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The Gretley Coal Mine Disaster: Reflections on the Finding that Mine Managers were to Blame

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Introduction

This is truly a working paper, a step along the way in a larger project that is intended to culminate in a book on the issue of individual culpability for corporate OHS offences. The paper is therefore not a complete account of the issues and is more in the nature of an empirical segment of the larger work. The broader context will first be sketched, very briefly, to situate the present paper.

Two significant developments are occurring in Australia and overseas in relation to OHS offences. The first is the increasing resort to the prosecution of senior company officers, as well as the corporate entity, under due diligence provisions of occupational health and safety legislation. That is the focus of this paper. The second is the rise of industrial manslaughter and workplace fatalities legislation aimed at individual directors or managers. This is generally seen as a way of dealing with exceptional cases of “rogue” employers who are reckless with respect to the welfare of their employees, people whose culpability is hardly in doubt. That is not the subject of this paper, although it will be dealt with in the final work.

In much Australian OHS law now, where a company is proved to have committed an offence, its senior officers are deemed to have committed the same offence, subject to various qualifications¹. The purpose of punishment in these circumstances is unclear. On one view the purpose is to provide an incentive for senior officers to attend more diligently to their OHS responsibilities. This is a version of the deterrence justification – what is being deterred is insufficient attention to OHS. Another justification is that these individuals are personally culpable and that they *deserve* to be punished. These two justifications are very different in nature. Deterrence is a consequentialist justification; and immediately gives rise to an empirical question – does punishment have the intended effect? Desert is a moral idea, more a matter for debate and discussion than empirical evaluation.

This paper is concerned with the prosecutions arising out the Gretley mine disaster in 1996. It examines the findings about the culpability of the individuals and corporations prosecuted. The paper contains two draft chapters from the proposed book. Comments and corrections are invited.

CHAPTER A

GRETLEY - RELIANCE ON FAULTY PLANS

Disaster struck the Gretley Colliery near Newcastle (NSW) on 14 November 1996. Miners inadvertently broke through into the flooded workings of an old abandoned mine, and four miners died in the inrush of water. Inrush from old workings is a well known mining hazard². How could this possibly have occurred?

Several years earlier³ Gretley management had obtained from the Department of Mineral Resources some old plans that purported to indicate the location of the earlier workings. Unfortunately the plans were wrong, indicating that the old workings were 100 metres further away than they actually were. Initially, mining was remote from the old workings. However, in 1994 Gretley management began planning a new section of the mine that would take them close to the old workings⁴. Using the department's plans, they drew up their own plan showing where they believed the old workings to be and where they proposed to mine. The mine surveyor at the time assumed that the plans provided by the department were accurate and the manager, relying on his surveyor, made the same assumption. At the time of the tragedy two years later the mine had a new surveyor and a new manager, and both men assumed that the maps were accurate, relying on the judgments of their predecessors. Indeed the new surveyor certified the accuracy of the plans in writing, based simply on the fact that they had been so certified by the previous surveyor.⁵ Both managers had also implicitly certified the accuracy of the plans in writing.⁶

The faulty maps were produced by a departmental draftsman for another purpose in 1980⁷. So it was that a drafting error, made long before the Gretley mine began operations, culminated sixteen years later in disaster. This is a classic example of what Reason has called a latent error⁸, an error that lies dormant for many years before, in conjunction with new circumstances, its catastrophic potential is realized. As the judge in an earlier inquiry noted, the plans "sat like a loaded gun in the archives"⁹, waiting to be fired.

The operating company and its owning company¹⁰ were charged and found guilty under the NSW OHS Act for failing to ensure the safety of employees, so far as reasonably practicable¹¹. The companies were aghast that they should be blamed in this way. They argued vigorously that they had been entitled to rely on the accuracy of the plans and that they were therefore not responsible for the tragedy. The prosecution alleged, however, and the judge agreed, that management should not have relied on the plans provided and should have sought to verify their accuracy independently. The judge's thinking on this point is worth quoting.

"The defendants submit that the cause of the inrush was (the department's drafting error)...I fundamentally disagree. The cause of the inrush, in my view, was the

failure by the defendants to properly research the location and the extent of ... the old workings”.¹²

This is a puzzling statement. Had the department not made the error it did, the accident would not have happened. Had the defendants researched the location of the old workings more carefully, the accident would not have happened. From this point of view, if one is a cause, so is the other. Clearly, therefore, the judge’s statement is not to be understood in this way. Instead, in placing the causal emphasis where he did, he was making a statement about the relative culpability of the parties¹³. His thinking was as follows:

“There is no doctrine of implied infallibility to be applied to the information, documentary or otherwise, given out by any government department. While it is reasonable to presume that such information would generally be correct, that in no way removes the defendant’s independent obligation to ensure the accuracy of the information”¹⁴

However, he did qualify this position when it came to sentencing the defendants.

“It is clear that the role of the Department... in providing the incorrect Record Tracings to the defendants and that the Department has not been prosecuted has caused the defendants to feel ‘a justifiable sense of injustice’... Those feelings are understandable”¹⁵

He therefore accepted that the Department’s error was a *mitigating* factor in relation to the culpability of the defendants¹⁶, but he insisted that the companies were independently culpable for failing to verify the plans.

That failure was essentially a failure to carry out an adequate risk assessment¹⁷. Inrush from old workings was a well known hazard with the potential to cause multiple fatalities, and there were several recorded cases overseas of multiple deaths occurring in this way. Had this risk been adequately assessed the need for more effective risk control measures would have been obvious. The critical nature of the plans and the need to be certain of their accuracy would have been highlighted¹⁸, as would the need to respond effectively to some of the indicators the plans might be in error which began to appear in the days before the inrush. The failure to respond to these indicators will be discussed later.

In order to be clear about just what was alleged against the companies, the prosecution charged them with a series of offences, but these were for the most part consequential on the initial failure to check the accuracy of the plans¹⁹. As the judge said:

“The genesis of many of the defendant’s failures derives from what I characterize as its primary failure to properly research the location and extent of the... old workings. To a large extent... the particularized failures... arise derivatively from the primary failure”²⁰.

The derivative nature of many of the charges was taken into account at the time of sentencing, and for present purposes it is convenient to speak of a single offence .

The NSW Act also states that, where a corporation commits an offence, all those concerned in the management of the corporation are guilty of the same offence, unless they show that they were not in a position to influence the conduct of the corporation or, if they were, they used “all due diligence” to prevent the contravention. The court convicted both managers under this provision, as well as the second surveyor, the first surveyor having died of cancer a month prior to the accident²¹. Conviction meant that these three individuals were found

- to be concerned in the management of the corporation,
- to have been in a position to influence the conduct of the corporation in relevant respects, and
- to have failed to exercise due diligence to prevent the contravention

The first two of these points are not at issue here; what is of particular interest is the finding that the managers and surveyor had failed to exercise due diligence.

What was it the judge expected them to have done? To answer this question we need to understand more about the nature of the error in the plans which had been given to mine management.

The nature of the mistake

The old mine, worked until 1912²², was known as the Young Wallsend Colliery. Mining had taken place in two parallel coal seams, a top seam and a bottom seam, separated by 18 metres of other material.²³

In 1993 the Department provided Gretley management with two plans, one headed Young Wallsend Coal Workings *Bottom* Seam, and the other headed Young Wallsend Coal Workings *Top* Seam²⁴. The two plans were , identified as RT (Record Tracing) 523, sheets 2 and 3, respectively. Gretley intended to mine the *top* seam. Sheet 3, therefore, was the one on which it relied. Both sheets carried notations indicating that they had been traced from a single earlier tracing. This earlier tracing, known as sheet 1 was not provided to Gretley management and never requested by mine management, although it was available in the department²⁵.

