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Holding Corporate Leaders Responsible

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Holding Corporate Leaders Responsible

Occupational health and safety law consists of a mixture of corporate and individual responsibility. There are good reasons for this. Offences are often truly corporate in nature, in the sense that it is easy to see how the company as a whole has failed, while at the same time it is often difficult, if not impossible, to sheet home the failure to a single individual[1]. In these circumstances it makes sense to prosecute the corporate entity. On the other hand, corporations act through human agents and there is a strong argument that identifying these agents and holding them responsible is one of the most effective ways to ensure corporate compliance[2]. Hence OHS law often contemplates holding responsible those people who take part in the management of the corporation. Obviously the higher in the corporate hierarchy these managers are, the better. CEOs and company directors are the people with the greatest capacity to influence corporate behaviour and hence holding these people responsible for corporate failures provides the greatest potential leverage.

At this point the issue of fault becomes critical. Current legislation holds individuals liable for corporate fault only if they were themselves individually at fault in some way, for example, by failing to exercise due diligence. The state of NSW has been more active than others in prosecuting directors who were personally at fault, but a recent study by Foster has shown that nearly all these cases involved very small companies – small family concerns or even one-person companies – and that in nearly all cases the director was personally involved in the incident[3]. In an important sense, these are not cases in which a director has contributed to an offence by a corporation, but rather, cases in which the offence is wholly and solely attributable to the director.

The Gretley prosecution[4] was an attempt to break out of this mould, in that it targeted individual managers in a much larger corporate structure. However, although the mine managers were the most senior people on site, they were separated by layers of management from the top corporate decision makers. In short, the Gretley prosecutions failed to target the most influential people in the corporate structure.

Foster's study showed that there have been virtually no prosecutions of directors of large companies. It is not hard to see why. It is almost impossible to establish that top people in large corporations are at fault when things go wrong at a particular site. Directors may reside in a distant metropolis and are probably unfamiliar with the technical details of the operations under their control. CEOs and directors can be expected to be diligent about setting up a safety management system and ensuring to the best of their abilities that it is working, but assuming they have carried out these obligations, they can hardly be held to be personally at fault when things go wrong at a particular site.

There are now suggestions that regulators should develop codes of practice for company directors which would make it possible to prosecute directors who failed to comply[5]. We can reasonably assume, however, that if and when this happens, directors of most large companies will be careful to ensure that they are in compliance. The result will be that even though a large company may be found to have breached to law, directors will remain immune from prosecution.

Beyond due diligence

Even though there may be no personal fault at the highest level, there is still good reason to find ways to target people at this level. The problem is that, having exercised due diligence and complied with any relevant code of practice, top corporate personnel may view themselves as having discharged their legal obligations and thus entitled to rest on their laurels. After all, if safety is the first item on the board agenda, if directors regularly scrutinise audit reports and safety statistics, if they require and receive assurances from senior managers that the company is in compliance with all relevant standards, what more can reasonably be asked of them?

The fact is, we can and must ask more, as a review of safety in NSW coal mines concluded. It found that despite the best intentions of the people at the top, there was what it called a "disconnect" between the policies developed at corporate headquarters and the practices occurring at the coal face. Its comments are worth quoting .

> There is a *disconnect* between the intentions of both the DPI (the inspectorate) and the companies, on the one hand, to reduce risk through systems and management plans and, on the other, the reality of risk encountered at the "coal face"….(T)he Review stresses the importance of effectively checking (monitoring, observing, inspecting and auditing), so as to ensure that risk-based management systems and plans are not only in place, but are actually implemented. The Review emphasises that a risk-based management system/plan that is not adequately implemented may be more dangerous than having no system/plan at all[6] (emphasis in original).

This is not the first time this problem has been noted. The inquiry into the Esso Longford gas plant explosion found that the safety management system was "divorced from operations in the field" and "diverted attention from what was actually happening" [7].

If a company has failed to ensure the safety of its employees, notwithstanding the fact that its most senior people may have exercised due diligence, we can reasonably ask these people to try even harder, and to be even more attentive to what may be going on at the operational level of their organisation. Directors need to be sensitive to the fact that bad news travels slowly, if at all, up corporate hierarchies, and they must be willing to bypass normal reporting lines and develop more direct methods of discovering just what is happening at the grass roots[8].

The Chief of the Air Force recently demonstrated such an approach[9]. He had received a complaint from a lowly corporal that maintenance activities were not what they should be. He thereupon commissioned a special team to visit Air Force bases and report to him on how extensive the problem was. In this way he was able to bypass the normal Air Force chain of command and inform himself far more directly about what was happening.

Another strategy is for directors to walk around regularly at work sites, asking employees to tell them about the problems they face[10]. This can elicit vital

information which might not otherwise be available, including examples of routine non-compliance[11].

These kinds of interventions on the part of directors go beyond most conceivable due diligence requirements, yet they are the kinds of interventions that are necessary if the disconnect described above is to be rectified. The question to be addressed here is: can the law be used to achieve this end?

