RULE OF LAW: RECENT DEVELOPMENTS

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INTRODUCTION

Three recent developments in English law that will be discussed in this paper include; Constitutional changes, the rise of compensation culture and corporate manslaughter.These developments raise issues that other jurisdictions have tried to grapple, and are likely to be significant not only in the United Kingdom but also elsewhere for years to come.

I CONSTITUTIONAL CHANGES

The first development is the Constitutional changes which have taken place involving the office of Lord Chancellor, and the impact of those changes on our judiciary. The underlying issue is the establishment and maintenance of a proper relationship between the executive and the judiciary. In every democratic jurisdiction that ought always to be a matter of continuing concern. For better or for worse Britain has never had a written Constitution, but for centuries before the European Convention on Human Rights was incorporated into English law by the *Human Rights Act 1998* (UK) we recognized the existence of fundamental rights. Some are enshrined in the *Magna Carta* signed by King John in 1215, and in statutes such as the *Bill of Rights 1688* and the *Act of Settlement 1700*. Then there are common law rights, some protected by statute, some not, such as Habeas Corpus, and the right to trial by jury. A written constitution has its advantages. It provides a degree of certainty and is a safeguard against whimsical change, but it can also be cumbersome and difficult to update. As long as our cherished freedoms were not under threat, we were content to go on in the same way that we had always done, hopefully preserving important fundamentals, but feeling free to adjust other matters (like the right to trial by jury in civil actions) as we went along.

Of particular interest to lawyers are matters such as –

1. The promotion of criminal legislation

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* Recently retired Lord Justice of Appeal in the civil and criminal divisions of the United Kingdom Court of Appeal.

2. The Police service

3. The Prison and Probation and after care services

4. The promotion of civil legislation

5. The provision of financing of courts and

6. The provision and financing of a competent and impartial judiciary.

In mainland Europe and in North America for over two hundred years it has been considered necessary in a democratic society to separate powers. In the United Kingdom we have not worried about that, believing, rightly or wrongly, that in our unwritten constitution we have enough checks and balances to prevent abuse. So in the list of matters mentioned above, the Home Office, headed by the Home Secretary, has been responsible for the first three matters, and the Lord Chancellor's Department, headed by the Lord Chancellor, has been responsible for the last three. Generally the system has served us well. The Crown Prosecution Service is independent of the Home Office and the Police Service, and each service is fiercely independent, so there is practically no evidence that inappropriate pressure has been exerted, either horizontally or from the top down.

That brings me to the curious position of the Lord Chancellor. Historically he was a great office holder, the adviser to the Monarch, the keeper of the Great Seal. If he lost the confidence of the monarch he might also lose his head – as St Thomas A Beckett did at Canterbury and St Thomas More did in the Tower of London. With the advent of parliamentary democracy in the 18th century the political status of the Lord Chancellor was over-taken by that of the newly emerged Prime Minister. The Lord Chancellor remained an important figure – always a lawyer, head of the judiciary, presiding by virtue of his office in the House of Lords, and responsible for advising the monarch on the appointment of judges.

Once appointed to the High Court Bench or above, an English or Welsh judge has considerable security. He cannot be removed except by an address of both Houses of Parliament, but in the past it was always possible for a Lord Chancellor to favour those of his own political persuasion. In fact that has not been a serious problem for as long as I remember, and in recent times Lord Chancellors of all political persuasions have taken great care to ensure that so far as possible the best candidates get offered the judicial jobs. Senior civil servants in the Lord Chancellor's Department have made widespread enquiries within the relevant areas of the legal profession to discover which lawyers are regarded as appointable. They have prepared a short list, which the Lord Chancellor has then discussed with senior judges, and the Lord Chancellor has then made up his mind. But that did not satisfy the

British press, which castigated what it described as 'secret soundings'. Gradually we have moved, and are moving, to a system under which vacancies are advertised, and those who apply (on a 24 page form with a 1500 word personal sales pitch) are then interviewed by a panel which reports to a Judicial Appointments Commission. I regard that as a retrograde step, because many of those best qualified, and who in the past have been persuaded by successive Lord Chancellors to accept an appointment, will not apply. They are earning far more than a judicial salary in practice, they are not anxious to accept the restrictions of office, and they certainly do not want to endanger their client base by it becoming known that they have applied for office and have not been appointed. In relation to judicial appointments the past has been sold and I can only hope that time will show that my fears are unfounded.

