

## **Can Corporations be Criminally Responsible?**

**Conceição Soares**

Assistant Professor

Centro de Estudos em Gestão e Economia/ Faculdade de Economia e Gestão do Centro regional do Porto, Universidade Católica Portuguesa. Rua Diogo Botelho, 1327 – 4169-005 Porto

### **Abstract**

*In this paper I will attempt to clarify the notion of corporate criminal responsibility. My analysis is based upon the case of the Herald of Free Enterprise. In the theoretical and practical debate about this case I will analyse the legal difficulties around the notion of corporate criminal responsibility. These difficulties are essentially related to three questions. The first one is related to the fact that in our Western cultures, responsibility is based upon individual responsibility. The second one is related to the elimination of mens rea (the relevance of fault and the degrees of fault) in offences of strict liability. The last difficulty is connected to the values which inform the theory of individual responsibility, and the law which endorses it. Despite all these difficulties I shall argue that under certain circumstances it is possible to support that corporations have criminal responsibilities.*

### **Introduction**

In this paper, I shall argue that an adequate theory of criminal responsibility is needed, which goes beyond individual responsibility, to include collective and corporate responsibility which is more open to taking into consideration society and its problems. An adequate theory of corporate responsibility must also rest on a theory of agency, which holds, as Hegel and Arendt contend, that individuals are not isolated fictive, abstract entities, but beings shaped by society; furthermore, it is also the case that while individuals are shaped by society they in turn shape society itself.

This paper is an attempt to clarify the notion of corporate criminal responsibility, (specifically in UK) rather than collective responsibility in general, I shall ignore the latter except to raise the following question — how is a corporation to be distinguished from collectivities in general — and then to answer it, here, in the briefest way possible. Collectivities like society, the family, the public, etc are general, amorphous, non-specific and ill-defined, whereas, corporations, *ex hypothesi*, are specific legal entities. Furthermore, corporations are consciously and carefully structured organizations with different levels of management and have clearly defined aims and objectives.

For my purpose the most important issue about corporate responsibility is to know if it makes sense to impute criminal responsibility to a corporation. According to what I will analyze in this paper I concluded that under certain circumstances it is possible to argue that corporations have criminal responsibilities.

I argue that some of the major criticisms of individual legal/criminal responsibility can be overcome; in other words, that it makes sense to hold certain people within the structure of a corporate hierarchy to be responsible for manslaughter, and even the notion of *mens rea*, a fundamental requirement for attributing responsibility in the law of homicide within the framework of individual responsibility applies.

This paper is organized as follows: First, I will describe the case of the Herald of Free Enterprise. Second, I analyze critically from the theoretical point of view, the legal theories of corporations and also some theories of corporate criminal culpability. Finally, I use the tragedy of the sinking of the Herald of Free Enterprise, to illustrate the points under discussion on the second part.

## The Case of the Herald of Free Enterprise

The day 6<sup>th</sup> March of 1987 was a terrible day for the passengers of the Roll on/Roll off ferry *Herald of Free Enterprise*.<sup>1</sup> The ferry capsized in the approaches to the Belgian port of Zeebrugge en route to Dover in England at 19.05 local time. There was a light easterly breeze and the sea was calm. The ship had a crew of 80 and carried 459 passengers, 81 cars, 3 buses, and 47 trucks. After leaving the harbour, 90 seconds later, she capsized ending on her side half-submerged in shallow water. Only an accidental movement to starboard in her last moments prevented her from sinking totally in deeper water.

After the capsizing, a courageous search and rescue operation was raised. At least 150 passengers and 38 members of the crew died from hypothermia, many of them inside the ship or in the frozen water. Many others were injured. The rescuers soon realised that the *Herald of Free Enterprise* had left the Zeebrugge port with her bow doors open. The design of the Roll on/Roll off ferry boats are essentially pontoons covered by a superstructure, with bow and stern doors which provide the means for vehicles to drive on and off via adjustable ramps at the dock. The speed of a ferry loading and unloading is improved for a Roll on/ Roll off ship, abbreviating the time a ship spends in port.

The Sheen Report identified five faults related to safety as the direct cause of the disaster. First, the pressure to leave the berth immediately after the loading. Second, excessive number of passengers. Third, indicator lights – “there is no indicator on the bridge as to whether the most important watertight doors are closed or not.” Fourth, ascertaining draughts: “The ship’s draught is not read before sailing, and the draught entered into the Official Log Book is completely erroneous. It is not standard practice to inform the Master of his passenger figure before sailing. Full speed is maintained in dense fog.” Fifth, the capacity of the ballast pumps. The existing pump took 1.30 minutes to empty the tanks, which meant that the ferry could not get back on to an even keel until it was well out to sea. A new pump would only have cost £25,000, but the Company regarded this as prohibitive. “From top to bottom the body corporate was infected with the disease of sloppiness”, said the Report on the disaster. The board of directors ignored the several recommendations about the safety management of their vessels.

