

Document name: Blood in the bank: social and legal aspects of death at work  
Document date: 2000  
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OpenLearn Study Unit: Corporate responsibility for industrial accidents  
OpenLearn url: [www.open.edu/openlearn/money-management/corporate-responsibility-industrial-accidents/content-section-0](http://www.open.edu/openlearn/money-management/corporate-responsibility-industrial-accidents/content-section-0)

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## **Blood in the bank: social and legal aspects of death at work**

*By Gary Slapper*

Extracts from Slapper, G. (2000) *Blood in the Bank: Social and Legal Aspects of Death at Work*, Advances in Criminology, series editor D. Nelken, Ashgate, Aldershot.

# Blood in the bank: social and legal aspects of death at work

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## Extract 1 (pp. 115–17)

Owing to various factors of social and historical development it is very common for deaths at work to be perceived as ‘accidents’ or, in any event, if they are wrongs, they are seen as wrongs which are suitably dealt with as infringements of regulatory legislation.

Popular ideas and implicit assumptions play a part in determining how the criminal justice system operates. In discussing the law which prevents sleeping in public transport facilities in many states of the USA, Chambliss and Seidman point out (1971, p. 82) that the conduct at which the law is aimed is clearly defined, but in practice certain types of people sleeping in the stations will be treated differently from others. A homeless, unwashed vagrant will be treated differently from a neat executive who has nodded off whilst waiting for a commuter train, even though both people are asleep in a station.

Quite often, decisions of police officers which stem from factual interpretations are presented as legal and lapidary. Police officers who, without properly investigating the background to the death, deem a work site death ‘accidental’, are making a factual, personal, subjective, evaluation. They are unlikely, however, if especially challenged, to defend their judgement as legal. Coroners who arrogate to themselves the decision as to whether a death *could be regarded as* an unlawful killing are doing the same thing in cases where there is evidence that could ‘not be rejected as worthless or incredible’ (*R v. Greater London Coroner ex parte Diesa Koto* [1993]). The reason for this, arguably arrogant, stance which dresses opinion in a little brief authority is that the question whether a particular matter is one of law or fact is a question of *law*.

The reasons why HSE inspectors have not always investigated directors after someone has been killed at work is partly because of limited time and resources (James, 1992, p. 98) but also because of commonly held notions about the nature of serious crime. As Quinney (1970, p. 16) has observed, ‘crime is not inherent in behaviour but it is a judgement made by someone about the actions and characteristics of others’. Coroners may be seen to share that same sort of assumptions as police officers and HSE inspectors. Such an outlook is the product of the axioms arising from the society we inhabit.

When interviewing coroners, HSE inspectors, police officers, lawyers and CPS counsel in the cases which informed this project, I found one fairly

common perception which is appropriate to adumbrate before looking in closer detail at the views of the separate occupational groupings.

Put in its simplest form it is this. The type of employers' risk-taking that results in death is not really criminal, it is a legitimate and proper cost-benefit calculation process gone wrong. This is very different from the youth who drops a brick from a supermarket roof believing it may or may not hit someone. The employer has a legitimate ulterior purpose in taking a risk with his employee: the creation of goods, services and employment. The youth with the brick has no such justification.

The essence of 'gross negligence' as it applies in criminal law is the taking of 'an unjustifiable risk'. Not all risk-taking constitutes recklessness. Leading authors on criminal law put it this way (Smith and Hogan, 1996, p. 64):

Sometimes it is justifiable to take a risk of causing harm to another's property or his person or even causing his death. The operator of an aircraft, the surgeon performing the operation and the promoter of a tightrope act in a circus must all know that their acts might cause death but none of them would properly be described as reckless unless the risk he took was an unreasonable one ... *whether it is justifiable to take a risk depends on the social value of the activity involved* relative to the probability and gravity of the harm involved [emphasis added].

If someone pushes a piece of concrete off a bridge on to an oncoming train, sincerely hoping it will hit only the roof of the train and frighten passengers, he will be guilty of manslaughter if it goes through the driver's window and kills him. The risk cannot be justified as there is no social value in throwing concrete at trains.