Of more significance is what happened to the office of Lord Chancellor on 13 June 2003. Previously the Lord Chancellor was responsible for the promotion of civil legislation, the provision and financing of courts, and the provision and financing of the judiciary. He was also a very senior member of the cabinet, usually a career lawyer with strong political ties but with no further political ambitions. Over the last forty years the size of his Department had grown enormously to cope with more civil legislation, more courts, and more judges. For example, in 1960, in addition to the Master of the Rolls there were nine Lords Justices of appeal. When I retired on 30 September 2005, I was one of 37. The the budget of the Lord Chancellor's Department had increased and it had become politically more significant. Past Lord Chancellors have been conscious of their responsibility as head of the judiciary. We require our judges not to engage in politics, and to avoid personal involvement in controversy. The Lord Chancellor traditionally regarded it as part of his responsibility to answer for the judges in public when some question was raised to which an answer was required, and it was often, I believe, to our considerable advantage as a profession that he was a senior member of the cabinet.

But increasingly there were problems. In recent times Lord Chancellors have not often sat as a judge, but they have done so occasionally in the House of Lords, and have presided whenever they sat, because the Lord Chancellor was the head of the judiciary. To our European neighbours that seemed strange, that a politician and a member of the government (albeit an experienced lawyer) should preside in the ultimate court of appeal which itself shared accommodation with the Upper House of Parliament, and that the other members of that court should also be able to participate in debates.

Furthermore, in recent years the judiciary has often found itself at odds with the government of the day, and particularly with the Home Office, on issues such as asylum and immigration, terrorism, and sentencing. The

Lord Chancellor must have had work to do to satisfy his cabinet colleagues that the judiciary was entitled to apply the law as they saw it. Until recently we had a blind but strong-minded Home Secretary named David Blunkett, and an equally strong-minded Lord Chancellor in Lord Irvine. Some of us think that it was a clash of personalities between those two which precipitated the unfortunate events of 13 June 2003. On that day it was suddenly announced that there would be a new Supreme Court to replace the judicial functions of the House of Lords, and that the office of Lord Chancellor would be abolished and subsumed in a new department of Constitutional Affairs. That department was to be headed by Lord Falconer, also a distinguished lawyer, with the title of Secretary of State for Constitutional Affairs. Lord Irvine disappeared from the political scene, but the changes had not been thought through. An office which has existed for hundreds of years simply cannot be abolished overnight. The office holder has too many responsibilities, and in the wake of the announcement made on 13 June 2003 it was necessary to do the work which should have been done in advance. From the outset Lord Falconer made it clear that although he would remain as a caretaker head of the judiciary, he would not sit as a judge. None of us had any difficulty with that. He also endorsed the process, started under Lord Irvine, of handing over to a judicial appointments commission the responsibility for judicial appointments. In principle again most of us, I suspect, have little difficulty with that, even if we regard the appointments procedure now envisaged as expensive, cumbersome and likely to be counter-productive.

But if the Lord Chancellor ceases to be head of the judiciary who takes his place? Who will be responsible for the deployment of judges, for handling public relations, for speaking on behalf of the judges, for discipline, and for the control of budgets? Those are questions to which the announcement of 13 June 2003 provided no answer, but they were questions which the then Lord Chief Justice, Lord Woolf at once raised on behalf of the judiciary, and which he and Lord Falconer set about trying to answer. With good will on both sides and a lot of hard work they arrived at what has become referred to as 'the concordat'. It undertook to transfer to the Lord Chief Justice the responsibility of being head of the judiciary, and promised to provide him with the staff and resources with which to fulfill that role. The post of Lord Chancellor, in an emasculated form, was to survive, but it would be no longer necessary for the office holder to sit in the House of Lords, or even to be a lawyer. The contents of the concordat are now embodied in the *Constitutional Reform Act 2005* (UK). Fortunately the contents of the concordant were not politically contentious, but it and the *Constitutional Reform Act 2005* are vital documents if the position of the judiciary is to be put on a sound footing for the immediate future. One of the matters covered by the *Constitutional Reform Act 2005* is

the establishment of a judicial appointments commission independent of government. It will have a lay chairman and five other lay members with an equal number of judicial members. There will also be a barrister, a solicitor, a magistrate and a tribunal member, and no member of the commission can be a Member of Parliament or a candidate for a parliamentary election or a civil servant. It will recommend the candidate to the Secretary of State or Lord Chancellor, and if he does not accept the first recommendation he can ask for it to be reconsidered, but in the last resort he cannot reject it. Deployment and judicial training remain matters for the Judges, discipline becomes a matter for the Lord Chief Justice and Lord Chancellor to deal with jointly. The Lord Chief Justice is to have the resources necessary to fulfill his enlarged role including, for example, a media relations office. Judicial pay, pensions and terms and conditions of service remain the responsibility of the Lord Chancellor or the Secretary of State.

It is proposed that in due course the members of the judicial committee of the House of Lords will go to a new Supreme Court, and will cease to have the right to be heard as members of the House of Lords in debate (although the Lord Chief Justice will have a right of audience). However, there is some difficulty in identifying a suitable building for the new Supreme Court, and, as so often, the sticking point in the end is, at least in part, money. For understandable reasons the government does not want to expend any large sum on the project, but if and when a suitable building can be found the Law Lords will, it seems, move out of the Palace of Westminster. However they will not get extra powers such as the power to strike down primary legislation which is enjoyed by the United States Supreme Court.