Yet, as far as culpability was concerned, the Sheen Report found Captain David Lewry and Mr Leslie Sabel (the Chief Officer) to have been “guilty of serious negligence causative of the casualty. Both these officers have suffered the penalty of having their Certificates suspended (The Sheen Report, 74).” In the light of that, the “Court does not wish to impose on them a heavy financial penalty. (ibid)” As for Townsend Car Ferries Limited, the Report merely concluded that it had no way of marking its “heavy responsibility for the disaster” than paying the sum of £350,000 towards the payment of the costs of the Court’s investigation into the whole tragedy. Justice Sheen significantly remarked: “That seems to me to meet the justice of the case (The Sheen Report, 74-75).”

In the theoretical and practical debate about this case I will analyse the legal difficulties around the notion of corporate criminal responsibility. These difficulties are essentially related to three questions. The first one is related to the fact that in our Western cultures, responsibility is based upon individual responsibility. The second one is related to the elimination of *mens rea* (the relevance of fault and the degrees of fault) in offences of strict liability. The last difficulty is connected to the values which inform the theory of individual responsibility, and the law which endorses it.

### The Theoretical Debate

How can a legal entity such as a corporation be said to be criminally responsible? According to Celia Wells: “Criminal law is pre-eminently concerned with standards of behaviour enforced, not through compensation, but through a system of state punishment negotiated via standards of fault such as intention, knowledge, and subjective recklessness” (1998a:654).

If it is difficult to ascribe civil liability to a corporation it is even more difficult to ascribe criminal responsibility. The most serious offence which corporations can be charged with is manslaughter; others, less serious, are connected with failure to enforce standards pertaining to environment, health and safety, conditions of trade.

Some theorists, such G. R. Sullivan argue that there is no such thing as corporate crimes.<sup>2</sup> In a good many cases such as the case of the Herald of Free Enterprise, there is no one single individual who has caused the harm; what has happened is a conjunction of several actions committed by several individuals producing the harm.

As the company structure is so complex, it is difficult to know who ultimately bears the responsibility. Even when we do attribute culpability to a corporation it is always an individual (or individuals) within the company who is (are) held culpable, as crimes “can only be committed by human, moral agents”. (Sullivan 1995:281-92)

Discussions about corporate criminal responsibility reflect concerns about the safety of employees, customers, as well as of the public at large. As Wells puts it:

Disasters such as rail crashes, ferry capsizes, and chemical plant explosions that can be attributed to corporate enterprise operations have led to calls for those enterprises to be prosecuted for manslaughter. It is the cultural origins in changing perceptions of risk and hazard from various sources as well as the legal acceptance of these demands that are of interest. (1998b:658)

A key source of resistance against the notion of corporate conviction is that, under the dominant theory of individual responsibility, individuals could be blamed for their actions only if *mens rea* obtains. In the homicide law (in England and Wales) it distinguishes between the so-called subjective and objective tests. The subjective test of liability is related to the state of the agent’s mind, *mens rea*, at the time of committing the act. The *mens rea*, or mental element, consists in the state of mind, either (directly) intentional or indirectly so under recklessness in relation to the *actus reus*, which must be proved, to secure a conviction of murder or manslaughter. The test is posed as follows (using a road incident as an example): Did the defendant deliberately and directly intend to kill the pedestrian in driving at the speed he/she did? If the answer is yes, then it is murder. If the answer is no, then a further question arises: Did the defendant foresee the harm that he/she caused to the victim but nevertheless run the risk of speeding? If the answer is yes, then the defendant is guilty of manslaughter. (This would be a case of “knowingly” causing or “indirectly intending” to cause the harm, that is to say, to cause the harm recklessly.)

The objective test is solely concerned with the *actus reus*; it merely asks the question whether the defendant as a “reasonable man” can foresee the death/harm. The *actus reus* is concerned only with the external elements of the offence. Using again the example cited above, the *actus reus* may be defined as “the act of speeding resulting in death”. The objective test may be posed as follows: (a) can the death be causally traced to the defendant (and not somebody or something else)? If the answer is yes, then go on to (b): would the reasonable man (not the defendant as such) have foreseen the death/harm resulting from the speeding? If the answer is yes, then the defendant is guilty of murder, irrespective of whether he/she directly or indirectly intended the death or foresaw it. (Under the objective test, it follows that the distinction between murder and manslaughter in the law of homicide disappears.)

In general the objective test may be said to be an instance of strict liability, as the performance of the unlawful act is sufficient to confirm culpability, and no *mens rea* is required as to any element in the *actus reus*. According to Smith and Hogan, those crimes: “(which) do not require intention, recklessness or even negligence as to one or more elements in the *actus reus* are known as offences of strict liability or, sometimes, “of absolute prohibition” (1996:101)

The objective test or strict liability is controversial in English law, especially in the context raised by Barbara Wootton (1960 and 1981). (1960:224-39) According to Wootton, who advocates the use of strict liability across the board in all circumstances, strict liability obtains in which the person who caused the forbidden result neither intended nor foresaw it. In this case the “person is held liable for the forbidden result although he did not foresee that it might occur, but a person behaving with prudence would have foreseen the risk and avoided the result. (Smith and Hogan 1996:142) The main problem of the offences of strict liability is that it appears to offend against the notion of justice as fairness which demands that there be no culpability unless there is *mens rea*. Another related difficulty is that it fails to distinguish between on the one hand, different degrees of fault and, on the other, no fault at all. With the “elimination” of *mens rea*, the basis of criminal responsibility as entailed by the Kantian/Millian paradigm of responsibility, disappears. Barbara Wootton suggests that:

