

Hillsborough: legal culpability in the aftermath of the findings of the Independent Panel

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Introduction

Twenty-five years ago the worst stadium disaster in British sporting history took place.¹ On 15 April 1989, Nottingham Forest Football Club (FC) played Liverpool FC in the Football Association (FA) Cup semi-final. The match was held at the neutral ground of Hillsborough in Sheffield, the home of Sheffield Wednesday FC. Tragically, 96 fans lost their lives in a major crush, an incident which has since been attributed, in the main, to incompetent policing.²

In the immediate aftermath, inaccurate press reporting, fuelled by misleading information provided by South Yorkshire Police (SYP) and a local Sheffield MP in an attempt to divert blame, sought to impose responsibility for the disaster on the Liverpool FC fans. It was alleged that many supporters had arrived at the ground late, intoxicated and without a ticket. An exit gate, it was claimed, was forced open, which led directly to the crush.³ These accusations were vehemently denied by the families of the victims and the people of Liverpool and it has since been established that the actual blame for the events that took place on that day lies firmly elsewhere.⁴ In 1990 the Taylor Report criticised SYP's handling of the match,⁵ confirming that the actual cause of the crush was not the actions of the fans, but the decision by the senior police officer in charge on the day, Chief Superintendent Dukenfield, to open an exit gate and his subsequent failure to order the closure of the entrance to the tunnel which directly serviced pens three and four, where the

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1 For detailed analysis of the build-up, the disaster itself and the aftermath, see P Scraton, *Hillsborough: The Truth* (Mainstream Publishing 2009).

2 Tony Bland was the 96th and final victim of the Hillsborough disaster. Artificial nutrition and hydration treatment was withdrawn as a result of him being diagnosed in a permanent and irreversible vegetative state. One patient, Andrew Devine, was initially diagnosed as being in a coma, but he subsequently demonstrated signs of awareness and a limited ability to communicate. For a full list of the victims see <<http://hillsborough.independent.gov.uk/memorial.html>>.

3 House of Commons, *Report of the Hillsborough Independent Panel* (HC 581 September 2012) paras 2.12.2–3.

4 *Ibid* para 1.124.

5 The Home Office, *Final Report of the Taylor Inquiry into the Hillsborough Stadium Disaster 1989* (Cm 962 January 1990).

crush then developed.⁶ Despite various out-of-court settlements being made between SYP and the victims' families, and in more recent times numerous apologies, SYP has never formally admitted liability for its behaviour and the families of the victims have remained unsuccessful in a range of legal actions which sought to hold it accountable.⁷

The recent report of the Hillsborough Independent Panel,⁸ whose remit was to develop public understanding of the tragedy based on thorough examination of a range of documents which have now become public,⁹ has exposed crucial new evidence about Hillsborough, illuminating the precise extent of SYP's failings and its subsequent cover-up. The findings also shed new light on the circumstances surrounding the disaster and what happened immediately afterwards and, as a result, the spotlight has intensified not only on SYP, but also on the Coroner, the emergency services, the English FA, Eastwood and Partners (a firm of safety engineers employed by Sheffield Wednesday FC), Sheffield City Council and Sheffield Wednesday FC itself.¹⁰ Amid this new evidence, there have been strong calls for criminal charges to be brought against those who were to blame for causing the disaster¹¹ and against those who were involved in what has been described as 'one of the biggest cover-ups in British history'.¹²

It is against this backdrop that this piece aims to explore the potential legal culpability of the various parties involved in Hillsborough, with a particular emphasis on the criminality of the conduct from both a historical and future perspective. The article begins by investigating the concept of collective blame. It discusses how the civil law of negligence is more suited to remedying behaviour of this kind and highlights the possible benefits which could have been gained from pursuing the initial civil law actions. It then examines the transition from civil liability to criminal liability for gross negligence manslaughter, identifying who potentially could be charged with this offence and the related problems. The narrative then moves to a discussion of 'systemic' fault and illustrates the limitations of the criminal law at the time of Hillsborough, and also of the criminal law at present. The paper finally concludes by suggesting where the most appropriate and realistic chance of success may lie in terms of any future criminal prosecutions.

6 See House of Commons (n 3) para 1.124.

7 House of Commons (n 3) para 2.7.24. In criminal law, see *Addington v Dukenfield and Murray*, Leeds Crown Court, 6 June 2000 [Unreported]. In tort law, see *White v Chief Constable of South Yorkshire* [1999] 2 AC 455; *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.

8 See House of Commons (n 3).

9 The Independent Panel's full terms of reference can be found in Appendix 1 of the Final Report. See House of Commons (n 3).

10 See N Morris, 'New Inquest to be Held into the Deaths of 96 Liverpool Fans Killed in the Hillsborough Disaster' *The Independent* (London, 16 October 2012) <www.independent.co.uk/news/uk/home-news/new-inquest-to-be-held-into-the-deaths-of-96-liverpool-fans-killed-in-the-hillsborough-disaster-8213378.html?origin=internalSearch> accessed 13 November 2012.

11 J Cusick, 'Manslaughter Charges Could be Brought over Hillsborough Tragedy' *The Independent* (London, 13 October 2012) <www.independent.co.uk/news/uk/crime/manslaughter-charges-could-be-brought-over-hillsborough-tragedy-8209055.html?origin=internalSearch> accessed 13 November 2012.

12 See M Beckford, 'Hillsborough: Prosecutions Likely over "The Biggest Cover-Up in History"' *The Telegraph* (London, 12 September 2012) <www.telegraph.co.uk/sport/football/teams/liverpool/9539424/Hillsborough-prosecutions-likely-over-the-biggest-cover-up-in-history.html> accessed 13 November 2012.

Pinpointing the blame

The difficulty with any large-scale disaster is that there is very rarely one isolated mistake which can be said to be the sole cause of it.¹³ More often than not, as was the case on the day of Hillsborough, circumstances conspire to create an environment where the potential for tragedy is heightened, and a chain of cumulative errors then triggers events which can very quickly spiral out of control.

In the investigations which inevitably follow, it will often become clear that some errors were graver than others, but it still may not be factually possible to say that any one individual has sole responsibility for causing the disaster.¹⁴ The problem then for any inquiry, legal or other, is ascertaining precisely who did what and identifying which errors are more culpable than others and deserving of civil, criminal or professional sanction. The natural inclination for any of the parties involved will be to blame each other in an attempt to protect themselves. This is exactly what happened after Hillsborough and is one of the principal reasons why it became so difficult for the numerous investigations that followed to elicit the truth.¹⁵ Despite attempts to divert blame to the Liverpool fans, SYP has since been held primarily responsible for the disaster.¹⁶ That being said, it is worth remembering that no matter how incompetent its officers were on the day, and no matter how abhorrent its subsequent lies were in the cover-up, SYP was not alone in error. The English FA knew that Hillsborough was a venue which had experienced crush problems before, a fact evidenced by its previous removal from the list of potential designated semi-final venues.¹⁷ When the question was raised as to whether or not it ought to be reinstated as a semi-final venue, the FA ought to have approached this with an increased sense of alertness. If nothing else it ought to have taken steps to ensure that the ground had received its safety certificate, something which Hillsborough did not have at the time of the disaster.¹⁸ If the FA had fulfilled its role properly, the tragedy would never have happened, at least not at that ground and on that day. Similarly, Sheffield Wednesday FC itself was partially at fault for failing to ensure that its ground adhered to safety regulations which were designed to protect fans from harm at the time, and so too was Eastwood and Partners, the firm of safety engineers which was engaged to make alterations to the Lepping's Lane End as a result of the earlier concerns about crushing. Finally, Sheffield City Council, which was under a statutory duty to issue the ground with a safety certificate in conjunction with the club and the safety engineers, had a legal responsibility that it failed to discharge.¹⁹ After the disaster occurred, there were also other parties, such as the South Yorkshire Ambulance Service, the South Yorkshire Fire Service and the Sheffield hospitals, whose conduct came under scrutiny. However, whilst the findings of the Independent Panel do consider the emergency response immediately after the incident, it is clear that if any fault can indeed be attributed to these parties, it is not of the same magnitude and thus any argument for a legal

13 This is evident from the range of disasters which took place in the late 1980s. These include, amongst others, the capsizing of the *Herald of Free Enterprise*, the rail crash at Clapham Junction, the *Piper Alpha* oil rig explosion and the sinking of the *Marchioness* pleasure boat on the River Thames. See I M Gault and R J McGrane, 'Corporate Manslaughter in Major Disasters' (1991) 2 *International Company and Commercial Law Review* 166.

