

The approach advanced by the Privy Council can assist our understanding of when and how corporate criminal liability will be imposed. It suggests that the acts of a company are merely the acts of individuals within the company and the acts of those individuals are attributable to the company. Companies are diffuse beings. They range from sole traders to global traders, yet all have the propensity to commit criminal acts and they should not be able to avoid

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[109] *Meridian* above n 8, 16.
[110] *P & O European Ferries* above n 5.

prosecution because no individual can be identified who has the requisite knowledge to enable a prosecution to succeed. From a practical perspective prosecutions should be easier as this approach takes into consideration the wide diversity of organisational structures that exist within companies. A company can no longer feign ignorance about the actions of its agents and employees as it is deemed to have that knowledge whether it was aware of their actions or not. Constructive knowledge not actual knowledge is what is important.

The most significant aspect of *Meridian* is that, providing a statute allows a company to be convicted of manslaughter, the acts of individuals at all levels within a company can be used to impute criminal liability to a company.

F. The Application of Attributed Liability

In both New Zealand and the United Kingdom the attribution approach to corporate criminal liability is applicable to both criminal offences and offences committed under health and safety legislation.[111] To date in New Zealand *Meridian* has only been argued in two interlocutory matters that have involved criminal charges against the same company.

In *R v Tranz Rail Ltd*[112] Tranz Rail was charged under sections 145 and 156 of the Crimes Act 1961 and made an application to be discharged under section 347 of the Crimes Act 1961. This case concerned a child who had been travelling on one of the accused's trains who was seriously injured when a safety rail on a viewing platform between the carriages gave way. Doogue J applied the attribution test in respect of both acts and omissions carried out by the company. In discharging the company in respect of the indictment for criminal nuisance he held that: [113]

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[111] Previously the identification approach exemplified in *Tesco* had been applied to determine corporate liability. See *Department of Labour v Winston Jacob* 19/9/94, Morris J, Auckland AP 170/94.
[112] (15 December 1996) unreported, High Court, Wellington Registry, T1/96.
[113] *R v Tranz Rail Ltd* (19 January 1996) unreported, High Court, Wellington 12-15.

> There was no evidence to establish beyond reasonable doubt that there was an inadequate safety audit system as alleged by the Crown. There is no suggestion the accused knew of the dangers. What is said is that it should have done so. The omission relied upon in this case is not the absence of handrails, where the consequences may be obvious, but a failure to have a system of checks which may have identified the unsafe, unauthorised system adopted for the attachment of handrails to rolling stock, of which the accused had no knowledge.

The next case involved an interlocutory application by Tranz Rail for further particulars in which Gallen J held that he was bound by the Privy Council decision in *Meridian*. The main reason he was prepared to order further particulars was "that the accused is a corporation and questions arise as to the basis on which it is contended corporate liability arises as distinct from the position of individuals."[114]

Further particulars were required to be given about how Tranz Rail omitted to provide or maintain its safety systems which were alleged to be defective. However, His Honor refused to make an order requiring further particulars which would give the names of persons and the specific obligations that they had allegedly failed to meet, as it was possible post *Meridian* for a defence to be brought without that degree of information. He held that: [115]

> The further particulars should be expanded to include in what respects it is contended that the accused omitted to provide or maintain the systems which are said to be defective ... there is a distinction between cases of omission and commission, that the obligation which is imposed on the accused under the provisions of s.156 is such that it is sufficient for the Crown to allege that that obligation was not met and that it is unnecessary, indeed it may well be impossible, for the Crown to set out in such detail as to include the names of persons responsible for the implementation and devising of systems in the way which Mr

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[114] *R v Tranz Rail Ltd* (19 January 1996) unreported, High Court Wellington 5.
[115] *R v Tranz Rail Ltd* (19 January 1996) unreported, High Court, Wellington 10-11.

> Smith contends. In my view the decision of the Privy Council in **Meridian** is such that it emphasises that there can be an obligation which rests on a corporation itself and that it is for the corporation to ensure that that particular obligation is met ... actions or failures of particular persons were under scrutiny and those such as this where there is an overall responsibility on the company which it is the contention of the Crown was not met.

