

Marquette University Law School

## Marquette Law Scholarly Commons

---

Faculty Publications

Faculty Scholarship

---

2001

### Reflections on the Accident at Miller Park and the Prosecution of Work-Related Fatalities in Wisconsin

Edward A. Fallon

Marquette University Law School, [edward.fallone@marquette.edu](mailto:edward.fallone@marquette.edu)

Follow this and additional works at: <https://scholarship.law.marquette.edu/facpub>



Part of the [Law Commons](#)

#### Publication Information

Edward A. Fallon, Reflections on the Accident at Miller Park and the Prosecution of Work-Related Fatalities in Wisconsin, 12 Marq. Sports L. Rev. 105 (2001)

---

#### Repository Citation

Fallon, Edward A., "Reflections on the Accident at Miller Park and the Prosecution of Work-Related Fatalities in Wisconsin" (2001). *Faculty Publications*. 153.

<https://scholarship.law.marquette.edu/facpub/153>

This Article is brought to you for free and open access by the Faculty Scholarship at Marquette Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [elana.olson@marquette.edu](mailto:elana.olson@marquette.edu).

# REFLECTIONS ON THE ACCIDENT AT MILLER PARK AND THE PROSECUTION OF WORK-RELATED FATALITIES IN WISCONSIN

EDWARD A. FALLONE\*

## I. THE ACCIDENT AT MILLER PARK

On July 14, 1999, a large construction crane known as "Big Blue" collapsed as workers rushed to complete the new home of the Milwaukee Brewers baseball team in time for the 2000 season.<sup>1</sup> Jeffrey Wischer, William DeGrave, and Jerome Starr died when Big Blue fell into the partially constructed stadium during a lift, dropping a 450-ton section of the ballpark's retractable roof.<sup>2</sup> The three ironworkers had been guiding the roof section into place from an aerial basket suspended from a separate crane.<sup>3</sup> They were killed when the collapse of Big Blue knocked their own basket to the ground. The accident caused approximately \$100 million in damage to the partially completed structure and delayed the completion of the project for one year.<sup>4</sup> The widows of the three men brought a wrongful death suit against the company that leased Big Blue and its crew to the construction site, Lampson International Ltd., as well as against the company responsible for constructing the retractable roof of the stadium, Mitsubishi Heavy Industries.<sup>5</sup>

---

\* Associate Professor of Law, Marquette University Law School. The author wishes to thank the editors of the *Marquette Sports Law Review* for their patience and their contributions to this essay.

1. Kenneth R. Lamke, *\$99 Million; Miller Park Ruling Apparently a Record*, MILWAUKEE J. SENTINEL, Dec. 2, 2000, at A1. With a boom length of 567 feet, Big Blue was the second tallest structure in Milwaukee. Steve Thomas, *Big Blue: Hard Lessons to Learn*, LIFTLINK.COM, at <http://www.liftlink.com/index2.cfm?articleID=1279> (last visited Oct. 31, 2001). By coincidence, an inspection team from the Occupational Safety and Health Administration (OSHA) happened to be videotaping the lift at the time of the accident. The video of the collapse can be viewed on the internet at <http://www.channel3000.com/Video/collapse000113.ram>.

2. Lamke, *supra* note 1, at A1.

3. *Id.*

4. *Id.*

5. A third corporate defendant who had designed and manufactured Big Blue, the Neal F. Lampson Company (which is also the parent company of Lampson International), was dismissed from the suit prior to verdict. *Lampson Co. Dismissed from Crane Case*, THE MILWAUKEECHANNEL.COM, (Nov. 27, 2000), at <http://www.themilwaukeechannel.com/sh/news/wisconsin/stories/news-wisconsin-20001127-182912.html> (last visited Oct. 31, 2001). An-

During construction, the roof sections were first assembled outside of the stadium. The procedures followed by Mitsubishi called for the sections to be lifted by the crew of Big Blue to a height of approximately 330 feet, rotated over the outer wall of the stadium and any previously installed roof sections, and lowered into place at a height of 230 feet.<sup>6</sup> On the day of the accident, the crane had been moved into place for the lift on its tank-like tracks. The surface area of the section of roof being lifted by Big Blue that day was equivalent to three and one half wings of a 747 airliner.<sup>7</sup> These dimensions made the roof section act like a sail in the wind, exerting pressure on the crane's boom and ultimately tipping the crane.<sup>8</sup>

At trial, expert witnesses placed the maximum safe wind speed for an attempted lift of a roof section of this size at eleven miles per hour.<sup>9</sup> The plaintiffs introduced testimony indicating that wind gusts at the top of the stadium construction site reached thirty miles per hour on the day of the accident. There was also testimony to the effect that several ironworkers had expressed concern about the wind prior to the lift.<sup>10</sup> Both plaintiff's attorneys and co-defendant Lampson International argued that the accident occurred because Mitsubishi Heavy Industries failed to

---

other company, Danny's Construction Company Inc., was the ironworker subcontractor that hired and supervised the three workers who were killed. Danny's Construction Company was cited by OSHA for safety violations that contributed to the accident but was not named as a defendant in the wrongful death lawsuit. Kenneth R. Lamke, *Deal Reached in Miller Park Lawsuit: General Contractor to Pay \$2 Million in Partial Settlement*, MILWAUKEE J. SENTINEL, Jan. 18, 2000, at B1.

6. Thomas, *supra* note 1, at <http://www.liftlink.com/index2.cfm?articleID=1279>.

7. *Expert: Wind, Poor Choices Caused Crash*, THEMILWAUKEECHANNEL.COM (Oct. 27, 2000) at <http://www.themilwaukeechannel.com/sh/news/wisconsin/stories/news-wisconsin-20001026-211024.html> (last visited Oct. 31, 2001) [hereinafter *Expert*].

8. OSHA issued citations for workplace safety violations against Mitsubishi Heavy Industries, Lampson International, and Danny's Construction Company as a result of the accident, and imposed penalties of \$240,500, \$131,300, and \$168,000 respectively. *OSHA Cites Subcontractors in Miller Park Fatal Crane Collapse, Milwaukee*, OSHA Regional News Release (Jan. 12, 2000), at <http://www.osha.gov/media/oshnews/jan00/reg5-20000112a.html> (last visited Oct. 31, 2001). For its part, Mitsubishi was cited for willful violations arising from the fateful lift on three grounds: exceeding the crane's rated load, failing to keep workers clear of the suspended load, and hoisting workers during unsafe weather conditions. *Id.* "Willful" violations are ones committed with an intentional disregard for or plain indifference to the Occupational Health and Safety Act and its regulations. *Id.* Mitsubishi was also cited for several serious violations, one of which was the failure to factor in wind conditions during crane operation. *Id.* A "serious" violation is "one in which there is a substantial probability that death or serious physical harm could result from a hazardous condition, and that the employer knew or should have known of the hazard." *Id.*

9. *Expert, supra* note 7, at <http://www.themilwaukeechannel.com/sh/news/wisconsin/stories/news-wisconsin-20001026-211024.html>.

