



## Rules, rights and justice: an introduction to law

### *Corporate manslaughter*

#### **MISHAL HUSAIN:**

It's been a long time coming. The issue of corporate killing has slowly risen up the political agenda until at the time of this recording a tightening of the corporate manslaughter legislation is on the statute books. Any law making it easier to prosecute companies would doubtless be popular with victims but in the words of the eighteenth century Lord Chancellor Lord Thurlow, an organisational company has no soul to damn and no body to kick. Criminal law has traditionally been a tool for dealing with individuals. Can it really be made to work on companies? Well, with me to discuss this are Gordon Bebb QC who brings his experience as one of the team of prosecuting barristers on the Hatfield rail crash trial, Professor Gary Slapper is director of the centre for law at the Open University, he has a particular interest in corporate manslaughter and Janet Asherson is the head of health and safety for the Confederation of British Industry, or CBI. Welcome to you all. Let's start with the position in 2005. It's already perfectly possible for either victims or the state to take up a case against a company, they can use existing health and safety regulations or go down the civil route using the tort of negligence. Gordon Bebb, if I can start with you, is it really necessary to add a specific option of corporate manslaughter?

#### **GORDON BEBB:**

Well I think it's recognised that the existing law that relates to corporate manslaughter is ineffective to deal with cases where there are obvious corporate failings. And what has happened in the past is that we've tried to bolt on to an individual law various rules to make individual responsibility attached to the corporation and I think that there certain tensions arise which make that difficult.

#### **MISHAL HUSAIN:**

Janet, do you accept the notion of corporate responsibility?

#### **JANET ASHERSON:**

I think that's been there ever since companies were set up. But it's always been vested in legislation, criminal legislation that is there for companies and the purpose, the best purpose of legislation is, and particularly in the criminal area, is to prevent recurrences. It's not really the best purpose of criminal legislation to pass the issue in terms of giving solace to victims, and that's why corporate manslaughter and the manslaughter issues are better in the area of civil legislation and negligence and tort. There is a raft of criminal legislation already there that has addressed the behaviour of companies and their responsibility.

#### **MISHAL HUSAIN:**

Gary, do you think that's fair, that this is something that can be dealt with elsewhere?

#### **PROFESSOR GARY SLAPPER:**

I think not actually. I think that there is distinctly another view on that. I mean the law it's true does provide for redress between citizens based on compensation, so that if you have your car damaged or even if you have someone who is providing for you economically killed, the law can take an action where there is the appropriate level of blame on the person who the law's machinery is being pointed to, to pay that compensation. However, there is another part of the apparatus of law altogether which serves a different purpose and this is the criminal law, which can't bring back dead victims, but which can put the imprint of social community disapproval on things. And there are of course each year hundreds of people who are prosecuted for, and convicted for manslaughter where I would have thought demonstrably the only purpose of that mechanism is for society to blame. So why in the appropriate

circumstances I would then ask should companies be excluded from that process if you can prove that they've culpably killed.

**MISHAL HUSAIN:**

Well let me put the same point that Janet made, to Gordon then. Gordon health and safety, negligence, civil courts, is that not enough to deal with these issues?

**GORDON BEBB:**

When there's death and when there is a really serious error leading to that death, health and safety at work I would suggest was not the appropriate vehicle. Because all you can do at the end of the day under that legislation on the whole is fine people or fine companies and of course you can give them very heavy fines and that is to a degree a deterrent. But I think you also have to bear in mind the fact that people have lost lives, families are grieving and the public might feel that fining companies for gross negligence is inappropriate.

**MISHAL HUSAIN:**

Let's look at the detail for a moment. In Britain since 1965 there have only been twelve convictions for corporate manslaughter and these have always been against relatively small companies. Yet during the same period tens of thousands of people have died in commercial and industrial settings. So why has it been so difficult to make a conviction for corporate manslaughter stick? Gordon, let me put that to you first.

**GORDON BEBB:**

Well you need to go back to basics as to what you need to prove. Manslaughter is well adjusted to individual responsibility. One person kills another person, the victim, the deceased. And we all understand and it's quite easy to understand the way that that person can be held responsible. Is there a duty of care? Yes. Has there been a breach of duty of care? Yes. Has that breach of duty of care caused the death? Yes. Can it be considered a gross act of negligence? Now that's manslaughter. Which we're all familiar with on an individual level. The problem you have with companies is that a company is an abstraction. It's a different person, if you can call it like that. It's not an individual in the way that we are.