(the) concept of responsibility should be allowed to “wither away” and that strict liability might, not immediately but in due course, take over altogether. The mental state of the defendant, or his negligence, at the time of committing the offence would come into the picture only “after what is now known as a conviction” for the purpose of determining the appropriate treatment. (1981: 47)

If in offences of strict liability we do not consider fault or degrees of fault, how can we attribute responsibility? As Smith puts it, to consider an offence of strict liability is a double reduction: (Smith and Hogan 1996) First, the exclusion of *mens rea* in the attribution of responsibility. Second, to remove the element of fault is to empty the law of moral content. In conclusion we can say that what counts in cases of strict liability is only the factual question: "Did he/she do it?" It seems that it does not matter, if he/she did it intentionally, recklessly, negligently, or by pure accident.

In this entire problematic, one question is fundamental to my purpose: What are the strengths and weaknesses of the two approaches regarding the issue of corporate responsibility for harm done. On the one hand, as I have already said, the subjective test/*mens rea* admits the relevance of fault and the degrees of fault so that it is possible to establish different degrees of responsibility and of corresponding severity of punishment. Such recognition seems to satisfy our instinctive sense of justice and fairness in attributing blame (moral/legal) to an individual. Strict liability ignores this fundamental insight. On the other hand, the ascription of responsibility based on *mens rea* does not appear to be able to accommodate a corporation bad when it arises.

*Mens rea* as normally understood is a theory of individual responsibility, where the harm, which ensues, can be causally traced to the action (usually) of the individual defendant. Furthermore, the individual defendant must either directly intend the harm or knowingly (indirectly intend to) cause it (when the defendant is prepared to run the risk of causing the harm foreseen by him/her). However, in the case of a corporation bad, none of these conditions appears to obtain. If so, no one could be held responsible. But if one were to use the objective test/strict liability, then each individual in the causal chain leading to the production of the harm in question could be held liable. Although he/she might not have foreseen the harm, the reasonable man would have done so, and therefore, refrained from contributing to the harm.

*Mens rea*/the subjective test is paradigmatically a theory of individual responsibility where the "individual" is the "flesh-and-blood individual". Such a theoretical approach seems to have difficulty in conceiving a corporation, which is not a "flesh-and-blood individual", to be responsible for any harm it causes. The entity referred to by the name "Robert" is a flesh-and-blood individual who work in a shoe factory. But there seems to be no such individual we can point to, when we talk about a corporation. In the case of the Herald of Free Enterprise numerous flesh-and-blood individuals are involved in causing the sinking. The assistant bosun who fell asleep, there was his immediate supervisor who failed to check whether he had carried out his duty, there were people further up the line who had failed to install lights on the bridge, etc. On the theory of individual responsibility, some if not all of these individuals might be found guilty using the objective test/strict liability.

However, what it does not permit one to do is to find the corporation, Townsend Car Ferries Limited, to be guilty of manslaughter. This is critical if corporations are to be punished beyond a mere fine. If imprisonment were considered to be appropriate, then whom does the court send to jail? A corporation could pay a fine but could a corporation be sent to jail? Only "flesh-and-blood" individuals could be sent to prison. The court could imprison the assistant bosun, but is jailing him necessarily jailing the corporation itself? But why bosun and not some one at the top of the management, as people at that level seemed to have also been negligent? Surely *mens rea* fails to obtain in the case of corporate conduct? In spite of this, Clarkson suggests that corporate conviction could apply: "(by) humanising companies in the sense of breaking them down, metaphorically, into their underlying human components to see if there was an individual within the company who had committed the *actus reus* of a crime with the appropriate *mens rea*." (1996:560)

If the individual is a senior member of the company and has a key place, in the corporation's structure of command it is possible to say that he/she represents the corporate brain and his/her acts could be identified with the company itself. If so, corporations could be held directly responsible (in the same terms as the individual). Lord Denning 1995:172) In English law, for a type of crime involving proof of *mens rea*, the established way of prosecution is via the *identification doctrine*. This doctrine establishes that this kind of crime is only applicable to (a) senior member(s) who stand(s) for the mind of the corporation and in this case the company can be liable for his/her act and *mens rea*. By this process there is identification between the acts of the individual and of the company, which means that direct accountability could be applied. Such a theory allows for the prosecution of the company via the individual. However, if the individual is not a senior member, the prosecution is only imputed to the individual and not to the company.