Responsibility without fault

It is clear that if we are to impose some kind of legal responsibility on top corporate people, whom we assume have exercised due diligence, it needs to be responsibility without fault. The law generally requires fault before liability can be imposed (but see below), so the idea that we might hold top corporate officers responsible in the absence of fault is clearly one that needs careful justification.

The work of Oxford legal philosopher Tony Honoré provides a way forward.[12] The starting point for his discussion is the meaning of responsibility in everyday life. He contends that in everyday life we are responsible for the outcomes of our actions regardless of fault. He terms this "outcome responsibility". Honoré provides the following example. If I trip someone quite by accident, I incur a moral obligation. "An apology is called for, and the person who has been tripped must be helped up and if necessary taken for treatment".[13] Here is another example that Honoré endorses[14]. I am at a dinner party with other guests who are not well known to me. We are discussing a news item about a women who was raped but failed to report the matter to the police. I express the view that she ought to have made a report. It turns out that one of the dinner part guests was raped earlier in life and chose not to report it to the police. She is deeply upset by my comment and has to retire from the table. This outcome is hardly my fault. In an important sense it is just bad luck. Merely by acting in the world we run the risk of unlucky outcomes of this nature. Nevertheless, I am responsible for the outcome and should do all I can to make amends. I will have incurred discredit by my comment.

Outcome responsibility can also be found in more structured social settings such as games, professional codes of practice and traditional codes of honour[15]. In the game of soccer, for instance, a player can be sent off and even suspended for several games for elbowing another in the face, even where that action was quite unintentional and simply a matter of bad luck.

Outcome responsibility is also quite explicit in Christian Orthodox liturgy, where God is asked to forgive sins, "both voluntary and involuntary", "known and unknown"[16]. According to Orthodox theology, a person may not be at fault for sins that are involuntary, unconscious and unknown, but he or she must nevertheless accept responsibility for them and ask forgiveness.

Honoré develops what he means by outcome responsibility in the following passage.

> Outcome responsibility means being responsible for the good and harm we bring about by what we do. By allocating credit for the good outcomes of actions and discredit for the bad ones, society imposes outcome responsibility; though often

> the rewards it attaches and, outside the law, the sanctions it imposes are informal and vague. Under a system of outcome responsibility we are forced, if we want to keep our social account in balance, to make what amounts to a series of bets on our choices and their outcomes. Provided we have a minimum capacity for choosing and acting, we win the bets and get credit for good outcomes more than we lose them and incur discredit or bad ones. We have to take the risk of harmful outcomes that may be sheer bad luck and not our fault; but that does not make the system unfair to people who are likely to be winners overall.[17]

Honoré argues that outcome responsibility is an inevitable and vital part of personal identity. It is so because identity is bound up with biography; in a sense we are what we have done[18]. If I set out to do something and I succeed, I normally expect to take the credit, even though my achievement depends partly on other people and on luck[19]. Moreover I become identified with that achievement in my own eyes as well as the eyes of other people. To take a pertinent example, if I have managed a coal mine successfully, I become a successful coal mine manager, even though that success may have a lot to do with favourable market conditions. If I take the credit for successful outcomes I must also take the discredit for unsuccessful or harmful ones, even though these outcomes result partly from the actions of other people and from bad luck. Just as the successful outcomes become part of my biography and my identity, so must the unsuccessful outcomes. If we were not assigned responsibility for outcomes in this way, if we were not regarded as the authors of the outcomes of our actions, then taking action of any sort in the world would no longer be meaningful. In these circumstances "we could have no continuing history or character…(and we) would hardly be people".[20]

Outcome responsibility is not only essential for personal identity, it makes for a better society. It does so by providing "an incentive to aim at and succeed in doing things that are regarded as valuable"[21], as well providing an incentive to avoid or rectify undesirable outcomes. If I am held responsible for unintentionally upsetting the dinner guest I am motivated to minimize the harm by apologizing and I am likely to be more tactful at future dinner parties.

Honoré argues that outcome responsibility is the basic type of responsibility in a community, more fundamental than moral or legal responsibility.[22] A famous English case illustrates this claim.[23] A batsman smashed a ball out of the cricket ground and onto a highway where it hit the plantiff in the head. She sued the cricket club for negligence but the House of Lords, on appeal, found that the outcome was so unlikely that the defendant was not at fault for failure to foresee and forestall the injury. The defendant was therefore under no legal obligation to pay compensation. The judges were clearly uncomfortable with this result. One said that the cricket club could fairly be expected to pay compensation, but the law of negligence was concerned with fault not fairness. The English press were outraged by the decision and the cricket club assured the public that, despite the finding in its favour, it would allow the injured woman to retain the damages and the costs awarded by the lower court. In this matter, then, outcome responsibility trumped fault-based responsibility[24].

