The Law Commission

(LAW COM No 237)

Legislating the Criminal Code
INVOLUNTARY MANSLAUGHTER

Item 11 of the Sixth Programme of Law Reform: Criminal Law

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THE LAW COMMISSION

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To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain

PART I
INTRODUCTION

THE SCOPE AND STRUCTURE OF THIS REPORT

1.1 This report is concerned with the criminal liability of those who kill when they do not *intend* to cause death or serious injury. There are two conflicting schools of thought about the way in which the law should deal with such people. Some argue that society should always punish a person who causes terrible *consequences* to occur. Professor Hart puts the opposite view in these terms:

> All civilised penal systems make liability to punishment for at any rate serious crime dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain state or frame of mind or will.[1]

In this report we consider what "frame of mind or will" ought to be required if criminal liability is to be imposed for unintentional killing.

1.2 There are only two general homicide offences[2] under the present law. The more serious of these, murder, requires proof of intention to kill or to cause serious injury,[3] and the absence of such mitigating circumstances as the fact that the killer was provoked, or acted under diminished responsibility, or was the survivor of a suicide pact.[4] Every other case of unlawful killing is included within the second homicide offence, manslaughter. This offence is, therefore, extremely broad. It "ranges in its gravity from the borders of murder right down to those of accidental death".[5]

1.3 Although it is a single offence, manslaughter is commonly divided by lawyers into two separate categories, "voluntary" and "involuntary" manslaughter. The first of these describes cases where the accused intended to cause death or serious injury,

[1] H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) p 114.

[2] There are, of course, other homicide offences aimed at particular situations, such as mothers who kill their babies (Infanticide Act 1938, s 1) or drivers who kill on the roads (Road Traffic Act 1988, s 1, as substituted by Road Traffic Act 1991, s 1), in certain circumstances defined by statute.

[3] *Moloney* [1985] AC 905.

[4] Homicide Act 1957, ss 2–4.

[5] *Walker* (1992) 13 Cr App R (S) 474, 476, *per* Lord Lane CJ.

but is excused liability for murder because some mitigating factor may be present.[6] In the present project we are concerned only with the second type, "involuntary" manslaughter. This expression covers cases where there was no intention to kill or to cause serious injury, but where the law considers that the person who caused death was blameworthy in some other way.

1.4 Under the law as it stands at present, a person who unintentionally causes death is treated as sufficiently blameworthy to attract serious criminal sanctions in two cases. The first, known as "unlawful act manslaughter", arises where the person who causes death was engaged in a criminal act which carried with it a risk of causing some, perhaps slight, injury to another person.[7] The second type of involuntary manslaughter, "gross negligence manslaughter", is harder to define. To put it very simply, the offence is committed by those who cause death through extreme carelessness.[8]

1.5 In Part II we summarise the present law relating to both types of involuntary manslaughter, and in Part III we examine the contemporary problems they create. There are a number of minor problems in the form of uncertainties arising from the way in which the law has been formulated in particular cases. In addition to these uncertainties, however, there are two major problems. The first is that the present offence of manslaughter is too wide. This can cause problems both for judges on sentencing and for the public, who have difficulty in understanding the sentencing dilemma that faces a judge when an offence is so wide. It is in any event inappropriate that the same label should apply both to conduct on the borders of murder and to conduct on the borders of mere carelessness. The second major problem relates to unlawful act manslaughter: we consider that it is wrong in principle that a person should be convicted for causing *death* when the gravest risk apparently inherent in his conduct was the risk of causing *some injury*. This is a matter which we consider thoroughly in Part IV.

1.6 That Part is devoted to an exploration of the distinction[9] between punishing a person for the consequences of his acts and punishing him for the state of mind in which he acted. The extent to which a person is responsible for the unintended consequences of his actions is, as we say there, one which has troubled philosophers for many years.[10] There is no easy answer. However, it was important for us to come to a decision on this issue because we believe very strongly that the

[6] Ie provocation, diminished responsibility or suicide pact: Homicide Act 1957, ss 2–4.

[7] See paras 2.3 – 2.7 below, where we explain that certain types of behaviour, rendered criminal by statute, are excluded from this general proposition.

[8] See paras 2.8 – 2.16 below.

[9] See para 1.1 above for this distinction.

[10] Eg H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968); R A Duff, *Intention, Agency and Criminal Liability* (1990); T Honoré, "Responsibility and Luck" (1988) 104 LQR 530; Bernard Williams, *Moral Luck* (1981); and Andrew Ashworth, "Taking the Consequences", in S Shute, J Gardner and J Horder, *Action and Value in the Criminal Law* (1993).

criminal law should rest, so far as is possible, on consistent, logical and principled foundations.[11]

1.7 We were greatly assisted by the very helpful comments sent to us on consultation, and by the advice of our consultant Professor Andrew Ashworth of King's College, London. We have eventually concluded that a person ought to be criminally liable for causing death only where he was aware that his conduct created a risk of causing death or serious injury to another, or where he was seriously at fault in failing to be aware of this risk. We believe that someone should only be blamed for failing to advert to such a risk if it would have been *obvious* to a reasonable person in his position, and he was himself *capable* of appreciating it at the material time.

1.8 In Part V we set out our detailed recommendations for a modern, codified law of involuntary manslaughter. In brief, we recommend the creation of *two* new offences in order to resolve the problems caused by the width of the present law.[12] The more serious of the two offences, with a maximum penalty of life imprisonment, is called "reckless killing". It would be committed by a person who unreasonably and consciously decides to run a risk of causing death or serious injury. The second new offence is called "killing by gross carelessness". This would require proof of three matters. First, that the defendant's conduct involved an obvious risk of causing death or serious injury, of which he need not actually have been aware, as long as he was *capable* of appreciating it. Secondly, that his conduct fell far below what could be expected of him in all the circumstances, or that he intended to cause some unlawful injury to another or was reckless whether he did so. And, thirdly, that he caused death. We make no recommendation as to the maximum sentence for this offence, and if our recommendations are implemented it will be for others to determine what maximum is appropriate; but we have no reason to suppose that the maximum would be set at such a figure as to affect the levels of sentence currently imposed by the courts.

1.9 If our recommendations were implemented, English law would then possess, in effect, four degrees of general criminal homicide: murder,[13] (voluntary) manslaughter,[14] reckless killing and killing by gross carelessness. There would also be, as now, certain homicide offences aimed at specific situations, such as causing death by dangerous driving,[15] infanticide[16] and aiding and abetting suicide.[17]

[11] Conversely, it may be argued that the absence of consistency, logic and principle in the present law has been at the root of the public's concern about certain recent high profile cases, and has thereby led to a lack of public confidence in the law itself, and in the judges who have to administer the law as they find it.

[12] See para 1.2 above for the width of the present law.

[13] See para 1.2 above.

[14] See para 1.3 above.

[15] Road Traffic Act 1988, s 1 (as amended by Road Traffic Act 1991, s 1).

[16] Infanticide Act 1938, s 1.

[17] Suicide Act 1961, s 2.

CORPORATE MANSLAUGHTER

1.10 In this report we have decided to devote special attention to corporate liability for manslaughter, for three reasons. First, as we will show,[18] a number of recent cases have evoked demands for the use of the law of manslaughter following public disasters, and there appears to be a widespread feeling among the public that in such cases it would be wrong if the criminal law placed all the blame on junior employees who may be held individually responsible, and did not also fix responsibility in appropriate cases on their employers, who are operating, and profiting from, the service they provide to the public, and may be at least as culpable. Second, we are conscious of the large number of people who die in factory and building site accidents and disasters each year:[19] many of those deaths could and should have been prevented. Third, there appear to have been only four prosecutions of a corporation for manslaughter in the history of English law,[20] and only the last of these cases resulted in a conviction; significantly, this was a "one-man company". It has been suggested that there are a number of outside factors which contribute to the low level of prosecutions brought against corporations for criminal offences generally.[21]

1.11 To highlight the problems with the present law, it is helpful to refer to a series of recent disasters followed by inquiries which found corporate bodies at fault and meriting very serious criticisms. Perhaps surprisingly, no successful prosecution for manslaughter[22] has been brought against any of the criticised parties.

1.12 On 18 November 1987 a fire of catastrophic proportions occurred in the King's Cross underground station, claiming the lives of 31 people. In his report on the fire,[23] Mr Desmond Fennell QC (as he then was) was critical of London Underground for not guarding against the unpredictability of the fire, and also because no one person was charged with overall responsibility.

1.13 In July 1988, the Piper Alpha oil platform disaster in the North Sea caused 167 deaths. In a public inquiry, conducted by Lord Cullen, which also served in effect

[18] See paras 1.11 – 1.17 below.

[19] The number of reported fatalities in accidents at work (including employees, the self-employed and members of the public) was 473 in 1991–92, 452 in 1992–93, and 379 in 1993–94: Health and Safety Executive Annual Report 1993–94. The decrease is largely attributable to the decline of the construction industry.

[20] *Cory Bros Ltd* [1927] 1 KB 810; *Northern Stripping Mining Construction Ltd, The Times* 2, 4 and 5 February 1965; *P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (Central Criminal Court); *Kite and OLL Ltd*, Winchester Crown Court, 8 December 1994, unreported.

[21] See, eg, David Bergman, *Deaths at Work: Accidents or Corporate Crime* (1991) pp 15–16; Celia Wells, *Corporations and Criminal Responsibility* (1993) p 59. These writers allege inadequate scrutiny by prosecution authorities in the context of a general culture which does not recognise corporate crime as being "real" crime.

[22] There have been prosecutions for regulatory offences. For example, British Rail was prosecuted for breaches of the Health and Safety at Work etc Act 1974 in respect of the Clapham Junction accident (see para 1.14 below).

[23] Investigation of the King's Cross Underground Fire (1988) Cm 499.

as an inquest,[24] serious criticism was directed at the platform operator, holding it responsible for the deaths.

1.14 On 12 December 1988, the Clapham rail crash caused 35 deaths and nearly 500 injuries when three rush-hour trains collided after a signal breakdown. In his report,[25] Mr Anthony Hidden QC (as he then was) was very critical of British Rail, whose "concern for safety was permitted to co-exist with working practices which … were positively dangerous[26] … the evidence showed the reality of [their] failure to carry that concern through into action".[27] Further, "the errors go much wider and higher in the organisation than merely to remain at the hands of those who were working that day",[28] and the report lists 16 serious relevant errors.[29]

1.15 The reason for the absence of any conviction is probably the difficulty of mounting a manslaughter prosecution against a large-scale corporate defendant. This is illustrated by the prosecution following the tragedy which occurred on 6 March 1987, when the *Herald of Free Enterprise*, a roll-on roll-off car ferry, departed from Zeebrugge for Dover and shortly afterwards foundered with substantial loss of life. A judicial inquiry[30] severely criticised P & O European Ferries (formerly Townsend Car Ferries Ltd). The jury at the inquest returned verdicts of unlawful killing in 187 cases, and eventually in June 1989 the DPP launched prosecutions against the company and seven individuals.[31] But the trial collapsed after Turner J directed the jury to acquit the company and the five most senior individual defendants.[32]

1.16 The outcome of this case provoked much criticism.[33] The principal ground for the decision in relation to the case against the company was that, in order to convict the company of manslaughter, individual defendants who could be "identified" with the company would have themselves to be guilty of manslaughter; since there

[24] The Public Inquiry into the Piper Alpha Disaster (1990) Cm 1310.

[25] Investigation of the Clapham Junction Railway Accident (1989) Cm 820.

[26] *Ibid*, para 17.3.

[27] *Ibid*, para 17.4.

[28] *Ibid*, para 17.11.

[29] *Ibid*, para 17.13.

[30] MV *Herald of Free Enterprise*: Report of the Court (No 8074), Department of Transport (1987). For the court's criticisms, see paras 8.45 – 8.48 below.

[31] See further, paras 6.49 – 6.56 below; and see also *The Times* 20 October 1990, and David Bergman, "Recklessness in the Boardroom" (1990) 140 NLJ 1496.

[32] (1990) 93 Cr App R 72.

[33] See, eg, David Burles, "The Criminal Liability of Corporations" (1991) 141 NLJ 609: "there was an immediate outcry, reforms were demanded, accusations of incompetence were made and the matter has been left to fester in the most unhealthy condition. It seemed to many that justice was not done." Eric Colvin, in "Corporate Personality and Criminal Liability" (1995) 6 Crim LF 1, 18, writes: "There is a yawning chasm between the moral condemnation of P & O European Ferries by the official inquiry and the legal position of the company … . The structure of the law of criminal corporate liability prevented any inquiry into the aspects of corporate organization that formed the basis of the moral condemnation." See also the criticism referred to in "Pressure renewed to reform liability", *The Times* 20 October 1990, p 2; and Celia Wells, *Corporations and Criminal Responsibility* (1993) pp 69–72.

was on the facts insufficient evidence to convict any such individual defendant, the case against the company also had to fail.[34] This decision highlighted the major difficulty that has to be overcome before a company can be successfully prosecuted, namely that the relevant acts have to be committed by those "identified as the embodiment of the company itself".[35] This principle is usually called the identification doctrine.

1.17 The great difficulty arises in identifying the people who are the embodiment of the company. As one commentator has pointed out, one effect of the identification doctrine is that the more diffuse the company structure, and the more devolved the powers that are given to semi-autonomous managers, the easier it will be to avoid liability.[36] Other critics have said that this point is of particular importance given the increasing tendency of many organisations to decentralise safety services in particular; they point out that it is in the interests of shrewd and unscrupulous management to do so.[37] They also quote from a study[38] which shows that companies sought to abrogate responsibility for the quality of their safety research by using contract laboratories, where the effects of fierce competition over price on the standard of safety checks could be said to be the responsibility of the laboratory itself. Another problem which was identified in the Zeebrugge inquiry was that no single individual had responsibility for safety matters. If responsibility for the development of safety monitoring is not vested in a particular group or individual, it becomes almost impossible to identify the "directing mind" for whose shortcomings the company can be liable.[39]

1.18 The problems that confront a prosecution for corporate manslaughter explain why there has only been one successful prosecution in England and Wales,[40] and in that case against a small company. We have welcomed the opportunity to reconsider the principles of corporate liability in the light of the great obstacles now confronting those wishing to bring a prosecution; but we are also conscious of the need to ensure that companies are not unjustly convicted merely because they are in charge of an operation or a vessel on which there has been a disaster.

[34] See paras 6.49 – 6.56 below.

[35] *R v HM Coroner for East Kent, ex p Spooner* (1989) 88 Cr App R 10, 16, *per* Bingham LJ; and see para 6.34 below for a full quotation.

[36] See Celia Wells, "Manslaughter and Corporate Crime" (1989) 139 NLJ 931.

[37] S Field and N Jörg, "Corporate Liability and Manslaughter: should we be going Dutch?" [1991] Crim LR 156, 158–159.

[38] J Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (1984) p 102.

[39] Field and Jörg say that problems in this area "seem to be generated by a failure to develop criteria for the judging of collective processes": [1991] Crim LR 156, 162.

[40] But in Hong Kong the construction company Ajax Engineers and Surveyors was recently convicted, after a three-month trial, of the manslaughter of 12 building workers: a site lift had fallen 17 floors, killing everyone inside, as a result of the poor condition of the pinion and the failure of the emergency brakes. Duffy J is reported to have criticised building sites where "greedy little men dictated that speed and economy rather than proper site management and safety were given top priority", and to have said that the knowledge of safety regulations shown by the contractors responsible would not cover a postage stamp. A technician and a site safety supervisor received prison sentences: *Construction News* 18 May 1995.

1.19 In our Consultation Paper we suggested that there was no justification for applying to corporations a different law of manslaughter from that which would apply to natural persons.[41] We accordingly provisionally proposed that a special regime should apply to corporate liability for manslaughter. Under this regime the direct question would be whether the corporation's conduct fell within the criteria for liability of the offence, namely that

(1) the accused ought reasonably to have been aware of a significant risk that his conduct could result in death or serious injury; and

(2) his conduct fell seriously and significantly below that which could reasonably have been demanded of him in preventing that risk from occurring or in preventing the risk, once in being, from resulting in the prohibited harm.[42]

1.20 In Part VI, we set out our understanding of the way in which the present law on corporate liability has developed. In Part VII, we reconsider the proposal we made in Consultation Paper No 135[43] and the responses on consultation,[44] which showed that most respondents thought that corporations should be held liable for manslaughter and were broadly in favour of the form of offence we had proposed. After considering one more recent case,[45] we look at the options for extending corporate liability before concluding that we should seek to apply to corporations the elements of the "individual" offence of killing by gross carelessness, in a form that is adapted to a corporate context but does not involve the principle of identification.[46] In reaching this conclusion we have been greatly assisted by our consultant Mr R C Nolan, Fellow and Director of Studies in Law, St John's College, Cambridge.

1.21 In Part VIII we set out the details of our new offence of corporate killing. Our main recommendations are as follows:

(1) There should be a special offence of corporate killing, broadly corresponding to the individual offence of killing by gross carelessness.

(2) Like the individual offence, the corporate offence should be committed only where the defendant's conduct in causing the death falls far below what could reasonably be expected.

(3) Unlike the individual offence, the corporate offence should *not* require that the risk be obvious, or that the defendant be capable of appreciating the risk.

[41] Consultation Paper No 135, para 5.73.

[42] Consultation Paper No 135, paras 5.79 – 5.90 and 6.22.

[43] Paras 7.1 – 7.6 below.

[44] Paras 7.7 – 7.25 below.

[45] *British Steel plc* [1995] ICR 586; paras 7.26 – 7.27 below.

[46] Paras 7.28 – 7.37 below.

(4) For the purposes of the corporate offence, a death should be regarded as having been caused by the conduct of a corporation if it is caused by a failure, in the way in which the corporation's activities are managed or organised, to ensure the health and safety of persons employed in or affected by those activities.[47]

(5) For the purposes of the corporate offence, it should be possible for a management failure on the part of a corporation to be a cause of a person's death even if the immediate cause is the act or omission of an individual.[48]

(6) The corporate offence should be capable of commission by any corporation, however and wherever incorporated, other than a corporation sole.[49]

(7) The corporate offence should not be capable of commission by an unincorporated body.[50]

(8) The corporate offence should not be capable of commission by an individual, even as a secondary party.[51]

(9) There should be liability for the corporate offence only if the injury that results in death is sustained in such a place that the English courts would have had jurisdiction over the offence had it been committed by an individual other than a British subject.[52]

(10) There should be no requirement of consent to the bringing of private prosecutions for the corporate offence.[53]

(11) The corporate offence should be triable only on indictment.[54]

(12) Where a jury finds a defendant not guilty of any of the offences we recommend, it should be possible (subject to the overall discretion of the judge) for the jury to convict the defendant of an offence under section 2 or 3 of the Health and Safety at Work etc Act 1974.[55]

(13) A court before which a corporation is convicted of the corporate offence should have power to order the corporation to take such steps, within such time, as the order specifies for remedying the failure in question and any

[47] Para 8.35 below.

[48] Para 8.39 below.

[49] Para 8.53 below.

[50] Para 8.55 below.

[51] Para 8.58 below.

[52] Para 8.62 below.

[53] Para 8.66 below.

[54] Para 8.67 below.

[55] Para 8.70 below.

matter which appears to the court to have resulted from the failure and been the cause or one of the causes of the death.[56]

(14) The ordinary principles of corporate liability should apply to the individual offences that we propose.[57]

THE CONTEXT IN WHICH THIS PROJECT IS SET

1.22 In 1989 we published our report on a Criminal Code for England and Wales.[58] This represented the culmination of eight years of work which had the central purpose of making the criminal law more accessible, comprehensible, consistent and certain. The Code was not in itself an exercise in law reform, although it included among its provisions some unimplemented recommendations for law reform made in recent years by official bodies, including ourselves, or by ad hoc committees whose recommendations carried weight.

1.23 We have now embarked on the next part of this major exercise, which is to take different areas of the criminal law and to subject them to critical scrutiny with a view to producing a series of discrete law reform Bills, each complete in itself, and ready for immediate implementation. These will also serve, once they have passed into law, as the material for consolidation into the complete Criminal Code which this country so badly needs.[59] We began this process by examining the law of offences against the person, before turning our attention in 1994 to the law of dishonesty. We have also given particular attention to certain areas of general principle – namely the rules on the effect of intoxication on criminal liability,[60] the liability of those who assist or encourage others to commit crimes,[61] and the effect of consent on criminal liability. This last subject was initially treated in relation only to offences against the person,[62] but has now been extended to embrace the problems raised by the concept of consent throughout the criminal law.[63]

[56] Para 8.76 below. See cl 5(1) of the draft Bill in Appendix A.

[57] Para 8.77 below.

[58] Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177.

[59] For a fuller statement of this policy, see Legislating the Criminal Code: Offences Against the Person and General Principles (1993) Law Com No 218, paras 1.1 – 1.4.

[60] Legislating the Criminal Code: Intoxication and Criminal Liability (1995) Law Com No 229.

[61] Assisting and Encouraging Crime (1993) Consultation Paper No 131.

[62] Consent and Offences Against the Person (1994) Consultation Paper No 134.

[63] Consent in the Criminal Law (1995) Consultation Paper No 139.

1.24 The first stage of our work on the part of the Code dealing with offences against the person was the publication in November 1993 of a major report on non-fatal offences against the person and general principles.[64]

1.25 We followed the publication of this report with our consultation paper on involuntary manslaughter.[65] Logically, the next stage of our work would have been a review of the entire law of homicide, because it would be unthinkable that a modernised statutory code for non-fatal offences could exist for long alongside the present law of homicide, consisting as it does for the most part of antique and unreformed common law concepts. There are, however, two reasons we did not embark on a project on that scale.

1.26 The first of these was that our experience over the years has shown us that it is more prudent to proceed by slow degrees, subjecting discrete but important parts of the law to critical examination on their own, while bearing in mind the framework of law which surrounds them. This technique ensures both that individual law reform projects can be completed reasonably quickly, without the disruption that is caused when the team working on a project is broken up, and also that the resultant recommendations are of a size which Parliament can reasonably handle without excessive disruption to its timetable.

[64] Legislating the Criminal Code: Offences Against the Person and General Principles (1993) Law Com No 218.

[65] Criminal Law: Involuntary Manslaughter (1994) Consultation Paper No 135.

1.27 The second, and perhaps more cogent, reason was that the law of murder has been subjected to critical scrutiny by very expert bodies twice in the last fifteen years.[66] In 1989 we incorporated into our draft Code the Criminal Law Revision Committee's recommendation for a statutory definition of murder which was along the following lines:

> A person is guilty of murder if he causes the death of another –
>
> (1) intending to cause death; or
>
> (2) intending to cause serious personal harm and being aware that he may cause death ...[67]

1.28 Later that year this recommendation was endorsed by the House of Lords Select Committee on Murder and Life Imprisonment.[68] The present Government has, however, made it clear, in the face of a continuous barrage of well-informed pressure, that it sees no reason to alter the present constituents of the law of murder, nor indeed, to alter the mandatory sentence for murder which has given rise to a great deal of controversy in recent times. In those circumstances, we took the view that it would not be a justified use of our resources to return so soon to the mental element of murder, although it is inevitable that we will have to come back to this topic sooner or later if Parliament does not reform the law itself in the meantime.

[66] Criminal Law Revision Committee, Fourteenth Report, Offences Against the Person (1980) Cmnd 7844, pp 7–44; House of Lords Select Committee on Murder and Life Imprisonment (1989) HL Paper 78-I. At the time when this report was approved the Home Affairs Select Committee of the House of Commons was examining the mandatory life sentence for murder; on 8 February 1995 we submitted to the Committee a paper which sought to demonstrate the anomalous nature of the distinction between murder and manslaughter. The Committee's report was published on 19 December 1995.

[67] Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177, Draft Bill, cl 54.

[68] House of Lords Select Committee on Murder and Life Imprisonment (1989) HL Paper at p 25.

1.29 While we were in the course of preparing Consultation Paper No 135 it became apparent to us that there was one aspect of the general law of homicide which was in urgent need of reform. This was the rule that a person cannot be convicted of a homicide offence if more than a year and a day elapses between the fatal act or omission and the death itself. This requirement, known as the "year and a day rule", had many critics, and it appeared to us to be outdated, unnecessary and unjust. Shortly after the publication of Consultation Paper No 135, therefore, we published a consultation paper[69] in which we considered the history and effects of the rule, and provisionally proposed that it be abolished. In February 1995 we were able to report[70] that our provisional recommendation had been almost universally accepted on consultation, and we therefore recommended the abolition of the rule. This recommendation was recently endorsed by the House of Commons Home Affairs Select Committee,[71] and on 19 July 1995 the Home Secretary announced that the Government agreed that the rule should be abolished.[72]

1.30 As is customary with our reports, a copy of our draft Bill embodying our recommendations is set out in Appendix A, with an index. We intend, in due course, to consolidate this Bill with those in Law Com Nos 218 and 230, to form part of a single, growing criminal code. However, the present Bill has been drafted to be free-standing, and is capable of passing into law whether or not these other Bills are also enacted. In accordance with Article 7 of the European Convention on Human Rights,[73] the Bill would not impose liability in respect of anything done or omitted to be done before it came into force.

1.31 Appendix B explains the background to our recommendations with regard to sentencing. Appendix C is a list of all those who commented on Consultation Paper No 135, and Appendix D lists those to whom we are particularly grateful for their assistance with the project after consultation had finished.

[69] Legislating the Criminal Code: The Year and a Day Rule in Homicide (1994) Consultation Paper No 136.

[70] Legislating the Criminal Code: The Year and a Day Rule in Homicide (1995) Law Com No 230.

[71] Second Report from the Home Affairs Committee (1994–95) HC 428.

[72] Written Answer, *Hansard* 19 July 1995, vol 263, col 1445.

[73] "No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed … ."

PART II
THE DIFFERENT WAYS OF COMMITTING "INVOLUNTARY MANSLAUGHTER" UNDER THE PRESENT LAW

INTRODUCTION

2.1 As we have observed,[1] "involuntary manslaughter" is the name given to those *unintentional* killings that are criminal at common law: causing death in the course of doing an unlawful act, and causing death by gross negligence or recklessness. "Involuntary manslaughter" is not recognised as a separate crime in its own right: it is simply a label used to describe certain ways of committing the very broad common law crime of manslaughter.[2]

2.2 Since a very full statement of the law as it stood in December 1993 appeared in Consultation Paper No 135,[3] only a summary of it is reproduced here.[4] We do, however, comment at some length on an important House of Lords decision on gross negligence manslaughter, *Adomako*,[5] which was decided after the publication of our consultation paper.

UNLAWFUL ACT MANSLAUGHTER

2.3 The basis of this type of manslaughter is that the defendant caused the death of another by or in the course of performing an act which would have been unlawful whether or not death was caused. As Lord Parker CJ put it:

> A man is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended. It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offence.[6]

2.4 The alternative name of this type of crime, "constructive manslaughter", draws attention to the fact that although the accused did not intend to cause serious harm or foresee the risk of doing so, and although an objective observer would not necessarily have predicted that serious harm would result, the accused's responsibility for causing death is "constructed" from her fault in committing a

1 See para 1.3 above.

2 The other ways of committing manslaughter, commonly called "voluntary manslaughter", require the same intention as for murder (viz to kill or cause serious injury), mitigated by provocation, diminished responsibility or agreement to enter into a suicide pact (when the killer is a survivor of the pact): Homicide Act 1957 ss 2–4.

3 Parts II and III.

4 For the comparative law position, see Consultation Paper No 135, paras 2.48 – 2.51 and 3.42 – 3.58.

5 [1995] 1 AC 171.

6 *Creamer* [1966] 1 QB 72, 82C–D.

quite unconnected and possibly minor unlawful act. Because of this feature of the offence, the accused's mental state is not assessed with reference to the death that she has accidentally caused, but only in relation to her unlawful act.

2.5 Over the years judges have tried in various ways to limit the scope of unlawful act manslaughter. Two ways in which they attempted to restrict liability were, first, by imposing stricter tests of causation than the test normally applied in criminal law,[7] and, secondly, by requiring that the accused's act must have been "directed at" the deceased.[8] Neither of these two approaches, however, has been consistently applied.[9] A more lasting modification was the rule that the accused must have committed a *crime* of some sort in order to incur liability;[10] at one time it was thought that the commission of a *tort*,[11] if it caused death, was sufficient.[12] In 1937 the House of Lords restricted the offence still further by holding[13] that negligent acts, even those that were capable of constituting statutory criminal offences (such as dangerous driving), would not automatically be sufficient to found a conviction for manslaughter where death was caused. Instead, it became necessary to prove that the defendant's negligence had been of a very high level. In such a case the prosecution would have to proceed under the second head of involuntary manslaughter, gross negligence manslaughter.

2.6 Another rule that judges have introduced relatively recently[14] to limit the width of unlawful act manslaughter is the rule that the act that caused the death, in addition to being unlawful, must also have been "dangerous", in the sense that "all sober and reasonable people would inevitably recognise [that it] must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm".[15] When applying this test, the "sober and reasonable person" is accredited with any special knowledge that would have been available to the defendant, but no more.[16] However, the reasonable observer will not have attributed to her any *mistaken belief* held by the accused.[17]

7 See *Bennett* (1858) 8 Cox CC 74; *Martin* (1827) 3 Car & P 211; *Van Butchell* (1829) 3 Car & P 629; *Franklin* (1883) 15 Cox CC 163; Hale's *Pleas of the Crown* vol 1, pp 475–476; and Consultation Paper No 135, paras 2.27 – 2.38.

8 *Dalby* [1982] 1 WLR 425.

9 See Consultation Paper No 135, paras 2.27 – 2.42.

10 *Franklin* (1883) 15 Cox CC 163; *Lamb* [1967] 2 QB 981: see R J Buxton, "By Any Unlawful Act" (1966) 82 LQR 174, and Consultation Paper No 135, para 2.6.

11 A *civil*, as opposed to a *criminal*, wrong.

12 *Fenton* (1830) 1 Lew 179; see Consultation Paper No 135, para 2.5.

13 *Andrews v DPP* [1937] AC 576: the House of Lords approved and applied the earlier decision of the Court of Criminal Appeal in *Bateman* (1925) 19 Cr App R 8; and see Consultation Paper No 135, para 2.7.

14 This new rule was first expressed by the Court of Criminal Appeal in *Larkin* [1943] 1 All ER 217.

15 *Church* [1966] 1 QB 59, 70 (CA); approved in *Newbury* [1977] AC 500 (HL).

16 Eg in *Dawson* (1985) 81 Cr App R 150 a petrol station attendant with a weak heart died of heart failure following the appellants' attempted robbery of the station. In judging whether this act was "dangerous", the Court of Appeal decided that the "sober and reasonable" bystander could be assumed to know, like the appellants, that the gun used by them was a

2.7 It is unlawful act manslaughter, then, if D slaps V in the face, V loses her balance, falls to the ground and dies as a result of brain injury caused by hitting her head on the pavement; if D breaks into a house with intent to steal, and terrifies the occupant into a heart attack;[18] or if D unlawfully carries a knife for self-defence, with which she accidentally stabs V.[19] It is, of course, possible to think of numerous other examples.

GROSS NEGLIGENCE MANSLAUGHTER

2.8 Where a person causes death through extreme carelessness or incompetence, the law of gross negligence manslaughter is applied. Frequently the defendants in such cases are people carrying out jobs that require special skills or care, such as doctors, police or prison officers, ships' captains or electricians, who fail to meet the standard which could be expected from them and cause death; however, an ordinary person who carries out a lawful activity, such as hunting or driving, without due caution, or who fails properly to look after a dependent person in her care, may be the subject of such a charge. The categories of unlawful act and gross negligence manslaughter are not mutually exclusive; for example, a defendant who unlawfully shoots at a trespasser may be guilty on both counts.

2.9 The early case-law indicated that to cause death by any lack of care whatsoever would amount to manslaughter.[20] The development of the modern law can be traced to cases in the nineteenth century in which judges began to use the language of "gross negligence".[21] They were concerned to establish that a higher degree of fault ought to be necessary to incur criminal liability for manslaughter than that sufficient for civil liability for negligence.

2.10 In due course, in the case of *Bateman*[22] the Court of Criminal Appeal held that gross negligence manslaughter involved the following elements: (1) the defendant owed a duty to the deceased to take care; (2) the defendant breached this duty; (3) the breach caused the death of the deceased; and (4) the defendant's negligence was gross, that is, it showed such a disregard for the life and safety of others as to amount to a crime and deserve punishment. This definition is circular – the jury should convict the accused of a crime if her behaviour was "criminal" – and has been criticised on this ground.[23] It is also uncertain and, because so much is left to the judgment of the jury, prone to inconsistent applications. In Consultation Paper No 135 we reviewed in some detail the English cases that followed *Bateman* and

replica but that the victim might think that it was real, but not that the attendant had a weak heart.

17 Eg the belief held by the defendant in *Ball* [1989] Crim LR 730 that there was no risk created by loading his gun from the mixture of live and blank ammunition in his pocket and firing at the deceased.

18 See, eg, *Watson* [1989] 1 WLR 684.

19 See *Jennings* [1990] Crim LR 588 for a similar scenario.

20 See Lord Atkin's exposition in *Andrews v DPP* [1937] AC 576, 582.

21 Eg *Williamson* (1807) 3 C & P 635; see Consultation Paper No 135, para 1.11.

22 (1925) 19 Cr App R 8; see Consultation Paper No 135, paras 3.4 – 3.5.

23 See, eg, J C Smith and B Hogan, *Criminal Law* (7th ed 1992) p 373.

also the law of a number of comparable foreign jurisdictions.[24] It is unnecessary to reproduce our findings here, because we were unable to detect any more satisfactory formula that had been used or proposed by the courts to help juries to distinguish criminal from civil negligence.

2.11 In the consultation paper we suggested that this difficulty of expression may gradually have led to a change in the law.[25] Because judges found the terminology of "gross negligence" unwieldy and difficult to explain to juries, they began to use the word "recklessness" as a synonym, to describe a high degree of negligence.[26] In other cases judges went further, and tried to give detailed definitions of recklessness.[27] In doing so they succeeded, perhaps without intending to, in gradually changing the law that had been applied in *Bateman*. This culminated in the 1983 decision of the House of Lords in *Seymour*,[28] which went some way towards removing the uncertainty that had previously characterised the law. However, this certainty was bought at the cost of widening the basis of liability and introducing a degree of rigidity into the way in which juries were directed.

2.12 In *Seymour* the House of Lords was concerned to identify the mental element required for "motor manslaughter" – the short name used for convenience to describe gross negligence manslaughter when committed by the driver of a motor vehicle. In his speech, with which the other Law Lords agreed, Lord Roskill referred to a recent decision[29] in which the House of Lords had held that the ingredients of motor manslaughter and of the statutory offence then in force of causing death by reckless driving[30] were identical. He also referred to two decisions by the House in 1981,[31] the combined effect of which was that, for the purposes of the offence of reckless driving, a person was reckless if (1) she did an act which in fact created an obvious and serious risk of injury to the person or substantial damage to property and (2) when she did the act she either had not given any thought to the possibility of there being any such risk or had recognised that there was some risk involved and had nonetheless gone on to do it. He concluded that, for motor manslaughter (and, by implication, for all cases of gross negligence manslaughter), the appropriate fault term was "recklessness", and that this expression should bear the meaning ascribed to it in these 1981 decisions. This

[24] Consultation Paper No 135, paras 3.42 – 3.58.

[25] Consultation Paper No 135, para 3.69.

[26] See, eg, *Andrews v DPP* [1937] AC 576; *Larkin* [1943] 1 All ER 217, 219D, *per* Humphreys J; *Lamb* [1967] 2 QB 981, 990, *per* Sachs LJ; *Cato* [1976] 1 WLR 110, 114, *per* Lord Widgery CJ.

[27] *Stone and Dobinson* [1977] QB 354; see Consultation Paper No 135, paras 3.75 – 3.77.

[28] [1983] 2 AC 493; see Consultation Paper No 135, paras 3.99 – 3.109.

[29] *Government of the USA v Jennings* [1983] 1 AC 624.

[30] This offence was created by the Road Traffic Act 1972, s 1(1), as amended by the Criminal Law Act 1977, s 50. It has now been replaced by a new offence of causing death by *dangerous* driving, under s 1 of the Road Traffic Act 1988, as amended by s 1 of the Road Traffic Act 1991.

[31] *Caldwell* [1982] AC 341 and *Lawrence* [1982] AC 510.

definition of recklessness is commonly described as "*Caldwell* recklessness", after the leading case.[32]

2.13 This judgment radically changed one aspect of the law of manslaughter. Under the *Seymour* rule, once the defendant had been shown by her conduct to have created an obvious and serious risk of causing physical injury to some other person, it was open to the jury to find her guilty whether her conduct was a result of mere inadvertence, conscious risk-taking or poor judgment. It was no longer open to a defendant to dispute guilt on the ground that her negligence had not been "gross".

2.14 For a decade *Seymour* was applied fairly consistently by the courts,[33] although in a few cases judges reverted to the previous law and language of gross negligence.[34] This state of affairs was, however, recently ended by the decision of the House of Lords in *Adomako*.[35] In this case, which was decided after the publication of Consultation Paper No 135, the accused, an anaesthetist, was acting as such during an eye operation which involved paralysing the patient. A tube became disconnected from the ventilator, the accused failed to notice the warning signs and the patient suffered a cardiac arrest and died. The House was asked to answer the following certified question:

> in cases of manslaughter by criminal negligence not involving driving but involving a breach of duty is it a sufficient direction to the jury to adopt the gross negligence test set out in the Court of Appeal in [*Prentice*][36] …, without reference to the test of … [*Caldwell* recklessness][37] or as adapted to the circumstances of the case?

2.15 Lord Mackay of Clashfern LC, who made the only substantial speech and with whom the other Law Lords agreed, disapproved the dictum of Lord Roskill in *Seymour*,[38] and held that *Bateman*[39] gross negligence was the appropriate test in manslaughter cases involving a breach of duty. He described the test for gross negligence manslaughter in the terms we set out in paragraph 3.8 below. In particular, he made it clear that it was a question of fact for the jury to determine

[32] *Caldwell* [1982] AC 341.

[33] Eg, so far as the higher courts were concerned, by the Privy Council in *Kong Cheuk Kwan* (1985) 82 Cr App R 18; and by the Court of Appeal in *Madigan* (1982) 75 Cr App R 145 and *Goodfellow* (1986) 83 Cr App R 23; see Consultation Paper No 135, paras 3.110 – 3.118. In *Reid* [1992] 1 WLR 793 the House of Lords upheld the *Caldwell* definition of recklessness in the context of the statutory offences of reckless driving: see Consultation Paper No 135, paras 3.119 – 3.120.

[34] Eg in *R v West London Coroner, ex p Gray* [1988] QB 467; see Consultation Paper No 135, paras 3.113 – 3.114.

[35] [1995] 1 AC 171.

[36] [1994] QB 304. This was the name under which *Adomako* was heard in the Court of Appeal; see Consultation Paper No 135, paras 3.121 – 3.155, for a full discussion of the case.

[37] See para 2.12 above.

[38] See para 2.12 above.

[39] See para 2.10 above.

whether the defendant's breach of duty should be classified as gross negligence and therefore as a crime.

2.16 This decision resolved the principal uncertainty in the law – whether the test of *Bateman* gross negligence or of *Caldwell* recklessness[40] should be applied. It also restored to the law the flexibility of the *Bateman* gross negligence test, which allowed the jury to consider the accused's conduct in *all the surrounding circumstances*, and only punished her if her negligence was very serious. There are, however, still some remaining difficulties, which we consider in Part III below.[41]

Special cases of gross negligence manslaughter

Motor manslaughter

2.17 This area of the law has had a troubled and complicated history, and it is necessary to set it out in some detail. Originally, causing death by bad driving was treated just like any other case of gross negligence manslaughter.[42] In the 1950s, however, it started to appear that juries were reluctant to convict motorists of the "barbarous-sounding"[43] crime of manslaughter, and Parliament therefore created the first of a series of statutory offences[44] aimed at drivers who cause death. A succession of cases in the early 1980s[45] then established that the same test of *Caldwell* recklessness[46] should be applied both to motor manslaughter (the term used to describe manslaughter caused by driving a motor vehicle) and to the statutory offence of causing death by reckless driving which was then in force.

2.18 In 1988 the Road Traffic Law Review Committee, chaired by Dr Peter North,[47] recommended that there should be a change from offences based on *recklessness* or any other mental state, to a new hierarchy of offences which focused on the *manner* of the driving in question, judged against an objective standard of "dangerousness". The Committee also recommended that the offence of manslaughter ought to be retained in relation to driving cases. The reasons for this recommendation were (1) that the change from recklessness to dangerousness as the basis of liability in the statutory offence would create a clear distinction between the statutory offence and manslaughter, and (2) that this distinction would be desirable in terms of both principle and policy, because it would create a

[40] See para 2.12 above.

[41] Paras 3.7 – 3.13.

[42] See, eg, *Andrews v DPP* [1937] AC 576.

[43] D W Elliott and H Street, *Road Accidents* (1968) p 20.

[44] Eg causing death by reckless or dangerous driving under s 8 of the Road Traffic Act 1956; causing death by reckless driving under s 1(1) of the Road Traffic Act 1972, as amended by the Criminal Law Act 1977; and causing death by dangerous driving under s 1 of the Road Traffic Act 1988, as amended by the Road Traffic Act 1991.

[45] See n 33 to para 2.14 above.

[46] See para 2.12 above.

[47] Road Traffic Law Review Report (1988), hereafter "the North Report". The Committee's terms of reference were, inter alia, to consider what improvements might be made to the structure of and penalties for the offences in ss 1–3 of the Road Traffic Act 1972, taking into account their relationship with other aspects of road traffic law.

hierarchy of different offences, with manslaughter being perceived as the most serious.

2.19 This was in some ways a paradoxical recommendation because, as the Committee itself reported,[48] the *Caldwell* recklessness test[49] which then applied to both manslaughter and causing death by reckless driving had been criticised for being too *wide*: it was thought that it might encompass cases where the driver was guilty of no more than thoughtless incompetence, because almost *any* error made while driving a car carries with it an obvious and serious risk of causing injury or damage to property.[50] The Committee was concerned that this test might devalue the seriousness of the statutory offence, and this was why it recommended that the proposed new test of "dangerousness" should require it to be proved that the accused's driving fell *far* below the standard of the competent and careful driver. The Committee's recommendations were enacted in the Road Traffic Act 1991.[51]

2.20 In the event the Committee's objective of a hierarchy of distinct offences has been somewhat undermined by the change in the law of manslaughter brought about by

[48] North Report, para 5.8.

[49] See para 2.12 above.

[50] But see the comments on this point in *Reid* [1992] 1 WLR 793.