Some objections could be applied to this theory. As Field and Jörg point out, this theory makes a division between “brains” and “hands” within the corporation structure, which leads to a real obstruction in the efficacy of legal control in at least, two ways. (1978:156-71) First, in large corporations in which the corporate structures are more diffused it is current practice to give power to quasi-autonomous managers; in these cases it is easy to avoid responsibilities. For instance, when a corporation is at risk of prosecution for manslaughter, a similar process of transferring power could occur with the aim of evading responsibilities. Second, this account limits corporate responsibility only to the “brains” of the corporation.

Whilst the first objection may have some force in some contexts, the second seems not to be really valid. However, it makes sense to single out the “brains” of the corporation as the embodiment of the corporation as it is at this level of top management that goals are chosen and strategies adopted.

One alternative to the identification doctrine is the *aggregation doctrine*. In order to overcome the problems of the identification doctrine, this theory aggregates all the acts and *mens rea* of several pertinent individuals in the company in order to verify if it is possible to consider it a crime as if those acts have been committed by only one person.

Again, critics point out that this view does not reflect corporate decision-making in reality. Even when the acts of A, B, C or D might be gathered together to determine a crime, the reality might show that none of these agents need be at fault. The corporation may be structured in such a way that B could and would not know what C was doing or has failed to do.

Another solution to corporate criminal responsibility is the theory of *Reactive Corporate Fault* which advocates that when the *actus reus* of an offence by the corporation is established, a court gives the corporation the power to guide its own investigation, with the aim of finding out who was the responsible employee and after that of applying the adequate measures. No criminal responsibility will be imputed if the corporation takes the necessary measures. Criminal responsibility is only prescribed in case the corporation does not implement in a satisfactory way the court order. According to Wells this theory has at least two advantages. First, traditionally corporate liability needs proof of responsibility for causally relevant acts or omissions at or before the time the wrongdoing is manifest; however, this theory does not presuppose antecedent fault. (Fisse and Braithwaite 1988:47-49) Second the corporation has the possibility to demonstrate grief and rehabilitative measures. (Wells1998a:659)

However, in Clarkson’s opinion, this theory also has some distinct disadvantages. What kind of practices or measures could be applied in terms of avoiding criminal responsibility? In the case that the corporation does not take satisfactory steps, what kind of offence is committed? Would admonishing an employee and warning the staff be enough to prevent people from doing certain actions in the future? (1982:8)

In Clarkson’s view, the best way to ascribe criminal responsibility to a corporation is to combine the *doctrine of corporate mens rea* with the *corporate compliance programme* (this is a formal programme with the aim of ensuring that every employee in the corporation knows the laws related to the corporation’s actions) which tries to guarantee corporate compliance with the law. As Laufer (2006) and Clarkson point out, such a programme is an attempt at recognising all the complexities of the dynamism of a corporation, namely, its structure, culture, aims and positions, which together form the corporation ethos that help or even animate the commission of crimes in certain instances. (1994:660) The first element, the *doctrine of corporate mens rea*, enables us to think of corporations as “culpability-bearing agents who “act” through their officers and employees and whose “mens rea” is to be found in their corporate practices and policies.” (Clarkson 1982:11)

This approach is based on the combination of two main theories of culpability, the *capacity theory* and the *character theory*. (Horder 1993:193-215) The *capacity theory* is largely based on the work of H.L.A. Hart (1963;1968;1983) and bears resemblance to my own account set out earlier. This theory advocates that the defendant has both the physical as well as the moral capacity to avoid the wrongdoing. When an agent makes choices it is expected that he/she take reasonable steps to avoid harming others. When extended to the context of the corporation, one must remember that the policies, plans, aims and the set of practices within a corporation are evidence of corporate culture, intention and knowledge that are irreducible to the purposes, intentions and knowledge of individuals in the corporation.

These aims and practices of the corporation are authoritative because they have emerged not from the decision of a single individual but by a decision-making process accepted and confirmed as authoritative in the corporation. The capabilities that such an account consider important to moral responsibility, such as understanding, reasoning and control can also be found in the policies and plans of corporations. The advantage of this theory in terms of corporate criminal responsibility is that it includes and explains negligence liability.

The *character theory* holds agents responsible for those actions, which manifest their character. To cause harm intentionally, knowingly, recklessly or negligently expresses a defective character trait, the result in turn of a morally defective character. (Bayles 1982:5-20) In the case of the (private) individual defendant, John Smith, John Smith may be said to be morally deficient if he either, knowingly, and, therefore recklessly, or negligently causes death to another through having too much alcohol in his bloodstream while driving. In an analogous way, a corporation upholds a morally deficient culture if it permits or tolerates the dumping of poison into a well or river — it would do this either, knowingly, and therefore recklessly, or negligently, thereby causing harm, even death to those who draw water from the well. But if the corporation could be said to be morally deficient, and therefore responsible for the harm, it could also be held legally responsible. Companies today cannot be viewed as a simple conglomeration of individuals. (Horder 1993:193-215)

In other words, a corporation could most certainly be held responsible for manslaughter through recklessness (which requires *mens rea*) or gross negligence (which does not require *mens rea*). Furthermore, a corporation by failing to implement the necessary safety measures may also be said to be guilty of gross negligence as was the case with the Herald of Free Enterprise.