This issue of 'social value' being capable of offsetting risk becomes critically important in the context of employment (Pearce and Tombs, 1990; Tombs, 1995). There are case precedents which address this point squarely and conclude that in order for industry to work it is necessary for people to be exposed to a certain degree of risk – the world would be a safer place without railways and roads but there would be a high price in comfort and convenience to pay. The level of risk an employer may expose his workers (and the public) to is a question whose answer depends not just on ideal safety but also on economic questions. In one case (*Stokes v Guest* [1968]) the plaintiff's husband was frequently required by the defendants, in the course of his employment as a tool setter, to lean over oily machines; he died of scrotal cancer. The plaintiff alleged that the defendant company ought to have known of the risks of this disease and were negligent in not warning her husband and in not giving periodical examinations. The question arose whether the company, through their full-time doctor, Dr Lloyd, had been negligent. In the course of his judgement, Swanwick J, said:

... a factory doctor, however, as emerged from the evidence, when advising his employers on questions of safety precautions is subject to pressures and has to give weight to considerations which do not apply as between a doctor and his patient and is expected to give and in this case regularly gave to his employers advice *based partly on medical and partly on economic and administrative considerations*. For

instance, he may consider some precaution medically desirable but hesitate to recommend expanding his department to cope with it, having been refused such an expansion before; *or there may be questions of frightening workers off the job or of interfering with production* [emphasis added].

There was in this case an example of the last type of consideration. In a memorandum to the defendant's labour manager, Mr Powis, on the subject of a worker called Aldridge who had been advised by his GP and a Dr Senter to cease working in oil or risk getting scrotal cancer, Dr Lloyd disagreed with what the courts had heard was 'high-powered medical opinion' and urged the man to stay on at work and keep up his earnings. The memorandum finishes: 'If we all took the medical advice given in this case, we might as well close the works and much of British industry'.

The alarmingly callous cost-benefit calculation made by Ford in the Pinto case which measured the cost of prospective deaths from burning against the cost of recalling and refitting an unsafe car, is really one which is regularly made in industry and commerce. The real difference here may just have been the company getting caught with an internal memo which showed the cost-benefit calculation (Dowie, 1977).

The point here is that when death results from unsafe work practices, the context of employment presents a *prima facie* excuse of a wrong, but not a criminal wrong, it is a calculation of a 'justifiable risk'. The social perceptions of the actors in the criminal justice system (police officers, HSE inspectors, coroners, lawyers and CPS officers) can help to explain why the system works in the way that it does.

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## Extract 2: The social view (pp. 155–7)

The views and assumptions of the *dramatis personae* involved in the official response to deaths at work are evolved mainly within their respective work cultures. What has been looked at is what these views are and how they affect the decision-making processes. It is also important to comment briefly upon what could be called the wider social culture in which members of these various occupations live and work; the way we ‘culturally absorb’ (Kinney *et al.*, 1990, p. 27) death and injury at work ‘as if they are part of life itself’.

The most striking aspect of the official response to deaths at work is that they are not treated as seriously and culpably caused as deaths in other circumstances (Wells, 1993a; Bergman, 1991, 1992 and 1994; Slapper, 1993b and 1998). In the context of corporate conduct, indisposition to perceive reprehensible behaviour as criminal arose partly due to accepted versions of what the results of a crime look like.

Carson (1979) has shown how factory crime came, historically, to be ‘conventionalized’. He notes that the significance of the history of the regulation of factory crime is its legacy in today’s perceptions. Once a ‘low profile’ approach to legal proceedings has been institutionalised within an enforcement agency, the approach becomes circular and self-perpetuating (Becker, 1971, p. 336; Carson, 1979, p. 55).

Traditionally, the illegal activities of corporations and those of conventional criminals have been defined as involving very different consequences. Corporate misbehaviour has been viewed as entailing a diffuse, impersonal cost to society. The harms, for example, produced by price fixing, false advertising, or mislabelling, have been perceived as increased financial burdens on the consumer (Swiggert and Farrell, 1980).