[51] Road Traffic Act 1991, s 1, creates the new offences of causing death by dangerous driving and dangerous driving:

> For sections 1 and 2 of the Road Traffic Act 1988 there shall be substituted –
>
> "1. A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.
>
> 2. A person who drives a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.
>
> 2A(1) For the purposes of sections 1 and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if) –
>
> (a) the way he drives falls far below what would be expected of a competent and careful driver, and
>
> (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.
>
> (2) A person is also to be regarded as driving dangerously for the purposes of sections 1 and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.
>
> (3) In subsections (1) and (2) above "dangerous" refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.
>
> (4) In determining for the purposes of subsection (2) above the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried."

the decision of the House of Lords in *Adomako*.[52] The Court of Appeal had had to exclude driving cases from the certified question in this case[53] because there was clear House of Lords authority that juries should be directed in terms of *Caldwell* recklessness in cases of motor manslaughter.[54] As we have seen, the House of Lords decided in *Adomako* that the appropriate test in cases of manslaughter involving a breach of duty was gross negligence. The Lord Chancellor also remarked, obiter, that

> the law as stated in *Seymour*[55] should no longer apply since the underlying statutory provisions on which it rested have now been repealed by the Road Traffic Act 1991. It may be that cases of involuntary motor manslaughter will as a result become rare but I consider it unsatisfactory that there should be any exception to the generality of the statement which I have made, since such exception, in my view, gives rise to unnecessary complexity.[56]

2.21 It is therefore virtually certain that in future cases of motor manslaughter the courts will apply a gross negligence test rather than that of *Caldwell* recklessness. Since the test of "dangerousness" in the statutory driving offence is also based on gross negligence, the statutory and the common law offences are now very similar. The only major difference appears to be that for the purposes of the common law offence of manslaughter the gross negligence element seems to require proof that the defendant's conduct involved a risk of *death*,[57] whereas only a risk of *injury* to any person or of serious damage to property is required to render a person's driving "dangerous" for the purposes of the Road Traffic Act offence.[58]

Liability for omissions

2.22 It is clearly established that the crime of involuntary manslaughter can be committed by omission, but only where the accused owes the deceased a duty to act. The circumstances in which a positive duty to act arises are uncertain, but we set out the common law position, so far as we were able to determine it, in Consultation Paper No 135,[59] and no-one on consultation dissented from our view, which we summarise in the paragraphs that follow.

2.23 There is no *general* rule in the criminal law imposing a duty to act.[60] However, in the law of manslaughter a number of discrete cases have become established in

[52] [1995] 1 AC 171; see para 2.14 above.

[53] See para 2.14 above.

[54] *Seymour* [1983] 2 AC 493.

[55] *Ibid*.

[56] [1995] 1 AC 171, 187G. The other four Law Lords agreed with the Lord Chancellor.

[57] *Adomako* [1995] 1 AC 171, 181D: the relevant extract is quoted in full in para 3.8 below.

[58] Road Traffic Act 1988, s 2A(3) (as amended by s 1 of the Road Traffic Act 1991); see n 51 to para 2.19 above.

[59] Paras 3.11 – 3.18.

[60] *Stephen's Digest of the Criminal Law* (4th ed 1887) art 212; see also A Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 LQR 424.

which there is a duty to act;[61] if the duty is neglected, and the person to whom it is owed dies, the person subject to the duty may be guilty of manslaughter. First, there is a duty to care for certain defined classes of helpless relatives: for example, spouses must take care of each other, and parents must look after their dependent children. A duty to act can also arise as a result of a contract,[62] and a contractual duty can give rise to criminal liability if persons *outside* the contractual relationship, who are nonetheless likely to be injured by any failure to perform the contractual duty, are killed.[63]

2.24 The most problematic instance of the duty to act arises where the accused has allegedly "undertaken" to care for the deceased. During the second half of the nineteenth century the class of relationships capable of imposing criminal liability for omissions was extended to include voluntary undertakings, as where a person received into her house a young child or some other person who was unable to care for herself. The undertaking was expressly or impliedly given to a relative or to the previous custodian of the person received.[64] In this century, however, the courts have extended this concept to cases where there has been no promise to care for the person received, by taking advantage of an ambiguity in the word "undertaking", which can mean either a promise to do something or actually doing it.[65]

2.25 In one case,[66] for example, the deceased, an elderly woman with anorexia nervosa, came to stay with her brother and his cohabitee, who were both of low intelligence, and subsequently starved herself to death. The Court of Appeal held that the question whether the couple owed a duty to care for the deceased was a question of fact for the jury, which was entitled to take into account the facts that she was a relative of one of the appellants, that she was occupying a room in his house, and that the other appellant had "undertaken" the duty to care for her by trying to wash her and taking food to her.

"SUBJECTIVE" RECKLESSNESS

2.26 Apart from unlawful act manslaughter and gross negligence manslaughter, there is one further way in which manslaughter may now be committed in the absence of

[61] Reference was made in Consultation Paper No 135 to P R Glazebrook, "Criminal Omissions: The Duty Requirement in Offences Against the Person" (1960) 76 LQR 386; G Williams, *Textbook of Criminal Law* (2nd ed 1983) pp 262–266; and J C Smith and B Hogan, *Criminal Law* (7th ed 1992) pp 45–52.

[62] Eg if an employer receives an employee or apprentice into her house, she is regarded as impliedly undertaking to provide the necessities of life if the other becomes ill.

[63] *Pittwood* (1902) 19 TLR 37. A railway crossing gate-keeper had opened the gate to let a cart pass and then went off to his lunch, forgetting to shut it again, thereby allowing a haycart to cross the line and be struck by a train. He was convicted of manslaughter. It was argued on his behalf that he owed a duty only to his employers, the railway company, with whom he had contracted. Wright J held, however, that "there was gross and criminal negligence, as the man was paid to keep the gate shut and protect the public … . A man might incur criminal liability from a duty arising out of contract."

[64] P R Glazebrook (1960) 76 LQR 386; see n 61 above.

[65] See G Williams, *Textbook of Criminal Law* (2nd ed 1983) pp 262–263.

[66] *Stone and Dobinson* [1977] QB 354; see Consultation Paper No 135, paras 3.16 – 3.17.

intention to kill or cause serious injury. This arises when the accused is aware that her conduct involves a risk of causing death (or, probably, serious injury) and she unreasonably takes that risk. This combination of awareness of risk and unreasonable risk-taking is called "subjective"[67] recklessness. Again, this type of mental state does not exclude liability for gross negligence or unlawful act manslaughter; a defendant may be guilty on all three counts.

2.27 Until ten years ago many cases of this type were treated as falling within the definition of murder. However, in a murder case in 1985[68] the House of Lords held that cases in which the defendant may have foreseen that death or really serious injury were highly probable to result from her act, without intending such consequences, would no longer constitute murder. These cases must then have fallen, by default, into the scope of the offence of manslaughter. There is little or no separate authority, however, about this type of manslaughter, since such cases are dealt with in practice as cases of unlawful act manslaughter, and the accused's awareness of the risk is taken into account only as an aggravating factor when it comes to sentencing.[69]

[67] To distinguish it from "*Caldwell*" recklessness, which has no requirement of awareness of the risk on the part of the accused: see para 2.12 above.

[68] *Moloney* [1985] AC 905.

[69] See, eg, *McGee* (1993) 15 Cr App R (S) 463.

PART III
WHAT IS WRONG WITH THE PRESENT LAW?

INTRODUCTION

3.1 We now turn to consider the problems created by the present law.[1] The two major problems relate to the very wide range of conduct falling within the scope of involuntary manslaughter. As we explained in Part II, the offence encompasses, first, cases involving conduct that falls only just short of murder, where the accused was *aware* of a risk of causing death or serious injury, although he did not *intend* to cause either; second, cases where the accused is a professional person who makes a very serious mistake that results in death; and third, cases where a relatively minor assault ends in death. This leads to problems in sentencing and labelling, including the fundamental problem that many cases currently amounting to unlawful act manslaughter involve only minor fault on the part of the perpetrator, and therefore ought not, perhaps, to be described as manslaughter at all. There are also a number of more specific problems which we consider below.

THE BREADTH OF THE OFFENCE

3.2 The first problem, as we have just said, relates to the breadth of the conduct that is at present categorised as involuntary manslaughter. The width of the present offence can cause problems to judges on sentencing. As Lord Lane CJ remarked:

> It is a truism to say that of all the crimes in the calendar, the crime of manslaughter faces the sentencing judge with the greatest problem, because manslaughter ranges in its gravity from the borders of murder right down to those of accidental death. It is never easy to strike exactly the right point at which to pitch the sentence.[2]

3.3 There is a strong argument in favour of defining criminal offences in terms of narrow bands of conduct, so that the judge can have the guidance of the jury on important factual questions, such as intention or awareness of risk. We agree with the notion that

> Questions of intention … involve the application of a test capable of precise definition (even though the task of drawing inferences from the evidence may be difficult). Gradations of culpability based on varying degrees of intention should, therefore, be incorporated into the definition of the offences, so that the issues can be contested with all that that implies in terms of the rules of procedure, evidence and quantum of proof.[3]

[1] Which is described in Part II above.

[2] *Walker* (1992) 13 Cr App R (S) 474, 476; see also *Morgan* (1993) 14 Cr App R (S) 734, 736, for a similar comment by Lord Taylor CJ.

[3] D A Thomas, "Form and Function in Criminal Law", in Peter Glazebrook (ed) *Reshaping the Criminal Law* (1978) p 28.

The same could be said of awareness of risk.

3.4 Another argument in favour of separate offences follows on from this point about sentencing. It is inappropriate that types of conduct that vary so widely in terms of fault should all carry the same descriptive label. The accused who sets fire to his house so that the council will rehouse him, knowing that his wife and children are asleep inside and that they will almost certainly be killed or seriously injured, is blameworthy in a very different way from the electrician who causes death by miswiring an electrical appliance with a high degree of carelessness. It is arguable that the label "manslaughter" is devalued, and the more serious forms of wrongdoing that it describes might come to be regarded as less serious, because it is also used to describe less heinous crimes. By the same token, juries might be reluctant to convict, for example, a highly incompetent doctor of manslaughter because of the perceived gravity of the offence.

UNLAWFUL ACT MANSLAUGHTER

3.5 The next problem with the present law also relates to the breadth of conduct falling within involuntary manslaughter. As we observed above,[4] if a person commits a criminal act that carries a risk of causing *some* harm to another, and by chance he causes death, he will be guilty of unlawful act manslaughter. In some of these cases, the defendant would only have been guilty of a relatively trivial offence if death had not chanced to occur. For example, if D pushes V in a fight, and V staggers but does not fall, D will at most[5] be guilty of causing actual bodily harm under section 47 of the Offences against the Person Act 1861, which carries a maximum sentence of five years' imprisonment. If, however, V loses his balance and falls to the floor, knocking his head on the pavement and thereby sustaining fatal brain injuries, D will be guilty of manslaughter.

3.6 For reasons we explain in more detail below,[6] we consider that it is wrong in principle for the law to hold a person responsible for causing a result that he did not intend or foresee, and which would not even have been *foreseeable* by a reasonable person observing his conduct. Unlawful act manslaughter is therefore, we believe, unprincipled because it requires only that a foreseeable risk of causing *some* harm should have been inherent in the accused's conduct, whereas he is convicted of actually causing death, and also to some extent punished for doing so.[7]

GROSS NEGLIGENCE MANSLAUGHTER AFTER *ADOMAKO*

3.7 There are also certain problems with the present law of gross negligence manslaughter, but they are much less fundamental than those considered above. As we explained in Part II, a recent House of Lords decision[8] has resolved many of

[4] See para 2.4.

[5] If, say, V was bruised or injured in some other way.

[6] See Part IV below.

[7] See, eg, *Coleman* (1991) 95 Cr App R 159 for the extent to which the causing of death is taken into account on sentencing in one class of unlawful act manslaughter.

[8] *Adomako* [1995] 1 AC 171.

the problems that existed hitherto. In particular, the House decided that gross negligence[9] (rather than *Caldwell* recklessness)[10] is the appropriate test. There are, however, still some residual difficulties.

3.8 Lord Mackay of Clashfern LC, in describing the test for gross negligence manslaughter, said:

> ... the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.[11]

3.9 The first problem with this test is that it is circular: the jury must be directed to convict the defendant of a crime if they think his conduct was "criminal". In effect, this leaves a question of law to the jury, and, because juries do not give reasons for their decisions, it is impossible to tell what criteria will be applied in an individual case. This must lead to uncertainty in the law. The CPS has told us that prosecutors find it difficult to judge when to bring a prosecution, defendants have difficulty in deciding how to plead, and there is a danger that juries may bring in inconsistent verdicts on broadly similar evidence.[12]

3.10 Other problems arise out of the Lord Chancellor's use of the terminology of "duty of care" and "negligence", and his linkage of the civil and criminal law in his speech. The meanings of these words are not entirely clear in a criminal law context, nor is it clear to what extent they mean the same things in tort and in criminal law.[13]

[9] See para 3.8 below.

[10] See para 2.12 above.

[11] [1995] 1 AC 171, 187A–D; the other Law Lords agreed with the Lord Chancellor's speech.

[12] This aspect of the decision is criticised by Simon Gardner, "Manslaughter by Gross Negligence" (1995) 111 LQR 22, 23; Alan Reed (1994) 138 SJ 1016; Sybil Sharpe, "Grossly Negligent Manslaughter after *Adomako*" (1994) 158 JP 725; Gary Slapper, "Manslaughter, *Mens Rea* and Medicine" (1994) 144 NLJ 941; Nicola Padfield, "Manslaughter: The Dilemma Facing the Law Reformer" (1995) 59 J Crim L 291, 296; and Graham Virgo, "Reconstructing Manslaughter on Defective Foundations" [1995] CLJ 14.

[13] See Sybil Sharpe, *op cit*: "the tortious and criminal duty of care may not necessarily be co-extensive". Graham Virgo argues further, "Reconstructing Manslaughter on Defective Foundations" [1995] CLJ 14, that "tortious duty of care can serve no useful function in this context and, anyway, the pragmatic approach to the concept which is adopted in the law of tort … is inappropriate in the criminal law".

3.11 As we explained in Consultation Paper No 135,[14] "negligence" in the context of the crime of manslaughter probably means nothing more than "carelessness": it does not carry the technical meaning that it has in the law of tort, where it depends on the existence of a duty of care owed and a breach of that duty. The Lord Chancellor said in *Adomako* that "the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died". This equation of the civil and criminal law concepts of negligence causes no problems where, as in *Adomako* itself, a death is caused by a badly performed positive act of the accused,[15] because it is virtually certain that both tort and criminal law would hold that a duty was owed to the deceased not to injure him by a *positive act*.

3.12 It is possible, however, that the courts in future cases of *omission* might feel obliged to apply the decision in *Adomako*. If so, they would run into difficulties, because it is by no means certain that the scope of liability for negligent omissions is the same in criminal law as it is in tort.[16] For example, in criminal law it would seem that once someone has voluntarily taken some steps to care for another, he may be liable if his care is not adequate and the other person dies.[17] In tort, however, there is probably no liability if the defendant abandons an effort to care for someone and that person dies, unless he causes harm through his own incompetence.[18]

3.13 It is possible, therefore, that the decision in *Adomako* may have changed the criminal law in relation to liability for omissions, by equating it with the civil law of tort.[19] This may have *restricted* the scope of the duty to act in criminal law, by implicitly overruling *Stone and Dobinson*;[20] on the other hand, there *may* be cases where the law of tort imposes a more stringent duty to act than the criminal law had hitherto. The law on this subject is so unclear[21] that it is difficult to tell whether the effect of Lord Mackay's speech was indeed to change the law, and, if so, what the implications of this change might be. It is, however, clear that the

[14] Paras 3.6 – 3.10.

[15] The accused, an anaesthetist, paralysed the patient for the purposes of an eye operation. When a tube became disconnected from the ventilator, the accused failed to notice the warning signs and the patient suffered a cardiac arrest and died.

[16] The extent of the duty to act in criminal law, so far as we understand it, is set out in paras 2.22 – 2.25 above.

[17] *Stone and Dobinson* [1977] QB 354: see para 2.25 above.

[18] See *Winfield and Jolowicz on Tort* (14th ed 1994) p 106; *East Suffolk Rivers Catchment Board v Kent* [1947] AC 74 is probably still authority on this point; and see also Tony Weir, *A Casebook on Tort* (4th ed 1979) p 71 n 3, and *Prosser on Torts* (4th ed) p 344.

[19] Professor Sir John Smith, in his commentary on the case at [1994] Crim LR 757, 759, thinks not; but see Sybil Sharpe, "Grossly Negligent Manslaughter after *Adomako*" (1994) 158 JP 725 for a contrary view, and Graham Virgo, "Reconstructing the Law of Manslaughter on Defective Foundations" [1995] CLJ 14, 16, where he argues: "In omission cases reference to a duty of care will still be necessary, but restrictively defined in accordance with liability for omissions throughout the criminal law."

[20] For which, see para 2.25 above.

[21] See paras 3.14 – 3.16 below.

terminology of "negligence" and "duty of care" is best avoided within the criminal law, because of the uncertainty and confusion that surround it.[22]

LIABILITY FOR OMISSIONS

3.14 The final problem with the present law is also connected with liability for omissions. In Part II we set out the circumstances where, as far as we can tell, there is a duty to act, so that a person may be guilty of manslaughter if he fails to act and another person dies as a result. However, the present law is uncertain. This was demonstrated by the Criminal Law Revision Committee's recommendation[23] in 1980 that it ought *not* to be codified:

> Most of us are of the opinion that the extent of the duty to act should be left undefined so that the courts can apply the common law to omissions. The main reason for this view is that the boundaries of the common law are not clearly marked and there would be difficulty in setting them out in statutory form.[24]

3.15 History repeated itself in 1989, when this Commission felt that there was so much doubt as to whether the Criminal Code Team had correctly stated the law when it had attempted to codify the duty to act in 1985, that we made no express provision for liability by omission in our 1989 version of the Draft Criminal Code:[25] clause 4(4) of the Draft Code[26] would simply have preserved the common law position by default.

3.16 It is extremely unsatisfactory that the law should remain uncertain in this important area. We have considerable sympathy for the view expressed by Professor Glanville Williams on the CLRC's recommendation against statutory formulation of the duty to act:

> If the top lawyers in a Government committee find the law hard to state clearly, what hope have the Stones and Dobinsons[27] of this world of ascertaining their legal position, in advance of prosecution, when they find themselves landed with a hunger-striking relative?[28]

[22] Simon Gardner, in "Manslaughter by Gross Negligence" (1995) 111 LQR 22, 23, also criticises the use of this terminology:

> The test [that there was a breach of a duty of care] probably originated in lawyers finding it helpful to conceive gross, criminal, negligence by contrasting it with ordinary, tortious, negligence. But since juries will be equally, if not more, unfamiliar with the latter, they will not be helped, and may even be confused, by being told to consider it.

[23] Professor Glanville Williams dissented.

[24] Fourteenth Report on Offences against the Person (1980) paras 255–256.

[25] Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177, vol 2, paras 7.9 – 7.13.

[26] "This Act does not affect any rule of the common law not abrogated by subsection (2) or limit any power of the courts to determine the existence, extent or application of any such rule": Law Com No 177, vol 1, cl 4(4).

[27] See para 2.25 above.

[28] *Textbook of Criminal Law* (2nd ed 1983) p 266.

Indeed, it is possible that the law in this area fails to meet the standard of certainty required by the European Convention on Human Rights.[29]

CONCLUSION

3.17 In Part V below we set out our proposals for the reform of the law, which we hope will resolve many of the problems identified here – although some, we believe, cannot be solved in the context of this present project or at all. First, however, we consider the principles that, in our view, ought to underpin a modern law of involuntary manslaughter.

[29] In *Sunday Times v UK* [1979] 2 EHRR 245, the European Court of Human Rights held that, before the state can impose coercive obligations by law on its citizens, the law must be formulated with sufficient certainty to enable the citizen to regulate his conduct and must also be "accessible" to him, so that he has an adequate indication in advance of the rules which would be applied in any case.

PART IV
THE MORAL BASIS OF CRIMINAL LIABILITY FOR UNINTENTIONALLY CAUSING DEATH

INTRODUCTION

4.1 In Parts II and III we examined the present law of involuntary manslaughter, and discussed the problems still inherent in it. This law has, of course, been developed by judges on a case by case basis. No single court has had the opportunity to consider the fundamental issues that underlie the whole of this area of the law. In this part of the report we turn to address the underlying principles, primarily the very basic, but also very difficult, question: when should a person be held criminally liable for unintentionally causing another person's death?

4.2 The extent to which a person is responsible for the unintended results of her actions is a question that has puzzled legal philosophers for years.[1] We have had to consider this question again because we believe that it is essential that any new law of involuntary manslaughter that we may propose[2] should be founded on just, coherent and logical principles.

4.3 We are also aware that our proposed new homicide offences ought, in time, to form part of a complete criminal code. It is evident that, in the interests of justice, logic and consistency, the same fundamental principles should, so far as possible, influence all the parts of this growing code. In this part, then, we begin by describing the philosophy that this Commission has traditionally applied in our criminal law reform work; it is known as "subjectivist legal theory". We will then consider how this philosophy has shaped the work we have already done on the reform and codification of the law of offences against the person. Finally, we undertake a thorough examination of this philosophy, in order to decide whether it should apply in the present project.

ORTHODOX SUBJECTIVIST THEORY[3]

4.4 The legal philosophy traditionally applied in mainstream English criminal law and by this Commission[4] is known as "subjectivist theory". It rests on the principle that

[1] Eg H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968); R A Duff, *Intention, Agency and Criminal Liability* (1990); T Honoré, "Responsibility and Luck" (1988) 104 LQR 530; Bernard Williams, *Moral Luck* (1981); and Andrew Ashworth, "Taking the Consequences" in S Shute, J Gardner and J Horder, *Action and Value in the Criminal Law* (1993).

[2] See Part V below.

[3] We are indebted to Professor Andrew Ashworth's *Principles of Criminal Law* (2nd ed 1995) pp 175–194, upon which this account draws heavily.

[4] The application of subjectivist thinking is evident in many of the Commission's reports. Fault elements have consistently been defined to accord with it, eg The Mental Element in Crime (1978) Law Com No 89, paras 50–51; A Criminal Code for England and Wales (1989) Law Com No 177, cl 18; Legislating the Criminal Code: Offences against the

moral guilt, and hence criminal liability, should be imposed only on people who can be said to have *chosen* to behave in a certain way or to cause or risk causing certain consequences. The roots of subjectivism lie in a liberal philosophy that regards individuals as autonomous beings, capable of choice, and each deserving of individual respect.[5] It is called "subjectivism" because of the significance it accords to the individual's state of mind at the time of the prohibited conduct.

4.5 Three principles have been identified as inherent in this basis of liability. The first of these is the "mens rea principle", which imposes liability only for outcomes which were *intended* or *knowingly risked* by the alleged wrongdoer. The second principle, the "belief principle", judges a defendant according only to what *she* believed she was doing or risking. Thirdly, according to the "principle of correspondence", subjectivists insist that the fault element of a crime *correspond* to the conduct element; for example, if the conduct element is "causing serious injury", the fault element ought to be "intention or recklessness as to causing serious injury". This ensures that the defendant is punished only for causing a harm which she *chose* to risk or to bring about.[6]

4.6 Subjectivist philosophy applies widely in the criminal law today. A man cannot be convicted of rape, for example, if he genuinely believed, albeit unreasonably, that his victim consented to sexual intercourse, because this belief would be incompatible with the intention to have intercourse with a woman *without her consent*, or recklessness as to that possibility, which are the mental states required for rape.[7]

Person and General Principles (1993) Law Com No 218, cl 1 of Criminal Law Bill. When we codified defences in Law Com No 218, we applied subjectivist principles: eg for duress, self-defence and the use of force in effecting lawful arrest, the defendant is always to be judged on the facts *as she believed them to be*. Legislating the Criminal Code: Intoxication and Criminal Liability (1995) Law Com No 229, which dealt with the question of when a person should be held responsible for the consequences of her actions if she was too intoxicated to form an intention or awareness of the risk of causing harm at the time of acting, was an exception. In the preceding consultation paper (No 127) we adopted a subjectivist stance and provisionally proposed that the actor ought *not* to be found guilty of an offence requiring intention or recklessness if she did not form these mental states due to intoxication, but that she could, if required, be convicted of a proposed new offence of "criminal intoxication". This proposal was almost universally rejected on consultation, and so we adopted a more pragmatic, but less principled, approach in our final report, whereby a person may be *deemed* to have acted recklessly if her failure to form the required awareness of risk was due to self-induced intoxication.

5 This view can be contrasted with, eg, "utilitarian theory", which places emphasis on the social benefit to be derived from punishing a person (eg deterring others) rather than on the deserts of the individual offender herself.

6 For criticism of the reliance placed on this principle, see Jeremy Horder, "A Critique of the Correspondence Principle in Criminal Law" [1995] Crim LR 759.

7 *DPP v Morgan* [1976] AC 182. But see Richard H S Tur, "Subjectivism and Objectivism: Towards Synthesis" in S Shute, J Gardner and J Horder, *Action and Value in the Criminal Law* (1993) for criticism of the decision to define rape in this maximalist way; and see also Consent in the Criminal Law (1995) Consultation Paper No 139, Part VII.

Subjectivist principles applied in the Law Commission's recent work on offences against the person

4.7 The principles just referred to were the basis of our law reform recommendations in our report on offences against the person[8] (hereafter "Law Com No 218"), which was enthusiastically received.[9] In it we recommended that the offences currently in force under sections 18, 20 and 47 of the Offences Against the Person Act 1861[10] should be replaced with three new offences, which were defined in the Criminal Law Bill included in the report as follows:

> (1) A person is guilty of an offence if he intentionally causes serious injury to another.
>
> (2) A person is guilty of an offence if he recklessly causes serious injury to another.
>
> (3) A person is guilty of an offence if he intentionally or recklessly causes injury to another.

4.8 The Bill contains definitions of "intentionally" and "recklessly". The definition of "intentionally" is not relevant here (except insofar as it requires a *knowing* decision to bring about a result). A person is defined as acting "recklessly" in relation to a result if "he is aware of a risk that it will occur, and it is unreasonable, having regard to all the circumstances known to him, to take that risk".[11] The requirements of intention to cause injury, or awareness of the risk of doing so, in these proposed new offences are characteristic of orthodox subjectivist theory.

[8] Legislating the Criminal Code: Offences Against the Person and General Principles (1993) Law Com No 218. This was the first step towards our objective of producing a series of self-contained law reform Bills which, in time, could be combined into a single, unified criminal code: see paras 1.22 – 1.30 above.

[9] See, for example, the speech of Lord Wilberforce, Debate on the Address, *Hansard* 23 November 1993, vol 550, cols 158–161, and the comments of the editor, *Archbold News* Issue 10, 26 November 1993, at pp 4–5. See also the comments of the Lord Chancellor in *Hansard* 6 June 1994, vol 555, col 952. For the response on consultation, see Law Com No 218, pp 4–5.

[10] These sections of the Offences Against the Person Act 1861 are as follows:

> **s 47: Assault occasioning bodily harm**
>
> Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable to be kept in penal servitude.
>
> **s 20: Inflicting bodily injury, with or without a weapon**
>
> Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a[n offence], and being convicted thereof shall be liable to be kept in penal servitude.
>
> **s 18: Shooting or attempting to shoot, or wounding, with intent to do grievous bodily harm, or to resist apprehension**
>
> Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person with intent to do some grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of [an offence], and being convicted thereof shall be liable to be kept in penal servitude for life.

[11] Law Com No 218, Criminal Law Bill, cl 1.

4.9 The main difference between the offences under the 1861 Act and those recommended in Law Com No 218 is that, for the proposed new offences, the accused's mental state (that is, her intention or recklessness) *corresponds* to the harm for which she is punished. Under the new scheme, a person is only held responsible for causing serious injury if she intended to cause serious injury, or was reckless as to doing so. This contrasts with the present law, which allows a person to be convicted of causing serious injury, under section 20 of the 1861 Act,[12] when all she intended or foresaw was the causing of *some*, perhaps minor, injury. Under the present law, it is not even necessary to show that a *foreseeable* risk of causing serious injury was inherent in her conduct. Similarly, under section 47,[13] all that the accused has to foresee is any physical contact: the actual bodily harm for which she is convicted may be entirely unforeseeable.[14]

Recklessly causing death

4.10 Thus, in Law Com No 218 we recommended that a person ought to be held responsible for causing injury, or serious injury, when she intended to cause the harm in question, or was reckless as to doing so. We are quite certain that a person should, similarly, be held criminally responsible for causing *death* in circumstances where she unreasonably and knowingly runs a risk of causing death (or serious injury).[15] Indeed – and we are sure that many people would agree with us – we consider this type of conscious risk-taking to be the most reprehensible form of unintentional homicide, on the very borders of murder.[16] A person who sets fire to a house (in order, perhaps, to make an insurance claim, or to frighten a former lover) while others are asleep in it, thus causing death without intending to do so but knowing that there is a risk of doing so, is an example of this type of offender. The Criminal Law Revision Committee considered that involuntary manslaughter should be *limited* to this branch of the offence, because it was the only one in which there was a correspondence between the offender's fault and the consequence of death.[17]

4.11 The difficult question is whether, and in what circumstances, a person should be held criminally liable for causing death unintentionally when she was *not* aware that her conduct created such a risk. We consider this question in the following paragraphs.

CRITICISMS OF THE SUBJECTIVIST MENS REA PRINCIPLE: CAN CRIMINAL LIABILITY BASED ON INADVERTENCE EVER BE JUSTIFIED?

4.12 Orthodox subjectivist theory, then, requires the defendant to have been, at least, *aware* of the risk of causing the prohibited harm. However, there is a body of

[12] See n 10 to para 4.7 above.

[13] See n 10 to para 4.7 above.

[14] See Law Com No 218, para 12.28.

[15] See para 4.19 below.

[16] Until recently it was murder to cause death foreseeing that death or serious injury was a highly probable consequence of one's conduct: *Hyam v DPP* [1975] AC 55; and see paras 2.26 – 2.27 above.

[17] Fourteenth Report: Offences Against the Person (1980) Cmnd 7844, para 124.

criticism, from very distinguished commentators, of the orthodox subjectivist mens rea principle. One ground of criticism is that it is based on a simplistic view of what constitutes knowledge or awareness of risk:

> … while we do indeed sometimes make our knowledge of what we are doing explicit to ourselves in … silent mental reports, it is absurd to suggest that such knowledge can be actual only if it is made thus explicit. When I drive my car, my driving is guided by my (actual) knowledge of my car and of the context in which I am driving: but my driving is not accompanied by a constant silent monologue in which I tell myself what to do next, what the road conditions are, whether I am driving safely or not, and all the other facts of which I am certainly aware while I am driving. … The occurrence or the non-occurrence of certain explicit thoughts is irrelevant to whether I am actually aware of what I am doing: my actions can manifest my awareness even if no explicit thoughts about the relevant facts pass through my mind at the time.[18]

4.13 On this view of what constitutes a mental state, the contrast between awareness and lack of awareness of risk is not as stark as in conventional subjectivist accounts, and it is less clear why inadvertence ought not to be classified as mens rea in certain circumstances.

4.14 The main argument in favour of criminalising some forms of inadvertent risk-taking, however, is that in some circumstances a person is *at fault in failing to consider* the consequences that might be caused by her conduct. The example given by R A Duff is that of a bridegroom who misses his wedding because it slipped his mind when he was in the pub.[19] An orthodox subjectivist would point to his lack of intention or awareness, and deem him consequently less culpable. The bride, however, would rightly condemn him, because it is plain from his conduct that he did not care, and this attitude is sufficient to make him blameworthy. Duff argues that this account retains a subjective element, because *attitudes* are subjective.

4.15 A similar argument was used by Lord Diplock in the famous case on criminal damage, *Caldwell*:[20]

> If it had crossed his mind that there was a risk that someone's property might be damaged but, because his mind was affected by rage or excitement or confused by drink, he did not appreciate the seriousness of the risk or trusted that good luck would prevent it happening, this state of mind would amount to malice in the restricted meaning placed upon that term by the Court of Appeal; whereas if, for any of these reasons, he did not even trouble to give his mind to the question whether there was any risk of damaging the property, this state of mind would not suffice to make him guilty of an offence under the Malicious

[18] R A Duff, *Intention, Agency and Criminal Liability* (1990) p 160. See also Alan Norrie, *Crime, Reason and History* (1993) ch 4.

[19] *Op cit*, p 163.

[20] [1982] AC 341; see also para 2.12 above.

> Damage Act 1861. *Neither state of mind seems to me to be less blameworthy than the other … .*[21]

4.16 Professor Hart[22] some years ago attacked the assumption that to allow criminal liability for negligence would be to set aside the requirement of mens rea as a precondition of punishment. His argument was that since "negligence" implies a failure to do what ought to have been done, it is therefore more than inadvertence, it is *culpable* inadvertence:

> Only a theory that mental operations like attending to, or thinking about, or examining a situation are somehow "either there or not there", and so utterly outside our control, can lead to the theory that we are *never* responsible if, like the signalman who forgets to pull the signal, we fail to think or remember. ...
>
> What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities. Where these capacities and opportunities are absent, as they are in different ways in the varied cases of accident, mistake, paralysis, reflex action, coercion, insanity etc, the moral protest is that it is morally wrong to punish because "he could not have helped it" or "he could not have done otherwise" or "he had no real choice". But, as we have seen, there is no reason (unless we are to reject the whole business of responsibility and punishment) *always* to make this protest when someone who "just didn't think" is punished for carelessness. For in some cases at least we may say "he could have thought about what he was doing" with just as much rational confidence as one can say of any intentional wrongdoing "he could have done otherwise".[23]

Professor Ashworth also concedes that negligence may be an appropriate standard for criminal liability where the harm risked was great, the risk obvious and the defendant had the capacity to take the required precautions.[24]

WHAT MAKES INADVERTENCE *CULPABLE*?

4.17 In all the sources cited in paragraphs 4.12 – 4.16, the view is taken that it may be justifiable to impose criminal liability for the *unforeseen* consequences of a person's acts, at any rate where the harm risked is great and the actor's failure to advert to this risk is *culpable*. We are persuaded by this reasoning. In the following paragraphs, therefore, we consider the criteria by which *culpable inadvertence* should be judged if it is to attract the sanctions of the criminal law when death results.

4.18 The first criterion of culpability upon which we must insist is that the harm to which the accused failed to advert was at least *foreseeable*, if not strikingly

[21] [1982] AC 341, 352 (emphasis added).

[22] H L A Hart, *Punishment and Responsibility* (1968).

[23] *Ibid*, pp 151–152.

[24] *Principles of Criminal Law* (1st ed 1991) pp 169–171; and see the 2nd ed (1995) pp 84–85.

foreseeable or obvious.[25] If the accused is an ordinary person, she cannot be blamed for failing to take notice of a risk if it would not have been apparent to *an average person in her position*, because the criminal law cannot require an *exceptional* standard of perception or awareness from her. If the accused held herself out as an expert of some kind, however, a higher standard can be expected from her; if she is a doctor, for example, she will be at fault if she fails to advert to a risk that would have been obvious to the average doctor in her position.

4.19 As a matter of strict principle, the accused ought only to be held liable for causing death if the risk to which she culpably failed to advert was a risk of *death*.[26] In practice, however, there is a very thin line between behaviour that risks serious injury and behaviour that risks death, because it is frequently a matter of chance, depending on such factors as the availability of medical treatment, whether serious injury leads to death. Admittedly it is possible for conduct to involve a risk of serious injury (such as a broken limb) though not a risk of death; but intention to cause serious injury constitutes the mens rea of murder although the actus reus is the causing of death, and we see no compelling reason to distinguish between murder and manslaughter in this respect. We consider, therefore, that it would not be wrong in principle if a person were to be held responsible for causing death through failing to advert to a clear risk of causing death *or* serious injury[27] – subject of course to a second criterion, to which we now turn.

4.20 The second criterion of culpability which we consider to be essential is that the accused herself would have been *capable* of perceiving the risk in question, had she directed her mind to it.[28] Since the fault of the accused lies in her failure to consider a risk, she cannot be punished for this failure if the risk in question would never have been apparent to her, no matter how hard she thought about the potential consequences of her conduct. If this criterion is not insisted upon, the accused will, in essence, be punished for being less intelligent, mature or capable than the average person.

4.21 This is what happened in the criminal damage case, *Elliott v C (a minor)*.[29] The defendant in this case was a 14 year old girl of low intelligence, who entered a garden shed at 5 am, having been out all night. She poured white spirit on the floor and threw matches on it, thus setting fire to the shed. The magistrates found that, in view of her age and understanding, her lack of experience of inflammable

[25] L H Leigh in "Liability for Negligence: A Lordly Legacy?" (1995) 58 MLR 457, 465, says: "It is clear that there must be an obvious and serious risk of physical injury or damage to property before liability for inadvertence can arise."

[26] In the recent case on gross negligence manslaughter, *Adomako*, the Lord Chancellor expressed the test in terms of a risk of *death*: [1995] 1 AC 171, 187C–D; and see para 3.8 above.

[27] We refer to this matter in more detail when we come to consider the *detailed* provisions of our proposed new offences in Part V below: see para 5.26.

[28] This criterion was also required by Professors Hart and Ashworth (see para 4.16 above); by L H Leigh, "Liability for Inadvertence: A Lordly Legacy?" (1995) 58 MLR 457, 467; and, we think, implicitly by Lord Diplock on a true reading of *Caldwell*: see J Parry, *Offences Against Property* (1989) paras 6.27 – 6.30.

[29] [1983] 1 WLR 939; see also *Stone and Dobinson* [1977] QB 354 (the facts are set out in para 2.25 above).

spirit and the fact that she must have been exhausted, the risk that the shed and its contents would be destroyed as a result of her actions would not have been obvious to her or appreciated by her, even if she had given any thought to it. However, the Divisional Court held that she ought to be convicted anyway, because the risk would have been obvious to a reasonable person in her position, and because at the time of starting the fire she had given no thought to the possibility of there being a risk of destroying the shed. According to the court's interpretation of the relevant House of Lords authority,[30] this was enough for a conviction of criminal damage.

4.22 We consider the position taken in *Elliott v C* to be highly unsatisfactory.[31] It is hardly to be supposed that a blind person will be held reckless for inadvertently creating a risk which would have been obvious to a person with the power of sight; yet a child of 14 was held in this case to be reckless as a result of thoughtlessly creating a risk which she was incapable of appreciating, although it would have been obvious to an adult. A person cannot be said to be morally at fault in failing to advert to a risk if she lacked the capacity to do so.

4.23 If the criteria in paragraphs 4.17 – 4.22 are satisfied, we consider that it is appropriate to impose liability for inadvertently causing harm in cases where the harm risked is *very serious*. Where a person embarks on a course of conduct which inherently involves a risk of causing death or serious injury to another, society is justified in requiring a higher standard of care from her than from someone whose conduct involves a lesser risk or no risk at all.[32] J L Austin made this point

[30] *Caldwell* [1982] AC 341: see para 2.12 above.

[31] Indeed, Robert Goff LJ in the Divisional Court made it clear that he reached this decision with great reluctance and only because he was bound by the authority of *Caldwell*: [1983] 1 WLR 939, 949H.

[32] L H Leigh, "Liability for Inadvertence: A Lordly Legacy?" (1995) 58 MLR 457, 467, argues:

> Whatever be the basis of punishment, a body of rules which required us all to be careful in all aspects of our daily lives on pain of punishment would seem totalitarian. It would seem an extreme assertion of the right to punish in order to uphold social values. It would also seem too diffused to meet the exigencies of any educative theory of punishment. It may well be that social awareness in respect of certain discrete dangers can be achieved by osmosis in the generation of which the status of certain instances of gross want of care can play a part. No doubt also, in certain environments, this may even work at the level of consciousness. No soldier is left in doubt that it is dangerous and wrong to point a rifle at someone whom he does not mean to kill. The same immediacy of perception of danger could not be said to be present in respect of a wide range of activities and situations which we face in our daily lives. Whether or not one believes that punishment can be justified on educative grounds, it must surely be admitted that at most it can only apply in particular situations of obvious and grave danger which are singled out as presenting obvious risks. Whether or not one believes that it is morally right to punish those whose social attitudes appear to evidence a contempt for accepted social values, no such justification could be advanced in respect of all cases of inadvertence causing harm.

graphically when he wrote "We may plead that we trod on the snail inadvertently: but not on the baby – you ought to look where you're putting your great feet".[33]

4.24 The criminal law has traditionally drawn a distinction between cases where death is caused by culpable inadvertence and cases where less serious forms of injury are caused, by imposing criminal liability for gross negligence manslaughter but not for causing non-fatal injury through gross negligence. It is more difficult to distinguish cases where the actor *risks* causing death or serious injury, but fortuitously causes only serious injury. Such cases, however, fall outside the scope of this project.

4.25 It may be helpful at this stage if we attempt to apply these principles to a few concrete examples.

4.26 *Example 1: D is an anaesthetist who causes her patient V's death because she fails to notice that a ventilation tube has become disconnected and that V has turned blue.*

D *would* fall within our criteria of culpability if expert evidence showed that the risk of V's death or serious injury would have been obvious to a competent anaesthetist in D's position.

4.27 *Example 2: D, an adult of average intelligence, in the course of a fight hits V over the head with a spanner. In the heat of the moment, D does not realise that death or serious injury may result; but the blow cracks V's skull and causes her death.*

D *would* fall within our criteria of culpability, because her conduct created an obvious risk of causing death or serious injury, which she was capable of appreciating, and which she ought to have considered before acting.

4.28 *Example 3: D, in the course of a fight, slaps V once across the face. V loses her balance and falls to the floor, cracks her skull, and dies.*

D would *not* necessarily fall within our criteria, because, arguably, there is not an *obvious* risk of causing death or serious injury inherent in her conduct.

4.29 If it is thought that the accused in this last example, or in any other case which does not meet our criteria, *ought* to be held liable for causing death, it must be on the basis that her *conduct* was culpable *although her failure to advert to the risk of death or serious injury was not*. We now consider some reasons why this might arguably be so; and, in the case of each such reason, whether it justifies convicting the defendant in respect of a death which she cannot be blamed for having failed to foresee.

WHAT MAKES *CONDUCT* CULPABLE?