Obviously the new arrangements, like the old, require that a good working relationship is maintained between the Lord Chancellor Secretary of State and the senior judiciary. In reality that has been and should remain achievable. Many duties have to be discharged by the Lord Chief Justice in consultation with the Lord Chancellor, or vice versa.

So what has been achieved by this upheaval? Is there a better basis for the relationship between the executive and the judiciary than there was prior to June 2003? As to that I can offer no firm answer, and time will tell, but two things can be said:

1. Judicial appointments will be more transparent, but I doubt if they will be better, and some good potential appointees will almost certainly be lost. The Lord Chancellor is very anxious to encourage a wider selection of people to apply for judicial office. In principle there can be no complaint about that, but it was not necessary to change the appointments procedure to achieve that end, and on any view the new system will be a lot more expensive than its

predecessor. It may also, despite the best endeavours of those who framed the concordat, be capable of being politicised through appointments to the judicial appointments commission.

2. The Lord Chief Justice should, in my view, be first and foremost a judge, not the head of a mini government department with all that entails. Our judges have frankly little or no experience of administration, and I fear that sooner or later that may become all too apparent.

But let us wait and see.

II COMPENSATION CULTURE

The second development is the escalation of personal injury claims and their impact upon not only insurance companies but also upon the lives of all of us. In other words what is sometimes referred to as the 'compensation culture'. I know this has been troubling Australian legal systems for some time, because it was the subject of an address by the Chief Justice of New South Wales in London in June 2004[1]. Our politicians rail against it, but so far they have not done much about it, except to encourage the public to believe that whenever a misfortune occurs someone ought to pay. In an article published in August 2004 David Davis, the shadow Home Secretary, pointed out that compensation claims against schools and hospitals had doubled since 1997, so that in 2003 schools paid out £200 million in compensation, the equivalent of 8000 new teachers, and hospitals paid out £480 million, the equivalent of 23000 new nurses.[2] Not surprisingly local authorities do try to take protective measures. They cut down trees, fill in ponds, and curtail school trips if they might involve any form of risk. Doctors, it is said, practice defensive medicine, and private sector employers face huge increases in premiums because the cost of compensation is said to be rising 15% per annum[3]. There are also hidden costs. The Ministry of Defence estimates that hidden costs are six times what is paid out, and so there is always a powerful incentive to settle doubtful claims.[4]

The compensation culture may well have been encouraged by the conditional fee arrangements which we introduced in England in

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1 Chief Justice Spigelman, 'Tort Law Reform in Australia' (Speech delivered to the Anglo-Australian Lawyers Society and the British Insurance Law Association, Lincoln's Inn, London, 16 June 2004).

2 Andrew Sparrow, 'Make it harder to sue, say Tories', *Telegraph* (London), 20 August 2004.

3 Association of British Insurers *Response to the Department of Work and Pensions Review of Employers' Liability Insurance* (February 2003), para 2.2.2.

4 Comptroller and Auditor General, *Ministry of Defence:Compensation Claims*, House of Commons Paper No 957, Session 2002-2003 (2003) 1.

1999[5], but that is not the only cause. When I was at the bar up to 1983 most personal injury claimants were supported by their trade union, or by the Legal Aid Fund, which had a reasonably effective screening process to weed out claims which were unlikely to succeed. If a claim was not settled and went to trial the hearing was usually quite short, perhaps half a day, and the costs were not enormous. We had long since abandoned juries in personal injury actions, and only gradually were judges resorting to reported cases to decide the level of the damages to award. As they did so damages rose – faster than the rate of inflation – and a more structured approach began to be adopted. In serious cases separate awards would be made for the cost of care, suitable equipment, and accommodation. To deal with such claims evidence was required from care experts, architects and accountants, so trials became longer and costs increased.

But what has really troubled insurers over the last decade or so has been the obligation to pay damages in respect of risks of which they had been unaware, such as mesothelioma manifesting itself long after exposure to asbestos. Very often until the condition began to manifest itself there was little if any appreciation of the risk, so the employers had never been called upon to pay an appropriate premium, and stale claims are inherently very expensive to investigate and difficult to meet.

On top of all of that there came conditional fees, and after the event insurance, justified politically by the assertion that the burden of Legal Aid generally had become unsustainable, and that the changes would render justice more accessible. As to that I remain unconvinced, not least because over-spending on Legal Aid was largely attributable to other types of litigation. Of course the advent of contingency fees increased the costs which employers and then insurers have had to pay to settle claims, and that increase – said to be of the order of 25 to 30%[6] - has far outweighed any advantage to employers and their insurers arising from their increased ability to recover costs when a claim fails. Parts of the costs are those of claims management companies and the ambulance chasers, who have deservedly received a bad press.