**MISHAL HUSAIN:**

Janet Asherson, I presume at the very outset that you have a different view on this but what Gordon Bebb was saying is that the law as it stands is ineffective.

**JANET ASHERSON:**

I think the great unfairness in this area is that the current law on corporate manslaughter can be effective for small companies where you have an obvious directing mind and yet it isn't possible to use it for large companies. Now we would say that why on earth is it being used possibly inappropriately for small companies? But it is that inequity that I think could justify review of the legislation.

**MISHAL HUSAIN:**

Gary Slapper, what would be your view on this?

**PROFESSOR GARY SLAPPER:**

I think that one way in which a new law could improve the prosecutorial policy and discretion of the authorities is precisely to do to address what Janet mentioned, in other words to be able to redraft things so that the law would apply just as easily in respect of large corporations as it would in respect of smaller corporations. The reason why now it's possible to convict where there has been gross negligence of small corporation of manslaughter is because one or two people are associated with the high level decisions and the lower level responsibility so it's easier to identify such a single human being or a couple of human beings as responsible. Whereas in the larger organisation which is much more diffuse in the way that it puts out responsibilities, it's much more difficult to do what the law requires which is to find at least one person who can be identified as acting on behalf of the company and who has made critically a grossly negligent decision which results in death.

**MISHAL HUSAIN:**

Gordon Bebb, you see this of course at the sharp end if you like as a practising barrister. Do you think that's an important point that any new law should address this question of discrimination if you like between different kinds of companies?

**GORDON BEBB:**

Yes, whether you call it discrimination or something else, the fact is it's - when you analyse the law and how you try and get it to apply to corporations, the fact is it's much easier to prove against a small company than a big company. It does need to be addressed. I have no doubt about that. And on the whole disasters because of the sophistication of today's society, disasters often arise out of big companies, and so we are having to address big company disasters and whether we can bring home corporate responsibility in those situations.

**UMISHAL HUSAIN:**

This is what we sometimes hear talked about is this problem of a controlling mind. Janet when you look at this issue from the point of view from business, why do you think it's been so hard to get convictions here?

**JANET ASHERSON:**

I think there are two main reasons and the first is as in all fatalities, the best evidence has gone. It is always difficult because you're surmising in many cases. And presenting that evidence in a way that gives beyond reasonable doubt is difficult. It doesn't matter what the offence, the fatality. It means that a major part of the evidence is gone. The second reason is frankly most companies are not grossly negligent and the CBI would never want to support any company that was. A company that was grossly negligent should not be in business and should be sanctioned. But most companies are not grossly negligent in their intention.

**MISHAL HUSAIN:**

But that's not a reason for not having a law to deal effectively with those that are.

**JANET ASHERSON:**

No but it is a reason why prosecutions have failed.

**MISHAL HUSAIN:**

Would you accept that Gary that that's - that it - perhaps this just hasn't been that much of an issue?

**PROFESSOR GARY SLAPPER:**

I think probably of, more of an issue than the number of prosecutions which have failed is the number of prosecutions which haven't taken place and you say that since 1965 over 35,000 have been killed in commercially related incidents and I think it would for many people raise questions of disbelief when you discover that of 35,000 deaths only twelve have resulted in prosecutions for manslaughter. So it's the number that haven't been brought rather than the number of ones that have been brought that have failed but it's true, I entirely agree with Janet, most companies like most people are not delinquents, they've got good intentions, they go about their business quite fairly. But the really pointed part of the social issue is where I think the public shrinks back in shock that something which bears all the hallmarks of having been a dreadful incident, is not followed by any prosecution because it appears that companies then are protected by a much more complicated and inefficient part of law than applies to ordinary human beings.

**MISHAL HUSAIN:**

Janet.

**JANET ASHERSON:**

The major point that was made was that the number of prosecutions that haven't been taken and the implication that the incredibly large number of deaths, every one of them a tragedy, may have been a matter of corporate failure. That is simply not true. We have to understand the nature of fatalities, accidents and deaths. And most of them, they may have been work related or corporately related, but there is in no way an indication that the corporates were to blame in those cases. And indeed we have to make that clear.