The great issue concerning all this problematic is about the efficacy of censuring corporations. The types of sanction, presently available, range from corporate inspection, hostile publicity, and community service to fines, but not imprisonment. In Wells's opinion, these measures are all ineffective, and that a combination of fines and imprisonment of directors will probably be the most effective punishment. If so then, one must lean on the so-called identification theory, as ultimately, it would be the really top managers who justifiably ought to be "carrying the can", both from the moral and the legal points of view, as far as incarceration is concerned.

### The Practice

J. Horder calls our attention to the fact that criminal culpability is not merely a question about theorising the notion itself in the abstract; the debate necessarily reflects the values of our society in which the law is embedded.

(Criminal) law reflects the cultural significance attributed in our society to a particular relationship between chance, fate, and responsibility, and to the fear of force or coercion over and above other motivations to commit crime. ... Our criminal law shows itself to be the product of the shared history of cultural-moral evolution, assumptions, and conflicts that is the mark of the community principle. (Horder 1993:193-215)

This indicates that the difficulty about applying criminal responsibility to corporations is not only due to the inadequacy of the individual theory of responsibility but also to the values, which inform that theory and the law, which endorses it. As Clarkson expresses it: "When a doctor, for instance, kills through gross negligence, a prosecution for manslaughter can, and sometimes does, follow. When the companies kill and injure, however, the practice is different. ... When persons are killed or seriously injured at work (even when they are not employees), the typical response is to describe this as an "accident" (Clarkson 1996:558).

This explains why in general prosecutions of corporations are rare, and even when they occur, the law is applied very softly, which may be due in particular to three interrelated causes. First, only in rare cases is there a police inquiry, although there is always a coroner's inquest. Second, sometimes the establishment of the offence does not take into account the injury caused and ignore the consideration of levels of culpability. Third, very soft sentences are applied with relatively light fines as the preferred mode. As Bergman underlined, "the prosecutions appear criminal in name only." (Bergman 1993:14)

In the case of the Herald of Free Enterprise, it was only in November 1987, eight months after the disaster and three months after the publication of the public inquiry report that the police initiated a criminal investigation.<sup>3</sup> However, the investigation was very limited in scope due to the absence of applicable criminal offences.

The only crime applicable to the corporation was reckless manslaughter, but for the applicability of this crime there was the need of proof that a senior officer in the corporation had acted recklessly. As Wells argues, the applicability of recklessness supposes two elements:

- (a) she does an act which in fact creates an obvious (and serious) risk of causing physical injury and
- (b) has either failed to give any thought to the possibility of there being any such risk or has recognized that there was some risk involved and has none the less gone on to do it. (1998b:788-801)

However, negligence and recklessness under the identification doctrine could only be considered if a senior officer of the corporation was identified as culpable. This is the drawback previously mentioned about the identification doctrine, the fact that a corporation under this doctrine is not considered a person. However, that even if one were to acknowledge the corporation as a moral/legal agent, it remains the case that punishment for manslaughter, either under recklessness or gross negligence, must involve recognising that the suitable agent(s) to incarcerate are those at the top of the management in a corporation.

However, this is not the only difficulty in terms of attributing negligence and recklessness to a corporation. Another difficulty is related to the fact that the application of responsibility to directors concerns, at most, only fiduciary matters, but does not traditionally apply to concern about safety.<sup>4</sup> According to the Sheen Report, in the case of the Herald of Free Enterprise, although it was the case that at least two of the seven litigants “were sufficiently senior to be identified”, (Mr. Develin, director and chief superintendent and Mr. Ayers, director, and group technical director), nevertheless, none of them was convicted. (See the Sheen Report.)

The absence of proper definitions concerning roles and individual responsibilities or as mentioned in the words of Mr. Owen (a member of the Council for the National Union of Seamen) “a vacuum at the centre” (Sheen Report:15) was one of the causes of the disaster and also the reason why senior officers escaped from conviction.

Under English criminal law (at least in recent years), only one corporation was ever convicted of manslaughter. (Midgley 1994:1-6) According to Clarkson there are two main reasons for this. The first is related to the media, the state and even to the large corporations that shape and influence public attitudes. As previously mentioned, when persons are killed or injured at work it is typical to describe this as “accidents”. The Health and Safety at Work Act 1974 is an attempt to increase safety and prevent “accidents” at work. This is in sharp contrast to the offences that individuals commit outside their workplaces involving harm. These differences of structures contribute to the general sense that death and injuries at work are not crime. The main purpose of Health and Safety Executive (HSE) is to enforce legislation with the aim of notifying corporations that particular matters need attention. When injuries or deaths occur in a corporation normally the investigation is conducted by the HSE.

