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Corporate Culpable Homicide: *Transco plc* v *H M Advocate*

On 22 December 1999, an explosion in Larkhall resulted in the deaths of a family of four, the house which they occupied being completely destroyed by the blast. Following investigation by the police and Health and Safety Executive, Transco plc, a corporate body responsible for gas distribution, was charged with culpable homicide and, in the alternative, a contravention of sections 3 and 33(1) of the Health and Safety at Work Act 1974.

Transco objected to the competency and relevancy of the culpable homicide charge, but these objections were rejected at a preliminary diet. On appeal, however, it was held that the charge was irrelevant.[1] This decision – *Transco plc* v *H M Advocate*[2] – is significant as one of only a very small number of reported decisions which address the criminal liability of corporations under Scots law, and the only such decision to consider the potential liability of a corporation for culpable homicide. The court's decision also rests on certain assumptions about the nature of criminal responsibility under Scots law which deserve further scrutiny. This note seeks to highlight these issues and the possibilities for future development of the law.

A. SYMBOLISM AND DENUNCIATION

As noted above, the indictment served on Transco included two alternative charges – one of culpable homicide and the second of a contravention of sections 3 and 33(1) of the Health and Safety at Work Act 1974.[3] In the case of both offences (as a corporate body cannot, for obvious reasons, be sentenced to imprisonment), the maximum penalty on conviction would be an unlimited fine.

That does, therefore, raise the question of why Crown Office should have been concerned to bring a culpable homicide charge, and equally why Transco should have been moved to contest the validity of such a charge. In both cases, the answer is grounded in symbolism. Rightly or wrongly, the denunciatory effect of a conviction for culpable homicide would inevitably have been greater than that of a conviction for a violation of the 1974 Act. Additionally, it is often assumed that such symbolism would have practical consequences in the form of a higher penalty being imposed on the offending corporation. Such a consequence is possible, but not inevitable – in the five successful prosecutions to date for corporate manslaughter under English law, the average fine appears to have been £15,000.[4] Conversely, the fact that a prosecution is brought under the 1974 Act rather than at common law does not necessarily mean that any fine imposed will be low: the Southall rail crash (in which seven people died) resulted in a fine of £1.5 million being levied on Great Western Trains.[5]

1 The decision was unanimous. Opinions were delivered by Lord Hamilton and Lord Osborne, while Lord MacLean concurred with Lord Hamilton.

2 *Transco plc* v *HM Advocate* 2004 SLT 41 (henceforth *Transco*).

3 The (lengthy) indictment is not included in full in the SLT report of the case. At the time of writing, it was available from the Crown Office website (<*http://www.crownoffice.gov.uk/news_items/Transco%20release%20and%20indictment.doc*>).

4 Centre for Corporate Accountability, *Manslaughter Cases – Convictions of Companies, Directors etc* (<*http://www.corporateaccountability.org/manslaughter/cases/convictions.htmi*>).

5 At the time of writing, Thames Trains was awaiting sentence for offences under the 1974 Act relating to the Paddington rail disaster in October 1999 in which thirty-one passengers were killed. See "Paddington train crash company faces huge fine", *Daily Telegraph*, 11 Dec 2003.

B. MENS REA AND ADVERTENCE

The form of culpable homicide on which the Crown case in *Transco* was based was what is sometimes, perhaps misleadingly, referred to as "lawful act" culpable homicide. As Lord Hamilton observes, this terminology serves only to distinguish this form of culpable homicide from "unlawful act" culpable homicide: "it is plain that culpable homicide of [this] kind can be committed not only where some lawful duty is performed in a culpable way but also where in any circumstances a person acts or fails to act with the requisite degree of culpability and death results."[6]

The first question, therefore, for the *Transco* court was general and not directly concerned with the issue of corporate culpability: what *is* the "requisite degree of culpability" required for this form of culpable homicide? This is not a point on which the court reaches a concluded view, but Lords Hamilton and Osborne are clear on one crucial point: a "state of mind" is required.[7] As Lord Hamilton explains:

> …under the law of Scotland the mental element (*mens rea*) is and remains a necessary and significant element in the crime of ("lawful act") culpable homicide. That element may, of course, be proved in various ways, including proof by inference from external facts. But it is, in my view, erroneous to suppose that the actual state of mind of a person accused of culpable homicide of this kind can be ignored and guilt or innocence determined solely on the basis of proof that the conduct in question fell below an objectively set standard.[8]

Although the point is not entirely clear, this approach appears to assume that *mens rea* must entail at least awareness of risk.[9] Lord Hamilton goes on to justify this position by reference to the "general requirement of the law of Scotland … that a common law crime can be committed only where the requisite mental element exists,"[10] noting Hume's reference to the requirement of "dole", or a "corrupt and evil intention",[11] and Macdonald's reference to "wicked intent".[12]

It seems doubtful, however, that either Hume or Macdonald intended these phrases to have the meaning which might be read into them by a modern criminal lawyer. Macdonald, while insisting on "wicked intent" for criminal liability, held that such wicked intent may be excluded by a mistake which "is based on reasonable grounds and would, if true, have justified the act done."[13] Similarly, Hume took the view that a person who appropriated property in the mistaken belief that it was his own would be guilty of theft unless the belief was "excusable"[14] – that is, it seems, that there were reasonable grounds for the belief. But to hold a person guilty of theft on the basis that he does not have reasonable grounds for his belief that he is the owner of the

6 *Transco*, per Lord Hamilton at 54.

7 Lord Osborne specifically describes this as a "criminal intent": *Transco*, per Lord Osborne at 45.

8 *Transco*, per Lord Hamilton at 54.

9 It has sometimes been argued that negligence, being inadvertent, cannot amount to *mens rea* because it does not involve awareness of risk and is therefore not a state of mind. But that is to attach too much weight to a "question of nomenclature" and does not address the real question of whether negligence is an appropriate basis for criminal responsibility. See H L A Hart, "Negligence, *mens rea* and criminal responsibility", in *Punishment and Responsibility* (1968), 136.

10 *Transco*, per Lord Hamilton at 55.

11 D Hume, *Commentaries on the Law of Scotland, Respecting Crimes*, 4th edn by B R Bell (1844), vol 1, 21.

12 J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5th edn by J Walker and D J Stevenson (1948), 1.

13 Macdonald, 11. It should be noted that the references by Lord Hamilton and this note to Macdonald's text are references to interpolations in Walker and Stevenson's fifth and final edition. Previous editions asserted that wicked intent would be presumed, and did not address the issue of mistaken belief in this way.

14 See Hume, 1, 73-75.

property is, in fact, to hold him liable for his conduct "falling below an objectively set standard" – exactly the kind of liability which Lord Hamilton rejects.

This approach, reliant as it is on general principles of criminal culpability, has potential consequences which range far beyond the issue of corporate culpable homicide. Most obviously, if *mens rea* requires awareness of risk, then that would seem to bolster the rule in *Jamieson* v *HM Advocate* that a man who has sexual intercourse with a woman in the unreasonably mistaken belief that she is consenting cannot be guilty of rape (or any other offence), despite the recent hint by the High Court that this rule might be open for reconsideration.[15] Lord Hamilton's approach is consistent with the general trend in Scots criminal law towards subjectivism[16] – a trend which may be defensible, but which probably cannot be justified on the basis of reference to writers such as Hume and Macdonald, who employed a rather different concept of criminal culpability.

C. ATTRIBUTING *MENS REA* TO THE COMPANY

Having considered the question of what form of *mens rea* is required for culpable homicide, both Lords Hamilton and Osborne went on to conclude that such *mens rea* may only be brought home to a corporate body by means of the identification principle outlined in *Tesco Ltd* v *Nattrass*.[17] In accordance with that principle, it must be demonstrated that an individual (or perhaps a group of individuals acting collectively), who could be identified as the "directing mind and will" of the corporation, possessed the requisite *mens rea*.[18] It seems likely that this principle applies to all common law crimes under Scots law,[19] but the position of statutory crimes is likely to be a more complex matter dependent on the particular statute concerned.[20]