The conduct led to harmful consequences: "moral luck"

4.30 It is arguable that a person is morally responsible for *all* the consequences that flow from her conduct, and that when these consequences are harmful it is

[33] J L Austin, "A Plea for Excuses" in *Proceedings of the Aristotelian Society*, New Series, vol 57 (1956–57) 1.

appropriate for the *law* to hold her liable for them as well.[34] A philosophical justification for this view is provided by "moral luck" arguments, which hold that ethics are not separable from *luck*. It has been suggested that luck influences most aspects of our lives – including the capacities and personalities we are born with – and that, in the course of a lifetime and throughout a community, good and bad luck are fairly evenly distributed. Individuals cannot prevent the outcomes of their actions being influenced by luck, and to the extent that their actions impinge on others in a harmful way, they are inevitably judged by others on those outcomes. For example, if a child runs from behind a car into the path of a van which is being entirely properly driven, and the child is knocked down and killed, it is commonly said that the death of the child will be on the conscience of the driver, although everyone accepts that the death was "an accident."[35]

4.31 Professor Bernard Williams[36] discusses the regret felt by an agent who was unintentionally responsible for the causing of harm, which is frequently accompanied by a desire, however illogical, to make reparation:

> What degree of such feeling is appropriate, and what attempts at reparative action or substitutes for it, are questions for particular cases, and that there is room in the area for irrational and self-punitive excess, no one is likely to deny. But equally it would be a kind of insanity never to experience sentiments of this kind towards anyone, and it would be an insane concept of rationality which insisted that a rational person never would. To insist on such a conception of rationality, moreover, would, apart from other kinds of absurdity, suggest a large falsehood: that we might, if we conducted ourselves clear-headedly enough, entirely detach ourselves from the unintentional aspects of our actions, relegating their costs to, so to speak, the insurance fund, and yet still retain our identity and character as agents.

4.32 This argument is echoed by Professor Honoré:

> … outcome-allocation is crucial to our identity as persons … . If actions and outcomes were not ascribed to us on the basis of our bodily movements and their mutual accompaniments, we could have no continuing history or character.[37]

4.33 Because in everyday life the consequences of our decisions are attributed to us in a variety of ways, it is therefore argued that a person should be held morally and legally responsible (at least in theory) for *all* the harmful outcomes of her actions. There are a number of reasons why we do not find this argument persuasive. First, the consequences of a person's actions are not the *only* factors that are relevant to her identity: the moral judgments which the individual and others make about her *responsibility* for consequences are also important. Secondly, and perhaps more

[34] Such reasoning is, however, more usual in the context of the law of tort than in relation to criminal liability.

[35] Cf the approach taken by the court in *Dalloway* (1847) 2 Cox CC 273.

[36] Bernard Williams, *Moral Luck* (1981) ch 2.

[37] T Honoré, *Responsibility and Luck* (1988) 104 LQR 530.

importantly, just because judgments based on outcome-allocation *do* occur in everyday life, this does not mean that they *ought* to do so. If it is thought that the popular allocation of blame is illogical or unfair in some way, it is even more illogical and unfair to compound the effect of luck by giving it legal significance. While an argument might be made for this in the civil law, where reparation and loss allocation are in issue, it is difficult to extend it to the criminal law, which is concerned with public censure and punishment, and where moral culpability ought, in our view, to be the deciding factor.

The accused's conduct was criminal in some way independent of the causing of death

4.34 It might be argued that if a person embarks on a train of behaviour which is contrary to the criminal law, she should take the consequences if death ensues. An example will clearly illustrate why we reject this argument: *D steals a cake from a shop, and feeds it to her friend, V. Unknown to either of them, the cake contains nuts, to which V is allergic, and V dies.* D ought to be punished for stealing the cake, but V's death cannot be said to be her responsibility any more than it would if she had purchased the cake quite properly. It seems extremely harsh automatically to hold D responsible for all the unforeseeable consequences simply because theft is a crime.

The accused intended to cause *some* harm, or was aware of the risk of doing so, and/or it was foreseeable that her conduct created the risk of causing some harm

4.35 As we saw in Part II,[38] the present law provides that a person is guilty of "unlawful act manslaughter" if she causes death by committing an act which is a crime in itself, and which carries a foreseeable risk of causing *some* injury to another person. A person who commits a relatively minor assault which unexpectedly causes death[39] is thus guilty of manslaughter.

4.36 Our respondents were divided on the question whether this type of manslaughter, or something very close to it, should continue to exist.[40] A number of different reasons were given. For example, the Law Society, in its response to our consultation paper,[41] was of the view that "those who commit crimes involving,

[38] Paras 2.3 – 2.7.

[39] Eg D in the example at para 4.28 above.

[40] Garland, Johnson, Schiemann, Tuckey, Buckley and Forbes JJ, the Old Bailey judges, the Judge Advocate General, A McColgan, Paul Roberts, Professor Sir John Smith, Gary Slapper, Celia Wells / the Cardiff Crime Study Group, Nicola Padfield, the SPTL, Barry Mitchell, Messrs Hempsons, David Jeffreys QC, the General Council of the Bar and the NSPCC all thought that unlawful act manslaughter ought to be abolished without replacement. The following thought that it should be retained in some form: the majority of the judicial officers in the Office of the Judge Advocate General; Farquharson LJ; McCullough, Owen, Potts, Rix, Swinton Thomas, Rougier, Bell, Sedley, Mantell, Jowitt, Hutchison, Phillips, Sachs, Latham and Waterhouse JJ; John Gardner; the Centre for Criminal Justice Studies, Leeds; the Police Superintendents' Association; the ACPO Crime Committee; the CPS; the Law Society; the Criminal Bar Association; the Justices' Clerks' Society; the British Railways Board; and Gary Streeter MP.

[41] Consultation Paper No 135.

albeit slight, violence should take the consequences if the results turn out to be more catastrophic than they expected."[42] Mr Justice Rix agreed: "It seems to me that once a person undertakes a violent act he sets himself deliberately … on a road which is not only seriously anti-social, … but potentially leading to calamitous results. … [H]e has deliberately embarked on an act of criminal violence, which it is, or ought to be, well known, leads to incalculable consequences." It is interesting that Rix J described the accused's culpability in terms of failing to advert to a "well known" risk of causing serious harm: this is similar to the first criterion upon which we insisted in our discussion of "culpable inadvertence" above.[43]

4.37 Dr John Gardner,[44] in his response, argued that the starting point in assessing criminal liability ought to be *what the actor did and the consequences of her action*:

> The first question, in all cases of culpability, is "what did the defendant do?", the answer to which will be some concrete action with results and circumstances incorporated into it already, eg "kill" … . Then we must ask, naturally, to what extent the culpability is mitigated or moderated by the conditions under which the act was performed, including the accidental nature of the result etc. … It is not "why does the mere fact that someone happens to die add to one's crime, or make a major crime out of an otherwise venal act?", but rather, "how does the mere fact that one kills accidentally serve to mitigate or otherwise intercede in the wrongness of killing?"

4.38 He did not, however, maintain that *all* killings should be subject to criminal sanction. First, he argued, the defendant must be *culpable in some way*, even if this culpability does not extend to the causing of death. Secondly, principles of justice and the rule of law require that the killer must have some *forewarning that her act will incur some criminal liability*. On his view, then, unlawful act manslaughter is, in principle, perfectly acceptable:

> … since the act was plainly dangerous, culpability is not eliminated, and this was still a wrongful killing. Then it is asked "what protections are required to make sure that the defendant has not been taken totally unawares by the law?" – to which the answer is that the act must have been criminal under some other heading *as well as* dangerous, so as to put the defendant on legal notice.[45]

[42] Other respondents, eg McCullough and Hutchison JJ, pointed to instances in other areas of the criminal law where the emphasis is placed on the *results* caused by a person, rather than her moral *fault* (eg sentencing for arson and causing death by dangerous driving), and argued that unlawful act manslaughter could be justified on the same grounds.

[43] See para 4.18 above.

[44] Dr Gardner is a fellow of Brasenose College, Oxford.

[45] See also Jeremy Horder "A Critique of the Correspondence Principle in Criminal Law" [1995] Crim LR 759, where it is argued that "the fact that I *deliberately* wrong V arguably changes my normative position *vis-à-vis* the risk of adverse consequences of that wrongdoing to V."

4.39 Unless one accepts moral luck arguments,[46] it is not clear *why* a person ought to be held criminally responsible for causing death if death or serious injury were the *unforeseeable* consequences of her conduct, just because she foresaw, or it was foreseeable, that *some* harm would result. Surely a person who, for example, pushes roughly into a queue is morally to blame for the foreseeable consequences of her actions – that a few people might get jostled, possibly even lightly bruised, and that people might get annoyed – but not for causing a death if, quite unexpectedly, she sets in train a series of events which leads to such an outcome. We consider that the criminal law should properly be concerned with questions of moral culpability, and we do not think that an accused who is culpable for causing *some harm* is sufficiently blameworthy to be held liable for the unforeseeable consequence of death.

4.40 One final argument in favour of recommending that a person ought to be liable for causing death, even if death or serious injury were not foreseeable consequences of her action, would be that this would be necessary for the protection of the public. This argument was considered by the Royal Commission on Capital Punishment[47] which, in 1953, recommended the abolition of the doctrine of constructive malice[48] in murder:

> We think it would be generally agreed that any liability for constructive crime offends against modern feeling, and that any departure from a subjective test of criminal liability can be justified, if at all, only if it is clearly established that it is essential for the protection of the public.[49]

4.41 The Royal Commission concluded that the public would be adequately protected by the existence of other criminal offences – principally, it has to be said, manslaughter.

4.42 Since, in the cases here under discussion,[50] the risk of causing death or serious injury was neither foreseen by the accused, nor foreseeable by her, it is difficult to see what deterrent effect would be achieved by imposing criminal liability for causing death which would not be achieved equally by imposing liability for the appropriate non-fatal offence.

CONCLUSION

4.43 In conclusion, we consider, as a matter of principle, that the criminal law ought to hold a person responsible for unintentionally causing death only in the following circumstances:

(1) when she unreasonably and *advertently* takes a risk of causing death or serious injury; or

[46] See paras 4.30 – 4.33 above.

[47] (1949–53) Report, Cmd 8932, paras 77–111.

[48] This rule, now abolished, held that it was murder if a person killed another, even quite accidentally, while committing a felony or while resisting an officer of justice.

[49] *Ibid*, para 97.

[50] See, eg, the example at para 4.28 above.

(2) when she unreasonably and *in*advertently takes a risk of causing death or serious injury, where her failure to advert to the risk is culpable because

(a) the risk is obviously foreseeable, and

(b) she has the capacity to advert to the risk.

4.44 We now turn to describe how these fundamental policy decisions, together with the views expressed on consultation, have influenced our detailed proposals for the reform of the law.

PART V
OUR PROPOSALS FOR REFORM

INTRODUCTION

5.1 In Part IV we considered the circumstances in which a person ought to be held criminally liable for the unintentional causing of death, and concluded that this should be the case only where there was an obvious risk of causing death or serious injury, which he was capable of appreciating.[1] In this part we consider in detail how this decision about liability should be reflected in the composition of individual offences. A draft Involuntary Homicide Bill, which would implement our recommendations, is annexed as Appendix A to this report.

ONE BROAD OR SEVERAL NARROW OFFENCES?

5.2 As we have observed,[2] involuntary manslaughter is an exceptionally broad category of offence. It seems to us to be inappropriate that types of conduct which vary widely in terms of fault should all carry the same descriptive label. Furthermore, its width can cause problems to the judge on sentencing, because he is unable to receive the jury's guidance on matters that are crucial to the severity of the penalty deserved, such as the accused's foresight of the risk of causing death.[3]

5.3 For these reasons, **we recommend the creation of two different offences of unintentional killing, based on differing fault elements, rather than one single, broad offence.** We adopted a similar approach in the context of non-fatal offences in Law Com No 218, where we created a hierarchy of offences, graded by reference both to the seriousness of the injury caused and to the accused's mental state.[4] **(Recommendation 1)**

5.4 There might be some *disadvantages* in having separate offences. First, there might be a danger of court time being wasted in legal argument as to where the exact borders of each offence lay. We do not believe, however, that this danger would be too great, since the offences that we recommend are defined in terms of easily understood degrees of fault. Secondly, there might be a danger that if the prosecution is provided with a choice of separate offences, it might undercharge or accept pleas to lesser offences than would be appropriate. This is a potential problem wherever a hierarchy of offences is created, but a single very wide offence carries with it what we believe to be the much greater dangers to which we refer in paragraph 5.2 above.

5.5 The prosecution would not be *disadvantaged* by the creation of several different offences if it was unclear at the start of the trial whether, for example, the accused was aware of a risk of death or whether he displayed culpable inadvertence towards it, because it would always be possible to charge the separate offences in

[1] See paras 4.12 – 4.44 above.

[2] See para 1.2 above.

[3] See paras 3.2 – 3.4 above for a more detailed discussion of these problems.

[4] Law Com No 218, paras 13.3 – 13.5; and see paras 4.7 – 4.9 above.

the alternative. If, for some reason, this procedure was not followed, the rules on alternative verdicts that we propose[5] would mean that the jury could convict of a less serious manslaughter offence on an indictment charging a more serious offence, even if the lesser offence was not specifically charged. Similarly, we propose later in this part that both of the new offences ought to be available as alternative verdicts on a charge of murder.[6]

RECKLESS KILLING

5.6 The first of our proposed new offences, set out in clause 1 of the attached Involuntary Homicide Bill, is "reckless killing". This offence shares the same concept of "recklessness" as the non-fatal offences in Law Com No 218,[7] and is drafted as follows:

> A person who by his conduct causes the death of another is guilty of reckless killing if –
>
> (a) he is aware of a risk that his conduct will cause death or serious injury; and
>
> (b) it is unreasonable for him to take that risk having regard to the circumstances as he knows or believes them to be.[8]

The response on consultation

5.7 We proposed the creation of this offence in Consultation Paper No 135.[9] It received almost uniform support on consultation,[10] although there were three contrary arguments. Five respondents[11] were opposed to the creation of a separate

[5] In paras 5.57 – 5.60 below.

[6] See paras 5.53 – 5.55 below.

[7] See para 4.7 above. There is one very slight change: the requirement of unreasonableness is to be considered in the light of the circumstances as the defendant (rightly or wrongly) *believes* them to be, not just the circumstances *known* to him – which must by definition be circumstances that actually exist. Thus it would be sufficient if, although the risk was not *in fact* an unreasonable one to take, it *would* have been unreasonable had the facts been as the defendant believed them to be. We think that this rule is necessitated by the subjective character of recklessness, and is consistent with the principle that a person is guilty of an attempt if he does something that, though objectively innocent, would have been an offence if the facts had been as he wrongly believes them to be. See Criminal Attempts Act 1981, s 1; *Shivpuri* [1987] AC 1. Only in very rare circumstances would this change make any practical difference.

[8] Involuntary Homicide Bill (Appendix A below) cl 1(1).

[9] Para 5.21.

[10] The Old Bailey judges; the Office of the Judge Advocate General; Garland, Johnson, Swinton Thomas, Schiemann, Tuckey, Phillips, Buckley, Sachs, Forbes and Latham JJ; A McColgan; Professor Sir John Smith; Celia Wells and the Cardiff Crime Study Group; Professor Martin Wasik; the SPTL; the Centre for Criminal Justice Studies, Leeds; the Police Superintendents' Association; ACPO; the CPS; Nicola Padfield; the Law Society; the Criminal Bar Association and Anne Rafferty QC; Hempsons; the General Council of the Bar; the Department of Transport; W J Bohan; the British Railways Board; and Gary Streeter MP.

[11] Paul Roberts, David Jeffreys QC and Waterhouse, Owen and Potts JJ.

offence of reckless killing because they thought that a clear distinction, in terms of culpability, could not be drawn between causing death through gross carelessness on the one hand and (subjective) recklessness on the other. We do not accept this argument because we consider that there is a clear distinction, in terms of moral fault, between a person who knowingly takes a risk and one who carelessly fails to advert to it, and that the worst case of advertent risk-taking is more culpable than the worst case of inadvertent risk-taking.[12] For this reason also, we suggest that the maximum penalty for this offence ought to be life imprisonment.

5.8 Next, two consultees[13] said that the word "recklessness" has had such a troubled and confused history that no new offence should draw on this terminology. We addressed this question in Law Com No 218, and concluded that "there is no other word equally suitable to serve as a label for [unreasonably taking a risk of which the defendant is aware]; and that in any event users, armed with [a statutory] definition, will readily realise that 'recklessness' and cognate words are indeed used in the Bill as labels only".[14] We have reconsidered this point in deference to the views we received, but we still consider it appropriate to use the same statutory definition of recklessness in the Involuntary Homicide Bill annexed to this report as in the Bill in Law Com No 218, for the same reason.

5.9 Finally, there were those who told us that, following the decision of the House of Lords in *Adomako*,[15] the law is in no need of reform. We do not accept this argument, for the reasons set out in Part III above.

The details of our recommendation

5.10 In Consultation Paper No 135[16] we proposed that a person could be guilty of reckless killing if he foresaw a risk of causing *either* death *or* serious injury, and no-one on consultation objected to the inclusion of the latter form of harm. We consider that this is the correct approach, both as a matter of principle[17] and in order to create parity with the law of murder.[18]

5.11 The Bill does not define "serious injury", because, as the Criminal Law Revision Committee concluded:

> ... no satisfactory definition could be drawn up: some broken noses might amount to serious injury, others not. Many cases involve a

[12] See para 4.10 above.

[13] McCullough and Tucker JJ.

[14] Law Com No 218, para 10.3.

[15] [1995] 1 AC 171.

[16] Paras 5.20 – 5.21.

[17] See para 4.19 above.

[18] The present law of murder requires proof of intention to kill or to cause serious injury: *Cunningham* [1982] AC 566; *Hancock and Shankland* [1986] AC 455. Under the statutory definition proposed by the CLRC the mental element would be intention to kill, or intention to cause serious injury by an unlawful act together with an awareness of the risk of causing death. This proposal has been endorsed by the House of Lords Select Committee on Murder and Life Imprisonment: see para 1.28 above.

> multiplicity of injuries none of which alone might constitute serious injury but which together might amount to it. In the absence of a definition, the court's task would be to assess whether the totality amounted to serious injury. We consider the most satisfactory solution to be to leave it to a court to decide in each case whether the harm done amounted to serious injury.[19]

For the same reason, we did not attempt to define it in the Bill on non-fatal offences in Law Com No 218.[20]

5.12 Our proposals would mean that, where both the defendant and the deceased knew that the defendant's conduct involved a risk of death or serious injury to the deceased, but the deceased nevertheless *consented* to it – for example, where it consisted in the carrying out of a surgical operation – the defendant would be guilty of reckless killing if it was unreasonable of him to take that risk. The relationship between consent and recklessness is not a simple one, and is a problem that we have recently considered at length. In our consultation paper on Consent in the Criminal Law[21] we suggested that the consent of the person injured (or, in the present context, killed) by the defendant ought in principle to be – and probably already is, under the present law – a *relevant factor* in determining whether the defendant acted unreasonably in taking the risk that he did: in other words, there may be risks which it is unreasonable to take with the life of an unwilling victim, but which are reasonable if the victim consents. On the date when we approved this report, the consultation paper on consent had not even been published, and we obviously cannot anticipate what our final recommendations on the subject-matter of that paper might be. In the meantime, we think that the effect of the deceased's consent on the question of the defendant's recklessness must continue to be governed by the existing law – whatever it may be.

5.13 For all these reasons, **we recommend the creation of a new offence of reckless killing, which would be committed if**

(1) **a person by his or her conduct causes the death of another;**

(2) **he or she is aware of a risk that his or her conduct will cause death or serious injury; and**

[19] Criminal Law Revision Committee, Fourteenth Report, Offences Against the Person (1980) Cmnd 7844, para 154; Professor Glanville Williams dissented from this recommendation.

[20] Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218, para 15.8. In the context of our law reform project on consent as a defence we have provisionally proposed a distinction between *serious* injury (within the meaning of the Bill annexed to Law Com No 218) and what we have called *seriously disabling* injury: under our proposals, the former could lawfully be inflicted upon a consenting adult but the latter could not. This distinction (unlike that between serious and non-serious injury) *would* in our view require definition, because it would mark the borderline not just between two offences of differing gravity but between conduct that is lawful and conduct that is not: see Consent in the Criminal Law (1995) Consultation Paper No 139, paras 4.29 – 4.40.

[21] (1995) Consultation Paper No 139, especially Pt IV.

(3) **it is unreasonable for him or her to take that risk, having regard to the circumstances as he or she knows or believes them to be. (Recommendation 2)**

UNLAWFUL ACT MANSLAUGHTER

5.14 In Part IV we concluded that, as a matter of principle, the criminal law is justified in holding a person liable for causing a death, which he neither intended nor foresaw, only in cases where he *should* have adverted to a risk of causing death or serious injury which was inherent in his conduct. A person is, we believe, at fault in failing to advert to such a risk only if it would have been *obvious* to a reasonable person in his position, and if he himself was *capable* of appreciating it.[22] As we explained above,[23] the form of manslaughter known as "unlawful act" or "constructive" manslaughter[24] does not meet these criteria. It follows that this form of the offence is in our view inconsistent with the principles that we believe ought to govern criminal liability.

5.15 We are conscious that to many people this conclusion will seem to be at odds with common sense. The instinct to blame a person for what he has actually *done*, rather than for the aspects of his conduct that are blameworthy, is a powerful one, and we can sympathise with those who believe that this should be the basis of criminal liability for homicide. Indeed, to some extent it is reflected in our proposals, since we recommend the retention of a sharp distinction between those cases where death results and those where it does not: only in the former case would there be liability for gross carelessness, as distinct from recklessness. What we cannot accept is the proposition that, whenever death *has* resulted, and the person causing it can fairly be held responsible for the injury (however minor) that caused it, it is automatically fair to hold him responsible *for the death*. We believe that the law should be founded on principle rather than instinct; and we believe that liability for unlawful act manslaughter is unjustifiable in principle.

5.16 For this reason **we recommend the abolition of unlawful act manslaughter in its present form**. This would not of course mean that all those who would be convicted under the present law of unlawful act manslaughter would escape criminal liability altogether. The overwhelming majority of such cases would fall within one of the offences that we do propose: even if the defendant was not aware of the risk of death or serious injury (in which case he would be guilty of reckless killing) it would usually be possible to say that that risk was obvious and that he *should* have been aware of it – in which case he would be guilty of the offence of killing by gross carelessness that we propose below.[25] In the minority of cases where this is not so, he could be prosecuted for the appropriate non-fatal offence.[26] **(Recommendation 3)**

[22] See paras 4.17 – 4.42 above.

[23] Paras 3.5 – 3.6.

[24] See paras 2.3 – 2.7 for an account of this present law.

[25] See paras 5.17 – 5.37.

[26] See n 10 to para 4.7 above.

KILLING BY GROSS CARELESSNESS

5.17 The second new offence which we recommend ought to be created is "killing by gross carelessness". This offence is set out in clause 2(1) of the attached Bill.

Our provisional proposal

5.18 In Consultation Paper No 135 we set out a provisional formulation for a new offence.[27] It was broadly based on the principles discussed in Part IV of this report. We also applied the policy that, while many people make errors of judgment, or absent-mindedly disregard important matters, a serious homicide offence should target only those who are very seriously at fault.[28] This view informs the present law of gross negligence manslaughter – the negligence must be very serious, or "gross" – and on consultation, no-one dissented from it.

5.19 The provisional proposal was in the following terms:

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

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

The response on consultation

5.20 This provisional formulation received a mixed reception on consultation. Many respondents,[29] including some with great experience of criminal law, unreservedly supported it. Others supported the general approach we had taken, but had some reservations about this precise formulation. In particular, several respondents[30] objected to the use of the words "seriously and significantly" in the second limb to describe the degree by which the accused's conduct failed to reach the acceptable standard. The fear was expressed that these words could lead to unnecessary legal argument in the attempt to distinguish between them. It was thought that one or other of the adverbs would be sufficient, or that another word, such as "substantially" or "far", would be preferable.

5.21 Respondents with a particular interest in the medical profession[31] supported our general approach but were slightly concerned that the distinction in the second limb of the proposed formulation, between defendants who create risks and those who respond to pre-existing risks, did not reflect the realities of medical practice.

[27] Para 5.57.

[28] Consultation Paper No 135, para 5.44.

[29] The Old Bailey judges; the Office of the Judge Advocate General; Swinton Thomas, Schiemann, Bell, Tuckey, Phillips and Latham JJ; the Law Society; the General Council of the Bar; the ACPO Crime Committee; Celia Wells and the Cardiff Crime Study Group; A McColgan; Disaster Action; and HASAC.

[30] One of the Old Bailey Judges; Sedley and Sachs JJ; the Criminal Bar Association and Anne Rafferty QC; the CPS; the Police Superintendents' Association; Paul Roberts; Gary Slapper; and the Centre for Criminal Justice Studies, Leeds.

[31] The BMA and the Medical Defence Union.

The BMA pointed out that some medical practices would be difficult to categorise in this way:

> A failure to diagnose at an early stage may have severe consequences for the patient. In this context the doctor may be said to have created the risk. Furthermore … many of the interventions of medical practitioners amount to causing serious harm and undoubtedly therefore create risks.

5.22 In any event, it is not certain that there is any clear difference, in terms of moral culpability, between risks created and inherited risks badly dealt with.

5.23 Some respondents[32] were concerned that the proposed statutory formulation would not preserve the jury's ability to consider the defendant's conduct in the context of *all* the surrounding circumstances, which is one of the advantages of the present gross negligence test. Other respondents[33] strongly criticised the proposed formulation on the grounds that it was too vague and would leave to the jury the task of categorising behaviour as criminal or not. This is, of course, a frequent criticism of the present law.[34] Because they could see no way around these drawbacks, a significant number of respondents[35] wished to keep the present *Adomako* test of gross negligence, principally because it was preferable to the proposed alternative.

Our final recommendation

5.24 We took all these comments into account when we were formulating the new offence in clause 2 of the attached Bill. We believe that, so far as is possible, this new offence answers both the criticism levelled at the provisional formulation set out in Consultation Paper No 135, and many of the problems inherent in the present gross negligence offence.[36]

5.25 The new offence is, to a certain extent, modelled on the test of "dangerousness" in road traffic offences.[37] This is a test with which lawyers, the courts and the public

[32] The Criminal Bar Association, the Medical Defence Union, and Sedley J.

[33] David Carson, W J Bohan, John Gardner, and the SPTL.

[34] See, eg, Graham Virgo, "Reconstructing Manslaughter on Defective Foundations" [1995] CLJ 14, 16; Simon Gardner, "Manslaughter by Gross Negligence" (1995) 111 LQR 22, 23; Alan Reed (1994) 138 SJ 1016; Sybil Sharpe, "Grossly Negligent Manslaughter after *Adomako*" (1994) 158 JP 725; and Gary Slapper, "Manslaughter, *Mens Rea* and Medicine" (1994) 144 NLJ 941.

[35] Ian Barker, Professor Sir John Smith, Messrs Hempsons, the SPTL, Farquharson LJ, and Owen, Rix, Scott Baker, Mantell, Jowitt and Waterhouse JJ.

[36] See paras 3.7 – 3.13 above.

[37] The Road Traffic Act 1988, s 2A(1), inserted by Road Traffic Act 1991, s 1, provides:

> ... a person is to be regarded as driving dangerously if ...
>
> (a) the way he drives falls far below what would be expected of a competent and careful driver, and
>
> (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

are now familiar. Our researches have not been able to discover any criticism of the way in which the "dangerousness" test in the Road Traffic Act 1991 operates in practice. Like the road traffic offences, the new offence is targeted at the person whose conduct falls *far* below that which could be expected from him, in the face of a risk which would have been obvious to a reasonable person in his position. It avoids reliance on the troubled concepts of "negligence" and "duty of care".[38]

5.26 One of the questions we asked in Consultation Paper No 135 was: "is it appropriate that the [proposed 'gross carelessness'] offence should be formulated in terms of [a risk of] serious injury as well as death?"[39] An overwhelming majority of the respondents who referred to this point thought that it should.[40] For example, the CPS told us that "[i]f the risk of death had to be proved, similar problems to those arising in attempted murder cases may arise". We believe that in practice there is a very thin line between behaviour that risks serious injury and behaviour that risks death.[41] However, much time could be spent in arguing about whether there was a foreseeable risk of causing death itself, and not merely serious injury. For these reasons, we have framed the offence in terms of an obvious risk of death *or* serious injury.

5.27 It is an important element of the new offence that the risk of death or serious injury would have been *obvious* to a reasonable person in the accused's position.[42] "Obvious" in this context means "immediately apparent", "striking" or "glaring"; we believe that a person cannot be blamed for failing to notice a risk if it would not have been obvious to a reasonable person in his place. We chose the word "obvious" rather than, for example, "foreseeable" because we think that the former is more generous to the defendant, and thus closer to the concept of culpable inadvertence discussed in Part IV.[43] Also, it is a word which, we believe, juries will readily understand. For the same reasons, we preferred it to the word "significant", which was proposed in Consultation Paper No 135.[44]

5.28 It will be a question of fact for the jury in every case whether the risk that the accused's conduct would cause death or serious injury would have been obvious to a reasonable person in his position. When considering this element, it must attribute to "the reasonable person" any relevant facts within the knowledge of the

[38] See paras 3.7 – 3.13 above.

[39] Consultation Paper No 135, para 6.14.

[40] Garland, Owen and Potts JJ; the Old Bailey judges; W J Bohan; the Police Superintendents' Association; the Office of the Judge Advocate General; the BMA; Gary Slapper; the Cardiff Crime Study Group and Celia Wells; David Jeffreys QC; the CPS; Blofeld J, summarising the views of the QBD judges; the SPTL; Barry Mitchell; the Centre for Criminal Justice Studies, Leeds; and the Health and Safety Commission. Professor Sir John Smith was the exception. He "would confine the offence to cases where there is a significant risk of death, as Lord Mackay appears to do in *Adomako*. This is different from the case of deliberate risk-taking, where it is arguable that the risk-taker cannot be heard to say 'I did not think that there was a risk of more than serious bodily harm.'"

[41] See para 4.19 above.

[42] Involuntary Homicide Bill (Appendix A below) cl 2(1)(a).

[43] Paras 4.12 – 4.42.

[44] See para 5.19 above.

accused at the time in question.[45] Thus if, for example, the accused broke into the house of an elderly person, and it is proved that he knew that his victim had a weak heart, this knowledge will be attributed to the reasonable person, and the jury may decide that it would have been obvious to such a person that the accused's conduct carried a risk of causing death or serious injury to the victim. Similarly, if the accused held himself out to possess any special skill or experience, the reasonable person will be credited with this.[46] If, therefore, the accused was a surgeon carrying out an operation, and a risk of causing death or serious injury to the patient would have been obvious to a reasonable surgeon in his position, this element of the offence will be satisfied.

5.29 The next element of killing by gross carelessness is that the accused must have been *capable* of appreciating the risk at the material time.[47] We explained why this is a necessary precondition of culpable inadvertence in Part IV.[48] For the purposes of this new offence, it is immaterial whether the accused was not capable of appreciating the risk because of a *permanent* disability, such as blindness or low intelligence, or because he was *temporarily* tired or ill etc. However, we would draw attention to the fact that the law at present allows the actus reus to be treated as a continuous course of conduct,[49] so that if at any time during the actus reus the accused had the requisite capacity to appreciate material risks, he would be excluded from the protection of the clause. An example of this type of defendant is the motorist who continues driving when he knows that he is very tired and eventually swerves into the opposite lane and causes an accident. It is possible that at the time of the accident he was so exhausted that he lacked the capacity to appreciate the risk inherent in swerving. However, if at some point during the time he was driving he had the capacity to realise that driving when very tired involves an obvious risk of causing death or serious injury, he could still fall within the scope of the new offence.

[45] Involuntary Homicide Bill (Appendix A below), cl 2(2)(a).

[46] *Ibid*, cl 2(2)(b).

[47] *Ibid*, cl 2(1)(b).

[48] Paras 4.20 – 4.22 above.

[49] See *Thabo Meli* [1954] 1 All ER 373; *Le Brun* [1992] QB 61; *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439; *Miller* [1983] 2 AC 161.

5.30 The Bill[50] applies to the two new offences the present law relating to the effect of intoxication on criminal liability.[51] Under the present law, where an allegation of recklessness (that is, awareness of risk) has to be proved, and the defendant was not aware of the risk in question because he was voluntarily intoxicated, the jury should be asked to consider whether he would have been aware of the risk had he been sober, and convict him if the answer to this question is yes. This principle will, of course, apply to the offence of reckless killing.[52] We know of no authority that applies the general rule to a requirement of *capacity* to recognise a risk, as distinct from a requirement that the risk be *actually recognised*,[53] but we are confident that if the point arose the rule would be applied to the former kind of requirement too. Thus, if a person charged with killing by gross carelessness was not capable of appreciating the risk at the time in question because he was voluntarily intoxicated, through drink or drugs, the jury will have to disregard this and decide whether he would have had the relevant capacity had he been sober.[54]

5.31 Finally, it must be proved *either* (i) that the accused's conduct fell far below what could reasonably be expected of him in the circumstances, *or* (ii) that he intended by his conduct to cause some injury or was aware of, and unreasonably took, the

[50] Involuntary Homicide Bill (Appendix A below), cl 8(3).

[51] See, eg, *DPP v Majewski* [1977] AC 443 and *Metropolitan Police Commissioner v Caldwell* [1982] AC 341.

[52] It is our intention that it should continue to apply if the recommendations in our report Legislating the Criminal Code: Intoxication and Criminal Liability (1995) Law Com No 229 are implemented. There is a technical problem in ensuring that this is the combined effect of the recommendations in that report and this. This is because the offence of reckless killing requires proof that the taking of the risk of death or serious injury should have been unreasonable having regard to the circumstances *as the defendant knows or believes them to be* – whereas our codified version of the rule in *Majewski* [1977] AC 443 expressly does not extend to allegations of knowledge or belief. If the recommendations in both reports were to be enacted, it would be necessary to amend one of the Bills so as to ensure that, in determining whether it was unreasonable for the defendant to take the risk, the court may have regard not only to those circumstances that *are* known to him or believed by him but also those circumstances of which he *would* have been aware had he not been voluntarily intoxicated.

[53] The language of some of the authorities (eg *Beard* [1920] AC 479) is *phrased* in terms of capacity to recognise a risk, rather than actual awareness of it; but these authorities are concerned with offences in which the defendant's *capacity* to recognise the risk is relevant only in the sense that, if he was incapable of recognising it, he obviously did not in fact recognise it. Capacity itself is not strictly the issue, as it would be in the case of our proposed offence.

[54] Here too the Bill annexed as Appendix A to the present report is drafted with a view to its immediate enactment, and for this reason does not quite dovetail with the Bill annexed to Law Com No 229. For example, cl 2(2)(a) of the present Bill requires the court, in determining whether the risk of death or serious injury would have been obvious to a reasonable person in the defendant's position, to attribute to this hypothetical person any relevant knowledge which the defendant actually had. In our view this ought to include knowledge which the defendant *would* have had if he had not been voluntarily intoxicated; but this effect would not be achieved by the Bill annexed to Law Com No 229 as it stands, because it expressly provides that the codified *Majewski* rule does not extend to allegations of *knowledge*. We intend to remedy these technical drafting problems when we come to consolidate the Bills annexed to Law Com Nos 218 and 229 with the Bill annexed to this report.

risk that it might do so.[55] This element of the new offence is intended to catch only the very worst cases in which a person inadvertently causes death, as is appropriate for a serious homicide offence.[56]

5.32 The first of the two alternative ways of satisfying this element of the offence is similar to the test of "dangerousness" in the offence of causing death by dangerous driving:[57] the accused's conduct must fall *far* below what could be expected from him. This formulation is intended to avoid the circularity of the *Adomako* formulation,[58] although it would still leave a large degree of judgment to the jury, and this might lead to inconsistent verdicts being entered in different cases based on similar facts. We can see no way around this problem, without attempting to define the offence in such rigid and detailed terms that it would be unworkable. The jury are required to consider the accused's conduct "in all the circumstances". It could therefore consider, for example, the pressures and conditions under which he acted or failed to act.[59]

5.33 However, it is not necessary to prove that the accused's conduct fell far below the required standard if it can be shown that he intended to cause some injury to another, or was aware of a risk of doing so, which he unreasonably took.[60] We included this provision because a number of consultees[61] told us that the elements of unlawful act manslaughter are easier to explain to juries, and simpler for them to understand, than gross negligence manslaughter; similarly, we think, it will be easier for juries to decide whether the defendant acted intentionally or recklessly in respect of *some* injury than whether his conduct fell far below what could reasonably be expected. This fact would not of course justify an alternative form of the offence if there were any danger of that alternative catching a defendant whose conduct is not seriously culpable; but we consider that a person who intentionally or recklessly causes some injury, thereby creating a risk of causing death or *serious* injury which ought to have been obvious to him, will *always* be seriously culpable.[62] Indeed it is hard to imagine circumstances in which this requirement would be satisfied but that of conduct falling far below the required standard would not. In other words, the alternative adds little or nothing to the reach of the offence; it serves only to simplify it for the jury, by dispensing with the need to consider a question which will almost inevitably be academic.

[55] Involuntary Homicide Bill (Appendix A below) cl 2(1)(c).

[56] See para 5.18 above.

[57] See n 51 to para 2.19 above.

[58] See para 3.8 above.

[59] See para 5.23 above.

[60] Involuntary Homicide Bill (Appendix A below) cl 2(1)(c)(ii).

[61] Eg McCullough J, Blofeld J.

[62] Unless of course he is *justified* in inflicting injury or taking the risk that he may do so, eg on grounds of self-defence. In that case he would be guilty of no offence if the *only* injury caused were the injury that he intends to cause or is aware that he may cause, and this alternative form of the gross carelessness offence would therefore not apply: see cl 2(4) of the draft Bill at Appendix A below. The prosecution might nevertheless seek a conviction of the gross carelessness offence on the ground that, in the light of the obvious risk of *death* or *serious* injury, his conduct nevertheless fell far below what could reasonably be expected.

5.34 For all these reasons, **we recommend the creation of a new offence of killing by gross carelessness, which would be committed if**

(1) **a person by his or her conduct causes the death of another;**

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

(3) **he or she is capable of appreciating that risk at the material time; and**

(4) ***either***

(a) **his or her conduct falls far below what can reasonably be expected of him or her in the circumstances, *or***

(b) **he or she intends by his or her conduct to cause some injury, or is aware of, and unreasonably takes, the risk that it may do so, *and* the conduct causing (or intended to cause) the injury constitutes an offence. (Recommendation 4)**

Some examples

5.35 The following examples will illustrate how the new offence would operate in practice.

5.36 *Example 1: D, a climbing instructor, took a group of inexperienced climbers out with inadequate equipment in very bad weather. They got trapped and one of them died.*

In order to convict D, the jury would have to answer "yes" to all the following questions: (1) Would it have been *obvious* to a reasonable climbing instructor in D's place that taking a group of inexperienced climbers out in the prevailing conditions would create a risk of causing death or serious injury to one of them? (2) Was D *capable* of appreciating this risk? and (3) Did his conduct fall *far* below what could reasonably be expected of him in all the circumstances?

5.37 *Example 2: D caused V's death by punching him in the head, not realising that serious injury might result; the impact of the blow caused a blood clot in the brain.*

The jury would have to decide whether it would have been *obvious* to a reasonable person in D's position that punching V as hard as he did would create a risk of causing death or serious injury, and whether D was *capable* of appreciating the risk at the time in question (unless he was incapable due to voluntary intoxication).[63] If the answer to both of these questions is "yes", and if it is satisfied that D intended to cause *some* injury to V, or was reckless as to doing so, the jury must convict. If not, the accused may be convicted of the appropriate non-fatal offence in the alternative.[64]

[63] See para 5.30 above.

[64] See para 5.59 below.

A single offence to cover all types of activity

5.38 In our consultation paper we provisionally proposed[65] that there should be one unified offence to cover every case in which death was caused by culpable inadvertence: by surgeons carrying out operations, captains controlling ships, site foremen organising construction work, or farmers scaring off trespassers. We suggested that causing death by bad driving on the roads might be a possible exception to this general rule, and we consider this issue separately below.[66]

5.39 On consultation, most respondents who referred to this point thought that there should be one general formulation to cover all forms of activity, although the TUC proposed the creation of a new offence of "manslaughter at work" and the GMB[67] proposed the creation of new offences within the framework of the Health and Safety at Work Act. We consider the serious problems connected with workplace deaths at length in our discussion of corporate liability below.[68]

5.40 We also considered whether to recommend the creation of a separate offence targeted at a person who causes the death of a young child, with a wider scope than either of our two new offences, because it is possible to think of cases which would not be caught by either. For example, in a case where D caused the death of a baby by shaking him hard, D would not be guilty of killing by gross carelessness if the jury decided either (1) that it would not have been obvious to a reasonable person in his position that shaking a baby hard might cause death or serious injury, or (2) that the accused was, perhaps, too unintelligent, immature or inexperienced to appreciate this risk even if he had stopped to think about it, or (3) that his conduct did not fall far below what could be expected from him in all the circumstances because, for example, the baby had been crying incessantly for the last three days. Under the present law many such cases are dealt with as unlawful act manslaughter, where, as we have seen,[69] all that needs to be proved is that the defendant intended to cause (or was reckless whether he caused) a relatively minor injury, but in fact caused death.

5.41 We decided against recommending a special offence for the following reasons. First, if it is wrong in principle that a person should be held criminally liable for causing death when death or serious injury were not foreseeable consequences of his conduct, or where he was not himself capable of appreciating the risk in question, this principle must surely hold true whatever the age of the person killed. Secondly, there are a number of special serious offences aimed at the carers of young children,[70] and we believe that these, in combination with the general

[65] Consultation Paper No 135, para 5.45.

[66] See paras 5.62 – 5.69 below.

[67] Formerly the General Municipal Boilermakers and Allied Trades Union.

[68] Parts VI–VIII.

[69] See paras 2.3 – 2.7 above.

[70] Principally under s 1 of the Children and Young Persons Act 1933, which provides, inter alia:

> (1) If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be

homicide offences proposed in this report, will provide adequate protection to young children. It is noteworthy that the NSPCC in its response to Consultation Paper No 135 considered that unlawful act manslaughter should be abolished without replacement, as long as an offence equivalent to gross negligence manslaughter was retained to cover cases where children are killed through negligent caring.

Omissions causing death

5.42 As we observed in Part III, the law that governs the circumstances in which a positive duty to act arises, so as to impose criminal liability for death caused by omission, is very uncertain, particularly in relation to "voluntary undertakings".[71] The policy behind the present law has been the subject of severe criticism from academic lawyers.[72] We considered three possible options, which we set out in the following paragraphs.

5.43 The first option was to attempt to codify the present common law position on the duty to act; we have decided against this for two reasons. The first reason is precisely that the extent of the duty to act at common law is not certain. In Consultation Paper No 135 we set out our view of the present law, and on consultation no-one dissented from this view. We did not, however, expressly ask consultees for their opinions on this topic, and we believe that it would be very unwise to attempt to do in this project what the CLRC, the Code Team and this Commission[73] have in the past failed to do, without the benefit of detailed and thorough consultation. Secondly, the present law has been the subject of much criticism,[74] and we consider that it would not be appropriate for it to be codified without reform. We therefore decided to reject this option.

5.44 The second option was to include a *new, reformed* statutory statement of the duty to act in the Bill. We rejected this option because, as recent academic debate has shown,[75] the extent to which the law ought to impose liability for omission is *very*

> assaulted, ill treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of an offence, and shall be liable –
>
> (a) on conviction on indictment [to a fine and/or imprisonment up to ten years];
>
> (b) on summary conviction [to a fine and/or up to six months' imprisonment].