Initially insurers did not pass their problems on to employers by means of higher premiums largely, it seems, because one competitor in the insurance market was charging premiums so low as ultimately to result in insolvency. Then the bubble burst. The remaining insurers raised their premiums sharply, and in fact five multinational companies write 70% of

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5 *Access to Justice Act 1999* (UK) s27.

6 Association of British Insurers *Response to the Department of Work and Pensions Review of Employers' Liability Insurance* (February 2003), para 2.2.5.

the UK business[7]. Some employers operating in high risk areas found it very difficult indeed to get insurance at a price they could afford, and both in government and in the City of London, people began to get worried. If employers cannot get employers' liability and public liability insurance at a realistic price they have two options – they can either eliminate exposure by going out of business, with the result that the service they previously offered becomes unobtainable or they can expose their employees and others by trading illegally uninsured. If in due course they cannot meet an obligation that will probably become yet another burden on the insurers who continue to operate in the field.

To some extent the problem is of our own making. We need never have had contingency fees with uplifts for success, and after the event insurance, and the English Bar did try unsuccessfully to persuade the government not to go down that road. As you may have gathered I believe that the bar was right and the government was wrong. Quite apart from anything else I fail to see how a lawyer can be sure of representing the best interests of his client when he also has his own financial interests to serve, and what happens to those claims which ought to be ventilated, but which have only a slender chance of success? Is justice still as accessible to those potential claimants as it was under Legal Aid?

In June 2003 the Office of Fair Trading reported on the UK liability insurance market[8]. It found that the effect of rising premiums was uneven. Small and medium-sized businesses, and those in high risk sectors, were hard hit. Not only were premiums being increased but insurers were also imposing exclusions and restrictions. 40 % of claims expenditure was found to be attributable to legal costs, a rise of about 25 – 30%[9], and actual awards of damages were said to be rising at about 15% per annum even though inflation was running only at about 3%[10]. In response to an enquiry by the Department for Work and Pensions, the National Federation of Roofing Contractors estimated the general increase in premiums for members during 2001/2 to be 161%[11]. Surprisingly 93% of small businesses were said to be still insured[12], but one major insurer put that

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7 Association of British Insurers *Response to the Department of Work and Pensions Review of Employers' Liability Insurance* (February 2003), para 3.15.

8 Office of Fair Trading, *Liability Insurance: A report on an OFT fact finding study* (2003).

9 Office of Fair Trading, *Liability Insurance: A report on an OFT fact finding study* (2003) 46.

10 Office of Fair Trading, *Liability Insurance: A report on an OFT fact finding study* (2003) 51.

11 Department for Works and Pensions, *Review of Employers' Liability Compulsory Insurance* (2003) 6.

12 Department for Works and Pensions, *Review of Employers' Liability Compulsory Insurance* (2003) 6.

figure at only 87%, with 210 thousand small businesses employing 1.8 million people at risk because no insurance cover was in place[13]. The Department for Work and Pensions did not suggest that insurers were overcharging – in fact insurers were said to have made an underwriting loss of £761 million between 1997 and 2002[14] – and the Department for Work and Pensions observed: Whilst it is compulsory for employers to have EL insurance, it is not compulsory for insurers to provide it. Although there is no evidence that any of the major insurers are planning to withdraw from the EL market, this option does exist.[15]

Potentially for insurers, things may get worse, for example if, as proposed, settlements in personal injury claims become reviewable. Clearly for a claimant that has attractions, but how do you evaluate and convert into a premium payable now the possibility of an uplift in 15 - 20 years time?

It would not be right to say that nothing has been done to address these problems. Fees have been fixed in relation to claims arising out of road accidents, and in July 2003 the House of Lords held that it was unreasonable to expect a local authority to protect a claimant from injuries he suffered when he dived into a shallow lake[16]. Some say that struck a blow for freedom, ending the concept that it is always possible to find some one else to blame, even if one falls victim to a danger which most of us would consider to be obvious, but the claimant had succeeded in the Court of Appeal, and I am by no means convinced that the decision of the House of Lords is really a judicial watershed. No doubt it has encouraged other judges to find for local authority defendants, but reports of strange claims still abound. The University of Kent was apparently sued by a student caught plagiarising on the grounds that he had been doing it for years and his teacher should have spotted it earlier[17]. I gather that his claim did not succeed but on 21 November 2005 the Times newspaper reported that in Scotland a 22 year old chef received an award of £3000 from his hotel employers when he cut his hand with a knife while attempting to prepare an avocado[18]. He asserted that no one had warned him about the danger of attempting to cut one which was unripe.

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13 Department for Works and Pensions, *Review of Employers' Liability Compulsory Insurance* (2003) 31.