14 This has been a perennial problem in the evolution of tort and criminal law in the context of causation. See, amongst others, *McGhee v National Coal Board* [1973] 1 WLR 1; *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32.

15 See House of Commons (n 3) para 1.148.

16 *Ibid* paras 2.12.6–9.

17 *Ibid* para 1.54.

18 *Ibid* para 2.1.82.

19 See Safety of Sports Ground Act 1975, s 1(1)(a)(b). See also House of Commons (n 3) para 1.141.

case against them is less compelling. As such, this article limits its analysis to those key parties at fault before and during the disaster.

The initial civil actions: importance overlooked?

Civil law is primarily concerned with the relationship between two parties and their legal responsibilities to each other; the principal aim of civil negligence is to provide compensatory redress for the careless conduct of one party which owes a legal duty of care to the other.²⁰ Numerous actions in negligence were pursued quickly after Hillsborough.²¹ It was clear that various agencies were at fault and that there was the distinct possibility of recovering damages against all of them. When faced with multiple tortfeasors, the claimant, in a civil action for negligence, has the advantage of choosing which defendant to sue; the defendants can be sued individually and/or together and it is then open to a particular named defendant to commence third-party proceedings against another unnamed defendant seeking a proportionate contribution to any compensatory award made.²² Thus, cases were initially brought against SYP, Sheffield Wednesday FC, Eastwood and Partners and Sheffield City Council for the fatalities and the physical injuries and/or psychological distress which the claimants endured as a result of being in the pens. One notable exception from this list of defendants was the FA. The FA was subject to minimal legal scrutiny and exposure for its failings in regard to Hillsborough, but for a number of reasons it would have been useful for it to be named as a defendant in the early civil proceedings. First, it would have sensitised governing bodies from that point on to the fact that across a range of different sports they may face civil liability for failing to monitor, review and implement effective safety procedures. Second, it would have served to clarify the law. The existence of a sports governing body's duty of care has now been recognised in English law,²³ but it was not until fairly recently and the legal basis for imposing the duty, and its precise parameters, are ill-defined.

Certain duties as and between those actually involved in sporting events have been confirmed by the courts,²⁴ but the law is much less clear in respect of the duty of care between sports governing bodies and spectators. Whilst one could argue that the requirements of proximity and foresight of harm are present between, say, the FA and spectators who attend one of its organised events,²⁵ it has been countered, albeit it in a slightly different context, that to impose a duty in this way would create a duty to an indeterminate class of individual.²⁶ First instance case law seems to indicate that the former view would prevail,²⁷ but there is another moot point. In the existing cases, assumption of responsibility seems to have played a big part in the confirmation of a duty of a governing

20 Negligence is only actionable on proof of damage. Causation is a further requirement of negligence which demands that the breach (careless conduct) has caused or materially contributed to the damage.

21 See House of Commons (n 3) para 1.146.

22 See for discussion, S Deakin et al., *Markesinis and Deakin's Tort Law* (7th edn OUP 2013) 880–87.

23 See *Watson v British Boxing Board of Control Ltd* [2001] QB 1134.

24 For the duty owed by participants to other participants, see *Condon v Basi* [1985] 1 WLR 866; *Caldwell v Maguire* [2001] EWCA Civ 1054, [2002] PIQR P6. For participants and spectators, see *Woodbridge v Sumner* [1963] 2 QB 43. For referees and participants, see *Vowles v Evans* [2003] EWCA Civ 318, [2003] 1 WLR 1607.

25 The tripartite test for establishing a legal duty of care is found in the case of *Caparo Industries v Dickman* [1990] 2 AC 605. The three requirements are proximity, reasonable foresight and that it must be fair, just and reasonable to impose a duty.

26 See the submissions made by counsel for the second defendant in *Wattlenorth v Goodwood Road Racing Co Ltd and Others* [2004] EWHC 140 (QB), [2004] PIQR P25 [116].

27 See the comments of Davis J in *ibid* [122].

body.²⁸ Assumption of responsibility is not a prerequisite to establishing a duty, but it is one component of the bigger question of whether it is fair, just and reasonable to impose one.²⁹ It would have been less of an issue in respect of the more direct parties, but in terms of a more distant defendant, such as the FA, it would have been difficult to ascertain whether in fact it did assume any responsibility for the safety of fans back at the time of Hillsborough. It did not do so explicitly,³⁰ but an assumption of responsibility does not have to be express and can be inferred through conduct or certain other working arrangements.³¹ Nonetheless, it is still not overtly clear whether such an assumption could have been inferred from the then working practices of the FA.³² If it was decided that the FA did not assume any responsibility, it would have been interesting to see what effect, if any, this would have had on the duty question. Nowadays, for instance, a specific statutory body is responsible for overseeing stadium and spectator safety and presumably it would now be easier to identify that body as assuming responsibility for the care and safety of fans.³³ Thus, if a similar case was litigated today and if it was deemed appropriate to pursue an action against a more distant defendant, would it be fair to hold the FA liable for an obligation that does not fall directly within its remit? The omission of the FA in the civil actions was probably more to do with pragmatic reasons than anything else. There were clearly more direct parties with better financial backing, but it would have been beneficial to see how the courts would have dealt with this question in the early 1990s, particularly given that the existence of a duty of care has significant importance outside the civil law and within the context of criminal gross negligence manslaughter.³⁴

The subtleties of the original civil actions are now only matters of academic interest because eventually the cases were settled out of court.³⁵ Agreements were made between SYP and the bereaved and injured; and also between SYP and the 'other' defendants

28 *Watson* (n 23) and *Wattleworth* (n 26) were decided on this basis.

29 See *Selwood v Durham County Council* [2012] EWCA Civ 979, [2012] PIQR P20 [53].

30 There is nothing in the FA's documentation, either now or at the time of Hillsborough, to suggest that it assumes explicit responsibility for the safety of spectators at football grounds. The most recent version of the FA's Memorandum of Association, amended in 2007, states, under cl 3(7), that one of its objectives is to 'promote, provide for, regulate and manage in all or any of the required details or arrangements, including any arrangements for the benefit of associations clubs, football competitions, contests and matches, international or otherwise, and in England or elsewhere, and to do or provide for all or any such matters and things as may be considered necessary for or ancillary to the comfort, conduct, conveyance, convenience or benefit of players and of the public, or of any other persons concerned or engaged in such competitions, contests or matches' (my emphasis added). Whilst the last line suggests the FA may acknowledge some responsibility to the public, it does not go as far as to mention clearly the words health and safety. See <www.thefa.com/football-rules-governance/more/rules-of-the-association>.

31 See *Selwood* (n 29) [52].

32 The immediate question when seeking to impose a duty of care on the FA would be: 'A duty to do what exactly?' This could be couched as a duty to take reasonable care in the organising and supervision of its competitions, which ought to encompass health and safety. By its own admission it has some, albeit loosely defined, responsibility to the general public in this regard (see n 30). However, once a decision is made by one of its committees, if the working practice of that committee is not to get involved in the logistics of health and safety and to leave this to the owners of the particular ground in question and/or the police and city councils, it would be difficult to infer any assumption of responsibility.