**MISHAL HUSAIN:**

And do you see a desire for people to blame others in these kinds of scenarios?

**JANET ASHERSON:**

I - oh I certainly do. I think that's one of the movers in society that is driving this legislation. A lot is the current shift that we have from, and we in the UK are well advanced in this, in shifting from the state and the public sector to a private sector, so there is less ownership by people of what happens within the state control, and more desire to blame somebody because it is a separate entity and particularly seen as possibly a profit making base.

**MISHAL HUSAIN:**

Gary what would you say to that?

**PROFESSOR GARY SLAPPER:**

I agree with the proposition that of say for example 35,000 deaths most are not caused by corporate recklessness or delinquency. I think that's probably quite fair. But then you wouldn't need to have most of them caused by corporate recklessness in order for there to be a very large number that still went unprosecuted or is uninvestigated. I conducted research nationally across forty coroners courts and carefully examined cases where there had been death at work, or commercially related death and found that twenty percent of those cases in this large national study presented evidence which on current law could have been taken forward by the Crown Prosecution Service. Prima facie, I mean it's for the jury to decide in the case where there is a conviction or not. But we had, would have had evidence to go to those cases. Well if twenty percent of thirty or 35,000 cases have gone unprosecuted then just simply numerically it's a fair number of lost cases.

**MISHAL HUSAIN:**

Well let's talk for a moment about the new legislation emphasising of course that the point, time of recording we don't know what will happen with that. But if the new legislation does go through, let's explore for a moment what could be done to ensure that it's effective. Gordon Bebb, from your perspective, what would you like to see change?

**GORDON BEBB:**

A lowering of the bar. I have already indicated where I think we have real difficulties, big companies you have to identify somebody in a senior position who could be considered to be the mind of the company. They on the whole are not the ones directly responsible because they've delegated down. And yet you can find further down gross negligence in a particular case. But because you can't attribute that to the senior person you don't have corporate manslaughter. So one of the ways you can do that is to lower the bar when it comes to the question of senior management and who could be considered to be the mind of the company which is where we are at the moment.

**MISHAL HUSAIN:**

Janet, what do you think about that? The idea of lowering the bar?

**JANET ASHERSON:**

Well I think the problem there is lowering it to a level where the definition that is being used of senior management failure is very flexible and it's not necessarily going to attribute at the right level of management. You have to be able to identify it with somebody who has considerable responsibility and authority within the company. The current definition and particularly relating to very flexible structures within company structures in the UK, you can be talking about managers who are at quite a low level. Now that is singularly inappropriate because you've got to retain this balance of authority and responsibility. And that's much better structured within the Health and Safety at Work Act that looks at directors' responsibilities being higher because their authority is higher. Management responsibilities, being in proportion to their authority and the responsibility of everybody, workers as well, employees being in responsible to their authority. Whereas to try and lower it to a state where you can pin it on everybody, frankly is unfair.

**MISHAL HUSAIN:**

Gary, is it possible that we end up with a new law doing just that? Where you can pin it on everybody?

**PROFESSOR GARY SLAPPER:**

I think if it fell into that position it would simply be unworkable and there would probably be you know social awkwardness or resistance to it, so I'm sure it wouldn't reach the statute book like that. It could equally have been a little bit stricter in its standard in accordance with the publication of the law commission in 1996 and this gave a slightly different styled version of what corporate manslaughter would be. Because it indicated that the best way of formulating the crime would be to call it corporate killing and rather than to have to identify blame on a very senior manager or a director or officer of the company, you would be able to convict a company of manslaughter in the appropriate circumstances if a case was supported with substantial evidence simply by judging the outcome of a company's behaviour. Simply by looking at what happened and not being prevented from convicting a company by having as it were the very senior officers who were in fact responsible for the thing, running back into the...

**MISHAL HUSAIN:**

You wouldn't have to trace it up ...

**UPROFESSOR GARY SLAPPER:**

You wouldn't have to audit, or identify. You'd simply be able to say that judged by existing industry standards in the round, what happened in relation to this particular accident or this particular event could only have resulted by gross negligence of a company.

**MISHAL HUSAIN:**

Janet, what do you think of that as a different approach?