The identification principle was, indeed, accepted by Crown counsel during the hearing of the appeal. The advocate depute, however, sought to argue that provided it could be shown that a series of individuals (or committees) who could be described as the "directing mind and will" of the corporation had certain knowledge, the company could be regarded as having the sum total of that knowledge, and therefore as possessing the *mens rea* of culpable homicide, despite the fact that no individual or individuals themselves possessed such *mens rea*. That approach was, however, rejected by the court, with Lord Hamilton describing it as "an aggregation of separate states of mind" and therefore "contrary to the basic tenets of Scots criminal law".[21]

Even if aggregation in the form proposed by the Crown had been permissible, it is difficult to see how it could possibly have led to a successful prosecution. The point may be explained by way of an example, as follows. We may assume that a natural person (A), if aware of facts B and C, can be expected to conclude on the basis of that knowledge that risk D exists. Let us assume also that risk D is of a sufficient degree that awareness of that risk will amount to sufficient *mens rea* for culpable homicide (in the sense that *mens rea* is understood by the *Transco* court). If A were to be prosecuted for a culpable homicide, evidence that he was aware of facts B and C will be relevant to prove that he was aware of risk D. That is uncontroversial, but what may be overlooked is that A's culpability is based on his awareness of that risk and *not* his knowledge of the underlying facts (even if such knowledge is a necessary precursor for awareness of the relevant risk). If it can be shown merely that A was aware of facts B and C, but not of risk D

15 See *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466, per Lord Justice General Cullen at 476.

16 Cf the potential consequences of the decision in *Drury* v *HM Advocate* 2001 SLT 1013, on which see F Leverick, "Mistake in self-defence after *Drury*" 2002 JR 35.

17 [1972] AC 153.

18 See *Transco*, per Lord Hamilton at 57 and Lord Osborne at 51.

19 See *Transco,* per Lord Hamilton at 57.

20 See *Meridian Global Funds Management Asia Ltd* v *Securities Commission* [1995] 2 AC 500; J Ross, "Corporate criminal liability: one form or many forms?" 1999 JR 49.

21 *Transco,* per Lord Hamilton at 60.

(perhaps because A was mentally subnormal and therefore unlikely to appreciate the consequent risk),[22] this will not be sufficient for criminal liability. In a similar vein, showing that a corporation was aware of facts B and C cannot, logically, suffice to show that the corporation was "aware" (in the sense required by the identification principle) of risk D. Such proof may be sufficient to show that the corporation *should* have known of risk D, but the approach taken by the *Transco* court to *mens rea* means that "should have known" will not suffice for liability.

D. IS CORPORATE CULPABLE HOMICIDE A REALISTIC POSSIBILITY?

The decision in *Transco* does not, of course, rule out the possibility of a corporation being found guilty of culpable homicide under Scots law. However, the English experience with the identification doctrine suggests that it will be difficult, if not impossible, to bring a successful prosecution against a large and complex corporation. Prosecutions may be possible where the corporation is a small one and a single individual can more readily be identified as the "directing mind and will" of the corporation, but in such cases it is doubtful whether much is gained by proceeding against the corporation rather than against that individual directly.[23]

One question remains. The indictment served on Transco was quite clearly based on an allegation of lawful act culpable homicide. However, there is arguably an alternative route to succeeding in a prosecution for corporate culpable homicide, which is this. If Transco was guilty of conduct amounting to an offence under the 1974 Act, and this conduct caused four deaths, then is this not arguably *unlawful* act culpable homicide? The scope of unlawful act culpable homicide in Scots law is less than clear, but it seems that the High Court has been prepared to accept that a theft which causes a death may be unlawful act culpable homicide (without, therefore, the need to prove the *mens rea* required for lawful act culpable homicide).[24] It is difficult, therefore, to see why a breach of sections 3 and 33(1) of the 1974 Act, which carry with them a much greater risk of personal injury or death than does theft, should not also provide a foundation for the offence. It may be, of course, that a charge of unlawful act culpable homicide cannot be based on conduct which is an offence under statute rather than common law,[25] but this is a question which has yet to be determined by the courts.[26]

E. WHERE NOW?

It remains possible that the Scottish Parliament may legislate on the issue of corporate criminal liability, perhaps by way of a member's Bill. On the 3 June 2003, Karen Gillon MSP lodged a proposal for such legislation: a "Culpable Homicide by Corporate Bodies Bill", "to provide for a charge of culpable homicide to be brought against corporate bodies". The proposal was supported by twenty-one MSPs.[27]

22 See, e.g., *R* v *Stephenson* [1979] QB 695.

23 Save, perhaps, in the unlikely case where the prosecution can prove that an individual who was necessarily a "directing mind and will" of the corporation acted with the requisite *mens rea*, but cannot establish the identity of that individual. Cf *Purcell Meats (Scotland) Ltd* v *McLeod* 1987 SLT 528.