33 From early on it has always been clear that the safety of sports grounds and spectators is not a matter purely for the FA. In 1976 the Home Office issued *The Guide to Safety at Sports Grounds* (The Green Guide). It is now in its fifth edition, last published in 2008. There is now also a statutory body that is responsible for overseeing stadium safety. See the Sports Ground Safety Authority (SGSA) website: <www.safetyatsportsgrounds.org.uk/about/history.php>.

34 See House of Commons (n 3) para 2.7.6 for the exact dates of the commencement of the civil litigation.

35 See *ibid* ch 7: 'Civil Litigation: Conclusion – What is Added to Public Understanding' for information relating to the amount paid out in the settlements.

(Sheffield Wednesday FC and Eastwood and Partners) in respect of third-party proceedings to determine the proportionate amount of costs that each should pay in respect of the out-of-court settlements.³⁶ Despite indications to the contrary, there has never been any formal admission of liability from any of the parties to the settlements.³⁷ The fact that the cases were settled before they ever reached court was, for a variety of reasons, unfortunate. With the benefit of hindsight this is easy to say and, with a lucrative offer having been made, settlement was financially the sensible move for the families.³⁸ In view of the findings of the Taylor Report, the families probably felt that justice and accountability would be achieved by other legal means and that accepting compensation would have little or no bearing on this.³⁹ Nonetheless, civil negligence is not just about compensation. It has a prescriptive power; it is not only a method of holding defendants to account for unreasonably careless behaviour, but is also a means of regulating future conduct.⁴⁰ Had the cases been heard in open court, and had the defendants been liable, there would have at least been a feeling back then that someone had been held legally accountable for the errors that took place. The defendants may well have tried to blame each other for what went wrong, but the standard of care is lower in civil law than in criminal and so it would have been easier, although by no means straightforward, for the claimants to prove, on the balance of probabilities, that each of the defendants was in breach of its duty.⁴¹ Crucially, however, in the course of jostling over the question of liability, important evidence would have been heard which may have exposed the serious shortcomings of SYP's version of events at a much earlier stage and which also could have been useful in pursuing lines of criminal prosecution further down the line.⁴² Knowing what we know now, there is probably a feeling of regret that the civil cases were settled when they were, but the harsh reality is that when things did not turn out as expected in the other multiple investigations, recourse to the criminal law was always going to prove difficult.

From civil to criminal: gross negligence manslaughter

From a criminal perspective, the Director of Public Prosecutions (DPP) decided not to instigate any criminal proceedings against those who were to blame for Hillsborough.⁴³ Of

36 House of Commons (n 3) ch 7. Sheffield City Council was not included in the original third-party proceedings. However, it was pursued separately at a later date and eventually did contribute to the overall pay-out.

37 In *Alcock*, (n 7) 392, Lord Keith stated that the 'Chief Constable of South Yorkshire has admitted liability in negligence in respect of the deaths and physical injuries'. This was technically incorrect.

38 One of the major difficulties with civil litigation of this type is the major imbalance of power between the parties. SYP had the financial resources to fight the claim if it had wanted, and the other named defendants were in a better financial position than many of the claimants.

39 One of the key problems in achieving accountability for Hillsborough was that there were multiple investigations and inquires which all overlapped and which all served different purposes. After the publication of the Taylor Report, the families probably thought that the inquest would return a verdict of unlawful killing and that criminal prosecutions would naturally follow. See House of Commons (n 3) ch 6.

40 For discussion see W V H Rogers, *Winfield and Jolowicz Tort* (18th edn Thomson Sweet & Maxwell 2010) ch 1. See also M Lee, 'Tort Law and Personal Injury Law in the Regulatory State' (2011) 3 *Journal of Personal Injury Law* 137.

41 The general standard of care required in ordinary negligence is to take reasonable care in all the circumstances: *Blyth v Birmingham Waterworks Co* (1856) 156 ER 1047. This same standard applies under the Occupiers Liability Act 1957, s 2(2). In the context of professional negligence, the standard required is to act in accordance with a reasonable, responsible and respectable body of expert opinion with that field: *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; *Bolitho v City and Hackney Health Authority* [1998] AC 232.

42 See discussion below of the offence of perjury and contempt (n 107).

43 See House of Commons (n 3) para 2.6.252. For discussion of the various other inquiries and investigations, see *ibid* paras 1.214–40.

the offences available, gross negligence manslaughter was the most appropriate and serious charge that could have been brought.⁴⁴ Prosecuting this offence is notoriously difficult. The scope of the crime is poorly defined and it arguably remains too closely aligned to civil negligence, insofar as it is difficult to explain the standard of conduct that is required to make the transition from one to the other.⁴⁵

When disaster occurs, individuals within organisations are sometimes singled out to conceal bigger systemic failings and, in the absence of any legal sanction being brought against the organisation, those who have been directly affected by the incident in question will often find solace in being able to blame one person. Sometimes this may be inappropriate,⁴⁶ but equally, on occasion, it may be justified, especially where the individual error seems so gross that it is deserving of criminal sanction. The problem lies, as it did for the families in Hillsborough, in identifying an appropriate individual whose error was of that magnitude.

Sheffield Wednesday FC's civil liability would have been by virtue of the Occupier's Liability Act 1957,⁴⁷ but attempting to identify one individual within that organisation whose negligence was such that it warranted criminal sanction would have been difficult for any prosecutor.⁴⁸ Framing a case against Sheffield City Council would have been even more challenging. Civilly, whilst it was clearly under a statutory duty to issue the ground with a safety certificate by virtue of the Safety of Sports Ground Act 1975, this statute explicitly precludes any civil action for breach of its terms.⁴⁹ Thus, what has been termed an action for breach of a statutory duty *simpliciter* would have been out of the question, meaning that any other claim would have had to be pursued under the ordinary common law principles of negligence.⁵⁰ Assuming a duty of care was held to exist between the City Council and those who attended the ground,⁵¹ the sloppiness inherent in its systems for checking and issuing safety certificates undoubtedly would have led to success in any civil claim, but the organisational structure of the council would have made it nigh on impossible to identify any one single decision-maker who owed a legal duty and whose error was so grave that

44 The origins of gross negligence manslaughter can be traced back to the early case of *R v Bateman* (1927) 19 Cr App Rep 8. However, as a result of the House of Lords' decision in *R v Seymour* [1983] 2 AC 493, there was some confusion about the applicability of the offence between the years 1983 and 1994. Depending on the precise timings of any prosecutions, it is possible, although by no means certain, that charges could have been pursued under the heading of reckless manslaughter, as per *Seymour*. In 1994, The House of Lords in *R v Adomako* [1995] 1 AC 171 held that there was no offence of manslaughter by recklessness and that the correct offence was gross negligence manslaughter. Despite this confusion, it is highly unlikely that the courts would have disregarded gross negligence manslaughter altogether in appropriate circumstances (see *R v Goodfellow* (1986) 83 Cr App Rep 23). It is clear that, in respect of Hillsborough, the legal opinion at the time was that any criminal prosecutions should have been pursued under the heading of gross negligence manslaughter. See Hillsborough Independent Panel: Disclosed Material, 'A Copy of Joint Opinion of Gareth Williams QC and Peter Birts dated 6 August 1990', Unique Document ID: AGO000003030001, para 63. As such, this article proceeds on this basis that this would have been the appropriate charge at the time, and certainly would be now moving forward.

45 For an interesting critique in a medical context, see M Brazier and A Alghrani, 'Fatal Medical Malpractice and Criminal Liability' (2009) 25 *Journal of Professional Negligence* 51.

46 For example, when the *Herald of Free Enterprise* capsized, there was an attempt to blame the entire disaster on the ship's bosun. He was not without error, but it was certainly inappropriate to make him the scapegoat in order to disguise a wider range of failings within the company.

