The Corporate Manslaughter Act: Goals And Expectations?

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ABSTRACT

The normative ethics of late twentieth century society were defining new goals in treating the growing mischief that organisations were avoiding accountability for the manslaughter of innocent people. The trouble was, that the common law was simply not meeting the expectations that had to underpin those goals, as a raft of cases, commencing with the Herald of Free Enterprise disaster, so graphically demonstrated. Parliament therefore had to achieve the goals by some bold new statutory provision - and it met the challenge with the Corporate Manslaughter and Corporate Homicide Act 2007. But the Act has been in force for over half a decade, without achieving the goal of a single conviction of a significant company by a Jury to justify faith in its superiority over common law.

This article examines the goals which define the structure of the 2007 Act, and analyses how the expectations placed on it have been met – or, rather, have not.

The cross-Channel ferry Herald of Free Enterprise had a minor yet irritating problem. She had been cleverly designed to minimise loading and discharge times by simultaneous roll-on roll-off operations at either end of her designated route, Dover to Calais, with custom-designed linkspans serving both vehicle decks. When the Owners were bought by P & O Ferries in February 1987, however, it was decided to take her off that route, which was already well-served by the P & O fleet, and transfer her, instead, to the Dover-Zeebrugge run. The only problem was, that there was only a single-deck linkspan at Zeebrugge, which meant that the ship had to flood her bow ballast tanks in order to enable the upper deck to load and unload.

In the competitive world of shipping, time is everything. It explains why there was such a sense of urgency to get the ship away as soon as possible. The company’s operations manager at Zeebrugge, Mr Shipley, had sent an internal memorandum to assistant managers the previous August:

There seems to be a general tendency of satisfaction if the ship has sailed two or three minutes early. Where, a full load is present, then every effort has to be made to sail the ship 15 minutes earlier . . . . . I expect to read from now onwards, especially where FE8 [another vessel in the fleet] is concerned, that the ship left 15 minutes early . . . . . put pressure on the first officer if you don’t think he is moving fast enough. Have your load ready when the vessel is in and marshal your staff and machines to work efficiently. Let’s put the record straight, sailing late out of Zeebrugge isn’t on. It’s 15 minutes early for us 1.

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When the *Herald of Free Enterprise* left Zeebrugge on the 6th March 1987, not all the water had been pumped out of the bow ballast tanks, causing her to be some three feet down at the bow. Mark Stanley, the assistant bosun, was responsible for closing the bow doors but he had been released from duties by the bosun before the sailing time. He duly went to his cabin and fell asleep; tragically, he slept through the ‘Harbour Stations’ call which ordered the crew to their assigned sailing positions. It was not part of anybody else’s duties to ensure that the bow doors were closed before sailing, save the statutory responsibility of the Master to ensure that the vessel was in all respects safe to proceed to sea². Her design of clamshell bow doors made it impossible for Captain David Lewry to see from the bridge if the doors were opened or closed, though.

The *Herald* sailed at 19.05 local time, with a crew of 80 and some 459 passengers³, 81 cars and 50 commercial vehicles. Passing the outer mole 19 minutes later, she increased speed, when a bow wave began to build up under her prow. At 15 knots, with the bow down 3 feet lower than normal, water began to break over the main car deck through the open doors at the rate of 200 tons per minute.

In common with other roll-on roll-off vessels, the *Herald*’s main vehicle deck lacked transverse bulkheads and, so, the sudden flood of water through the bow doors quickly caused the vessel to become unstable. The *Herald* listed 30 degrees to port almost instantaneously, as water continued to pour in and fill the port wing of the vehicle deck, causing her to capsize 40 seconds later. The *Herald* settled on the sea bed at slightly more than ninety degrees with the starboard half of her hull above water. There had been no chance to launch any of the ship’s lifeboats.

