# Prosecuting for Workplace Death and Injury

Andrew Hopkins
Sociology (Arts)
Australian National University

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# Prosecuting for Workplace Death and Injury.

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Prosecuting companies which kill or injure their workers is only one of a number of strategies available to governments seeking to improve workplace health and safety. It involves a reaction, after the event, in contrast to more proactive regulatory strategies which seek to prevent harm before it occurs. Proactive or preventive policies are of course preferable - they represent the regulatory system at work, safeguarding employees. Reactive prosecutions, on the other hand, are really a symptom of the breakdown of regulation - they occur only when proactive procedures have failed to ensure worker safety. Reactive prosecutions are often bitterly resented by employers on the grounds that the harm was truly an accident for which they cannot reasonably be blamed. This paper will show first that employers <u>are</u> culpable when they are prosecuted, that is, that the injuries concerned are not simply the result of unavoidable and regrettable accidents for which employers cannot be blamed. Secondly, the paper shows that such prosecutions can have preventive effects, that is, that they do have an important part to play in the total system of preventive regulation. (For further discussion of the reactive approach , see Hopkins, 1989; Hopkins,1993; Hutter and Lloyd-Bostock,1990).

## The offences

What are the offences for which employers are being prosecuted? Until the early 1980s and the advent of Robens-style legislation in Australia (to be discussed below), reactive prosecutions were for whatever violations of the preventive regulations inspectors uncovered in the course of investigating a workplace injury or death. Thus, a prosecution might have been for failure to have the guard on some dangerous machine in place, failure to supply workers with a ladder which conformed to prescribed standards, or the failure to install scaffolding as prescribed in legislation. These offences typically specified maximum penalties of only a few hundred dollars. Furthermore, they were strict liability offences, that is there was no requirement that the employer be shown to be culpable in the sense of having known about the violation or having negligently allowed it to occur. It was enough that the machine was unguarded or that the ladder was not as prescribed in regulation for a conviction to be possible. In these circumstances employers might well argue on occasion that the violations were technical only and not really criminal offences.

However, the 1980s saw the passage in all states and territories of Robens-style legislation, which moved away from highly prescriptive regulation and imposed a general duty of care on employers. Thus, to take NSW as an example, Section 15 of its OHS Act requires that "every employer shall ensure the health, safety and welfare at work of all his employees". Note that where

the employer is an organisation, as is normally the case, this duty falls in the first instance on the employing organisation rather than on any individual. Put simply, the word "employer" normally refers to an employing organisation. In what follows the words "he" and "him" refer to the employing organisation, unless the context indicates otherwise.

Although this duty of care appears from the employer's point of view to be frighteningly absolute, it is modified by the defences available to an employer under section 53. This section states that an employer is not guilty of an offence if he can show that it was not reasonably practicable for him to comply. Thus, for an employer to be found guilty the court must be satisfied that it was reasonably practicable for the employer to have ensured a worker's safety and that despite this he failed to do so. Similar provisions apply in other jurisdictions. One can begin to see, then, that for a prosecution to succeed, some degree of employer culpability is involved. Let us spell this out a little further.

The precise legal interpretation of the phrase "reasonably practicable", as used in the legislation, is unclear (Brooks 1988:406-10), but it can be taken as meaning approximately what it means in common law proceedings for damages. At common law a precaution is reasonably practicable and ought to have been taken if, first, the harm was foreseeable by a reasonable person, secondly , the harm was practicably preventable (for instance by using appropriate procedures or protective equipment), and third, a reasonable employer would have taken the necessary precautions (Brooks, 1988:chap 2). Thus a conviction implies that the employer failed to foresee what a reasonable employer would have foreseen (or worse still actually foresaw it) and failed to take preventive action which a reasonable employer would have taken. Spelt out in this way it can be seen that an employer will only be found guilty under this legislation if he has exhibited considerable negligence with respect to the safety of his employees. In short, a prosecution will only succeed in circumstances where the employer is indeed blameworthy. Some examples will clarify the point.