The Tranz Rail decisions make it clear that in New Zealand following *Meridian* it should be easier to attribute liability to a corporation as the attribution approach does not necessarily require the indictment to identify the individuals who had the necessary knowledge or who failed to meet the imposed obligations.

The Tranz Rail indictment indicates a new willingness to prosecute companies under the criminal law when their acts have resulted in members of the public being injured. It is a step in the right direction. The actions of the company hierarchy and their attitudes and policies regarding employee and public safety need to be examined. Managers who receive remuneration for making decisions about safety also need to also be held accountable as their actions or oversights can cause deaths if they put profits first. The current legal definitions do not allow this to happen and they need to be reviewed as there is limited value in prosecuting a company alone.

Tranz Rail is a nationally based company, the type of company that has proved difficult to bring manslaughter charges against in other jurisdictions. In New Zealand companies can be charged with other offences when a wrongful death or injury occurs such as criminal nuisance and failing to operate machinery safely. Following the Tranz Rail cases it is no longer necessary to identify an individual within the company who has the necessary knowledge nor is it necessary to identify a director or manager who knew of the operational deficiencies in order to obtain a conviction.

A separate prosecution can be brought against either employees or directors if they were responsible for the incident or had responsibility for overseeing that particular sphere of activity.

After *Meridian* to attribute liability to a company the fault has to be attributable to the actions of the company's management or employees. However, merely prosecuting the company will not promote voluntary compliance with high safety standards. Lower level employees like pilots, deckhands and railway workers' safety is often placed at risk by being required to work within the safety parameters dictated by management. If management is responsible for failing to create a corporate culture that has effective internal compliance mechanisms they also need to be targeted as this will be what ultimately deters individuals within companies from allowing unsafe practices to occur.

G. Who to Prosecute?

1. The Behavioural Perspective

From a behavioural perspective it is difficult to prevent misconduct if only the company is prosecuted. Many individuals will have a personal interest in preventing a demotion or dismissal and pursue a course of action irrespective of the potential cost of litigation to the company. This risk taking behaviour can be explained in part by the low level of detection and prosecution of corporate crime. It is only when the potential costs of likely litigation to a company outweigh the expected benefits of its action or failure to act that a company has an incentive to change its mode of operating.

Some individuals are risk takers and need to be controlled. Unfortunately shareholders and directors are not always able to exert the necessary control. In those situations the law needs to intervene.

The police rarely investigate or prosecute companies for poor safety systems, so a company's managers may perceive there is little risk of apprehension or conviction. So the fear of prosecution may not be as great as the fear of dismissal if the company does not perform. An individual is most likely to be deterred if the pecuniary loss to the company exceeds any personal gain that he/she can reap.

2. The Economic Perspective

The Chicago School of Economics advocates punishing the company not the individual. It believes if penalties are imposed on a company that are severe enough it will take action to prevent conduct by its agents for which it would be ultimately responsible. This perspective enables senior managers to escape incarceration, and the burden of penalties to fall on employees further down the chain of command and on to shareholders and employees.

It is only when the expected punishment cost exceeds any gains that there is incentive for a company to alter its behaviour. Bergman has suggested the imposition or risk of large fines may force shareholders to scrutinise a company's safety record more carefully for fear of reduced profits. In turn this may make directors improve their safety standards.[116] No longer would shareholders benefit if money is not expended on safety systems.

3. The Company or the Individual?

a) The Company

What the Erebus disaster and the Zeebrugge disaster a decade later have in common is the willingness of the senior management of the respective companies to place all responsibility for the accidents on the employees at the scene who were seen by the company as expendable.

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[116] Bergman D "Corporate Sanctions and Corporate Probation" [1992] New Law Jnl 1312, 1313.

The Chairman of P & O, Sir Jeffrey Stirling, publicly stated that he saw the responsibility for the disaster lying squarely with those on board the ferry despite the findings of the official inquiry which found management did not have in place adequate safety procedures.[117] This reaction was identical to the stance adopted by the senior management in Air New Zealand, who in Mr Justice Mahon's view, were prepared to hold the dead pilots solely responsible for the accident.