47 Occupiers Liability Act 1957, s 2 (1), imposes on occupiers the 'same' common law duty of care to all their visitors.

48 See discussion of 'systemic fault' below.

49 Safety of Sports Ground Act 1975, s 13(a).

50 See M Jones, *Textbook on Torts* (8th edn OUP 2005) 447.

51 This is not an absolute certainty, but in the circumstances would seem highly likely.

instigating criminal proceedings would have been appropriate. The case against Eastwood and Partners would have been easier to argue in the sense that the firm was a much smaller concern and so 'individual' error would have been more readily identifiable. Nonetheless, even though individuals within the firm did receive criticism about how they performed their professional duties, it is debateable whether or not their conduct would have amounted to criminal negligence because the stadium safety guidelines at the time were open to a range of possible interpretations.⁵²

After being overlooked in the civil proceedings, personnel within the FA were almost certain to be ignored in any criminal investigation. In the context of a charge for gross negligence manslaughter, a lot would hinge on whether in fact a legal duty was said to exist between an individual at the FA and the victims.⁵³ Even if it did, which is open to debate, problems would again reside in identification of *the* appropriate individual. The FA was aware of problems with Hillsborough, both from past experiences of games held there and also from written correspondence from fans warning it of the dangers.⁵⁴ Naturally, the organisation denied all knowledge of this,⁵⁵ which, in turn, would have rendered the task of isolating the negligent conduct of one individual who knew about the risk and who blatantly ignored it, a complex exercise. Prosecution would have been dependant on the ability to demonstrate that a sufficiently senior person within the FA owed a legal duty, was aware of a risk of death, and whose negligence was so gross in the circumstances that it could be said to amount to a crime. With the threshold being so high, one can understand why prosecutors were hesitant to explore this particular avenue.

On an individual basis, then, the most likely avenue for success would have been to bring criminal charges for gross negligence manslaughter against officers within SYP, which is what the families did in a private prosecution.⁵⁶ Whilst civil action against SYP as an organisation would not have been uncomplicated, success would have been more likely than not given the circumstances.⁵⁷ The only realistic candidates for individual criminal prosecutions though were Chief Superintendent Dukenfield and Superintendent Murray, match-day commander and second-in-command respectively, both of whom were situated in the police control box at the time of the crush. Having identified the relevant parties who were under a legal duty, the next step would have been to isolate the error that was likely to lead to a successful prosecution. It was not open to prosecutors to consider the range of failings that quite blatantly contributed to the nightmare situation that those two officers found themselves in on the day, for those were systemic errors which had taken place beforehand. Thus, the investigation would have had to look specifically at what those two did, and the decisions they took. It was evident that they did not delay kick-off and perhaps they should have done, but it is unclear whether this would have prevented the disaster from happening the way it did.⁵⁸ They also took the decision to open exit gate C. Ignoring the lie that Dukenfield subsequently told about the fans forcing the gate open, would this decision alone have been sufficient to convince a jury to convict? Considering the surrounding circumstances, it is

52 See House of Commons (n 3) paras 2.140–82: 'The Green Guide: A Matter of Interpretation?'

53 See nn 23–33.

54 See House of Commons (n 3) paras 2.1.107–9.

55 Ibid.

56 *Addington v Dukenfield and Murray*, Leeds Crown Court, 6 June 2000 [Unreported].

57 See n 41 for discussion of establishing breach.

58 In 1987 the semi-final kick-off at Hillsborough was delayed by 15 minutes. See House of Commons (n 3) para 2.1.96. However, even if the kick-off had been delayed in 1989, it is unclear to what extent it would have averted the disaster. The HSE calculated that had gate C not been opened it would have taken until 3.40pm to admit all 10,100 spectators with tickets for the Lepping's Lane terrace, 40 minutes after the scheduled kick-off. See House of Commons (n 3) para 2.6.104.

highly unlikely. If that gate had not been opened there would have been fatalities outside the ground and, faced with this situation, it is not unreasonable to suggest that most people in Dukenfield's position would have done the same in the genuine belief that they were acting to save lives. This certainly does not lend itself to conduct which equates to gross negligence. This left one critical error, an error which must then have been viewed in isolation; opening exit gate C, *without giving a thought to whether or not the tunnel leading to pens 3 and 4 should then have been closed off*. It was this error which was central to the private prosecution.

The leading case on gross negligence manslaughter is the House of Lords' decision in *R v Adomako*.⁵⁹ This involved a charge against an anaesthetist for causing the death of a patient when he failed to notice that the patient's air tube had become disconnected. Lord Mustill delivered the leading judgment stating that 'the essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission'.⁶⁰ This does not provide a great deal of assistance and the test has been criticised as being circular in nature; it essentially asks a jury to convict of a crime if they think a crime has been committed.⁶¹ Accordingly, a judge will have to elaborate on this when giving a direction in a particular case. In the private prosecution, Hooper J posed four questions to the jury: first, 'are you sure, that by having regard to all the circumstances, it was foreseeable by a reasonable match commander that allowing a large number of spectators to enter the stadium through exit gate C without closing the tunnel would create an obvious and serious risk of death to the spectators in pens 3 and 4?' If 'yes', they were to move to question two; if 'no', the verdicts should be 'not guilty'. Second, could a 'reasonable match commander have taken effective steps . . . to close off the tunnel thus preventing the deaths?' If 'yes', they were to move to question three; if 'no', the verdicts should be 'not guilty'. Third, was the jury 'sure that the failure to take such steps was neglect?' If 'yes', it was on to question four; if 'no', the verdicts should be 'not guilty'. Fourth, was the 'failure to take those steps . . . so bad in all the circumstances as to amount to a very serious criminal offence?' If 'yes', the verdicts should be 'guilty'; if 'no', they should be 'not guilty'.⁶² In respect of the first question, the officers on trial would no doubt have claimed that the obvious and serious risk of death was unforeseeable, but the test is objective and, when viewed through the prism of reasonableness, that defence was unlikely to be accepted. If questions two and three were also answered in the affirmative, the main obstacle would still have been question four. It is possible that the test Hooper J posed could have been phrased in a slightly different way, and also that his comments about why a jury may not think it appropriate to convict a police officer of such a felony could have been tempered,⁶³ but that does not escape the fact that the final question is central to establishing criminality.⁶⁴

Two factors would have weighed against conviction. First, things would have had to be considered as they were in 1989 and not as we know them to be now.⁶⁵ Second, the 'circumstances' element of the question opens up a wide range of considerations which may

59 *R v Adomako* [1995] 1 AC 171.

60 *Ibid* 187.

61 *Ibid* 183.

62 See House of Commons (n 3) para 1.264.

63 See *ibid* 1.270–2.

64 See *ibid* para 1.265. A judge will naturally vary his or her direction to the jury based on the particulars of a given case. In the conjoined appeals of *Adomako*, *Prentice* and *Holloway*, the test for gross negligence manslaughter was articulated in slightly different terms to that presented by Hooper J in the private prosecution against Dukenfield and Murray. See *R v Adomako and Others* [1994] QB 302, 323.