Having established the priority of outcome responsibility in everyday life, Honoré argues that "the main role of legal liability is to reinforce our basic outcome responsibility with formal sanctions such as compensation or punishment"[25]. The

criminal law often adds a requirement of fault before offenders can be severely punished, and damages are generally only awarded if the author of the damage was at fault in some way. But there are many cases in law where the legal response is dictated by outcome rather than fault. For example, murder is dealt with more severely than attempted murder, even though the intention is the same in both cases, and it may be nothing but luck that determines whether the attempt is successful. Similarly, causing death by dangerous driving is punished more severely than dangerous driving, even though the level of fault is the same in both cases. It is the outcome that makes the difference, despite the fact that luck clearly plays a big part in whether or not any particular instance of dangerous driving culminates in a fatality. Some have argued that holding people absolutely liable for outcomes in this way is unjustified, being contrary to normal principles of criminal law, but Honoré takes the view that such laws reflect wider social attitudes and that we are right to judge a crime by its outcome, not just by the degree of fault[26].

There is another circumstance, much closer to the concerns of this book, in which the law holds people responsible for outcomes regardless of fault, that is, imposes absolute liability. A famous 19th century case, *Rylands v Fletcher*, involved a reservoir that overflowed to neighbouring property causing damage. The overflow was in no way the fault of the owner of the reservoir, who was nevertheless held liable for the damage[27]. The case established an important precedent. According to Honoré, the law nowadays generally imposes civil liability, regardless of fault,

> "on those who pursue permissible but dangerous activities: storing explosives, running nuclear power stations, keeping wild animals, (and) marketing drugs or other dangerous products"[28]

Clearly, running a coal mine falls into the category of permissible but dangerous activities.

Honoré argues that the law is morally justified in imposing outcome responsibility in such cases. The people who carry out these dangerous activities normally benefit from them, often handsomely, and fairness requires that they accept responsibility for the consequences when things go wrong.[29] Turner adds an additional argument in his commentary on Honoré[30]. Provided potential defendants are warned that their activity is one which attracts absolute liability there is no unfairness. They can avoid liability simply by not engaging in the hazardous activity[31].

Honoré's ideas about grounding responsibility in outcomes rather than in fault seem at first sight surprising. His real value in the present context is that he shows that this approach is not at all esoteric but originates in everyday life. What this means is that, in so far as the law imposes outcome responsibility, this should not be seen as an aberration from general legal principle, but an expression of a principle more fundamental than any other. His ideas therefore provide a basis for the project of this chapter, which is to find a way to impose responsibility without fault on the most senior corporate officers.

Before focussing in on this task, however, it is worth considering certain other regimes where outcome responsibility has been practised, or at least discussed, regimes that might conceivably provide a model for imposing outcome responsibility

on the most senior corporate officers. Two examples will be considered: the Westminster system of ministerial responsibility, and the Japanese custom of holding top corporate officers responsibility.

Ministerial responsibility

Ministerial responsibility has a variety of meanings in the Westminster system. The relevant meaning here is the idea that a minister is responsible for the actions and policies of his or her department. But what precisely does this mean? On one view "the act of every civil servant is by *convention* regarded as the act of his Minister"[32] (emphasis added). That being the case any serious error by a civil servant must be regarded as the minister's error or at least an error for which the minister must take personal responsibility. If the matter is serious enough, the minister should resign from office. This has been described as the classic version of ministerial responsibility[33]. It requires a minister to accept responsibility regardless of whether the minister knew or could have been expected to know about the matter in question. In Honoré's terms this is outcome responsibility.

Modern forms of ministerial responsibility are less absolute, requiring ministers to accept responsibility only if they knew or should have known about the matter. Thus, for example, the code of ministerial responsibility promulgated by an Australian Prime Minister, John Howard, states that ministerial responsibility

> "does not means that ministers bear individual liability for all actions of their departments. Where they neither knew, nor should have known about matters of departmental administration which come under scrutiny it is not unreasonable to expect that the secretary or some other senior officer will take the responsibility"[34].

There is considerable skepticism about whether the so called convention of strict ministerial responsibility ever operated in practice. One of the most exhaustive studies of this matter was carried out by Finer in 1955 in the UK and covered ministerial resignations in the preceding hundred years. He was interested in resignations which had been required by parliament or the Prime Minister or which had been forced by parliamentary criticism. He found only about twenty cases. Of these, ten were cases where the minister was clearly not personally involved in the matter, but was held vicariously responsible for the failures within his department. Finer comments that this is "a tiny number compared with the known instances of mismanagement and blunderings"[35]. He concludes that there has never really been a convention holding ministers absolutely responsible for the misdeeds of their departments and the small number who have actually been held to account in this way were "plain unlucky"[36] .

In recent years there has been an increasing tendency for ministers to avoid responsibility by blaming senior civil servants[37]. For example, an inquiry into the illegal jailing of an Australian citizen by the Australian Department of Immigration concluded that it was the result of a Departmental culture that had persisted under successive ministers. The report stated that "there are serious problems with the handling of immigration detention cases. They stem from deep-seated cultural and attitudinal problems within (the Department) and a failure of executive leadership".[38] It can reasonably be argued that ministers should accept responsibility for the culture

of the organizations they head[39], but the government did not hold the minister accountable in this way. Its response was to move the Departmental head. Clearly, we are now further away than ever from strict ministerial responsibility.