At least 150 passengers and 38 members of the crew lost their lives when the vessel capsized, the worst disaster for a British vessel in peacetime since the sinking of the *Titanic* in 1912. In accordance with the provisions of the Merchant Shipping Act 1970, a Formal Investigation was conducted by Mr Justice Sheen⁴, who found fault with the Master, Chief Officer and assistant bosun but, in fairness, the brunt of his condemnation was borne by the management of the Owners, finding:

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

Such findings would logically inform the question of the Owner’s accountability. The judge expressed his firm opinion that *The Board of Directors must accept a heavy responsibility for their lamentable lack of directions* but, however blameworthy the company was for the failure of management, there was no individual who was part of the controlling mind of the Owner culpable for the manslaughter of the souls lost aboard the ship and, hence, the requirements to establish a case in corporate manslaughter could not be met. That did not discourage the Director of Public Prosecutions from indicting P & O European Ferries on corporate manslaughter charges and the case went to Trial⁵. It is, of course, incumbent upon the Prosecution to establish that every element of the crime has been proved beyond reasonable doubt by the weight of the evidence adduced by them. How persuasive the Jury finds the evidence is entirely up to them and, by the end of the Prosecution case, it was apparent that the evidence was insufficient to establish the

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² This has been preserved in Section 98 Merchant Shipping Act 1995 and the applied definitions in s94
³ It would be an issue in the investigation that there was no accurate count of passengers carried on board; see *mv Herald Of Free Enterprise*, Ibid, para 17
⁴ *mv Herald Of Free Enterprise*, Ibid, para 14.1
⁵ *R v P & O European Ferries (Dover) Ltd* [1991] 93 Cr App R 72
elements of the common law crime of corporate manslaughter, for the lack of a causal link to the company’s controlling mind; hence, the Defence made a submission that it would be unsafe to direct the Jury to reach a verdict on the evidence, and that there was, thus, no case to answer. The Judge was with the Defence on this occasion and ruled that the Prosecution was not in a position to satisfy the essential ‘doctrine of identification’.

A succession of cases over decades addressed how evidence of an individual’s state of mind should underpin criminal liability for manslaughter, and the common law conveniently turned an important corner just four years after the P & O case when, in 1995, R v Adomako established that the Defendant can be convicted of gross negligence manslaughter in the absence of evidence to his state of mind, joining an emerging concept in criminal negligence. In this case the Defendant was the anaesthetist in an eye operation on a patient, when the tube from the ventilator supplying oxygen to the patient became disconnected. The Defendant failed to notice the disconnection for some six minutes before the patient suffered a cardiac arrest, from which he subsequently died. The Defendant was charged with manslaughter. At his Trial it was conceded that the Defendant had been negligent in the tortious understanding of the word and medical evidence was called by the Crown that the Defendant had shown a gross dereliction of care. The Judge directed the Jury that the test to be applied was whether the Defendant had been guilty of gross negligence. The Defendant was convicted and the conviction upheld in the House of Lords, in a ruling in which Lord Mackay held:

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

The strands of corporate accountability and individual liability for gross negligence manslaughter were gathered together by the Law Commission in 2000, and the fabric of new law was woven when the Select Committee on Home Affairs and Work and Pensions set its face to drafting a Bill that reflected the Government’s determination to enable more prosecutions to proceed by tackling the difficulties created by the identification principle in corporate manslaughter at common law.

The Corporate Manslaughter Bill reflected Parliament’s intention to avoid the hazards to a successful prosecution illustrated by the Herald case, with proposals to change the basis of liability, from the requirement of identifying the causal link, between an individual Guilty of manslaughter and the controlling mind of the company, to liability founded on accountability for gross negligence in the way in which the company’s activities are managed. Essentially, Parliament would have to make the leap to render a company vicariously liable for such criminal acts of its employees which had led to a negligent

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9 In R v Brown (Davina) [2002] 1 Cr App R 5 CA it was confirmed that if, at any time after the conclusion of the Prosecution case, the Judge is satisfied that no Jury, if properly directed, could convict, they have the power to withdraw the case from the Jury, but that this is a power to be sparingly exercised. That being said, this is precisely what happened in the Trial against P & O Ferries for corporate manslaughter in the case of the Herald of Free Enterprise.


8 R v Adomako [1995] 1 AC 171

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


11 Home Office, Corporate Manslaughter: The Government's Draft Bill for Reform, Cm 6497, March 2005
fatality, in the understanding of Adomako. Such a leap was not unique\textsuperscript{12}, but Parliament had to express its meaning in the statute with crystal clarity, and the Courts historically viewed vicarious liability in criminal law with suspicion\textsuperscript{13}. The solution had to follow some path by which a company could be held criminally accountable for gross negligence manslaughter, whether or not the gross negligence could be attributed to the controlling mind of the company.