[71] This is all common law: see paras 2.22 – 2.25 above.

[72] See, eg, Professor Andrew Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 LQR 424, and Professor Glanville Williams, "Criminal Omissions – the Conventional View" (1991) 107 LQR 86: both attack the present position, although they have very different views on what should replace it.

[73] See paras 3.14 – 3.16 above.

[74] See n 72 above.

[75] See n 72 above. Professor Ashworth takes the view, in brief, that "social responsibility" justifies the imposition of extensive liability for omission, whereas Professor Williams strongly rejects this view for a number of reasons.

controversial, and it would be foolhardy to attempt to come to any conclusions without a full and thorough consultation. Furthermore, it would be inappropriate to consider when the law should impose a duty to act in the context of a single offence or group of offences only. This is a question, linked to the question of which offences should be *capable* of being committed by omission, which applies throughout the criminal law. We believe that the Commission ought to consider this topic in the context of a discrete law reform project on criminal liability for omission, if and when resources and competing priorities permit.

5.45 We have therefore reluctantly adopted the third option,[76] and **we recommend that the duty to act continue to be governed by the common law for the purposes of involuntary manslaughter for the time being.** This was also the course we adopted in Law Com No 218.[77] **(Recommendation 5)**

The maximum sentence

5.46 We have considered what should be the maximum sentence available on conviction of the offence we recommend. In the case of *reckless* killing, the answer is obvious: since the offence is intended to cover the most serious forms of involuntary manslaughter, it is clear that the maximum sentence must be the maximum currently available on a conviction of manslaughter – namely life imprisonment.

5.47 The appropriate maximum for our proposed offence of killing by gross carelessness is much harder to determine.[78] Certainly it should, in our opinion, be a determinate sentence rather than life, because we regard the offence as less serious than that of reckless killing. That is not to say that there will not be some cases of killing by gross carelessness which are more serious than some cases of reckless killing. What we mean, by describing the offence of killing by gross carelessness as less serious, is that the *worst* examples of reckless killing (falling short of murder) will inevitably be more serious than the *worst* examples of killing by gross carelessness (falling short of reckless killing). There may be good reason to punish a person who fails to appreciate a risk of death which he ought to have appreciated, but we do not think that such a person could ever be *as* culpable as (for example) the terrorist who leaves a bomb in a public place, knowing that people may well be killed.

5.48 Similarly we think that killing by gross carelessness is (in this sense) a less serious offence, and should therefore be punishable with a lesser maximum sentence, than our proposed offence of intentionally causing serious injury (contrary to clause 2 of the Criminal Law Bill annexed to Law Com No 218), which we recommended should carry life imprisonment. We are conscious that to many people this will seem paradoxical, since it would mean that an offence of causing non-fatal injury would be more serious than one of causing death. We recognise the strength of the concern to which this may give rise. However, we cannot meet this concern without abandoning the principle for which we have argued in Part IV above –

[76] Involuntary Homicide Bill (Appendix A below) cl 3.

[77] Para 11.4; see also Law Com No 177, para 7.9 *et seq*.

[78] For the present law that forms the background to this issue, see Appendix B below.

that the actual *outcome* of the defendant's conduct, though inevitably of great importance to his liability, ought to carry less weight than its *culpability*. The fact that a person has caused death must clearly be a major factor in determining what offence, if any, he has committed, and our recommendations would make no change in that respect. They would mean, for example, that a person who through gross carelessness causes death would be guilty of a serious offence, whereas a person who is equally careless but causes non-fatal injury only, or no injury, would in general[79] be guilty of no offence at all. It is the fact of death that justifies the imposition of – and under our proposals would continue to incur – liability for carelessness falling short of mens rea.

5.49 However, the principle by which we have been guided in formulating our recommendations is that the fact of death, though undeniably of great significance, cannot be *as* significant, for the purposes of criminal liability, as the moral culpability of the defendant's conduct; and that the culpability of his conduct depends primarily on what consequences he *intended* to cause by it, what consequences he was aware it *might* cause, and what consequences he *should* have been aware it might cause. A person who intends to cause *serious* injury is clearly more culpable, and should be sentenced more severely, than one who intends to cause only *minor* injury. If the latter causes not just minor injury but death, that is a factor that ought to be reflected both in the offence and in the sentence; but in our view it ought still to be given less weight than the fact that what he *intended* was minor injury rather than serious injury, and non-fatal injury rather than death. From this perspective, the intentional causing of serious injury can indeed be more serious than the unintentional causing of death, even where the defendant intends to cause *some* injury; and a fortiori where he does not.

5.50 Therefore we conclude that the maximum sentence for killing by gross carelessness should be a determinate one. The question of how long it should be, however, we find much harder to answer. It is conventional for the most serious offences that do *not* carry life imprisonment to be punishable with 14 years' imprisonment. It is true that determinate sentences of more than 14 years are sometimes imposed in the worst cases of involuntary manslaughter. Sentences of 18 years have been upheld for killing in the course of robbery,[80] and of 15 years for manslaughter by arson;[81] and killing in the course of rape might justify a comparable sentence.[82] However, it seems highly probable that most such cases would fall within our proposed offence of reckless killing,[83] and if so charged could therefore be punished with life imprisonment. In addition, robbery, arson and rape are themselves punishable with life imprisonment, so that there would be no question of the judge being unable to impose an appropriate *overall* sentence in such a case. The real issue is whether it should be open to the judge to impose a

[79] Ie in the absence of a specific offence appropriate to the particular activity in question.

[80] *Tominey* (1986) 8 Cr App R (S) 161.

[81] *Nedrick* (1986) 8 Cr App R 179.

[82] Cf *A-G's Ref (No 33 of 1992)(Oxborough)* (1993) 14 Cr App R (S) 712, where the deceased had been raped, tied to a bed and gagged: the sentence was increased to 11 years.

[83] In *Nedrick*, n 81 above, the appellant had admitted in cross-examination that anyone doing what he had done would know that someone might get killed.

sentence of (say) 15 years for the killing alone, as distinct from 15 years for the robbery, arson or rape and (say) 10 years concurrent for an unintentional killing in the course of it. Many would say that a sentence of the latter kind would be an affront to common sense, and that is a view with which we can sympathise. On the other hand we also see force in the view that the maximum sentence for an offence ought to be set at a level appropriate for the worst imaginable case of *that offence*, but should not attempt to reflect the gravity of all the *other* offences that might conceivably be committed at the same time.

5.51 A further consideration is the comparison between the new offence of killing by gross carelessness and the existing offence of causing death by dangerous driving, on which the new offence is closely modelled, the maximum sentence for which has recently been increased to 10 years.[84] We consider below whether this offence should be retained alongside the new offence.[85] For present purposes, however, it is relevant for the light it throws on the view taken by Parliament as to the appropriate sentence for the worst such case. If 10 years' imprisonment is adequate punishment for the worst case of causing death by *driving* that falls far below the requisite standard, it is not clear why it should not also be adequate punishment for a person who causes death by a similar degree of carelessness in any other activity. As a society, we have moved away from our traditionally indulgent attitude towards bad driving; and it is hard to see why carelessly killing someone with a motor vehicle should be any less serious than doing it with equal carelessness but in some other way.

5.52 We find these issues difficult to resolve, and we are not convinced that we are the appropriate body to resolve them. If our recommendations are implemented, others will undoubtedly give consideration to such matters as the maximum sentences for the offences we propose, and we see no purpose in selecting a figure which may or may not prove acceptable, at a time when Parliamentry attitudes to sentencing are so volatile. We therefore make no recommendation as to the maximum sentence for the offence of killing by gross carelessness.

ALTERNATIVE VERDICTS

The new offences as alternatives to murder

5.53 The present law on alternative verdicts is to be found in section 6(2) of the Criminal Law Act 1967.[86] This provides that a person found not guilty of murder

[84] Criminal Justice Act 1993, s 67.

[85] Paras 5.62 – 5.69.

[86] Which states:

> On an indictment for murder a person found not guilty of murder may be found guilty –
>
> (a) of manslaughter, or of causing grievous bodily harm with intent to do so; or
>
> (b) of any offence of which he may be found guilty under an enactment specifically so providing, or under section 4(2) of this Act; or
>
> (c) of an attempt to commit murder, or of an attempt to commit any other offence of which he might be found guilty;
>
> but may not be found guilty of an offence not included above.

on an indictment for murder may be convicted of, inter alia, manslaughter. It is noteworthy that it is a matter for the judge's *discretion* whether he directs the jury about the option of finding the accused guilty of an alternative offence: he is under no obligation to do so.[87] This is important because in some cases the accused might be unfairly prejudiced by the suggestion, at a late stage in the trial, that he might be guilty of another offence which he has not had the opportunity to counter in the course of his defence. If, however, the possibility that the accused is guilty only of a lesser offence has fairly arisen on the evidence, and if directing the jury about it will not unnecessarily complicate the case, then the judge should, in the interests of justice, leave the alternative to them.[88]

5.54 This judicial discretion will, perhaps, be even more important in relation to the new offence of killing by gross carelessness, if, as we recommend, it is able to stand as an alternative to murder. This is because in many murder trials evidence will not automatically have been presented on the elements of this new offence.

5.55 Indeed, murder cases in which it will be appropriate for the judge to leave this charge to the jury may occur relatively rarely; we believe, however, that such cases will be sufficiently frequent to justify providing for them in the legislation. For example, such a power might be useful in a case where D pours petrol through the letter box of his wife's lover, V, and sets it alight, killing V in the fire. In such a case it might be difficult to be sure, until the evidence has been given, whether D (1) intended to kill or seriously injure V, or (2) intended only to frighten V, but was aware that his conduct would create a risk of killing or seriously injuring him, or (3) intended only to frighten V, but ought to have adverted to the risks created by his conduct. In such a case it would be convenient for the judge to have the power to leave alternative allegations of reckless killing and killing by gross carelessness to the jury, in the event that they find D not guilty of murder, provided he considers this to be in the interests of justice. **We therefore recommend that both of the new homicide offences should be available as alternative verdicts to murder.[89] (Recommendation 6)**

5.56 **We also, however, recommend that the long established practice**, supported by House of Lords authority,[90] **that where there is a possibility on a count of murder of the jury returning a verdict of manslaughter, a separate count of manslaughter is *not* added to the indictment, be abandoned.** The rationale behind the current practice is that the inclusion of a manslaughter charge might confuse the jury, and might also lead the defence to argue that manslaughter must be an acceptable verdict on the facts because the prosecution have charged it.[91] Under the present law, if the jury finds the defendant not guilty of murder, many of the ingredients of unlawful act manslaughter[92] will inevitably have been

[87] *McCormack* [1969] 2 QB 442. The trial judge is obliged to leave the lesser offence to the jury whenever it is in the interests of justice to do so: *Maxwell* [1990] 1 All ER 801.

[88] *Fairbanks* [1986] 1 WLR 1202.

[89] Involuntary Homicide Bill (Appendix A below), cl 6(1).

[90] *Saunders* [1988] AC 148, 163A–C, *per* Lord Ackner.

[91] *Ibid*.

[92] An offence which does not focus very precisely on mens rea: see para 2.4 above.

canvassed in the course of the murder trial. The same will not occur in relation to the elements of our two new homicide offences. We consider that the advantage of alerting the defence, judge and jury to, and focussing the prosecution's mind on, the possibility that the jury might be asked to consider an alternative charge of reckless killing or killing by gross carelessness from the beginning of the trial will outweigh the risk of confusing the jury with the inclusion of an alternative count. **(Recommendation 7)**

Alternatives to the new offences

5.57 The question whether any other offence may constitute an alternative on a charge of one of our two new offences will, by virtue of clause 6(4) of the Bill, be governed by the general provisions of section 6(3) of the Criminal Law Act 1967.[93] This allows a jury, having acquitted the accused of the offence charged, to find him guilty of an offence not specifically charged in the indictment,[94] in two principal situations. The first is where the offence charged *expressly* includes an allegation of another indictable offence; the other is where it *impliedly* does so.

5.58 A count *expressly* includes an allegation of another offence if one or more of the allegations in the particulars of the indictment may be notionally deleted and what remains amounts to a valid count for another offence.[95] It is more difficult to decide whether a charge *impliedly* amounts to an allegation of another offence. It used to be the rule that this was only the case where the alternative offence (B) was a *necessary step* towards committing the offence specifically charged (A): in other words, where it was *not possible* to commit A without also committing B.[96] This approach was disapproved by the House of Lords in *Metropolitan Police Commissioner v Wilson*.[97] In that case it was held that alternative offence B need not be a *necessary step* in the commission of offence A, as long as it was *possible* for A to be committed by doing B. For example, although an allegation of inflicting injury does not *necessarily* include an allegation of assault, because it is possible to inflict injury on someone without assaulting him, it *can* do so, and in many cases the injury will have been inflicted by way of an assault. It is necessary to look at the

[93] Which states:

> Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.

[94] But it is preferable to add a separate count of the lesser offence: *Mandair* [1995] 1 AC 208.

[95] *Lillis* [1972] 2 QB 236 (CA): the particulars of a count of burglary under the Theft Act 1968, s 9(1)(b), alleged that D entered a conservatory as a trespasser and stole a lawn-mower. The evidence at the trial showed that, in fact, D had been given permission to enter the conservatory and borrow the mower, which he had then failed to return. If the allegations which the prosecution could not prove were notionally struck out from the particulars, what remained was: D stole a lawn-mower. Such an allegation would have been (just) sufficient to satisfy the Indictment Rules 1971; accordingly it could be left to the jury.

[96] *Springfield* (1969) 53 Cr App R 608.

[97] [1984] AC 242.

factual allegations in each case in order to decide whether these allegations impliedly amount to an allegation of an alternative offence.[98]

5.59 We see no reason why this general law should not apply to our two new offences. If Parliament decides that this area of the law needs reform, this should take place in the context of *all* offences and their alternatives. **We therefore recommend that the question whether any other offence may constitute an alternative on a charge of reckless killing or killing by gross carelessness should be governed by the general provisions of section 6(3) of the Criminal Law Act 1967. (Recommendation 8)**

5.60 It is unlikely that a court would find that an allegation of reckless killing expressly or impliedly includes or amounts to an allegation of killing by gross carelessness. However, we believe that it would be in the interests of justice to have this latter offence available as an alternative to the former in some cases: an example is provided in paragraph 5.55 above. For this reason, **we recommend that killing by gross carelessness should be an alternative to a charge of reckless killing**, and the Bill so provides.[99] Again, it will be a matter for judicial discretion in each individual case whether this course is appropriate. **(Recommendation 9)**

5.61 Under these last two proposals, therefore, where the jury find the accused not guilty on a charge of reckless killing, it may, as a matter of law, be possible for them to enter a verdict of guilty of any offence which amounts to recklessly causing an injury short of death, or any of the alternatives to killing by gross carelessness, some of which follow. Alternatives to killing by gross carelessness might include[100] (depending on the facts of each case) dangerous driving or careless driving,[101] causing damage to property intending to endanger life or being reckless whether life was endangered,[102] and some regulatory offences based on negligence.

MOTOR MANSLAUGHTER

5.62 The history of this area of the law is set out in Part II.[103] At present, a person who causes death through very bad driving can be charged with *either* the statutory offence of causing death by dangerous driving contrary to section 2 of the Road Traffic Act 1991 *or* common law gross negligence manslaughter.[104]

[98] This test is difficult to apply and has been much criticised: see, eg, Professor J C Smith's commentary on the case in [1984] Crim LR 37 and Professor Glanville Williams, "Alternative Verdicts and Included Offences" [1984] CLJ 290. However, if there is a case for reform, it falls outside the scope of the present project.

[99] Involuntary Homicide Bill (Appendix A below), cl 6(2).

[100] This is not intended to be an exhaustive list.

[101] These are statutory alternatives to causing death by dangerous driving: Road Traffic Offenders Act 1988, s 24.

[102] Criminal Damage Act 1971, s 1(2).

[103] See paras 2.17 – 2.21 above.

[104] Following the Lord Chancellor's dictum in *Adomako*: see para 3.8 above. Such a person may also be charged, in an appropriate case, with causing death by careless driving when

5.63 One of the alternative proposals for the reform of motor manslaughter which we made in Consultation Paper No 135[105] is, following the decision in *Adomako*, now obsolete:[106] it was to reverse the decision in *Seymour*[107] so that the same gross negligence test applied to all forms of manslaughter. This leaves three other possible options.

Option 1

5.64 The first, which was the other alternative proposed in Consultation Paper No 135, is to disapply the offence of manslaughter to deaths caused by negligent driving on the roads (or, to put it differently, to except cases that fall within section 1 of the Road Traffic Act 1988[108] from the proposed new offence of killing by gross carelessness). This would leave only the statutory offence of causing death by dangerous driving available in cases where death was caused by *very careless* driving, but it would be possible to charge reckless killing where the death was caused by *subjective recklessness*. This proposal would not have any effect on overall liability: its only effect would be to tidy up the law by removing co-existent liability for two identical offences.

5.65 On consultation there was a split of opinion on this issue. A narrow majority considered that it would be simpler and more logical if the negligent causing of death by driving on the road did *not* continue to fall within a general homicide offence, and that the statutory road traffic offences and the proposed new offence of reckless killing would be sufficient.[109] For example, the CPS described the continued existence of the concept of gross negligence manslaughter in road traffic cases as "an irritant", because it is not clear when manslaughter should be charged rather than the statutory offence, and prosecutors come under pressure from the public to charge what is perceived as the more serious offence.

Option 2

5.66 Other respondents[110] suggested another option for reform: that causing death by bad driving should once again fall within a general homicide offence, without the need for a separate road traffic offence, as was the position in the first half of this

under the influence of drink or drugs (Road Traffic Act 1988, s 3A) or with aggravated vehicle taking which causes death (Theft Act 1968, s 12A(1), (4)).

[105] Consultation Paper No 135, paras 5.25 – 5.29.

[106] See paras 2.20 – 2.21 above.

[107] For which, see para 2.12 above.

[108] This offence applies only to driving *on a road or in a public place*: cases where death was caused by bad driving in another location would have to be dealt with through the law of manslaughter (unless the Road Traffic Act 1988 were to be amended).

[109] Garland J; Johnson J; the Old Bailey judges; the majority of the QBD judges consulted by Blofeld J, including Farquharson LJ, Tuckey, Buckley, Sachs and Forbes JJ; Gary Slapper; Nicola Padfield; Alan Reed; the Law Society; the Criminal Bar Association and Anne Rafferty QC; the General Council of the Bar; the ACPO Crime Committee; the Justices' Clerks' Society; and the British Railways Board.

[110] Owen, Potts, Swinton Thomas, Schiemann and Phillips JJ; Celia Wells and the Cardiff Crime Study Group; the Centre for Criminal Justice Studies, Leeds; the CPS; Hempsons; David Jeffreys QC; and Ian McCartney MP.

century.[111] These respondents pointed out that the cultural reasons for the separate "causing death" driving offences (namely the reluctance of juries to convict of manslaughter in these circumstances) might no longer apply, since public opinion now appears to take a far less sympathetic view of dangerous motorists than hitherto.

Option 3

5.67 Many consultees[112] with particular interest and experience in this field, however, would leave the law as it is at present: that is, they would retain both the separate road traffic offences *and* killing by gross carelessness as possible charges following a killing on the roads. For example, CADD[113] wrote:

> It is significant that complaints to CADD on undercharging and over lenient sentencing have now almost disappeared [since the creation of the new offences of causing death by dangerous driving and causing death by careless driving when under the influence of drink or drugs by the Road Traffic Act 1991]. … It is clear that juries are now more ready to convict for road deaths brought under the Road Traffic Act than they previously were. CADD believes that to start tinkering again with the law in this area would be a retrograde step.

5.68 Our consultation has persuaded us that it would be unwise to amend the current road traffic offences, which appear to be working satisfactorily in an area of the law which has had a troubled history.[114] We think that there might still be a danger that juries would be unwilling to convict of a general homicide offence, in circumstances where they would be prepared to convict of a road traffic homicide offence.

5.69 We also consider, however, that the two new offences that we recommend in this report ought to be available in cases where death is caused by bad driving. Although in the overwhelming majority of such cases the appropriate charge will be one of causing death by dangerous driving, there will be some cases in which the prosecutor may wish to charge one of our new, general, homicide offences. For example, one of our consultees told us of a case in which the accused had blindfolded himself before driving off: a charge of reckless killing would clearly be appropriate in such a case. We would expect the CPS to reserve the charge of killing by gross carelessness for driving cases in which there might be some technical impediment to proceeding on a charge of causing death by dangerous driving, for example where it is not certain whether the accused was actually driving, or whether he was driving on a public road.[115] **We recommend that no change should be made to the existing offences of causing death by bad driving, and that it should also be possible, where appropriate, to**

[111] See para 2.17 above.

[112] The Campaign Against Drinking and Driving; the Department of Transport; Mitchell and Judge JJ; the Recorders of London, Liverpool, Manchester and Newcastle; and the Common Serjeant.

[113] The Campaign Against Drinking and Driving.

[114] See paras 2.17 – 2.21 above.

[115] See n 51 to para 2.19 above.

prosecute such cases as reckless killing or killing by gross carelessness. (Recommendation 10)

THE FORFEITURE ACT 1982[116]

5.70 A common law principle, based on public policy, debars a person who has unlawfully killed another from acquiring a benefit in consequence of the killing,[117] and therefore from taking any benefit under the victim's will or intestacy.[118]

5.71 The Forfeiture Act 1982 ("the Act") empowers the court, except where a person stands convicted of murder,[119] to grant discretionary relief from this principle, to which the Act refers as the "forfeiture rule". Where the court determines that the rule would apply to preclude a person who has unlawfully killed another from acquiring any interest in property, the court may make an order modifying the

[116] See Stephen Cretney, "The Forfeiture Act 1982: the Private Member's Bill as an Instrument of Law Reform" (1990) 10 OJLS 289.

[117] *Cleaver v Mutual Reserve Fund Life Association* [1982] 1 QB 147.

[118] The principle does not apply to a person found to have been insane at the time of the killing: see, eg, *Re Pitts* [1931] 1 Ch 546. It has been stated judicially that the principle does not apply to every case of manslaughter, but only to those in which there has been violence or a threat of violence: eg, *Gray v Barr* [1971] 2 QB 554, 581 *per* Salmon LJ, 587 *per* Phillimore LJ; *Re K (deceased)* [1985] Ch 85 (Vinelott J), affirmed [1986] Ch 180 (CA); *Re H (deceased)* [1990] 1 FLR 441. In the last-mentioned case Peter Gibson J applied the test (at 447C): has the person been guilty of deliberate, intentional and unlawful violence or threats of violence? He explained (at 446H-447A):

> No doubt, one of the reasons behind the rule of public policy is to prevent the encouragement of crime. Terrible though the taking of any life is, it is not an encouragement of crime if the law allows a person to inherit on a death which he has caused in circumstances where he did not act deliberately or intentionally.

Pennycuick V-C expressed a contrary view, however, in *Re Giles* [1972] Ch 544. He held that a wife's conviction of the manslaughter of her husband automatically debarred her from benefiting under his will: the question whether she deserved punishment or was morally blameworthy was, he stated (at 552G), immaterial. *Re Giles* was cited without disapproval in *Royse v Royse* [1985] Ch 22 (CA) 26G-27B, *per* Ackner LJ; and a similar approach was recently adopted by His Honour Judge Kolbert (sitting as a High Court judge) in *Jones v Roberts* [1995] 2 FLR 422, who considered himself bound by *Royse v Royse*.

[119] s 5.

rule.[120] The Act provides that the court should not make an order unless satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear material, the justice of the case requires the effect of the forfeiture rule to be so modified.[121]

5.72 The forfeiture rule and the Act were considered in *Re K (deceased)*,[122] in which a wife who had been subjected to repeated violence at the hands of her husband killed him when a shotgun with which she was threatening him went off. She was convicted of manslaughter and placed on probation for two years. Vinelott J (whose decision was upheld by the Court of Appeal) held that the forfeiture rule applied, but granted relief under the Act. He took into account (among other things) the fact that the applicant had been a loyal wife who had suffered grave violence.

5.73 We have considered whether the Act should be amended in consequence of the proposed replacement of involuntary manslaughter with the two offences of reckless killing and of killing by gross carelessness.

5.74 As in the case of murder, a person cannot be convicted of reckless killing without having in mind the consequences of his actions. In murder, he must intend to kill or cause serious personal injury; in reckless killing he must be aware of the risk that his conduct will have one of those consequences. It seems arguable therefore that the considerations which prompted the exclusion of murder from the Act are applicable to reckless killing as well. Support for this argument might be found in the fact that at the date of the Act "the predominant judicial view was that an actor intended a result if he knew that it was a highly probable (or perhaps merely probable) result of his act, although it was not his purpose or object to cause that result".[123] It seems probable that some cases of manslaughter where the defendant was aware of the relevant risk would have been thought to involve murder and hence to fall outside the ambit of the Act.

5.75 Whatever the merits of the argument canvassed in the previous paragraph, however, we take the view that they cannot prevail against the following consideration. It seems from authorities such as *Re K (deceased)*[124] that at present the court may exercise its discretionary power to grant relief against the forfeiture rule in circumstances where, had the proposed offence of reckless killing been available, the person seeking relief might have been convicted of that offence. In the absence of consultation on this issue we do not consider that it is properly open to us to make a recommendation that would remove from a person seeking

[120] s 2(1). If there has been a conviction, the application must be brought within 3 months of its date: s 2(3).

[121] s 2(2).

[122] [1985] Ch 85 (Vinelott J), [1986] Ch 180 (CA).

[123] J C Smith and B Hogan, *Criminal Law* (7th ed 1993) p 54. This view was subsequently exploded: *Hancock and Shankland* [1986] AC 455, in which both the Court of Appeal and the House of Lords emphasised that even an awareness that the consequence was virtually certain did not constitute an intention.

[124] See para 5.72 above.

relief a right which he has at present, although no doubt discretion would only be exercised in favour of such a person in wholly exceptional circumstances.

5.76 We accordingly make no recommendation for the amendment of the Forfeiture Act 1982.

PART VI
CORPORATE MANSLAUGHTER: THE PRESENT LAW

INTRODUCTION

6.1 Although a corporation is a separate legal person,[1] it has no physical existence; and it can therefore act only through individuals who are its servants or agents. At one time it was thought that, for procedural reasons, a corporation was not indictable. Those procedural reasons have long since ceased to apply;[2] and, as a matter of substantive law, two main techniques have been developed for attributing to a corporation the acts and states of mind of individuals it employs.

6.2 It is convenient to call the first technique "identification". It originated in the 1940s and the concept has been developed in later cases. Broadly, under this doctrine those who *control* the corporation are treated, for the purpose of criminal liability, as embodying the corporation: the acts and states of mind of those who control a company *are* in law those of the company itself.

6.3 The second technique, of vicarious liability, emerged much earlier, in the nineteenth century. According to this doctrine a company is vicariously liable for the acts of any employee wherever an individual employer would be so liable.

6.4 Where neither technique applies, a corporation is not criminally liable. As Lord Hoffmann emphasised in a recent Privy Council decision,

> reference to a company "as such" might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no ding an sich,[3] only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the rules of attribution, count as an act of the company.[4]

Procedure

6.5 Many years ago it was thought that a corporation could not be indicted for any offence.[5] However, legislation now provides:

[1] *Salomon v Salomon* [1897] AC 22.

[2] See paras 6.5 – 6.6 below.

[3] "Thing in itself".

[4] *Meridian Global Funds Management Asia Ltd v The Securities Commission* [1995] 2 AC 500, 506H–507A.

[5] *Anon* (1701) 12 Mod 560, 88 ER 1518, note, *per* Holt CJ. One difficulty was that the accused had to be physically present at a trial at assizes or quarter sessions, though it was held that a corporation could be brought before a court of summary jurisdiction under the Summary Jurisdiction Act 1848: *Evans & Co Ltd v London County Council* [1914] 3 KB 315. This difficulty was, however, overcome by removing the indictment into the Court of

> On arraignment of a corporation, the corporation may enter in writing by its representative a plea of guilty or not guilty, and if either the corporation does not appear by a representative or, though it does so appear, fails to enter as aforesaid any plea, the court shall order a plea of not guilty to be entered, and the trial shall proceed as though the corporation had duly entered a plea of not guilty.[6]

6.6 There used to be a further difficulty, that a corporation could not be indicted for felony.[7] However, section 1 of the Criminal Law Act 1967 abolished the distinction between felonies and misdemeanours.[8]

Interpretation provisions

6.7 Section 14 of the Criminal Law Act 1827 provided that, in the absence of a contrary intention, the word "person" in a statute extended to corporations. The repetition of this provision in the Interpretation Act 1889[9] appears to have induced the courts to invoke it more readily.[10]

King's Bench, which allowed appearance by attorney, by means of a writ of certiorari: eg *Birmingham and Gloucester Railway Co* (1842) 3 QB 223, 114 ER 492 (Worcester Spring Assizes).

6 Criminal Justice Act 1925, s 33(3).

7 A fine was not inflicted for felony except under statutory authority. Manslaughter became punishable with a fine in 1828: 9 Geo 4 c 31, s 9. In *Cory Bros & Co* [1927] 1 KB 810 Finlay J regarded himself as bound to rule on that ground (among others) that an indictment would not lie against a corporation for manslaughter. This decision was subsequently doubted: see para 6.40 below.

8 And, on all matters on which a distinction was previously drawn, assimilated the law to that applicable to misdemeanours at the commencement of the Act.

9 Section 2(1), which defined "person" (unless a contrary intention appeared) as including "a body corporate". (Section 14 of the 1827 Act was repealed by the 1889 Act: s 41 and Sch.) Now, the Interpretation Act 1978 defines "person" as including "a body of persons corporate" (s 5, Sch 1); and, in relation to such bodies, the definition applies to any Act "whenever passed relating to an offence punishable on indictment or on summary conviction" (s 22, Sch 2, para 4(5)).

10 Eg, in *Pearks Gunston & Tee Ltd v Ward* [1902] 2 KB 1, a Divisional Court (Lord Alverstone CJ, Darling and Channell JJ) held that a company could commit an offence under s 6 of the Sale of Food and Drugs Act 1875, of selling to the prejudice of the purchaser any article not of the nature, substance, and quality demanded by her. Both Lord Alverstone CJ and Darling J cited the 1889 Act. Darling J referred to it thus in the opening sentences of his judgment (at p 9):

> With regard to the point that a corporation cannot be liable to a penalty under s 6, we have in s 2, sub-s 1 of the Interpretation Act, 1889, the authority of Parliament for saying that the word "person" in this section includes a body corporate unless the contrary intention appears. For the reasons given by [Lord Alverstone], I cannot see any intention here to exclude a company from the interpretation of the section.

VICARIOUS LIABILITY

6.8 The rule that, in general, vicarious liability does not form part of the criminal law is a long-established principle of the common law.[11] There are three exceptions to this principle.

6.9 Two of these exceptions are the common law offences of public nuisance[12] and criminal libel.[13] The third, more important, exception concerns statutory offences. Many statutes, by imposing an absolute duty on an employer or principal, render her liable for the acts of her employees or agents even if she has not authorised or consented to the commission of those acts:

> A master is not criminally responsible for a death caused by his servant's negligence, and still less for an offence depending on the servant's malice; nor can a master be held liable for the guilt of his servant in receiving goods knowing them to have been stolen. *And this principle of the common law applies also to statutory offences*, with this difference, that it is in the power of the Legislature, if it so pleases, to enact … that a man may be convicted and punished for an offence although there was no blameworthy condition of mind about him.[14]

6.10 The question whether a particular provision imposes vicarious liability is one of construction, depending upon "the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed".[15]

6.11 Where the doctrine of vicarious liability applied, the courts have had no difficulty in holding that a corporation, as well an individual, might be the principal.[16] In 1842, in *Birmingham & Gloucester Railway Co*,[17] the Divisional Court upheld an indictment against the defendant company for failing to construct connecting

[11] "It is a point not to be disputed but that in criminal cases the principal is not answerable for the act of his deputy, as he is in civil cases; they must each answer for their own acts, and stand or fall by their own behaviour": *Huggins* (1730) 2 Ld Raym 1574, 92 ER 518, *per* Raymond CJ.

[12] Eg *Stephens* (1886) LR 1 QB 702, in which the owner of premises on which his servants had created a nuisance was held liable. However, the ground of the decision was that the proceeding, though criminal in form, was essentially civil in nature; and Bramwell B, at p 710, stated that he wished to guard himself against "it being supposed that … the general rule that a principal is not criminally responsible for the act of his agent is infringed".

[13] The leading case is *Holbrook* (1878) 4 QBD 42. Reviewing the history of this aspect of the offence, Lush J explained (at pp 46–49) that the law regarded libel as an exceptional offence and treated, eg, the proprietor of a newspaper which contained a personal libel as a criminal, "though he had not himself committed the criminal act, nor procured or incited another to commit it, nor aided in its commission, nor knew that it was about to be committed" (at p 49). The rigour of the common law had, however, been mitigated by the Libel Act 1843, s 7 of which introduced a defence that publication was made without the defendant's authority, knowledge or consent and (in effect) without negligence on her part.

[14] *Chisholm v Doulton* (1889) 22 QBD 736, 741, *per* Cave J (emphasis added).

[15] *Mousell Bros Ltd v London and North-Western Railway Co* [1917] 2 KB 836, 845, *per* Atkin J.

[16] *Mousell v London and North-Western Railway Co* [1917] 2 KB 836.

[17] (1842) 3 QB 223; 114 ER 492.

arches over a railway line built by it, in breach of a duty imposed upon it by the statute which authorised the incorporation of the company.[18] The duty was imposed by statute directly upon the company. Since the breach of duty consisted of an omission, there was no distraction created by the existence of an obvious individual within the company against whom proceedings could have been brought instead.

6.12 Four years later, however, the same court held that a corporation could also be liable for the positive acts of its servants. In *Great North of England Railway Co*[19] the defendant corporation obstructed the highway while it was building a railway, and failed to comply with statutory instructions which imposed a duty to build a bridge for other traffic over the railway during construction. The corporation was indicted for breach of its statutory duty. Lord Denman CJ could find no grounds of principle on which to distinguish between offences of omission, as in the *Birmingham and Gloucester Railway Co* case, and those based on the commission of a positive act. For pragmatic reasons he also rejected an argument that in the latter type of case it was not necessary to proceed against the corporation because it might be possible to identify and prosecute an individual agent of the company responsible for the breach.[20]

6.13 In both cases the court said that there were some offences for which a corporation could not be indicted. In *Birmingham and Gloucester Railway Co* Patteson J (delivering the judgment of the court) referred to

> a number of cases, which show that a company may be indicted for breach of a duty imposed by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults.

In *Great North of England Railway Co* Lord Denman CJ stated that a corporation could not be guilty of treason, felony, perjury or offences against the person; and pointed out that nobody had sought

> to fix [corporations] with acts of immorality. These plainly derived their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases: but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large.

6.14 This principle has been recently considered at appellate level in two cases, one on each side of the line. The first was *Seaboard Offshore Ltd v Secretary of State for Transport*,[21] in which the House of Lords held that the relevant provision did not

[18] 6 & 7 Will IV c xiv.

[19] (1846) 9 QB 315; 115 ER 1294.

[20] "There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority": (1846) 9 QB 315, 327; 115 ER 1294, 1298.

[21] [1994] 1 WLR 541.

impose vicarious liability. In that case the House was concerned with an offence contrary to section 31 of the Merchant Shipping Act 1988, which provides:[22]

> (1) It shall be the duty of the owner of a ship to which this section applies to take all reasonable steps to secure that the ship is operated in a safe manner.
>
> ...
>
> (3) If the owner of a ship to which this section applies fails to discharge the duty imposed on him by subsection (1), he shall be guilty of an offence … .

Subsection (4) enlarges the usual meaning of "owner" to include a charterer by demise and a person managing the ship under a management agreement. It concludes by providing that the reference in subsection (1) to the taking of all reasonable steps should (in relation to the owner, the charterer or manager) be "construed as a reference to the taking of such reasonable steps as it is reasonable for him to take in the circumstances of the case".

6.15 The justices found that the defendant company, the manager of a ship, had caused it to be operated in an unsafe manner by allowing the chief engineer insufficient time to familiarise himself with the ship before it sailed; but no finding was made as to which of the company's employees was responsible for that failure.

6.16 Both the Divisional Court and the House of Lords held that the company had been wrongly convicted. The question certified for the House of Lords, which it answered in the negative, was:

> whether a manager is vicariously liable for a breach of duty under section 31 of the Merchant Shipping Act 1988 which arises from any act or omission by any of the manager's servants or agents.[23]

6.17 Lord Keith of Kinkel (who made the only reasoned speech) said:

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

[22] This section was brought into force as a result of the findings of the Sheen inquiry into the Zeebrugge disaster: MV Herald of Free Enterprise: Report of the Court No 8074, Department of Transport (1987).

[23] [1994] 1 WLR 541, 545B.

> taking appropriate measures to bring it about that such safe manner is adhered to.[24]

6.18 The second case is *British Steel plc*,[25] which seems to be of considerable practical significance in the context of the present project.[26] In that case the Court of Appeal construed section 3(1) of the Health and Safety at Work etc Act 1974 as imposing vicarious liability. The subsection provides:

> It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.[27]

6.19 The charge related to an accident at a British Steel plant. A 7.5 tonne section of steel platform at the plant was to be repositioned by two men, G and C, provided by subcontractors, the subcontract being on a labour-only basis, with equipment and supervision being carried out by British Steel. An identified British Steel employee was responsible for the supervision. The platform was supported by four supports from which it was cut free without having been secured to a crane or other prop. It collapsed, killing C.

6.20 The Court of Appeal upheld the conviction of British Steel. Rejecting the argument that the principle of identification applied,[28] the court held that, subject to the words "so far as is reasonably practicable",[29] section 3(1) created an absolute prohibition.[30]

6.21 The Court of Appeal accepted that its decision might result in the imposition of liability on a corporation where, for example, an employee merely dropped a spanner or drove without due care and attention. In some cases, the court suggested, this would not be an absurd result: the incident might have occurred because at *some* level in its hierarchy the corporation's system had broken down.

[24] [1994] 1 WLR 541, 545E–G.

[25] [1995] ICR 586.

[26] It has been described by one academic commentator as a "landmark decision" representing a "new mood of realism": Celia Wells, "Corporate Liability for Crime: The Neglected Question" (1995) 14 IBFL 42, 44.

[27] Section 2 of the Act provides for a similar (but more extensive and detailed) offence relating to a company's employees. Such failure under either section constitutes an offence under s 33(1).

[28] The court refused leave to appeal, but certified (see p 595C–D) the following point of general public importance:

> Whether section 3(1) [set out at para 6.18 above] … should be construed as if immediately after the word "employer", the additional words "through senior management" appear.

[29] These qualifying words are "simply referable to measures necessary to avert the risk": [1995] ICR 586, 592B. The court also stated (at p 591H): "Significantly, there is no due diligence defence in the Act … ."

[30] The court found support for this contention in *Taylor v Coalite Oil and Chemicals Ltd* [1967] 3 KIR 315, *Board of Trustees of the Science Museum* [1993] ICR 876 (CA) and *Associated Octel Co Ltd* [1994] 4 All ER 1051 (CA).

The driver's carelessness, for instance, might have resulted from an attempt to meet excessively tight schedules or from tiredness due to over-long hours of work. In other cases a prosecution was unlikely or, if brought, would probably result in an absolute discharge and a refusal of an order for the defendant to pay the prosecution's costs.[31]

6.22 The court added that the effects of this judgment would be to reduce the time taken up in trials on section 3(1) by dispensing with the need to examine whether particular employees were part of senior management, and to promote a culture of guarding against risks to health and safety caused by hazardous industrial activity.[32]

6.23 Vicarious liability is not necessarily excluded even if the management of the company has expressly forbidden its employees to commit the acts in question. In *Coppen v Moore (No 2)*,[33] for example, a company was charged with an offence under the Merchandise Marks Act 1887, section 2(2). The offence consisted in selling goods to which a false description was applied unless the defendant proved (a) that having taken reasonable precautions she had no reason to suspect the genuineness of the trade description; (b) that on a demand duly made she gave all information in her power with respect to the persons from whom she had obtained such goods; and (c) that otherwise she had acted innocently. An employee of the defendant company sold some American ham as Scotch ham. The defendant company was convicted, notwithstanding that written instructions had been issued to employees forbidding them to sell ham under any specific name of place or origin.

6.24 A similar approach was recently adopted by the House of Lords in *Director General of Fair Trading v Pioneer Concrete (UK) Ltd*,[34] a case which was concerned with the quasi-criminal law of (civil) contempt. The Director General of Fair Trading obtained an injunction, restraining the company from enforcing certain agreements in breach of the Restrictive Trade Practices Act 1976. The company issued express instructions to its staff that the injunctions were to be obeyed, but, unknown to the management, certain employees entered into proscribed agreements. The application of the Director General to enforce the injunction by sequestrating the company's property succeeded, on the ground that, on the

[31] "[S]o-called absurdities are not peculiar to this corner of the law: at the extremities of the field of application of many rules surprising results are often to be found. That circumstance is inherent in the adoption of general rules to govern an infinity of particular circumstances. … Despite the intellectual difficulties created by [these] examples, they do not deflect us from the firm conclusion at which we have arrived": [1995] ICR 586, 594A–C. Professor Sir John Smith suggests that this is an unsatisfactory response; that the answer might lie in the adoption of a narrower interpretation of the words in the subsection, "conduct his undertaking"; that the failure of the hypothetical lorry driver to observe a red light cannot really be described as a failure by the employer to perform her duty. The effect (he concludes) "might be to limit liability to failures to establish and maintain safe systems of work and to exclude individual failures to apply them": [1995] Crim LR 655, 656.

[32] [1995] ICR 586, 594D–E.

[33] [1898] 2 QB 306.

[34] [1994] 3 WLR 1249 (on appeal from *Re Supply of Ready Mixed Concrete (No 2)*), reversing the Court of Appeal. Lord Jauncey of Tullichettle, Lord Mustill and Lord Slynn of Hadley expressed agreement with Lord Templeman and Lord Nolan, both of whom made reasoned speeches.

proper construction of the Act,[35] the company was liable for the conduct of its employees acting in the course of their employment.