65 See House of Commons (n 3) para 1.270.

convince a jury to be more sympathetic. Despite the fact that Dukenfield and Murray were trained professionals, some jurors may have fallen into the trap of considering what they themselves would have done, and how they would have acted, had it been them in the control box on that day. If a judge, in summing up, stresses the importance of considering 'surrounding circumstances', which Hooper J did, the chances of this happening are increased. The fact that this was an unforeseen disaster which struck out of the blue, and that decisions had to be taken quickly in an emergency situation, may have been issues which heavily influenced jurors' reasoning.⁶⁶ It is conjecture, but the lack of guidance may also have caused some of the jurors to reach their decision by directing their minds to the wrong question. The need to avert a life-threatening crisis outside would no doubt have formed an integral part of their reasoning and to that end any question relating to the criminality of opening exit gate C alone would probably have been answered in the negative. However, the jury was not concerned with that question; its attention should have been on the decision not to close off the tunnel. In answering this, if the jury was genuinely convinced that Dukenfield honestly believed it was the responsibility of the club stewards to control the flow of fans through the tunnel, or that his officers would have acted on their own initiative to close off the tunnel, as he has always maintained, could his error have been legitimately classified as being so gross so as to warrant a crime?⁶⁷ Dukenfield did not give evidence in the private prosecution, but it was claimed by Murray that it simply never occurred to him (Murray) to close off the tunnel at the time.⁶⁸ If there was a blatant lack of foresight of an obvious risk on the part of Dukenfield and Murray then they had a case to answer, but if it did not cross their mind due to an honest belief that others would have acted on their own initiative and already closed off the tunnel, that is slightly different. Given his position as match-day commander, Dukenfield should have been more diligent in checking what his officers inside the stadium had done, and he was certainly careless in not doing so, but the question as to the criminality of his conduct to this day remains borderline and the answer depends largely on who is asked. When juries are faced with difficult questions and indecision strikes, more often than not defendants will escape conviction. Murray was acquitted; the jury could not reach a decision on Dukenfield and a retrial was refused.

The double jeopardy rule has now been relaxed in English law.⁶⁹ In light of the new evidence which has been uncovered by the Independent Panel, and against a background of calls for new individual prosecutions for gross negligence manslaughter, if a jury was asked once again to decide on the question of whether certain conduct was so bad in the circumstances to amount to a crime, would anything be different? The panel's findings are not likely to change anything in regard to the criminal liability of individuals previously involved in Sheffield Wednesday FC, Eastwood and Partners and Sheffield City Council. Consequently, Dukenfield's error will continue to take centre stage in any future individual prosecution. Given that SYP's cover-up played a big part in the findings, it is possible that any jury would now be sceptical of Dukenfield's purported 'honest' beliefs about who had responsibility for managing the tunnel. This is particularly pertinent amid evidence that the tunnel had been closed off at the semi-final the year before in 1988 in order to avoid a similar crush. Both Dukenfield and his predecessor, Chief Superintendent Brian Mole, who

66 House of Commons (n 3) paras 1.269 and 1.271.

67 See *ibid* paras 2.3.69, 2.3.82 and 1.87.

68 See *ibid* para 1.263.

69 The double jeopardy rule prevents a defendant from being prosecuted for the same crime twice following a legitimate acquittal or conviction. It is now possible, in certain circumstances where new and compelling evidence has come to light, to retry a defendant for certain crimes. See Criminal Justice Act 2003, Part 10. Given recent developments, it seems clear that the findings of the Independent Panel amount to 'new and compelling' evidence.

was the match-day commander in 1988, denied that they had any knowledge of this, but the findings of the Independent Panel suggest that, even if they were specifically unaware of the tunnel closure in 1988, they admitted awareness of the practice of occasionally closing the tunnel to prevent crushing in the pens.⁷⁰ Given that this was known to Dukenfield and that he failed to ensure that it had been implemented effectively, it surely amplifies the scale of his error. Even so, in assessing the likelihood of a guilty verdict, at best it can be said that the final outcome would be unpredictable; at worst the chances of success slim. For this reason, pursuing a prosecution for causing death against one individual is perhaps not the most appropriate course of action, but that is not to suggest that bringing serious criminal charges for causing death against SYP as an organisation is inappropriate. Here the emphasis switches from individual to organisational fault and it becomes evident very quickly that a criticism of English criminal law, both past and present, is that it has only limited means of dealing with the type of systemic failings which truly caused Hillsborough.

The law then and the law now: criminal recognition of 'systemic fault'

At the time of the Hillsborough disaster, there was a distinct lack of criminal offences aimed at organisational fault. Offences existed for some time under the Health and Safety at Work Act 1974, but prosecutions were seldom brought against organisations such as the police.⁷¹ A further problem is that any conviction under this legislation was often perceived to be more symbolic than punitive.⁷² The other possibility was common law corporate manslaughter. The origins of this offence had already started to take shape before Hillsborough,⁷³ but its actual recognition as a crime was not confirmed by the courts until just after, in a case which concerned another catastrophic disaster, the sinking of the *Herald of Free Enterprise*.⁷⁴ From this point on though, the offence existed, at least notionally.

In order to prosecute, the organisation in question first had to have corporate status. This immediately removed SYP from the purview of the offence because, at the time, a police force was 'devoid of any legal status as a corporate body'.⁷⁵ In actual fact, prior to 2007, the police force could not be prosecuted for the common law offence of involuntary manslaughter, leading Griffin and Moran to suggest that this 'represented an obvious injustice to the relatives of a victim killed by police neglect'.⁷⁶ The various other parties did not enjoy the same immunity. Eastwood and Partners, whilst giving the impression of a partnership, was actually a registered company.⁷⁷ Similarly, whilst it seems to have gone generally unnoticed, the FA had the status of a private limited company⁷⁸ and, as a statutory

70 See House of Commons (n 3) Part 2: 'What is Added to Public Understanding?'; ch 3: 'Custom, Practice, Roles, Responsibilities' and 'Conclusion: What is Added to Public Understanding?'

71 See S Griffin and J Moran, 'Accountability for Deaths Attributable to the Gross Negligent Act or Omission of a Police Force: The Impact of the Corporate Manslaughter and Corporate Homicide Act 2007' (2010) 74 *Journal of Criminal Law* 358, 368.

72 *Ibid* 361.

73 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

74 *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72.

75 See Griffin and Moran (n 71) 368.

76 *Ibid* 361.

77 A search of Companies House indicates that Eastwood and Partners (Consulting Engineers) Limited is a private limited company, incorporated on 23 July 1984, company number 01835021: see <www.companieshouse.gov.uk/index.shtml>. In the correspondence which forms part of the Independent Panel's evidence, the company is listed as an unlimited company. Either way, it is clear that it had incorporated status.

78 A search of Companies House indicates that the Football Association Limited is a private limited company, incorporated on 23 June 1903, company number 00077797.

company, so too did Sheffield City Council.⁷⁹ Sheffield Wednesday FC was also a registered company and so equally fell within the reaches of the offence.⁸⁰ Having established that at least some of the key fault-bearers could theoretically have been charged, what other obstacles stood in the way of a successful prosecution?

The second and integral component of the offence was satisfying what was known as the 'identification doctrine'.⁸¹ This left prosecutors having to identify the senior directing mind and will of the company; in reality this meant it had to be possible to locate, within the corporate structure, one individual who was of such seniority that their guilty mind could be imputed to that of the company. Thus, even though the offence was ostensibly aimed at organisations, conviction still hinged on being able to identify the necessary mental state of an individual. This had the perverse effect of penalising smaller companies, where it was easier to identify a senior directing mind, and benefitting larger corporations, where the diffuse nature of their management structure often made it impossible to identify one person of sufficient seniority who was culpable.