The offence is described in Section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007, by which a company is guilty of an offence if the way in which its activities are managed or organised causes a person's death, and amounts to a gross breach of a relevant duty of care owed by the company. But the company is guilty of an offence only if the way in which its activities are managed or organised by its senior management is a substantial element of that breach. For the purposes of this Act, a ‘relevant duty of care’ means any of the duties owed by it ‘under the law of negligence’ according to civil law. Given this, it is unclear why Parliament steered away from the director’s duty of care, skill and diligence sensibly defined under section 174 Companies Act, passed just one year before\textsuperscript{14}, which requires the evidential burden to be satisfied as to whether there was negligence in the understanding of civil law and its associated burden of proof; instead it applied a definition in terms of what falls far below the reasonable expectation of the company to meet Health and Safety statutory criteria for a duty - which, as strict liability offences, need no further evidence as to the standard reasonably to be expected in their discharge\textsuperscript{15}. Either there must be evidence of negligence, or not; which will it be?

This is where the Act starts to run into difficulty. A breach of a duty of care by a company is a ‘gross’ breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the company in the circumstances; ‘senior management’ means the persons who play significant rôles in the making of decisions about how the whole or a substantial part of its activities are managed or organised. In this respect, one might be forgiven for thinking that the identification doctrine has not really gone away at all; it will still be easier to prosecute a company with just one director, than with a whole host of ‘senior managers’ whose individual parts to play in the management activities must be analysed. The mischief remains as described by Gobert and Punch, writing four years before the new Act found its way onto the Statute Books:

\begin{itemize}
  \item \textsuperscript{12} See \textit{Mousell Brothers v London and North Western Railway Company} [1917] 2 Kb 836
  \item \textsuperscript{13} See, for example, \textit{Seaboard Offshore Ltd v Secretary of State for Transport} [1994] 1 WLR 541
  \item \textsuperscript{14} S174 Companies Act 2006: (1) A director of a company must exercise reasonable care, skill and diligence. (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—
    \begin{itemize}
      \item (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
      \item (b) the general knowledge, skill and experience that the director has.
    \end{itemize}
  \item \textsuperscript{15} S2 Corporate Manslaughter Act 2007: (1) A “relevant duty of care” means any of the following duties owed by it under the law of negligence—
    \begin{itemize}
      \item (a) a duty owed to its employees or to other persons working for the organisation or performing services for it;
      \item (b) a duty owed as occupier of premises;
      \item (c) a duty owed in connection with—
        \begin{itemize}
          \item (i) the supply by the organisation of goods or services (whether for consideration or not),
          \item (ii) the carrying on by the organisation of any construction or maintenance operations,
          \item (iii) the carrying on by the organisation of any other activity on a commercial basis, or
          \item (iv) the use or keeping by the organisation of any plant, vehicle or other thing;
        \end{itemize}
      \item (d) a duty owed to a person who, by reason of being a person within subsection (2), is someone for whose safety the organisation is responsible.
    \end{itemize}
...Holding companies derivatively liable for the crimes of their employees, staff and officers is unfair to those companies which have made a good faith and reasonable effort to prevent such criminality...\(^\text{16}\)

In very real terms, \(R \text{ v Adomako}\) lives, and must be applied to senior managers, because, of course, the mental element cannot be attributed to a corporate body, but those who manage it. As if to confirm this, the Act’s explanatory notes state that Section 1 reflects the position under the common law offence of gross negligence manslaughter and, by defining the necessary relationship between the defendant organisation and victim, sets out the broad scope of the offence. The mental element, therefore, still requires human failure, falling far below reasonable expectations upon them: humans must decide what is reasonably foreseeable in the process of their management activities; an inanimate, fictional entity such as a company possesses no reasoning powers of its own to fulfil this.

But the situation becomes more complicated by section 8, which addresses factors for the Jury to consider if it is established that the company owed a relevant duty of care to the deceased, and it falls to the Jury to decide whether there were a gross breach of that duty. In this context, the Jury must consider whether the evidence shows that the company failed to comply with any relevant provisions of the Health and Safety at Work etc Act 1974 and, if so, how serious that failure was, and how much of a risk of death it posed.