6.25 Lord Templeman pointed out that to permit a company to escape liability by forbidding its employees to do the acts in question would allow it

> to enjoy the benefit of restrictions outlawed by Parliament and the benefit of arrangements prohibited by the courts provided that the restrictions were accepted and implemented and the arrangements were negotiated by one or more employees who had been forbidden to do so by some superior employee identified in argument as a member of the "higher management" of the company or by one or more of the directors of the company identified in argument as "the guiding will" of the company.[36]

6.26 It is noteworthy that the fact that the company had put in place a compliance system was held to be immaterial (and went only to mitigation). Lord Nolan explained:

> Liability can only be escaped by completely effective preventive measures. How great a burden the devising of such measures will cast upon individual employers will depend on the size and nature of the particular organisation. There are, of course, many areas of business life, not only in the consumer protection field, where it has become necessary for employers to devise strict compliance procedures. If the burden is in fact intolerable then the remedy must be for Parliament to introduce a statutory defence for those who can show that they have taken all reasonable preventive measures.[37]

THE PRINCIPLE OF "IDENTIFICATION"

The nature of the principle

6.27 This principle, which was introduced into the criminal law by three cases decided in 1944 and was subsequently developed by the courts, now applies when vicarious liability does not. In summary, the governing principle is that those who control or manage the affairs of a company are regarded as embodying the company itself. The introduction of this principle enabled criminal liability to be imposed on a corporation, whether as perpetrator or accomplice, for virtually any offence, notwithstanding that mens rea was required, and without having to rely on statutory construction.[38]

[35] The law of contempt also fell for consideration; the injunction restrained the company from giving effect to the agreements "whether by itself or by its servants or agents or otherwise".

[36] [1994] 3 WLR 1249, 1254H–1255A.

[37] [1994] 3 WLR 1249, 1264C–D. For Celia Wells' view that this decision, together with other cases, represents "a quiet revolution", see n 21 to para 7.18 below.

[38] See, eg, *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580 (HL), a civil case concerned with the construction of an insurance policy covering certain types of theft: "the reason why the company was guilty of theft in the circumstances of this case was that its directing mind and will, Mr [X, its chairman], was himself guilty of theft", *per* Lord Keith of Kinkel at p 1584A.

6.28 The origin of the principle lies in a civil case[39] in which it was held that, for the purpose of a statute referring to "actual fault or privity", the privity of the company's manager was the privity of the company itself. In an oft-cited passage, Viscount Haldane LC said:

> [A] corporation is an abstraction. It has no mind of its own any more than it has a body; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.[40]

6.29 In 1957, Denning LJ, in another well-known passage (subsequently cited with approval and explained in *Tesco Supermarkets Ltd v Nattrass*),[41] said:

> A company in many ways may be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.[42]

6.30 In the first of the 1944 cases, *DPP v Kent and Sussex Contractors Ltd*,[43] a company was charged with offences contrary to the Defence (General) Regulations 1939, of making use of a document (signed by the transport manager of the company) which was false in a material particular, with intent to deceive; and of making a statement (in the document) which it knew to be false in a material particular.[44] The magistrates found that the servants of the company knew that the statement was false, and used the document with intent to deceive, but they held that the company could not itself be guilty of the offences charged because it was not possible to impute the required mens rea to the company. The Divisional Court disagreed. Lord Caldecote CJ explained how a company can form a criminal intent:

> I think that a great deal of [counsel for the company]'s argument on the question whether there can be imputed to a company the knowledge or intent of the officers of the company falls to the ground, because although the directors or general manager of a company are

[39] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

[40] *Ibid*, at p 713.

[41] [1972] AC 153, 171B–E, *per* Lord Reid; 187D–F, *per* Viscount Dilhorne; 200B–D, *per* Lord Diplock. The decision is considered at para 6.32 below.

[42] *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159, 172 (a civil case).

[43] [1944] 1 KB 146.

[44] It was alleged that the company made use of the false statement in the document for the purposes of a Motor Fuel Rationing Order.

> its agents, they are something more. 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 … .[45]

6.31 Later that year, in *ICR Haulage Ltd*,[46] a company was held indictable for common law conspiracy to defraud, another offence requiring mens rea to which vicarious liability could not apply. The corporation was not held responsible on the basis of liability for the acts of its agents; instead it was regarded as having committed the acts personally. *DPP v Kent and Sussex Contractors Ltd*[47] was treated as authority for the proposition that a state of mind could be attributed to a company. The last of the trio of 1944 cases was *Moore v Bresler*,[48] which followed the two earlier decisions and is considered below.[49]

6.32 This principle was developed thereafter on a case by case basis. The leading authority is the decision of the House of Lords in *Tesco Supermarkets Ltd v Nattrass*,[50] in which a company was charged with an offence under the Trade Descriptions Act 1968. It invoked the defence of due diligence provided by the Act,[51] and argued that the commission of the offence was due to the act or default of "another person" – namely, the branch manager, who had failed to supervise the assistant who actually committed the offence. The defence was held to be available, on the ground that the branch manager was not part of the "mind" of the company. The principle of identification, and the clear distinction between it and the doctrine of vicarious liability, were described by Lord Reid:

> [A corporation] must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable … . He is an embodiment of the company … and his mind is the mind of the

[45] [1944] KB 146, 155.

[46] [1944] KB 551.

[47] [1944] KB 146.

[48] [1944] 2 All ER 515.

[49] Para 6.38 below.

[50] [1972] AC 153.

[51] Under s 24(1):

> In any proceedings for an offence under this Act it shall … be a defence for the person charged to prove (a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

> company. If it is a guilty mind then that guilt is the guilt of the company.[52]

6.33 Referring to the distinction drawn by Lord Denning between the "brains and nerve centre" of a company and its hands,[53] Lord Diplock expressed the view that Lord Denning's "vivid metaphor" was not to be taken as authority for extending the class of persons whose acts were treated as those of the company itself beyond those entitled under its articles of association to exercise the company's powers.[54]

6.34 The distinction between vicarious liability and the liability of corporations under the identification principle was also emphasised more recently, in *R v HM Coroner for East Kent, ex p Spooner*.[55] Bingham LJ said in that case:

> It is important to bear in mind an important distinction. A company may be vicariously liable for the negligent acts and omissions of its servants and agents, but for a company to be criminally liable for manslaughter … it is required that the mens rea and actus reus of manslaughter should be established not against those who acted for or in the name of the company but against those who were to be identified as the embodiment of the company itself.[56]

Who are the controlling officers?

6.35 Although Lord Denning's dictum cited in paragraph 6.29 above was approved by the majority in the House of Lords in the *Tesco* case,[57] the speeches showed variations in the detailed application of the test. Lord Reid said that a company may be held criminally liable for the acts only of

> the board of directors, the managing director and perhaps other superior officers of a company [who] carry out the functions of management and speak and act as the company … .[58]

Viscount Dilhorne, on the other hand, said that a company should only be identified with a person

> who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders.[59]

[52] [1972] AC 153, 170E–F. Lord Pearson, at p 190G, also stressed that the principle applied in the instant case was different from that of vicarious liability.

[53] See para 6.29 above.

[54] We consider at paras 6.35 – 6.39 below the differing judicial views on the question as to who are a company's controlling officers.

[55] (1989) 88 Cr App R 10.

[56] (1989) 88 Cr App R 10, 16. The reference to the mens rea of manslaughter is outdated, since the offence is now founded on gross negligence.

[57] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; para 6.32 above.

[58] [1972] AC 153, 171F.

[59] [1972] AC 153, 187G.

Lord Diplock thought that the question was to be answered by

> identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors or by the company in general meeting pursuant to the articles are entrusted with the exercise of the powers of the company.[60]

Lord Pearson, too, thought that the constitution of the particular company should be taken into account.

6.36 The tests outlined above would, if applied strictly, produce rather different results. Viscount Dilhorne's test would appear to be stricter than the others, since there are very few people in a company who are not responsible to others for the manner in which they discharge their duties. However, the general principle is clear: the courts must attempt to identify the "directing mind and will" of the corporation, the process of such identification being a matter of law.[61]

6.37 It is noteworthy that under the principles enunciated in the *Tesco* case a branch manager was not regarded as a controlling officer. Lord Pearson explained in that case:

> In the present case the company has some hundreds of retail shops, and it would be far from reasonable to say that every one of its shop managers is the same person as the company … Supervision of the details of operations is not normally a function of higher management; it is normally carried out by employees at the level of foreman, chargehands, overlookers, floor managers and "shop" managers (in the factory sense of "shop").[62]

6.38 Although there is little direct authority on the matter, it would seem right in principle that the person who is identified with the corporation renders it liable only so long as she acts within the scope of her office.[63] However, this requirement does not mean that the corporation's liability is necessarily excluded where the activities in question are contrary to its interests. In *Moore v Bresler Ltd*,[64] for instance, the respondent company was convicted of making false tax returns. The returns were actually made by the secretary of the company and the general

[60] [1972] AC 153, 200A.

[61] [1972] AC 153, 170F–G, *per* Lord Reid.

[62] [1972] AC 153, 191B, 193C–D. Professor Glanville Williams suggests, in his *Textbook of Criminal Law* (2nd ed 1983) p 973, that the line was drawn too tightly in the *Tesco* case:

> There is no absolute right and wrong about this, but the practical effect of *Tesco* appears to be to confine the identification doctrine to the behaviour of a few men meeting, say, in London, when the activities of the corporation are country-wide or even world-wide. It would seem on the whole to have been more sensible to have extended identification to cover the person or persons in control of local branches.

[63] In *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146 (DC), Macnaghten J referred at p 156 to the "responsible agent of a company, acting within the scope of his authority".

[64] [1944] 2 All ER 515.

manager of the branch concerned, and were designed to conceal their own fraudulent sale of company property. The court held that

> The sales undoubtedly were fraudulent, but they were sales made with the authority of the respondent company by these two men as agents for the respondent company … . These two men were important officials of the company, and when they made statements and rendered returns … they were clearly making those statements and giving those returns as officers of the company … . Their acts, therefore, … were the acts of the company.[65]

6.39 It is not clear whether the principle of identification can apply to a director or official whose appointment is invalid. Dicta by Lord Diplock in the *Tesco*[66] case suggest that it would not: he emphasised that "the obvious and only place" to look in deciding whose acts are to be identified with the corporation is the constitution of the corporation, its articles and memorandum of association.[67] This emphasis on the formal structure of the company would rule out anyone not validly appointed under the relevant Companies Act.[68]

CORPORATE LIABILITY FOR MANSLAUGHTER

An indictment for manslaughter now lies against a corporation

6.40 At one time it was thought that (in addition to other reasons relating to corporate liability in general) a corporation could not be guilty of manslaughter, because homicide required the killing to be done by a human being.[69] This was the basis of a decision in 1927, *Cory Bros Ltd*,[70] in which Finlay J quashed an indictment

[65] [1944] 2 All ER 515, 516H–517A, *per* Viscount Caldecote CJ.

[66] [1972] AC 153, 199E.

[67] [1972] AC 153, 199H–200A.

[68] In 1972 the Law Commission's Working Party on the Criminal Liability of Corporations suggested that this failure to take into account the realities of the situation was undesirable in principle: see WP No 44, para 40. The definition in the Draft Criminal Code (1989) treats as a controlling officer anyone who in fact participates in the control of a corporation by exercising the functions of a relevant office, whether as the result of an appointment (valid or not) or de facto. It would include, for example, a bankrupt who runs a company of which members of his family are the nominal directors and shareholders. Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177, vol 1, cl 30 and vol 2 (Commentary on the Draft Code Bill) para 10.7.

[69] See, eg, Co Inst (6th ed 1809) Pt 3, ch 8; Stephen, *Digest of the Criminal Law* (1877) Art 218, p 140. Professor Sir John Smith suggests at [1991] Crim LR 697, 698, that Coke would not have thought it necessary to exclude corporations from the ambit of homicide, not only because a corporation could not at the time be indicted for any offence but also because manslaughter was a felony. He further suggests that, in referring to killing by a human being, Coke had in mind the law relating to deodands (which Coke went on to consider in the next chapter). Although a killing by an inanimate thing or an animal without fault on the part of a human being was not a crime, the thing that caused the death was "deodand" – to be given to God – and forfeited to the Crown to be applied to pious uses; Coke's probable purpose in specifying that the death must be caused by a human being was, therefore, to distinguish such killing from killing by an inanimate thing or an animal. Deodand was abolished in 1846.

[70] [1927] 1 KB 810. The facts are fully stated only in *The Times* 11 January 1927 and 1 March 1927. See also n 7 to para 6.6 above.

against a company for manslaughter: he considered himself bound by earlier authorities, which (he concluded) showed "quite clearly" that an indictment would not lie against a corporation for a felony or a misdemeanour involving personal violence.[71] *Cory Bros* was, however, decided before the principle of identification was developed, as Stable J pointed out in *ICR Haulage Ltd*. He added:

> [I]nasmuch as [*Cory Bros*] was decided before the decision in *DPP v Kent and Sussex Contractors* …, if the matter came before the court today, the result might well be different. As was pointed out by Hallett J in *DPP v Kent and Sussex Contractors*, this is a branch of the law to which the attitude of the courts has in the passage of time undergone a process of development.[72]

6.41 A 1965 case at Glamorgan Assizes appeared to support Stable J's view. In *Northern Strip Mining Construction Co Ltd*[73] a welder-burner was drowned when a railway bridge which the company was demolishing collapsed. Workmen had been instructed to burn down sections of the bridge, starting in its middle. The defendant company was acquitted on the facts of the case, but neither counsel nor the presiding judge appeared to have any doubt about the validity of the indictment; and defence counsel seems to have conceded its propriety.[74] We are not, however, aware of any report of the argument or of the judge's reasons.

6.42 In 1987 the decision of a coroner (who had held that a corporation could not be indicted for manslaughter) was challenged in an application for judicial review.[75] The issue was not fully argued, but Bingham LJ saw no reason in principle why such a charge could not be established and "was tentatively of opinion" that an indictment would lie.[76]

6.43 In 1990 the same question was argued in depth in *P & O European Ferries (Dover) Ltd*.[77] In that case Turner J comprehensively reviewed the authorities (including some in other jurisdictions)[78] and concluded that an indictment for manslaughter

[71] [1927] 1 KB 810, 817–818.

[72] [1944] KB 551, 556.

[73] *The Times* 2, 4 and 5 February 1965.

[74] He argued that it was "the prosecution's task to show that the defendant company, in the person of [the] managing director, was guilty of such a degree of negligence that amounted to a reckless disregard for the life and limbs of his workmen": *The Times* 4 February 1965.

[75] *HM Coroner for East Kent, ex p Spooner* (1989) 88 Cr App R 10.

[76] *Ibid*, at p 16.

[77] (1991) 93 Cr App R 72 (Central Criminal Court).

[78] *Murray Wright Ltd* [1970] NZLR 476, in which the New Zealand Court of Appeal held that, under the Code of that country (originally drafted by Sir James Fitzjames Stephen), a corporation could not be guilty of manslaughter in the first degree (though two judges thought, obiter, that it might be convicted as a secondary party). The report includes citations from certain State Courts in the United States which demonstrate a diversity of approach.

would lie today against a corporation. Although this ruling has not yet been considered at appellate level, it is plainly of great persuasive authority.[79]

6.44 Turner J outlined the development of corporate criminal liability. He pointed out that statements in works such as Coke, Hale, Blackstone and Stephen (which defined homicide as a killing by a human being) were not exclusive. Rather, they

> reflected the historical fact that, at the dates when these definitions originated, the concept of criminal liability of a corporation, just as their very existence, was not within the contemplation of the courts or the writers of [those] legal treatises.[80]

6.45 Turner J noted that, although *Birmingham and Gloucester Railway Co*[81] and *Great North of England Railway Co*[82] established that an indictment could lie against a corporation, dicta in those cases also referred to exceptions to the general liability of corporations. For example, both Patterson J in the former case[83] and Denman CJ in the latter[84] said that a corporation could not be indicted, inter alia, for treason or felony, for perjury or for any offence involving personal violence. The exception of treason and felony (Turner J explained) was justified at that date because the appropriate penalty could not then have been imposed upon a corporation.[85]

6.46 As to the exception of perjury and offences against the person, Turner J explained that Denman CJ had based this exception on the ground that since a corporation had no social duties, it could not suffer from a "corrupt mind", as natural persons could.[86] Similarly, in the case of *Cory Bros & Co*,[87] Finlay J had felt bound by the authorities[88] to hold that "an indictment will not lie against a corporation either for

[79] This was the criminal trial that followed the Zeebrugge disaster.

[80] (1991) 93 Cr App R 72, 73. Later in his judgment Turner J stated (at p 84):

> I find unpersuasive the argument of the company that the old definitions of homicide positively exclude the liability of a non-natural person to conviction of an offence of manslaughter. Any crime, in order to be justiciable, must have been committed by or through the agency of a human being. Consequently, the 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 (deodand) 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.

[81] (1842) 3 QB 223; 114 ER 492.

[82] (1846) 9 QB 315; 115 ER 1294.

[83] (1842) 3 QB 223, 232; 114 ER 492, 496.

[84] (1846) 9 QB 315, 326; 115 ER 1294, 1298.

[85] See para 6.6, n 7, above.

[86] (1991) 93 Cr App R 72, 74–75, and see also para 6.40 above.

[87] [1927] 1 KB 810.

[88] The cases cited were the two railway cases, *Tyler and the International Commercial Co Ltd* [1891] 2 QB 588 and *Pharmaceutical Society of Great Britain v London and Provincial Supply*

a felony or a misdemeanour involving personal violence",[89] on the ground that mens rea could not be present in the case of an artificial entity like a corporation.[90]

6.47 Rejecting the argument that these dicta demonstrated that a corporation could not, as a matter of substantive law, be indicted for manslaughter, Turner J considered in detail[91] the subsequent authorities that had introduced and developed the principle of identification.[92] That principle had transformed corporate liability since, by "identifying" the corporation with the state of mind and actions of one of its controlling officers, it became possible to impute mens rea to a corporation and so to convict it of an offence requiring a mental element. Turner J concluded his summary of the English authorities as follows:

> Since the nineteenth century there has been a huge increase in the numbers and activities of corporations … . 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 the cases decided by the 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 "mind" which is generally one of the essential ingredients of common law and statutory offences. … Once a state of mind could be effectively attributed to a corporation, all that remained was to determine the means by which that state of mind could be ascertained and imputed to a non-natural person. That done, the obstacle to the acceptance of general criminal liability of a corporation was overcome. … [T]here is nothing essentially incongruous in the notion that a corporation should be guilty of the offence of unlawful killing. … [W]here a corporation, through the controlling mind of one of its agents, does an act which fulfils the prerequisites of the crime of manslaughter, it is properly indictable for the crime of manslaughter.[93]

6.48 The first conviction of a company of manslaughter in English legal history took place in 1994, in *Kite and OLL Ltd*.[94] Since the company was a one-man concern

Association Ltd (1879) 4 QB 313, 319 (DC). However, as Turner J pointed out at (1991) 93 Cr App R 72, 76, when the *Pharmaceutical* case reached the House of Lords, (1880) 5 App Cas 857, Lord Blackburn, at p 869, observed that although some forms of punishment were not appropriate to a corporation, this should not be a bar to conviction since a corporation could be fined. Lord Blackburn continued, at p 870:

> A corporation may in one sense, for all substantial purposes of protecting the public, possess a competent knowledge of its business, if it employs competent directors, managers, and so forth. But it cannot possibly have a competent knowledge in itself.

89 [1927] 1 KB 810, the headnote summary, cited by Turner J at (1991) 93 Cr App R 72, 76.

90 (1991) 93 Cr App R 72, 76.

91 *Ibid*, at pp 77–83.

92 See paras 6.27 – 6.33 above.

93 (1991) 93 Cr App R 72, 83–84.

94 Winchester Crown Court, 8 December 1994, unreported.

whose "directing mind"[95] was plainly its managing director, the company's liability was established automatically by his conviction.[96]

The application to corporations of the substantive law of manslaughter

6.49 The prosecution against P & O European Ferries (Dover) Ltd was terminated when Turner J directed the jury that, as a matter of law, there was no evidence upon which they could properly convict six of the eight defendants, including the company, of manslaughter.[97] The principal ground for this decision in relation to the case against the company, was that, in order to convict it of manslaughter, one of the individual defendants who could be "identified" with the company would have himself to be guilty of manslaughter. Since there was insufficient evidence on which to convict any of those individual defendants,[98] the case against the company had to fail.

6.50 In coming to this conclusion Turner J ruled against the adoption into English criminal law of the "principle of aggregation".[99] This principle would have enabled the faults of a number of different individuals, none of whose faults would individually have amounted to the mental element of manslaughter, to be aggregated, so that in their totality they might have amounted to such a high degree of fault that the company could have been convicted of manslaughter. Because of the rejection of the "aggregation" approach, the company could only be convicted if an individual who "could properly be said to have been acting as the embodiment of the company"[100] was also guilty.

[95] Under the principle of "identification"; see paras 6.27 – 6.34 above.

[96] It was subsequently held, in *Dovermoss Ltd* (1995) 159 JP 448 (CA), that the prosecution must establish not only that the conduct of a controlling officer constituted the offence but also that she was acting in that capacity at the material time.

[97] *Stanley and others* 19 October 1990 (CCC No 900160) unreported, transcript p 13.

[98] This aspect of the ruling is discussed at paras 6.51 – 6.54 below.

[99] *Stanley and others* 19 October 1990 (CCC) transcript pp 8G–9C. Previously, in *HM Coroner for East Kent, ex p Spooner* (1989) 88 Cr App R 10, 16–17, a similar approach was adopted by Bingham LJ, who said:

> Whether the defendant is a corporation or a personal defendant, the ingredients of manslaughter must be established by proving the necessary mens rea and actus reus of manslaughter against it or him by evidence properly to be relied on against it or him. A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such.

This issue is explained at greater length in Consulation Paper No 135, paras 4.31 – 4.37.

[100] *Stanley and others* 19 October 1990 (CCC) unreported, transcript pp 8E–G.

6.51 In reaching his decision about the individual defendants, Turner J applied what was, in the period between *Seymour*[101] and *Prentice*,[102] thought to be the ruling law for manslaughter, the recklessness test of *Caldwell* and *Seymour*.[103] He said:

> Before any of these defendants … could be convicted ..., it was necessary for the prosecution to prove as against each such defendant not just one or more of the failures alleged against them in the indictment, but that – and this is the nub of the present situation – such failures were the result of recklessness in each defendant, in the now legally approved sense that they either gave no thought to an obvious and serious risk that the vessel would sail with her bow doors open, when trimmed by the head, and capsize, in circumstances unknown to shipboard management, or, alternatively, that if thought or consideration to that risk was given, each defendant, nevertheless, went on to run it.[104]

6.52 There was insufficient prosecution evidence to justify a finding that the risk of the vessel putting to sea with her bow doors open was "obvious" within the *Caldwell* / *Lawrence* definition. The appropriate test of "obviousness" in this case was

> what the hypothetically prudent master or mariner or whosoever would have perceived as obvious and serious.[105]

This formulation was not disputed by the prosecution, and it was undoubtedly the correct approach to take since an ordinary person, with no experience of shipping, could not be expected to perceive this possibility as an obvious risk in an unfamiliar and complex system.

6.53 Turner J rejected the prosecution argument that the test should operate in a similar way to the test of foreseeability employed in cases of civil negligence,[106] so as to allow the jury to infer that the risk of the ship sailing with her bow doors open was obvious from the very fact that the safety system in place was defective and that this defect had allowed that eventuality to occur. Referring to *Andrews*,[107] he emphasised that recklessness in manslaughter was intended to be more culpable than ordinary civil negligence: the criterion of reasonable foreseeability of the risk was not appropriate.[108] Instead, it was necessary to show that the risk was "obvious" in the sense that it would actually have occurred to a reasonably prudent person in the position of the defendant. What was required was

> some evidence upon which the jury, being properly directed, can find that the particular defendant failed to observe that which was "obvious

[101] [1983] 2 AC 493.

[102] [1993] 3 WLR 927.

[103] See paras 2.12 – 2.13 above.

[104] *Stanley and others* 19 October 1990 (CCC) transcript pp 9E–10B.

[105] *Ibid*, at p 18F.

[106] *Ibid*, at p 8A.

[107] [1937] AC 576; para 2.5 above.

[108] *Stanley and others* 10 October 1990 (CCC) transcript pp 19D–E, 22D–E.

> and serious", which words themselves convey a meaning that the defendant's perception of the existence of risk was seriously deficient when compared to that of a reasonably prudent person engaged in the same kind of activity as that of the defendant whose conduct is being called into question.[109]

6.54 The prosecution evidence did not go far enough on this issue. It consisted of the testimony of a number of ships' masters who were, or had been, in the employment of the defendant company, who all said that it had not occurred to them that any risk existed, let alone that it was an obvious one.[110] This evidence alone would not have been fatal. Indeed, it might even have advanced the prosecution case against the defendant company, since it supported the allegation that no-one in the company had given any thought to the risk, within the first limb of *Caldwell* recklessness. However, the prosecution was not able to prove through the testimony of witnesses from outside the defendant company that the risk was "obvious". Turner J referred to the evidence of witnesses from other shipping lines as to the practice adopted on various of their ships:

> I do not understand that the statements of any of these witnesses condescend to criticism of the system employed by the defendants in this case as one which created an obvious and serious risk, except to the extent that any legitimate deduction may be made from the fact that they took precautions other than those employed by any of these defendants.[111]

6.55 For these reasons the prosecution against the ferry company failed, despite the findings of a judicial inquiry, in the Sheen Report,[112] that all concerned in management must be regarded as sharing responsibility for the failure of management and that from top to bottom the body corporate was infected with the disease of sloppiness.[113] Even if Turner J had had the benefit of the analysis of the Court of Appeal in *Prentice*, and had approached the issue of individual liability on the basis of gross negligence rather than of *Caldwell* recklessness, it seems likely that he would have reached the same conclusion. The dominant test remained the test set out in *Bateman*,[114] of doing something which no reasonably skilled *doctor* would have done. On this approach, based as it is on the practices of the relevant profession or industry, it would have been difficult to prove that the mode of operation of this ship, although not that of other companies, fell seriously below prevailing standards.[115]

6.56 Evidence of the type adduced before Turner J would also present difficulties to the prosecution even if, in the case of a corporate defendant, it were possible to apply

[109] *Ibid*, at p 24B–D.

[110] *Ibid*, at pp 16G–17D.

[111] *Ibid*, at p 17D–F.

[112] MV Herald of Free Enterprise: Report of the Court No 8074, Department of Transport (1987).

[113] *Ibid*, at para 14.1; see paras 8.45 – 8.50 below.

[114] (1925) 19 Cr App R 8, 14; para 2.10 above.

[115] See, eg, the summary of the evidence cited at para 6.54 above.

some version of the aggregation approach, and to look more widely, and not merely at the responsibility of individuals. The fact that none of the witnesses saw the method of operating the vessel as creating an obvious and serious risk of disaster might be thought to suggest that the company's attitude and method of organisation, which had been so seriously criticised by the Sheen inquiry,[116] were not unique within the industry.

[116] See para 8.48 below.

PART VII
OUR PROVISIONAL PROPOSAL IN CONSULTATION PAPER NO 135, AND OUR PRESENT VIEW

THE PROPOSAL

7.1 We referred in the Introduction to this report[1] to the prevailing public concern over the difficulty of establishing criminal liability against a large company whose grossly careless failure to set up and monitor adequate systems of operating its undertaking results in death or serious injury, in some cases on a large scale.

7.2 In the light of that concern, we reviewed in Consultation Paper No 135 the existing law relating to corporate liability for manslaughter.[2] We explained in the consultation paper that we saw no justification for applying to corporations a law of manslaughter which was different from the general law; and that our concern related to the way in which the general law of manslaughter might be applied "in the particular circumstances of a corporation, and not whether standards and requirements should apply to corporations which are different from those which apply generally, that is to say to individuals".[3]

7.3 We went on to point out:

> Critics have complained that the structure of the criminal law, whose concepts of mens rea and conscious intention or risk-taking assume the mechanisms of human, individual, choice and decision-making, are simply inept when applied to companies. This is the reason, it is suggested, for the failure to apply the criminal law effectively to damage and injury which occur in the course of companies' operations.[4]

7.4 We suggested that the essential difficulty which had been experienced in the existing law of corporations was that of attaching liability to corporations for crimes of *conscious* wrongdoing. "But", we continued,

> the crime of manslaughter [by gross negligence] is not a crime of conscious wrong-doing at all;[5] rather, it is a crime of neglect or

[1] See paras 1.10 – 1.18 above.

[2] Consultation Paper No 135, paras 4.21 – 4.45 and 5.72 – 5.92.

[3] *Ibid*, para 5.73.

[4] Much material on this theme is contained in Celia Wells' recent book *Corporations and Criminal Responsibility* (1993); and see also the same author at [1993] Crim LR 551, 561–566. (Footnote in original.)

[5] This is not so of manslaughter by subjective recklessness … . What follows … as to corporate manslaughter applies only to what we have called a general law of manslaughter, based on a version of objective negligence. Subjective manslaughter, insofar as it affects companies, will continue to be adjudicated on according to the general principle of identification described … above. … (Footnote in original.)

> 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. The former statements can be made directly, without recourse to the intermediary step of finding a human mind and a decision-making process on the part of an individual within or representing the company; and thus the need for the identification theory, in order to bring the corporation within the subjective requirements of the law, largely falls away.[6]

7.5 We provisionally proposed the introduction of a special regime applying to corporate liability for manslaughter in which a corporation's liability would no longer be based solely on the principle of identification.[7] Rather, "the direct question would be whether the *corporation* fell within the criteria for liability" applicable to the offence of gross negligence manslaughter (which, elsewhere in this report,[8] we have recommended should be superseded by a new statutory offence of killing by gross carelessness).[9]

7.6 We suggested in Consultation Paper No 135 that the elements of such "special regime" should be, first, that the *corporation* itself should have been aware of the risk of death or serious injury[10] and, secondly, that its conduct fell seriously and significantly below what could reasonably have been demanded of it in dealing with the risk.[11]

THE RESPONSE ON CONSULTATION

7.7 On consultation, most respondents expressed the view that corporations should be held liable for manslaughter; and, of those, the majority were broadly in favour of the form of the offence that we proposed.[12]

[6] Compare, in this, the comparative ease with which the law has been able to attribute offences of strict liability to corporations … . Our approach … does not entail the imposition of *strict* liability, because it demands, as does the general law of manslaughter, the presence of (seriously culpable) *negligence*. It does, however, share with strict liability an absence of the need to show *subjective* fault on the part of the corporation. … (Footnote in original.) Consultation Paper No 135, para 5.77.

[7] See paras 6.27 – 6.39 above.

[8] See paras 5.17 – 5.34 above.

[9] Consultation Paper No 135, para 5.78.

[10] *Ibid*, paras 5.79 – 5.84.

[11] *Ibid*, paras 5.85 – 5.90.

[12] In Consultation Paper No 135, para 5.91, we briefly considered whether, on conviction, the court should have power to make an order against a corporation other than for payment of a fine, but concluded that any further power was unnecessary. On consultation several respondents, including Victim Support, Disaster Action and the Royal Society for the Prevention of Accidents, strongly disagreed with that approach, and suggested that the courts should be empowered to make remedial orders. We accept the force of the arguments addressed to us, and we have made a recommendation to that effect: see paras 8.69 – 8.00 below.

Reasons adduced on consultation in favour of extending corporate liability for manslaughter

7.8 A variety of reasons were given by respondents who supported the provisional proposal in Consultation Paper No 135. We turn now to consider the main reasons. We would point out, however, that not all of them necessarily involve an *extension* of the present law of corporate manslaughter.

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

7.9 On this view, although (following the *P & O* case) the law now permitted the indictment of a corporation for manslaughter, the "identification" principle was inadequate: under that principle an individual or individuals were actually or notionally on trial as well as the corporation itself, so that the corporation's defence was effectively identical with theirs. What was needed, it was suggested, was some "genuine corporate liability as opposed to the liability of an individual responsible for running the company".

7.10 The Herald Families Association[13] suggested that the identification principle enabled the board of directors to "construct an impenetrable defence by neglecting to make any of its members responsible for safety and therefore being able to claim that no 'controlling mind' had failed to perform that duty."

7.11 It was also suggested that the present law showed "little regard for the way modern corporations are managed and directed", having regard to changes that were currently taking place in the structure and conduct of business generally. The changes included the substitution of informal networks for traditional lines of communication and responsibility, and the "empowerment" of low-level employees following the erosion of middle management.

Public confidence

7.12 It was thought that, "whatever the true rights and wrongs" of cases such as *P & O* and the *Bowbelle* case,[14] public confidence in industry and in enforcement bodies suffered if the "perpetrator" *appeared* to escape prosecution or conviction "on a technicality rather than having his culpability tested in court by the same standards as that court would apply to a private individual on a charge of manslaughter".

[13] See para 7.14, n 15 below.

[14] The sinking of the *Marchioness* Thames cruiser in August 1989 with the loss of 51 lives gave rise to a prosecution of the captain (but not the owners) of the dredger *Bowbelle* for failing to keep a lookout. Charges of the offence of failing to ensure that a proper look-out was kept, under s 32 of the Merchant Shipping Act 1988, were dropped after two juries failed to agree. A private prosecution for manslaughter was then mounted against the owners; but the Divisional Court stated that the DPP might take over the proceedings and discontinue them under s 23 of the Prosecution of Offenders Act 1985 (or, if it was too late to discontinue, to offer no evidence): *Bow Street Stipendiary Magistrate, ex p South Coast Shipping Co Ltd* [1993] QB 645, 650F–G.

Causation

7.13 The Health and Safety Executive informed us that in practice the negligence of a single individual was rarely the sole cause of death or personal injury, which were generally the result of failure in systems for controlling risk, the carelessness of an individual or individuals being a (more or less important) contributory factor.

Deterrence

7.14 Both the Herald Families Association and Disaster Action[15] were concerned with this aspect, and emphasised that they were not concerned with punishment as an end in itself.

The availability of new kinds of sentence

7.15 On consultation, a considerable number of respondents addressed the question of sentencing. Disaster Action, for example, criticised our failure in the consultation paper to consider "equity fines" and corporate probation, and suggested that companies were "totally malleable" and could be "rehabilitated" in ways not open to individuals. This body, while agreeing that the power to fine was desirable, pointed out that there was no established procedure for determining the appropriate level of fine for a company and referred to "overspill" – that is, the phenomenon that the higher the fine the more likely it was that others (shareholders, taxpayers in the case of public corporations, workers and consumers) would pay. Similarly, Victim Support suggested that there should be no question of requiring the company to allocate its resources to a fine until it had paid for remedial measures.

7.16 We have reconsidered the provisional view that we expressed in Consultation Paper No 135 in the light of these responses, which have greatly assisted us. We now accept, and recommend, that the courts should have power not only to impose a fine on a corporation but also to order it to take remedial steps. We regard this power, indeed, as an important feature of our recommendations. We return to this matter in Part VIII below.[16]

The inadequacy of the regulatory offences in the Health and Safety at Work etc Act 1974

7.17 It was suggested that the conduct proscribed by offences under this Act[17] is failure to comply with a duty, whether or not death or injury resulted: the fact that an employee had died or been seriously injured as a result was immaterial. The courts therefore imposed small fines for these offences which did not reflect the serious consequences of the offence.[18] Another perceived defect of the 1974 Act was that

[15] "Lobby groups" representing the families of victims killed in recent disasters.

[16] Paras 8.72 – 8.76; Involuntary Homicide Bill (Appendix A below) cl 5.

[17] Sections 2 and 3 of the Act impose general duties in respect of the health and safety of employees and others respectively. The maximum penalty for either offence is an unlimited fine (£20,000 on summary conviction): 1974 Act, s 33(1A) (as amended by the Offshore Safety Act 1992).

[18] A similar view is expressed by D Bergman, *The Perfect Crime?: How Companies Escape Manslaughter Prosecution* (1994) p 102.

none of the offences for which it provides were triable only on indictment, even where death had occurred; it is therefore "up to the discretion of the magistrate to decide whether or not the case should be prosecuted in the Crown Court".[19]

Reasons adduced on consultation against our provisional proposal

7.18 The responses of the minority of the respondents who were opposed to the proposal included arguments that involved both questions of principle and practical considerations.[20] However, before considering the grounds on which opposition to the proposal was based, we would make the following general point. The *principle* that a corporation may be liable for a wide range of criminal activities (including many offences triable on indictment) is long established.[21] In particular, corporate liability for involuntary manslaughter, though a comparatively recent development, is now part of the common law,[22] for which at least one company has been convicted;[23] and there is no practical difficulty in attributing to many "one-man" or small companies the acts and omissions of those who control them.[24]

7.19 The proposal in Consultation Paper No 135 was therefore aimed solely at the difficulty that a corporation whose system of conducting its activities is so seriously defective as to cause a death can escape liability for the unmeritorious reason that its size and structure render it impossible to identify particular controlling officers whose conduct is attributable to the company itself. Some of the arguments against the proposal that were advanced on consultation by those who opposed it would, however, apply to corporate liability in general: in our view, to that extent they fail properly to address the point at issue. It appeared on consultation that the view that a corporation should *never* be liable for manslaughter was taken by very few commentators indeed.

7.20 We agree with Turner J's comments in the *P & O* case[25] that a "clear case can be made for imputing to … corporations social duties including the duty not to offend all relevant parts of the criminal law";[26] and that

[19] *Ibid*, at p 103.

[20] In particular, the response of Mr Justice Rix comprised a full and cogently argued statement of the case against the proposal.

[21] See paras 6.27 – 6.34 above. Celia Wells, the author of *Corporations and Criminal Responsibility* (1993), has recently suggested that, taken together, (a) *Pioneer Concrete* (paras 6.24 – 6.26 above), (b) the suggestion by the House of Lords in the *Seaboard* case (paras 6.14 – 6.17 above) that a company might commit the offence under s 31 of the Merchant Shipping Act 1988 where it failed to establish a system for ensuring that the ship was operated safely, and (c) the approach of the Privy Council in the *Meridian* case (para 6.4 above) "represent a quiet revolution in this twilight area of the criminal law" and reflect both the growing awareness of, and the demand for, corporate responsibility: "Corporate Liability for Crime: The Neglected Question" (1995) 14 IBFL 42, 43.

[22] See paras 6.43 – 6.48 above.

[23] See *Kite and OLL Ltd* (para 6.48 above).

[24] Under the doctrine of identification; see paras 6.27 – 6.39 above.

[25] *P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (Central Criminal Court), considered at paras. 6.43 – 6.47 above.

> there is nothing essentially incongruous in the notion that a corporation should be guilty of the offence of unlawful killing. … [W]here a corporation, through the controlling mind of one of its agents, does an act which fulfils the prerequisites of the crime of manslaughter, it is properly indictable for the crime of manslaughter.[27]

7.21 It was suggested, in the first place, that one of the Commission's aims in making the proposal – namely, that those responsible for the conduct of activities that might affect public safety should be "kept up to the mark", is best achieved by imposing *personal* liability on those who undertake such activities. Whatever the theoretical merits of this suggestion, it does not address the difficulty that, where the inadequate management or organisation of a corporation's undertaking has caused or contributed to a death, it is often difficult in practice to identify any individual who is at fault, especially where (as is commonly the case) an omission to act is involved. The *P & O* trial, which we considered in Part VI of this Report,[28] strikingly illustrates the point. After the judge had ruled that there was no evidence on which the jury could convict individual defendants other than members of the crew, he was bound to include the company itself within that ruling. Yet, as we have pointed out,[29] previously the Sheen Report had concluded that "from top to bottom" the company was "infected with the disease of sloppiness". There is, in our view, an overpowering argument that, on the ground of public policy, a corporation should be liable for a fatal accident caused by gross negligence in the management or organisation of its activities.

7.22 It was argued, secondly, that where a major disaster has occurred the most important step to be taken is to hold an inquiry and establish the causes of the disaster; and that witnesses would be reluctant to give evidence to the inquiry for fear that criminal prosecutions might follow.[30] We appreciate that this may happen. However, this difficulty does not arise where, as in many of the cases with which we are here concerned, no major disaster (and hence no inquiry) is involved. Moreover, even in those cases that do involve such a disaster, the problem is not peculiar to cases of *corporate* liability:[31] it may arise wherever there is a possibility of a subsequent prosecution, whether against the company or an

[26] (1991) 93 Cr App R 72, 83.

[27] *Ibid*, at p 84. Professor Celia Wells has recently suggested that "current interest in, and cultural recognition of, corporate manslaughter reflects changes in public perceptions of disaster": *Cry in the Dark: Corporate Manslaughter and Corporate Meaning*, in Ian Loveland (ed) *Frontiers of Criminality* (1995) at p 109. She refers, elsewhere, to a view that new technology is a major cause of this development, on the ground that it creates new social responsibilities that necessitate cultural re-assessment. She also points out that the trend towards blaming collective bodies such as corporations is not confined to England and Wales, instancing (among other developments) the 1988 Recommendation of the Committee of Ministers of the Council of Europe (referred to at para 7.34 n 52 below): "Corporate Manslaughter: A Cultural and Legal Form" 6 Crim LF 45, 66–67 (1995).

[28] The judge's ruling in the *P & O* trial is considered at para 6.49 – 6.56 above.

[29] See para 6.55 above.

[30] Mr Justice Rix pointed out that this occurred in the *Marchioness* case (see para 7.12, n 14), when witnesses refused to give statements.

[31] There is no question of a witness incriminating himself as a secondary party to the new corporate offence that we recommend in this report: see paras 8.56 – 8.58 below.

individual.[32] We see no reason why the implementation of the proposals in this report should have any additional effect.

7.23 It was suggested, further, that it would be harsh to punish a corporation for failing to do something of which all or many of the others in the same business or activity had failed to recognise the need. However, we have little doubt that (irrespective of the practices prevailing elsewhere) a criminal sanction should be visited on a corporation in respect of a death where the jury decides not only that the corporation was at fault in the way in which it conducted its enterprise but that its conduct fell *far* below the standard that could reasonably be expected of it. It should be borne in mind, further, that the jury must be satisfied of these matters beyond reasonable doubt. We believe that this approach, which requires a high standard of what must be established against a corporation, meets this objection very clearly.

7.24 Another argument against the proposal was that a company's profits belong to its shareholders, who would therefore be penalised for no fault of theirs by the imposition of a fine on the company. This argument, however, would apply equally to the present law of manslaughter and to other areas of the criminal law (such as offences under the Trade Descriptions Act 1968, and pollution offences)[33] in which corporate liability is well established. We would add that shareholders invest money in a company on a speculative basis and take the benefits that accrue to a company and (subject to the principle of limited liability) bear the losses suffered by the company. We see no difference in principle between payment by the company of damages for breach of contract and payment of a fine imposed on it: in either case the loss sustained by the company is liable to have an adverse effect upon the shareholders' interests. A company must not cut corners in its desire to make profits for its shareholders, and in particular it must not cut overhead costs at the expense of safety. Finally we add that it is unacceptable to suggest that a penalty should not be imposed simply because it may affect more people than the guilty party: after all, when an individual is fined or imprisoned, this has consequences for other members of his family.

7.25 It was also pointed out that the fine imposed on a corporation did not go to the victims. However, although compensation is primarily the province of the civil law, to which the victims may have recourse, criminal courts have power[34] to award compensation against a convicted defendant for "any personal injury, loss or damage" resulting from the offence, or to order him to "make payments for funeral expenses or bereavement in respect of a death resulting from the offence".[35] This objection has no greater force in relation to the present proposal

[32] In relation to regulatory offences under the Health and Safety at Work etc Act 1974, an inspector has power to require anyone "whom he has reasonable cause to believe to be able" to supply relevant information to answer questions; but any such answer is inadmissible against that person in any proceedings brought against him: s 20(2)(j) and (7).