A skip, a large and very heavy metal bucket, was being used regularly to tip raw materials into a furnace. A man was employed to clean the debris which fell from the skip in this operation. In order to avoid being hit by the skip he had to duck when it passed over him and on at least one previous occasion it had grazed him on the head and shoulders. On a later occasion an employee had failed to duck and had been decapitated. Management commented at the coroner's inquiry that it did not know of the existence of this dangerous situation. The death was reasonably foreseeable (there had already been at least one near miss) and certainly practicably preventable (the company took the necessary precautions subsequently). The company was convicted under the general duty of care provision and fined some $6000 dollars, the magistrate saying that it was one of the most serious breaches he had dealt with, being both tragic and unnecessary. (NSW,WorkCover News #8, p21)

In another case a man was injured when he fell onto an unguarded section of transmission machinery. The court was told that the safety guard for the machinery had been left off because it did not fit properly and adjustments to the machinery could not be a made while it was in place. The guard had not been in place for four months prior to the accident. Here again the injury was both reasonably foreseeable and preventable; the company in other words was guilty of quite serious negligence. It was fined $25,000 ( NSW, WorkCover News #13, p21).

A final example: an injury occurred because a company had directed its employees to continue working, despite the fact that an inspector had found the work so dangerous that he had issued a notice prohibiting further work. (Victoria, Recent Prosecutions 2/93). The culpability here is self-evident.

Magistrates frequently comment on the carelessness or negligence of the defendant companies. Here are some magistrates' comments taken from various issues of the Victorian publication, Recent Prosecutions: "The defendant was *grossly negligent* and had shown a *flagrant disregard* for the health and safety of its employees" (4/92 ); "it is difficult to imagine a more *blatant breach*" (4/91); "far too much was taken for granted by the defendant and the accident was easily preventable" (3/91); "it is difficult to see how anyone could fail to recognise the inherent danger of the work practice adopted" (3/91); "the modifications to an existing guard were *recklessly undertaken* " (1/91); "arrangements for employee welfare were really *grossly inadequate* "(1/91).

These statements leave little doubt that in the minds of magistrates the injuries befalling workers are not simply unfortunate accidents but are the result of truly culpable behaviour on the part of the defendant companies. They are not mere technical violations but serious offences, sufficiently blameworthy to warrant condemnation and punishment by the state.

Finally, it should be noted that many of the companies being prosecuted are not simply fly-by-nighters but are major Australian firms with good reputations.

The prosecutions referred to above are all of corporations, that is, of organisations. Much of the legislation passed in Australia in the 1980s also makes it possible in certain circumstances to prosecute individual directors and managers for offences committed by the corporation. In most cases it is up to the prosecution to show that the individual was directly responsible for the offence or consented to it or was wilfully negligent in the matter. Again, therefore, it is clear that an individual manager or director cannot be prosecuted unless there is some degree of negligence on his/her part. These are certainly not strict liability offences. There have been relatively few prosecutions of individuals under these provisions and those few that have occurred have involved the managers or directors of relatively small firms. But the possibility of such prosecutions is of considerable significance, as I shall argue later.

## Why prosecute?

Having discussed the kinds of prosecutions being mounted we can now address the question of why prosecute. Two kinds of justifications can be given, the first, in terms of justice and the second, in terms of the preventive effects of prosecutions. The argument in terms of justice is a moral one: if companies and their managers and directors behave culpably, they *deserve* to be punished. Questions of equity or fairness are also at stake. Where individuals injure or kill each other in more conventional ways they are prosecuted. Not to do so when a company kills or injures its workers in a culpable fashion involves a kind of moral blindness and a bias in favour the rich and powerful.

The second justification is in terms of the preventive effects of prosecutions. This said, we are immediately faced with an empirical question: do these prosecutions in fact have an effect on the companies and individuals concerned or on others who may come to know of the prosecutions? I do not propose to try to answer this question in a generalised way. Any such attempt faces severe methodological problems which I shall not canvas here. I take a rather different tack. Let us assume that prosecutions can have preventive effects in some circumstances. The question of interest then is: what are these circumstances?

In trying to answer this question we need to make a distinction between specific and general effects. Specific effects are those on the companies and individuals actually prosecuted and general effects are on others who are aware of the prosecutions and who may thus be motivated to comply with the law in order to avoid prosecution themselves.

## Specific preventive effects.

Consider first the specific effects on organisations prosecuted. I shall describe four cases which exhibit some of the possible variation in the specific effects. Some general lessons will then be drawn from these cases.

