

# European Developments in Corporate Criminal Liability

*Edited by*  
**James Gobert and**  
**Ana-Maria Pascal**



Routledge Advances in Criminology

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# European Developments in Corporate Criminal Liability

When corporations carry on their business in a grossly negligent manner, or take a cavalier approach to risk management, the consequences can be catastrophic. The harm may be financial, as occurred when such well-regarded companies as Enron, Lehman Brothers, Worldcom and Barings collapsed, or it may be environmental, as illustrated most recently by the Gulf oil spill. Sometimes deaths and serious injuries on a mass scale occur, as in the Bhopal gas disaster, the Chernobyl nuclear explosion, the Paris crash of the Concorde, the capsizing of the Herald of Free Enterprise, and rail crashes at Southall, Paddington and Hatfield in England. What role can the law play in preventing such debacles and in punishing the corporate offenders?

This collection of thematic papers and European country reports addresses these questions at both a theoretical and empirical level. The thematic papers analyse corporate criminal liability from a range of academic disciplines, including law, sociology/criminology, economics, philosophy and environmental studies, whilst the country reports look at the laws of corporate crime throughout Europe, highlighting both common features and irreconcilable differences between the various jurisdictions.

**James Gobert** has been a Professor of Criminal Law at the University of Essex since 1989, and before that at the University of Tennessee. He has also taught at the University of Michigan, Vanderbilt University, and the University of Notre Dame (London). His specialist areas of research are corporate crime and white collar crime and he has spoken on these topics at universities and conferences throughout Europe, Australia and North America.

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# Foreword

Attitudes to big business have become increasingly binary in nature. Chicago-school monetarists assert that corporations should be left to 'get on with the job', contending that the only contribution capitalism should make towards the achievement of progressive social goals is to generate profit.

Not that any multinational, sensibly advised, would itself put it like that in the modern era. The point is invariably made by proxies.

On the contrary, when companies speak these days of the public interest, they are quick to acknowledge their obligations to a slew of stakeholders other than those on their share register. Firms now invest significant sums in good works and are not coy in saying so. Rare indeed is the day which goes by without the publication of a blue-chip stock's sustainability report. Corporate social responsibility or CSR has been elevated into a term of art in less than a generation.

There is, however, an equal and opposite view. If, as *The Economist* said in 2005, corporate social responsibility is 'the tribute that capitalism everywhere pays to virtue' it comes with an increasingly expensive price-tag, for the denunciation of perceived corporate vices has never been louder. Union Carbide, Toyota, McDonald's, Enron and (as I write) BP: in the popular consciousness these have all at one time or other been part of a rogues' gallery of corporate villainy, susceptible to excoriation at every turn, albeit in each case for different reasons.

So global business is in the dock. More often than not, however, the charge sheets have been based on rhetoric rather than substance. NGOs have for years held up the US Alien Torts Claims Act as a tool whereby corporate crimes anywhere in the world may be impeached in a US court, and true it is that this 1789 statute has by turns been invoked against Shell, Exxon-Mobil, Pfizer and others. But Professor John Ruggie, Special Representative on Business and Human Rights for the United Nations Secretary General, several years ago concluded that ATCA's relevance was largely 'existential' and it is not clear that it can bear the burden of expectation placed upon it by those anxious to constrain and punish corporate misconduct.

Time was when corporate entities, at least in England, were considered to be incapable of committing crimes, because they lacked the requisite intent, even though their members could be liable. This gave way to a 'directing mind' theory whereby a company was likened to a human body with a 'brain and a nerve centre'

and ‘hands which [held] the tools and [acted] in accordance with directions from the centre’.<sup>1</sup>

The ‘directing mind’ idea has proved no more adequate to the task in the modern era than has ATCA in the US. In recent years specific statutory measures have been introduced in this country to make the four corners of corporate liability less opaque, not least in the manslaughter context, while the UK Bribery Act 2010 will substantially extend the potential culpability not only of firms corporately but also their leaders individually.

Scrutiny of corporate conduct appears unlikely to diminish any time soon. Professor Ruggie will report next year on the instrumentalities which might conceivably underpin the *protect, respect, remedy* framework that he has devised and as a result the terrain across which companies may be at risk of liability may grow larger.

It was against this dynamic background that my firm was delighted to host the conference the papers for which appear in this book. There is much learning to be found here, which will be of interest not only to students and scholars but also to practising lawyers and their clients in the field.

**Michael Smyth CBE**  
**Partner, Head of Public Policy, Clifford Chance LLP,**  
**18 June 2010**

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<sup>1</sup> *HL Bolton (Engineering) Co Limited v T.J. Graham & Sons Ltd* [1957] 1 QB 159 at 172.

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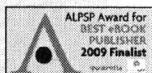
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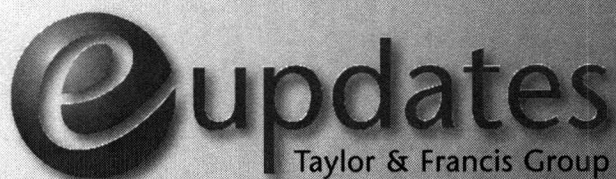
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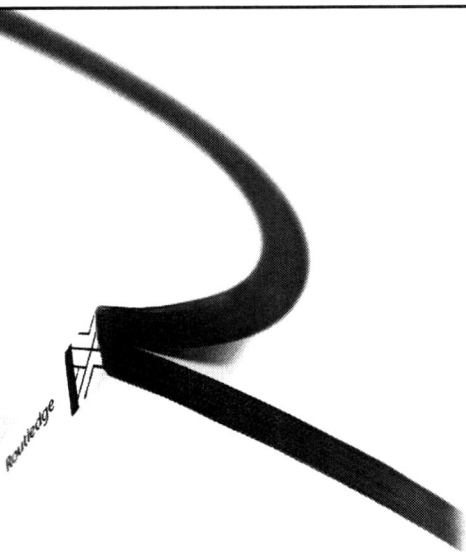
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