It would have been unheard of at the time to charge a city council with corporate manslaughter and the fragmented management structures and convoluted decision-making processes of local government, untypical of a commercial company, would have severely hindered any chance of success.⁸² Sheffield Wednesday FC, on the other hand, was a more traditional company. It was not a huge multinational affair and was therefore likely to have had a more discernible corporate management structure, but that does not mean that this structure would have been straightforward, nor incapable of manipulation. The club would have most likely claimed that health and safety decision-making was delegated further down the chain of command. If the owner, chair and/or board of directors could legitimately claim they had no real knowledge of the inadequacies of the stadium's health and safety measures, nor any sole responsibility for implementing and checking them, any hope of securing a conviction would have been slim. Eastwood and Partners was more typical of the type of company that could have fallen victim to the identification doctrine. It was a smaller concern than many of the other entities involved and thus it would have been less taxing to identify the senior directing mind and will of the company. Even so, the only successful prosecution for corporate manslaughter under the common law was against a much smaller company than Eastwood and Partners and, if an individual charge of gross negligence manslaughter was deemed inappropriate, there would have been little hope of securing a conviction against the company.⁸³ In terms of the FA, problems would have existed in regard to its senior personnel and the precise role each had in the decision-making process of venue selection. Would it have been possible to identify any one person of sufficient

79 Local Government Act 1972, s 2(3).

80 A search of Companies House indicated that Sheffield Wednesday plc was a public limited company at the time of Hillsborough, incorporated on 08 June 1899, company number 00062478. This company was dissolved on 26 July 2011. This is at odds with other sources which provide evidence about the history of the club. In their recent book it was said by Brodie and Dickinson that 'in the summer of 1893 the club became a limited company, issuing fifty £5 shares'. They then proceed to suggest that in 1899: 'Wednesday were turned into limited liability company (LLC) and a share issue was announced, which it was hoped would raise £5,000.' See J Brodie and J Dickinson, *Sheffield Wednesday: The Complete Record* (DB Publishing 2011) 14 and 16. Interestingly, a new company, Sheffield Wednesday Football Club Ltd, which is still active, was incorporated just after Hillsborough, on 08 June 1990, company number 02509978. This could have been done with the purpose of avoiding significant liabilities if the club had been ordered to pay compensation.

81 This test was developed in *Tesco v Natrass* (n 73).

82 There was the possibility of charging Sheffield City Council with the offence of culpable misfeasance. This charge could have equally been brought against the FA.

83 See *R v Kite and OLL* [1994] Unreported. For the appeal against the individual jail sentence imposed on the company director, see *R v Kite (Peter Bayliss)* [1996] 2 Cr App R (S) 295.

seniority, whose directing mind and will could have been attributed to the organisation in order to secure a conviction? The FA did have a prominent figure in the public eye who was readily identifiable as the senior official at its helm, the then chief executive, Graham Kelly. He almost certainly would have had a key role in many of the association's decisions, but he was not the only person involved. In fact it is difficult to ascertain the precise extent of any one individual's input into the ultimate decision to select Hillsborough as the semi-final venue, and whether this was done with an awareness of the health and safety concerns which had previously been raised about the ground and the subsequent ignoring of them.⁸⁴ The pragmatic difficulties associated with identification and subsequent proof were definite barriers to a possible prosecution for common law corporate manslaughter against the FA.

The collapse of the prosecution against P&O Ferries for the Zeebrugge Ferry Disaster took place in early June 1990;⁸⁵ soon after that the DPP decided not to bring criminal charges against any individual or corporations for their respective roles in the Hillsborough disaster.⁸⁶ The failure of the earlier case may well have had a bearing on this decision. Yet, in hindsight, it may have been more appropriate to use the Hillsborough errors as test cases in the development of common law corporate manslaughter.

The Corporate Manslaughter and Corporate Homicide Act 2007 came into force on 26 July 2007. This statutory offence replaces the common law offence of corporate manslaughter and provides a different basis for attributing criminal liability to organisations which focuses on collective fault. An organisation is guilty of an offence if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care. Immediately, the offence is more suited to holding organisations to account for systemic failings from top to bottom. Greater emphasis is placed on the role of senior personnel because an organisation will only be guilty of the offence if the way in which its activities are managed and organised by its senior management is a substantial element of the gross breach of the duty of care.⁸⁷ The offence would cast the net much wider insofar as the considerations which could be taken into account when prosecuting companies such as Sheffield Wednesday FC, Eastwood and Partners and the FA.⁸⁸ The meaning of 'gross' breach is defined as conduct which falls far below what can reasonably be expected of the organisation in the circumstances.⁸⁹ Juries are allowed to consider a range of factors when determining this question, but are specifically directed that they must take into account whether the organisation breached any health and safety legislation and, if so, how serious this was and how much of a risk it posed.⁹⁰ What would have been highly relevant to the Hillsborough cases is that juries may also now specifically weigh up the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged the failure to adhere to health and safety legislation, or to have produced a tolerance of it.⁹¹ The legislation therefore elaborates on the term 'gross breach' which may prove more helpful to juries in assessing the conduct

84 See House of Commons (n 3) paras 2.3.16–20.

85 See n 74.

86 See House of Commons (n 3) para 1.160.

87 Corporate Manslaughter and Corporate Homicide Act 2007, s 1(3).

88 Sheffield City Council would fall outside the scope of the offence by virtue of the Corporate Manslaughter and Corporate Homicide Act 2007, s 3(3).

89 *Ibid* s 1 (4)(b).

90 *Ibid* s 8(2)(a) and (b).

91 *Ibid* s 8(3)(a). Under s 8(3)(b) the jury may also have regard to any health and safety guidance that relates to the breach. This would have allowed for such things as the guidance contained in Green Guide (n 33) to be considered.

in question. The Act also eliminates the need to identify a scapegoat as the definition of senior management is far-reaching and would include the range of personnel involved in the various decision-making processes of organisations, such as those who contributed to the catalogue of errors at Hillsborough.⁹² There were, however, a number of sticking points with the legislation, the main one being how this offence would apply to public authorities. After a stormy passage through Parliament, the final version of the Act extended the offence, in a restricted way, to the police.

At a cursory glance, the impression is that this would have been a particularly useful tool for holding the police criminally accountable for their actions at Hillsborough had it existed at the time. Instead of having to concentrate on solitary errors of particular individuals, the remit of the criminal investigation could have been extended to allow wider management decisions to be analysed. For a long time we have known that Dukenfield and Murray were not the only members of SYP who acted in error, it was simply they who were in the direct firing line because of their presence and inactions on the day. There were grave errors both before and after from higher up within SYP which were serious contributing factors to the disaster. Any legal inquiry under the Corporate Manslaughter and Corporate Homicide Act could have considered such things as the thought process behind the ticket allocation, who took the decision to replace the experienced match-day commander Chief Superintendent Brian Mole with the inexperienced Dukenfield just three weeks before the game and why,⁹³ who had responsibility for checking that there had been an effective transition between the two officers, and who was in charge of ensuring that effective channels of communication remained open between all officers before, during and after the game.⁹⁴

On closer inspection, however, the Act would have changed very little. In terms of its applicability to the police, the offence is limited. The duties owed by the police are confined to a duty owed to its employees, a duty owed as occupiers of premises and a duty owed to a person, such as a prisoner, for whose safety the police are responsible.⁹⁵ Other than that, the relevant duty of care does not extend to things done in the exercise of an exclusively public function and so 'operational decisions' taken by the police fall outside the scope of the offence.⁹⁶ To this end, even if the Act had been in existence as the time, the legal accountability of SYP for the deaths at Hillsborough would remain unchanged, meaning they would still have to be dealt with under the other limited mechanisms available to prosecutors. The rationale for restricting the offence was based on a defensive practice argument. Widening the offence could result in police becoming risk averse in the discharge of their duties and cause them to prefer 'inaction over decisive intervention'.⁹⁷ As with all defensive practice-type arguments, the claim is unsubstantiated and open to interpretational ambiguities. It is certainly regrettable that the offence does not impose liability for the death

92 'Senior management' is defined as persons who, in relation to an organisation, play significant roles in (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial part of those activities: Corporate Manslaughter and Corporate Homicide Act 2007, s 1(4)(c).

93 For an interesting account, see Scraton (n 1) 18–20.

94 There was evidence that a crushing incident had occurred in the 1988 semi-final at Hillsborough. Disaster was averted here by closing off the tunnel. Equally, there was evidence that the police, in 1988, checked the tickets of the fans on their way to the ground thereby staggering their arrival to the turnstiles. Mole denied this happened, but it now seems clear it did. This information should have been passed on to Dukenfield, but it was not. See House of Commons (n 3) Part 2: 'What is Added to Public Understanding?'; ch 3: 'Custom, Practice, Roles, Responsibilities' and 'Conclusion: What is Added to Public Understanding?'