Nevertheless, the arguments in favour of ministerial outcome responsibility remain strong. Using a games theory approach Kam has recently shown that when ministers are governed by a doctrine of strict ministerial responsibility they will police their departments more effectively[40]. They are motivated to search out bureaucratic errors and they have an incentive to correct bureaucratic drift, that is, drift away from officially required practice.

It is not necessary that every case of serious departmental error be followed by ministerial resignation for the incentive to operate. As long as some such cases occur and as long as ministers are aware of this possibility, the incentive exists. It is possible therefore that in the period covered by Finer's study the threat of being held strictly accountable for departmental errors did have some of the benefits that Kam describes.

There are several features of this discussion that are relevant to the accountability of top corporate officers. The first is that punishments do not need to be those imposed under the conventional criminal law in order to provide the necessary incentives. It is the shame of forced resignation that provides the incentive to seek out departmental error. If outcome responsibility is to be imposed on top corporate officers, it may be more useful to impose shame-inducing consequences rather than conventional retribution. Second, imposing outcome responsibility induces far more vigorous efforts than is the case when responsibility is fault-based. It obliges senior officers to search out and correct bureaucratic drift, to use Kam's term, and they can never be certain that they have fully discharged this obligation. On the other hand, where responsibility is fault-based, lawyers can advise senior officers what they need to do to discharge their obligations, after which they need do no more. Finally, Kam's reference to bureaucratic drift is particularly relevant for large corporations. Snook has argued that it is the key to understanding what goes wrong in the hyper-complex organizations of the modern world[41]. Corporate officers need to be as alert as possible to ways in which practice may drift away from policy. This is precisely the issue of "disconnect" referred to earlier.

The responsibility of Japanese company heads

The Japanese corporate world is another well-known environment in which outcome responsibility is attributed to the head of the organisation. If some event incurs shame for the corporation, Japanese custom requires the head of the corporation to take personal responsibility, apologise and, if necessary resign, even though he or she may not be personally at fault in any way.

A recent example of this is the resignation of the president of the Tokyo Stock Exchange in December 2005, along with the head of the stock exchange computer system and the exchange's managing director. A trader, acting on behalf of a bank, had mistakenly placed a huge order to sell. When the trader discovered his mistake he tried to have the order cancelled but a fault in the stock exchange computer prevented him from doing so for about ten minutes. In the meantime other traders snapped up the shares at a bargain price, costing the bank US $347 million. Other major stock

exchanges would have picked up the error immediately and suspended trading. According to one commentator, what was needed was

> "a full redesign of the bourse's trading system, which is often described as the most complicated in the world. The problem is that it is essentially based on procedures used when transactions were processed by hand".[42]

The president had been in his job less than two years and was not personally at fault for the antique state of the exchange's trading system. Yet he took full responsibility by resigning. As one newspaper reported, he "stood in the glare of television cameras... to do what Japanese executives perhaps dread most: bow in shame."[43]

Fisse and Braithwaite describe this situation as one of *noblesse oblige* (literally, nobility obliges), which "means the titular head of the organization assuming strict individual responsibility for collective wrong doing"[44]. This is a ubiquitous and long standing feature of Japanese culture, applying to business leaders and government officials of all types. According to one observer of Japanese ways, "official responsibility means the assumption by the public officer of the consequences, however remote, of his official acts".[45] Unlike the Westminster convention of individual ministerial responsibility, Japanese *noblesse oblige* operates in practice. The suicide by Japanese military commanders whose forces fail in battle is a well-known example. Even in times of peace, Japanese military commanders may commit suicide because of mistakes made under their command for which they have been personally exonerated.[46]

The willingness of Japanese business leaders to take personal responsibility in the absence of personal fault must be seen in the context of Japanese company decision making. So-called *ringi* management involves the formulation of draft plans at middle management level followed by exhaustive consultation both horizontally, by other groups of equivalent rank, as well as vertically, by people at other levels in the hierarchy. By the time the plan is ready for approval at the highest level it is everybody's and nobody's. At this stage, as one observer has said,

> "the nature of the act of confirmation or approval is very vague... this is a skilful device for obscuring both the locus of authority for carrying out the plan and the locus of responsibility for its effects"[47]

According to another observer, "the Japanese… have resisted the urge to parcel out a firm's myriad operations in neat little bundles of authority and responsibility"[48].

This situation means that failures cannot be meaningfully attributed to the actions or inactions of particular individuals. As a result, no one, and certainly not the CEO, is personally at fault, in any Western sense, when things go wrong. This has led some observers to claim that the apologies and resignations of Japanese leaders are merely symbolic or ritualistic, and that the Japanese system involves the "symbolic sacrifice"[49] or "scapegoating" [50] of its leaders. Fisse and Braithwaite are particularly critical:

> "Why should an individual person be sacrificed rather than the corporate ox that gored? For a collectivist culture, it is perverse that Japanese law does not direct

> more of the fire and brimstone of public shame at corporate entities rather than individuals"[51]

Whether or not it is perverse, there is certainly puzzle here. Western societies do not insist on finding someone to blame when things go wrong. The criminal law is on the look out for individual fault, but where none exists, it can still hold corporations to account. Why does the Japanese system require what to Western eyes appears to be a ritual sacrifice?