10. Thomas, *supra* note 1, at <http://www.liftlink.com/index2.cfm?articleID=1279>.

properly monitor wind gusts on the day of the lift and ignored warnings that conditions were unsafe.

Mitsubishi, for its part, argued in defense that it was Lampson International's responsibility to monitor wind speed.<sup>11</sup> Mitsubishi also argued during the trial that Lampson International failed to provide Mitsubishi with clear or sufficiently detailed warnings concerning the effect of wind speed on suspended loads.<sup>12</sup> Finally, Mitsubishi introduced testimony that blamed the accident on contributing factors in addition to the wind conditions, such as unstable soil underneath the crane and on a defect in the crane's assembly that left Big Blue susceptible to collapse.<sup>13</sup>

However, much of the testimony at trial centered on the actions of Victor Grotlisch, who was the site supervisor for Mitsubishi Heavy Industries. Grotlisch was clearly singled out by the plaintiffs as the person most responsible for the accident. On the stand, Grotlisch admitted that he did not make sure that "wind-sail" calculations were performed prior to ordering the lift to proceed.<sup>14</sup> Other witnesses testified that Grotlisch clashed often with the Lampson crew assigned to operate Big Blue, to the point that Mitsubishi demanded and obtained the replacement of

---

11. *Lawyer: Miller Park Crash Was Preventable*, THEMILWAUKEECHANNEL.COM (Oct. 18, 2000) at <http://www.themilwaukeechannel.com/sh/news/wisconsin/stories/news-wisconsin-20001018-115935.html> (last visited Oct. 31, 2001) [hereinafter *Lawyer*].

12. *Expert Says Lampson at Fault in Big Blue Crash*, THEMILWAUKEECHANNEL.COM (Nov. 16, 2000), at <http://www.themilwaukeechannel.com/sh/news/wisconsin/stories/news-wisconsin-20001116-134004.html> (last visited Oct. 31, 2001) [hereinafter *Expert Says Lampson at Fault*].

13. After the collapse, a broken water main was discovered within 20 feet of the crane. Mitsubishi argued that the water main ruptured prior to the accident and rendered the surrounding soil unstable. Thomas, *supra* note 1, at <http://www.liftlink.com/index2.cfm?articleID=1279>. Mitsubishi also argued that a "spacer" or washer of unknown origin was installed as part of the crane's kingpin assembly, and that the collapse occurred when this spacer failed. *Expert: Big Blue Assembled Correctly*, THEMILWAUKEECHANNEL.COM (Nov. 20, 2000), at <http://www.themilwaukeechannel.com/sh/news/wisconsin/stories/news-wisconsin-20001120-195345.html>. This latter argument was effectively countered by Bernard Ross, witness for Lampson International, who testified forcefully that the crane had been assembled properly and that "[t]he reason for this accident is an abuse of operating procedure and running the crane in winds that are well in excess of that what was contemplated for the crane." *Crash Blamed on Poor Handling of Crane*, THEMILWAUKEECHANNEL.COM (Nov. 21, 2000) at <http://www.themilwaukeechannel.com/sh/news/wisconsin/stories/news-wisconsin-20001121-192604.html> (last visited Oct. 31, 2001) [hereinafter *Poor Handling*].

14. Lamke, *supra* note 1, at A1. Under questioning by the plaintiffs' lawyer, Grotlisch admitted on the stand that he had "dropped the ball" in failing to make sure that wind speed calculations were performed more recently than two hours prior to the lift. *Supervisor Admits Fault in Fatal Crane Collapse*, APBNEWS.COM (Oct. 24, 2000), at [http://www.apbnews.com/newscenter/breakingnews/2000/10/24/crane1024\\_01.html](http://www.apbnews.com/newscenter/breakingnews/2000/10/24/crane1024_01.html) (last visited Oct. 31, 2001). He testified that he had assumed that the Lampson crew had performed the calculations. *Id.*

one Lampson crewmember.<sup>15</sup> Grotlisch was portrayed by witnesses as both “sloppy” in his approach to safety and “authoritarian” in his response to subordinates who expressed concerns about the safety procedures.<sup>16</sup> Weather had delayed several previous lifts in the weeks prior to the accident, putting pressure on Mitsubishi to pick up the pace of construction.<sup>17</sup> The plaintiffs also introduced evidence suggesting that after the collapse Grotlisch may have unplugged the construction site’s weather computer, in an effort to eliminate a precise record of the wind speed at the time of the accident.<sup>18</sup>

On December 1, 2000, the jury returned its unanimous verdict.<sup>19</sup> Mitsubishi was found to be 97% negligent in its operations at the time of the accident, most likely due to its failure to properly monitor wind speed during the attempted lift.<sup>20</sup> Lampson International was found to be 3% negligent, presumably because Mitsubishi argued that the directions for operating the crane were unclear.<sup>21</sup> The jurors responded negatively to questions in the verdict form that asked whether the employees of Lampson International who were operating Big Blue at the time of the accident were negligent.<sup>22</sup> Neither Victor Grotlisch nor any other employee of Mitsubishi was named in the verdict.<sup>23</sup>

The jurors awarded \$1.4 million to each of the widows for pain and suffering, as well as \$350,000 apiece for loss of companionship.<sup>24</sup> In addition, Mitsubishi was ordered to pay punitive damages to the three women in the amount of \$94 million.<sup>25</sup> The total of over \$99 million in

---

15. Lamke, *supra* note 1, at A1. See also *Testimonies Focus on Safety, Weather*, THEMILWAUKEECHANNEL.COM (Oct. 20, 2000), at <http://www.themilwaukeechannel.com/sh/news/wisconsin/stories/news-wisconsin-20001020-202952.html> (last visited Oct. 31, 2001).

16. Lamke, *supra* note 1, at A1. See also Erik Gunn, *Crane Owner Says Mitsubishi Made Fateful Decisions on Lift*, ENG’G NEWS-RECORD (Nov. 27, 2000), at <http://www.enr.com/news/news112700b.asp> (last visited Oct. 31, 2001).