24 *Lourie* v *HM Advocate* 1988 SCCR 634.

25 If unlawful act culpable homicide could be based on a statutory offence, it might entail the consequence that causing death by dangerous driving was necessarily culpable homicide. However, it could be argued that this is an exception caused by the particular structure of criminal liability which Parliament has opted for under the Road Traffic Acts.

26 It is also arguable that a violation of ss 3 and 33(1) of the 1974 Act represents an omission rather than an act – but again, it has never been decided that a charge of unlawful act culpable homicide cannot be based on a criminal omission.

27 Scottish Parliament, *Business Bulletin* No 99/2003, section G.

Even assuming that the principle underlying such a proposal is accepted, however, there is considerable room for debate over the detail. There is, first, no accepted "model" of corporate liability which can be readily adopted. South of the border, the 1996 proposals of the Law Commission for a new offence of corporate killing[28] were substantially narrower than the proposals subsequently brought forward by the Home Office in its 2000 consultation paper.[29] Both sets of proposals have been heavily criticised for a variety of reasons.[30] While the UK Government is expected to introduce legislation later this year,[31] it seems possible that the draft Bill may differ substantially from both sets of proposals.

Why, it may be asked, is the issue so difficult? There are a number of reasons. Even if it is accepted that reform is needed, any proposal for an offence of "corporate killing" makes two very large and questionable assumptions – first, that the new offence should be restricted to corporations;[32] and secondly, that the offence should be restricted to cases where a corporate failure has caused death, and should not extend to cases where "only" serious injury has been caused.

Both of these issues need proper consideration as part of any reform proposal. Even if they are resolved, significant difficulties remain, both with respect to questions of causation and as to how the relevant "management failure" (the Law Commission's terminology) or similar is to be assessed.[33] There is, in the circumstances, much to be said for Glazebrook's argument that the proper approach is not to create an offence of "corporate killing", but instead to create offences of causing death or serious injury by breach of a safety regulation (similar, perhaps, to offences such as "causing death by dangerous driving").[34] Such an approach would provide a welcome corrective to the fact that safety offences are generally drafted in the "inchoate mode" (that is, without reference to any harm caused), meaning that prosecutions for such offences may fail properly to reflect the fact that death or serious injury has resulted from the corporate failure.[35]

In summary, while the decision in *Transco* represents a welcome clarification of the law, it is unlikely to be thought to leave it in a wholly satisfactory form. The scope of corporate liability for crimes other than culpable homicide (or, at least, statutory offences) remains unclear. There is no accepted model for reform, and so it would be inappropriate to proceed directly to legislation. The best approach, it is submitted, would be for the matter to be considered by the Scottish Law Commission, with a view to legislative reform in due course.

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28 Legislating the Criminal Code: Involuntary Manslaughter (Law Com No 237, 1996).

29 Home Office, *Reforming the Law on Involuntary Manslaughter: the Government's Proposals* (2000).

30 See, in particular, B Sullivan, "Corporate killing – some government proposals" [2001] Crim LR 319; P R Glazebrook, "A better way of convicting businesses of avoidable deaths and injuries?" (2002) 61 CLJ 405.

31 See "Blunkett bill to take aim at firms that cause fatal accidents", *The Independent*, 10 Nov 2003.

32 The Law Commission's proposals would have applied only to corporations, while the Home Office proposals would have applied to any "undertaking". Arguably, the first is improperly narrow and the second improperly wide. See Sullivan, note 30 above, 34-36.

33 For a particularly caustic evaluation of the Law Commission's proposals in this respect, see Glazebrook, note 30 above, 409-414.

34 Glazebrook, note 30 above.

35 See C Wells, *Corporations and Criminal Responsibility*, 2nd edn (2001), 5-8.