Another reason has to do with the fact that the traditional penal mechanism geared to individual wrongdoing does not take into account the structures of large corporations. In the case of the Herald of Free Enterprise, as I have mentioned earlier, it is not certain who within the company was responsible for safety. The individuals who were directly involved in the disaster were Mr. Stanley (the assistant bosun) who failed to close the bow doors; Mr. Sabel (the bosun) who also failed to check and supervise Mr. Stanley; Mr. Lewry (the captain) who started the over-crowded vessel at maximum speed without verifying that the doors had been closed; and finally the corporation Townsend Car Ferries Limited which had been notified of previous open-door incidents without taking any real measures to rectify the matter. In June 1989, after fifteen months of police investigation, Mr. Stanley, Mr. Sabel, Mr. Alcindor, Mr. Ayers, Mr. Develin, Captain Lewry and Captain Kirby were charged with manslaughter and P&O European Ferries<sup>5</sup> was charged with corporate manslaughter. Nonetheless, one year later, on October 19<sup>th</sup>, after 27 days of a trial expected to last five to six months, the judge dismissed the case by instructing the jury to find the litigants not guilty of manslaughter. The conclusion failed to prove that the litigants should have noticed the possibility of the Herald sailing with its doors open to be “an obvious risk”.

At the end of the prosecution, as Clarkson comments, “it is hardly surprising that the trial judge, Turner J, directed acquittals against P&O and the five most senior employees” (Clarkson 1996:561), because it could not be proved that the risks of open-door sailing were the direct responsibility of one senior officer. As Field and Jörg contend, “collective responsibility becomes lost in the crevices between the responsibilities of individuals.” (1978:162)

However, one must then raise the questions: Why should it be assumed that only one or at best two people be held responsible? Why cannot all be charged in the name of corporate responsibility? Admittedly one would have to have a scale of punishment with the “brains” at the hierarchy of “brains”, so to speak, bearing the heaviest. It is worth labouring the point (already made earlier) that if senior “brains” could be held responsible for fiduciary probity, then why cannot they be held responsible also for the health and safety of the operations they run as a business? As Wells noted: “Someone, if not more than one person, in P&O’s (then Townsend Car Ferries Limited) management knew that roll on-off ferries were potentially unstable. One task for criminal lawyers is to question critically how such knowledge within corporations can be related to familiar notions of individual culpability.” (1989:934)

As it was mentioned in the Sheen Report, the management was aware of the instability of the ferry; however, no measures were taken. As it can be read in the Report, it is interesting to note that a similar situation occurred with the vessel PRIDE, before what happened with the Herald. “On the 29<sup>th</sup> October the assistant bosun of the PRIDE neglected to close both the bow and stern doors.” (Sheen Report:23) In June, Prides’s Captain Blowers sent a memorandum to Mr. Develin (director and chief superintendent) in which he said that an indicator light would enable the “bridge team to monitor the situation”. However, no measures were adopted and the Sheen Report concludes: “If the sensible suggestion that indicator lights be installed had received, in 1985, the serious consideration which it deserved, it is at least possible they would have been fitted in the early months of 1986 and this disaster might well have been prevented.” (Sheen Report:24)

In spite of all the memoranda written to the higher management by employees in their attempts to improve the safety conditions, the corporation did not feel either morally or legally responsible for having acted so negligently. On the contrary, the corporation put pressure on the crew to turn round the ferry in record time, to transport an excessive number of passengers, and to maintain full speed in bad weather conditions. It also ignored the necessity of another ballast pump. It is clear that it was the corporation, which deserved to be found guilty and punished. As Clarkson mentioned, the families of the Herald’s victims did not primarily press the prosecution of the individuals but the prosecution of Townsend Car Ferries Limited, as they intuitively had felt that above all it was the corporation, which was at fault. (1996:563)

We can say that it is, the corporation, Townsend Car Ferries Limited (and then P & O which took it over), which had failed in its duties because the highest management systematically refused to implement and improve the measures for safety, profit being probably its only concern. As the Sheen Report has said, installing another pump would only cost £25,000 but this “was regarded by the company as prohibitive.” (Sheen Report:24) Mr Sterling, a P&O chairman says, “my first responsibility is to the shareholders of P&O and profit is what it is all about”. (Crainger 1993:17) However, according to critics, corporate responsibility should go beyond profits and in this concrete case, safety should have been one of the priorities of the corporation. However, such moral “sloppiness at the top leads to sloppiness down the line.”(Crainger 1993:17)

According to Field and Jörg, the Dutch law of corporate liability, unlike English Law, “rests on those who have the power to control the *general practices* of the corporation. ... It was not necessary to identify any individual as responsible for the sloppy supervision: it could be seen simply as a collective failure by management.” (1978:167) This reinforces French’s arguments that corporate intentions and responsibility can be investigated within a system of rules and commands, which are determined by corporate policy. But in English law, at present, there is neither the political nor the legal will to undertake such prosecution, a reluctance one can see yet again in the aftermath of the rail crash in Hatfield on 17 October 2000. Four people have been killed and many others injured. Gerald Corbett, Railtrack’s chief executive during the inquiry refused to accept that the rail industry’s safety problems were due to management failure. He said, “it’s more of a system rather than a management failure... . (Harper 2001a:4) When Robert Owen, QC, counsel for the inquiry asked him who has responsible for the crash he answered: “I think it’s me. It’s clear in the public’s mind that they think it’s me (*ibid*).” Three months later it was confirmed that Railtrack was aware of the unsafe conditions of the track but had failed to act to remedy the situation till after the disaster. The report published by the HSE revealed that “the Hatfield track was so bad at the point of the crash that it shattered into 300 pieces, like a sheet of glass, and was therefore the direct cause of the accident.” (Harper 2001b:1)

This case shares some similarities, concerning safety problems with the Herald of Free Enterprise disaster, in terms of causes and of consequences.