Case 1

The company operates Australia-wide and employs thousands of workers. It has a number of semi-autonomous business divisions. The prosecution, the first ever against this organisation, occurred when a worker received a severe, but non-fatal electric shock. The general manager of the division concerned was known for his lack of commitment to safety and had not provided the resources necessary for proper training and for the purchase of safe electrical equipment, even though lower level managers had pressed for them. Not even an earlier fatality in his division had caused him to give a higher priority to safety. Nor it should be noted had corporate headquarters forced the issue. The prosecution changed all this. The general manager was removed, and the division now operates quite differently. Moreover, the effect was not just on this division. The chief executive officer was worried

about the effect of the prosecution on the corporation's public image and the corporation is now involved in an intensive process of documenting its work procedures to ensure that best practice is observed.

Prior to the prosecution the health and safety manager had toured the country talking to managers about their responsibilities under OHS legislation. Senior managers had not come to his briefings, sending delegates in their place. But following the prosecution the question of the responsibilities and liabilities of top managers became an item for discussion at meetings of the corporation's senior management. News of the prosecution spread far more rapidly and widely through the corporation than news of the original incident.

Case 2

The company is involved in off-shore petroleum production. Some maintenance work was not done in accordance with standard safe procedures, resulting in an oil leakage. A fire ensued and burned out of control for several minutes, injuring one worker. Others were overcome by smoke. The fire could not be controlled because one fire hose nozzle was blocked and the fire hose pumps did not function properly. A coronial inquiry took nearly two and a half years to come to a conclusion, followed just over a year later by a prosecution. The company was convicted of failure to maintain a safe workplace, its first such conviction, and fined $6000 .

The effect of the incident and the associated legal proceedings was dramatic. The company had believed that it had good safety management systems, indeed it prided itself on them, but it was forced to accept that they were not good enough. The failure of its safety systems caused a severe dent in the corporate ego. Since the fire the company has improved its safety auditing, revised its physical procedures in relation to locks, danger tags and the like, and most importantly made its platform supervisors not just "responsible" for safety but "accountable". What this means is that safety is now one of the performance criteria by which they are assessed for remuneration purposes and indeed for continued employment. Supervisors know that if some amongst them are to be laid off in any company reorganisation, those with a poor safety record are likely to be among the first to go.

The incident has also contributed to the company's determination to work harder at creating a culture of safety, that is, an environment in which even the lowest level supervisors are totally committed to safety and will not tolerate any departures from safe practice.

It is often difficult to disentangle the effects of a prosecution as such from other effects of an accident such as the blow to corporate pride and the loss of production. These consequences in and of themselves may generate major safety improvements, quite independently of prosecution. In this case it would seem that the far-reaching safety improvements which the company undertook were a response to the accident itself and not to the prosecution which occurred some three and a half years after the fire.

On the other hand, the threat of prosecution hung over the company throughout much of this period. Soon after the fire the minister announced that no decision about prosecution would be made until after the initial coroner's report was handed down, thus putting the company on notice that a prosecution was a distinct possibility. It would be unrealistic to argue that this threat of prosecution had no impact at all.

There is one more consequence of the legal proceedings following the fire which deserves to be highlighted. The company chose to be represented in court by one of its most senior managers. He reports that being quizzed on how and why the fire occurred was one of the most significant events of his life, profoundly reinforcing his commitment to safety. This man was one of the driving forces behind subsequent safety improvements.

Case 3

This is a large manufacturing company with thousands of employees. It has been prosecuted a number of times, but the financial penalties imposed, normally only a few thousand dollars, are insignificant in relation to company profits. The company's health and safety manager is not involved in the prosecutions, which are handled by the firm's legal department. The company normally pleads guilty, which avoids the need to give evidence or to have any company personnel appear in court. Sometimes, in arguing for as small a penalty as possible, the company lawyer will put an employee on the witness stand to give evidence of what has been done since the death or injury to prevent a recurrence. But these witnesses are never members of senior management. They are local area safety officers, front line supervisors or middle level managers. The company regards prosecutions as relatively routine matters (they are not "pivotal events" I was told) and the prosecutions themselves do not call forth a company-wide response. Furthermore, the company does not see itself as a recidivist or repeat offender. The events occasioning prosecution occur in different parts or divisions of the organisation and are viewed as unconnected with each other, and the number of prosecutions tends to be explained in terms of the size of the company rather than any exceptional level of negligence. It should be said, too, that the company is not unresponsive to fatalities; recent safety initiatives at senior management level are in part an outcome of concern that the number of fatalities has been too high. The point is simply that prosecutions do not in themselves appear to have much of an impact. No doubt one reason for this is that, although senior management keeps itself informed about the prosecutions, it is never involved in them and never has to experience directly the indignity and stigma of a court appearance or confront the gruesome reality of the deaths and injuries which occasion the prosecutions.