[33] Eg offences of polluting water under (now) the Water Resources Act 1991, s 85.

[34] Under s 35 of the Powers of Criminal Courts Act 1973 (as amended).

[35] A compensation order in respect of bereavement may only be made for the benefit of a person who can claim damages under that head under the Fatal Accidents Act 1976 – that is, the deceased's spouse or, in the case of a deceased minor, his parents (or, if the minor is illegitimate, his mother); and the amount of damages for bereavement must not exceed the

than it has in relation to any other offence. It was suggested, further, that a fine might be misunderstood as in some way placing a value on the lives that were lost; but we do not accept that the possibility of a *misconception* as to the purpose of the criminal law is a material consideration.

THE *BRITISH STEEL* CASE

7.26 We have referred above[36] to the decision in *British Steel plc*[37] (given after the publication of Consultation Paper No 135), which was concerned with corporate liability for regulatory offences under the Health and Safety at Work etc Act 1974. In the light of this significant development, we have considered whether that decision has rendered otiose the need for the legislative extension of corporate liability for the offences with which we are concerned in this report. This approach, it can be argued, is justified on the ground that the problems canvassed in Consultation Paper No 135 have now largely been met by the *British Steel* case; and that we need do no more than recommend that, where the relevant breach of duty has resulted in death, the 1974 Act offences should be triable only on indictment, or, perhaps, that a new offence along the lines of sections 2 and 3 of the 1974 Act should be introduced, triable only on indictment and relating specifically to cases where death has resulted.

7.27 We have, however, rejected this approach, which would go far too wide. It would extend beyond our present purpose in two essential respects. First, it would not simply impose on a corporation liability for death where it was to blame because the death arose from the (grossly) careless way in which it organised or managed the conduct of its activities; rather, it would virtually make the corporation strictly liable[38] for the acts or omissions of any employee which resulted in a death. Secondly, it would render the company liable without regard to the seriousness of the breach in question. In both respects this would cover many cases that fell outside those with which Consultation Paper No 135 and this report are concerned.

OPTIONS FOR EXTENDING CORPORATE LIABILITY

7.28 We have considered four possible methods of extending corporate liability. The first, vicarious liability, has been adopted in many United States jurisdictions. This would involve, in brief, that the corporation would be liable for a crime[39] committed by *any* corporation employee if it is committed within the scope of his

sum specified in that Act (currently £7,500). The section further provides that the court should give preference to compensation where the offender has insufficient means to pay both a fine and compensation. There are several authorities for the proposition that a compensation order "is designed for the simple, straightforward case where the amount of the compensation can be readily and easily ascertained": *Donovan* (1981) 3 Cr App R (S) 192, 193, *per* Eveleigh LJ.

[36] Paras 6.18 – 6.22.

[37] [1995] ICR 586.

[38] Subject to the limited defence of reasonable practicability: see para 6.20, n 29, above.

[39] Although there are limitations on the crimes of which a corporation can be convicted, it has been held that a corporation can be convicted of manslaughter: *Granite Construction Co v Superior Court* (1983) 149 Cal App 3d 465, 197 Cal Rptr 3.

employment and is intended to benefit the corporation. "Scope of employment" has been given a wide interpretation by the courts. A general direction forbidding employees to break the law is unlikely to suffice where in practice the company has not ensured that its employees understand that they must take the prohibition seriously; and the retention of profits engendered by an employee's offence after it became known is strong evidence of this fact. In practice, the corporation has to establish that the employee acted for personal gain, contrary to the corporation's interests, and retained the profits of his wrongdoing.[40]

7.29 In England and Wales, however, the almost complete absence[41] of vicarious liability for a common law offence is a traditional and fundamental feature of the criminal law.[42] More specifically, the introduction of vicarious liability for an offence that requires negligence (as distinguished from a strict liability offence)[43] seems to us to be open to objections of principle, since it would automatically, and in our view unfairly, penalise a company for the fault of one of its employees even where it had taken considerable pains to prevent the kind of incident that caused the death.[44]

7.30 Vicarious liability would, moreover, involve practical difficulty. Its application depends upon proof that an individual employee has committed an offence, and in many cases it may be difficult to identify such a person.

> It is often the case that different corporate officers and employees bear varying degrees of responsibilty for any given offence.[45] Fault may be diffused throughout the company, and may be particularly difficult to

[40] *Standard Oil Co of Texas v United States* (1962) 307 F 2d 120. According to one commentator, "scope of employment in practice means little more than that the act occurred while the offending employee was carrying out a job-related activity": Note, Harvard 1979:1250, cited by Celia Wells in *Corporations and Criminal Responsibility* (1993) p 119.

[41] Public nuisance and criminal libel are exceptions; see para 6.9.

[42] See para 6.8, n 11 above.

[43] Eg the offences under ss 2 and 3 of the Health and Safety at Work etc Act 1974: see *British Steel plc*, considered at paras 6.18 – 6.22 above.

[44] As Professor Eric Colvin has recently pointed out in "Corporate Personality and Criminal Liability" (1995) 6 Crim LF 1, 8, vicarious liability has been criticised by academic commentators on the ground that it is both "underinclusive" and "overinclusive":

> It is underinclusive because it is activated only through the criminal liability of some individual. Where offenses require some form of fault, that fault must be present at the individual level. If it is not present at that level, there is no corporate liability regardless of the measure of corporate fault. Yet vicarious liability is also overinclusive because, if there is individual liability, corporate liability follows even in the absence of corporate fault. The general objection to vicarious liability in criminal law – that it divorces the determination of liability from an inquiry into culpability – applies to corporations as it does to other defendants. The special characteristics of corporations do not insulate them from the stigmatizing and penal consequences of a criminal conviction.

[45] See L Leigh, "The Criminal Liability of Corporations and Other Groups" (1977) 9 Ottawa L Rev 247, 275. (Footnote in original.)

> pin down when the crime is alleged to consist of the failure to prevent the harm in question from occurring.[46]

7.31 The introduction of vicarious liability for manslaughter was not canvassed in Consultation Paper No 135; and in our view it fails appropriately to address the problem with which we are concerned. The principle would go much further than the mischief addressed (or the remedy proposed) in the consultation paper – namely the failure of the company to set up an adequate system of conducting its operations (irrespective of whether or not an individual within the corporation was liable). It also seems unrealistic to expect the directors and senior management of a company to oversee in person the actions of a workforce that may be numbered in thousands. We therefore reject this option.

7.32 We have considered, secondly, the adoption of the principle of "aggregation". This principle would extend the doctrine of identification by enabling the court to "aggregate" the conduct of a number of a corporation's controlling officers, none of whom would individually be guilty, so as to constitute in sum the elements of killing by gross carelessness: a series of minor failures by employees might lead to a finding that the conduct of the corporation amounted to the offence. As we explained above,[47] aggregation has been summarily rejected by the courts in the past.[48]

7.33 In our view, it would be unsatisfactory to extend the doctrine of identification by introducing a principle of aggregation. In practice, it is often possible to state with confidence what the corporation did or omitted to do without investigating the conduct of individual controlling officers and the information that each of them possessed. The principle of aggregation would not enable this fact to be reflected automatically in a finding that the corporation was therefore liable.[49] It would be no more than a gloss on the identification principle,[50] and would not obviate the need to conduct a detailed investigation into the conduct and state of mind of particular controlling officers;[51] and it might well give rise to difficult (and perhaps

[46] J Gobert, "Corporate Criminality: Four Models of Fault" (1994) 14 LS 393, 398.

[47] Para 6.50.

[48] For a detailed discussion, see S Field and N Jörg, "Corporate Liability and Manslaughter: should we be going Dutch?" [1991] Crim LR 156, 161–162.

[49] "[O]nce the derivative model [sc a model of liability derived from the traditional insistence that corporate liability be derived from individual liability] is abandoned in favour of a model of true organizational responsibility, aggregation becomes a weak conceptual tool. The question to be asked is not whether responsibility can be constructed from bits and pieces of information, but rather whether it inheres in the organization itself": Professor Eric Colvin, "Corporate Personality and Criminal Liability" (1995) 6 Crim LF 1, 23. (Footnote omitted.)

[50] "The major objection to aggregation is … that it distorts the nature of corporate criminal liability. As long as aggregation is presented within a framework of vicarious or identification liability, it carries an air of artificiality. The qualification to the model of derivative liability is so great that the usefulness of the model is called into question": *ibid*, 22–23.

[51] It would be theoretically possible to apply the principle of aggregation to *all* the company's employees, rather than to its controlling officers alone. In effect, however, this would amount to vicarious liability in a different form.

insoluble) problems where different controlling officers knew or believed different things.

7.34 A third option, at least theoretically, would be the creation of a radically new corporate regime.[52] In Consultation Paper No 135[53] we explained this approach in the following terms:

> Put very briefly, this would not look for orthodox mens rea on the part of the corporation (or rather, somewhat artificially, on the part of one of its controlling officers), but would judge the corporation's liability post hoc, according to the steps which it had taken, after the accident, to prevent any recurrence. The test would not be the advance awareness of some person who might be identified to represent the company, but the reaction of the company itself, acting consciously through its authorised decision-making machinery, in correcting its practices, ensuring compensation, and generally acting as a responsible company should.
>
> > Rather than struggling to establish some antecedent fault within the corporation, the prosecution would invite the court to infer fault from the nature and effectiveness of the company's remedial measures after it had been established that it was the author of a harm-causing or harm-threatening act or omission.[54]

7.35 We went on to conclude, however, that the present project, limited as it was "to one particular, and confessedly somewhat singular, crime", was not the appropriate occasion to consider a reform which would affect the whole of the criminal law; and that it was unnecessary "to proceed that far in order to put corporate liability for *manslaughter* on a proper basis".[55] We remain of that view.

7.36 The fourth option, which we favour, is to apply the elements of the "individual" offence of killing by gross carelessness to corporations in principle, but in a form

[52] In Consultation Paper No 135, para 5.77 n 79, we referred briefly to the 1988 Recommendation of the Committee of Ministers of the Council of Europe (No R (88) 18 of 1988). The Recommendation, which relates only to economic activities, states that member states should consider the promotion of corporate liability. They should be guided (inter alia) by the principle that enterprises should be liable for offences committed in the exercise of their activities, even where the offence is "alien to the purposes of the enterprise" *and whether or not an individual who committed the acts or omissions can be identified*. The enterprise would, however, be exonerated where its management is not implicated and has taken all necessary steps to avoid the offence. The Recommendation stipulates that, in providing for sanctions, "special attention should be paid to objectives other than punishment, such as the prevention of further offences and the reparation of damage suffered by victims".

[53] Para 5.75.

[54] This theory is most fully expounded in a famous article by Fisse and Braithwaite (1988) 11 Sydney LR 468. The most accessible summary of the theory is to be found in Ashworth, *Principles of Criminal Law* (1991) pp 86–88, from which the quotation in the text is taken. (Footnote in original.)

[55] Consultation Paper No 135, para 5.76.

adapted to a corporate context and, in particular, in a form that does not involve the principle of identification.

7.37 We turn now, in the next Part of this report, to consider how best to give effect to this principle.

PART VIII
A NEW OFFENCE OF CORPORATE KILLING

INTRODUCTION

8.1 In Part VII we concluded that the use of the identification principle alone,[1] when applied to the individual offences that we recommend, would impose unacceptable limitations on the scope of corporate liability for involuntary homicide; that it would be wrong to adopt, solely for the purposes of the law of homicide, any wider principle of corporate liability such as vicarious liability or aggregation; and that it is therefore necessary to recommend the creation of a special offence, modelled on our proposed offence of killing by gross carelessness, but with such adaptation as is dictated by the peculiar characteristics of corporations. In this Part we consider what adaptation is required, and how the corporate offence should therefore be defined. We also consider a number of ancillary matters relating to the proposed offence.

8.2 For the offence of killing by gross carelessness, it must be proved

(1) that the defendant's conduct caused the death,

(2) that the risk of death or serious injury would have been obvious to a reasonable person in her position, and that she was capable of appreciating that risk, and

(3) that her conduct fell far below what could reasonably be expected of her in the circumstances.[2]

FORESEEABILITY OF THE RISK

8.3 In our view, the second of these requirements cannot appropriately be applied to corporations, which, as Lord Hoffmann has recently emphasised,[3] are only metaphysical entities. To hypothesise a human being who *could* be in the same position as the corporation is a logical impossibility,[4] and it would therefore be

[1] We see no reason why the identification principle should not apply to our proposed offences in the comparatively unusual case where the necessary conditions for its application are satisfied – eg where the proprietor of a "one-man company" commits the offence of killing by gross carelessness in the course of running the company. See para 8.77 below.

[2] The alternative, that she *intended* by her conduct to cause *some* injury, or was aware of, and unreasonably took, the risk that it might do so, may for present purposes be disregarded, since one of the reasons for adapting the offence for the purposes of corporate liability is the difficulty of attributing mens rea to a corporation: cf para 8.3 below.

[3] *Meridian Global Funds Management Asia Ltd v The Securities Commission* [1995] 3 WLR 413, 419A; see para 6.4 above.

[4] This was pointed out by some respondents on consultation. The Chamber of Shipping, for example, suggested with some force that the question whether a *corporation* should have been aware of the risk is of "an entirely different kind" from the requirement, in the context of manslaughter by an individual, that the defendant should have been aware of the risk. It added that, since the jury would always be faced with the situation in which the risk had in

meaningless to enquire, as in the offence of killing by gross carelessness, whether the risk would have been "obvious" to such a person. Moreover, corporations have no "capacity", in the sense in which we use that term in this report in relation to an individual, so that it would be equally impossible to enquire whether the defendant corporation had the capacity to appreciate the risk. It is also, in our view, unnecessary. In judging the conduct of an individual defendant, the law must in fairness take account of such personal characteristics as may make it harder for her to appreciate risks that another person would appreciate; but the same considerations scarcely apply to a *corporate* defendant.

8.4 We have therefore concluded that the foreseeability of the risk, either to a hypothetical person in the defendant's position or to the defendant itself, should not be included in the definition of the corporate offence. This will not prevent juries from finding (in general terms) that the risk was, or should have been, obvious to any individual or group of individuals within the company who were or should have been responsible for taking safety measures, in deciding whether the company's conduct fell below the required standard. Nor would we wish to discourage the jury from approaching its task in that way. We are simply concerned, in formulating the new offence, to remove the *legal* requirement under the present law to identify individuals within the company whose conduct is to be attributed to the company itself.

SERIOUSNESS OF THE DEFENDANT'S CONDUCT

8.5 On the other hand we see no reason why the third requirement for the individual offence, that the defendant's conduct must have fallen *far* below what could reasonably be expected of her in the circumstances, should not apply equally to the corporate offence. This approach, as we have already explained,[5] is based on our view that the offence ought to be one of last resort, available only when all the other sanctions that already exist[6] seem inappropriate or inadequate, and that, therefore, the negligence in question must have been very serious.

8.6 We have therefore concluded, for the same reasons, that the new corporate offence should be committed only where the defendant's conduct fell far below what could reasonably be expected of it "in the circumstances". In our view, it would be neither practicable nor desirable to specify in legislation what those "circumstances" should or should not include: in every case it would be for the jury to decide whether the corporation's conduct fell within that description. In many cases this would involve the jury in balancing such matters as the likelihood and possible extent of the harm arising from the way in which the company conducted its operations against the social utility of its activities and the cost and

fact eventuated, there was a danger of their being strongly tempted to conclude that the risk *must have been* one of which the company should have been aware.

5 Para 5.8 above.

6 Eg the regulatory offences under ss 2 and 3 of the Health and Safety at Work etc Act 1974: see para 6.18 above.

practicability of taking steps to eliminate or reduce the risk of death or serious personal injury.[7]

8.7 The jury might also think it right to take account of the extent (if any) to which the defendant corporation's conduct diverged from practices generally regarded as acceptable within the trade or industry in question. This could not be conclusive, since the fact that a given practice is common does not *in itself* mean that the observance of that practice cannot fall far below what can reasonably be expected; but it might well be highly relevant.[8] The weight to be attached to it, if any, would be a matter for the jury.

CONDUCT OF THE DEFENDANT THAT CAUSES DEATH

8.8 Of the three requirements for the individual offence of killing by gross carelessness, therefore, we envisage that the second (namely the obviousness of the risk, and the defendant's capacity to appreciate it) should be discarded for the purposes of the corporate offence, whereas the third (namely that the defendant's conduct in causing the death should have fallen far below what could reasonably be expected) should be retained. It remains to be determined what should be done about the first, namely that the defendant's conduct should have caused the death. Obviously that requirement must be retained in some form; equally obviously (in the light of the difficulties that we have explored in determining whether particular conduct can, under the present law, be regarded as the conduct of a company and not merely of its human agents), it must be adapted for the purposes of the corporate defendant. There are two aspects to this requirement: first, the defendant must have acted, or omitted to act, in a particular way; and second, the death must have resulted from that act or omission. In the case of an individual defendant it is rarely necessary to distinguish these two aspects: once the facts are known, there is no difficulty in distinguishing the defendant's conduct from someone else's. In the case of a *corporate* defendant, however, this distinction is problematic. Since we have rejected the option of attributing to the corporation *everything* done (or not done) by its agents, we must find a way of identifying that conduct which *can* properly be attributed to it. The question is: in what circumstances can it properly be said, not merely that the conduct of a corporation's *agents* has caused a death, but that the conduct of *the corporation itself* has done so?

[7] Cf the recent decision (on employer's liability) of the Full Court of the High Court of Australia, *Miletic v Capital Territory Health Commission* 16 August 1995 (Australian Current Law, August 1995, 300). A housemaid cleaning a room in the nurses' quarters of a hospital fell and sustained injury while trying to move a bed on which the castors were jammed. The question was whether the employer was required to take preventive measures by way of routine maintenance against the likelihood of castors jamming and causing serious injury. Finding the employer liable, the court stated: (1) whether a reasonable person would take steps to avoid a foreseeable risk of injury to another was to be answered by balancing "the magnitude of the risk and the degree of the probability of its occurrence along with *the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which may exist*"; and (2) the duty to provide a safe place of work *required the balancing exercise* and could only result in the conclusion that a reasonable employer would carry out simple and inexpensive maintenance. (Emphasis added.)

[8] Cf para 6.56 above.

Conduct of the defendant

8.9 In answering this question we have not had to start with an entirely clean slate. In the first place we have borne in mind the analogy of the identification principle laid down in *Tesco Supermarkets v Nattrass*,[9] which distinguishes between those agents of a company that qualify as its "controlling minds" and those that do not. As we have explained in Part VII above, we do not think that this principle is in itself sufficient for the imposition of corporate liability in every case of homicide where such liability would be justified; but the main reason for this is that the principle requires the prosecution to identify one or more "controlling minds" who are themselves guilty of a homicide offence. The distinction drawn in the *Tesco* case between things done in the management and organisation of the company on the one hand, and things done at a purely operational level on the other, seems to us to encapsulate the nature of the distinction that we need to draw. The difference between our approach and the identification principle is that we think the distinction should be drawn in terms of the *kind of conduct* that can incur liability, rather than the *status* of the person or persons responsible for it.

8.10 Secondly, we have drawn on the law governing an employer's common law obligation to take care for the safety of employees,[10] and one aspect of that obligation in particular – namely, the employer's duty to provide a safe system of work. This obligation is personal to the employer and is quite distinct from any *vicarious* liability that may arise in respect of injury caused to an employee by a fellow employee in the course of their employment. A breach of this obligation is not just negligence for which the employer is (vicariously) responsible: it is the employer's *own* negligence. The distinction thus corresponds to the distinction that we seek to draw, in the case of a corporate employer, between the conduct of the corporation and the conduct of its employees alone; and it is because of this analogy that we have taken this obligation as a starting-point in defining the kind of conduct that we propose as an element of the new corporate offence. In effect, we propose to use it as a model for the duty of *every* corporation to *all* those (not just employees) who may be affected by the corporation's activities.[11]

8.11 In a leading case in 1938 Lord Wright explained the general nature of the employer's obligation as

> a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, *or a company*, and

[9] [1972] AC 153; above, paras 6.32 – 6.33, 6.35 – 6.39.

[10] The employer's obligation is not absolute: it can be performed by the exercise of due care and skill.

[11] Other models may be thought equally useful: eg the liability of an occupier to her lawful visitors under the Occupiers' Liability Act 1957. The model of employer's liability does not *directly* resolve the problem of differentiating between negligence at managerial and operational levels, because even in tort it may be necessary to identify a controlling mind who is at fault before the company can be said to be in breach of its *personal* duty: see *Winfield and Jolowicz on Tort* (14th ed 1994) pp 716–717; *Street on Torts* (9th ed 1993) p 565. The analogy we seek to draw is not with tortious *corporate* liability in particular, but with the distinction between the *personal* liability of an employer (including an individual employer) and her *vicarious* liability for the negligence of her employees.

whether or not the employer takes any share in the conduct of the operations.[12]

8.12 Lord Wright described the obligation as threefold: "the provision of a competent staff … , adequate material, and a proper system and effective supervision". The doctrine of common employment was, however, still in existence in 1938.[13] Following the abolition of that doctrine ten years later, the obligation need no longer be put under three heads. It is a single duty, and "all other rules or formulas must be taken subject to this principle".[14] In practice, however, the duty may still be regarded as having several branches (which may overlap). The main branches are: (1) to provide a safe place of work, including a safe means of access; (2) to employ competent staff; (3) to provide and maintain adequate appliances; and (4) to provide a safe system of work.

8.13 An illustration of the first branch is provided by *Stafford v Antwerp Steamship Co Ltd*,[15] a case in which a stevedore was injured whilst loading a vessel. He fell into the hold through an open hatch after slipping on some ice as he tried to pass along the space between the case being loaded and the hatchway. The employers had caused or permitted cargo to be lowered and worked on in dangerous proximity to the edge, although climatic conditions rendered it likely that ice or frost would render the floor area slippery, and had failed to maintain any safety net in contemplation of such an incident.

8.14 The duty to employ competent staff is illustrated by *Hudson v Ridge Manufacturing Co Ltd*,[16] where an employee persistently engaged in "skylarking". For instance, he tripped up other employees, and took no notice of the foreman's reprimands. It was held that the employers were under a duty to remove the danger, by dismissal if necessary. In *Butler v Fife Coal Co Ltd*,[17] a man was killed by an outbreak of poisonous gas whilst working in the defendants' coal mine. The defendants were held liable not only under the Employers' Liability Act 1880 but also at common law, for breach of their duty to appoint and keep in charge persons competent to deal with the dangers arising in the mine. The under-manager and the fireman were negligent in that, despite being aware of a peculiarly smelling haze which had given some workmen headaches and nausea, they had failed to take steps to remedy the situation or evacuate the area.

[12] *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, 84. (Emphasis added.)

[13] An employer, though vicariously liable to third parties for torts committed by her employees during the course of their employment, was not *vicariously* liable to one employee for harm sustained in consequence of a tort committed by another employee with whom she was in "common employment". The doctrine became subject to considerable judicial qualifications that restricted its scope. It was finally abolished by the Law Reform (Personal Injuries) Act 1948.

[14] *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145, 165, *per* Lord Keith.

[15] [1965] 2 Lloyd's Rep 104.

[16] [1957] 2 QB 348 (Streatfield J).

[17] [1912] AC 149.

8.15 The duty to provide and maintain adequate appliances is exemplified by *Taylor v Rover Co Ltd*,[18] where the plaintiff was injured by a piece of metal which had flown off a chisel he was using. The excessive hardness of the chisel had been identified a few weeks previously when a piece had broken off and injured another workman. This area of the law is now covered by section 1 of the Employer's Liability (Defective Equipment) Act 1969.[19]

8.16 In the present context the duty to provide a safe system of work is of particular significance: it requires the company to plan its operations in advance with due regard to safety.[20] As the author of a leading textbook points out:

> [T]he state of the premises and plant, and the choice and supervision of personnel, fall especially within the employer's province. In adding as a further component the system of work, the law does no more than adopt and clarify a distinction accepted in everyday life. The employer is responsible for the general organisation of the factory, mine or other undertaking; in short, he decides the broad scheme under which the premises, plant and men are put to work. This organisation or "system" includes such matters as co-ordination of different departments and activities; the lay-out of plant and appliances for different tasks; the method of using particular machines or carrying out particular processes; the instruction of apprentices and inexperienced workers; and a residual heading, the general conditions of work, covering such things as fire precautions. An organisation of this kind is required – independently of safety – for the purpose of ensuring that the work is carried on smoothly and competently; and the principle of law is that in setting up and enforcing the system, due care and skill must be exercised for the safety of the workmen. Accordingly, the employer's personal liability for an unsafe system – independently of the negligence of fellow-servants – is not founded on an artificial concept, but is directly related to the facts of industrial organisation.[21]

8.17 The term "system of work" includes the organisation of the work, the way in which it is intended the work shall be carried out, the giving of adequate instructions (especially to inexperienced workers), the sequence of events, the taking of precautions for the safety of the workers at all stages, the number of such persons required to do the job, the part to be taken by the various persons employed and the time at which they should perform their respective tasks.[22] Further,

[18] [1966] 1 WLR 1491.

[19] In *Coltman v Bibby Tankers Ltd* [1988] AC 276, where the design and construction of a vessel were defective so that she was unseaworthy and led to the death of the deceased during the course of his employment, it was held that the vessel was "equipment" within the meaning of the Act of 1969.

[20] "It is the duty of an employer to give such general safety instructions as a reasonably careful employer *who has considered the problem presented by the work* would give to his workmen": *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, 189, *per* Lord Oaksey. (Emphasis added.)

[21] J H Munkman, *Employer's Liability at Common Law* (11th ed 1990) pp 135–136.

[22] *Charlesworth & Percy on Negligence* (8th ed 1990) p 819, para 10-59.

> it includes … or may include according to circumstances, such matters as the physical layout of the job – the setting of the stage, so to speak – the sequence in which the work is to be carried out, the provision of proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet circumstances which may arise. Such modifications or improvements appear to me equally to fall under the head of system.[23]

8.18 By contrast with the employer's liability under sections 2 and 3 of the Health and Safety at Work etc Act 1974,[24] the company would not automatically be liable for the negligence (however gross) of an employee. We would adopt the distinction in the field of employer's liability that was explained in one case as follows:

> [B]roadly stated, the distinction is between the general and particular, between the practice and method adopted in carrying on the master's business of which the master is presumed to be aware and the insufficiency of which he can guard against, and isolated or day to day acts of the servant of which the master is not presumed to be aware and which he cannot guard against; in short, it is the distinction between what is permanent or continuous on the one hand and what is merely casual and emerges in the day's work on the other hand.[25]

8.19 Whether or not a system of work should be prescribed in any given case will depend on the circumstances: there is no doctrine of precedent to require cases to be followed where facts are similar.[26] The question is always: was "adequate provision made for the carrying out of the job in hand under the general system of work adopted by the employer or under some special system adapted to meet the particular circumstances of the case?"[27] We have adopted a similar approach for the corporate offence: under our recommendations, the crucial question would be whether the conduct in question 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). This would be a question of fact for the jury to determine, and the discussion that follows must be viewed in the light of that overriding consideration.

8.20 Under our proposals, individuals within the company could be concurrently liable, in respect of an incident for which the company was liable, for the offence of killing by gross carelessness; and, whether or not they were so liable, their conduct might be relevant to the corporate offence as part of the circumstances surrounding that offence. For the purpose of the corporate offence and by contrast with the present law, however, there would be no need to identify the controlling

[23] *Speed v Thomas Swift & Co Ltd* [1943] 1 KB 557, 563–564, *per* Lord Greene MR.

[24] See the *British Steel* case, considered at paras 6.18 – 6.22 above.

[25] *Wilsons and Clyde Coal Co Ltd v English* 1936 SC 883, 904, *per* Lord Aitchison (the Lord Justice-Clerk).

[26] *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743.

[27] *Winter v Cardiff Rural District Council* [1950] 1 All ER 819, 822, *per* Lord Porter.

officers of the company.[28] The question would be whether there had been a management failure, rather than, as at present, whether there was blameworthy conduct on the part of any individual or group of individuals which should be attributed to the company.[29]

8.21 To take a simple hypothetical example, if a lorry driver employed by a company causes death by dangerous driving in the course of the company's business, this act would not *of itself* involve a management failure so as to incur corporate liability;[30] nor would the company be *vicariously* liable for the driver's negligence. The company might be liable, however, if the incident occurred because the driver was overtired at the material time in consequence of a requirement to work excessively long hours, or because she consistently worked very long hours in her desire to earn overtime, and the company had no adequate system of monitoring to ensure that this did not happen.

8.22 Lord Keith's approach in the *Seaboard* case[31] gives a further illustration of the distinction between the "casual" negligence of a company's employee and the failure to provide a safe system of conducting the company's activities. He said:

> [I]t would be surprising if by the language used in section 31[32] Parliament intended that the owner of a ship should be criminally liable for any act or omission by any officer of the company or member of the crew which resulted in unsafe operation of the ship, ranging from a failure by the managing director to arrange repairs to a failure by the bosun or cabin steward to close portholes. … The steps to be taken are to be such as will secure that the ship is operated in a safe manner. That conveys to me the idea of *laying down a safe manner of operating the ship* by those involved in the actual operation of it and taking appropriate measures to bring it about that such safe manner is adhered to.[33]

8.23 We accept that there will be some cases in which the jury will have to draw a somewhat fine line between an employee's "casual" negligence and a management failure. Such cases abound in the field of employer's liability. We consider some of them in the following paragraphs, solely, we would emphasise, for the purpose of illustration. If a company was on trial for an offence that arose out of a death in

[28] The introduction of the new corporate offence would not affect the present law of corporate liability in its application to the other offences recommended in this report: see para 8.77 below. In cases such as *Kite and OLL Ltd* (the "Lyme Bay" case, para 6.48 above), therefore, the company could be convicted of killing by gross carelessness.

[29] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 WLR 413 (PC) *per* Lord Hoffmann; see para 6.4 above.

[30] See Professor Sir John Smith's comment on *British Steel*: para 6.21, n 31 above. His suggestion accords with our approach in the context of the corporate offence.

[31] *Seaboard Offshore Ltd v Secretary of State for Transport* [1994] 1 WLR 541, considered at paras 6.14 – 6.17 above.

[32] Of the Merchant Shipping Act 1988, which provides that it is the duty of the owner of certain ships to take all reasonable steps to secure that the ship is operated in a safe manner. See further para 6.17 above. (Footnote added.)

[33] [1994] 1 WLR 541, 545E–G. (Emphasis added.)

circumstances similar to one of the cases cited, that case would be no authority on the question whether on the present occasion the company was guilty of a management failure, since this would be a question of fact to be decided by the jury.

8.24 The earliest case in which an employer's liability for failing to have a proper method of work can be traced is *Sword v Cameron*,[34] in which a workman employed in a stone quarry was injured by the explosion of a shot in the quarry in which he was working. The workmen were not given sufficient time to get clear before the explosion took place, and the Court of Session held that the employer was liable for failing to have a proper method of warning. Lord Cranworth later said of this decision:

> The injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions. … The accident occurred, not from any neglect of the man who fired the shot, but because the system was one which did not enable the workmen at the crane to protect themselves by getting into a place of security.[35]

8.25 The inadequacy of the system in *Sword v Cameron* closely resembled that of the leading authority of *Wilsons and Clyde Coal Co v English*[36] in which the workmen were not given a sufficient period of time in which to reach a place of safety before certain operations in the mine began. The respondent in that case was injured whilst making his way to the pit bottom after having finished his morning shift. During the period in which the men finished their shift and left that part of the mine, the haulage plant was not stopped and the respondent was caught by a rake of hutches and crushed between it and the side of the road along which he was proceeding. The court held that it was a necessary part of a safe system of working that the haulage should be stopped on the main haulage roads during the period fixed for raising the day shift men up the pit. Lord Justice-Clerk Aitchison in the Court of Session[37] drew a distinction between

> the practice and method adopted in carrying on the master's business of which the master is presumed to be aware and the insufficiency of which he can guard against [and those] isolated or day-to-day acts of the servant of which the master is not presumed to be aware and which he cannot guard against.[38]

8.26 In *Smith v Baker and Sons*,[39] the plaintiff was employed to drill holes in a rock cutting near a crane worked by men in the same employment. The crane lifted stones and at times swung them over the plaintiff's head without warning. A stone fell from the crane, injuring the plaintiff. It was found by the jury that the

[34] (1839) 1 D 493.

[35] *Bartonshill Coal Co v Reid* (1858) 3 Macq 290.

[36] [1938] AC 57 (HL).

[37] 1936 SC 883.

[38] *Ibid*, at p 904.

[39] [1891] AC 325 (HL).

machinery for lifting the stone was not fit for the purpose for which it was applied, that the omission to supply a special means of warning was a defect in the ways, works, machinery and plant, and that the employers were guilty of negligence in not remedying the defect. Lord Herschell described the duty as

> the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.[40]

8.27 In *Speed v Swift (Thomas) & Co Ltd*[41] a ship was being loaded from a barge alongside. In the course of the operation an empty hook, which was being brought back to the ship's side, caught in a section of rail and caused it and a piece of timber to fall, injuring the plaintiff. Although the system of work applied did not diverge from the normal system of working expected, there were special circumstances with regard to the particular ship in this instance which increased the danger and thus necessitated extra precautions being taken. In view of this the employers had failed to provide a safe and proper system of working adapted to the special circumstances. Lord Greene MR emphasised that the duty should

> be considered, not generally, but in relation to the particular circumstances of each job.[42]

8.28 Lord Greene then proceeded to give a detailed, though not exhaustive, account of what may amount to a "system".

> I do not venture to suggest a definition of what is meant by system, but it includes … such matters as the physical lay-out of the job – the setting of the stage, so to speak – the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions.[43]

8.29 In *Colfar v Coggins and Griffiths (Liverpool) Ltd*[44] the facts were similar to those in *Speed v Swift*,[45] yet the court reached a different conclusion. A dock labourer was working in the hold of a ship stowing bags of salt, which were being lifted from a barge by two derricks, which necessitated the fixing of one derrick arm by means of a guy rope. The labourer was injured when several bags of salt fell from a swing into the hold in which he was working, as a result of the derrick arm being inadequately secured by the rope. It was held that the injury was attributable to the casual act of negligence committed by a fellow worker in reference to the guy rope, and was not a consequence of the system of work, it having not been found that placing so many bags of salt in one sling was negligent.

[40] *Ibid*, at p 362.

[41] [1943] 1 KB 557.

[42] *Ibid*, at p 562.

[43] *Ibid*, at p 563.

[44] [1945] AC 197 (HL).

[45] [1943] KB 557.

8.30 In *General Cleaning Contractors Ltd v Christmas*[46] a window cleaner was injured when the sash of the window he was working on came down on his hand, causing him to lose his balance and fall. It was held that although there was no evidence sufficient to establish negligence on the part of the employers in failing either to fix hooks for the safety belts into the building, or to cause the work to be done by means of ladders, they had failed to devise a safe system of work providing for an obvious danger, having neither given instructions to ensure that windows were tested before cleaning, nor provided any apparatus (such as wedges) to prevent them from closing. Leaving the taking of precautions to the initiative of their workers was a failure to discharge the duty to ensure a safe system of work.

8.31 In *Rees v Cambrian Wagon Works Ltd*[47] a heavy cog wheel was being removed by means of a plank and a sloping wedge in the course of dismantling a machine. The wheel overbalanced owing to the insufficiency of the wedge, and injured a workman. It was held that the operation required proper organisation and supervision, which the company had failed to provide.

8.32 In *Winter v Cardiff Rural District Council*,[48] by contrast, an employer was held not to have failed to provide a safe system where a heavy voltage regulator fell off a lorry on which it was being carried, carrying the plaintiff with it. The regulator had not been tied to the lorry, but the House of Lords held that the manner of the loading of the lorry was a routine matter within the discretion of the chargehand, and that the employers were not required to establish a proper system for such a routine task.

8.33 In *McDermid v Nash Dredging & Reclamation Co Ltd*,[49] the plaintiff, in the course of his employment as a deckhand with the defendant company, worked on board a tug owned by another company and under the control of a captain employed by it. The plaintiff's work included untying ropes that moored the tug to a dredger. The system used by the captain was that, when the plaintiff had untied the ropes and it was safe for the captain to move the tug, the plaintiff would give a signal. At the time in question the plaintiff was still in the course of untying one of the ropes when the captain, without waiting for the plaintiff's signal, put the engine of the tug hard astern. As a result, the plaintiff was injured. The House of Lords held that the defendant company was in breach of its duty to the plaintiff to provide a safe system of work for him: even if the captain's system of waiting for a signal was a safe system (which was doubtful), at the material time it "was … not being operated and was therefore not being 'provided' at all".[50]

8.34 These cases are, we repeat, merely *illustrations* of how our proposed offence might work. Most of them concern the employer's duty to ensure a safe *system* of work; but there is no reason in principle why a "management failure" within the meaning

[46] [1953] AC 180.

[47] (1946) 175 LT 220 (CA), approved by the House of Lords in *Winter*'s case (see n 48 below).

[48] [1950] 1 All ER 819.

[49] [1987] AC 906.

[50] [1987] AC 906, 911F, *per* Lord Hailsham of St Marylebone.

of the proposed offence should not consist in a failure to provide safe premises or equipment, or competent staff. Nor do we suggest that the offence should be *defined* as hinging on whether the corporation's civil liability for the death would be personal or vicarious: in the context of criminal trials, such a test would be unworkable. The scope of an employer's personal duty of care is a model and no more. But we believe that the distinction between "management failure" and operational negligence is an appropriate way of differentiating, in the context of involuntary homicide, between the conduct of a corporation and the conduct of its employees alone. Moreover, we would emphasise that a corporation would be liable only in extremely limited circumstances, namely where its conduct fell *far* below what could reasonably be expected of it in the circumstances. The offence would be confined to cases of very serious negligence.

8.35 **We therefore recommend**

(1) **that there should be a special offence of corporate killing, broadly corresponding to the individual offence of killing by gross carelessness;**

(2) **that (like the individual offence) the corporate offence should be committed only where the defendant's conduct in causing the death falls far below what could reasonably be expected;**

(3) **that (unlike the individual offence) the corporate offence should *not* require that the risk be obvious, or that the defendant be capable of appreciating the risk; and**

(4) **that, for the purposes of the corporate offence, a death should be regarded as having been caused by the conduct of a corporation if it is caused by a failure, in the way in which the corporation's activities are managed or organised, to ensure the health and safety of persons employed in or affected by those activities. (Recommendation 11)**

CAUSATION OF DEATH

8.36 Our proposed concept of "management failure" is an attempt to define what, for the purposes of a corporate counterpart to the individual offence of killing by gross carelessness, can fairly be regarded as unacceptably dangerous conduct *by a corporation*. But it must of course be proved, as in the individual offence, that the defendant's conduct (which, in the present context, means the management failure) *caused* the death. To a large extent this will involve the application of the ordinary principles of causation, as in any other homicide offence. If, for example, the jury are not satisfied beyond reasonable doubt that the death would not have occurred had it not been for the management failure, the offence will not be proved. Even if the death would not otherwise have occurred, it will be open to the jury to conclude that the "chain of causation" was broken by some unforeseeable act or event, and that the management failure was not itself a cause of the death but merely part of the events leading up to it. If, for example, the management failure consisted of a failure to ensure that some potentially dangerous operation was properly supervised, a jury would be unlikely to conclude that this failure *caused* the death if the immediate cause was a *deliberate* act by an

employee rather than a merely careless one – even if that act would probably not have occurred had a supervisor been present.

8.37 However, we think that the scope for any defence of a "break in the chain of causation" should be very limited. In many, perhaps most, cases it will be the operational negligence of one or more of the company's employees that is most closely connected in point of time with the death. For example, the immediate cause of the death might be the failure of an employee, through lack of attention, to give a signal which she was employed to give. Indeed, depending on the circumstances, the employee in question may personally be guilty of our proposed offence of killing by gross carelessness. It does not, in our view, follow that the employee's conduct should in itself absolve the *corporation* from liability, because the management failure may have consisted in a failure to take precautions against the very kind of error that in fact occurred. If a company chooses to organise its operations as if all its employees were paragons of efficiency and prudence, and they are not, the company is at fault; if an employee then displays human fallibility, and death results, the company cannot be permitted to deny responsibility for the death on the ground that the employee was to blame. The company's fault lies in its failure to anticipate the foreseeable negligence of its employee, and any consequence of such negligence should therefore be treated as a consequence of the company's fault.

8.38 It is not clear how far the ordinary law of causation takes account of this reasoning.[51] As Professor Ashworth has explained:

> [T]he principle of individual autonomy presumes that, where an individual who is neither mentally disordered nor an infant has made a sufficient causal contribution to an occurrence, it is inappropriate to trace the causation any further. This is taken to justify not only picking out D's conduct from other possible causes and regarding that conduct as operating on a "stage already set",[52] but also declining to look behind D's conduct for other persons who might be said to have contributed to D acting as he or she did.[53]

[51] Cf Celia Wells, *Corporations and Criminal Responsibility* (1993) p 43:

> I have called legal causation a non-issue to emphasize the futility of the traditional search for separate principles by which to impute cause beyond the factual "but for" level. This of course does not mean that any "but for" contribution must lead to legal attribution, but that taking any steps beyond "but for" means *entering a complex terrain of responsibility attribution which is connected to issues beyond those of cause*. Whether a result was a *sine qua non* of the defendant's act is a necessary but not sufficient condition for imputing cause. (Emphasis added to second sentence.)

[52] See H L A Hart and T Honoré, *Causation in the Law* (2nd ed 1985), ch 1 and *passim*, and the derivative discussions by S Kadish, *Blame and Punishment* (1987), ch 8, and H Beynon, "Causation, Omissions and Complicity" [1987] Crim LR 539; cf also Williams, *Textbook of Criminal Law*, ch 14. (Footnote in original.)

[53] *Principles of Criminal Law* (2nd ed 1995) p 123. Cf J H Munkman, *Employer's Liability at Common Law* (11th ed 1990) p 62:

> Reduced to its simplest terms, the question in each case is this: What factors actually *brought about* the accident? – as distinct from factors which merely *led up* to it. (Emphasis in original.)