Sheet 1, the earlier tracing, was the key to what went wrong. It had been drawn up initially in 1892 and contained various amendments to incorporate additional work carried out prior to cessation of mining in 1912²⁶. But there was one very peculiar feature of this plan: it indicated two sets of workings or tunnels, one in red and one in black. Moreover these two sets overlapped each other. Crucially, there was no indication on the plan as to what distinguished the red from the black. As the judge said,

“Any person looking at RT523 sheet 1 could not help but wonder as to the precise import of the red and black workings and their relationship to each other”²⁷

In 1980, another mining company, BHP, asked the Department for separate plans of the old workings in the top and bottom seams. It was in response to this request that the sheets 2 and 3 were produced.²⁸ The unknown person who drew up sheets two and three resolved the uncertainty about the meaning of the black and the red by assuming that one colour referred to the top seam and one to the bottom seam and that these two sets of workings at different levels had been superimposed on a single sheet at the time sheet 1 was originally created. They could therefore be separated into two sheets. In separating them out, the person concerned made the further assumption that the red workings referred to the bottom seam and the black to the top. To repeat, there were no annotations or other indications on Sheet 1 that justified these decisions and, as the judge noted, “on any view, that was a big call to make”²⁹. It needs to be emphasized, here, just how extraordinary these decisions were. As far as can be ascertained they were no more than guesses. As it turned out, the guesses were wrong. Both red and black workings were in the same seam, the top seam, the seam that Gretley was later to mine³⁰. So it was that the plan relied on by Gretley management failed to show a significant section of the workings that had occurred in the seam. The disaster occurred when Gretley miners broke through into these unmarked workings.

How should the surveyors have behaved?

Against this background we can now be more explicit about how, in the judge’s view, mine officials ought to have behaved. His view was based in part on expert evidence about what could be expected of a competent surveyor. The essence of that expert evidence was as follows³¹.

The two plans handed over to Gretley contained various puzzles. For instance, the purported workings in the bottom seam would have been almost impossible to ventilate. Moreover, every surveyor knows that transcription is liable to create errors. These plans had not been certified by the Department and the possibility of error was correspondingly greater. A competent surveyor would, therefore, have asked the Department for sheet 1, on which sheets two and three were based. An examination of sheet 1 would have raised doubts about whether it was intended to represent two sets of workings in different seams superimposed on each other. For a start, there were no notations on the sheet to indicate that this was the case. Furthermore, looking at sheet 1 more closely revealed that, where the red and black workings overlapped they did so exactly. If they had really been in different seams there is no way they could have aligned so exactly, and in any case there was no particular reason to expect top and bottom tunnels to align at all. These and other anomalies raised serious doubts about the decision to separate the two sets of workings as the Department had done. It was very evident from an examination of sheet 1 that sheets 2 and 3 could not be relied on and that other methods would need to be used to determine the exact location of the old workings³². In the judge’s words:

“the defendant and those acting on its behalf failed to recognize the glaring inconsistencies that sheets 2 and 3 presented...They were not such inconsistencies that a competent surveyor should have failed to recognize them. The evidence... is

compelling as to the extent of the basic surveying principles ignored by those charged with the responsibility to check such matters and who seemingly embraced sheets 2 and 3 without questions”³³

He added,

“Any competent mine surveyor would not only ask to look at and obtain a copy of sheet 1, but having done so, would immediately be alerted to the anomalies and irregularities in sheet 1 and question the basis of the decision made within the Department to separate and depict the red and black workings in the way that was done”³⁴

The surveyor’s failure to take any additional steps to verify the plans was, according to the judge “the essence of (his) culpability”.³⁵

How should the managers have behaved?

The managers had relied on their surveyors and the judge recognized that this was to some degree inevitable. The expert witness had said:

“The mine manager has the ultimate responsibility but would rely on the expertise of the other professionals available to him. He is in effect the captain of the team and he should not be expected to be a surveyor, a mechanical engineer and an electrical engineer and so on.”³⁶

The judge acknowledged this, but he went on:

“Where Mr P failed, in my view, is that in taking steps to satisfy himself as to the accuracy of sheets 2 and 3 in properly identifying the location and extent of the old colliery, he too easily accepted the assurances he was given by the respective mine surveyors. He took no independent steps beyond that assurance. It was, I believe, a one-off but serious error of judgment. In that respect he failed to take the essential but fundamental step required of him in accord with the provisions of the s 37(2)(h) of the CMRA that as mine manager he:

“take such steps as may be necessary to ensure that at all times the manager is in possession of ...all available information regarding disused excavations or workings in the vicinity of the mine”

That responsibility was his and his alone. At the very least he owed it to himself to direct his Mine Surveyors and any other relevant staff to proactively research every available source for all information regarding the old workings. The implications if sheets 2 and 3 were wrong demanded that. That is not something Mr P could delegate. Nor is it something that required additional skills and knowledge...That to me is the essence of Mr P’s culpability”³⁷.

In relation to the other manager there was evidence that he had actively questioned one of the mine surveyors about the accuracy of the plans³⁸ but, as the judge noted, he did not look at the plans himself to “ascertain whether in his view they were reliable. In this respect he relied entirely on (the surveyor)”³⁹. His culpability was essentially the same as Mr P’s.⁴⁰

The penalties

The penalties imposed on the various defendants were as follows

Operating company	\$730,000
Owning company	\$730,000
First mine manager	\$30,000
Second mine manager	\$42,000
Mine surveyor	\$30,000

In order to understand the significance of these penalties, they need to be seen in relation to the maximum penalties available under the legislation at the time of the offence. The defendants were each convicted of several offences⁴¹ and the judge imposed sentences for each offence. But since, as explained earlier, most offences were consequential on a single initial failure, he then discounted the penalties in various ways.

In the case of the corporations, the maximum penalty per offence was \$500,000 and the notional penalty assessed for several of these offences was \$300,000 per offence, in each case more than half the maximum possible. After discounting, and splitting the fine equally between the two corporations, the fine for each corporation came to \$730,000. In this way the total fine per corporation came to more than the maximum possible per offence.

For the individual defendants, the judge proceeded a little differently. The maximum for an offence was \$50,000⁴². He determined a notional fine for each offence. But instead of discounting, and then adding the discounted fines to determine a final figure, he reversed the process. He selected a total which he intended to impose on each individual and then apportioned this penalty between the various offences in such a way that they added to the pre-determined total. This procedure suggests that the judge was treating the \$50,000 maximum not just as the maximum fine per offence, but also as the maximum fine per offender. As a result, the total fine imposed on each individual did not exceed the maximum fine per offence, as it did in the case of the corporations. It is noteworthy, however, that the total fine for each individual was in the upper half of the \$50,000 penalty range.

The sentencing rationale - culpability

I turn now to the sentencing rationale articulated by the judge in imposing these fines. His starting point was the “objective seriousness of offence”⁴³. At law “seriousness of offence” is an alternative way of talking about the culpability of the defendant, and it is

clear from the context that this was the judge's understanding. Any inquiry into the meaning or "objective seriousness" is therefore also an inquiry into the meaning of culpability.

Culpability is a very basic idea, not in any way limited to legal contexts; it means quite simply, blameworthiness or fault. The question of interest is how we decide whether someone is blameworthy or at fault. More specifically, here, we are interested in how the law made judgments about culpability in the Gretley case. Precisely because culpability is an idea that is broader than the law, we are entitled to appeal to these broader, if intuitive, understandings in evaluating the legal criteria. I shall want to do that at some points.