The preceding case has important implications. Were the authorities to find ways of getting senior management into court as witnesses or possibly even as individual defendants one could expect these prosecutions to have greater effect. To be specific, if company lawyers can call witnesses on the question of

penalty, it would seem reasonable for the prosecution to subpoena senior management and grill them on what steps they had taken to prevent a recurrence. If such an examination revealed an inadequate response from corporate headquarters, senior management would find itself acutely embarrassed and motivated to take a more direct interest in organisational reform.

Case 4

The general manager of a major metropolitan hospital was one level below his present position at the time the hospital was prosecuted. He learnt about the prosecution through a newspaper report and heard nothing about it at work. In his current position he is unaware of any impact of the prosecution on the hospital. It is clear that communication within the organisation about this matter was non-existent. The general manager is also not concerned about personal liability, viewing such a prosecution as a remote and most unlikely event.

This last case raises an important point. Unless organisations have some way of formally noticing events such as prosecutions and reacting to them in an organisation-wide way, they are unlikely to have a significant impact in terms of changing the management systems which led to the violation in the first place. The hospital exhibited serious organisational incompetence, indeed paralysis, in apparently doing nothing about the negligence which led to the violation. There is a good argument in cases such as this for courts to impose on managements a requirement to respond in a coherent and organisation-wide way and perhaps to file with the OHS authorities a statement of the organisational changes which they have made to prevent a recurrence anywhere within the organisation. Court orders requiring defendant companies to undertake some form of organisational rehabilitation of this kind have been recommended in the specialist literature and have been used overseas (Fisse,1990:597, n53). They are likely to enhance the specific preventive effects of prosecution in cases such as this.

**Conclusions about specific preventive effects.**

The diversity of response in the above cases reinforces the earlier comment about the difficulty of drawing any general conclusions about the specific preventive effects of prosecution, that is, the effects on the companies prosecuted. We can, however, draw some conclusions about strategies which are likely to enhance these effects.

First, it seems likely that repeat prosecutions of a company do not have the same impact as first time prosecutions. First time prosecutions are a shock. They are threatening because they are involve the unknown. In particular, the consequences in terms of bad publicity for the defendant company are unknown and, for that reason, feared. Once the process is known, companies may form the view that they have relatively little to fear and may come to regard prosecution as just one more cost of doing business. In these

circumstances prosecutors must try to "up the ante" in one of the ways described below.

Second, the level of fines is not sufficient to have a significant deterrent effect on large companies. Only if courts are prepared to impose fines much higher than they currently do will these fines in themselves become an influential consideration. One way of encouraging courts to impose higher penalties on repeat offenders would be for the prosecution to present evidence of the magnitude of company profits in order to demonstrate to the court the relative insignificance of the penalties previously imposed.

Third, top managers are often very concerned about possible adverse publicity flowing from prosecutions. Regulatory agencies should take every opportunity to publicize the names of offending companies and to describe the culpability involved so that no-one can harbour the illusion that violations are simply technical breaches or that injuries and deaths are unavoidable accidents.

Fourth, prosecutions can be regarded as having a significant impact if the organisations respond by making fundamental changes in the way safety is managed. These changes should be company-wide and not confined to the particular circumstances of the offence. Thus, for a example, replacing a guard on an unguarded machine is not enough. At the very least, the company should audit all its machines regularly to ensure that all guards are properly installed. If at the time of the prosecution, the company cannot report that such changes have been made, or are in the process of being made, the court should impose some form of organisational probation or rehabilitation order on the company to achieve this end.

Fifth, prosecutions of companies are likely to have a greater impact if the prosecutors can find ways of getting senior management into court. The unpleasantness of this experience is likely to focus the mind of senior management on the problem and provide a real and very personal incentive to avoid repeat occurrences. In particular, senior managers should be asked to describe what company-wide changes have been made to prevent a recurrence. They will be severely embarrassed if they have to admit that the company has failed to make any such changes.