8.39 In our view, therefore, there is a danger that, without more, the application of the ordinary rules of causation would in many cases result in a management failure being treated as a "stage already set", and hence not linked in law to the death.[54] In our view the legislation should include an express provision to the effect that in this kind of situation the management failure may be *a* cause of the death, even if the *immediate* cause is the act or omission of an individual.[55] Whether in all the circumstances the management failure *is* a cause of the death, in spite of the intervening act or omission of an individual, will be a matter for the common sense of the jury. **We recommend that, for the purposes of the corporate offence, it should be possible for a management failure on the part of a corporation to be a cause of a person's death even if the immediate cause is the act or omission of an individual. (Recommendation 12)**

INDEPENDENT CONTRACTORS

The issue

8.40 A corporation may employ an independent contractor to carry out work in a variety of situations. One who engages an independent contractor is not normally liable to others for the negligence of that contractor; and an employer's duty of care in tort does not render her liable to her employees for injury sustained through the negligence of her contractor, save in exceptional circumstances.[56] The question whether an employer is criminally liable for such injury has recently arisen in the context of the offence under section 3(1) of the Health and Safety at Work etc Act 1974.[57] We first consider this recent development and then explain

[54] Cf Draft Criminal Code, Law Com No 177 (1989) vol 1, cl 17. The clause was intended to be a statement of existing common law principles (*ibid*, vol 2, para 7.14). It provides, so far as material:

> (1) Subject to [subsection] (2) …, a person causes a result which is an element of an offence when –
>
> (a) he does an act which makes a more than negligible contribution to its occurrence; or
>
> (b) he omits to do an act which might prevent its occurrence and which he is under a duty to do according to the law relating to the offence.
>
> (2) A person does not cause a result where, after he does such an act or makes such an omission, an act or event occurs –
>
> (a) which is the *immediate and sufficient* cause of the result;
>
> (b) which he did not foresee; and
>
> (c) which could not in the circumstances reasonably have been foreseen. (Emphasis added.)

As to paras (b) and (c) of subs (2), foreseeability is inapplicable to the corporate offence: see paras 8.3 – 8.4 above.

[55] See cl 4(2)(b) of the draft Bill at Appendix A below.

[56] There are several exceptions. They include the case in which the employer fails to co-ordinate the activities of subcontractors (*McArdle v Andmac Roofing Co* [1967] 1 WLR 356). Another exception arises where the employer exercises control over the contractor's operations, in the sense that she can tell the contractor's employees what to do and what safety precautions to adopt, or where she exercises joint or partial control over them in that respect (see, eg, *Associated Octel Co Ltd* [1994] 4 All ER 1051, 1057b–c).

[57] See paras 6.18 – 6.22 above.

how we envisage that the matter would be approached under the corporate offence that we recommend.

The offence under section 3(1) of the Health and Safety at Work etc Act 1974

8.41 Section 3(1) of the 1974 Act refers to the duty of every employer to "conduct his undertaking" in such a way as to avoid exposure to risk.[58] There are two possible approaches to the construction of this phrase. On the narrower construction,[59] the employer's duty is coterminous with the employer's common law duty of care to those not in her employment, and it does not therefore (save in exceptional cases)[60] involve liability for the acts of independent contractors. On the wider construction, the expression is not confined to imposing criminal liability on an employer for a breach of her duty of care and extends to work necessary for the conduct of the employer's enterprise. The Court of Appeal recently adopted the wider construction in *Associated Octel Co Ltd*.[61] The court made it clear that the offence was concerned with a wider spectrum of activities than those under the company's control.[62] All that the prosecution had to show, the court held, was that the activity in question was part of the conduct of the employer's undertaking. It was then for the employer to show, if she could, that it was not "reasonably practicable" to prevent the accident.[63]

8.42 Stuart-Smith LJ, giving the judgment of the court, said:

> The word "undertaking" means "enterprise" or "business". The cleaning, repair and maintenance of plant, machinery and buildings

[58] See para 6.18 above.

[59] Applied in, eg, *RMC Roadstone Products Ltd v Jester* [1994] IRLR 330 (DC). The defendant company (R) manufactured road-making materials. They engaged X and Y, a firm of general repairers, to replace asbestos sheeting on the side of a transfer tower on their premises. Although the original intention was to use new sheets, X and Y obtained permission from the owners of adjacent premises to remove old asbestos sheets from the roof of a disused loading bay. R's loading manager warned the men of the dangers of working on an asbestos roof but (apart from lending them a front-loading shovel which they used to gain access to the roof, and to lower and transport the sheeting) left them to get on with the job. While working on the roof, X fell through a skylight and was fatally injured. It was held that the events leading to the death were not within the ambit of R's undertaking: X and Y had been left to do the work as they pleased. Smith J (with whose judgment Ralph Gibson LJ agreed) accepted, however, that where the employer had actual control over an activity and either exercised that control or was under a duty to do so, the activity would fall within the employer's conduct of her undertaking.

[60] See para 8.40, n 56 above.

[61] [1994] 4 All ER 1051.

[62] One commentator, G Holgate, "Employer's Liability: Reconstructing Section 3(1) of the Health and Safety at Work etc Act 1974" (1995) 159 JPN 385, 386, suggests that

> *Associated Octel* is a most important decision which can only enhance workplace health and safety. … In order to avoid liability, the prudent employer/principal will henceforth be well advised to adopt a "hands on" approach to the activities of contractors engaged by them, stipulating the necessary safety precautions and procedures and ensuring that they are complied with.

[63] The question of control may be relevant to *that* issue; see para 8.43 below.

> necessary for carrying on business is part of the conduct of the undertaking, whether it is done by the employer's own employees or by independent contractors. If there is a risk of injury …, and, a fortiori, if there is actual injury as a result of the conduct of that operation, there is prima facie liability, subject to the defence of reasonable practicability.[64]

8.43 Stuart-Smith LJ emphasised that the question of control might, however, be "very relevant" in relation to the question of reasonable practicability, which was a matter of fact and degree in every case. On the one hand, where specialist contractors were instructed, it might not be reasonably practicable for the employer to do otherwise than rely on those contractors to see that the work was carried out safely. There were, on the other hand, cases where it was reasonably practicable for her to give instructions on how the work was to be done and what safety measures were to be taken. It would depend on

> a number of factors so far as concerns operations carried out by independent contractors; what is reasonably practicable for a large organisation employing safety officers or engineers contracting for the services of a small contractor on routine operations may differ markedly from what is reasonably practicable for a small shopkeeper employing a local builder on activities on which he has no expertise. The nature and gravity of the risk, the competence and experience of the workmen, the nature of the precautions to be taken are all relevant considerations.[65]

Independent contractors and the proposed corporate offence

8.44 We believe that there is no need to make specific provision in the present context in relation to the employment of a contractor by the company. In every case it will be for the jury to determine (1) whether a death of which the immediate cause was the conduct of a contractor employed by the company was attributable, at least in part, to a management failure on the part of the company, and (2) if so, whether that failure amounted to conduct falling far below what could reasonably be expected of the company in the circumstances.[66] It may well be that in particular cases the jury will take into account all or some of the matters referred to by Stuart-Smith LJ in the passage cited in paragraph 8.43 above.

AN ILLUSTRATION

8.45 We will now show how we envisage the new offence would operate by reference to the 1987 Zeebrugge ferry disaster, which involved the "roll-on roll-off" passenger and freight ferry, *Herald of Free Enterprise*.[67] The ferry set sail from Zeebrugge inner harbour and capsized four minutes after crossing the outer mole, with the loss of 150 passengers and 38 crew members. The immediate cause of the capsize was

[64] *Associated Octel Co Ltd* [1994] 4 All ER 1051, at pp 1062j–1063a. Under s 40 of the 1974 Act the burden of establishing the defence is placed on the defendant employer.

[65] *Associated Octel Co Ltd* [1994] 4 All ER 1051, at p 1063f–h.

[66] By contrast with the regulatory offence under s 3(1) of the 1974 Act (see para 8.41 above), the burden of proof will rest on the prosecution in respect of every element of the offence.

[67] See paras 6.49 – 6.56 above.

that the ferry had set sail with her inner and outer bow doors open. The responsibility for shutting the doors lay with the assistant bosun, who had fallen asleep in his cabin, thereby missing the "Harbour Stations" call and failing to shut the doors. The Chief Officer was under a duty as loading officer of the G deck to ensure that the bow doors were closed, but he interpreted this as a duty to ensure that the assistant bosun was at the controls. Subsequently, the report of the inquiry by Mr Justice Sheen into the disaster ("the Sheen Report") said of the Chief Officer's failure to ensure that the doors were closed that, of all the many faults which combined to lead directly or indirectly to this tragic disaster, his was the most immediate.[68] The Chief Officer could in theory have remained on the G deck until the doors were closed before going to his harbour station on the bridge. However, although this would have taken less than three minutes, loading officers always felt under such pressure to leave the berth immediately that this was not done.[69]

8.46 The Master of the ferry on the day in question was responsible for the safety of the ship and those on board. The inquiry therefore found that in setting out to sea with the doors open he was responsible for the loss of the ship. The Master, however, had followed the system approved by the Senior Master, and no reference was made in the company's "Ship's Standing Orders" to the closing of the doors. Moreover, this was not the first occasion on which the company's ships had gone to sea with doors open, and the management had not acted upon reports of the earlier incidents.

8.47 The Senior Master's functions included the function of acting as co-ordinator between all the Masters who commanded the *Herald* and their officers, in order to achieve uniformity in the practices adopted on board by the different crews. He failed to enforce such orders as had been issued, and also failed to issue orders relating to the closing of the bow doors on G deck. The Sheen Report found that he "should have introduced a fail-safe system".

8.48 The criticism in the Sheen Report did not stop with those on board the ship:

> [F]ull investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company [than the Master, the Chief Officer, the assistant bosun and the Senior Master]. The Board of Directors did not appreciate their responsibility for the safe management of their ships. They did not apply their minds to the question: What orders should be given for the safety of our ships? The directors did not have any proper comprehension of what their duties were. There appears to have been a lack of thought about the way in which the *Herald* ought to have been organised for the Dover/Zeebrugge run. 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

[68] MV *Herald of Free Enterprise*: Report of the Court (No 8074), Department of Transport (1987), para 10.9.

[69] The Sheen Report pointed out (at para 11.2) that the guide issued by the company created a conflict in the loading officer's duties.

> top to bottom the body corporate was infected with the disease of sloppiness. … The failure on the part of the shore management to give proper and clear directions was a contributory cause of the disaster.[70]

8.49 As we explained above,[71] the prosecution against P & O European Ferries (Dover) Ltd ultimately failed. The judge directed the jury that, as a matter of law, there was no evidence upon which they could properly convict six of the eight defendants, including the company, of manslaughter.[72] The principal ground for this decision in relation to the case against the company, was that, in order to convict it of manslaughter, one of the individual defendants who could be "identified" with the company would have himself to be guilty of manslaughter. Since there was insufficient evidence on which to convict any of those individual defendants, the case against the company had to fail.[73]

8.50 If circumstances such as these were to occur again, we think it would probably be open to a jury to conclude that, even if the immediate cause of the deaths was the conduct of the assistant bosun, the Chief Officer or both, another of the causes was the failure of the company to devise a safe system for the operation of its ferries; and that that failure fell far below what could reasonably have been expected. In these circumstances the company could be convicted of our proposed new offence.

POTENTIAL DEFENDANTS

Corporations

8.51 We consider that the new offence should extend to all corporations, irrespective of the legal means by which they are incorporated. This would include not only those incorporated under a general public Act (such as the Companies Act 1985) but also those incorporated at common law (such as the Corporation of London), by royal charter (such as the BBC, and most universities), by private or local Act (such as certain public utility companies) or special public Act (including a number of organisations in the public sector). Most of these corporations have no shareholders and are not run with a view to profit, but we do not regard this as a reason for exempting them from the rules applicable to other corporations.

8.52 We also think that the offence should extend to corporations incorporated abroad. If a death results from the mismanagement of a company, we see no reason why the company's liability should be affected by the place where it happens to have been incorporated, any more than the liability of an individual (for things done in England and Wales) is affected by her nationality. We do not propose, in general, that the offence should be committed where the fatal injury occurs outside England and Wales; but this is a question of the offence's territorial extent. It does

[70] *Ibid*, para 14.1.

[71] Paras 6.49 – 6.56 above; and see Consultation Paper No 135, para 4.31.

[72] *Stanley and others* 19 October 1990 (CCC No 900160), unreported.

[73] In coming to this conclusion Turner J ruled against the adoption into English criminal law of the "principle of aggregation": *Stanley and others* 19 October 1990 (CCC) unreported transcript pp 8E–9C. See para 6.50 above.

not follow that foreign corporations should be immune from prosecution in respect of fatal accidents that do occur in England and Wales.

8.53 However, we propose that corporations sole should be excluded. A corporation sole is a corporation constituted in a single person in right of some office or function, which grants that person a special legal capacity to act in certain ways: examples are government ministers and archbishops.[74] The corporation sole is in reality a legal device for differentiating between an office-holder's personal capacity and her capacity *qua* holder of that office for the time being. It is expressly excluded from the definition of a corporation in section 740 of the Companies Act 1985, and we exclude it from our proposed corporate offence as well. **We recommend that the offence of corporate killing should be capable of commission by any corporation, however and wherever incorporated, other than a corporation sole. (Recommendation 13)**

Unincorporated bodies

8.54 We have considered whether the proposed new offence should apply to partnerships, trusts (such as hospital trusts) and other unincorporated bodies. Many such organisations are for practical purposes indistinguishable from corporations, and it is arguable that their liability for fatal accidents should be the same. However, we have concluded that it would be inappropriate for us to recommend such an extension of the offence at the present time. Under the existing law the individuals who comprise an unincorporated body may be criminally liable for manslaughter, as for any other offence; and, by contrast with the law relating to corporations, the question of attributing the conduct of individuals to the body itself does not arise. In this respect the law will be unaffected by the replacement of manslaughter with the offences in the draft Bill of reckless killing and killing by gross carelessness.

8.55 It would clearly be wrong to extend the offence to *all* unincorporated bodies, because there are many such bodies (for example, a partnership of two individuals, employing no-one) that would be unfairly disadvantaged by being charged with the corporate offence (which does not require foreseeability)[75] rather than that of killing by gross carelessness (which does). Any extension of the offence beyond incorporated bodies would therefore raise intractable problems as to the *kinds* of unincorporated body that ought and ought not to be included. But there has been no consultation on any proposal to this effect, either in the consultation paper or in any other form. We think it would be wise to await experience of the operation of our proposed corporate offence, in the context of the kind of organisation for which it is primarily designed – namely the commercial corporation – before considering whether to extend it further. **We recommend that the offence of corporate killing should not be capable of commission by an unincorporated body. (Recommendation 14)**

[74] It has no connection with a company having a single member – something which, in the UK, can now exist by virtue of the Companies (Single Member Private Limited Companies) Regs 1992, SI 1992 No 1699, made in pursuance of EC Council Directive No 89/667/EEC.

[75] See para 8.4 above.

Secondary parties

8.56 A provision imposing liability on the officers of a company is commonly included in legislation creating an offence likely to be committed by a corporation. The Health and Safety at Work etc Act 1974, for example, provides:

> Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager,[76] secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence … .[77]

8.57 Even in the absence of such a provision, an individual may be liable under the general law[78] as a secondary party, for aiding, abetting, counselling or procuring an offence committed by a corporation, just as she may be party to one committed by another individual.

8.58 We intend that no individual should be liable to prosecution for the corporate offence, even as a secondary party. Our aim is, first, that the new offences of reckless killing and killing by gross carelessness should replace the law of involuntary manslaughter for individuals; and second, that the offence of killing by gross carelessness should be adapted so as to fit the special case of a corporation whose management or organisation of its activities is one of the causes of a death. The indirect extension of an *individual's* liability, by means of the new corporate offence, would be entirely contrary to our purpose. There will no doubt be many cases in which the conduct of one or more of the company's employees will amount to the commission of one of the two "individual" offences; but where that conduct does not fulfil the requirements of liability for one of those two offences, we would not wish an individual employee to be caught by the corporate offence. We doubt whether, in practice, it would be possible for an individual employee to be a secondary party to the corporate offence without committing the offence of reckless killing or that of killing by gross carelessness; but we take the view that it is desirable, by means of express legislative provision, to obviate the need for

[76] The word "manager" in this type of provision refers to someone of real authority, with the power and the responsibility to decide corporate policy: she must perform a governing role in the company's affairs rather than one of day-to-day management: see, eg, *Boal* [1992] 1 QB 591. (Footnote added.)

[77] Section 37(1). The definition of "relevant statutory provisions" in s 53(1) of the Act includes ss 2 and 3 of the Act (considered at paras 6.18 – 6.22 above).

[78] Accessories and Abettors Act 1861, s 8 (as amended by the Criminal Law Act 1977, s 65(4), Sch 12). The section, which placed the common law on a statutory footing, provides:

> Whosoever shall aid, abet, counsel or procure the commission of any indictable offence whether the same be an offence at common law or by virtue of any act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

Section 44 of the Magistrates' Courts Act 1980 contains similar provision for summary offences. We examined the principles applicable in Assisting and Encouraging Crime (1993) Consultation Paper No 131.

prosecutors and courts even to consider the question of secondary liability for the corporate offence. **We recommend that the offence of corporate killing should not be capable of commission by an individual, even as a secondary party. (Recommendation 15)**

TERRITORIAL JURISDICTION

8.59 The general rule is that nothing done outside England and Wales is an offence under English criminal law.[79] In the case of homicide by an individual, however, the English courts have jurisdiction in the following cases:

(1) Section 9 of the Offences Against the Person Act 1861 confers jurisdiction over a homicide committed by a British subject on land outside the United Kingdom.

(2) Section 2 of the Territorial Waters Jurisdiction Act 1878 confers jurisdiction over offences committed on ships (including foreign ships) in British territorial waters.[80]

(3) Section 686(1) of the Merchant Shipping Act 1894[81] confers jurisdiction over offences committed on British ships, even in foreign waters.

(4) Section 92 of the Civil Aviation Act 1982 confers jurisdiction over offences committed on British-controlled aircraft while in flight elsewhere than in or over the United Kingdom.

(5) The Criminal Jurisdiction (Offshore Activities) Order 1987,[82] made under section 22 of the Oil and Gas (Enterprise) Act 1982, confers jurisdiction over offences committed on, under or above an "installation"[83] in British territorial waters or certain parts of the continental shelf, or within 500 metres of such an installation.

8.60 Where a particular offence consists in the bringing about of a particular result, the place where the offence is committed is normally the place where that result occurs. In the case of homicide, however, section 10 of the Offences Against the Person Act 1861 confers jurisdiction

(1) where the *injury* is inflicted in England and Wales, even if the death occurs elsewhere; or

(2) where the *death* occurs in England and Wales, even if the injury is inflicted elsewhere;

[79] See G Williams, "Venue and the Ambit of Criminal Law" (1965) 81 LQR 276, 395, 518.

[80] But not foreign aircraft in flight over territorial waters.

[81] As amended by the Merchant Shipping Act 1993, s 8(3).

[82] SI 1987 No 2198.

[83] Ie "any floating structure or device maintained on a station by whatever means".

but it has been held that the latter rule applies only if the injury is inflicted within the jurisdiction of the English courts, for example on a British ship.[84]

8.61 We see no reason why the rules relating to the territorial extent of our proposed offences of *individual* homicide should be different from those that now apply to manslaughter, and we make no recommendation on this issue: the existing rules would thus apply to our proposed individual offences. We also think that, for the most part, the same principles should apply, as far as possible, to the corporate offence. Thus, subject to the other requirements of the offence, it would be committed if the injury that results in the death is sustained in such a place that the English courts would have had jurisdiction over the offence if it had been committed by an individual – that is, in England and Wales, on any vessel in territorial waters or a British vessel elsewhere,[85] on a British-controlled aircraft in flight outside the United Kingdom, or in any place to which an Order in Council under section 22 of the Oil and Gas (Enterprise) Act 1982 applies.

8.62 However, we do not propose that the corporate offence should be extended by a provision corresponding to section 9 of the Offences Against the Person Act, which confers jurisdiction over homicides committed by British subjects abroad. Such a provision would presumably involve extending the offence to deaths resulting from management failures by *British* companies, even where the injury is sustained abroad. We see no pressing need for such a provision, since there might well be liability under foreign law in such a case; we think it likely (though we have not investigated the matter) that the considerations affecting the liability of British companies are different from those affecting the liability of British citizens; and there has been no consultation on the matter. **We recommend that there should be liability for the corporate offence only if the injury that results in the death is sustained in such a place that the English courts would have had jurisdiction over the offence had it been committed by an individual other than a British subject. (Recommendation 16)**

CONSENT TO PROSECUTION

8.63 We are very conscious of the strength of feeling understandably engendered by fatal accidents, and of how much pressure there can be for a prosecution. At present it is initially for the Crown Prosecution Service ("CPS") to decide whether there is sufficient evidence to offer a realistic prospect of a conviction, and (if so) whether the public interest requires a prosecution;[86] but if the CPS decides not to prosecute, on either ground, a private individual (such as a relative of the deceased) may either seek judicial review of the decision[87] or bring a private

[84] *Lewis* (1857) Dears & B 182, 169 ER 968.

[85] Thus it would extend to the circumstances of the Zeebrugge ferry disaster.

[86] Code for Crown Prosecutors (June 1994) para 5.1.

[87] As in the case of the sinking of the pleasure cruiser *Marchioness* on the River Thames on 20 August 1989, where judicial review was sought (without success) of the DPP's decision to charge only an offence under s 32 of the Merchant Shipping Act 1988 against the master of the *Bowbelle*. An application for judicial review would succeed only in limited circumstances, for example, where the DPP was shown to have acted in bad faith or to have failed to apply the Code for Crown Prosecutors (as in *R v DPP, ex p C* [1995] 1 Cr App R 136).

prosecution.[88] The CPS has power to take over a private prosecution and discontinue it,[89] but will not necessarily think it appropriate to do so merely because it decided not to institute proceedings itself. A decision to discontinue may be open to judicial review.[90] Private prosecutions are also controlled to some extent by the magistrates' court. In the first place the court can decline to issue a summons if the proceedings appear to be vexatious; but such a refusal can itself be challenged by judicial review. Secondly, the defendant can at present ask for an "old-style" committal hearing and submit that there is insufficient evidence to justify the case being committed to the Crown Court. When section 44 of the Criminal Justice and Public Order Act 1994 comes into force, committal proceedings will be abolished, but it will still be possible for a defendant to make an application to the court for dismissal of the charges.

8.64 We have considered whether these procedures are a sufficient safeguard against the risk of private prosecutions for the corporate offence in cases where the CPS's decision not to prosecute is entirely justified. The effect of our proposed offence would be to make it easier to secure a conviction against a company whose operations have caused a death. It might therefore be argued that, if the evidence would be less likely to be held insufficient, it must also be less likely that proceedings would be brought on insufficient evidence. Moreover, the incidence of vexatious proceedings for manslaughter does not at present seem to be unduly high. However, this may be largely a consequence of the financial risk involved in bringing private proceedings that may result in an acquittal and an order for costs; the easier the offence is to prove, the smaller that risk will be perceived to be, and the more likely it is that private proceedings will be brought. And a proportion of those proceedings will undoubtedly be in cases that are clearly inappropriate for prosecution, even under the less restrictive rules that we propose.

8.65 We are aware that the definition of the offence we propose is in broad terms and relies to an unusual degree on the judgment of the jury. There will therefore be many cases where, although a jury would be *unlikely* to convict, it cannot be said that no reasonable jury *could* convict. In these cases the courts would have no power to prevent a private prosecution from going ahead (unless the proceedings appeared to be an abuse of the process of the court, which would be unlikely if there were a prima facie case), and it would be up to the CPS to intervene and discontinue the proceedings on the ground that there is no "realistic prospect of a conviction" – in other words, that an acquittal is a more likely outcome than a conviction. In such a case the CPS will not begin or continue a prosecution: the question whether the public interest requires a prosecution does not arise.

8.66 However, the right of a private individual to bring criminal proceedings, subject to the usual controls, is in our view an important one which should not be lightly set

[88] In *R v Bow Street Stipendiary Magistrate, ex p South Coast Shipping Co Ltd* (1993) 96 Cr App R 405 it was held that the DPP's decision not to bring manslaughter charges in respect of the *Marchioness* disaster (n 87 above) did not preclude the bringing of a private prosecution, subject to the right of the DPP to intervene in the proceedings and discontinue them.

[89] Prosecution of Offences Act 1985, ss 6(2), 23.

[90] *Turner v DPP* (1979) 68 Cr App R 70.

aside. Indeed, in a sense it is precisely the kind of case with which we are here concerned, where the public pressure for a prosecution is likely to be at its greatest, that that right is most important: it is in the most serious cases, such as homicide, that a decision not to prosecute is most likely to be challenged. It would in our view be perverse to remove the right to bring a private prosecution in the very case where it is most likely to be invoked. **We recommend that there should be no requirement of consent to the bringing of private prosecutions for the corporate offence. (Recommendation 17)**

MODE OF TRIAL

8.67 Where a death has occurred, and is alleged to have been caused by conduct which not only fell below an acceptable standard but fell *far* below it, we do not believe it would ever be appropriate for the case to be heard by a magistrates' court. It is true that magistrates' courts often hear cases arising out of fatal accidents which are prosecuted under regulatory legislation such as the Health and Safety at Work etc Act 1974; but in these cases the causing of death is not part of the offence. As we have said before, the corporate offence is intended to be the corporate counterpart of the individual offence of killing by gross carelessness. The fact that it would be punishable only with a fine, and not with imprisonment, is attributable to our proposal that it should be capable of commission only by a corporation, and not to any difference in the perceived gravity of the two offences. **We recommend that the offence of corporate killing should be triable only on indictment. (Recommendation 18)**

ALTERNATIVE VERDICTS

8.68 In practice, there will commonly be an overlap between the proposed new offence and the offences under sections 2 and 3 of the Health and Safety at Work etc Act 1974, which impose a duty on an employer to conduct her undertaking in such a way as to ensure, so far as reasonably practicable, that others are not thereby exposed to risks to their health and safety.[91] There may well be cases where a corporation is acquitted of the corporate offence but has no defence to a charge under one of these sections, and in such a case we think it should be open to the jury to convict of an offence under the appropriate section. It would clearly be inconvenient if, whenever preferring an indictment for the corporate offence, the prosecution had to choose between including a count of an offence under the 1974 Act and abandoning the chance of a conviction under that Act in the event of an acquittal of the corporate offence. On the other hand it is doubtful whether an alternative verdict under the 1974 Act would be available by virtue of section 6(3) of the Criminal Law Act 1967, which applies only where "the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence".[92] We think it should be made clear that on a charge of the corporate offence the jury has power to convict the corporation, instead, of one or

[91] The Court of Appeal, in one important "policy" decision, *British Steel plc* [1995] ICR 586, a case which happened to involve a fatal accident, has held that the identification doctrine does not apply to these offences; and that, in effect, a corporation is vicariously liable for the conduct of all its employees. See paras 6.18 – 6.22 above.

[92] See para 5.57 n 93 above.

other of these offences under the 1974 Act.[93] This would of course be subject to the control of the judge: if, in the light of the evidence and the way the trial has been conducted, it would be in any way unfair to the defendant to leave the alternative to the jury, the judge will not do so.

8.69 We also think that it should be possible for the jury to convict of either of these offences on a count charging one of the *individual* offences we propose. There are two reasons for this, one somewhat theoretical and one practical. The theoretical reason is that we do not propose that corporations should be immune from prosecution for the individual offences, subject to the ordinary rules governing liability under the existing principle of identification. It is conceivable, though unlikely, that if our recommendations were implemented a corporation might be charged with reckless killing, or killing by gross carelessness, and not with the corporate offence. In such a case we see no reason why an alternative verdict under the 1974 Act should not be available.

8.70 The practical reason is that a charge of the corporate offence may well be tried together with a charge of killing by gross carelessness (or reckless killing) against one or more of the company's directors or managers. If the company were guilty of an offence under section 2 or 3 of the 1974 Act, those individuals might also be guilty of that offence.[94] It would be anomalous if there were power to return an alternative verdict against the company but not against its controllers, where they are facing what is for practical purposes the same charge. **We therefore recommend that, where the jury finds a defendant not guilty of any of the offences we recommend, it should be possible (subject to the overall discretion of the judge) for the jury to convict the defendant of an offence under section 2 of 3 of the Health and Safety at Work etc Act 1974. (Recommendation 19)**

THE COURT'S POWERS ON CONVICTION

Compensation

8.71 The court would have its ordinary powers to order compensation.[95]

Remedial action

8.72 On conviction of a corporation of an offence under the 1974 Act, the court has power to order the cause of the offence to be remedied (in addition to, or instead of, imposing punishment).[96] We did not raise this issue in Consultation Paper No

[93] Section 2 is confined to employees of the defendant corporation, s 3 to others.

[94] s 37(1); see para 8.56 above.

[95] See para 7.25 above.

[96] Health and Safety at Work etc Act 1974, s 42. Section 42(1) provides that where a person is convicted of an offence under the relevant statutory provisions in respect of any matters which appear to the court to be matters which it is in his power to remedy, the court may, in addition to or instead of imposing any punishment, order him, within such time as may be fixed by the order, to take such steps as may be specified in the order for remedying the said matters. The other four subsections of s 42 contain ancillary provisions, including a power to extend time for compliance with the order on an application before the end of the time

135, but in their responses on consultation some respondents who favoured an extension of corporate liability said that they contemplated that the court would have power not only to fine but also to order the taking of remedial action.[97]

8.73 We believe that in the interests of future safety it would be useful for the court to have such a power. Because the failure which will lead to a conviction is a management failure it is, we believe, necessary to make it clear that the court's remedial powers will extend to requiring the corporation to remedy any matter which appears to the court to have resulted from the failure and been the cause or one of the causes of the death.

8.74 This will be a quite novel power in the context of a conviction for a serious criminal offence in the Crown Court, and we believe that it is necessary to include some provision to assist the judge in selecting the type of order she might make.[98] In an ordinary case of sentencing an individual, the judge will be able to rely not only on her own sentencing experience but also, in cases of any difficulty, on a pre-sentence report. In the present context she will have no such experience on which to draw.

8.75 For this reason we think it desirable that there should be an onus on the prosecution[99] to apply for a remedial order, if it considers the case warrants the making of such an order, and to specify the terms of the order it proposes. It should then be open to the prosecution and the convicted corporation to adduce evidence and to make representations to the judge, by analogy with the present statutory procedure for making compensation orders.[100] The court should then have power to make such an order, if any, as it considers appropriate in the circumstances. An appeal against such an order would then lie to the Court of Appeal (Criminal Division) in the usual way.[101]

8.76 For these reasons **we recommend that**

(1) **a court before which a corporation is convicted of corporate killing should have power to order the corporation to take such steps, within such time, as the order specifies for remedying the failure in**

originally fixed, and also a power to order the forfeiture and destruction of an explosive acquired, possessed or used in contravention of the Act.

97 See paras 7.15 – 7.16 above.

98 By analogy with the court's power to make a mandatory injunction in civil proceedings, where the party seeking the injunction will place before the court a draft of the order she seeks.

99 Because some other investigating agency may have been responsible for investigating the causes of the death or deaths, we recommend that this term should include the Health and Safety Executive and any other body or person designated for this purpose by the Secretary of State either generally or in relation to the case in question.

100 See Powers of Criminal Courts Act 1973 s 35(1A), as inserted by Criminal Justice Act 1982 s 67.

101 See Criminal Appeal Act 1968 s 50(1), where a sentence is defined to include "any order made by a court when dealing with an offender". See also *Hayden* (1974) 60 Cr App R 304 for the principle that a court order dependent on conviction falls within the definition of the word "sentence" in the 1968 Act.

question and any matter which appears to the court to have resulted from the failure and been the cause or one of the causes of the death;[102]

(2) **the power to make such an order should arise only on an application by the prosecution (or the Health and Safety Executive or any other body or person designated for this purpose by the Secretary of State, either generally or in relation to the case in question)**[103] **specifying the terms of the proposed order;**[104] **and**

(3) **any such order should be on such terms (whether those proposed or others) as the court considers appropriate having regard to any representations made, and any evidence adduced, by the prosecution (or any other body or person applying for such an order) or on behalf of the corporation.**[105] **(Recommendation 20)**

CORPORATE LIABILITY FOR THE INDIVIDUAL OFFENCES

8.77 We recommended above[106] that there should be no question of *individual* liability for the *corporate* offence, because that offence is intended as a practical device to ensure that corporations cannot escape liability for killing by gross carelessness merely because their decision-making structures are large and complex. It does not follow, in our view, that there should be no *corporate* liability for the offences we have (for convenience) referred to as the *individual* offences. The existence of the corporate offence would normally make it unnecessary for the prosecution to charge a corporation with reckless killing or killing by gross carelessness, and thus undertake the burden of showing that a "controlling mind" of the corporation was guilty of the offence charged: even if no such person could be identified, the corporation could still be convicted of a homicide offence if the death were caused by a management failure of the requisite gravity. But, just because it would not normally be *necessary* to charge the corporation with an individual offence, it does not follow that it would never be *appropriate*; still less does it follow that it should not be *possible*. There may be the occasional case where, although under the identification principle the conduct of the individual responsible is the conduct of the company, it is arguable that that conduct does not amount to a *management* failure. Even where this is not the case, on facts such as those of the Lyme Bay tragedy[107] we see no reason why it should not continue to be possible for the company to be convicted of the same offence as the individual responsible. **We recommend that the ordinary principles of corporate liability should apply to the individual offences that we propose. (Recommendation 21)**

[102] See cl 5(1) of the draft Bill in Appendix A.

[103] See cl 5(3) of the draft Bill.

[104] See cl 5(2) of the draft Bill.

[105] *Ibid*.

[106] Paras 8.56 – 8.58.

[107] *Kite and OLL Ltd*; see para 6.48 above.

PART IX
SUMMARY OF OUR RECOMMENDATIONS

INDIVIDUAL MANSLAUGHTER

1. We recommend the creation of two different offences of unintentional killing, based on differing fault elements, rather than one single, broad offence.[1]

Reckless killing

2. We recommend the creation of a new offence of reckless killing, which would be committed if
   (1) a person by his or her conduct causes the death of another;
   (2) he or she is aware of a risk that his or her conduct will cause death or serious injury; and
   (3) it is unreasonable for him or her to take that risk, having regard to the circumstances as he or she knows or believes them to be.[2]

Unlawful act manslaughter

3. We recommend the abolition of unlawful act manslaughter in its present form.[3]

Killing by gross carelessness

4. We recommend the creation of a new offence of killing by gross carelessness, which would be committed if
   (1) a person by his or her conduct causes the death of another;
   (2) a risk that his or her conduct will cause death or serious injury would be obvious to a reasonable person in his or her position;
   (3) he or she is capable of appreciating that risk at the material time; and
   (4) *either*
      (a) his or her conduct falls far below what can reasonably be expected of him or her in the circumstances, *or*
      (b) he or she intends by his or her conduct to cause some injury, or is aware of, and unreasonably takes, the risk that it may do so, *and* the conduct causing (or intended to cause) the injury constitutes an offence.[4]

Omissions

5. We recommend that the duty to act continue to be governed by the common law for the purposes of involuntary manslaughter for the time being.[5]

[1] Para 5.3 above.

[2] Para 5.13 above; draft Involuntary Homicide Bill (Appendix A below), cl 1.

[3] Para 5.16 above.

[4] Para 5.34 above; draft Bill, cl 2.

[5] Para 5.45 above; draft Bill, cl 3.

Alternative verdicts

6. We recommend that both of the new homicide offences should be available as alternative verdicts to murder.[6]
7. We recommend that the long established practice, that where there is a possibility on a count of murder of the jury returning a verdict of manslaughter, a separate count of manslaughter is *not* added to the indictment, be abandoned.[7]
8. We recommend that the question whether any other offence may constitute an alternative on a charge of reckless killing or killing by gross carelessness should be governed by the general provisions of section 6(3) of the Criminal Law Act 1967.[8]
9. We recommend that killing by gross carelessness should be an alternative to a charge of reckless killing.[9]

Motor manslaughter

10. We recommend that no change should be made to the existing offences of causing death by bad driving, and that it should also be possible, where appropriate, to prosecute such cases as reckless killing or killing by gross carelessness.[10]

CORPORATE MANSLAUGHTER

11. We recommend
    (1) that there should be a special offence of corporate killing, broadly corresponding to the individual offence of killing by gross carelessness;
    (2) that (like the individual offence) the corporate offence should be committed only where the defendant's conduct in causing the death falls far below what could reasonably be expected;
    (3) that (unlike the individual offence) the corporate offence should *not* require that the risk be obvious, or that the defendant be capable of appreciating the risk; and
    (4) that, for the purposes of the corporate offence, a death should be regarded as having been caused by the conduct of a corporation if it is caused by a failure, in the way in which the corporation's activities are managed or organised, to ensure the health and safety of persons employed in or affected by those activities.[11]

Causation

12. We recommend that, for the purposes of the corporate offence, it should be possible for a management failure on the part of a corporation to be a cause of a person's death even if the immediate cause is the act or omission of an individual.[12]

[6] Para 5.55 above; draft Bill, cl 6(1).

[7] Para 5.56 above.

[8] Para 5.59 above.

[9] Para 5.60 above; draft Bill, cl 6(2).

[10] Para 5.69 above.

[11] Para 8.35 above; draft Bill, cl 4(1), (2)(a).

[12] Para 8.39 above; draft Bill, cl 4(2)(b).

Potential defendants

13. We recommend that the offence of corporate killing should be capable of commission by any corporation, however and wherever incorporated, other than a corporation sole.[13]
14. We recommend that the offence of corporate killing should not be capable of commission by an unincorporated body.[14]
15. We recommend that the offence of corporate killing should not be capable of commission by an individual, even as a secondary party.[15]

Territorial jurisdiction

16. We recommend that there should be liability for the corporate offence only if the injury that results in the death is sustained in such a place that the English courts would have had jurisdiction over the offence had it been committed by an individual other than a British subject.[16]

Consents

17. We recommend that there should be no requirement of consent to the bringing of private prosecutions for the corporate offence.[17]

Mode of trial

18. We recommend that the offence of corporate killing should be triable only on indictment.[18]

Alternative verdicts

19. We recommend that, where the jury finds a defendant not guilty of any of the offences we recommend, it should be possible (subject to the overall discretion of the judge) for the jury to convict the defendant of an offence under section 2 of 3 of the Health and Safety at Work etc Act 1974.[19]

Remedial action

20. We recommend that
    (1) a court before which a corporation is convicted of corporate killing should have power to order the corporation to take such steps, within such time, as the order specifies for remedying the failure in question and any matter which appears to the court to have resulted from the failure and been the cause or one of the causes of the death;[20]
    (2) the power to make such an order should arise only on an application by the prosecution (or the Health and Safety Executive or any other body or person designated for this purpose by the Secretary of State,

[13] Para 8.53 above; draft Bill, cl 4(8).

[14] Para 8.55 above.

[15] Para 8.58 above; draft Bill, cl 4(4).

[16] Para 8.62 above; draft Bill, cl 4(6), (7).

[17] Para 8.66 above.

[18] Para 8.67 above; draft Bill, cl 4(3).

[19] Para 8.70 above; draft Bill, cl 6(3).

[20] Para 8.76 above; draft Bill, cl 5(1).

either generally or in relation to the case in question)[21] specifying the terms of the proposed order;[22] and

(3) any such order should be on such terms (whether those proposed or others) as the court considers appropriate having regard to any representations made, and any evidence adduced, by the prosecution (or any other body or person applying for such an order) or on behalf of the corporation.[23]

Corporate liability for the individual offences

21. We recommend that the ordinary principles of corporate liability should apply to the individual offences that we propose.[24]

(*Signed*)

HENRY BROOKE, *Chairman*
ANDREW BURROWS
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
13 December 1995

[21] Draft Bill, cl 5(3).

[22] Draft Bill, cl 5(2).

[23] *Ibid*.

[24] Para 8.77 above; draft Bill, cl 4(5).

APPENDIX A
Draft Involuntary Homicide Bill

INDEX

This index shows alongside each clause and (where appropriate) each subsection of the draft Bill the paragraph(s) in the report where the provision is discussed.

Clause of Bill	Discussion
1(1)	paras 5.6 – 5.13
1(2)	para 5.46
2	paras 5.17 – 5.52
2(1)(a)	paras 5.26 – 5.28
2(1)(b)	para 5.29
2(1)(c)(i)	para 5.32
2(1)(c)(ii)	para 5.33
2(2)	para 5.28
2(3)	para 5.32
2(4)	para 5.33 n 62
2(5)	paras 5.47 – 5.52
3	paras 5.42 – 5.45
4	Part VIII
4(1)(a)	paras 8.8 – 8.10 and 8.36
4(1)(b)	paras 8.5 – 8.7
4(2)(a)	paras 8.9 – 8.35
4(2)(b)	paras 8.36 – 8.39
4(3)	para 8.67
4(4)	paras 8.56 – 8.58
4(5)	para 8.77
4(6), (7)	paras 8.59 – 8.62
4(8)	paras 8.51 – 8.55
5	paras 8.72 – 8.76
6(1)	paras 5.53 – 5.55
6(2)	para 5.60
6(3)	paras 8.68 – 8.70
6(4)	paras 5.57 – 5.59
7	paras 5.14 – 5.16

8(1)	See clause 18 of the draft Criminal Law Bill set out in Appendix A to Law Com No 218
8(2)	See clause 20 of the draft Criminal Law Bill set out in Appendix A to Law Com No 218
8(3)	para 5.30
9–11	These clauses deal with consequential amendments, commencement (and saving in respect of things done or omitted before the legislation comes into force), short title and extent. They are not discussed in the report.

DRAFT

OF A

B I L L

TO

Create new offences of reckless killing, killing by gross carelessness and corporate killing to replace the offence of manslaughter in cases where death is caused without the intention of causing death or serious injury. A.D. 2000.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Reckless killing.

1.—(1) A person who by his conduct causes the death of another is guilty of reckless killing if—

(a) he is aware of a risk that his conduct will cause death or serious injury; and

(b) it is unreasonable for him to take that risk having regard to the circumstances as he knows or believes them to be.

(2) A person guilty of reckless killing is liable on conviction on indictment to imprisonment for life.

Killing by gross carelessness.

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

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

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

(c) either—

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

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

(2) There shall be attributed to the person referred to in subsection (1)(a) above—

(a) knowledge of any relevant facts which the accused is shown to have at the material time; and

(b) any skill or experience professed by him.

(3) In determining for the purposes of subsection (1)(c)(i) above what can reasonably be expected of the accused regard shall be had to the circumstances of which he can be expected to be aware, to any circumstances shown to be within his knowledge and to any other matter relevant for assessing his conduct at the material time.

(4) Subsection (1)(c)(ii) above applies only if the conduct causing, or intended to cause, the injury constitutes an offence.

(5) A person guilty of killing by gross carelessness is liable on conviction on indictment to imprisonment for a term not exceeding [ ] years.

Omissions causing death.

3. A person is not guilty of an offence under sections 1 or 2 above by reason of an omission unless the omission is in breach of a duty at common law.

Corporate killing.

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.

(3) A corporation guilty of an offence under this section is liable on conviction on indictment to a fine.

(4) No individual shall be convicted of aiding, abetting, counselling or procuring an offence under this section but without prejudice to an individual being guilty of any other offence in respect of the death in question.

(5) This section does not preclude a corporation being guilty of an offence under section 1 or 2 above.