The answer, surely, has to do with the way the self is constituted in Japanese society. Japanese personal identity is bound up with group identity to a greater extent than it is in the West. This is true, in particular, for Japanese business leaders and their firms. Given this identification of the individual with the company, the collective fault of the organization is simultaneously the fault of the head of the organization. The leader *feels* personally responsible for the collective failure and it is precisely for this reason that a public apology is a deeply felt and personally shameful experience, not merely a ritual.

The fact that a Japanese leader might feel personally ashamed in these circumstances seems at first sight strange to Western observers. Sociologists have shown, however, that personal identity is bound up with group identity even in societies which purport to be far more individualistic. This is most easily seen in the case of national identity. As an Australian travelling abroad I have felt personally ashamed of some of the actions of my government. In the eyes of others I meet and even in my own eyes I am diminished by those actions, simply because I am an Australian. Of course I am not personally implicated and may even seek to distance myself from those actions by explaining that I voted against the government, but I cannot disown my national identity and so cannot escape some degree of responsibility.

In times of war the identity of the individual is tied so tightly to the nation that individuals may have to answer with their lives for the actions of the nation. The taking and killing of innocent hostages in the conflicts in the Middle East is a contemporary example.

The point can be put even more sharply. Although it seems strange to Western observers that Japanese business leaders should accept personal responsibility for the faults of their firm, that is precisely what Westerners expect of Japanese political leaders in relation to the faults of their nation. An Australian Prime Minister in the 1990s demanded that Japanese national leaders of the day should apologise for Japan's role in the second world war, fifty years earlier. The expectation was that present day Japanese political leaders, who were no more than children and may not even have been alive during the second world war, should express personal remorse for Japan's role in that war. At this point the thoughtful reader might suggest that what was expected was not a personal apology but an apology *on behalf of* the nation. But apologies are only useful if they are sincere, that is, accompanied by genuine remorse and shame. So it was, that on the fiftieth anniversary of the end of war, the Japanese Prime Minister issued a statement which said, "I… express here once again my feelings of deep remorse and state my heartfelt apology". The Australian Prime Minister accepted this apology. In expecting a Japanese political leader to experience

shame we are assuming that his personal identity is in some way bound up with that of his nation and that the faults of his nation are to some extent his own. [52].

These comments are intended to demonstrate that *noblesse oblige*, Japanese style, is not as foreign to Western ways of thinking as might at first appear. This is not some curious phenomenon of anthropological interest only. It is a way of thinking that has parallels in Western societies and has, moreover, deep sociological roots.

The obligation of Japanese business leaders to accept responsibility for the faults of their firms is customary only. It is not a component of Japanese criminal law. Fisse and Braithwaite, argue that titular responsibility of this type cannot be part of Western criminal law either, because it is fundamentally unfair. What we can do, they say, is impose criminal liability on corporations and then hope that "organizations imbued with the ethos of *noblesse oblige* will translate this quickly enough into assumptions of responsibility by the titular head"[53].

The problem is that Western firms do not often function in this way. Corporate leaders will not take personal responsibility for deaths that happen at remote company outposts, unless the law finds ways of imposing it on them. Some of the most safety conscious multinationals summon plant or site managers to corporate headquarters to account for deaths at sites under their control and to explain what they intend to do to ensure no further fatalities occur. This an internal system for imposing outcome responsibility on site managers. Such a practice is likely to have a beneficial effect on site safety and is therefore to be applauded. But it does not impose responsibility on corporate leaders. To repeat, while Japanese culture imposes outcome responsibility on corporate leaders, there is nothing in Western culture or Western law that imposes outcome responsibility on top corporate leaders, in the absence of personal fault. The challenge, then, is to find a legal mechanism to do for Western firms what the national culture does for Japanese firms.

Imposing outcome responsibility on corporate leaders

Let us recall some of the arguments made earlier in this chapter. First, corporate leaders are often immune to fault-based liability since in many large corporations they can be expected to be complying with due diligence requirements, even when things go wrong. Holding them strictly responsible for outcomes is one way of going beyond due diligence and establishing legal incentives to attend more closely to safety. Second, outcome responsibility is not some legal aberration; it is the most basic form of responsibility. Honoré shows, moreover, that outcome liability is morally justified. Where organizations are engaged in dangerous activities as many large corporations are, and where their leaders reap the benefits of those activities, it is only fair that they also shoulder responsibility for any harm caused by those activities. Particularly where they are warned about their liability, it cannot be said that outcome responsibility is unfair.

Assuming that senior company officers are to be held legally responsible in this way, what kinds of sanctions should be imposed? The courts can hardly force them to resign, Japanese style, but they could prohibit them from acting as directors or CEOs for a period of years. Would this be an appropriate response? Here I turn again to Honoré. In an important passage he notes that while "it is a myth that fault and desert

are essential to responsibility", this is not to say they are irrelevant. "They serve rather to increase the credit or discredit for the outcome of our behaviour that we incur in any event"[54]. In the Japanese collectivist tradition, the fault of the corporation shifts subtly to the individual leader. Typically that does not occur in a more individualist culture. Indeed the situation contemplated here is one where the leader is not at fault in any significant way. In these circumstances the discredit due to the leader is limited and it would be inappropriate to remove him or her from office.