**General preventive effects**

Many small employers are largely unaware of the existence of regulation and have certainly never heard of the general duty to maintain a safe and healthy workplace. They may be quite ignorant of prosecutions launched by the regulatory authorities. Firms large enough to have specialised managerial positions are however generally aware of the existence of health and safety regulations. Most managements of larger firms I spoke with were only dimly aware of prosecutions but this awareness is sufficient to create the belief that violations may have legal consequences and that it is therefore

expedient to comply. This belief is evidence of the general preventive effect of prosecutions.

Consider the case of the Queensland Electricity Commission which is building the Stanwell power station. When the project began in 1988, the Commission was aware of the immanent passage of the Workplace Heath and Safety Act (1989), which would place responsibility for safety at construction sites primarily on the principal contractor, in this case, the Commission. A certain number of fatalities were considered the norm on large power stations construction projects but the Commission recognised that from now on it would be held accountable for these fatalities. It therefore set itself the objective of no fatalities on the new site and introduced an energetic safety program to achieve this goal. WorkSafe Australia is so impressed by the program that it has declared the project one of its best practice sites. It is clear from WorkSafe's analysis that the Commission's commitment is driven in part by a belief that there would be legal consequences in the event of non-compliance.

Larger organisations will have specialist health and safety officers who are often specifically charged by management with the job of ensuring that the the company is in compliance with relevant legislation. In several cases I studied the position of health and safety officer had been created in response to new legislation which either required companies to designate such officers or which placed new obligations on employers which they felt they could only be certain of complying with by employing an OHS specialist. It is the fear of the legal consequences of noncompliance, that is, of prosecution, which motivated these changes. As one manager put it to me the OHS officer was appointed so as "to reduce the company's exposure" (to legal liability). When I asked another what, if anything, motivated him to think about health and safety matters, he said without hesitation: "fear". This is precisely what is meant by the general preventive effect of prosecution.

**Personal liability**

Managers often do not distinguish clearly between prosecutions of corporate entities and prosecutions of individual managers and directors. In so far as they do, it is the fear of personal liability which is by far the most important motivating factor. It is ironic that although there have been very few individual prosecutions of company directors or managers in Australia for health and safety offences, it is this kind of prosecution which most exercises their minds. It is quite widely known that individual directors have been prosecuted and even sent to gaol in the United States and this has had a profound effect on the thinking of some managements and boards.

Concern about personal liability for OHS offences is driven in part by the personal liability provisions in various environmental protection acts which make directors and others personally liable for environmental offences. This legislation normally specifies defences available to directors and managers,

that is, arguments which they can advance to exonerate themselves. The most reliable of these is that they used "all due diligence" to prevent the contravention by the corporation. Directors and top managers have become very aware of these personal liability provisions in environmental legislation in recent years, particularly as they involve the possibility of being sent to gaol, something which is not provided for in OHS legislation. In the chemical and petroleum industries the concern about personal liability is particularly acute because of the potential for environmental disasters in these industries, for example, oil tanker spills, which generate enormous public outrage and demands for retribution. For many companies the OHS manager is also responsible for compliance with environmental legislation and this close connection between the two has served to enhance directors' fears of personal liability under OHS law as well.

The extent of personal liability under OHS legislation is generally less than under environmental law. The use of "due diligence" is specified as a defence in two states and would certainly protect senior company officers from liability in all other states. But more than this, in most states ignorance of the contravention is a defence, provided that this ignorance is not negligent or wilful. In NSW it seems that not even these qualifications apply; the Act states that a senior officer is not liable if "the corporation contravened the provision without his knowledge". Only in Queensland is it mandatory for a senior officer to show due diligence in order to avoid liability.

The response of senior company officers who are concerned to avoid personal liability is to set in place management systems which promote workplace health and safety and to audit these systems to ensure that they are working as well as possible. Directors and managers who have set up such systems can be reasonably sure that they have exercised "due diligence" and that they could not be held personally liable in the event that a worker is killed or injured, or worse, some disaster results in more widespread death and injury.

One chemical company has what it calls a "regulatory affairs manager". His job, quite explicitly, is to ensure that the company is in compliance with all relevant legislation. He divides his areas of responsibility into three risk categories: high risk, including OHS and environmental matters; medium risk, including trade practice and consumer affairs matters; and low risk, including company law matters. Risk is assessed in term of financial costs and the likelihood of legal and other impact on the company, as well as the risk of personal liability. It is the last of these about which directors express most concern and which, I was told, motivates the compliance program more than anything else. The regulatory affairs manager needs to be able to report to every meeting of the board that for each area of concern: "we are substantially in compliance" .