14 Department for Works and Pensions, *Review of Employers' Liability Compulsory Insurance* (2003) 7,36.

15 Department for Works and Pensions, *Review of Employers' Liability Compulsory Insurance* (2003) 55.

16 *Tomlinson v Congleton* B C [2004] 1 AC 46.

17 BBC News, ' 'Plagiarist' to sue University' <http://news.bbc.co.uk/2/hi/uk_news/education/3753065.stm> at 16 August 2006.

18 BBC News *'Chef sues hotel over cut finger'* <http://news.bbc.co.uk/1/hi/scotland/3367335.stm?ls> at 16 August 2006.

Another problem is that a surfeit of unmeritorious claims increases the difficulty of dealing properly with meritorious claims. On 27 May 2004 the Better Regulation Task Force, a government appointed advisory group, reported the results of a ten month study of compensation litigation[19]. It concluded that the compensation culture is a myth, to the extent that bad claims do not succeed, but accepted that the perception that the culture does exist is real, and troublesome[20]. I agree that if a claim is manifestly absurd no employer or insurer will pay out, and hopefully no judge will order them to do so, but the situation is not always that clear cut, and almost any claim which has any potential has a nuisance value. The Better Regulation Task Force drew comfort from the fact that the number of accident claims registered had been falling, and pointed out that, unlike the United States, we have a system where costs generally follow the event[21], so it is not in the interests of claimants or their lawyers to pursue hopeless claims. However, the Better Regulation Task Force recognised that if the introduction of 'no win no fee' arrangements and the emergence of claims management companies has increased access to justice[22], as to which in the field of employer's liability I would reserve my position, those changes have certainly encouraged people to "have a go". 85% of local authorities reported an increase in the cost of handling compensation claims[23], many of them vexatious or frivolous, and some of the advertising which has been put out by claims management companies, and some solicitors, is mischievous and disgraceful. For example, the telephone numbers of claims management companies have been printed on hospital and doctors appointment cards – presumably as a result of a National Health Service initiative to obtain some easy revenue – and one shocking poster of a patient on crutches bears the legend 'did the doctor or nurse make you worse? We can get you compensation!'. That kind of poster has apparently frequently been displayed on hospital premises, and no doubt contributes to the atmosphere which encourages senior staff to seek early retirement at a time when we desperately need their services. As the Better Regulation Task Force noted:

> The fear of litigation does change behaviour … pharmaceutical companies are more wary about developing new drugs for fear of litigation, and some doctors prefer to carry out a caesarean section to a natural birth because it is perceived as less risky … excessive risk aversion is not helpful to the UK's prosperity nor well-being.[24]

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19 Better Regulation Taskforce, *Better Routes to Redress* (2004).
20 Better Regulation Taskforce, *Better Routes to Redress* (2004) 4.
21 Better Regulation Taskforce, *Better Routes to Redress* (2004) 16.
22 Better Regulation Taskforce, *Better Routes to Redress* (2004) 6.
23 Better Regulation Taskforce, *Better Routes to Redress* (2004) 7.
24 Better Regulation Taskforce, *Better Routes to Redress* (2004) 19.

Things may improve as claims management companies are better regulated by statute, as is now proposed. The Better Regulation Task Force made a number of recommendations which are worthy of consideration, such as increasing the personal injuries jurisdiction of the small claims track, more emphasis on mediation, and real emphasis on rehabilitation where, by contrast with other countries, the UK is weak[25]. The International Underwriters Association say that the chance of a paraplegic returning to work is at least 50% in Scandinavia, 32% in the USA, but only 14% in the UK[26]. The Association of British Insurers said in March 2003 that real savings in that area could amount to £1.3 billion[27]. No one who reads the review in full can be left with the impression that the present situation is acceptable.

Nevertheless predictably here has been a tendency to cherry-pick. On 1 June 2004 one leading London solicitor in the personal injuries negligence field asserted in an article in the Times that the whole debate about compensation culture in relation to personal injury claims "highlights how inequality remains entrenched in British Society"[28]. It was, to my mind, a silly and sanguine article. It may be true that, as the writer asserted, 'the total amount spent annually by the National Health Service on compensation and legal costs is significantly less than 1% of the entire National Health Service budget; roughly one quarter of what most businesses expect to have to pay for indemnity insurance'[29].But the National Health Service is not a commercial organisation making and selling goods for profit, and what about the hidden costs and the social problem of defensive medicine? Everyone wants to see genuine claims properly met, but to say that we can go on as we are because of the unavailability of punitive damages and that our rules in relation to costs will protect us from following the American route is, I believe, unreasonably optimistic. Furthermore, it is not only claims management companies who are aggressively touting for business. As recently as 27 August 2004 there was a report of a Birkenhead solicitor who wrote to 650 General Practitioners in Merseyside offering them £175 for each patient they referred to his firm[30]. No doubt such behaviour can be justified, but to my mind it is distasteful and dangerous.