Of course, the complexity arises, in this respect, in that ‘failure to comply’ must be isolated from ‘liability’, for the strict liability required in health and safety offences turns the burden of proof on to the Defendant to prove due diligence\(^\text{17}\), an alien concept in the establishment of negligence at Common Law, which is demanded by Section 2(1). As a result, it would be unsafe to allow the Jury to consider statutory duties owed under health and safety law which are not relevant duties for the purpose of the 2007 Act\(^\text{18}\).

Alexandra Dobson has argued further and observed that, in consequence, a conviction under the 2007 Act will almost always rely on failings in the company’s health and safety regime. But the 1974 Act does not require proof that the death in question was caused by breach of its provisions\(^\text{19}\); while the 2007 Act demands that the failings at least were a substantial cause, if not the only cause, of the death\(^\text{20}\).

So where do we stand? The evolution of the modern law of corporate manslaughter has brought us from the \textit{Herald} to the case of \textit{Cotswold Geotechnical Holdings Limited}\(^\text{21}\) (‘CG’), which arose out of the death in 2008 of Alexander Wright, employed by CG as a junior geologist, when he was taking soil samples from inside a pit which had been excavated as part of a site survey and the sides of the pit collapsed, crushing him. In

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\(^{16}\) Gobert, J and M Punch, 2003, Rethinking Corporate crime, LexisNexis Butterworths Tolley, London, p113

\(^{17}\) S40: In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.


\(^{19}\) It is not arranged that way; rather, section 2(1) states that It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.


\(^{21}\) \(R \text{ v Cotswold Geotechnical Holdings Limited}, Winchester Crown Court, 15^{th} \text{ February 2011 (unreported)}\)
addition to the charge under the 2007 Act, the company was charged with failing to discharge a duty contrary to Section 33 of the 1974 Act\textsuperscript{22}.

The Prosecution case was that CG had failed to update and comply with its own risk assessments, and had failed to take all reasonably practicable steps to prevent the deceased from working in a dangerous way. The Jury had to consider whether the way in which the company’s activities were managed or organised caused Mr Wright’s death and amounted to a gross breach of a relevant duty of care owed by the company to the deceased. If satisfied on this, the Jury then would have to consider whether the way in which the company’s activities were managed or organised by its senior management was a substantial element in the breach of the relevant duty of care.

The Jury returned a verdict of Guilty against the company; but what guidance did this case actually offer in divining the efficacy of the 2007 Act, to succeed where the common law had failed? This was the telling point, for Peter Eaton was the company’s sole director – the sort of entity (and the only sort of entity) which had previously been successfully prosecuted under the common law, in which it was easier for the Prosecution to incriminate senior management and their rôle within the Company. It was, in effect, just as simple as the common law conviction obtained in \textit{R v OLL and Kite}\textsuperscript{23}. Moreover, Peter Eaton’s criminal accountability, both under the common law offence of gross negligence manslaughter and under the Health and Safety at Work etc Act 1974, was never tested, for the Court held that he was too ill to stand trial.

The key issue in this study is that size matters. OLL Limited was a small company and proving that Mr Kite was its ‘controlling mind’ and had acted negligently was easily achieved. CG was an equally small company and the Prosecution would have been able to establish that Mr Eaton had been its ‘senior manager’ just as easily as it had been able to prove a ‘management failure’ resulting in Mr Wright’s death. Writing in the Law Society’s Gazette on the 3\textsuperscript{rd} March 2011, David McCluskey expressed the sage opinion that the test of the new law had not yet come, and would not come until a large company with a large board of directors, faced prosecution\textsuperscript{24}.

The \textit{Lion Steel} case offered such a test\textsuperscript{25}.

With the thoroughness perhaps not altogether ubiquitous in Crown Court proceedings, it has been extremely helpful that the Judge should have addressed his sentencing remarks in the case with minute care, although he did not necessarily do so for the reason of divining the emergent law but for the purpose of clarifying his decision on a submission on the admissibility of evidence under that law.