According to the manager of health, safety and the environment of another large company, the personal liability of directors is by far the most effective

pressure on the company to take worker health and safety seriously. Since environmental regulations specified directors as personally responsible the board has asked the managing director at every meeting about compliance. The board normally requires more information about environmental than about OHS compliance, but increasingly it is asking about the latter. However, spending on environmental matters is still more readily approved than spending on OHS matters.

The health, safety and environment manager described to me how, despite a policy which forbad employees to ride on the bonnet of certain of its vehicles, an employee was killed doing just that. There was considerable evidence that, despite the policy, the practice of free-riding was in fact widespread. Following the death, he said, "everybody was going back looking for documentary evidence that they had cautioned people about free-riding" so as to be able to demonstrate that they had exercised due diligence. "Due diligence is the way to go", he said. "This is the way to get to managers".

Some OHS management consultants are making very good use of personal liability to interest their clients in matters of health and safety and, incidentally, to convince them of the advisability of buying the services of the consultant to set up "due diligence" systems.

The approach of one management consulting firm is first to talk to the board of directors of a potential client. Here they stress the personal liability of directors. If they win a contract they then conduct management seminars throughout the company and in a typical one day seminar half the program will be devoted to ways in which managers can exercise due diligence. The consultant firm supplies its clients with good advice on how to manage health and safety and stresses other benefits such as reduced workers' compensation costs. But there is no doubt in talking to managers in one of the client companies that the clearest message which remains in their minds is the need to show due diligence in order to avoid personal liability.

It is important to make a distinction between, on the one hand, line managers and directors of very small companies, who can be expected to have some first hand knowledge of the circumstances of a violation, and on the other, senior managers and directors of large companies who would normally know nothing of such details. The way the law is currently written makes it very difficult for a prosecution to succeed against a director or senior manager of a large corporation. In NSW in particular, where ignorance is a defence, directors of large companies are virtually immune from prosecution. This substantially reduces the legal, if not the psychological significance of personal liability. Australian OHS legislation needs to be rewritten so that directors cannot plead ignorance; due diligence should be their only defence.

By contrast, it is much more difficult for "hands on" or line managers to plead ignorance of the circumstances of an offence and it is for this reason that the individual prosecutions which have occurred have been of these

smaller fry. Notwithstanding this limitation, these prosecutions have proved useful for some company health and safety officers who inform their own line managers about them as a way of reinforcing the personal liability message which they are seeking to convey.

Despite the difficulties presented by the current legal situation, it would be good policy for the regulatory agencies to place a high priority on finding cases where directors of reasonably large companies can be prosecuted. The evidence presented here suggests that any such prosecution would send shudders through every board room in Australia. Even in the absence of such cases, regulatory agencies could well take a leaf out of the book of the management consultants and publicize the theoretical possibility of such prosecutions more than they do.

**The interaction of corporate and personal liability**

One of the less recognised preventive effects of prosecuting companies is that it raises the salience of personal liability in the minds of company officers and other relevant audiences.

Four city council workers were clearing weeds from a river using a three person boat. They were not equipped with life jackets and one man could not swim. The boat foundered due to overloading and the non-swimmer drowned. The council was prosecuted and fined $7000. As a direct effect of the prosecution the council adopted a new health and safety policy with an associated training program, resulting, among other things, in a substantial decrease in the number of injuries. This is an example of the specific preventive effects of prosecution.

There was also a general preventive effect. Although there was no suggestion in this case that any council engineer should be personally prosecuted, the case generated a widespread awareness of the theoretical possibility of such a prosecution. Professional engineering magazines carried articles about the personal liability of senior engineers under the OHS Act and one engineer in a neighbouring council went so far as to transfer all his assets into his wife's name. The prosecution raised the spectre of individual prosecutions and this, I was told, is what really made people jump.

**The precedent-setting function of prosecutions**

Prosecutions can also serve to make employers take action in areas in which previously they had thought they had no responsibility. Take the case of fatigue, a major cause of industrial death and injury. The state rail authority in Western Australia, Westrail, was successfully prosecuted following a road accident in 1990 in which one of its employees was killed. The man had been working for 34 hours without adequate sleep and went to sleep at the wheel of his truck. Prior to the fatality Westrail had taken no responsibility for the amount of overtime worked by its employees.