After the publication of the Better Regulation Task Force report the then Master of the Rolls, in an interview which he gave to the Independent

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25 Better Regulation Taskforce, *Better Routes to Redress* (2004) 8-11.
26 Better Regulation Taskforce, *Better Routes to Redress* (2004) 33.
27 Better Regulation Taskforce, *Better Routes to Redress* (2004) 33.
28 Russell Levy, 'Compensation Culture: myth or reality?', *The Times* (London), 1 June 2004.
29 Russell Levy, 'Compensation Culture: myth or reality?', *The Times* (London), 1 June 2004.
30 *Medics Slam 'Money for Referrals'* (2004) BBC News <http://news.bbc.co.uk/2/hi/health/3604174.stm> at 29 May 2006.

Newspaper, warned that Britain was edging closer to the compensation culture of the United States where swings and slides are routinely removed from playgrounds to avoid the parents of injured children bringing claims for damages[31]. He urged local authorities to show courage in the face of such claims, but the newspaper article noted that the claims against the National Health Service are rising 10% per annum, and claims against local authorities topped £117 million in 2003, with schools and the police also being affected[32].

I know that in Australia the problem has been recognized and addressed. As Chief Justice Spigelman said in London, 'Insurance premiums for liability policies can be regarded as in substance a form of taxation imposed by the judiciary as an arm of the state'[33]. That is not an approach which had previously occurred to most of us but it makes a forceful point.

I gather that in New South Wales after re-insurers were hit by 9/11, and after considering the results of a government enquiry, significant changes have been made. When considering what risks should be foreseen and guarded against, no claimant can succeed unless he can show that the risk of injury was not insignificant, and the court will also look at the probability of harm; whether if injury occurred it was forseeably likely to be serious; the burden of taking precautions and the social utility of the activity involved. Public authorities are now able to invoke the wider public interest, including competing demands on resources. Volunteers and those who act in self-defence in response to criminal conduct are better protected, and an insured person is deemed to have been aware of any obvious risk. Significantly, from our point of view, an apology cannot constitute an admission, so an employer or a doctor can express sorrow for a result without compromising his or her position. In calculating damages and costs thresholds, caps have been introduced, and, not-surprisingly, there has been a dramatic fall in the number of claims. I know that New South Wales is not alone in the changes it has made, and that other changes are or were in prospect. The progress in Australia contrasts with the United Kingdom's half-hearted response.

On 2 September 2005 the Lord Chancellor introduced into the House of Lords the Compensation Bill [HL]. Clause 1 reads:

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31 Robert Verkaik, 'Compensation culture harms British way of life, says judge', *The Independent* (London), 21 June 2004.

32 Robert Verkaik, 'Compensation culture harms British way of life, says judge', *The Independent* (London), 21 June 2004.

33 Chief Justice Spigelman, 'Tort Law Reform in Australia' (Speech delivered at the presentation to the London market at Lloyds, Lincoln's Inn London, 16 June 2004.

> A court considering a claim in negligence may, in determining whether the defendant should have taken particular steps to meet the standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might –
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> a) prevent a desirable activity from being undertaken at all, to a particular extent or in any particular way, or
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> b) discourage persons from undertaking functions in connection with a desirable activity.

So far so good, but that is all. The rest of the Bill is entirely concerned with the regulation of claims management services, the continued existence of which is assumed to be necessary. As to Clause 1 the explanatory notes say, 'This provision reflects the existing law and approach of the courts as expressed in recent judgments of the higher courts.'[34]

What, one may be forgiven for asking, does that achieve?

In my view the reality is that in the United Kingdom so far, practically nothing has been done to address a problem which we all know exists. Premiums cannot simply be allowed to escalate on the basis that somehow or other they will be paid. The whole concept of contingency fee litigation needs to be re-considered, preferably with a recognition that tightly controlled legal aid funding could probably be paid for several times over if it filtered out spurious claims against public bodies such as local authorities, schools and the National Health Service. Such bodies and the judiciary should all do what they can to resist frivolous claims, especially those which seek incrementally to extend the duty of care. We need to look again at rehabilitation, and at what Australia and others have been doing. No justice of any kind will be done unless our arrangements for compensation both now and in the long term are economically viable and, so far as possible, fair.

III CORPORATE MANSLAUGHTER

The third development is Corporate Manslaughter. In English law, as it stands at present, a person can only be convicted of murder if it is proved that he intended either to kill or to do really serious bodily harm. In certain circumstances the crime may not amount to murder because some mitigating circumstance is present, such as provocation or diminished responsibility, and then the verdict will be manslaughter. That type of manslaughter is commonly known as voluntary manslaughter, but there is another type of manslaughter, involuntary manslaughter,

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34 Explanatory Notes, Compensation Bill [HL] 2005, 12.

where it cannot be shown that there was any intent to kill or to do grievous bodily harm, but death has been caused by a criminal act involving some risk of injury to another person, or by gross negligence.