On the other hand, to impose a nominal fine would be to miss a golden opportunity. There is now a strong tradition in criminology that a purely punitive response is not the best way to achieve the purposes of the criminal law. Punishment in and of itself does not create remorse in the offender and therefore provides no moral incentives to do better. Moreover, the levels of punishment that can be justified by fault are often far less than the losses and suffering experienced by victims and leave victims feeling unacknowledged and hence unable to move on in their lives. The restorative justice movement in criminology seeks to overcome these defects. Perhaps not coincidentally, one of the sources of inspiration for this movement is the Japanese response to crime in general and to corporate crime in particular. The aim of the system is to shame the offender, induce remorse in him or her and secure a sincere apology for the victim which, precisely because it is sincere, is likely to involve some form of material restitution in addition to its symbolism.

Braithwaite and others have argue that because neither national cultures nor conventional legal systems in the West achieve these outcomes we need to create institutions to fill the vacuum[55]. One such institution is the community conference in which, following a plea of guilty, the offender meets with victim or victims, together with other people respected by the offender, who nevertheless do not condone the offenders actions. The meeting is designed to achieve various ends:

- to confront the offender with the full consequences of the offence;
- to shame the offender, not so as to ostracise, but in a way that induces remorse and a commitment not to reoffend;
- to secure recognition for the victim of the suffering inflicted;
- to secure a sincere apology for the victim;
- to impose some practical consequences on the offender, for instance payment of financial compensation, or attendance at some relevant course[56].

Fisse and Braithwaite provide a powerful example of how this can work in the context of corporate crime. Agents for several insurance companies had been selling worthless life insurance policies to poorly educated Aboriginal people in very isolated parts of Northern Queensland. The agents had pressured Aboriginals in various ways, even threatening that they would be imprisoned if they didn't sign up. Saddest of all, the Aboriginals were falsely told that the policies would pay generous funeral benefits that would help transport bodies back to the place of origin for burial, a matter of profound importance to these Aboriginal people. These matters finally came to court where senior corporate officers denied knowledge of the practices. Nevertheless,

> "for some participants, responsibility was brought home in a particularly compelling way. Top management found themselves directly confronted with the shame of the practices from which they and their companies had benefited.

> The media and the courts were not the only forums in which some found themselves exposed. Top management from Norwich (one of the companies concerned) were pressed into immediate contact with the victims as part of the process leading up to the settlement. This was an exacting and conscience-searing experience. They had to take four-wheel-drive-vehicles into Wujul Wujul (in tropical North Queensland) to participate in dispute negotiations in which the victims were given an active voice. Living for several days under the same conditions as their victims, Norwich's top brass had to sleep on a mattress on a concrete floor, eat tinned food, and survive at times without electricity"[57].

It is worth quoting Fisse and Braithwaite further on the consequences of this kind of experience.

> Processes of dialogue with those who suffer from acts of irresponsibility are among the most effective ways of bringing home to us as human beings our obligation to take responsibility for our deeds. Traditional courts, where victims are treated as evidentiary cannon fodder rather than given their voice, have tended to be destructive of this way of eliciting responsibility…. Boardrooms and executive suites are hardly the frontiers where victims are harmed, but provide a haven conducive to cosy rationalisations and distorted pictures of actual corporate impacts…. Encountering victims allows the shame of the wrongdoing to be communicated directly to those responsible. The process of encounter also helps to pre-empt or counter efforts by directors or managers to deny the existence of the problem or to neutralize it by means of some self-serving rationalisation. Beyond these salutary effects, encounters with victims provide an opportunity for healing through acceptance of responsibility and putting right the wrong.[58]

This passage is important for more than one reason. It describes very clearly the cathartic effects of meetings between top corporate executives and victims of corporate wrong doing. But beyond this it is interesting for what it says or implies about the responsibility of top corporate executives. It talks about "our obligation to take responsibility for our deeds", about "eliciting responsibility" and about encouraging the "acceptance of responsibility". This is not a fault-based conception of responsibility. The corporations were at fault, as were numbers of their agents. But Fisse and Braithwaite are not talking about the transfer of fault from the corporation to its senior executives, Japanese style. They are talking about how meetings with victims encourage senior executives to accept personal responsibility for outcomes regardless of personal fault[59]. This is precisely Honoré's idea of outcome responsibility.

Senior officers who accept responsibility for outcomes in this way will act decisively to correct the problems that led to the offence. They will not be satisfied with the practices of due diligence which too easily degenerate into rituals to protect senior officers from legal liability. They will be motivated to ferret out errors and wrong doing, not just to ensure that they are personally immune from their consequences.