17. Thomas, *supra* note 1, at <http://www.liftlink.com/index2cfm?articleID=1279>. Under the construction contract, general contractor HCH Joint Venture would have been eligible for over \$1 million in bonuses if the stadium was completed in time for opening day of the 2000 baseball season. *Id.*

18. Lamke, *supra* note 1, at A1.

19. *Id.*

20. *Id.*

21. *Id.* The verdict also stated that the terms of the lease between Lampson International and Mitsubishi required Mitsubishi to indemnify Lampson for any liabilities incurred as a result of the construction project. *Id.* Therefore, Mitsubishi must ultimately bear the cost of the entire amount of compensatory damages. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

damages is believed to be a record for a personal injury case in Wisconsin.<sup>26</sup> The verdict is currently on appeal.<sup>27</sup>

Representatives of the Milwaukee County District Attorney's Office attended each day of the trial in order to evaluate possible criminal charges against the parties responsible for the collapse of Big Blue.<sup>28</sup> The Chief Investigator for the Milwaukee County D.A.'s Office was quoted as saying that the office was "looking to see if somebody was reckless in their actions and put somebody in harm's way."<sup>29</sup> Prior to the conclusion of the civil trial, the Milwaukee County Sheriff's Office had stated that its own investigation pointed to a structural failure as the cause of the collapse, making criminal charges unlikely.<sup>30</sup> However, the jury clearly rejected structural failure as a contributing factor in the accident when it returned its verdict. Therefore, the filing of criminal charges against Mitsubishi and/or others is still possible. As of October 2001, no criminal charges have been brought.<sup>31</sup>

---

26. *Id.*

27. Kenneth R. Lamke, *Stadium Insurers Called Liable*, MILWAUKEE J. SENTINEL, Aug. 7, 2001, at B1. On August 6, 2001, Circuit Judge Dominic Amato ruled that the five insurance companies that underwrote the construction project were liable for the jury verdict under the terms of the policies. *Id.* The judge concluded that the verdict reflected a finding that Mitsubishi was negligent in displaying an "intentional disregard" for the creation of a safe workplace. However, Judge Amato ruled that Mitsubishi's failure to maintain a safe workplace did not rise to the level of an intent to injure the three ironworkers that died. *Id.* Negligent acts were covered by Mitsubishi's insurance, while intentional acts were excluded from the terms of the policy coverage. *Id.* Therefore, in considering the appeal of the damages awarded to the three widows, the Wisconsin Court of Appeals will have before it two conflicting arguments. Mitsubishi is arguing on appeal that the conduct leading to the accident did not justify the imposition of punitive damages, while the insurers will pursue their argument that Mitsubishi engaged in intentional acts that "bordered on [the] criminal." Elizabeth Amon, *Insurers Still Owe in Crane Case*, NAT'L L.J., Aug. 20, 2001, at A4 (quoting plaintiff's attorney Robert Habush).

28. *Miller Park Accident Case Goes to Jury*, MILWAUKEE BUS. J., (Nov. 29, 2000), available at <http://milwaukee.bcentral.com/milwaukee/stories/2000/11/27/daily30.html>. See also Kenneth R. Lamke, *Construction Firms Point Fingers at Each Other*, MILWAUKEE J. SENTINEL, Oct. 19, 2000, at B1 (noting the attendance of the District Attorney E. Michael McCann during opening statements of the trial).

29. Greg J. Borowski, *Workers Argued About Safety of Lift*, MILWAUKEE J. SENTINEL, July 16, 1999, at A1 (quoting Richard Heath).

30. Kenneth R. Lamke & Steve Schultze, *Charges in Crane Collapse Called Unlikely*, MILWAUKEE J. SENTINEL, July 27, 1999, at A1.

31. Despite the passage of time since the accident occurred, criminal charges may still be brought. In a previous prosecution, District Attorney E. Michael McCann brought reckless homicide charges against a construction contractor that was ultimately held responsible for the deaths of three workers in a 1988 methane gas explosion at the site of Milwaukee's deep tunnel sewer project. Those criminal charges came some 20 months after the accident occurred. *Id.*

This essay will examine whether the circumstances of the Big Blue accident would support a criminal indictment against Mitsubishi Heavy Industries upon charges of either reckless homicide or homicide by the negligent operation of a vehicle under the Wisconsin Criminal Code. The possible application of criminal charges to the accident provides an opportunity to reevaluate the use of criminal sanctions generally against corporate defendants arising out of work-site fatalities. This essay will argue that the creation of an unsafe work environment that evidences the employer's disregard for the life of its employees should properly give rise to charges of reckless homicide. However, it is inappropriate for prosecutors to use the charge of homicide by negligent operation of a vehicle to prosecute employers for work-site accidents arising out of a one time misjudgment or miscalculation that leads to fatalities. Accomplishing such disparate results under these two separate statutes will require both judicial and legislative action.

## II. THE CHARGE OF RECKLESS HOMICIDE IN THE WAKE OF WORK-RELATED FATALITIES

The paradigm of a prosecution brought against a corporate defendant for the reckless homicide of an employee is a 1990 Illinois case called *People v. O'Neil*,<sup>32</sup> which involved a corporation called Film Recovery Systems, Incorporated. The company engaged in the recovery of silver metal from used film chips by immersing the chips in a sodium cyanide solution.<sup>33</sup> Workers at the plant mixed the solution in open vats, stirred in the film chips, removed the saturated chips, and cleaned the tanks.<sup>34</sup> The vats had no hoods to control the emission of noxious fumes, the workers had no protective clothing and only flimsy paper masks, and the plant itself was poorly ventilated.<sup>35</sup> Management did not inform the workers, many of whom were illegal immigrants, about the dangers of inhaling cyanide gas or absorbing cyanide through the skin.<sup>36</sup> The only warning sign in the plant stated the single word "poison" in both English and Spanish; there was evidence that the skull and crossbones symbol had been removed from the cyanide vats.<sup>37</sup> Stefan Golab, a 59-year-old illegal Polish immigrant who spoke no English, became ill from inhaling

---

32. 550 N.E.2d 1090 (Ill. App. Ct. 1990).

33. Kathleen F. Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 771 (1987).

34. *Id.* at 771-72.

35. *Id.*

36. *Id.* at 772.