At the beginning of the 20th century it was thought that a company could not be guilty of manslaughter because homicide required the killing to be by a human being. In 1927 an indictment charging manslaughter was quashed because the judge said that he was bound by previous decisions to hold that a corporation could not be convicted of any felony or misdemeanour involving violence to human beings[35]. Unlike civil law, criminal law does not normally recognize the possibility of vicarious liability, so even if a particular servant of a corporation can be shown to have been grossly negligent his employers will not be held to be vicariously responsible. There are limited exceptions to that principle in the case of public nuisance, criminal libel, and in the case of statutory offences, but we can leave the exceptions largely on one side because manslaughter is a common law offence. Those exceptions did, however, demonstrate that there was nothing inherently repugnant about the notion of a corporation being held responsible for a criminal act, and in 1944 the English courts began to adopt a different approach to corporate liability, which became known as the identification principle. The approach first emerged in a case concerned with wartime regulations[36]. The defendant corporation was alleged to have made use of a false document with intent to deceive, and to have made a statement in a document which it knew to be false in a material particular. The magistrates were satisfied that the senior servants in the corporation knew the statement to be false, and used the document with intent to deceive, but they felt unable to impute the required mens rea to the corporation. That problem was addressed by the then Lord Chief Justice in the Divisional Court when he said 'Although the directors or general managers of a company are its agents, they are something more, a company is incapable of acting or speaking or even thinking except in so far as its officers have acted, spoken or thought …'[37]

That approach, namely that some servants of a company of sufficient seniority could be said to represent the company, opened the way to the possibility of a company being charged with involuntary manslaughter, and in particular manslaughter where death could be said to have been caused by gross negligence.

But the offence was not easy to prove. Approximately 20 years ago a cross-channel ferry called the 'Herald of Free Enterprise' set off from

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35 *R v Cory Brothers Ltd* (1927) 1KB 810.
36 *DPP v Kent and Sussex Contractors Ltd* (1944) 1 KB 146.
37 Lord Caldecote CJ, *DPP v Kent and Sussex Contractors Ltd* (1944) 1 KB 155.

Zeebrugge before its bow doors had been fully closed. Water entered and the ferry capsized with a considerable loss of life. A prosecution for manslaughter was launched against P & O European Ferries and a number of individual defendants. The prosecution came to an end when the experienced trial judge ruled that before the company could be convicted, one of the individual defendants who could properly be said to be acting as the embodiment of the company would have to be convicted[38]. There was not sufficient evidence to convict any individual defendant. As the judge said, English criminal law did not recognize the possibility of guilt being aggregated[39].

Needless to say the families of the deceased and the press were not happy with the result, and the difficulty of proving manslaughter against a company was thereafter illustrated time and again when other disasters occurred. For example, in August 1989 the Thames dredger 'Bow Belle' collided with the river cruiser 'Marchioness' and 51 people lost their lives. Two juries failed to agree whether the captain of the dredger had failed to keep a proper lookout, and an attempt to bring a private prosecution for manslaughter came to nothing. There were also several serious accidents connected with the operation of the railways, each of which could be said to have given rise to a public belief that in some way or another the operating company must have been to blame, but no manslaughter conviction ever ensued.

Large corporations seemed to be almost immune from prosecution despite their ability to cause substantial loss of life. Small corporations, by contrast, were not so lucky because if gross negligence and causation could be proved it was not too difficult to identify the individual who represented the mind of the company. Thus in 1994, for the first time in English history, a company was convicted of manslaughter, but only because it was a one man concern[40]. The case concerned the organisation of a canoe trip for young people. The managing director was the company's directing mind, and the company's liability was established automatically by his conviction.

In 1995 the Law Commission produced an excellent report on involuntary Manslaughter with a draft Involuntary Homicide Bill[41]. It proposed some changes to the law of manslaughter relating to individuals, including the creation of an offence of killing by gross carelessness, and the creation of an offence of corporate killing roughly

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38 R v P & O European Ferries 93 CAR 72.

39 R v P & O European Ferries 93 CAR 72.

40 R v Kite & OLL Ltd (Unreported, Winchester Crown Court, 8 December 1994).

41 The Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, LAW COM No 237 (1995).

corresponding to killing by carelessness. In each case it would have to be shown that the conduct causing death fell far below what could reasonably be expected. It would not have to be shown that the risk was obvious or that the defendant corporation was capable of appreciating it, and a death would be regarded as having been caused by a defendant corporation if it was shown to be caused by a failure in the way in which the corporation's activities were managed or organized to ensure the health and safety of persons employed in or affected by those activities. In other words the proposal was to shift the focus away from individual servants of corporations, and to look at the conduct of the corporation's operations. Was there a management failure which caused death?