OHS legislation does not prohibit death and injury; it imposes a duty on employers (among others) to maintain a safe workplace as far as reasonably practicable. The point is that a workplace may be patently unsafe and an employer therefore liable to prosecution, even though no death or injury has occurred. The fact of death or injury is not strictly relevant. As legal authorities have said, "the gravity of the consequences of an accident, such as damage or injury, does not, in itself, dictate the seriousness of the offence or the amount of penalty"⁴⁴

It has to be said that this legal principle does not seem to operate in practice with anything like this clarity. Many regulatory agencies state that their policy is to prosecute when it is in the "public interest" and that the occurrence of death or serious injury is one of the factors taken in to account in determining the public interest. Thus, for instance, the major OHS regulator in NSW, WorkCover, states in its guidelines that "WorkCover tends to prosecute when a death has occurred, when there has been a serious injury, or when there has been a risk of fatal or serious injury."⁴⁵ The policy of the NSW mining industry inspectorate is that, "generally speaking the more serious an offence and the more serious its actual or potential consequences, the more likely it will be that the public interest will lead to prosecution"⁴⁶. It is clear from these statements that the actual occurrence of death or injury is indeed relevant to the decision to prosecute. In practice it is rare for prosecutions to occur in the absence of such harm. Imagine for a moment that the Gretley management had discovered its mistake at the last moment and stopped mining just in time to avoid the disaster, and assume the inspectorate was aware of what had happened. It is inconceivable in these circumstances that the earlier failure to check the accuracy of the plans or to carry out an adequate risk assessment in relation to the danger from old workings would have resulted in prosecution.

This last conclusion is supported by a statement made by the NSW Chief Inspector of mines at the initial inquiry into the Gretley disaster. The Department's de facto policy, he said, was to consider prosecution only when there had been a death or serious injury stemming from the violation, or when companies were failing to comply despite repeated warnings⁴⁷. This is a far cry from the legislative intent.

But to return to the judge's reasoning, regardless of whether anyone was actually killed, the potential consequences of the failure to check the accuracy of the plans were

extremely serious. This increased the seriousness of the offence itself, that is, the level of culpability.

Foreseeability is a second factor taken into account by the judge in determining seriousness of offence. He quoted approvingly from another judgment, as follows:

“The degree of foreseeability is a significant fact to be taken in to account when assessing the level of culpability of the defendant. The existence of a reasonably foreseeable risk to safety which is likely to result in serious injury or death is a factor which will be relevant to the assessment of the gravity of the offence.”⁴⁸

The defence argued that the judge needed to make a distinction between the foreseeability of inrush in the vicinity of old workings and the foreseeability that the plans were incorrect, and that it was the foreseeability that the plans were incorrect which needed to be considered in determining culpability. Inrush was a risk that was foreseeable and indeed foreseen. What was not foreseen was an error in the plans. This was rather less foreseeable than the risk of inrush itself⁴⁹. The culpability was correspondingly less.

The judge rejected this reasoning. The question was “whether there was an obvious or foreseeable risk to safety against which appropriate measures were not taken”⁵⁰. The answer was, yes, inrush was an obvious risk, yet the measures taken were far from adequate. In the circumstances of such an obvious risk, the mine should not have been relying unquestioningly on the plans provided.

It has to be said that this is a curious piece of reasoning. The judge had determined that the culpability of the surveyor lay in his not being alert of the possibility that the plans might be in error. A competent surveyor would have foreseen that possibility and taken steps to verify the accuracy of the plans, he said. The surveyor’s culpability lay in his failure to foresee what was reasonably foreseeable. Similarly, according to the judge, the culpability of the managers lay in failing to seek independent verification of the accuracy of the plans. The desirability of seeking independent verification logically entails foresight of the possibility that the plans might be in error. If error in the plans is not a foreseeable possibility, why bother to verify them? I shall assume in what follows that the relevant failure of foresight was the failure to foresee that the plans might be in error.

A further factor relevant to culpability is whether or not the offence is part of a general pattern of failure to attend to risk or, on the contrary, an isolated aberration⁵¹. The judge found that

- the defendants, both corporate and personal, were generally safety conscious;
- the company had a effective safety management system;
- there was “an active workplace safety culture among employees and corporate defendants”; and
- workers were encouraged to cease work when they encountered a hazard;⁵²
- there was a “genuine commitment to workplace safety” on the part of all defendants.

Conversely, “there is no evidence that suggests the defendants had overall demonstrably unsafe systems of work or were indifferent as to their workplace responsibilities in relation to safety”⁵³. This led the judge to conclude that the failure to properly research the location of the old workings was “a most significant and serious lapse in an otherwise demonstrable commitment to providing a safe workplace”⁵⁴

This last conclusion is clearly overstated. A good safety management system is no guarantee against lapses and errors of various sorts. Every credible safety system audit finds problems; an audit which doesn’t is hardly credible⁵⁵. It is doubtful that the lapse identified in this case was unique and no sensible manager would ever make such a claim. The comment must be seen as the judge’s way of giving credit where credit was due and treating the company’s generally laudable approach to safety as a mitigating factor, reducing the level of culpability.

The other mitigating factor, already mentioned, was role of the Department in providing incorrect information. In a sense the judge had found that the Department should share some of the blame for what had happened. But despite these mitigating factors, he still assessed the culpability of all the defendants as being, as he said, “towards the high end of the range of penalty available”⁵⁶.

The sentencing rationale – retribution

The concept of retribution was discussed in an earlier chapter (not in this paper) and was equated with the idea that punishment is required so that offenders receive their just deserts. Furthermore, the need for retribution was seen to be directly proportional to degree of culpability.

However, at one point in his sentence the judge in the Gretley case made a distinction between culpability and retribution. He stated that the penalty must properly reflect the defendant’s “culpability and society’s retribution”⁵⁷. In so saying he appeared to be suggesting that penalty would be determined not only by the level of culpability, but also society’s need for retribution. He did not expand in this second purpose, but it invites consideration.

The NSW Crimes (Sentencing Procedure) Act 1999 which guided the judge in the sentencing process⁵⁸ contains a statement of the purposes of sentencing⁵⁹. Retribution is not explicitly included among these purposes. The statement does, however, include the following two purposes:

- (a) to ensure that the offender is adequately punished for the offence;
- (g) to recognize the harm done to the victim of the crime and the community.

Arguably the first of these refers to the defendant’s culpability and the second to society’s need to see the offender punished. If so, they provide a basis for the judge’s distinction.

There is of course a problem with this distinction. It suggests that society’s need to see offenders punished is to be given weight independently of the question of culpability, or

at least over and above the question of culpability. This is hardly tenable. No court could responsibly impose a penalty higher than was warranted by the degree of culpability simply because of societal demand. Nevertheless, in the Gretley case there was public pressure to see significant punishments imposed⁶⁰. Realistically there was only one way the court could impose substantial punishments, and that was if the defendants were found to be highly culpable. There is no way of knowing whether the need to satisfy public opinion influenced the judgments about culpability in this way. All that we can say is that the fact that the defendants were in fact found to be highly culpable meant that society's need for retribution could be satisfied.

The sentencing rationale - remorse

Earlier discussion referred to the *objective* seriousness of the offence as the basis of judgments about culpability. The judge noted that there were additional *subjective* features which impacted on culpability. Remorse and contrition were singled out for particular consideration. These two ideas are very similar; arguably they are indistinguishable. The judge did not distinguish between the two and I shall not do so here.

In principle remorse can affect a sentencing decision in two ways⁶¹. First, it may reduce the gravity of the offence in the eyes of a judge, so that purposes of retribution may be served by a lesser sentence. Second, if the offender is truly remorseful it means that some measure of rehabilitation has occurred, that further offences are less likely, and that the need for specific deterrence is therefore lessened.

Human beings are capable of remorse, but it is hard to conceive of a remorseful corporation. Nevertheless, corporations were in the dock in the Gretley case and the judge was obliged to give some attention to the concept of corporate remorse.