95 Corporate Manslaughter and Corporate Homicide Act 2007, s 2(1)(a)(b)(d). See also s 2(2)(a)–(d).

96 *Ibid* s 5(3).

97 HL Deb 5 February 2007, col 564; see also HC Deb 5 June 2007, col 147.

of members of the public born out of gross negligence on the part of the police, for if it did important questions concerning systemic failure and the role of senior management in contributing to that failure could be considered, questions which the law has always overlooked and which very often need to be examined.

Before the enactment of the Corporate Manslaughter and Corporate Homicide Act 2007, English law was unequipped to deal with instances of death caused by systemic fault in organisations. This must be a bitter pill to swallow for the families of the Hillsborough victims and other such disasters. The new law does not apply retrospectively but, even if it did, it is severely limited in scope, capturing only some types of organisational behaviour and omitting to include in its reach certain activities performed by important public bodies such as the police. A further salient point is that it has long been recognised that a criminal offence aimed at an organisation does not bring with it the same sense of justice as those which are aimed at individuals. Under the statutory offence there is no individual liability.⁹⁸ Moreover, an organisation cannot face a jail sentence. The only sanction available is a fine, and there is now the possibility of an adverse publicity order against the entity convicted.⁹⁹ For bereaved relatives, these sanctions may not go far enough. Thus, in regard to Hillsborough, it is worth considering the other potential avenues for criminal responsibility.

Where the prosecutions should lie

There are a number of criminal offences which are available to ensure that there is some form of accountability for Hillsborough. Whilst some of these may be perceived as not having the same status as the serious homicide-type offences, they could still have an important role in the quest for justice and their value should not go unnoticed.

The possibility of prosecution has always existed under the Health and Safety at Work Act 1974. The most likely ground for prosecution would be under s 3(1) of the Act, which places a duty on employers to conduct their undertaking in a way as to ensure, so far as is reasonably practicable, that persons not in their employment who may be affected thereby are not exposed to risks to their health and safety. This could conceivably apply to any one of the entities involved in the Hillsborough errors. Section 2(1) of the Act, which places a duty on employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees, could equally apply to some of the organisations involved, particularly SYP and Sheffield Wednesday FC, whose employees were at work on the day of the game and who were exposed to danger and consequential harm as a result.¹⁰⁰ A breach of this offence is a crime punishable by a range of sanctions, encompassing both custodial sentences and fines.¹⁰¹ It is unclear why the Health and Safety Executive (HSE) decided not to prosecute the various parties for breaching this legislation because, at the time, this was the only real criminal offence that had any chance of success.¹⁰² That being said, knowing what we now know, there are other offences which could be pursued.

98 Corporate Manslaughter and Corporate Homicide Act 2007, s 18.

99 Ibid s 10.

100 In terms of applicability to the police, see Health and Safety at Work Act 1974, s 51A inserted by Police (Health and Safety) Act 1997, s 1.

101 Health and Safety at Work Act 1974, Schedule 3A inserted by Health and Safety (Offences) Act 2008, ss 1(2), 3(2), Schedule 1.

102 A section of the Independent Panel's findings is devoted to the HSE report. However, it is not explained why no prosecutions were brought. See House of Commons (n 3) paras 2.6.96–109.

The most appropriate criminal charge against SYP, and against any other party involved in the cover-up, would be perverting the course of justice.¹⁰³ This is a common law offence which is committed where an accused does an act or series of acts which has or have a tendency to pervert, and which is or are intended to pervert, the course of public justice.¹⁰⁴ The offence, triable on indictment, carries a maximum sentence of life imprisonment and/or a fine.¹⁰⁵ However, no sentence above ten years has been passed in the last century for the commission of this offence.¹⁰⁶ Whilst it covers a wide range of activities, it is usually reserved for more serious cases where there has been a fundamental interference with the administration of justice. Certainly, the conduct of SYP in terms of giving false information, altering witness statements, lying and concealing certain key facts would satisfy the requirements of the offence. The course of justice must have been in existence at the time of the acts, which it was in respect of Hillsborough as the misleading information was submitted to the Taylor Inquiry. Thus, if charges were to be brought for this crime there would be a chance of conviction.

Perjury could also be an option.¹⁰⁷ Under s 1(1) of the Perjury Act 1911 an offence is committed if a lawfully sworn witness or interpreter in judicial proceedings wilfully makes a false statement which he or she knows to be false or does not believe to be true, and which is material in the proceedings. The potential penalty for this offence is imprisonment for a maximum of seven years and/or a fine.¹⁰⁸ On the face of it, if it could be proved that Dukenfield and Murray lied under oath in the course of the criminal proceedings then they could be charged with this crime. However, whilst we know that Dukenfield lied initially in respect of exit gate C being forced open by fans, by the time of the private prosecution this lie had already been exposed and it is more likely that, whilst both officers remained vague in their evidence, they did not explicitly lie about anything else.¹⁰⁹ In respect of the others involved in the doctoring of evidence submitted to the Taylor Inquiry, the charge of perjury may be inappropriate. At the time of Hillsborough, evidence submitted to a public inquiry was not given under oath.¹¹⁰ This is not the case now,¹¹¹ but as it was then it would technically render the charge redundant. If, however, it could be ascertained that false statements were made under oath in the Coroner's court, the possibility of a charge remains. Interestingly enough, this is where the benefits of pursuing the initial civil litigation become apparent. Although prosecutions are rare in a civil context, perjury is punishable as a criminal offence whether it was committed in criminal or civil proceedings. The lack of criminal proceedings against the many different wrongdoers in the Hillsborough affair

103 For discussion, see S S M Edwards, 'Perjury and Perverting the Course of Justice Considered' (2003) *Criminal Law Review* 525.

104 The offence is sometimes termed 'attempting' to pervert the course of justice. The word 'attempting' should be removed as the offence is committed when acts tending and intended to pervert a course of justice are done. Here the offence is charged contrary to the common law and not under the Criminal Attempts Act 1981.

105 See the CPS website. 'Public Justice Offences – Incorporating the Charging Standard'. <www.cps.gov.uk/legal/p_to_r/public_justice_offences_incorporating_the_charging_standard/#a03>.

106 See Edwards (n 103) 527.

107 For an interesting discussion, see K Soothill et al, 'Perjury and False Statements: A Criminal Profile of Persons Convicted 1979–2001' (2004) *Criminal Law Review* 926.

108 See CPS (n 105).

109 The witness statements and transcripts of oral evidence (including cross-examinations) of both Dukenfield and Murray, which formed part of the evidence of the Taylor Inquiry, can be downloaded from the Hillsborough Independent Panel's website. It is clear that they remained vague and non-committal in respect of their evidence.