As Box advocates: “The essence of corporate crime is not the behaviour of individuals, but the “behaviour” of corporations. ... In order to be effective, the level of intervention to regulate corporate crime has to be organizational rather than individual.” (1983:70)

Mr. Gerald Corbett (director of Railtrack at the time of the Hatfield disaster) expressed his view about the government’s plan to introduce a new charge of corporate killing: “I think it would encourage a culture of secrecy and blame which is not necessarily an appropriate safety culture.” (Harper 2000:4) He did not back this up with detailed arguments. It is hard to make out what he could mean. However, his response was a clear indication that corporations would resist the introduction of such a charge with as much vigour as they are politically capable.

### Conclusion

Corporations do possess a structure and a set of coherent properties which make it possible to say that they are rational and autonomous agents (provided that agency is not understood uniquely to refer only to so-called “flesh-and-blood” individuals as favoured by the philosophy of individualism). Furthermore, in virtue of the structural properties just due by their agency, it makes sense to hold them legally/criminally<sup>6</sup> responsible, through certain key personnel in the corporate hierarchy who must, of course, be “flesh and blood” individuals, even to the extent of attributing to them that hall-mark of the theory of individual responsibility, namely, that of possessing *mens rea*. I have, tried to show that the notion of *mens rea* is not necessarily incompatible with that of corporate responsibility, provided the following points are borne in mind:

(a) To recognise that pre-meditation or direct intention is irrelevant, as it is obvious that no corporations could be convicted of wilfully murdering their victims – not even tobacco companies, which continue to manufacture and sell cigarettes, could be thus convicted, in spite of the fact that one could show that they know that their products could lead to disease and death in a good many cases.

(b) To recognise all the same that indirect intention obtains. Corporations may be said knowingly (indirectly) to intend the harm in the sense that they can foresee that harm would occur, but are prepared to run the risk in doing so. Tobacco companies know that harm would come to some of their customers but this does not prevent them from making and selling their poisonous products. In this sense, they could be convicted of recklessness. In the same way, Townsend Car Ferries Limited (later P & O Ferries) also could and did foresee that harm could and would very likely occur, yet the corporation continued to cut costs by failing to implement certain safety measures, ranging from the installation of indicator lights on the bridge and a second pump, abandoning the policy of taking on passengers above the official limit or working their staff to exhaustion owing to the very tight scheduling of the voyages, to querying the very design of the ro-ro ferry itself without bulkheads so that more cars could be accommodated, but which would lead to easier flooding when water entered the ferry, and to its eventual faster sinking.

(c) To recognise that gross negligence (which does not rely on *mens rea*) leading to death, though perhaps rightly objected to in some cases where individual defendants are involved, may be said to be appropriately applied in the case of a corporation. The reason is that, unlike an ordinary individual agent, the corporation possesses vast resources, which it deploys in researching the market, in designing its product or service, in calling on science and technology to do its bidding, etc. In other words, it answers perfectly to the legal fiction of the “reasonable man”. As the “reasonable man”, the corporation ought to have foreseen, could have foreseen the harm that ensued.

(d) To recognise that a corporation is a highly structured entity with its own explicit aims and objectives, freely chosen and endorsed, and with clearly worked-out strategies for implementing them. In other words, a corporation knows or ought to know exactly what it is doing, is not ignorant or unfocused. As such, it satisfies the description that it is rational, free and autonomous, in much the same way as an individual agent may be said to be rational, free and autonomous. To be free and autonomous does not, of course, mean that the agent, whether individual or corporate, may act without constraints whatsoever – for example, either type of agent has to act within the confines of the law.

According to this, the core objection regarding corporate criminal responsibility could be overcome. In other words, a corporation could be held responsible for manslaughter through recklessness or gross negligence. Moreover, a corporation by failing to implement the necessary safety measures may also be said to be guilty of gross negligence as was the case with the Herald of Free Enterprise.

## Notes

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<sup>1</sup> See Department of Transport, Report of Court No. 8074 (1987). This report, throughout the rest of this paper, will be referred to, for short, as the Sheen Report. Department of Transport, Report of Court No.8074, Formal Investigation of mv Herald of Free Enterprise, HMSO, London, 1987.

<sup>2</sup> The refutation of that view is in Nicola Lacey, (2000) "Philosophical Foundations of the Common Law: Social Not Metaphysical", in J. Horder (ed), *Oxford Essays in Jurisprudence*, Fourth Series, Oxford University Press, Oxford, p.17.