When Esso was prosecuted in 2001, following the gas plant explosion at Longford in 1998, the judge found that Esso had failed to exhibit any remorse⁶². He took this view on three grounds. First, the company had engaged in litigious treatment of its employees, blaming them for the explosion. Second, the legal defence it had advanced was one of obfuscation, designed not to clarify but to obscure. Third, the company had failed to accept responsibility for the explosion.

These conclusions were put to the judge as relevant in the Gretley case⁶³. He found, however, that the Gretley companies had not engaged in litigious treatment of their employees and that their defence, while vigorous, was not designed to obscure. On the question of whether the companies accepted responsibility, the evidence was not as stark as it had been in the Esso case⁶⁴. Nevertheless, the defendants in the Gretley case clearly felt that the department was to blame. "In that sense the defendants, both corporate and personal (with the exception of Mr P – of which more below) have demonstrated a reluctance to accept full and practical responsibility"⁶⁵. Of course they deeply regretted what had happened but in the absence of any acceptance of responsibility, this did not amount to

remorse.⁶⁶ Accordingly, (apart from Mr P), there were no grounds here for mitigating the penalties.

As for Mr P, the manager at the time of the accident, under questioning, he explicitly accepted responsibility and expressed remorse. He spoke about the searing impact which the accident had and continued to have on his life. The judge stated that this was “the fullest expression of remorse and contrition he had ever encountered in circumstances of a workplace accident”⁶⁷.

It is difficult to gauge the impact of the remorse factor on penalties. The judge was at pains to stress that the absence of remorse did not *increase* the penalties⁶⁸. But to what extent did Mr P’s expression of remorse *reduce* the penalty imposed on him? In fact he was fined \$42,000, while the other manager and the surveyor were fined \$30,000 each. The differing fines reflect the differing circumstances in which these individuals found themselves; Mr P was manager at the time of the accident. But one thing is clear: Mr P’s expression of remorse did not save him from the judge’s conclusion that he was the most culpable of the three.

The sentencing rationale – deterrence

Although the primary factor determining the penalty was the seriousness of the offence, it was not the only factor to be taken into account. Punishment was also expected to have a deterrent effect, both on the offenders concerned (specific deterrence) and on potential offenders (general deterrence)⁶⁹. The need for such deterrent effects influences the penalty: where the need for deterrence is considerable, the penalty can be increased; where it is minimal, the penalty can be reduced. We consider here how the issue of deterrence affected sentencing for corporate and personal defendants, in turn⁷⁰.

In relation to the companies, the judge accepted that industry as a whole had learnt the lessons concerning the need to be particularly vigilant about the risk of inrush, and that companies now approached old mining plans with the utmost caution. From this point of view the general deterrent effect which punishment might be expected to have on the industry as a whole had already been achieved. However, in the judge’s view, this did not eliminate totally the need for general deterrence. He quoted approvingly the following words from another judgment:

“The fundamental duty of the court in this important area of public concern [is] to ensure a level of penalty for a breach as will compel attention to occupational health and safety issues so that persons are not exposed to risks to their health and safety in the workplace”⁷¹.

The reasoning here seems almost contradictory: if the general deterrent effect has already been achieved, how can it still be necessary for the sentence to have a general deterrent effect? However, if the aim is to make companies more careful about hazards in general, not just the hazard of inrush, then the court’s reasoning remains coherent.

As for specific deterrence, some time after the accident the defendant companies were acquired by the mining multinational, Xstrata. Although this company had nothing to do with the accident, the judge took the view that specific deterrence was relevant to Xstrata.

“The evidence... as to Xstrata’s comprehensive system of workplace safety standards, while commendable, highlights factors that, in my view, reinforce the need for specific deterrence to be taken into account in the current sentencing process... The defendants are part of a large corporate enterprise that must maintain constant vigilance and take all practicable precautions to ensure safety in the workplace... While steps taken by the defendants to date post the inrush are to be commended, the scope of the defendant’s ongoing obligations requires the need to encourage a sufficient level of diligence by the defendants in the future”⁷².

Since Xstrata was in no way responsible for the accident, these comments about specific deterrence are a little perplexing. It is arguable that Xstrata occupies the same position as any other mining company in this matter and that, in so far as the penalty can be expected to have any deterrent effect on Xstrata, it is better viewed as a general rather than a specific deterrent effect.

The conceptual difficulties highlighted in the previous discussion would be of concern if it was clear that considerations of deterrence were significant in the final decision on penalties. There is no evidence however that they were. As noted earlier, in the judge’s view the offence in and of itself merited a penalty towards the top end of the range and that is what it received.

The situation in relation to the individual defendants was a little different. Overall, the judge accepted that none of them was as culpable as the corporate defendants since each had played only a part in determining the outcome.

As for deterrence, his view was that in all cases, “general deterrence has some, albeit limited, application”.⁷³ Presumably what he meant was that the sentence was intended to send a signal to other mining officials of the need to be diligent with respect to safety. The judge was clear, however, that there was no need for the sentence to have any specific deterrent effect on the individuals concerned. All three had clearly learnt the lesson and needed no further incentive. All had suffered greatly. Moreover, all had undergone various “rehabilitative measures”. The two mine managers had completed risk management courses and the surveyor had attended various lectures and retraining seminars for surveyors⁷⁴. Despite this, the individual defendants received fines in the upper half of the penalty range. It would seem, then, that the issue of deterrence played a relatively small part when it came to the determination of sentence.

Culpability reconsidered

Having described the considerations which went to the sentencing of the corporate and individual defendants, let us return to the question of culpability and consider in a little more detail what it meant in the Gretley case.

Judgments about culpability are judgments about moral rectitude, about the degree of wickedness, if you like. These are fundamentally human characteristics. It is very difficult to talk meaningfully about the moral rectitude or wickedness of a corporation⁷⁵. There is a famous saying that a corporation “has no body to be kicked or soul to be damned”. We can talk about whether a corporation is law abiding, whether it is deterrable, whether, from a policy point of view, it is useful to hold corporations liable and to punish them⁷⁶. But, it makes little sense to talk about whether a corporation, as such, is blameworthy⁷⁷. There are various solutions to this problem. The law recognizes that “a corporate employer can only conduct its activities through human agents, such as its managers, supervisors, employees and contractors”⁷⁸. Thus, to say that a corporation failed to foresee what was reasonably foreseeable is to say that relevant managers failed to foresee what was reasonably foreseeable⁷⁹.

Transferring the culpability of individuals to corporations in this way seems artificial, indeed counter-intuitive. But the criminal law generally requires a finding of culpability before heavy punishment can be imposed, and transferring individual culpability to the corporation is one way this can be achieved. In this sense, corporate culpability is simply a derivative of individual culpability`

What, then, can we say about individual culpability in the Gretley case? Note, first, that judgments about culpability are not factual judgments. They cannot be made by reference to evidence alone. A judgment about culpability is a value judgment, about what people ought or ought not to have done. Implicit in such judgments is a comparison with how some other, reference individual would have behaved. To blame someone is to say that their behaviour in some way falls short of the behaviour of the reference individual.

Let us explore in a little more detail the characteristics of this implied reference individual. Recall that the judge talked about a *competent* surveyor and concluded that the surveyors at Gretley had not behaved as a competent surveyor would have. The inference is that they were incompetent. But incompetence is hardly a moral evaluation. If they were indeed incompetent, they can hardly be blamed for this. The fault lies with the education system which had certified them competent, or with management which had not verified their competence for the job at hand. The fact that the behaviour of the surveyors fell short of how a competent surveyor would have behaved hardly makes them culpable. In short, the *competent* surveyor is not the reference individual we are looking for.