The consequences for the senior executives described in the life insurance case are precisely the types of consequences that the law needs to impose on senior officers of large corporations when people are killed. Managers who have been in charge of a

mine at which a death occurs will sometimes tell you that it is a life changing experience. They usually know the person killed, sometimes quite well; they are acutely aware of the impact on fellow workers, who may need counseling, and they may have had the unforgettable task of conveying the sad news to the family. What is needed is a legal mechanism for imposing these consequences on senior corporate managers. Chapter 2 described the sense of frustration felt by relatives and friends of the dead Gretley miners at their inability to get senior company people to accept responsibility. Legally imposed outcome responsibility would satisfy this community expectation.

A legal model

I hesitate to propose the precise wording for an amendment to OHS legislation that would achieve this end, since critics will no doubt focus on problems with this particular formulation, without considering the more fundamental issues. But in the interests of concreteness let me suggest one possible model, using the NSW OHS Act as starting point. Section 26 of the Act states that

> (1) If a corporation contravenes … any provision of this Act … each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that:
> (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention …, or
> (b) he or she, being in such a position, used all due diligence to prevent the contravention...

Conviction under this section, involves an inference of fault, that is, that the person did not exercise due diligence. An additional section imposing outcome responsibility might read as follows:

> If a corporation contravenes any provision of this Act, and
> if, as a result of that contravention, a person is killed,
> each director of the corporation, and each person concerned in the management of the corporation, is guilty of an offence,
> unless that person satisfies the court that he or she was not in a position to influence the conduct of the corporation in relation to its contravention

There are a several things to note about this formulation. First, unlike section 26 it only comes into operation if the corporate violation has resulted in harm, in this case, death. In these circumstances it requires the senior officers to accept responsibility for the outcome. Second, it falls short of absolute outcome responsibility. It only comes into operation if death is a result of an offence committed by the corporation. This is probably not a significant compromise since it brings the situation into line with the life insurance case described earlier, in which outcome responsibility was imposed on top corporate officers only after corporate fault had been established. Third, there is no liability if a defendant can establish that the violation and death were not in fact outcomes of the defendant's actions or inactions. Fourth, as with section 26, it targets a potentially large number of senior corporate officers. It would be up to the prosecution to decide which individuals could be most usefully charged, but unlike

section 26 the prosecution would be able to target people at the apex of the corporation.

The penalty under this provision might be to attend a community conference with relatives of the victim to hear their grief and to explain what the corporation intends to do to rectify the wrong and to prevent any recurrence. One goal of such a conference might be for the corporate officer concerned to express an apology that relatives of the victim agree to accept. Relatives might impose a number of conditions on acceptance, such as, that the apology be written and published, that it be accompanied by various promises and so on. Obviously, the processes of the conference would need to be elaborated in detail, perhaps in a code of some sort. There would need to be backup provisions in the event that a senior officer refused to engage in the process or refused to engage in good faith. It might be, for example, that the company itself would be subject to heavier penalties in the event of non-cooperation by its senior executives.

I repeat, this specific legislative formulation is not intended to be the last word; it is sketched here simply to provide an indication of what outcome liability might look like in practice.

Finally, it should be stressed that a provision imposing outcome liability would not replace any existing provision imposing fault-based liability. Where a senior officer is at fault, there may be good reasons to make use of the fault-based provision. For one thing, heavy penalties can be imposed, if appropriate. Secondly, as discussed in the preceding chapter, it may be desirable to take legal action where dangerous conditions have been allowed to persist but simply by luck no one has been killed or injured. Outcome liability is of no use in these circumstances.

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[1] Fisse B &Braithwaite J, (1993), *Corporations, Crime and Accountability*, Cambridge Univ Press: Cambridge

[2] Cressey D, (1988) "The poverty of theory in corporate crime research", *Advances in Criminological Theory* 1:31-56

[3] Foster N, "Personal liability of company officers for corporate OHS breaches: Section 26 of the OHS Act 2000 (NSW)" , *Australian Journal of Labour Law* 18 (2005):107-135

[4] See earlier working papers in this series by the author

[5] See McCallum R, Hall P, Hatcher A, Searle, A (2004) *Advice in relation to workplace death, occupational health and safety legislation and other matters – Report to WorkCover Authority of NSW*. McCallum recommended "a code of practice that identifies the following individual responsibilities of management personnel:

1. the obligations and requirements for an adequate safety management system;
2. the development of a relevant risk assessment plan; and
3. the methodology and strategies required and that should be followed for implementing, overseeing and enforcing compliance with relevant safety management systems". Quoted from NSW WorkCover, *Review of the OHS Act 2000: Discussion Paper*, June 2005, p31.