<sup>3</sup> In the *Marchioness/Bowbelle* case, it was eleven years after the disaster that on the 14th February 2000, the Deputy Prime Minister, John Prescott ordered a formal investigation under the Merchant Shipping Act 1995 into the circumstances surrounding the collision. Mr. Prescott announced the appointment of Lord Justice Clarke to act as Wreck Commissioner to the Formal Investigation. A Non-Statutory Inquiry into the identification of victims began on the 30 November 2000; on 24 March (2001), the *Guardian* made available on the internet the access to the Formal Investigation Report. See "Report Spreads Blanket of Blame for Thames Tragedy", *Guardian*, Saturday March 24, (2001).

<sup>3</sup> The *Marchioness/Bowbelle* case represents very well the difficulty of attributing criminal responsibilities in matters relating to safety. The dredger (*Bowbelle*) struck from behind the *Marchioness* on the night of August 1989 on the river Thames, with the loss of 51 lives. "Lord Clarke's report said: The basic cause of the collision is clear. It was poor lookout on both vessels. Neither vessel saw the other in time to take action to avoid the collision... . The owners of the *Bowbelle*, East Coast Aggregates, and the managing company for the dredger, South Coast Shipping, must bear their share of responsibility for the collision for failing properly to instruct their masters and crews [on lookout duties] and for failing thereafter to monitor them. ... Lord Clarke criticised the former Department of Transport, which he said had been well aware of the problems posed by the limited visibility from the steering positions." Even when it is not difficult to find the causes of the disaster it is not simple to bring a criminal prosecution against the corporation. See, "Report Spreads Blanket of Blame for Thames Tragedy", *The Guardian*, Saturday March 24, (2001).

4 P & O European Ferries took over Townsend Car Ferries Limited.

## References

- Bayles, M. 1982. "Character, Purpose and criminal Responsibility", *Law and Philosophy*, 1, 5: 5-20.
- Bergman, David. 1993. *Disasters – Where the Law Fails – A New Agenda for Dealing with Corporate Violence*, London, Herald Families Association 14.
- Box, S. 1983. *Crime and Mystification*, Tavistock, London.
- Boyd, Colin. 1996. "Ethics and Corporate Governance: The Issues Raised by the
- Clarkson, C. M. V. 1982. "Corporate Culpability", *Web Journal of Current Legal Issues*, 2.
- Clarkson, C. M. V. 1996. "Kicking Corporate Bodies and Damning Souls", *The Modern Law Review*, 59, 4, July: 560.
- Crainer, Stuart. 1993. *Zeebrugge: Learning from Disaster – Lessons in Corporate Responsibility*, Herald Families Association, London.
- David Bergman. 1993. *Disasters – Where the Law Fails – A New Agenda for Dealing with Corporate Violence*, London, Herald Families Association
- Denning Lord. 1995. *The Bolton (Engineering) Co Ltd v T.J. Graham & Sons Ltd*, 1 QB 159, 172.
- Field Stewart and Jörg Nico. 1978. "Corporate Liability and Manslaughter: Should we be going Dutch?", *The Criminal Review*, 191: 156-71.
- Fisse, Brent and Braithwaite, John. 1988. "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability", *The Sydney Law Review*, vol. 11: 47-49
- Hart, H. L. A., 1963. *Law, Liberty and Morality*, Oxford, Oxford University Press,
- Hart, H. L. A., 1968. *Punishment and Responsibility – Essays in the Philosophy of Law*, Oxford, Clarendon Press,
- Hart, H. L. A. 1983a. "Positivism and the Separation of Law and Morals", Essay 2 in *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon Press,
- Hart, H. L. A., 1983b. *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon Press.
- Harper, Keith 2000. "Tactless Corbett says sorry to crash families", *The Guardian*, Saturday, November 11, p.4.
- Horder, J. 1993. "Criminal Culpability: The Possibility of a General Theory", *Law and Philosophy*, 1, 5: 193-215.
- Laufer, W. S 2006. *Corporate Bodies and Guilty Minds: The failure of Corporate Criminal Liability*, The University of Chicago Press, London.
- Simon, Midgley. 1994. "Boss is Jailed over Canoe Deaths", *The Independent*, Friday 9 December 1-6.
- Smith J.C and B. Hogan, 1996. *Criminal Law*, London, Butterworths.
- Sullivan, G. R. 1995. "Express Corporate Guilt", *Oxford Journal of Legal Studies*, 15, 281, 19: 281-92.
- The Sheen Report, 1987. Department of Transport, Report of Court No.8074, Formal Investigation of mv Herald of Free Enterprise, HMSO, London.
- Wells, Celia. 1998a. "Corporate Responsibility", *Encyclopedia of Applied Ethics*, ed. by Chadwick London, Academic Press, vol.1: 654.
- Wells, Celia. 1998b. "The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility", *The Criminal Law Review*, December: 788-801.
- Wells, Celia, 2001. *Corporations and Criminal Responsibility*, Oxford, Oxford University Press.
- Wotton, Barbara. 1981. *Crime and Criminal Law – Reflections of a Magistrate and Social Scientist*, London, Steven.
- Wootton, Barbara. 1960. "Diminished Responsibility: A Layman's View", *The Quarterly Review*, Vol.76: 224-39.