In finding the individual defendants culpable, the judge was explicitly finding that they had failed to exercise “all due diligence”. How would a person who was exercising all due diligence be behaving? According to Johnstone,

“due diligence is generally accepted as the converse of negligence and requires reasonable care in all the circumstances... What is due diligence will depend on all the circumstances of the case, and contemplates a mind concentrated on the facts. It is to be decided objectively according to the standard of the reasonable person in the circumstances”⁸⁰.

Here, then, is our reference individual – the reasonable person in the circumstances, the reasonable surveyor or the reasonable manager.

What can we say about these reference individuals contemplated by the court - the reasonable surveyor and the reasonable manager? Are they, for instance, the ordinary or average⁸¹ surveyor and manager? What we know is that neither of the two managers and neither of the two surveyors behaved in the way the judge believed the reasonable person in the circumstances would have behaved. All four accepted the accuracy of the plans provided. Were all four unreasonable men?

The Gretley defendants accepted that old plans might have small errors in them, which could arise in the following way. Mines which are being actively worked must update their mine plans every three months⁸². If mining at an old colliery was terminated between updates, some workings would remain unrecorded. Errors of up to 26 metres had been known to occur in this way⁸³. To allow for this, Gretley mine management intended to leave a barrier of 50 metres between itself and where the old workings were thought to be. Apart from errors of this nature, the assumption was that the plans provided by the department were accurate and could be relied upon.

The evidence suggests that other mine managers and surveyors made similar assumptions. The Gretley mine manager who immediately preceded the two who were charged said that he had accepted the accuracy of the plans provided by the department. “That was always our position and I believe the view of the mining industry, up until the inrush itself”.⁸⁴ An earlier surveyor at Gretley had accepted the accuracy of the plans and had certified them as accurate⁸⁵. The chief company surveyor also assumed that the plans were accurate.⁸⁶

Two mines adjacent to Gretley had made the same assumptions⁸⁷. They had been provided with the same departmental plans which their surveyors had duly certified. This was known to Gretley managers, which reinforced their assumption that the plans were accurate.

The chief inspector of coal mines also assumed the accuracy of the plans. “Up until this accident (he said) I regarded record tracings supplied by the department as accurate representations of old workings. I had never previously seen a record tracing that I knew to be inaccurate”⁸⁸. Finally, a senior inspector gave evidence that he assumed that the plans provided by the department were accurate⁸⁹ and he noted that this assumption was “well entrenched and accepted – both at Gretley and adjacent mines”.⁹⁰

The initial inquiry conceded all this. It accepted “that a sizeable number of individuals within the mining industry assumed before the inrush that 50 metres... offered adequate protection against inadequate plans”.⁹¹

It is clear then that many, perhaps most surveyors and managers would have behaved as the defendants did. If that is so, the ordinary mine surveyor and manager does not qualify as reasonable in the judge’s view; the reasonable officials he had in mind are probably few and far between.

This is a significant departure from community perceptions of reasonableness⁹². The reasonable person was once famously defined as the man on Clapham omnibus, and more recently, as the traveller on the London underground⁹³. Such descriptions are intended to convey that the reasonable person is an ordinary person, not an unusually diligent or careful person. Yet this is precisely what the judge was requiring of the individuals before him, that they be unusually diligent and careful, indeed that they behave as the *ideal* surveyor or manager would behave⁹⁴. If the reference individuals in the judge's mind were the ideal surveyor and the ideal manager, it is to be expected that real live surveyors and managers will fall short of these ideals. To conclude on this basis that real live individuals have behaved unreasonably and therefore culpably seems unfair.

Jim Reason has developed this line of thinking into a test for whether or not it is appropriate to blame an employee who violates rules. He terms it the substitution test. Mentally substitute the individual concerned with someone else who has the same training and experience and ask: "In the light of how events unfolded and were perceived by those involved... is it likely that this new individual would have behaved any differently?"⁹⁵ If the answer is no, there are clearly systemic factors generating the behaviour concerned and it is better to seek to change those factors than to blame the individual rule violator. This principle applies to managers as much as it does to front line workers and it provides a rationale for rejecting the culpability of the individual Gretley defendants for relying on faulty plans.

For all these reasons, it is hard to agree with the judge that the culpability of the individual defendants for relying on faulty plans is so serious as to put them "towards the high end of the range of penalty available".

Two final points need to be made. First, none of this is to suggest that the behaviour of those concerned was good enough. With hindsight it is clear that the standard of care being applied was quite inadequate. The industry has learnt this lesson well and NSW mines are now subject to stringent requirements aimed at avoiding the possibility of inrush. The bar has been raised. Were there to be any repeat of the Gretley story, those concerned would be unequivocally culpable.

The second point may seem almost paradoxical in light of the first. To question the culpability of the Gretley defendants is not necessarily to question the appropriateness of the prosecution and punishment of these individuals. As discussed in earlier chapters, retribution is not the only purpose of punishment; deterrence or, more generally, prevention is another, which may justify punishment even in the absence of culpability. I shall have more to say about this in a later chapter. The point here is simply that, on the basis of the evidence presented so far, the conclusion that these individuals are blameworthy and therefore *deserving* of punishment seems somewhat unfair.

CHAPTER B

GRETLEY – THE WARNINGS

As we saw in the preceding chapter, the courts seeks to make judgments about culpability. Where an employer has failed to take effective steps to manage a risk with potentially serious consequences, then the more foreseeable the risk the more culpable the defendant. In short, given a potentially serious risk, foreseeability is the crucial test of culpability. I have argued that, despite what he said, the judge in the Gretley case focused of the question of whether or not it was foreseeable at the *outset* that the plans provided by the Department might be in error.

The whole situation changed, however, in the weeks immediately prior to the inrush. Indications began to emerge that the Gretley miners were closer to the old workings than the maps indicated. These indications were considered but effectively dismissed. Had they been taken more seriously the accident could have been averted.

The question to be addressed here is whether these indicators made it reasonably foreseeable in the last few days that the maps might be in error. The purpose is two-fold. First, by contrasting the court's approach to these two situations I want to demonstrate the somewhat arbitrary nature of judgments about culpability. Second, I want to point to ways in which this accident realistically could have been avoided.

The Gretley disaster generated two sets of findings. In 1997/8 an inquiry was held before Judge J Staunton. Its purpose was to establish the causes of the accident and it was not a forum for determining liability. One of its recommendations was that consideration be given to prosecuting the companies. The prosecution took place in 2003/4. So far the focus has been on the findings of the prosecution. This chapter draws heavily on the findings of the earlier inquiry. When I speak here of the inquiry I refer to the first, judicial inquiry. Any references to the court are to the later prosecution.

The indicators mentioned above were reports made by various people, as mining approached the old workings, that water was seeping out of the mine face and accumulating at a low point on the tunnel floor. The question is: how should these reports have been interpreted? One influential view is “any water inflow in the vicinity of abandoned mines... should be considered a danger signal”⁹⁶.

However matters were not quite so simple. Gretley was a wet mine and flows of water out of the seam were to be expected. Nevertheless, there was something unusual about the flow of water. As one witness observed

“Gretley is a very wet mine, all the districts are wet, the water percolates from one district to another because of the way it is developed. The funny thing about (the district where the inrush occurred) and I always commented when I went in there, it is ... (a) pleasure to come into this district, it is the driest district in the pit. It was probably the only district in the pit without a pump”⁹⁷.

The appearance of water did not demonstrate conclusively that mining was close to the old workings because an increase of water flow from the face could be expected as the old workings were approached, even though those workings were still at a considerable distance⁹⁸. But clearly, the reports were an indication of *possible* danger. Before proceeding further it will be useful to list these reports.