**JANET ASHERSON:**

Well it had an equity, but again it's looking at the incredible diversity of structures of companies. And the problem of that was that many companies have offshore basis, they move in and out of paths of other corporations and identifying truly where there was control and authority was going to be a problem under that structure and it was the lack of flexibility.

**MISHAL HUSAIN:**

It strikes me Gordon that this leads us totally into just how difficult it is when it comes to dealing with companies rather than individuals.

**GORDON BEBB:**

I agree. It is striking a balance and it's very difficult striking the balance that - the difficulty we have particularly in terms of deaths arising out of the way companies run their business, is often a death is caused by a series of small events but when you add them together you get a very big event. And if you have a look at the way a company is being run, all those small events may be indicative of a badly run company. At the moment the balance I would suggest is very much weighted in favour of the company. What we're all trying to achieve is a state of affairs where a company that should be responsible for whatever has happened, can be prosecuted with a reasonable prospect of conviction. What you don't want to do attribute to a company blame when in fact it's not the company's fault but an individual's fault and it's a question of getting the balance.

**MISHAL HUSAIN:**

Well let's explore the broader point then of whether the criminal law can ever be effectively be used against companies. Janet I'm interested to know whether you think that companies should be outside the remit of the criminal law.

**JANET ASHERSON:**

Oh good heavens no! They're already in there anyway. A huge chance for legislation directing company behaviour and so it should remain. There should always be a backstop. And it is most important for companies. They exist on their reputation, and any sanction, any

conviction of any offence, whatever it is called, it tarnishes that reputation. And that is one of the drivers for maintaining corporate responsibility.

**MISHAL HUSAIN:**

Gary, would you agree, difficult as it is perhaps sometimes to apply the criminal law in this field, it's important that that structure's there.

**PROFESSOR GARY SLAPPER:**

I think it's very important. I think one thing that's sometimes gets missed in the larger debate about this is the point that everyone contributing to it from all the different fields really wants there to be no prosecutions. No-one is in favour of prosecutions as such that you know if the law were to be angled properly and devised properly then you would have a situation where companies were sufficiently deterred and people knew clearly what the standards were, what the consequences of reckless wrongdoing were. So that society would be happier for it. And by arguing passionately for the law to be clarified and tightened I don't think it follows that one is necessarily in favour of prosecutions as a social policy and that there should be more of them.

**GORDON BEBB:**

The other side of the coin is this, so from the victim's point of view and you can't ignore that, dealing with it under what is after all a lesser offence is considered by them and it may be by the public as not an appropriate way of the seal of disapproval for a really bad bit of company performance.

**MISHAL HUSAIN:**

Janet, if I could put that to you. The stigma of a corporate manslaughter sanction is much greater than anything a company would suffer under health and safety sanctions.

**JANET ASHERSON:**

I think you're talking about a rose by any other name here. Any corporate sanction does damage their reputation. And particularly the way that the proposed legislation is structured, the sanctions under this legislation will be exactly the same as under the current Health and Safety at Work Act. You can't imprison a company, so we're talking about giving them a label that pleases society as a more damning label. That's not really how we treat and motivate companies. And I think we have to be very careful about structuring prosecutions and offences round emotive words.

**MISHAL HUSAIN:**

Do we have to be careful Gary?

**PROFESSOR GARY SLAPPER:**

I think we have to be very careful but for that reason I'd say we have to bring the conduct of companies and the consequences that flow from the conduct of companies into line with the way that the law treats individuals and this should be an even response. I would have to think about it carefully but create equity between all different social actors.

**MISHAL HUSAIN:**

A final thought from you Gordon. Is it important to bring all these things into line?

**GORDON BEBB:**

Yes, I think if a company is being guilty of gross negligence which has caused the death of somebody it should be marked as such and health and safety at work in my view is not appropriate. It should have the appropriate offence against it.

**MISHAL HUSAIN:**

Well, it's a brave person who'll future gaze and make predictions about how the law or society will change which makes me particularly grateful to our contributors Professor Gary Slapper, Janet Asherson, and Gordon Bebb QC. The discussion we've had today can trace itself back past Lord Thurlow in the eighteenth century right back to the twelfth century, and only time will

tell how much the forthcoming changes to the legislation will affect the global picture. But whatever form the new law takes, the underlying issues will doubtless remain.