[6] Wran N & McClelland J, *NSW Mine Safety Review, Report to the Minister for Mineral Resources*, February 2005, pp7,8

[7] quoted in Hopkins, A. (2000). *Lessons from Longford.* Sydney: CCH, p84

[8] Hopkins A (2005) *Safety, Culture and Risk* (CCH: Sydney) , pp89,90

[9] Author's field work

[10] Hopkins, *Safety Culture and Risk*, op cit p10

[11] Author's fieldwork

[12] Honoré T (1999) *Responsibility and Fault*, (Oxford: Hart Publishing)

[13] Op cit p127
[14] personal communication
[15] Gardner J "Obligations and outcomes in the law of torts", in Cane P & Gardner J (2001) *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Hart: Oxford) p131
[16] See for instance the Communion Prayers.
[17]op cit p15
[18]op cit p128
[19]op cit p130
[20]op cit p29
[21]op cit p131
[22]op cit p27
[23] *Bolton v Stone* [1951] AC 850. See Epstein F (1973) "A theory of strict liability", *J of Legal Studies*, 2: 151-204, p169-70
[24] A similar case occurred recently in NSW *Coca Coca Amatil (NSW) Pty Ltd v Pareezer & Ors* [2006] NSWCA 45. A man who had a contract to refill Coca-Cola vending machines at scattered locations was shot and severely injured in a robbery attempt. The Supreme Court ordered Coca-Cola to pay $3million in compensation, but the Court of Appeal ordered the man to pay the money back, finding that Coca-Cola was not legally liable for his injuries. The NSW premier asked the company to show compassion for the man and the union said that Coca Cola had "chosen to refuse to accept accountability for this workplace incident and had left (the man) and his family to fend for themselves without even paying his medical expenses". Clearly, the public perception was that Coca-Cola was responsible for the outcome of the situation it had set up, regardless of fault. (AAP 17/3/2006). The company responded to this perception and agreed to compensate the man an undisclosed amount, even though it was under no legal obligation to do so. It said it "regrets the pain and suffering (the man) and his family have been through and are pleased that he and his family will be able to face the future in a positive way" (AAP 23/3/2006)
[25] Op cit p15
[26] Op cit p31
[27] see Friedman W (1972) *Law in a Changing Society* (Penguin: Harmondsworth), p163. See also Gardner, op cit p 123
[28] op cit p23. See also p 27
[29] op cit p24.
[30] Turner op cit p125,133
[31] Turner's argument applies when the activity is aimed primarily at private benefit. Braithwaite (personal communication) raises the issue of dangerous activities that have great social value, such as peace keeping operations in war-torn countries. Peace keepers might be forced to kill innocent people. Individual peace keepers cannot choose to withdraw from this situation. But a government can. The fact that it chooses not to should not be taken as *increasing* its degree of responsibility for the undesired outcomes. Nevertheless, if peacekeepers are forced to kill innocent people, we would surely want governments to accept some responsibility and may whatever amends are possible.

Honoré's ideas have been exhaustively evaluated in a Festschrift, Cane P & Gardner J (2001), op cit. See also Simons, K (1997) "When is strict criminal liability just?" *The Journal of Criminal Law and Criminology* 87(4):pp1075-1137
[32] Quoted in Finer, S (1956) "The individual responsibility of ministers", *Public Administration* 34:377-395.
[33] Kam C (2000) "Not just parliamentary 'cowboys and indians': ministerial responsibility and bureaucratic drift", *Governance: An International Journal of Policy and Administration*, 13(3):365-391, p366
[34] Prime Minister, "A guide on key elements of ministerial responsibility", Canberra, December 1998, p13
[35] p386
[36] p394
[37] Kam, op cit, p 366
[38] Palmer M, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau - Report*, July 2005, Commonwealth of Australia, pxi
[39] Macintosh A "The buck no longer stops with this government", *The Canberra Times*, 19/7/2005
[40] op cit
[41] Snook S, (2000), *Friendly Fire*. (Princeton Univ Press: Princeton), p235
[42] Nikkei Report "Editorial: TSE Chief needs expertise, leadership ability" 22 December 2005

[43] Pesek W, "The blame game in Tokyo", Commentary Business Asia, Bloomberg News, 26 December 2005
[44] Fisse B &Braithwaite J op cit p112
[45] Duran,P (1937) *Japanese concept of official responsibility* (Manila: general Printing Press), p4
[46] Duran ,op cit, p 12
[47] quoted in Brown W, "Japanese management: the cultural background" pp174-191 in Lebra T & Lebra W (eds) (1974) *Japanese Culture and Behaviour*, (Honolulu: The University Press of Hawaii) p 182
[48] Brown op cit p 187
[49] Fisse and Braithwaite, op cit p 113
[50] Dore R (1973) *British Factory- Japanese Factory* (Berkeley: University of California Press)
[51] ibid
[52] *The Sun Herald*, 27/5/1995, 19/8/1995; *The Sunday Age*, 12/8/1995
[53] op cit, p113
[54] p 31
[55] Braithwaite J (1989) *Crime Shame and Reintegration*, Cambridge, Cambridge University Press
[56] Braithwaite J (2002) *Restorative Justice and Responsive Regulation*, Oxford, Oxford Univ Press), pp24-26
[57] Fisse and Braithwaite, op cit, p 236
[58] ibid
[59] Fisse and Braithwaite conceptualise this a little differently. They argue that the fault or otherwise of senior executives depends on how they *react* to corporate offences. They describe this as reactive fault. On this formulation, where senior executives react in a non-restorative fashion they are personally at fault (1993: 210-213).