The reports of water

November 1

Day shift safety officer, Mr M, made the following comment in his end of shift report:

“Nuisance accumulation of water”⁹⁹

November 4

Mr M made another, similar comment in his end of shift report:

“Large amount of nuisance water”¹⁰⁰

Two other shift safety officers told the inquiry that it was unusual for safety officers to make such comments in their end of shift reports and the inquiry came to the same conclusion itself, having perused a large number of end of shift reports.¹⁰¹ Mr M explained later that although he had used the term “nuisance” water, he was intending to draw management attention to a potential danger.¹⁰²

Also on November 4, Mr M reported the accumulation of water to the mine manager who happened to be underground doing an inspection. He said to him “There is water gathered in 7 cutthrough. We are not close to the old mine are we?”¹⁰³.

That night, the night shift safety officer, Mr B, commented to the shift manager about the accumulation of water. He observed that the accumulation of water had increased since November 1. He also told the shift manager’s superior the undermanager in charge, about the water and the fact that it appeared to be unusual.

He said later “It seemed to me that for a panel (area of the mine) in such good condition there was more water laying around the floor than I would have expected”¹⁰⁴

November 13

The day shift safety officer, Mr M, spoke about the water on various occasions to the driver of the mining machine, as well as speaking to two other miners. He asked them repeatedly: “where’s all that water coming from?”¹⁰⁵. In his end of shift report he stated:

“coal seam giving out a considerable amount of water”

It was the next day, November 14, that miners broke through into old workings.

Management response to the reports

Following the November 4 reports the shift manager examined the water and concluded it might have been coming out of the floor.¹⁰⁶ His superior, the undermanager in charge concluded that the increased quantity of water was to be expected as they were heading towards the old workings.¹⁰⁷ His superior the mine manager, observed the water accumulation but told the safety officer that the old mine was about 200 metres away. The inquiry made the following comment on this response:

“The misgivings of an experienced deputy about a serious potential hazard, namely inrush, ought to have made (the manager) pause, and reflect upon what was being said. Instead, he brushed Mr M’s concern to one side, glibly referring to the plan. A warning went unheeded which, had it been taken seriously and investigated, may have exposed the (error in the plan).”¹⁰⁸

Following the report of November 13 the shift manager immediately turned to the mine plan and measured what he thought to be the distance between the face and the old workings¹⁰⁹. He discussed the matter with the safety officer who had made the report and thereupon decided that nothing further needed to be done. Precisely what the safety officer said that led to this outcome is in doubt. Both parties subsequently told the inquiry that he had effectively contradicted his written report and said to the shift manager that the “considerable” amount of water was in fact only a “trickle”. It was this that led the shift manager to do nothing.

The inquiry did not accept this version of the conversation and expressed the opinion that it was intended to protect the company¹¹⁰. The inquiry’s view was that whatever the safety officer may have said to the shift manager, he remained of the view that what he saw was a “considerable” amount of water, enough to give rise to concern.

“He saw the link, or possible link, between the water and the old workings, and recognized that it may be a symptom of danger. He was right to do so”¹¹¹.

The inquiry went on to say that the shift manager’s “investigation of the observations by Mr M were superficial. Having recognized from Mr M’s report the symptoms of danger, they were dismissed too readily”¹¹².

To summarise, the inquiry characterised management’s response to the warnings as “superficial”, “glib”, and certainly inadequate¹¹³.

Differences between the inquiry and the court on the investigation of warnings

Let us return to the prosecution. How did the court deal with these matters? One of the charges laid against the companies was as follows:

“(h) a failure to investigate, adequately or at all, the (safety officers’) written reports on 1 November, 4 November and 13 November 1996 and two oral reports on 4 November 1996”¹¹⁴

The judge inclined to the view that “the defendant did adequately investigate the reports of water... Ultimately, it has to be said the steps and investigations undertaken to investigate the reports of water... were made against the background of the presumed location of the... old workings... being 100 metres or more away”.¹¹⁵ In other words, given the presumption that the plans were accurate, management acted reasonably in dismissing the warning signs. More cautiously he went on to say, “Overall, I am not satisfied that the failure (h) has been established to the requisite standard”.

The contrast between the judgments of the court and the inquiry is perplexing. Could it be an outcome of the different nature of the proceedings – one a criminal prosecution and the other a judicial inquiry? In a criminal matter the prosecution is required to establish its case beyond reasonable doubt. That is the “requisite standard”. The findings at the judicial inquiry, on the other hand, were made on the balance of probabilities. It was thus in theory easier for the inquiry than the court to draw adverse conclusions from the same evidence. However, the comments of the court suggest that this was not the real issue. Even on the balance of probabilities the judge would probably have dismissed the charge. Another possibility is that the nature of the evidence put before these two tribunals was different. The comments made by the court do suggest that the evidence available to it may have been more limited. A third possibility is that the difference is simply a demonstration of somewhat uncertain nature of judgments about culpability: the court taking the view that the various managers at Gretley behaved reasonably in relation to the reports of water and the inquiry believing that they did not. I shall return to this shortly.

The decision to drill ahead

There is one way in which mine management could have been sure that the old workings were not closer than indicated on the plan, and that was to check what lay ahead by drilling forward from where mining was taking place. Drilling could also determine if there were any unusual geological formations ahead.

The possibility of drilling ahead was discussed in the first week of November and the undermanager in charge made the final decision to drill ahead just before he went on leave on November 8¹¹⁶. On 13 November, the day before the inrush, a management meeting ratified this decision. The minutes state: “Advance drill 60 m to prove ground to be driven”¹¹⁷.

Why was the decision made at this time, just days after the first reports of water had been made? The undermanager in charge told the inquiry that “water played no part in the decision to drill”¹¹⁸. But in other statements he made it clear that water was the precipitating factor. He recounted a conversation he had with a subordinate shift manager, to the best of

his recollection at the end of October or early November, in which he had discussed the water that was building up.

Shift manager: “Have you thought about putting a borehole in advance of the workings?”

Undermanager in charge: “I hadn’t planned to. We are still a long way from the old workings. It would be useful to put the hole in the prove the ground in front of us”¹¹⁹.

Elsewhere he spoke of drilling ahead as “giving us the added safety factor as to the presence of the old workings”¹²⁰ and being undertaken so that the mine did not “run into any surprises”.¹²¹

One interchange at the inquiry was the following

Q: Is not (the possibility that the water was coming from the old workings) the thing that provoked the thought that we had better just prove the ground ahead?

A: It was part of it, I suppose, yes.”¹²²

Perhaps the most telling interchange was this:

Q: (The decision to drill ahead) was a step that you had suggested, amongst other reasons, as an insurance against risk?

A: That’s correct.

Q: The risk that the old workings might be closer than the plans in fact indicated, is that right?

A: You could assume that, yes.

Q: And even though that risk to you may not have been a high risk at the time, it was perceived by you as risk, is that not right?

A: As a minimum risk.¹²³

The inquiry concluded in relation to the undermanager in charge that: “the presence of water had brought to his mind the possibility, although he thought it minimal, that the old workings were closer than the plan indicated”¹²⁴, and by implication that the plan was wrong. The inquiry also made the following statement concerning the undermanager who had initiated the conversation above: “the (inquiry) believes that he did recognise the possibility that the plan may be inaccurate”¹²⁵. In short, according to the inquiry, both these men foresaw the possibility that the plans might be in error.

Evidence was also provided to the inquiry that the miners themselves understood that the purpose of drilling was to check that they were not about to break through inadvertently into the old workings.¹²⁶

The criminal court, on the other hand, did not draw this conclusion. The judge stated that there was no evidence that allowed him to conclude with certainty that the decision to drill ahead was connected to the reports of water¹²⁷. He had before him the minutes recording the decision to “advance drill 60 m to prove ground to be driven”. But, he said, no evidence had

been provided about exactly what this meant. It seems, therefore, that in this case the difference between the two tribunals reflected differences in the evidence put before them.