These two examples demonstrate the lengths a company will go to ensure blameworthiness is not attributed to the company or to the senior management within the company. There is a willingness to sacrifice the "hands" of the company in the hope prosecutors will not go after the "mind" of the company or the company itself, "very large firms view middle managers as a fungible commodity that can be sacrificed as convenient scapegoats and easily replaced." [118]

b) The Individual

Conversely in smaller companies like Denbo Pty Ltd and OLL Ltd where it is difficult to distinguish between the acts of the company and the acts of the director, the director is more likely to allow the company to be convicted if it means that he or she does not face any charges. That was the approach taken by Mr Nadenbousch from Denbo Pty Ltd and one can only assume Mr Kite (who was sentenced to three years imprisonment) would have exercised a similar option if it had been offered to him.

Corporate criminal liability needs to ensure responsibility for a company's actions are apportioned correctly. The dogged pursuit of low ranking employees as currently happens will not make organisations and those in charge of them behave more responsibly that will only come if the organisation and senior personnel personally face punitive sanctions.

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[117] Reported in Fisse B, Braithwaite J "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism & Accountability" Sydney L R 468, 497.
[118] Coffee JC "No Soul to Damn: No Body to Kick" An Unscandalised Inquiry into the Problems of Corporate Punishment (1981) 79 Michigan Law Review 386, 410. Coffee argues that in America with the plea bargaining system there are economies of scale obtainable by simultaneously pursuing both the individual and the company.

Braithwaite reports that in pharmaceutical industry some companies have set up their structures so that there is a vice present responsible for going to jail.[119] This example demonstrates the extremes a company will go to prevent its senior personnel being held accountable. It also demonstrates how difficult it can be, especially if a suitable sacrificial lamb is held out, to determine who a prosecution should be brought against.

c) The Company and the Individual

Neither a corporation nor an individual should be allowed to become a convenient surrogate in a prosecution if it prevents liability being attributed to those who should be held accountable. A successful manslaughter prosecution needs to be able to target not only the company but culpable officials in the company who were in a position to implement appropriate safety procedures and omitted to do so. This sends a strong message to those with the necessary authority that the failure to devise and enforce suitable safety standards will be at their peril. In my view if liability can be evaded this will not be achieved.

H. Penalties

The ultimate goal of any prosecution needs to be to ensure that those responsible are held accountable[120]. A company is often perceived as being responsible for the death but the prosecution of a company does not always punish or deter those individuals in the company whose acts or omissions have caused the death.

The reason a penalty is imposed on a company is because its systems have failed to operate as they should. The sanctions imposed are to punish, rehabilitate and deter corporate offenders. Unlike the wide range of penalties available to a court in the case of an individual offender, the sentences imposed on a company have largely been restricted to fines. The imposition of a fine

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[119] Reported in Fisse B, Braithwaite J "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" Sydney LR 468, 497.
[120] Wells C, "The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility" [1988] CRIM.L.R. 788, 798. Wells reported that the relatives of the Zeebrugge disaster did not want the ship level operators to take the blame for management's failure.

on a company will not necessarily prevent recidivism for as Coffee put it "when the corporation catches a cold, someone else sneezes".[121] Punishment of a company with a large fine may in fact have negative consequences. If the fine is too high there is a risk that the company will go into receivership to avoid having to pay the fine. This could mean workers lose their employment or the cost of the fine is transferred to shareholders or the public.

The literature abounds with sentencing options including equity fines, community service and dissolution[122]. However, the two most practical options are fines and corporate probation. Corporate probation cannot be lightly dismissed. It has been used in the United States since 1987. This type of sanction targets those involved in a company's decision making process, while having minimal impact on shareholders and employees. For it to be fully effective the court needs to have a full pre-sentence report (perhaps prepared by a consultant) of how the company operates and how its operations could be improved.