37. *Id.* at 772-73.

fumes while working at the plant and went into convulsions.<sup>38</sup> He died before he could be transported to the hospital.<sup>39</sup>

Illinois prosecutors charged Film Recovery Systems and individual members of its management with involuntary manslaughter in Mr. Golab's death, and with recklessly endangering the lives of other workers.<sup>40</sup> The judge that tried the case concluded that the individual defendants operated the plant with the knowledge that their procedures created a strong probability of death or serious injury, and that Film Recovery Systems, Inc. recklessly tolerated this mismanagement.<sup>41</sup> All of the defendants, including the corporation, were convicted. The District Attorney's office in Milwaukee made note of the Film Recovery Systems conviction and began a policy of investigating every work-site fatality in Milwaukee County in light of a possible criminal prosecution.<sup>42</sup>

The crime of first degree reckless homicide under Wisconsin Statutes Section 940.02 states "[w]hoever recklessly causes the death of another human being under circumstances which show utter disregard for human life is guilty of a Class B felony."<sup>43</sup> A defendant acts with criminal recklessness under this section when "the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk."<sup>44</sup> This is a subjective mental state. The element of an "utter disregard for human life" is an aggravating factor that increases the penalty over that imposed for second degree reckless homicide.<sup>45</sup> This last element is "measured objectively, on the basis of what a reasonable person in the [actor's] position would have known."<sup>46</sup>

The first significant prosecution of a corporate defendant for reckless homicide in Milwaukee County involved the deaths of three workers involved in the construction of Milwaukee's "deep tunnel" sewer project. The S.A. Healy Company was contracted to construct tunnels beneath the south side of Milwaukee in order to better control the flow of water into Lake Michigan.<sup>47</sup> The Sewage Commission, which was supervising

---

38. *Id.* at 756, 771.

39. *Id.* at 756.

40. *Id.* at 769-70.

41. *Id.* at 774.

42. E. Michael McCann, *Judges, Jurors and Organized Labor: Four Perspectives of Corporate Citizenship*, 84 MARQ. L. REV. 782, 793 (2001).

43. WIS. STAT. § 940.02 (2000).

44. WIS. STAT. § 939.24 (2000).

45. *State v. Jensen*, 613 N.W.2d 170, 174 (Wis. 2000).

46. *Id.* at 174.

47. McCann, *supra* note 42, at 794.



the construction, specifically warned all of the contractors working on the project that methane gas had been detected in some of the tunnels. The contractors were told that if workers encountered readings indicating that gas was present they must immediately cease any and all operation of machinery at the risk of an explosion.<sup>48</sup> One day, methane gas was detected in the tunnel and the work crews immediately ceased operation and left the tunnel. However, rather than waiting a full hour before rechecking for the presence of gas, as required by the Sewage Commission, the S.A. Healy crew chief went back in the tunnel with two workers.<sup>49</sup> Presumably they were intending to clean out a machine used to affix concrete to the tunnel walls, out of a concern that the concrete inside the machine would likely set and the machine would be ruined.<sup>50</sup> When the three workers turned on the machine to clean it there was a spark and an explosion. All three were killed. The District Attorney's Office successfully prosecuted the S.A. Healy Company for two counts of reckless homicide arising out of the accident.<sup>51</sup>

Another notable prosecution of a corporation for reckless homicide in Milwaukee County is unusual in that it did not involve a workplace fatality. The District Attorney's Office brought reckless homicide charges against the Chem-Bio Corporation, which operated a laboratory that evaluated Pap smear slides under a contract with an HMO.<sup>52</sup> Chem-Bio paid its Pap smear readers by the number of slides that they evaluated, which led to the readers evaluating slides in a rapid manner and in a number far in excess of industry standards.<sup>53</sup> At least two slides were misread as a result, and cancer that should have been diagnosed early on went undetected.<sup>54</sup> Two women died, but not before one of the patients in the terminal phase of her disease personally requested that the D.A. bring criminal charges of homicide upon her death.<sup>55</sup> On the eve of trial, Chem-Bio pled no contest to two counts of reckless homicide.<sup>56</sup>

These three fact scenarios fall into a common pattern. Corporate managers did not intend for anyone to die, and they may not have

---

48. *Id.*

49. *Id.* at 794.

50. *Id.* at 795.

51. *Id.* The District Attorney did not charge the company in the death of the crew chief whose recklessness had led to the accident. *Id.*

52. *Id.* at 795.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 796.

known with certainty that death would result from their conduct. However, the business practices adopted by the managers flew in the face of a known and substantial risk, making death or serious injury an almost inevitable consequence of the manner in which the company did business. Film Recovery Systems placed workers into an extremely hazardous situation without any warning, training, or protection. The crew chief of the S.A. Healy Company ordered workers to place themselves in the path of a known and substantial danger that was unrelated to their construction duties. Finally, while the Chem-Bio Corporation did not put its own employees at risk, the company did encourage and tolerate procedures that significantly undermined the accuracy of the diagnostic work their employees performed even though management had knowledge of the likely consequences. In each case, there also appears to be an "utter disregard for human life" inherent in the choices made by the corporate managers.

Construction accidents resulting in worker fatalities can be quite different from the above model. A construction site, by its nature, is a dangerous and highly complex environment. Workers do their job at high altitudes and in close proximity to heavy machinery. The risk of injury is known and recognized by managers and workers alike, and countless calculated risks are taken during the course of the project.

In discussing the failure of management in the Film Recovery Systems case to take steps to protect its employees, Professor Kathleen Brickey distinguished their reckless conduct from the conduct of employers who place employees in necessary danger due to the nature of their work:

Consider a construction site, for example. There is at least a substantial risk (if not a probability) that one of the construction workers at a high-rise building site will be killed or seriously injured on the job, and that risk is clearly known and understood by the construction company's management. Does it therefore follow that the managers are forever in peril of criminal prosecution for the foreseen (or at least foreseeable) death or injury when it occurs?

The answer, of course, is no. As a general matter, employees are deemed to assume the ordinary risks inherent in the nature of their work. When the market functions as we expect it to, they will have taken the risks into consideration when they arrange their compensation. The construction workers with whose fate we are concerned are paid to assume commensurately greater

risks, and their employers presumably have an interest in protecting them from injury.<sup>57</sup>

Compare this analysis with the conduct of the crew chief in the S.A. Healy case, who knowingly ordered his employees to enter the tunnel despite the presence of methane gas. That is not a risk that the construction workers considered or accepted as a natural part of their employment.

This is not to argue that corporations should enjoy absolute immunity from prosecution for workplace fatalities. However, criminal liability should not be imposed due to an error of judgment in performing a complex and dangerous task or on the basis of the miscalculation of a risk known and accepted by the workers. Chem-Bio Corporation was not prosecuted because its employees misread a slide, but because its corporate practices made it inevitable that slides would be misread. If the Miller Park construction site was knowingly run in a dangerous and slipshod manner, so as to make a fatal accident foreseeable, then management and the corporate contractor responsible should be held accountable for creating such a situation in disregard of the consequence. On the other hand, if the crane collapse was caused by an isolated instance of an error in judgment or a failure to appreciate the risks associated with one particular lift, then the accident is not the result of management's indifference to human life.