Lion Steel Equipment Limited (‘LS’) manufactures and distributes storage equipment from two factories, at whose Hyde, Manchester premises it employed Steven Berry who, in 2008, fell through a rooflight to his death. LS was described by the Trial Judge as being ‘not a large firm’; with a turnover exceeding £10 million per annum and a workforce of 142 employees, the anticipation, however, lay in the fact that here, at last, was a company which was large enough to test the capability of the 2007 Act in corporate accountability, and succeed where the common law had failed. In terms of the evolution

\textsuperscript{22}Section 33 (1) stating that it is an offence for a person to fail to discharge a duty to which he is subject by virtue of sections 2 to 7, etc
\textsuperscript{23}\textit{R v Kite and OLL Ltd}, Winchester Crown Court, 8 December 1994 (unreported)
\textsuperscript{25}\textit{R v Lion Steel Equipment Ltd}, Manchester Crown Court, 20 July 2012 (currently unreported) For the sentencing remarks see \url{http://www.judiciary.gov.uk/media/judgments/2012/r-v-steel-equip-ltd-sentencing-remarks}
of the law, the prosecution was expected to demonstrate the value of this new generation of corporate accountability, and to succeed where the old common law had failed.

It will be recalled that Section 1 of the 2007 Act renders the Company guilty if the way in which its activities were managed or organised caused the victim’s death and amounted to a gross breach of a relevant duty of care owed by the company to the deceased. The demands of section 1(3) require that, once this has been established, the Prosecution must prove that the way in which the company’s activities were managed or organised by its senior management was a substantial element in the breach of the relevant duty of care.

Steven Berry, 45 years old, was employed as a maintenance worker at the company’s Hyde factory, which made steel lockers for storage systems. Some – but not all - of the roof of the factory building had been replaced in recent years leading up to the incident. At one end, an old part of the roof, consisting of roof panels made of translucent fibreglass, had needed repairs from time to time, and the Court heard evidence of holes being patched with strips of tape to stop rainwater leaking on to the works below. The Judge emphatically resisted the Prosecution’s suggestion that the fact that the roof needed repairing was, somehow, contributory to the Defendants’ guilt and, indeed, emphasised in his remarks that the case, rather, was about whether the method of carrying out the maintenance was causative of Mr Berry’s death, with criminal responsibility attaching to the company for that death occurring.

But Mr Berry was not trained as a roofer; the Judge summed up his duties as that of a general maintenance man. He and another man would carry out small repairs about the premises; but evidence was heard that, if they were in any doubt about their ability to carry them out, they were instructed to ask for independent outside contractors to attend.

The Court heard evidence that, while Mr Berry was aloft with all his weight upon the roof, a fibreglass rooflight became detached from some of its fixings, twisted, and he fell 13 metres to the floor below, suffering fatal injuries.

The Indictment originally contained five counts, of which Count 1 covered corporate manslaughter under the 2007 Act, while Count 2 alleged common law manslaughter against three directors of the Defendant company: Kevin Palliser, works manager at the Hyde factory; Richard Williams, works manager at LS’s other factory in Chester; and Graham Coupe, the company’s financial director. The Crown alleged that each was under a personal duty of care towards the company’s employee Mr Berry, and that he died as the result of what the Crown pleaded was their gross negligence (the Judge rather clarified the Crown’s assertion as to the Defendants’ alleged gross breach of the duty of care, which the Crown argued was owed by them as directors to him as an employee).

On the 2nd July 2012, the Judge duly ruled that in the cases of two directors (Messrs Williams and Coupe) there was no case to answer on the common law manslaughter count, and in the case of Mr Williams also no case to answer on the charge of neglect in Count 4 (under the 1974 Act). In the Judge’s opinion, the case against them should

26 The case of R v Adomako [1995] 1 AC 171 established the precedent for the Jury to convict in a case of gross negligence manslaughter against an individual defendant if it is satisfied beyond reasonable doubt that the defendant owed a duty of care to the deceased; that he was in breach of that duty; the breach of duty was ‘a substantial’ cause of death (as refined by R v O’Connor [1997] Crim LR p16 CA); and the breach was so grossly negligent that the accused can be deemed to have had such disregard for the life of the deceased that it should be seen as criminal and deserving of punishment by the state.