The authors note, in their detailed study of the media coverage of the Ford Pinto case that: (a) the indictment against Ford marked a significant definitional shift, expanding the scope of the criminal law; and (b) that, in the course of events leading to the indictment, the greatest shift in public opinion and public perception was accomplished through a ‘personalization of harm’, i.e. a transformation of the problem from one of mechanical defect to one of personal harm.<sup>1</sup>

There is today a greater public awareness of the nature of violent white collar crime. Consider a popular film (starring Gene Hackman and Mary Elizabeth Mastrantonio) shown in cinemas throughout the USA and the UK, and now a popular video in both countries. It has also been broadcast on commercial television in the UK.

The film, *Class Action* (1990), is closely based on the Ford Pinto, and concerns a legal action arising from deaths caused by a defective car. The

<sup>1</sup> In a footnote (1980, p. 167) the authors state: We are not arguing that the media cause behavioural boundaries or that they are a perfect mirror of popular moral sentiment. Rather, in the stories covered and the words used to describe events, symbols are utilized that both depend upon and reinforce shared meanings. Thus, while readers may disagree as to the content of particular reports, that content is nonetheless recognizable as a definition of the situation to which the report pertains. These are the meanings that we have sought to identify in the analysis.

weighty legal and political matters are given relief by emotional aspects of the story; the legal opponents in the case are father and daughter. The car suffered from a faulty design which meant that when the left-side direction indicator was turned on, circuitry around the petrol tank became very dangerous; a slight rear-end collision at such a moment would cause the petrol tank to explode into flames.

This conversation between a lawyer and the Chief Executive Officer (CEO) of the motor company goes to the heart of the matter.

Lawyer: ... Why didn't you just change the blinker-circuit?

CEO: I told Flannery to tell him about the problem about a month or so before he died. He called in his chief bean counter.

Lawyer: What's a bean counter?

Lawyer II: A risk management expert? Right George?

CEO: Yeah. So Flannery shows him the data and asks him how much it would cost to retrofit.

Lawyer: You mean recall?

CEO: You get it; to retrofit 175,000 units. You multiply that times 300 bucks a car give or take, you're looking right around \$50 million. So the bean counter, he crunches the numbers some more and he figures that you have one of these fireball collisions about every 3,000 cars, that's 158 explosions...

Lawyer: Which is almost exactly how many plaintiffs there are.

Lawyer II: These guys know their numbers.

CEO: So you multiply that times \$200,000 per lawsuit, that's assuming everyone sues and wins. See it's cheaper to deal with the lawsuits than it is to fix the blinker. It's what the bean counters call a 'simple actuarial analysis'.

The film centred round the civil actions, but the idea of corporate crime was an abiding part of the theme. There is thus evidence that the social perception of how companies commit violent crime is improving in the sense that more people are acquiring a clearer, wider picture of corporate operations which cause physical injury and death, and do so with very high levels of blameworthiness. It is not suggested that identifying homicidal behaviour in companies is new – the family and fellow workers of the deceased in the *Cory Bros Ltd* case in 1926 would have seen the deceased as

a victim of a crime (the firm was prosecuted for manslaughter); and generations who know Upton Sinclair's *The Jungle* would be familiar with how companies can kill. What is suggested is that in recent times (since the Ford prosecutions in the USA, and the Zeebrugge case here) there has been a distinct development. The change has been such that there is a wider social awareness and people are not simply seeing the results of commercial carnage as *equivalent* to the sort of crime prosecuted in the courts, they are seeing it as something which can and should be prosecuted. The centre of gravity in this public debate has now effectively moved from the areas of criminal jurisprudence (can companies commit manslaughter) to formulaic and penological ones (how shall we determine corporate culpability, and how shall we sanction guilty defendants).

Examining the social assumptions and perceptions of those who act officially in the response to deaths at work can assist in understanding why the system works in the way that it does. Up until 1995, the mechanical operation of the system brought only four prosecutions for manslaughter arising from commerce during this time. An ethnomethodological exploration of each of the various occupational groupings provides evidence of why these people, like the HSE inspectors or coroners, interpret the rules as they do. This chapter has sought to unveil some of their precepts. We can thus be more enlightened than when we simply watched the operation of the rules, but there are still important inquiries to satisfy. Chief among these is the question: how does the political economy generate and cultivate these occupational precepts? It is therefore appropriate to consider the historical and economic factors that have engendered certain ideas.

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