If Mitsubishi ran the lift operations using procedures that evidenced a total disregard for the safety of workers, then it is highly unlikely that the unionized construction crews would have tolerated such conditions. It appears that Mitsubishi and its on-site supervisor Victor Grotlisch did not, in fact, recognize the full extent of the danger present in attempting the lift attempted on July 14, 1999. Several factors appear to have contributed to Mitsubishi's failure to fully comprehend the risk. The absence of procedures to adequately account for wind speed appears to have played a predominate role. However, the angle chosen for the lift (which required a higher lift and thus subjected the load to greater wind-sail conditions) also created a more dangerous situation than Mitsubishi recognized. Poor communication and unclear lines of authority between Mitsubishi and Lampson employees also prevented Mitsubishi from recognizing the true extent of the danger. Finally, the authoritarian management style of Victor Grotlisch appears to have stifled dissenting views and prevented worker concerns from being fully expressed.

---

57. Brickey, *supra* note 33, at 785-86.

Certainly Mitsubishi did not satisfy the standard of care that a reasonable contractor would have exercised in performing such a dangerous maneuver. But the evidence does not appear to support the conclusion that Mitsubishi proceeded with the lift in the face of a subjective knowledge that conditions made the lift unsafe. A charge of reckless homicide under such facts appears unlikely.

### III. AN ALTERNATIVE CHARGE: HOMICIDE BY THE NEGLIGENT OPERATION OF A VEHICLE

Big Blue was a self-propelled piece of construction equipment that operated on tank-like tracks. Therefore, prosecutors have the option of charging Mitsubishi under the statute governing Homicide by Negligent Operation of a Vehicle. Section 940.10 of the Wisconsin Statutes states: "Whoever causes the death of another human being by the negligent operation or handling of a vehicle is guilty of a Class E felony."<sup>58</sup> This statute has been used in recent years by Wisconsin prosecutors to charge corporate entities for fatalities caused by the employees of the corporation while operating a vehicle.

In 1991, prosecutors in Waukesha County brought charges under this statute against a construction company when a backhoe operator accidentally came into contact with live power lines, resulting in the electrocution of a fellow worker.<sup>59</sup> Clark County prosecutors used the statute in 1996 to charge a mobile home manufacturer for the death of three bicyclists when an improperly attached trailer became unhitched from a company tractor-trailer, allowing a mobile home to become disengaged and strike the bicyclists.<sup>60</sup> Finally, in 1999 the Waukesha County District Attorney publicly flirted with filing charges under the statute against Universal Metrics, Inc. after one of its employees got drunk at a company Christmas party and killed a woman whilst attempting to drive home.<sup>61</sup>

---

58. WIS. STAT. § 940.10 (2000).

59. *State v. Richard Knutson, Inc.*, 537 N.W.2d 420, 421-422 (Wis. Ct. App. 1995).

60. *State v. Steenberg Homes, Inc.*, 589 N.W.2d 668, 670-671 (Wis. Ct. App. 1998). At the conclusion of an inquest examining the cause of the accident, a jury found probable cause to charge the corporate defendant with two counts of second-degree reckless homicide under Wisconsin Statutes Section 940.06. *Steenberg Homes, Inc.*, 589 N.W.2d at 671. However, the criminal information filed by the State charged the company with homicide by the negligent operation of a vehicle. *Id.*

61. Lisa Sink, *Falls Firm Not Liable in Fatal Crash*, MILWAUKEE J. SENTINEL, July 25, 2001, at 2B. After calling an inquest to examine the accident, Waukesha County District Attorney Paul Bucher ultimately decided not to file charges. In a later civil proceeding the

The attraction that this statute holds for prosecutors should be obvious. A conviction is possible upon a showing of criminal negligence on the part of the operator of the vehicle. The prosecution need not prove that the corporation's employees were reckless in their actions leading up to the accident. The difference between criminal negligence and recklessness has been succinctly described:

Criminal negligence involves the same degree of risk as criminal recklessness – an unreasonable and substantial risk of death or great bodily harm. The difference between the two is that recklessness requires that the actor be subjectively aware of the risk, while criminal negligence requires only that the actor should have been aware of the risk – an objective standard.<sup>62</sup>

Therefore, the key focus is not on the state of mind of the defendant, but rather on what a reasonable person in similar circumstances would have known. In the case of Big Blue, prosecutors would not have to prove that Mitsubishi employees acted in the face of a known risk when attempting the lift in the absence of up-to-the minute wind speed data. Rather they would merely have to prove that a reasonable person in Mitsubishi's position would have known that proceeding with the lift without performing wind-sail calculations created a substantial risk of serious injury.

Filing charges on the basis of a work-site fatality might seem a stretch for a statute seemingly designed to promote safety on state highways. However, a "vehicle" is defined for purposes of the statute as "any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on lands, rails, water, or in the air."<sup>63</sup> Construction equipment falls within the literal language of the definition.<sup>64</sup> Big Blue was certainly self-propelled, and its crew had just moved it into position for the day's lift prior to the accident.

A more difficult question, and the one addressed by the Wisconsin Court of Appeals in *State v. Richard Knutson, Inc.*,<sup>65</sup> is whether a corpo-

---

Wisconsin Court of Appeals ruled that the corporation enjoyed immunity as a "social host[ ]" under state law and could not be sued by the family of the victim. *Id.*

62. Walter Dickey et al., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 WIS. L. REV. 1323, 1377 (quoted in *Richard Knutson, Inc.*, 537 N.W.2d at 428).

63. WIS. STAT. § 939.22(44) (2000). See also *Steenberg Homes, Inc.*, 589 N.W.2d at 672.

64. See, e.g., *Richard Knutson, Inc.*, 537 N.W.2d at 421 (corporation charged with negligent vehicular homicide after backhoe operator inadvertently moved backhoe's boom into contact with live electrical wires, electrocuting a crew member on the job).