27 S37: (1)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, 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 and shall be liable to be proceeded against and punished accordingly.
never have been brought and he was minded to direct the Jury to acquit them. The Judge
did feel that the Prosecution had an arguable, albeit weak, case against the director Mr
Coupe but the merit of that case disappeared as the evidence in the case unfolded and
there just remained a case on neglect. One might speculate on how a Jury, capricious at
the best of times, would have determined on the gross breach of a relevant duty of care.
In the event, the good sense of criminal litigation prevailed, for it was preferable for the
company to pay a fine than for a director to risk imprisonment. And so it was, that the
Prosecution and Defence negotiated a solution with acceptable pleas that would bring the
Trial to a close before the corporate manslaughter count was tried; LS pleaded Guilty on
that, and the Prosecution offered no evidence against the directors on the remaining
counts.
The personal priorities of the directors to eliminate the risk of conviction and
imprisonment of manslaughter had been met, but the downstream consequence, is that we
are none the wiser, nor are we better informed, as to whether the 2007 Act will succeed in
its task of securing corporate accountability for manslaughter where its common law
predecessor had failed.
The exercise was not entirely a waste of time, though. The Judge made some notable
observations which can be employed to clarify some key points in the prosecution of a
company under the 2007 Act. The Judge accepted evidence that a Health and Safety
Executive inspector had conducted an inspection in 2006 and advised LS that warning
notices should be erected to keep persons away from fragile roofs; referred to health and
safety guidance and codes of practice warning of the danger of fragile roofs; and
emphasised the need for proper supervision and training. Most importantly, the Judge
accepted evidence that LS had, in fact, responded to this risk by devising a safe system of
work, intending to keep Mr Berry off the fragile areas; and to this extent he
acknowledged the facts upon which a due diligence defence would be based, namely, that
it was not reasonably practicable to do more than was in fact done to satisfy the duty or
requirement, or that there was no better practicable means than was in fact used to satisfy
the duty or requirement.
What, he felt, it had not done, was to train Berry properly, or to equip him with
equipment, in the form of a harness and line, which would protect him should an accident
occur, meeting the duty of care reasonably to be expected in the circumstances of the
case. Without catwalks or barriers defining safe access routes, the Judge concluded that
there was nothing to discourage a workman from taking a short cut if he carelessly chose
to do so: and there’s the rub, once again, for it is argued that this trespasses beyond the
limits necessary to establish a due diligence defence and a Jury, directed in such terms,
might have been misled.
In fact, the much-heralded case of Lion Steel was preceded by a matter of weeks by a
less-publicised prosecution in Belfast Crown Court, when the Recorder of Belfast, His
Honour Judge Burgess, sentenced J M W Farm Limited²⁸ (‘JM’) for the corporate
manslaughter of Robert Wilson, one of the company’s employees, who, on the 15th
November 2010, was washing the inside of a large metal bin which was positioned on the
forks of a forklift truck. In a seemingly Heath-Robinson arrangement, such a method of

²⁸ R v J M W Farm Limited, Belfast Crown Court, 8th May 2012 (currently unreported). For the Summary of
Judgment See:
http://www.courtsni.gov.uk/en-
GB/Judicial%20Decisions/SummaryJudgments/Documents/Summary%20of%20 Judgment%20-%
%20R%20v%20J%20M%20W%20Farm%20Limited/j_sj_R-v-JMW-Farm-Limited_080512.pdf
cleaning was not inevitably catastrophic, for the positions of the forks on the usual truck corresponded with the position of the sleeves on the bin, giving an apparently safe foundation for the process; but the truck on this occasion was not the normal one, having been substituted when the normal truck had gone for servicing a number of weeks earlier. As a result, the arrangement was now decidedly unstable and, when he jumped onto the side of the bin it overbalanced and, when he fell to the ground, the bin fell on top of him, killing him.

In this case, JM also pleaded Guilty and, so, the 2007 Act was still not tested before a Jury. Once again, though, we may hazard some analysis of the evidence as applied to the statutory provisions. The Court was told that JM was aware of such a danger, having carried out a risk assessment which included instructions for anyone operating the forklift truck but it is clear from the Judge’s remarks that this assessment had been made of the former truck; when it was replaced by the temporary truck, no assessment was made of the position of the forks relative to the sleeves on the bin. The Judge commented that it would have been apparent to any operator that it would not be possible to take the necessary steps to secure against the foreseeable dangers and added that it was of particular concern that the operation had been going on from when the replacement forklift truck was deployed and the incident was not an isolated event. The Judge concluded with rather wearied words that, yet again, the Court was confronted with an incident where common sense would have shown that a simple, reasonable and effective solution would have been available to prevent this tragedy. 29 Of course, common sense is the human element to be found in the mens rea of a crime, of which an inanimate entity is incapable. It would be for the Prosecution to establish that the responsible managers had negligently failed to meet the standard to be expected of them in the discharge of their duties.