Corporate probation allows judges to compel a company to make changes to improve a company's safety standards. Unlike a fine which only has an economic impact on a company corporate probation forces a company to change the way it operates and punitive prohibitions can be imposed on management. Depending on the order made the company's reputation may be diminished in the eyes of the public. A positive side effect of all prosecutions is adverse publicity which can have a negative impact on both a company and management. Any criticism that emanates from a judicial source cannot be easily dismissed and the unwanted publicity can have a very negative impact not only on a company's profits but on an individual's future advancement.

If, as suggested, both the company and culpable individuals within the company should face charges, imprisonment remains as a sentencing option. If a wrongful death has occurred then

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[121] Coffee J C "No Soul to Damn: No Body to Kick" An Unscandalised Inquiry into the Problems of Corporate Punishment (1981) 79 Michigan Law Review 386, 401.

[122] See Fisse B, Braithwaite J: "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Sydney L R 468.

the ultimate deterrent available in the criminal law, incarceration, may need to be imposed to ensure that the penalty is commensurate with the offending.

V. CONCLUSION

Ultimately it will be a matter of political will whether the issues of corporate criminal liability in relation to unlawful deaths are the subject to review. The New Zealand Government has shown a marked reluctance to examine this area preferring to rely on health and safety legislation and Commissions of Inquiry. Yet as other jurisdictions grapple with the thorny issues of holding a company criminally accountable for their actions so ultimately must we. The two United Kingdom reports comprehensively cover many of the problems in this area and chronicle in detail the litigation surrounding the Zeebrugge Ferry disaster which was instrumental in bringing about reform. The United Kingdom's Law Commission chose not to examine in any detail the law relating to corporate criminal liability in other jurisdictions however, it would be unwise for us to make the same mistake. The United States experiences with corporate sanctions and the economic rationale underpinning their effectiveness need to be taken into account.

Wrongful deaths are occurring in a wide range of situations and accountability is being sought from the law for those deaths. This can only occur in New Zealand if our law is changed which would require a relatively straightforward amendment. The law change is the simple part. What is also required is a prosecutorial willingness to investigate not only the actions of the company but individuals, at all levels, within it.

Clarkson on a play on the well known phrases[123] suggests:[124]

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[123] Edward, 1st Baron Thurlow Cited in The Oxford Dictionary of Quotations (4th ed, 1992) 69 "Corporations have neither bodies to be punished nor souls to be condemned, they therefore do as they like" *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1127 per Lord Denning "a corporation has no body to be kicked or soul to be damned".

[124] Clarkson CM "Kicking Corporate Bodies and Damning their Souls" [1996] Melb U LR 557.

> "kicking a few more corporate bodies and damning a few more corporate souls might stimulate the development of a few more consciences in those companies that have the lives and safety of their workers in their hands, and who operate in spheres that pose serious risks to the public and the environment."

In order to achieve Clarkson's vision a corporation and individuals within that corporation need to be able to be convicted of the same offence- manslaughter. To do otherwise runs the risk of marginalising the wrongdoing. If there is a death the police need to be involved at the start and an offence under the health and safety legislation only laid in the alternative. Companies need a firm but fair approach and to know what the penalties will be, for all concerned if they get it wrong.

Corporates need to be held accountable for grossly negligent behaviour. The attribution approach outlined by the Privy Council *Meridian* is an attempt to do that within the existing legal framework. Whether or not that approach can successfully be transferred from a white collar offence to the criminal law and the offence of manslaughter is as yet uncertain. What is certain is that:

> "Convicting companies of the same offences, established in the same way as those committed by an individual, is the best route to emphasising the seriousness of the crime and expressing the appropriate degree of censure".

Introducing a separate offence of corporate killing may enable a company to be convicted of a wrongful death but so does the introduction of an offence of industrial manslaughter in health and safety legislation. A company needs to face the full opprobrium of the criminal law and be charged with manslaughter when a wrongful death occurs. It should not face this condemnation alone. Culpable individuals within a company need to be similarly charged. Our law needs to be changed to accommodate this.

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