65. 537 N.W.2d 420 (Wis. Ct. App. 1995).

ration (as opposed to a natural person) may be prosecuted under the statutory language of section 940.10. The corporate defendant in that case argued that the language of the statute – directed at “whoever” causes the death of “another” human being – clearly limited the pool of possible defendants to the universe of human beings.<sup>66</sup> The rules of grammar suggest that the word “another” limits the class of possible defendants to “human beings.” Judge Anderson, writing for the court, was unpersuaded by grammatical arguments alone. Because the word “whoever” is nowhere defined in the statute, the court found that it was ambiguous whether the term should be read to include or exclude artificial persons from its definition.<sup>67</sup>

Therefore, the court turned to an examination of legislative intent. The court noted that prior to the revision of the Criminal Code in 1955, the comparable version of the crime was addressed to “any person,” a phrase that clearly encompassed corporations.<sup>68</sup> The legislature gave no reason for this change. In addition, the court noted that an earlier version of the 1955 revision had explicitly addressed corporate criminal liability for the acts of its agents, but that this provision had been deleted from the final version of the revision.<sup>69</sup> The reporter for the revision of the Criminal Code noted that the proposed provision on corporate liability had been deleted upon the motion of a committee member who was in-house counsel for a large industrial company, and that the 1955 revision was not intended to change the existing rule of law on the subject.<sup>70</sup>

The court then turned to an examination of precedent in order to determine what the existing legal rule was at the time of the 1955 revision. The court cited *Vulcan Last Co. v. State*<sup>71</sup> for the proposition that a corporation can be criminally liable under Wisconsin law.<sup>72</sup> The court also cited *State ex rel. Kropf v. Gilbert*<sup>73</sup> for the proposition that a corporation can be held guilty of any crime that is punishable by a fine.<sup>74</sup> Therefore, the court in *Knutson* concluded that the “well established” rule in Wisconsin prior to 1955 was that if a crime was punishable by a fine then a corporation could be held criminally responsible for that

---

66. *Id.* at 422.

67. *Id.* at 423.

68. *Id.* at 424.

69. *Id.*

70. *Richard Knutson, Inc.*, 537 N.W.2d at 424 (citing William A. Platz, *The Criminal Code*, 1956 WIS. L. REV. 350, 362-63).

71. 217 N.W. 412 (Wis. 1928).

72. *Richard Knutson, Inc.*, 537 N.W.2d at 424.

73. 251 N.W. 478 (Wis. 1933).

74. *Richard Knutson, Inc.*, 537 N.W.2d at 424.

crime.<sup>75</sup> Since the legislature did not express an intention to change this rule when it passed the 1955 revisions, the court reasoned that the legislature intended to continue the rule unchanged.<sup>76</sup> Notwithstanding the plain language of the statute, the court held that corporations are proper defendants under a charge of homicide by the negligent operation of a vehicle. Under both the facts and the law, then, it appears that a criminal prosecution of Mitsubishi arising out of the collapse of Big Blue is possible under this provision of the criminal code.

#### IV. THE RESULT IN *KNUTSON* IS WRONG

As an exercise in statutory interpretation, the opinion of the majority in *Knutson* is just plain wrong. Judge Brown demonstrated this fact when he convincingly brushed aside the majority's arguments in a well-reasoned dissent. First, Judge Brown examined the state of the precedent prior to 1955. He noted that the *Vulcan Last Co. v. State*<sup>77</sup> opinion involved a crime that prohibited "persons" from attempting to influence a voter in any way.<sup>78</sup> Therefore, the holding in that case was confined to the question of whether the word "person" in a penal statute could reach a corporate defendant.<sup>79</sup>

In the view of Judge Brown, the choice of the legislature to apply the criminal statute to "whoever" causes the death of "another" human being through the negligent operation of a vehicle – rather than to direct the statute towards "persons" – clearly evidenced the legislature's intention to exclude artificial persons from liability.<sup>80</sup> The basic rules of grammar dictate such a conclusion. Judge Brown notes that the *Kropf* case does not alter this result. The actual holding of that case is that a corporation can be held guilty of a crime when it is punishable by a fine, not that it must be.<sup>81</sup> The intent of the legislature remains the paramount consideration. In the absence of any settled pre-existing rule extending criminal liability to corporations in all cases without regard to the language used in the statute, it is impossible to conclude that the legislature's use of the word "whoever" in the revision of section 940.10 was intended to reach corporate actors.<sup>82</sup>

---

75. *Id.* at 425.

76. *Id.*

77. 217 N.W. 412 (Wis. 1928).

78. *Id.* at 429 (Brown, J., dissenting) (citing *Vulcan Last Co.*, 217 N.W. at 413).

79. *Id.* at 429-430.

80. *Id.* at 430.

81. *Id.* at 431.

82. *Richard Knutson, Inc.*, 537 N.W.2d at 430 (Brown, J., dissenting).

Although Judge Brown does not make this argument, the legislative history of the 1955 revision also supports the position that corporations were not intended to be defendants under this crime. The fact that the legislature changed the language describing the perpetrator of the crime from "person" to "whoever" indicates an intention to change the scope of liability. The additional fact that a proposed section of the revision dealing with corporate liability was deleted during the drafting process further supports this view. The concluding comments of Judge Brown are worth considering:

What this debate really comes down to is whether it is desirable that a court avoid the literal meaning of this statute. I acknowledge that there exists a tension between the language of the statute and the announced public policy goal by some of our citizenry that corporations be held to criminal liability for negligent deaths. And I reject the notion that we should never search for the 'real' rule lying behind the mere words on a printed page. But when the statute's wording is so clear in its contextual rigidity, the statute has therefore generated an answer which excludes otherwise eligible answers from consideration. Unlike the majority, I take the clear wording of the statute seriously.<sup>83</sup>

#### V. CORPORATE CRIMINAL LIABILITY FOR WORK-PLACE FATALITIES ON THE GROUNDS OF NEGLIGENT OPERATION OF A VEHICLE IS POOR POLICY

Not only is the holding in the *Knutson* case a misreading of the statute, but the Court of Appeals' ruling to permit corporate liability in such circumstances also goes contrary to several strong policy arguments. The first argument recognizes that the legislature should only criminalize conduct that evidences a blameworthy state of mind. The essence of a "crime" – indeed, the only characteristic of a crime that distinguishes it from a civil sanction – is that it invokes the moral condemnation of the community.<sup>84</sup> The mens rea element of a crime provides the justification for a moral condemnation of the conduct. Clearly the intentional or knowing infliction of harm upon another is morally blameworthy. In addition, "[i]f an individual knowingly takes a risk of a kind which the community condemns as plainly unjustifiable, then he is morally blameworthy and can properly be adjudged a criminal."<sup>85</sup>

---

83. *Id.* at 432.

84. Henry A. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404-05 (1958).

85. *Id.* at 416



A charge of negligent operation of a vehicle does not impose liability because the defendant acted in the face of a known risk (without regard for the consequences). Instead, liability is imposed because the actor unreasonably failed to appreciate the true nature of the risk and therefore failed to take adequate steps to reduce the possibility of injury or death. While a reasonable person might have acted differently under the circumstances, that does not mean that the defendant desired to harm anyone or was indifferent to that possibility. On what basis does the community condemn the defendant's state of mind as immoral in these circumstances?