(6) This section applies if the injury resulting in death is sustained in England and Wales or—

(a) within the seaward limits of the territorial sea adjacent to the United Kingdom;

(b) on a British ship or vessel;

(c) on a British-controlled aircraft as defined in section 92 of the Civil Aviation Act 1982; or

1982 c.16

(d) in any place to which an Order in Council under section 22(1) of the Oil and Gas (Enterprise) Act 1982 applies (criminal jurisdiction in relation to offshore activities).

1982 c.23

(7) For the purposes of subsection (6)(b) and (c) above an injury sustained on a ship, vessel or aircraft shall be treated as including an injury sustained by a person who is then no longer on board, and who sustains the injury, in consequence of the wrecking of, or of some other mishap affecting, the ship, vessel or aircraft.

(8) In this section "a corporation" does not include a corporation sole but includes any body corporate wherever incorporated.

Remedial orders against convicted corporation.

5.—(1) A court before which a corporation is convicted of corporate killing may, subject to subsection (2) below, order the corporation to take such steps, within such time, as the order specifies for remedying the failure in question and any matter which appears to the court to have resulted from the failure and been the cause or one of the causes of the death.

(2) No such order shall be made except on an application by the prosecution specifying the terms of the proposed order; and the order, if any, made by the court shall be on such terms (whether those proposed or others) as the court considers appropriate having regard to any representations made, and any evidence adduced, in relation to that matter by the prosecution or on behalf of the corporation.

(3) In subsection (2) above references to the prosecution include references to the Health and Safety Executive and to any other body or person designated for the purposes of that subsection by the Secretary of State either generally or in relation to the case in question.

(4) The time specified by an order under subsection (1) above may be extended or further extended by order of the court on an application made before the end of that time or extended time, as the case may be.

(5) A corporation which fails to comply with an order under this section is guilty of an offence and liable—

(a) on conviction on indictment, to a fine;

(b) on summary conviction, to a fine not exceeding £20,000.

(6) Where an order is made against a corporation under this section it shall not be liable under any of the provisions mentioned in subsection (7) below by reason of anything which the order requires it to remedy in so far as it continues during the time specified by the order or any further time allowed under subsection (4) above.

(7) The provisions referred to in subsection (6) above are—

(a) sections 1, 2 and 4 above;

(b) the provisions of Part I of the Health and Safety at Work etc. Act 1974; 1974 c.37

(c) the provisions of any regulations made under section 15(1) of that Act;

(d) the existing statutory provisions as defined in section 53(1) of that Act.

Alternative verdicts.

6.—(1) On an indictment for murder a person found not guilty of murder may be found guilty of reckless killing or killing by gross carelessness.

(2) On an indictment for reckless killing a person found not guilty of that offence may be found guilty of killing by gross carelessness.

(3) On an indictment for reckless killing, killing by gross carelessness or corporate killing a person found not guilty of that offence may be found guilty of an offence under section 2 or 3 of the Health and Safety at Work etc. Act 1974.

1974 c.37

(4) Subsections (2) and (3) above are without prejudice to section 6(3) of the Criminal Law Act 1967 (alternative verdicts).

1967 c.58.

Abolition of involuntary manslaughter.

7. The offence of manslaughter is abolished except for—

(a) the cases for which provision is made by sections 2(3) and 4 of the Homicide Act 1957 (cases which would be murder but for diminished responsibility or a suicide pact); and

1957 c.11.

(b) cases which would be murder but for provocation.

Supplementary provisions.

8.—(1) In this Act "injury" means—

(a) physical injury, including pain, unconsciousness or other impairment of a person's physical condition; or

(b) impairment of a person's mental health.

(2) This Act has effect subject to any enactment or rule of law providing a defence, or providing lawful authority, justification or excuse for an act or omission.

(3) This Act has effect subject to the rules relating to the effect of intoxication on criminal liability.

Consequential amendments.

9. The enactments mentioned in the Schedule to this Act are amended in accordance with that Schedule.

Commencement and saving.

10.—(1) This Act comes into force at the end of the period of two months beginning with the day on which it is passed.

(2) This Act does not apply in relation to anything done or omitted before it comes into force.

Short title and extent.

11.—(1) This Act may be cited as the Involuntary Homicide Act 1995.

(2) The amendments in the Schedule to this Act have the same extent as the enactments to which they relate but, subject to that, this Act extends to England and Wales only.

SCHEDULE

Section 9.

CONSEQUENTIAL AMENDMENTS

The Offences Against the Person Act 1861 (c.100)

1.—(1) The Offences against the Person Act 1861 is amended as follows.

(2) In section 9 after "manslaughter", in the first two places where it occurs, insert ", reckless killing or killing by gross carelessness".

(3) In section 10 after "manslaughter" insert ", reckless killing or killing by gross carelessness".

The Infant Life (Preservation) Act 1929 (c.34)

2. In section 2(2) of the Infant Life (Preservation) Act 1929 for "manslaughter", in both places where it occurs, substitute "reckless killing or killing by gross carelessness".

The Children and Young Persons Act 1933 (c.12)

3. In the first paragraph of Schedule 1 to the Children and Young Persons Act 1933 after "manslaughter" insert ", reckless killing or killing by gross carelessness".

The Infanticide Act 1938 (c.36)

4. In section 1 of the Infanticide Act 1938—

(a) in subsection (1) for "manslaughter" substitute "reckless killing";

(b) in subsection (3) after "manslaughter" insert ", reckless killing or killing by gross carelessness".

The Visiting Forces Act 1952 (c.67)

5.—(1) The Visiting Forces Act 1952 is amended as follows.

(2) In section 7(6) after "manslaughter" insert ", reckless killing, killing by gross carelessness".

(3) In paragraph 1(a) of the Schedule after "manslaughter" insert ", reckless killing, killing by gross carelessness".

The Army Act 1955 (c.18)

6.—(1) The Army Act 1955 is amended as follows.

(2) In section 70(4) and (5) after "manslaughter" insert ", reckless killing or killing by gross carelessness".

(3) In section 71A(4)(b) after "manslaughter" insert ", reckless killing or killing by gross carelessness".

The Air Force Act 1955 (c.19)

7.—(1) The Air Force Act 1955 is amended as follows.

(2) In section 70(4) and (5) after "manslaughter" insert ", reckless killing or killing by gross carelessness".

(3) In section 71A(4)(b) after "manslaughter" insert ", reckless killing or killing by gross carelessness".

SCH.

The Naval Discipline Act 1957 (c.53)

8.—(1) The Naval Discipline Act 1957 is amended as follows.

(2) In section 48(2) after "manslaughter", in both places where it occurs, insert ", reckless killing or killing by gross carelessness".

(3) In section 43A(4)(b) after "manslaughter" insert ", reckless killing or killing by gross carelessness".

The Suicide Act 1961 (c.60)

9. In section 2(2) of the Suicide Act 1961 for "or manslaughter" substitute "manslaughter, reckless killing or killing by gross carelessness".

The Criminal Law Act 1967 (c.58)

10. In section 6(2)(a) of the Criminal Law Act 1967 after "manslaughter" insert ", reckless killing or killing by gross carelessness".

The Powers of Criminal Courts Act 1973 (c.62)

11. In section 43(1C)(b) of the Powers of Criminal Courts Act 1973 for "manslaughter" substitute "reckless killing or of killing by gross carelessness".

The Bail Act 1976 (c.63)

12. In paragraph 9A(2)(b) of Part I of Schedule 1 to the Bail Act 1976 after "manslaughter" insert ", reckless killing or killing by gross carelessness".

The Internationally Protected Persons Act 1978 (c.17)

13. In section 1(1)(a) of the Internationally Protected Persons Act 1978 after "manslaughter" insert ", reckless killing, killing by gross carelessness,".

The Suppression of Terrorism Act 1978 (c.26)

14. In paragraph 2 of Schedule 1 to the Suppression of Terrorism Act 1978 after "manslaughter" insert ", reckless killing, killing by gross carelessness".

The Aviation Security Act 1982 (c.36)

15.—(1) The Aviation Security Act 1982 is amended as follows.

(2) In section 6(1) after "manslaughter" insert ", reckless killing, killing by gross carelessness,".

(3) In section 10(2) after "manslaughter" insert ", reckless killing, killing by gross carelessness,".

The Criminal Justice Act 1982 (c.48)

16. In paragraph 1 of Part I of Schedule 1 to the Criminal Justice Act 1982 after "manslaughter" insert ", reckless killing or killing by gross carelessness".

The Nuclear Material (Offences) Act 1983 (c.18)

17. In section 1(1)(a) of the Nuclear Material (Offences) Act 1983 after "manslaughter" insert ", reckless killing, killing by gross carelessness,".

The Police and Criminal Evidence Act 1984 (c.60)

18. In paragraph 3 of Part I of Schedule 5 to the Police and Criminal Evidence Act 1984 after "manslaughter" insert ", reckless killing or killing by gross carelessness".

SCH.

The Coroners Act 1988 (c.13)

19.—(1) The Coroners Act 1988 is amended as follows.

(2) In section 11(6) after "manslaughter", in both places where it occurs, insert ", reckless killing, killing by gross carelessness, corporate killing".

(3) In section 16(1)(a)(i) after "manslaughter" insert ", reckless killing, killing by gross carelessness, corporate killing".

(4) In section 17(1)(a) and (2)(a) after "manslaughter" insert ", reckless killing, killing by gross carelessness, corporate killing".

The Road Traffic Act 1988 (c.40)

20. In section 172(1)(d) of the Road Traffic Act 1988 for "manslaughter" substitute "reckless killing or killing by gross carelessness".

The Road Traffic Offenders Act 1988 (c.53)

21. In Part II of Schedule 2 to the Road Traffic Offenders Act 1988 for "Manslaughter" substitute "Reckless killing or killing by gross carelessness".

The Aviation and Maritime Security Act 1990 (c.31)

22.—(1) The Aviation and Maritime Security Act 1990 is amended as follows.

(2) In section 14(2) after "manslaughter" insert ", reckless killing, killing by gross carelessness,".

(3) In section 18(2) after "manslaughter" insert ", reckless killing, killing by gross carelessness,".

The Railways Act 1993 (c.43)

23. In section 119(11) of the Railways Act 1993 in the definition of "act of violence" for "manslaughter" substitute "reckless killing, killing by gross carelessness,".

The Criminal Justice and Public Order Act 1994 (c.33)

24. In section 25 of the Criminal Justice and Public Order Act 1994—

(a) in subsection (2) after paragraph (c) insert—

"(cc) reckless killing;

(cd) killing by gross carelessness;";

(b) in subsection (3) after "manslaughter" insert ", reckless killing or killing by gross carelessness".

APPENDIX B

Involuntary Manslaughter: Sentencing

B.1 This Appendix is in two sections. The first section contains a review of all the recent reported cases[1] in which the Court of Appeal approved[2] a determinate sentence of 10 years or more for involuntary manslaughter. The sub-headings in this section correspond to those used in *Thomas' Current Sentencing Practice*. The purpose of this Appendix is to support the assertion in paragraph 5.50 of the report that:

> It is true that determinate sentences of more than 14 years are sometimes imposed in the worst cases of involuntary manslaughter. Sentences of 18 years have been upheld for killing in the course of robbery, and of 15 years for manslaughter by arson; and killing in the course of rape might justify a comparable sentence. However, it seems highly probable that most such cases would fall within our proposed offence of reckless killing, and if so charged could therefore be punished with life imprisonment.

B.2 In the second section we describe the basis on which a court may pass a discretionary life sentence for an offence for which such a sentence is available (manslaughter, rape and section 18 are examples under the present law). We explain why we consider that the desirability of grading offences in terms of relative culpability far outweighs the desirability of making express provision for a wholly exceptional case of killing by gross carelessness for which an indeterminate sentence might be more appropriate.

1. LONG SENTENCES FOR INVOLUNTARY MANSLAUGHTER

Manslaughter involving the use of a firearm

B.3 In *O'Mahoney*[3] the appellant was convicted of manslaughter and other offences, including possessing a firearm with intent to endanger life and with intent to commit an offence. The appellant and two other men had set out to find and beat a fourth man, having armed themselves on the way with a pistol and some ammunition. They did not find the man they were looking for but the pistol was fired on two occasions during the course of the evening. A dispute arose outside a club which the appellant and the two others had visited and the appellant shot the deceased in the chest at close range. The sentence of 15 years' imprisonment which the appellant received at first instance was upheld on appeal.

B.4 In this case the shooting had occurred after the deceased had grabbed hold of one of the appellant's companions. While there was no suggestion that there was a "dangerous situation or anything in the nature of a fight going on"[4] the appellant

[1] We have considered all the relevant cases reported in the Criminal Appeal Reports (Sentencing) series which began in 1979.

[2] Whether by upholding the sentence imposed by the trial judge or reducing it to a sentence which was still 10 years or more.

[3] (1980) 2 Cr App R (S) 57.

[4] *Ibid*, at p 58, *per* Eveleigh LJ.

responded to the situation by shooting the deceased at close range in the chest. The court found that the appellant had been drinking earlier in the afternoon but, in the opinion of the Court of Appeal, he "must have been aware that he had a gun and he must have been aware that he fired it."[5]

B.5 In this case it must be beyond doubt that the appellant would be liable for the proposed offence of reckless killing: shooting someone else in the chest at close range must give rise to an awareness that serious injury (at least) will result and taking the risk must be unreasonable in the circumstances known to the appellant. As the Court of Appeal stated "[t]his was a shot at close range into the chest of a completely innocent man."[6]

Manslaughter in the course of burglary

B.6 In *Wood*[7] the appellants pleaded guilty to manslaughter and burglary. They had broken into the bungalow of their 84 year old victim, tied her to the frame of her bed, covered her eyes and mouth with sticking plaster and left her in that condition after contacting a hospital and disclosing the name of the relevant village, but not the exact location of the bungalow. They left the front door of the bungalow open to attract the attention of anyone who might be passing. An ambulance was dispatched to the village but the information they had provided was so inadequate that the victim was not found until the following day, by which time she had died of partial asphyxia. The Court of Appeal said that she must have died a "dreadful death" and had suffered heart disease and a cerebral infarction. The appellants' sentences of 12 years' imprisonment were reduced to 10 years on appeal: offences of this kind, the Court of Appeal said, generally attracted sentences in the 10 year range.[8]

B.7 This case perhaps falls less obviously within the parameters of the proposed reckless killing offence. While the appellants can be said to have run an *unreasonable* risk in treating an 84 year old victim, known by them to be frail, in the manner that they did, it is less clear, in comparison with *O'Mahoney*, that they

[5] *Ibid*, at p 59.

[6] *Ibid*.

[7] (1984) 6 Cr App R (S) 139. The more recent case of *A-G's Reference (No 33 of 1992) (Oxborough)* (1993) 14 Cr App R (S) 712 involved a burglary and a rape, with the deceased being left gagged and tied to her bed. She managed to escape but suffered a stroke the following day and died. The defendant pleaded guilty to burglary and rape and was convicted of manslaughter. His sentence of 7 years was increased to 11 years by the Court of Appeal. While there were a number of aggravating factors present in this case, which justified the increase in sentence, it may be possible to "disconnect" these from the fact of death. Lord Taylor CJ said, at p 716, that in the circumstances of the case the offence of manslaughter and the offence of rape were inextricably entwined, but the loss of a life aggravated the seriousness of the offending. In that the deceased was a woman of 61 years who appeared in perfectly good health it may be difficult to establish that the defendant had the foresight necessary to support a finding of liability for the proposed offence. It may be significant that in this case, unlike in *Wood*, the deceased died *after* she had freed herself from the gags and restraints placed upon her by the defendant. In both cases some time had elapsed between the defendants' conduct and the deaths of the victims.

[8] This would correspond to a sentence of less than 14 years in a case where a discount could not be given for a plea.

were themselves aware of a risk of causing death or serious injury. The Court of Appeal gave credit to the appellants for telephoning for an ambulance. However, it may be that their "concern" about the health of their victim evidences an awareness, on their part, of a risk of serious injury or death sufficient for liability under the proposed offence.

Manslaughter in the course of robbery

B.8 In *Tominey and others*[9] the appellants were either convicted of or pleaded guilty to manslaughter or attempted robbery. The appellants had devised a plan to rob a security van after a drinking session to celebrate the birth of a child to the wife of one of their number. The crime was not carefully planned and followed several hours of drinking. The appellants were in the course of the attempted robbery when the sawn-off shotgun which they were using went off by accident, injuring one of the security guards, who later died as a result. The appellants were sentenced for manslaughter, to terms of imprisonment of 22, 18 and 17 years' imprisonment. On appeal the two sentences of 22 years' imprisonment were reduced to 18 years, the sentence of 18 years was reduced to 14 years and the sentence of 17 years was reduced to 13 years.

B.9 At the time that the gun went off one of the appellants had cocked it and was pointing it at the deceased in an attempt to "persuade" him to move in a particular direction. While the accidental nature of the killing was implicit in the finding reached by the jury, the Court of Appeal approved of the following statement by the trial judge to the appellant who had handled the gun:

> It is no excuse to say that the gun went off by accident if the reason for its so doing was an attachment to your shoulder by a piece of string under your overcoat connected with the trigger guard, in order to avoid this being seen by the public, because if you point it so close to the head of a Securicor guard, as you did, you must realise the danger of it going off.[10]

B.10 While the appellant holding the gun at the time that it went off can be said, with confidence, to have acted recklessly for the purposes of the proposed offence of reckless killing it may not be possible to draw the same conclusion in respect of those appellants who took a less active role in the enterprise. Counsel for some of these appellants argued that they were only aware of an intention to frighten and did not, at any time, realise that serious harm might ensue. The liability of these appellants will, of course, be contingent upon whether they were *in fact* aware of a risk of serious injury or death, and under the present law the jury did not have to make findings on this issue. The evidence was that they were only aware that a gun was being carried and that the intention was to frighten those carrying the money. In these circumstances it is just possible that while, as counsel for one of the appellants conceded, there was an obvious possibility that serious harm would ensue, a jury might have found that one or other of these appellants were not actually aware of a risk of serious injury or death. It is therefore possible that liability for the proposed offence of reckless killing would *not* therefore be justified

[9] (1986) 8 Cr App R (S) 161.

[10] *Ibid*, at pp 163–164.

in the case of these, less active, appellants, but the effect of our proposals is that they will enable the jury to assist the judge in his sentencing task by making appropriate findings of relative blameworthiness in their verdicts.

B.11 In *McGee*[11] the appellant was convicted of manslaughter and robbery. The appellant and another man planned to commit a robbery at the home of a businessman who was known to keep large sums of money at home. They attacked their businessman victim as he was leaving his premises and, in the course of a struggle, he was shot at close range. The appellant's finger was severed in the incident. He was sentenced to 18 years' imprisonment for manslaughter to run concurrently with 15 years for robbery. The 18 year sentence was reduced to 16 years on appeal.

B.12 The Court of Appeal referred to the conclusions that the jury had reached on the question of the appellant's mens rea:

> The jury did not believe the totality of his [the appellant's] evidence, but they clearly did accept that at the time the gun went off there was no intent to kill Mr Keegan [the victim] or even to cause him serious bodily harm. It is easy to see how they came to that conclusion, because the shot had not only injured Mr Keegan but had also blown off the appellant's finger, which he was unlikely to have done on purpose.[12]

B.13 Although the evidence could not support a finding that the appellant had acted with the intention needed to give rise to liability for murder, pointing a loaded sawn-off shotgun at another person must, as in *O'Mahoney*, be close to a classic example of reckless killing as defined in this report. Hobhouse LJ described the appellant's conduct as, variously, an act of "extreme recklessness" and an act involving "a very high element of recklessness".

Manslaughter of young child

B.14 In *Johnson*[13] the appellant, who was aged 29, was convicted of the manslaughter of his own three and a half year old child. The child died from multiple injuries including fractures of the spine and ribs, and, while the precise cause of the injuries could not be established, it was accepted that the injuries had been inflicted on more than one occasion. The appellant's sentence of 10 years' imprisonment was upheld on appeal.

B.15 It appears that this appellant, whose appeal resulted in the confirmation of a sentence at the upper end of the tariff for involuntary manslaughter, would be liable for the proposed offence of reckless killing. The very serious spinal injuries sustained by the deceased were, an expert witness stated, commensurate with those which he would expect to see in a passenger in a jet plane which had plunged to its destruction. The deceased's injuries were, in the opinion of one of the expert witnesses, the result of a severe shaking, on a number of occasions, by

[11] (1993) 15 Cr App R (S) 463.

[12] *Ibid*, at p 464.

[13] (1990) 12 Cr App R (S) 271.

someone holding the deceased around the waist. Counsel for the deceased accepted that the injuries which resulted in death had been caused by severe shaking. There was also evidence of wasting of various parts of the deceased's anatomy which, in the Court of Appeal's view, must have been readily obvious to the appellant, who made no attempt to seek medical attention for the deceased. While it was accepted on appeal that the trial judge was right not to have sentenced the appellant on the basis that the injuries were the result of deliberate blows "[t]hey were nevertheless injuries the result of deliberate conduct by this applicant and injuries of an extremely severe nature … ."[14]

B.16 In *White*[15] the appellant, aged 21, was the mother of a three and a half year child. In the 12 months leading up to the child's death the appellant and a man living with the family had repeatedly ill-treated the child. The child died as a result of a blow or a series of blows to the chest: numerous other injuries were found on her body. The man was convicted of murder and the appellant of manslaughter on the ground that, knowing that the man was likely to inflict injury on the child, she had taken no steps to protect her children from him. It was found that the appellant had not participated directly in the infliction of injury to the child. The 10 year sentence for manslaughter that the appellant received at first instance was upheld on appeal. Again, this case would be likely to qualify under the proposed definition of reckless killing. The Court of Appeal quoted the trial judge as saying that each defendant knew exactly what the other was doing, and that it was a very bad case of manslaughter.

Manslaughter caused by setting fire to buildings etc

B.17 In *Nedrick*[16] the appellant's conviction for murder was quashed on appeal and a conviction for manslaughter was substituted. The appellant had an argument with a woman and later returned to her house in the early hours of the morning, poured paraffin through her letter box and set fire to it. A 15 year old boy died in the fire. The appellant was sentenced to 15 years' imprisonment at trial, which was upheld on appeal.

B.18 In this case the appellant had readily accepted, during police questioning, that he was aware of the following matters: that his intended victim had young children who, at the material time, would be asleep in their bedrooms; that there was a good deal of wood panelling in the house; and that it was "highly probable" that someone who acted as the appellant did caused a "very serious" situation in which it was "quite possible" that somebody might be killed. This was, as the Court of Appeal acknowledged, a "very serious case of manslaughter", of the sort that would, it appears, result in liability for the proposed offence of reckless killing.

B.19 In *Palma*[17] the appellant pleaded guilty to manslaughter among other related offences. He had been dismissed from his job for stealing as a result of information disclosed by a colleague. He later exacted "revenge" by pouring petrol through the

[14] *Ibid*, at p 274.

[15] (1994) 16 Cr App R (S) 705.

[16] (1986) 8 Cr App R (S) 179.

[17] (1986) 8 Cr App R (S) 148.

colleague's letter box, again in the early hours, and lighting the petrol. The colleague was at work but his wife and son were both in the house. The son died in the fire. The appellant was sentenced to 12 years' imprisonment, upheld on appeal.

B.20 In this case the appellant had said that he was aware that his colleague's wife and son were in the house. The Court of Appeal stated that it was "astonished" that the prosecution had decided to accept a plea of not guilty to murder but guilty to manslaughter.[18] It also accepted the trial judge's characterisation of the appellant's conduct as involving recklessness "of a very high order" and, in these circumstances, the appellant appears to have had the awareness necessary to give rise to liability for reckless killing.

B.21 In *Snarski*[19] the appellant pleaded guilty to manslaughter on an indictment charging, inter alia, murder. The appellant had got up early one day, taken petrol out of his wife's car, poured the petrol over the living room and ignited a jet on the gas cooker. He lit a paper and ignited the petrol. It was his intention to claim the insurance on the house. There was an explosion and a fire which burned him. His children, who were asleep upstairs, were asphyxiated and his wife, who escaped by jumping from an upstairs window, was injured. The appellant left for work but was later taken by a friend to a police station. The prosecution did not accept that the appellant was suffering from diminished responsibility despite the fact that, at the relevant time, the appellant was taking anabolic steroids in massive doses. The appellant's sentence of 12 years' imprisonment was upheld.

B.22 The Court of Appeal stated that counsel for the appellant had accepted that the only basis upon which the prosecution was prepared to accept the pleas of not guilty to murder but guilty to manslaughter entered by his client was on the basis that these pleas "must necessarily amount to an admission of guilt of arson reckless whether life be endangered", for which offence the mens rea element is *Caldwell*[20] recklessness. The liability of this appellant under the proposed offence of reckless killing would depend on his actual awareness of a risk of serious injury. The fact that the defendant lit the petrol knowing that his wife and children were asleep upstairs and then went to work without alerting the proper authorities must support the conclusion that the defendant *did* have the foresight necessary to give rise to liability. Our proposals would make it much easier for the judge to understand the degree of blameworthiness the jury attached to the acts of the defendant in this type of case.

Other forms of involuntary manslaughter

B.23 In *Barrell and others*[21] the appellants were convicted of manslaughter together with conspiring to commit buggery. They had been concerned in a sexual orgy during the course of which a boy had died. One of the appellants had removed the body and dumped it. The appellants were sentenced to 19 years, 15 years and 13 and a

[18] *Ibid*, at p149, *per* Lawton LJ.

[19] (1993) 15 Cr App R (S) 19.

[20] [1982] AC 341. For *Caldwell* recklessness, see para 2.12 above.

[21] (1992) 13 Cr App R (S) 646.

half years respectively. The sentence of 19 years was reduced to 16 years and the sentence of 13 and a half years to 10 years.

B.24 In this case the pathologist who examined the body of the deceased found that he had sustained very severe injuries prior to his death, which had resulted from asphyxiation consistent with a hand being placed across his mouth or his head being forced against a pillow. The appellants who appealed against sentence, while being willing participants in or observers of the sexual orgy in which the deceased had died and while some of them had helped to dispose of the deceased's body, were not "ringleaders" of the criminal conduct. However, they must have been aware of a risk of, at the very least, serious injury and would, therefore, be liable under the proposed offence of reckless killing.

Conclusion

B.25 In the cases we have described above the tangential aggravating factors that have an effect upon the length of sentence can, at least to some extent, be ignored. We believe that we can say, with some degree of confidence, that in nearly all the cases that now attract a sentence of 10 or more years' imprisonment for manslaughter the facts *would* support a finding of liability for the proposed offence of reckless killing, and that a determinate sentence of 14 years' imprisonment would almost certainly represent the maximum sentence, on a plea of not guilty, that a court would now pass in a case where the defendant would, under our proposals, stand to be sentenced for killing by gross carelessness as opposed to reckless killing.

2. DISCRETIONARY LIFE SENTENCES

B.26 In this section we set out the basis on which a court may pass a discretionary life sentence under the present law, and explain why, in our opinion, it is inappropriate to recommend that such a sentence should be available for the proposed new offence of killing by gross carelessness.

Criminal Justice Act 1991

B.27 The Criminal Justice Act 1991, as amended, provides that custodial sentences may not be passed unless the court is of the opinion

> (a) that the offence, or the combination of the offence and one or more offences associated with it, was so serious that only such a sentence can be justified for the offence;
>
> (b) where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from him.[22]

In general the custodial sentence shall be for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it;[23] where the offence is a violent or sexual offence,

[22] Criminal Justice Act 1991, s 1(2), as amended by Criminal Justice Act 1993, s 66(1).

[23] *Ibid*, s 2(2)(a), as amended by Criminal Justice Act 1993, s 66(2).

however, it may be for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender.[24]

B.28 The philosophy which informs the latter provision is the utilitarian concept of incapacitation: that the public deserve protection from the dangerous offender who must, therefore, be rendered incapable of committing further offences. This ethic has been described in the following terms:

> The hard-headed man in the street is less interested in the educative or ritual function of sentencing – if indeed he has heard of them – than in its protective efficacy. He wants would-be predators deterred and those that are not deterred put away. For some serious crimes he would like them to be eliminated: humanely executed. Where moderately serious crimes are concerned he would settle for long periods of incarceration.[25]

The case law

B.29 The same sentiment, less crudely expressed, is evident in the leading case of *Hodgson*.[26] This case, decided in 1967, involved a 23 year old appellant who had been convicted of two acts of rape and one of buggery. The Court of Appeal took the opportunity to set down the requirements that had to be satisfied before the imposition of a discretionary life sentence would be justified:

(1) the offence or offences are in themselves grave enough to require a very long sentence;

(2) it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and

(3) if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence.[27]

B.30 In the more recent case of *Wilkinson*,[28] which was decided before the 1991 legislation was enacted,[29] Lord Lane CJ added weight to the view that the discretionary life sentence is an exceptional penalty to be reserved for offenders

> who for one reason or another cannot be dealt with under the provisions of the Mental Health Act,[30] yet who are in a mental state

[24] *Ibid*, s 2(2)(b).

[25] N Walker, *Why Punish?* (1991) p 34.

[26] (1968) 52 Cr App R 113.

[27] *Ibid*, at p 114.

[28] (1983) 5 Cr App R (S) 105.

[29] In *Roche* (1995) 16 Cr App R (S) 849 Lord Taylor CJ said that there is nothing in subsection 2(2)(b) of the 1991 Act to "override or derogate" from the criteria laid down in the earlier case law and, in particular, the *Hodgson* criteria.

> which makes them dangerous to the life or limb of members of the public. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required, so that the prisoner's progress may be monitored by those who have him under their supervision in prison, and so that he will be kept in custody only so long as public safety may be jeopardised by his being let loose at large.[1] (footnotes added)

The gravity of the immediate offence

B.31 In the current edition of *Archbold* it is suggested that the first requirement referred to in *Hodgson* is no longer insisted upon by the courts.[2] This suggestion is supported by dicta of Lord Lane CJ in *Wilkinson*[3] where only the *dangerousness* of the offender was expressly referred to as a justification for a discretionary life sentence. The criterion of gravity is also absent from section 2(2)(b) of the 1991 Act: it is now only necessary that the offence be of a violent or sexual nature.[4] It appears, therefore, that the first rung of the *Hodgson* requirements is now redundant.

B.32 This would seem to be confirmed by *Blogg*,[5] a case concerned with an appellant sentenced to life imprisonment for arson. This was not a particularly grave case of arson – the defendant had set fire to an empty office block and then called the fire brigade and police – and the Court of Appeal, confirming the sentence, relied upon the fact that the appellant, while not mentally ill, had a series of previous convictions for arson stretching back over 30 years. Watkins LJ, while acknowledging the "trifling" nature of the offence of which the appellant had been convicted, said that the court could not be confident, given the appellant's history, that he would not try to commit the same offence again. It could not, therefore, be said that the offender was not a danger to the public and the life sentence that he had been given was justified.

Mental instability

B.33 This is often said to be the most important of the *Hodgson* case requirements in that it goes directly to the incapacitative ethic at the heart of section 2(2)(b) of the Criminal Justice Act 1991 and discretionary life sentences. Courts will generally assess whether the offender falls within this criterion by recourse to expert medical evidence; although it is not necessary to show that the offender is suffering from mental illness or any other mental condition recognised by the Mental Health Act 1983.[6] It is, however, in cases where the appellant, while not suffering from any recognisable psychiatric complaint, is labouring under some personality or

1 (1983) 5 Cr App R (S) 105, 108–109.

2 *Archbold* vol 1 (1995 ed) para 5-236.

3 See n 7 above.

4 This was pointed out by Lord Taylor CJ in *A-G's Reference (No 34 of 1992)* (1994) 15 Cr App 167.

5 (1981) 3 Cr App R (S) 114.

6 The Mental Health Act 1983 defines mental disorder as a mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind: see ss 1(2), 145(1).

psychological disorder that the assessment of dangerousness, the second of the *Hodgson* criteria, will be most difficult.

B.34 In *Williams*,[7] for example, the appellant was a 23 year old man of previous good character who had pleaded guilty to five offences of rape, one of burglary with intent to rape, five of burglary with intent to steal and one of burglary. The evidence was that the rapes were committed over a period of nine months and the burglaries, which had a sexual connotation, over a period of two years. The trial judge had the benefit of a medical report prepared by a senior consultant psychiatrist which found that the appellant, while suffering from a psychological disorder, was not mentally ill: the remorse which he showed meant that the prognosis was better than it might otherwise have been. Nevertheless, the Court of Appeal upheld the appellant's life sentence and stated that, notwithstanding the expert evidence that he was not suffering from any *psychiatric* complaint, he was "more than an ordinary danger to the public" and would continue to be so for an indefinite time.

B.35 In *De Havilland*[8] the appellant was convicted on two counts of (very violent) rape and sentenced to life imprisonment. The medical evidence was to the effect that there was no psychiatric reason why the appellant's sexual behaviour should become more dangerous in the future. In spite of this the Court of Appeal said that, notwithstanding the absence of medical evidence to support the finding that the appellant was dangerous, the discretionary life sentence was justified. While the *Hodgson* criteria must be satisfied the court may find evidence of dangerousness from the accused's character and record without the need for supporting *medical* evidence. Conversely, in cases where the medical evidence will only support a finding of mental disorder rather than mental instability, and there is nothing in the character evidence or the offender's record to support a finding of mental instability, the second of the *Hodgson* criteria will not be satisfied.[9]

B.36 In *Dempster*[10] the Court of Appeal reviewed the authorities referred to above and said of the requirement of dangerousness:

> In order to be satisfied that the second of the three criteria is established, there must be clear evidence, usually but not essentially medical evidence, of mental instability which would indicate that the defendant is likely to be a danger to the public. A history of similar offences, as in the cases of *Hodgson* ... may well be sufficient. Where a defendant is convicted of, or pleads to, a series of similar offences, that too may be enough.[11]

[7] (1986) 8 Cr App R (S) 480.

[8] (1983) 5 Cr App R (S) 109.

[9] See *Naylor* (1987) 9 Cr App R (S) 302, 305, *per* Watkins LJ: "So the evidence was barren of any indication that the appellant is mentally unstable. As is not unusual in criminals, he has a personality disorder and a tendency to lose his self-control at very little provocation."

[10] (1987) 9 Cr App R (S) 176.

[11] *Ibid*, at p 179, *per* Gatehouse J.

B.37 The Court of Appeal has on very rare occasions upheld a discretionary life sentence despite the fact that there is no evidence at all of mental instability. In *Easterbrook*,[12] for example, the appellant was convicted of robbery, wounding with intent, possessing firearms with intent to endanger life and other offences. The offence had been committed during a planned robbery in the course of which the appellant, armed with a loaded revolver, had fired shots at the police. While there was no evidence to suggest that the appellant was suffering from any form of mental instability he did have a large number of previous convictions stretching over a period of 40 years: he had been sentenced for terms of up to 13 years' imprisonment for offences including causing grievous bodily harm, robbery and possessing firearms. The appellant was sentenced to life imprisonment and appealed on the ground that the second of the *Hodgson* criteria was not satisfied. The trial judge appears to have justified the sentence on the ground of the appellant's dangerousness; the Court of Appeal, however, said that it was necessary to emphasise the seriousness of the appellant's conduct:

> There are exceptional cases to which ... [the *Hodgson*] guidelines have no application. This is just such a case. This is not a case of a man who has anything wrong with his mind in the medical sense – far from it. This is the case of a man who is a very skilful and dangerous criminal who has not been deterred from committing serious crimes, no matter how long the sentences which have previously been passed upon him. He comes into a very different category. No medical report was called for, and rightly. ...
>
> What was called for here was the necessity to indicate plainly how severe the punishment should be for a man who is willing to risk the life of himself and others to achieve the aim of gaining large sums of money.[13]

B.38 The editor of the current edition of *Archbold* suggests[14] that this case should be regarded as having been decided on its own special facts. It is possible, for instance, to discern the traces of a denunciatory approach[15] in the judgment.

Injurious consequences of injuries to others

B.39 While the courts generally assess whether this criterion has been met by looking at the risk to the public at large it is also possible to satisfy this requirement in cases where there is only a risk to a particular individual. In *Allen*,[16] for example, the appellant's discretionary life sentence, while justified partly on the ground that the

[12] (1990) 12 Cr App R (S) 331.

[13] *Ibid*, at p 333.

[14] *Archbold*, vol 1 (1995 ed) para 5-238.

[15] This essentially ritualistic function of punishment has from time to time been embraced by the English courts: see *Sargeant* (1974) 60 Cr App R 74, 77 *per* Lawton LJ: "society, through the courts, must show its abhorrence of particular types of crime … . The courts do not have to reflect public opinion. On the other hand the courts must not disregard it. Perhaps the main duty of the courts is to lead public opinion."

[16] (1987) 9 Cr App (S) R 169.

public at large needed protection, was also thought necessary to protect two women victims that he had preyed upon.

Manslaughter and the discretionary life sentence

B.40 The editor of *Thomas' Current Sentencing Practice* identifies only three cases in which a discretionary life sentence for manslaughter has been imposed.[17] These cases were all cases of manslaughter on the grounds of diminished responsibility and, therefore, there was obviously room for a finding that the offender was dangerous within the meaning of subsection 2(2)(b) of the 1991 Act and the *Hodgson* criteria.[18] In these cases the specified period for the purposes of section 34 of the 1991 Act[19] was, following an appeal, between 5 and 8 years' imprisonment.

The proposed offence of killing by gross carelessness and the discretionary life sentence

B.41 In paragraph 5.47 above we discussed the maximum sentence for the proposed offence of killing by gross carelessness in these terms:

> Certainly it should, in our opinion, be a determinate sentence rather than life, because we regard the offence as less serious than that of reckless killing.

B.42 We consider it to be unlikely, on the whole, that the *Hodgson* criterion of dangerousness, assessed by reference to the offender's psychiatric condition, will be satisfied in cases of gross carelessness as defined in our Bill. In appropriate cases, of course, a hospital order may be available under section 37 of the Mental Health Act 1983.

B.43 On balance, therefore, we consider that the desirability of grading offences in terms of relative culpability far outweighs the desirability of allowing for the possibility of a wholly exceptional case in which an indeterminate sentence might seem appropriate, notwithstanding that the offender's conduct does not fall within the criteria suggested for the new offence of reckless killing. Indeed, there might seem to be little purpose in creating the two new categories of offence if they each carried the same maximum term of imprisonment.

[17] Despite the fact that *Thomas' Current Sentencing Practice* also contains a large number of cases in which very high determinate sentences for manslaughter have been imposed: for examples, see section 1 above.

[18] *Sanderson* (1993) 15 Cr App R (S) 263; *O'Connor* (1993) 15 Cr App R (S) 473; *Murray* (1994) 16 Cr App R (S) 17.

[19] See *Baverstock* [1991] 1 WLR 202 for a description of the effect of this provision, which empowers a court to specify the part of a discretionary life sentence which the offender must serve, for the purposes of punishment and deterrence, before he can require the Secretary of State to refer his case to the Parole Board. See also *Practice Direction (Crime: Life Sentences)* [1993] 1 WLR 223. During the remaining part of the sentence the prisoner's detention will be governed by considerations of risk to the public.

APPENDIX C

List of persons and organisations who commented on Consultation Paper No 135

Organisations

Association of Chief Police Officers

British Medical Association

British Railways Board

British Steel plc

Building Employers Confederation

Campaign Against Drinking and Driving

Cardiff Crime Study Group, University of Wales

Centre for Criminal Justice Studies, University of Leeds

Chamber of Shipping

City of London Law Society Litigation Sub-Committee

Confederation of British Industry

Coroners' Society of England and Wales

Criminal Bar Association

Crown Prosecution Service

Department of Trade and Industry

Department of Transport

Disaster Action

General Council of the Bar

GMB

Health and Safety Commission

Hempsons

Herald Families Association

Imperial Chemical Industries plc

John Mowlem & Company plc

Justices' Clerks' Society

London Transport

McKenna and Co

Medical Defence Union

National Society for the Prevention of Cruelty to Children

Office of the Judge Advocate General

Police Federation of England and Wales

Police Superintendents' Association of England and Wales

Crime Advisory Committee

Royal Society for the Prevention of Accidents

Society of Public Teachers of Law Special Committee on Criminal Law

The Law Society Criminal Law Committee

Trade Union Congress

Transport 2000

Victim Support

West Midlands Health and Safety Advice Centre

Individuals

The Judges of the Old Bailey

Mr Ian Barker (article at [1994] Crim LR 547)

Mr Justice Bell

Mr Justice Blofeld

Mr WJ Bohan CB

Mr Michael Brown

Mr Justice Buckley

Mr MH Cadman

Mr David Carson

Dr Alastair Donald, President of the Royal College of General Practitioners

Sir Donald Farquharson

Mr Justice Forbes

Mr DN Ford

Mr John Gardner

Mr Justice Garland

Lord Justice Hutchison

Mr David Jeffreys QC

Mr Justice Johnson

Mr Justice Jowitt

Mr Justice Latham

Mr W Lockheed

Mr Justice Mantell

Mr Ian McCartney MP

Ms Aileen McColgan (at [1994] Crim LR 547)

Mr Justice McCullough

Mr Andrew Miller MP

Mr Barry Mitchell

Mr Justice Morland

Mr Mark Mullins

Mr Justice Ognall

Mr Justice Owen

Lord Justice Phillips

Mrs Nicola Padfield

Miss Anne Rafferty QC

Judge JW Rant QC, the Judge Advocate General

Mr Alan Reed

Mr Justice Rix

Mr Paul Roberts

Mr and Mrs Roberts

Mr Justice Rougier

Mr Justice Sachs

Lord Justice Schiemann

Mr Justice Scott Baker

Mr Justice Sedley

Ms Sybil Sharpe

Mr Gary Slapper

Professor Sir John Smith, CBE QC LLD FBA

Mr Gary Streeter MP

Mr GR Sullivan

Lord Justice Swinton Thomas

Mr Justice Tucker

Mr Justice Tuckey

Mr Justice Waller

Professor Martin Wasik (at [1994] Crim LR 883)

Mr Justice Waterhouse

Ms Hazel J Wearmouth

Professor Celia Wells

2 Anonymous Queen's Bench Judges

APPENDIX D

List of those who asssisted with the project after consultation had finished

D C Blakey QPM, Chief Constable of West Mercia Constabulary

Mr Justice Buxton

Judge Peter Crawford QC, Recorder of Birmingham

Judge Rhys Davies QC, Hon Recorder of Manchester

Judge Denison QC, Common Serjeant of London

Professor Edward Griew

Health and Safety Executive

Mr Justice Hidden

Mr Justice Hooper

Mr Justice Judge

Mr Justice Mitchell

Professor Daniel Prentice

Mr Justice Smedley

Professor Sir John Smith, CBE QC LLD FBA

Judge Stroyan QC, Hon Recorder of Newcastle upon Tyne

Judge Sir Lawrence Verney TD, Recorder of London

Judge Wickham, Hon Recorder of Liverpool