Again, the NSW Forestry Commission, which is responsible for the safety of contract workers cutting timber in its forests was prosecuted when a contract worker who had been working 12 hours a day, seven days a week, injured himself. The prosecution failed, but the judge commented on the likelihood that men who are paid by the amount they cut will suffer from fatigue . The situation, he said, predisposed "a tired man to accepting risk that he otherwise might not have accepted, to get the job done" (Occupational Health Newsletter #287). The Commission had not previously seen it as part of its responsibility to control the number of hours worked by contract workers, but following the prosecution, it has taken on this responsibility so as to reduce the risk of accidents caused by fatigue.

Such a prosecution would be of particular benefit in the long distance road haulage industry. According to a recent study, more than a quarter of all work-related fatalities in NSW involve trucks. In many of these a major factor is fatigue, caused by driving long hours without sleep. Where these drivers are working for employers or have hours of work effectively determined by freight forwarders, there is a good case for holding the latter liable. This has not been done to date and these fatalities go largely unscrutinised by the OHS authorities. A few precedent-setting cases in this area would encourage the industry to provide safer systems of work for these drivers. Improved safety in this one area could be expected to lead to a significant reduction in the number of all work-related deaths. There can be very few circumstances in which prosecution has the potential to have such a dramatic effect (Hopkins, 1992).

Finally, it is easy to imagine the effect of a successful case against an employer for failure to maintain a smoke-free workplace. The West Australian authorities have tried, so far unsuccessfully, to establish such a precedent (Occ. Health Newsletter #307). If and when they succeed it can be expected to have a substantial impact on the problem of passive smoking in the work place.

**Manslaughter**

Recent years have seen persistent suggestions that companies be prosecuted for manslaughter when they kill their workers in culpable fashion (Neale, cited in Wettenhall,1988; Polk, 1993). The suggestions are not just that individual directors and managers be prosecuted, but that in appropriate circumstances corporate entities be charged. It is in fact the policy of the authorities in Victoria to do so and it may only be a matter of time before they are successful. One such case has already been brought but thrown out on a technicality, while another is under way at the time of writing. It should be noted, too, that some of the magistrates comments cited earlier - "gross negligence," "reckless" - connote levels of blameworthiness sufficient in law to warrant manslaughter convictions. That magistrates are using these words suggests that in their minds manslaughter charges might well be appropriate.

The reasons for proceeding down this path are two-fold. First, there is the equity argument: if individuals who cause death in a culpable fashion in more conventional circumstances can be charged with manslaughter or even murder, why not companies?

Secondly, the purposes of prevention would be well served: a manslaughter conviction would carry with it rather more stigma than is associated with a conviction for failure to maintain a safe workplace. This stigma, or the fear of it, could be expected to have a potent preventive effective, particularly if the proceedings were run as showcase trials with maximum publicity. Research has shown that bad publicity has a powerful preventive effective on large corporations (Fisse & Braithwaite,1983). But corporate misconduct does not automatically generate bad publicity. When large scale financial scandals are uncovered or when disasters involving widespread death or environmental destruction occur, publicity is assured, but when one or two workers are killed in a particular the workplace, there is seldom nationwide publicity and the impact on the image of a large corporation is minimal. In these circumstances, a showcase manslaughter trial can be expected to generate the level publicity and consequent corporate embarrassment necessary have a significant preventive effect. To give an example, when three people died in the United States as a result of design defects in the Ford Pinto, hardly anyone noticed. But when Ford was prosecuted for homicide, the whole world watched (Cullen, et al, 1984).

As far as penalties are concerned, corporations cannot be imprisoned, but they can be fined, and courts would presumably be willing to impose rather higher fines in such cases than they currently do. Thus manslaughter convictions could have a greater deterrent effect from this point of view as well.

The preceding comments assume that the target of the prosecution is a corporation. Of course manslaughter charges can also be laid against named corporate officers. But the purposes of prevention will probably be served better if prosecutions are aimed at corporations rather than individuals, since a focus on individuals is likely to lead to the prosecution of relatively small fry, given that their culpability is most easily established. This has been the experience in the US where homicide prosecutions have been successful against a number of small company directors who managed company activities is a very hands-on way (Reiner and Chatten-Brown, 1989).