110 See Scraton (n 1) 121.

111 Inquiries Act 2005, s 17(2).

automatically limits the scope of perjury. Yet, if civil cases had been pursued, and had it been possible to identify false statements made under oath, an offence would have been committed.¹¹² The reality is that perjury and perverting the course of justice are closely aligned. Where there is a single isolated incident, the most appropriate charge will normally be perjury, but if the perjury is part of a much wider series of acts committed by individuals, as would seem to be the case in Hillsborough, then perverting the course of justice will be the more likely charge. There are also other possibilities, such as the offence of misconduct in a public office,¹¹³ which may be considered, and also non-legal avenues of accountability, such as an investigation by the Independent Police Complaints Commission, which is currently underway.¹¹⁴

In theory, then, there remain a number of options available, albeit the majority of which have only become possible because of the altering of evidence after the event rather than the actual conduct which caused the disaster itself. Nonetheless, many would argue that the actual cover-up is the most despicable aspect of the Hillsborough saga which is most deserving of punishment. The likelihood of success is still hard to gauge though, with most of the uncertainty resting on pragmatic questions about what can be proved and against whom. Disentangling what happened all those years ago will take considerable time and effort. Recollections of who altered statements and on whose advice will be sketchy. Moreover, pinpointing who actually changed the statements will be problematic. Presumably, most of the lower-level officers in SYP at that time will insist that their statements were genuine and altered after the event without their knowledge or approval, and then those who actually altered evidence will blame the advice provided by SYP's legal team. In turn, the legal advisers will undoubtedly claim that they were only offering advice. The upshot will be that any investigator will have to tread carefully for otherwise they may become lost in circular arguments. The extent to which SYP and its legal team were entitled to remove statements of opinion rather than fact will also come under scrutiny. If it becomes apparent that the majority of the redacted statements do not conceal much other than personal views and recollections of officers then there may be some difficulty in proving that the alterations would have adversely affected the public inquiry, the Coroner's inquest and the DPP's initial criminal investigation. This must not have been perceived to be too much of a problem though as a new criminal investigation has recently been announced by the Home Secretary, Theresa May, which will focus not only on SYP but also on the FA.¹¹⁵ It will be a lengthy process and no doubt subject to political machinations, but this move will be welcomed by the families of the victims and it is hoped that they will finally see some form of accountability for the actions and aftermath of the Hillsborough tragedy.

112 It is incredibly difficult to prosecute someone for committing perjury in a civil hearing. Witnesses are likely to claim that they gave evidence to the best of their knowledge and that, whilst any recollections may have been vague and perhaps inaccurate, they were not blatant lies. However, theoretically it is possible to prosecute as the offence applies to any lawfully sworn witness who gives a false statement in a judicial proceeding: Perjury Act 1911, s 1(1) and (2).

113 Dukenfield was actually charged (and acquitted) with this in the private prosecution. Cases are rarely successful against the police. There is also the equivalent tort of misfeasance in public office. See J Murphy, 'Misfeasance in Public Office: A Tort Law Misfit' (2012) 32 *Oxford Journal of Legal Studies* 51.

114 See V Dodd, 'Hillsborough Investigation: IPCC Granted Powers to Force Police to Testify' *The Guardian* (London, 22 November 2012) <www.guardian.co.uk/politics/2012/nov/22/hillsborough-investigation-ippc-powers-police> accessed 26 November 2012. For information on the range of new investigations and inquiries, see: <<http://hillsboroughinquests.independent.gov.uk/about-the-inquests/>>.

115 See D Conn, 'Hillsborough: More New Hope for Families Scarred by a Long Struggle' *The Guardian* (London, 12 September 2013). <www.theguardian.com/football/2013/sep/12/hillsborough-new-hope-families-struggle> accessed 17 December 2013. For information on the range of new investigations and inquiries, see: <<http://hillsboroughinquests.independent.gov.uk/about-the-inquests/>>.

Conclusions

The findings of the Hillsborough Independent Panel should not be understated. Without doubt they have exposed facts which were previously unknown. Notwithstanding this, 'developing public understanding' of the disaster does not necessarily alter anything in terms of certain criminal offences which we know are now being pursued once again. This piece has argued that any future attempt to prosecute individuals for gross negligence manslaughter would be highly unlikely to result in convictions. Indeed, whilst it is a difficult question to address, particularly in view of the pain and suffering that the families have endured throughout the years, would anything really be gained by singling out individuals and exposing them, potentially, to convictions for the most serious of criminal offences which have caused death? All but one of the key senior figures formerly of SYP and directly involved in Hillsborough are now deceased¹¹⁶ and, even if Dukenfield was convicted, it is highly unlikely that he would face a jail sentence.¹¹⁷ Focusing on the actions of one person, no matter how negligent those actions may seem, simply disguises the bigger problem, the problem of systemic failings and the inadequacies of the English criminal law as having no effective means to deal with it. Some may suggest that the law has now caught up in the form of the Corporate Manslaughter and Corporate Homicide Act, but it is too little too late.¹¹⁸ The law was slow to reach the statute books and its limited scope and applicability render it a blunt tool in the battle against police negligence which has caused death to members of the public. However, given that a significant portion of the report's findings focus on the alteration of evidence by SYP, it has been argued here that the sense of justice yearned for by the families can be better achieved elsewhere by charging those involved in the cover-up with the range of criminal offences which are designed to combat behaviour of this type.

Although beyond the scope of this paper, in a wider sense questions still remain about how the disaster was dealt with afterwards. The Coroner limited his inquiry to an incredibly narrow time-frame, imposing a cut-off point of 3.15pm. Thus, any evidence concerning events which took place after that time was deemed inadmissible. This was always disputable. It was not necessary for the Coroner to impose that cut-off and it is now clear that he ignored what has since turned out to be crucial information. Confirmation that a significant number of victims could, *potentially*, have been saved is some of the most shocking evidence to come from the Independent Panel's Report.¹¹⁹ The avenues for

116 The then Chief Constable of SYP, Peter Wright, died in 2011; Superintendent Murray died in 2006. After his retirement from the police force, Chief Superintendent Brian Mole worked as a security adviser to the University of Sheffield. In a recent publication, Sheffield University paid tribute to two recently deceased colleagues, Brian Mole (who died on 12 April 2010) and Roger Marshall who worked in Porterage Services (who died on the 27 March 2010). Whether or not this is the same Superintendent Roger Marshall, who was on duty outside the ground at Hillsborough, is unknown. See University of Sheffield, Accommodation and Campus (ACS) Newsletter Issue 11 (2010) 3. Dukenfield is the only survivor who played a key role on the day.

117 In the private prosecution, Hooper J controversially stated, whilst committing Dukenfield and Murray for trial, that even if they were convicted, they would not face a custodial sentence. See House of Commons (n 3) para 1.258.

118 For discussion, see J Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2007: Thirteen Years in the Making but was it Worth the Wait?' (2008) 71 *Modern Law Review* 413.

119 See House of Commons (n 3), 'Report Summary', ch 5, bullet point 63. There was clear evidence from the post mortem reports that 28 of those who died did not have traumatic asphyxia with obstruction of the blood circulation, and asphyxia may have taken significantly longer to be fatal than the 3.15pm cut off. There was separate evidence that in 31 the heart and lungs had continued to function after the crush, and in 16 of these this was for a prolonged period. (These numbers cannot be added to the 28 as some featured in both groups.)

holding the Coroner accountable are incredibly limited,¹²⁰ yet as a result of his decision, a sizeable time-frame within the chain of events of Hillsborough was left uninvestigated. If the remit of the inquest had been extended, it may have exposed further shortcomings of the police, the emergency services and perhaps even the Sheffield hospitals. Thankfully, the verdict of accidental death returned by the initial Coroner's inquest has recently been quashed by the High Court and we await the outcome of a new inquest in which a jury will deliver a verdict.¹²¹ In all probability the fresh inquest will uncover further evidence of systemic fault, rather than exposing the negligent actions of any one individual, but it is hoped that it will yield a new verdict of unlawful killing, which will be a powerful statement in the history of the Hillsborough affair. What is evident is that deficiencies in all the historical investigations feed into bigger questions about the whole 'system' of British justice and accountability, a system which has failed the families of the victims over the years and which, in many ways, is left severely wanting.¹²²

120 In a legal sense, any challenge would be limited to a judicial review action, which the families of the victims tried and failed. See *R v HM Coroner for South Yorkshire, ex p Stringer* (1994) 158 JP 453. Outside formal legal action, it is now possible to lodge a complaint with the Office for Judicial Complaints.

121 See above n 115. For information on the range of new investigations and inquiries, see: <http://hillsboroughinquests.independent.gov.uk/about-the-inquests/>.

122 See P Scraton et al., *No Last Rights: The Denial of Justice and the Promotion of Myth in the Aftermath of the Hillsborough Disaster* (Centre for Studies in Crime and Social Justice/Liverpool City Council 1995).