The actions of the surveyor

In early November the surveyor asked someone where he might get independent evidence of the location of the old mine, and he was referred to an agency called the Mine Subsidence Board. The plans made available by the Board turned out to be the very same plans available at the Department of Mines, including sheet 1. But they were made available on microfiche and sheet 1, when printed out, was of such poor quality that it was discarded.¹²⁸ It will be recalled from the last chapter that this was the sheet that showed both sets of workings on the same plan, which should have cast serious doubt on the accuracy of the plans on which the mine management was relying. In the end, then, despite the surveyor's efforts to obtain independent verification of the location of the workings, his efforts were in vain.

Why did he go to this effort to check the accuracy of the mine plans? There was some dispute about the evidence but the inquiry judge made the following findings, "as a matter of probability". The surveyor had been present at the discussion between the two managers about the water and the need to drill ahead. "He recognized that drilling ahead was being suggested because there was the possibility that the plan may be inaccurate. He therefore decided to check the plan"¹²⁹. In short, the surveyor, like the undermanagers, foresaw the possibility that the plans were in error.

The court took a somewhat contradictory view of surveyor's actions. It stated that "the inference arising from such an inquiry (to the Mine Subsidence Board) is that mine management, through (the surveyor), was responding to reports of water...that were surfacing at about that time and that (the surveyor) was double checking the location of the... old workings"¹³⁰. The further inference is that the mine management had foreseen the possibility that the maps might be in error. The court did not explicitly draw this inference.

Culpability

The inquiry was not a tribunal set up for the purpose of establishing culpability. Its findings are however directly relevant to this issue. Let us recall earlier statement on which the court relied.

"The degree of foreseeability is a significant fact to be taken in to account when assessing the level of culpability of the defendant. The existence of a reasonably foreseeable risk to safety which is likely to result in serious injury or death is a factor which will be relevant to the assessment of the gravity of the offence."¹³¹

In short, other things being equal, the degree of culpability is directly related to degree of foreseeability.

It will be remembered that prior to the commencement of mining, no one foresaw the possibility that the plans might be in error and the question for the court was whether a

reasonable person would have. That issue does not arise here. The inquiry found that in the final days before the inrush, the people concerned actually foresaw the possibility that the plans were in error. There could hardly be better evidence that this was a reasonably foreseeable possibility. Based on the findings of the inquiry and the test of culpability spelt out by the court, it can be concluded that these individuals were indeed culpable for their failure to respond adequately to the warnings of danger that occurred in the days immediately preceding the inrush.

But that is not the end of the matter. We need to consider just what would have constituted an appropriate response to the warnings. Drilling ahead was one appropriate response. But the drilling was scheduled to commence a day or two after November 14, the day of the inrush¹³². For drilling to have been effective, mining should have stopped until drilling had indeed proved the ground ahead.

Why didn't the managers concerned suspend mining? The answer appears to be that although the undermanager in charge foresaw the possibility that the plans might be in error, he regarded this as a remote possibility, and therefore judged that the risk in continuing to mine, even though the ground ahead had not been proved, was an acceptably low risk. We are back here to the question of reasonableness. Is this a judgment which a reasonable manager would have made? If so, this would presumably diminish the culpability which arises from the fact that he foresaw the risk but allowed mining to continue¹³³. If, however, we judge that a reasonable manager in the circumstances would have ordered work to stop immediately, until the ground ahead had been proved, then the manager's failure remains culpable. The court did not deal explicitly with this point, but the inquiry made the following comment.

“(The undermanager-in-charge) gave no direction to suspend mining and monitor the build up of water, *as he ought to have done*” (emphasis added)¹³⁴.

In so saying the inquiry was clearly blaming this individual.

A second appropriate response to the warning signs would have been for the surveyor to thoroughly research the location of the old workings. The approach to the Mine Subsidence Board turned out to yield no new information. Did this absolve the surveyor of responsibility? The court did not pass judgment on this particular question, but the inquiry did:

He should not have stopped his investigation at that point. Once there was a doubt in his mind, it was his duty, first to inform the manager, and secondly to resolve that doubt completely (or disclose to his superiors that it was incapable of resolution, because of the paucity of material)¹³⁵.

The inquiry was critical of the surveyor for failing to check the plans adequately in the first place but it regarded as especially blameworthy this failure to take effective action after the possibility was recognized that the plans might be in error.

“It was completely unacceptable for (the surveyor) not to sound a strong warning in early November (at the very latest) and recommend that development be suspended immediately pending proper inquiry and confirmation”¹³⁶

It would seem, therefore, that as far as the inquiry was concerned, having foreseen the risk, the individuals were under an obligation to act effectively to counteract that risk. Their culpability lay in foreseeing the risk but failing to respond effectively.

At this point it needs to be stressed that this discussion does not translate automatically into conclusions about liability under the OHS Act. The Act envisages that when a corporation commits an offence, individuals may be found guilty of the same offence, only if they are “concerned in the management of the corporation”. The undermanagers had been charged, along with the managers and the surveyor. But, after a long discussion of what it meant to be “concerned in the management of the corporation”, the court found as follows.

“I cannot be satisfied beyond reasonable doubt that those personal defendants employed as undermanagers and undermanagers in charge at Gretley were persons concerned in the management the corporations.”¹³⁷

All charges against them were therefore dismissed. No matter how culpable they might be they were not liable under the Act. In contrast, the court found that the surveyor and the mine managers were persons “concerned in the management of the corporation” and therefore went on to convict them and make judgments about their culpability.

Conclusion

The court was not critical of the failure to respond effectively to the last minute warnings. It concluded that the investigations of the reports of water were adequate, in the circumstances, and that the failure to drill ahead in time was irrelevant, since it had not been proved beyond reasonable doubt that the decision to drill ahead had anything to do with the reports of water. Nor was the failure to effectively investigate the accuracy of the plans at this stage especially culpable. These failures were all, in the court’s view, a consequence of the initial failure to investigate the accuracy of the plans prior to the commencement of mining. It was this initial failure that the court found so culpable, despite the fact the managers and surveyors had behaved as many other ordinary managers and surveyors would probably have behaved in the same circumstances.

The evidence presented to the inquiry, however, led it to a different conclusion, namely, that the failure to respond to the warning signs was indeed culpable. The inquiry judge did not use the word “culpable” but that is the inevitable implication of his language. His view with respect to culpability was almost the reverse of the court’s, in that he appeared to conclude that the initial failure to investigate the accuracy of the plans was not as culpable as the failure to take effective action once the warnings emerged. Whether or not this alternative view is accepted, one thing stands out. In the Gretley matter two different tribunals went over the same material and came to significantly different conclusions, demonstrating just how uncertain and idiosyncratic judgments about culpability can sometimes be.

¹ Eg section 26 of the NSW OHS Act 2000.

² I p90. “I” refers to the Inquiry by Judge J Staunton (1998), *Report of a Formal Investigation under Section 98 of the Coal Mines Regulation Act, 1982*

³ I p 271

⁴ The application to mine was date September 1994. Plans of the old workings included in the application were dated 31 July 1994 and signed by the mine manger and the mine surveyor. J 395, 396.

“J” refers to the Judgment handed down in *McMartin v Newcastle Wallsend Coal Company Pty Ltd and ors [2004] NSWIRComm 202 (9 August 2004)*. Numbers following a “J” refer to paragraphs

⁵ J 968

⁶ J 963

⁷ J 389

⁸ J Reason, *Organisational Accidents*, Ashgate: Aldershot, 1997.

⁹ I p711.

¹⁰ J 280

¹¹ J 824

¹² J 805

¹³ The law often restricts the idea of cause in this way. Eg Mason, (1991), *J March v. Stramare. Commonwealth Law Reports* 171, 506. See also H Hart & T Honore, *Causation in Law, 2nd Ed*, Oxford: Clarendon, 1985

¹⁴ J 466

¹⁵ S 54. The reference to a justifiable sense of injustice is from Nesmat, see S47, 48.