In both cases, the Judges relied heavily on the guidelines published by the Sentencing Guidelines Council in February 2010. In JM, the Judge recited the Court’s function in a slightly different way to that summarised by Judge Gilbart in LS, stating that the Court should firstly consider the seriousness of the offence by asking how foreseeable was serious injury; how far short of the applicable standard did the individual defendants fall; how common was a breach of this kind in the organisation; and how far up the organisation the breach went. This smacks suspiciously of the need to identify senior managers whose criminal responsibility informs the case against the company; and such was confirmed by the Judge, who held that it was clearly foreseeable that the failure to address the hazard would lead to serious injury and indeed that the consequences could well be fatal; that the company had thus fallen far short of the standard expected in relation to such an operation; and that the operation was permitted to continue for some time. The Judge added, however, that there was no evidence that this represented a systemic departure from good practice across the company’s operations. This, itself, would lead us into some difficulty in reconciling the Judgment with the Act. The Sentencing Guidelines Council particularly distinguishes guilt in corporate manslaughter cases from guilt in cases under the Health and Safety at Work etc Act 1974:

because corporate manslaughter involves both a gross breach of duty of care and senior management failings as a substantial element in that breach, those cases will generally involve systemic failures; by contrast health and safety offences are committed whenever the defendant cannot show that it was not

29 R v J M W Farm Limited, Summary of Judgment, Ibid, para 4
30 Indeed, in sentencing the defendant in such a case, the Court is obliged to follow any sentencing guidelines, unless the court is satisfied that it would be contrary to the interests of justice to do so, pursuant to s125 of the Coroners and Justice Act 2009.
reasonably practicable to avoid a risk of injury or lack of safety; that may mean that the failing is at an operational rather than systemic level and can mean in some cases that there has been only a very limited falling below the standard of reasonable practicability\textsuperscript{31}.

As a result, we are left in rather a quandary: in the case against LS, the Judge apparently had satisfied himself that there had been a systemic failure, which (had the trial proceeded) it would have been safe for the Jury to conclude that the breach was a significant (if not necessarily the only) cause of death and, hence, the essential elements of an offence under Section 1 of the 2007 Act would be established. If, however, we analyse the Judge’s conclusion in JM, the rationale of his decision is equivocal; if there were no evidence of a systemic management failure, then it would not have been safe to leave the matter for the Jury to decide and a Guilty verdict would be misconceived.

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Dr Simon Daniels is a Solicitor of the Senior Courts of England and Wales, with a background in private practice, representing clients in maritime, commercial and criminal litigation, before he developed a career in alternative dispute resolution as a Qualified Dispute Resolver and Member of the Faculty of Mediation and ADR, founded by the Academy of Experts in furtherance of one of the Academy’s principal objectives, the pursuit of cost-efficient dispute resolution. In addition to mediation and arbitration, he continued to advise clients in a consultancy capacity, both in civil and criminal proceedings in the maritime sector.

Simon has brought his professional background to the academic field, as Senior Lecturer in Maritime Law at Southampton Solent University, whose mission is to pursue inclusive and flexible forms of Higher Education that meet the needs of employers and prepare students to succeed in a fast-changing competitive world.

He has written and presented a number of papers on current law, in subjects associated with marine law as well as in the field of corporate manslaughter.

Simon has a particular interest in the field of the criminalisation of the Ship’s Master which harnesses his professional career to his background in the maritime industry and in 2012 was awarded a PhD for his thesis: *The Criminalisation of the Ship’s Master. A new approach for the new millennium.*

Simon has close ties with the United States and has carried out a substantial research project on Britain’s involvement in the American Civil War.

In October 2005, Simon was admitted to Freedom of the Worshipful Company of Arbitrators. In 2006 he was made a Freeman By Redemption of the City of London.