For example, the backhoe operator in the *Knutson* case did not operate the vehicle in a negligent manner. The negligence supporting the conviction of the construction company was the company's failure to have power cut off from nearby power lines while the backhoe was in operation.<sup>86</sup> However, OSHA regulations governing work in the vicinity of electrical power lines gave the contractor the option of either cutting off power or proceeding with the work while maintaining visual contact with the power lines.<sup>87</sup> Under management instructions the backhoe operator complied with this second option, but he misjudged the distance to the power lines and allowed his vehicle to come into contact with the wires.

Was management's choice of one of two options permitted under OSHA regulations morally blameworthy? The court placed emphasis on the fact that the contract between the construction company and the City of Oconomowoc required the contractor to notify the power company and cut off electricity when work was performed in the vicinity of live wires.<sup>88</sup> However, a breach of contract is not usually condemned as a crime unless the underlying conduct is itself blameworthy. It is hard to conclude that workplace procedures employed by the defendant in the *Knutson* case were so outrageous as to be criminal under circumstances where OSHA explicitly permitted such procedures.

Similarly, the newly trained driver in *State v. Steenberg Homes, Inc.*<sup>89</sup> case operated his truck in a safe and prudent manner on the highway.<sup>90</sup> However, he forgot to attach safety chains to the trailer before leaving on what was his second day as a driver.<sup>91</sup> The trailer came unattached

---

86. *Richard Knutson, Inc.*, 537 N.W.2d at 429.

87. *Id.* at 428-429.

88. *Id.* at 429.

89. 589 N.W.2d 668 (Wis. Ct. App. 1998).

90. *Id.* at 670.

91. *Id.*

and struck three bicyclists. By convicting the corporation of a crime under these facts, the court essentially found the corporate manager to be morally blameworthy because company procedures did not include a safety checklist on which the driver could indicate that safety chains had been attached in preparation for the day's assignment.<sup>92</sup> This failure was deemed blameworthy despite the fact that the driver had been trained in the proper procedures over the course of a week and had practiced hooking and unhooking safety chains without any problems.<sup>93</sup>

Maybe the institution of a safety checklist procedure would have prevented the accident. Or maybe, despite such a procedure, it would still be possible for a driver to check off that the safety chains were properly installed without realizing that, in fact, they were not. Perhaps a two-week training course would be better than a one-week course. Should the moral condemnation of the community turn on such trivialities? The problem with section 940.10 is that it allows conduct to be defined as criminal on the basis of just such fine distinctions.

The second argument against corporate liability under the statute flows from the first. When conduct that is not morally blameworthy is prosecuted as homicide, it diminishes the moral opprobrium attached to other homicides. Professor John Coffee summarized this viewpoint as follows:

[I]f the criminal law is over used, it will lose its distinctive stigma. . . . Once everything wrongful is made criminal, society's ability to reserve special condemnation for some forms of misconduct is either lost or simply reduced to a matter of prosecutorial discretion.<sup>94</sup>

In addition, if corporate defendants come to believe that there is nothing that they can do to prevent being charged with crimes as a result of work-site fatalities, then they (and their shareholders) will come to view these crimes as merely one cost of doing business.<sup>95</sup>

---

92. *Id.* at 673-674.

93. *Id.* at 670.

94. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 200-01 (1991).

95. Consider again the observations of Professor Coffee:

[W]orkplace injuries are, to a degree, inevitable. As a result, some individuals must engage in legitimate professional activities that are regulated by criminal sanctions; to this extent, they become unavoidably 'entangled' with the criminal law. That is, they cannot plan their affairs so as to be free from the risk that a retrospective evaluation of their conduct, often under the uncertain standard of negligence, will find that they fell short of the legally mandated standard.

*Id.* at 219-20.

The amount of discretion given to prosecutors under the statute provides the third argument against its application to corporate defendants. Charges are brought in the case of some work-site fatalities, but not all. The criteria for distinguishing between corporate procedures found lacking under the statute and procedures which are deemed adequate but merely ineffective in preventing accidents is ambiguous and unknowable. Could Steenberg Homes really have foreseen that their training and safety procedures would be found to support criminal liability? Would a different prosecutor have viewed the same procedures differently? The attempt of the Waukesha County D.A. to apply the statute in the case of a drunk driving accident following a company Christmas party merely underscores the breadth of the prosecutorial discretion inherent in a crime premised upon negligent behavior.

Yet another policy argument against imposing corporate liability as a result of a homicide by the negligent operation of a vehicle is that to do so is to divert fault and moral condemnation away from the individuals responsible for the act. No natural person was charged as a defendant in either the *Knutson* case or the *Steenberg Homes* case. Yet each prosecution was premised upon the theory that an individual acting in a supervisory or managerial position acted in a criminally negligent manner. It is easy to hold a corporation vicariously liable for the acts of its employees, and to minimize the impact that a conviction has upon the corporation and its shareholders. However, if we are uncomfortable charging responsible employees with a crime under certain facts then we should also hesitate to condemn the corporation. Contrast these cases with the reckless homicide prosecutions involving Film Recovery Systems and the S.A. Healy Company. Individual corporate employees were charged in the former case and the crew chief would have been charged in the latter case had he not died in the explosion.<sup>96</sup> If the conduct is truly criminal, the existence of a corporate defendant should not divert the community from punishing the natural persons who are responsible.

Finally, corporate criminal liability is unnecessary in this context because punitive damages in a civil suit are a better deterrent. If our pur-

---

96. The fact that the corporation was not charged with the death of the crew chief suggests that the D.A. viewed the crew chief as criminally culpable. McCann, *supra* note 42, at 795. Criminal charges were not brought against the labworkers in the Chem-Bio prosecution who failed to catch the cancer on the Pap smear slides, despite the opinion of an expert advising the D.A. that one of the cases was the worst misread of a Pap smear that she had ever seen. *Id.* at 795-96. It is troubling that health care professionals could participate in such an obviously deficient manner of reviewing slides without having to answer for the consequences of their actions.

pose is to encourage companies to take all reasonable measures to protect their employees, then a \$99 million judgment similar to the one handed down in the Miller Park wrongful death suit will be far more effective than the \$10,000.00 statutory maximum fine in a reckless homicide prosecution.<sup>97</sup> The possibility that insurance might cover the verdict should not concern us here, since any applicable insurance policy would almost certainly limit its coverage to negligent acts. If the conduct is truly negligent, so that insurance is available to pay a judgment, then the conduct should not be subject to criminal penalties anyway.