The Law Commission draft bill never reached the statute book, and whenever a disaster occurred there was vocal discontent, enhanced by a culture which increasingly wants to be able to find someone to blame. In fact corporations did not escape, and were frequently convicted under Health and Safety legislation, which gives courts power to impose substantial fines, but that was not perceived to be enough, and the Government has now produced its own draft bill to reform the law in relation to corporate manslaughter[42]. It is unlikely to be enacted before the end of 2006, but it is an appropriate time to look at some of its provisions, and consider what, if anything, it will achieve. Will it, in particular, improve health and safety, or will it turn out to be no more than a political gesture designed to placate the tabloid press?

By clause 1(1) it is proposed that a corporation will be guilty of corporate killing if :

> The way in which any of its activities are managed or organised by its senior managers –
>
> a) causes a person's death, and
>
> b) amounts to a gross breach of a relevant duty of care owed by the organization to the deceased.

Clause 2 defines a senior manager. He is a person who plays a "significant role" in either making decisions in relation to or actively managing or organizing "the whole or a substantial part of the undertaking". So some aggregation of blame is envisaged, and the net is cast wider. The target employees do not have to be the directing minds of the company, but there will of course still be problems as to who, in any given case, is a senior manager. There will also be problems in relation to attribution and causation – can it be shown that they managed or organized the activities of the company in a way that caused death? Even if that hurdle can be overcome, in order to establish

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42 *Corporate Manslaughter: The Government's Draft Bill for Reform*, Cm 6497 (2005).

criminal liability on the part of the company it must be shown that the input of the senior managers amounted to a gross breach of a relevant duty of care owed by the organization to the deceased. Gross, according to clause 3(1) means conduct falling far below what could reasonably be expected of the organization in the circumstances. So clearly it is envisaged that there will only be a manslaughter prosecution in some very serious cases. Other cases will be left to be dealt with under health and safety legislation.

If manslaughter is proved against a corporation there will be the possibility of an unlimited fine, and of remedial orders which, if not complied with, will attract a further fine[43]. It has been said that the power to make remedial orders should be sparingly used because a court familiar only with the facts of one case may have no real appreciation of the possible impact of a remedial order on the industry as a whole. Senior managers will not themselves be found guilty of corporate killing. They can be prosecuted individually for manslaughter if the evidence against them is sufficiently strong. Otherwise, in appropriate cases, they can be prosecuted for offences under the *Health and Safety at Work Act*, and a conviction under that Act can result in an order disqualifying an individual from acting as a director, so the sanctions are there[44].

But what will it all achieve? Are we too much concerned with attributing blame rather than focusing on what can be done to improve safety? Will the new Act simply result in further precautions being taken to ensure that if anything does go wrong senior management cannot be held to blame?

Gross negligence will still be an essential ingredient of the offence of corporate manslaughter, and it is not easy to prove. When directing a jury in a recent case where a doctor was accused of manslaughter the trial judge said, 'Mistakes, even very serious mistakes, and errors of judgment, even very serious errors of judgment, and the like, are nowhere near enough for a crime as serious as manslaughter to be committed …'[45] The judge went on to say that what was required was:

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43 *Corporate Manslaughter: The Government's Draft Bill for Reform*, Cm 6497 (2005) 20.

44 The Company Directors Disqualification Act 1986 s.2(1) empowers a court to make a disqualification order against a person convicted of an indictable offence in connection with the promotion, formation, or management of a company. This provision is applicable to directors and to managers who have been convicted of individual offences under SS. 7,8 and 37 of the *Health and Safety at Work Act*. They relate to a person's suitability to fulfil the role of a director.

45 Judge LJ, *R v Misra* (2004) EWCA Crim 2375.

> Something … truly exceptionally bad, and which showed such an indifference to an obviously serious risk to the life of (the deceased) and such a departure from the standard to be expected as to amount … to a criminal act or omission, and so to be the very serious crime of manslaughter.[46]

That definition has been approved at appellate level, and it sets the standard very high.

As a result of the new legislation there may be the occasional conviction of a corporation after a major disaster, but that will not satisfy public expectations raised by the clamour of the media. As to the relatives of victims they will probably never be satisfied with anything less than the liquidation of the offending corporation, and the imprisonment of all of its directors, so the political attempt to satisfy public expectations by making it easier for a corporation to be convicted of manslaughter is probably doomed to failure. And it is permissible to ask whether the game is worth the candle. Under Health and Safety legislation courts already have in reality all of the powers which they would be able to exercise if there was to be a conviction of a corporation for manslaughter. All that is missing is the name of the offence, and it may well be that prosecutions for statutory offences, although less dramatic, can be more effective. Instead of trying to reform the law in relation to corporate manslaughter should we perhaps abolish it? I do not know.

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46 Judge LJ, *R v Misra* (2004) EWCA Crim 2375.