“S” refers to the Sentence handed down in *McMartin v Newcastle Wallsend Coal Company Pty Ltd and ors [2005] NSWIRComm 202 (11 March 2005)*

Numbers following an “S” refer to paragraphs

¹⁶ S 46,48

¹⁷ J 548ff

¹⁸ There is considerable doubt as to whether a risk assessment would really have raised the question of the adequacy of the plans, I p 418

¹⁹ see J 370 for a partial listing; third set of particulars at J 362

²⁰ J 633

²¹ J 944

²² J 389

²³ J 395

²⁴ J 393; S 221 [60]

²⁵ J 382, 811

²⁶ J 386

²⁷ J 388

²⁸ J 389

²⁹ J 401

³⁰ J 46. In fact there had been very little mining in the lower seam (para46).

³¹ J 457, 462

³² The additional research required was extensively discussed in the judgement but need not detain us here.

³³ J 472,3

³⁴ J 466

³⁵ S 263

³⁶ S 157

³⁷ S 180, 181.

³⁸ S 221[64]

³⁹ S 22

⁴⁰ S 227

⁴¹ J 145; 204-6;241-2;271-2

⁴² S 203,

⁴³ S 40
⁴⁴ S 21
⁴⁵ NSW WorkCover “Compliance policy and prosecution guidelines”, March 2004, section 5.9
⁴⁶ , NSW Department of Mineral Resources, “The enforcement of health and safety standards in mines”, January 1999. Section F.5.1
⁴⁷ I p694. Even this de facto policy appeared not to have been followed. In the seven years from 1990 there had been 33 deaths in NSW coal mines but not a single prosecution – I p686
⁴⁸ S 19
⁴⁹ S 42
⁵⁰ S 44
⁵¹ S 62
⁵² S 62,63
⁵³ S 64
⁵⁴ S 85
⁵⁵ A Hopkins, *Lessons from Longford: The Esso Gas Plant Explosion* (CCH:Sydney, 2000), p80
⁵⁶ S 88
⁵⁷ S 199
⁵⁸ S 16
⁵⁹ section 3A
⁶⁰ This will be discussed in an earlier chapter.
⁶¹ G Hall, *Sentencing Guide*, (Wellington: Butterworths, 1994) p B221
⁶² A Hopkins, *Lessons from Longford: The Trial* . CCH: Sydney, 2002
⁶³ S 133-143
⁶⁴ S 140
⁶⁵ S 141
⁶⁶ S 234-6; 268
⁶⁷ S 191
⁶⁸ S 141, 236
⁶⁹ S 22
⁷⁰ The philosophy of deterrence will be discussed in greater detail in the foreshadowed book
⁷¹ S 122
⁷² S 131
⁷³ S 184, 229, 264
⁷⁴ S 187, 230, 265
⁷⁵ Bakan makes the argument that corporations are inherently criminal in the sense that they have no commitment to law abiding behaviour and remain law abiding only in so far as it is their interest to do so. J Bakan, *The Corporation*. Constable, London, 2004.
⁷⁶ There is of course a huge literature on this. As a starting point see B Fisse and J Braithwaite, *Corporations, Crime and Accountability*. Cambridge Univ Press, Cambridge, 1993.
⁷⁷ D. Cressey, “The poverty of theory in corporate crime research”, pp31-55 in W Laufer and F Adler, *Advances in Criminological Theory Vol 1*, Transaction Publishers, Oxford, 1989; J Braithwaite and B Fisse, “On the plausibility of corporate crime theory”, *Advances in Criminological Theory, Vol 2*, Transaction Publishers, Oxford, 1990
⁷⁸ R Johnstone, *Occupational Health and Safety Law and Policy, 2nd Ed* LBC Information Services 2004, p229
⁷⁹ Where a corporate offence requires proof of a guilty subjective state of mind (eg intent) , only the state of mind of someone who can fairly be described as the directing mind and will of the corporation can be taken as the state of mind of the corporation. See Johnstone, op cit pa 206
⁸⁰ Johnstone, *op cit* pp210-11, citations omitted.
⁸¹ The concept of an average human being is problematic. What is the sex of the average human being? Strictly speaking the “mode”, meaning the “most common”, is more relevant here, but for ease of expression it is convenient to use the word “average”.
⁸² I p231
⁸³ I p45
⁸⁴ I p241

⁸⁵ I p271

⁸⁶ Ip243

⁸⁷ S 173; I p249

⁸⁸ S 58 [19]

⁸⁹ I p50

⁹⁰ I p419.

⁹¹ Ip243

⁹² Luntz and Hambly (1995:219)

⁹³ Cattanach v Melchior [2003] HCA 38 (16 July 2003), see paras 82,135

⁹⁴ The law frequently departs in this way from the idea that the reasonable person is the ordinary person.

This will be discussed in greater detail in a later chapter.

⁹⁵ Reason, op cit, p208

⁹⁶ I p515

⁹⁷ I p514

⁹⁸ I p514

⁹⁹ I p523

¹⁰⁰ I p534

¹⁰¹ I pp536-7,638-9

¹⁰² I p619

¹⁰³ I p528

¹⁰⁴ I p524

¹⁰⁵ I pp600-1

¹⁰⁶ I p525

¹⁰⁷ I p527

¹⁰⁸ I p532

¹⁰⁹ I p617

¹¹⁰ I p613

¹¹¹ I p617

¹¹² I p627

¹¹³ The inquiry offered some useful further analysis of the attitude displayed by management. It quoted approvingly the following comment which had been put to it

“In several instances persons in the mine management hierarchy demonstrated, by their answers to questions in the course of the hearing, an attitude of mind which appeared to make assumptions and act on them without questioning whether or not they were valid. Similarly, on several occasions, conclusions appear to have been readily arrived at (eg, that no investigations of a particular matter were required) rather than maintaining an open or questioning mind. A tendency towards closure rather than maintaining a questioning mind is an attitude fraught with danger” p627.

The inquiry spelt out what it saw as the appropriate attitude of mind in the circumstances.

“Something more than a superficial assessment was called for in the circumstances where mining was taking place in the vicinity of old workings known ...to be full of water. The terms of Mr M’s report were startling, different. They were the observations of an experienced deputy. The panel was known to be the direst in the mine. How long had Mr M observed the considerable seepage at the face? What was the flow rate of the trickle? Had the water reappeared after production ceased? What was the likely source? If the (old) colliery was a possible source, what did that suggest? Might the plan be wrong?” p628. see also page643

¹¹⁴ J 632

¹¹⁵ J 703

¹¹⁶ I p543

¹¹⁷ I p544

¹¹⁸ I p544

¹¹⁹ I p545

¹²⁰ I p546

¹²¹ I pp554,543

¹²² I p548

¹²³ I p549

¹²⁴ I p554

¹²⁵ I p557

¹²⁶ I p555-6

¹²⁷ J 702

¹²⁸ I p592

¹²⁹ I p587

¹³⁰ J 417

¹³¹ S 19

¹³² I p556, J 701

¹³³ The question of what a reasonable person who has foreseen a risk would do is discussed in A Brooks, *Occupational Health and Safety Law in Australia*, 4th ed, p78ff. Strictly speaking this applies to liability, not culpability, but the reasoning relevant here.

¹³⁴ I pp557-8

¹³⁵ I p595

¹³⁶ I p505

¹³⁷ J 934. Had they been charged under section 19(a) of the Act the outcome might have been different.

That section states “Every employee while at work shall take reasonable care for the health and safety of persons who are at his or her place of work and who may be affected by his or her acts or omissions at work”