The law concerning manslaughter by corporations is currently in an unsatisfactory state. In order to gain a manslaughter conviction the prosecution must normally establish a high degree of negligence. But negligence is a state of mind, and since a corporation does not have a state of mind, it is problematic to describe its behaviour as negligent. One way in which Anglo-Australian law gets around this by attributing the state of mind of top personnel to the company (Fisse,1990:599ff.). Thus if a senior manager is negligent the company will be held to be negligent. In this way a corporate offence turns upon individual negligence. This somewhat bizarre approach

works with small companies where top managers play a hands-on role and where it may well be the personal negligence of the manager which is responsible for a death. But for large companies the approach is sociologically unrealistic. In a large organisation it is often not the negligence of one individual which is critical but the negligence of a number of individuals or indeed the failure of the organisation as a whole to develop safety policies and to mandate procedures which would have prevented the fatality.

Consider the the case of the P&O cross-Channel ferry, "The Herald of Free Enterprise", whose bow doors were left open as it departed from Zeebrugge, causing it to fill with water and capsize , drowning nearly 200 people. Here is what an inquiry judge said.

> At first sight the faults which led to this disaster were the aforesaid errors of omission on the part of the Master, the Chief Officer and the assistant bossun (who should have closed the doors but was asleep at the time), and also the failure of Captain Kirby to issue and enforce clear orders. But a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the company. The Board of Directors did not appreciate their responsibility for the safe management of their ships. They did not apply their minds to the question: what orders should be given for the safety of our ships? The directors did not have any proper comprehension of what their duties were. There appears to have been a lack of thought about the way in which the Herald ought to have been organised for the Dover/Zeebrugge run. All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness ... The failure on the part of the shore management to give proper and clear directions was a contributory cause of the disaster..." (Wells, 1993:46-7)

This is a case where the negligence was truly corporate and it is difficult to pin the blame on any one individual at whatever level in the hierarchy. Indeed, an attempted prosecution of the company for manslaughter, based on the the recklessness of individual senior managers, failed because the judge did not concede that these managers had been reckless with respect to the closure of the door since they were in no way involved in this particular matter (Wells, 1993:69).

The failure of the prosecution in the Zeebrugge case illustrates how the criminal law, pre-occupied as it is with individual guilt, is presently unable to comprehend truly corporate fault. Legal commentators have been urging for some time that this defect be remedied by enacting notions of corporate negligence into law (Field and Jorg, 1991; Fisse, 1990; Wells, 1993). Until this is done charges of manslaughter against large companies are unlikely to succeed. Health and safety authorities should take the lead in encouraging

governments to enact the concept of organisational blameworthiness into the criminal law.

## Conclusion

Prosecution is just one of many strategies available to the regulatory authorities. Some commentators have urged that it be the strategy of last resort, to be used only when offenders exhibit particular recalcitrance (Ayres&Braithwaite, 1992). In many circumstances this is good policy. An advisory approach will sometimes secure compliance more effectively than a punitive approach (Bardach&Kagan,1982) and prosecution is, in any case, a time consuming and expensive strategy which can only be used sparingly. There are, however, circumstances in which prosecution is appropriate as a first resort, in particular, when workers are killed or injured as a result of company negligence. In addition to reasons of justice and equity, the purposes of prevention are well served be such prosecutions. Death and injury are unwelcome events and holding companies responsible may motivate them to do better. Prosecutions do not always have this effect on the companies prosecuted and the challenge for the authorities is to find ways to maximise this impact. A number of ways were suggested in the preceding discussion, including issuing subpoenas to the defendant company's top management to appear in court so that they can be brought face to face with their responsibilities, and requiring companies to engage in corporate-wide rehabilitation, that is, organisational change designed to make a recurrence less likely. Prosecution also sends a signal to other companies about the importance of compliance in a way that more conciliatory approaches can never do.

More effective than any of this, however, is the threat of personal prosecution. It is this, above all else, that managers and directors fear and which motivates them to comply with the law. The irony is that as the law presently stands the prosecution of the directors of large corporations is virtually impossible. Law reform on this point should be given the highest priority. A few show trials of the directors of large companies for failure to concern themselves with the health and safety of their workers would be extremely salutary.

Prosecution also serves to establish precedents, compelling employers to safeguard the health and safety of their workers in ways which were previously thought to be beyond their realm of responsibility.

Finally, the current criminal law makes the prosecution of large corporations for manslaughter almost impossible. The law needs to be changed to allow such prosecutions because of their capacity to focus the attention of all employers on the need to act responsibly in relation to employee health and safety.

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