#### VI. CONCLUSION: THE FUTURE OF CORPORATE LIABILITY FOR WORK-RELATED FATALITIES IN WISCONSIN

It would appear that reckless homicide under section 940.02 is an unlikely charge against Mitsubishi under the facts of the Big Blue accident. Construction accidents resulting in fatalities should not be charged as reckless homicides unless the workers are exposed to an unusual or outrageous danger on the job site. Reckless homicide should only be charged against a construction company when the fatal occurrence falls outside of the normal risks present on a job site. The job of a construction worker by its nature involves high altitudes, heavy machinery and the ever-present possibility of human error.

It is true that Mitsubishi, through its supervisor Victor Grotlisch, failed to verify safe wind speeds on the day of the fateful lift, ignored concerns raised by the ironworkers, and fostered an environment that stifled communication or dissent among the workers. However, no evidence was presented at the civil trial that Grotlisch or any other Mitsubishi employee chose to proceed in the face of a subjective appreciation of the likelihood of a crane collapse under the prevailing wind conditions. After all, if Mitsubishi employees had been aware of the true extent of the risk, would they really have attempted the lift in the presence of OSHA inspectors?

That does not mean that the accident was inevitable. Better monitoring of wind speed might have meant that the lift was delayed. Perhaps the lift might have been attempted using a different approach – one that did not require the roof segment to be lifted quite so high before being swung into place. It is undisputed that Mitsubishi could have taken additional steps that would have minimized (although not eliminated) the likelihood of Big Blue collapsing. But one could make a similar argu-

---

97. *Id.* at 798. Civil litigation in the Chem-Bio case resulted in judgments totaling \$11 million. *Id.* at 795.

ment after almost any construction accident. Little purpose is served by treating every construction accident as criminal if, with the benefit of hindsight, it is deemed to have been preventable. Victor Grotlich's failure to more closely monitor wind speed may constitute negligence, but it does not indicate a subjective awareness of the risk of a collapse much less exhibit the "utter disregard for human life" required to support a charge of first degree reckless homicide.

However, criminally negligent conduct would be sufficient to support a charge of homicide by negligent operation of a vehicle under section 940.10. As interpreted by the Wisconsin Court of Appeals in the *Knutson* case, the statutory language would appear to cover the collapse of Big Blue. The evidence at the civil trial may be sufficient to establish criminal negligence in the operation of the crane. Therefore, a criminal prosecution of Mitsubishi would appear to be a very real possibility.

For the reasons discussed above, the wisdom of such a result can be questioned. The Wisconsin legislature chose its words carefully when it passed the statute prohibiting homicide by the negligent operation of a vehicle but limiting potential defendants to natural persons. Undoubtedly the legislature meant what it said. It is likely that at some point the Wisconsin Supreme Court will be called upon to revisit the question considered by the Court of Appeals in *Knutson*. At that time, the Court should interpret the language of section 940.10 to preclude the prosecution of corporations.

The problem with such an interpretation is that it can also be applied to the similar language in section 940.02. Similar to section 940.10, the reckless homicide statute is also addressed to "whoever" causes the death of "another" human being. A similar interpretation of the statutory language would prevent a corporation from being charged with reckless homicide in situations where death is a real and foreseeable consequence of the nature of the workplace created by corporate management. Should we extend immunity from prosecution to corporations under section 940.02 of the Criminal Code as well?

The indifference to life exhibited by the officials of S.A. Healy and Film Recovery Systems should be obvious. In both cases management knowingly exposed workers to hazardous conditions where they knew that the loss of life or serious injury were very real possibilities. The management of Chem-Bio was indifferent to the lives of the patients it purportedly served. Officials of that company knew that a misdiagnosis – with potentially fatal consequences – was almost inevitable given the manner in which patient slides were reviewed. In these situations, management chose a course of conduct and an utter disregard for human life

was evident in the choice they made. Reckless homicide prosecutions would be appropriate. Of course, in these situations the individual responsible for the corporate action is equally responsible for the deviation from societal norms reflected in the corporate conduct and should be subject to criminal charges as well as the corporation.

Therefore, the choice facing the Wisconsin Supreme Court would seem to be between finding a pretext for ignoring the language of the negligent homicide provision of section 940.10 on the one hand, and eliminating corporate liability for homicide altogether on the other. One need not be a cynic to recognize that courts often ignore the plain language of a statute. The decision of the Court of Appeals in *Knutson* ignored the statutory language because the judges in the majority recognized that a contrary interpretation would preclude corporate criminal liability under not only this statute but also under all of the homicide provisions of the Criminal Code. Certainly it is difficult to imagine a legal system where a corporate employer is never criminally responsible for a death caused by the actions (or inactions) of its employees. However, such immunity from prosecution is not only imaginable, it is defensible in the context of work-site fatalities resulting from negligent conduct.

Prosecuting the corporation for a single misjudgment or miscalculation in the performance of a complex and dangerous operation of heavy machinery, under the theory of homicide through the reckless operation of a vehicle, serves no valid purpose. If workplace conditions on the whole do not exhibit a depraved indifference to human life, then it is difficult to understand what society accomplishes by holding the corporation criminally responsible for the one-time misjudgment of its employees. Neither Victor Grotlich nor the crew of Big Blue fully appreciated the danger that the three ironworkers were being exposed to on the day of the collapse. None of the employees involved chose to ignore dangerous wind conditions. They should have known better, but the point is that they did not know. Since the employee is not typically charged as an individual in these negligent vehicular homicide cases, how is it that the corporation – whose liability is entirely derivative of the actions of the employee – can be viewed as morally culpable if the employees are not? Section 940.10 of the Wisconsin Statutes, as currently interpreted, allows too many accidents like the Big Blue collapse to be prosecuted as crimes under varying and ill-defined standards.

When called upon to interpret the crime of homicide by the negligent operation of a vehicle in the future, the Wisconsin Supreme Court should give effect to the plain language of the legislature and overrule

the *Knutson* decision. At the same time, the Court should invite the legislature to amend the reckless homicide statute, section 940.02, in order to explicitly permit the continued prosecution of corporate defendants under that statute. However, until such time as the legislature revisits the issue of the appropriate scope of corporate liability for work-site fatalities, the Court should assume that the legislature meant what it said. The result may be that for a period of time Wisconsin finds itself alone among the fifty states in rejecting the concept of corporate liability for homicide in general. What is necessary is a rethinking of the circumstances under which corporate liability for workplace deaths makes sense. The law should recognize that sometimes corporations adopt policies that are indifferent to the safety of employees and the public. But the law should also recognize that sometimes an accident is just an accident. An examination of the facts and circumstances behind the collapse of Big Blue demonstrates that the current treatment of corporate homicide under the laws of Wisconsin fails to adequately distinguish between these two vastly different scenarios.