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The Westray Mine Disaster and its Aftermath: The Politics of Causation*

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Abstract — Causation analysis is densely political in at least three ways. First, because causation is crucial to our system of attributing moral, legal and political responsibility, causation arguments are advanced for purely instrumental purposes. They do political work. Second, because any particular occurrence is the outcome of an almost infinite number of antecedent events, "but for" causation analysis produces trivial results. A judgement about causal significance is required and will depend, in part, on the goals of the analysis. The choice of goals is political, but unstated goals and hidden assumptions often exclude consideration of some possible causes as significant. These politics of causation need to be made explicit. Third, the institutional setting in which official determinations of causation are made influence the outcome. Hence, it is necessary to explore these as well. Each of these three dimensions of the politics of causation is explored through an analysis of the 1992 Westray mine disaster which killed 29 miners in Nova Scotia, and the official responses to it. It is argued that if the goal is to protect workers and nothing else, then the political-economic context that promotes the creation of hazardous conditions must be considered a significant cause of harmful occurrences. It is unlikely, however, that any of the official responses to the disaster will take this approach.

Résumé — La théorie de la causalité est largement influencé par des dimensions politiques et ce, à trois égards. Premièrement, étant donné qu'elle est au centre de notre système d'attribution morale, légale et politique de responsabilité, les arguments issus de l'analyse de la relation de cause à effet ne servent qu'à des fins instrumentales. Ils font le travail politique. Deuxièmement, tout phénomène étant l'aboutissement d'une infinité d'événements précurseurs, la théorie de la causalité ne fournit que des réponses futiles. Une critique de cette théorie est nécessaire mais est tributaire, en partie, des buts de l'analyse. Le choix des

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objectifs est de nature politique. Cependant, les objectifs non avoués et les hypothèses implicites tendent souvent à exclure certaines causes plausibles et importantes. Ces considérations de nature politique doivent être dévoilées. Enfin, les institutions, qui opèrent ces choix, influencent les résultats de l'analyse. Dès lors, il est nécessaire de les examiner. Chacun de ces trois aspects de la théorie de la causalité, ainsi que les réponses officielles, sont analysés à la lumière de la catastrophe de la mine Westray, en Nouvelle-Écosse, qui a été la cause du décès de 29 mineurs. L'auteur soutient que si les objectifs politiques ne visent uniquement que la protection des travailleurs, alors le contexte politique et économique qui favorise la mise en place de conditions de travail dangereuses doit être considéré comme étant un facteur important d'accidents. Il est cependant peu probable que les réponses officielles à cette catastrophe reflètent cette approche.

Introduction

Nearly three years have now passed since the morning of May 9, 1992 when we awoke to the awful news that there had been an explosion at the Westray Mine in Nova Scotia and that 26 miners were trapped underground. In the days that followed, as we watched and waited, hoping that survivors would be found, we also began to ask, how did this happen and who is responsible? Despite the efforts of Curragh Resources Inc.,—the mine's owner—to manage the news,¹ information began to trickle out strongly suggesting that systemic failures at many levels caused the disaster.²

Since the explosion, there has been a flurry of legal and administrative activity in response to the disaster. Charges under provincial health and safety laws were belatedly brought and then dropped after Curragh and two of its employees, Gerald Phillips, the former Westray mine manager, and Roger Parry,

1. By 8:30 that morning, Curragh had retained Tom Reid, a Bay Street public relations consultant, to direct their efforts. See S. Cameron & A. Mitrovica, "Burying Westray" *Saturday Night* (May 1994) 54 at 56. Shaun Comish, a Westray miner who participated in the rescue effort, described the company's efforts at news management in his *The Westray Tragedy* (Halifax: Fernwood, 1993) at 48: "I have never seen so much snow in May. The media was snowed, and so was everyone else. The company controlled every bit of information given out to the public and the families."
2. These causes are explored in H. Glasbeek & E. Tucker, *Death by Consensus: The Westray Story* Working Paper No. 3 (Toronto: Centre for Research in Work and Society, York University, 1992); published in a slightly modified form in (1993) *New Solutions* 14 (further citations to *New Solutions*). For a more detailed account of events, see D. Jobb, *Calculated Risk* (Halifax: Nimbus, 1994).

the former underground manager, were charged with manslaughter and criminal negligence. These charges were dismissed as inadequate and, subsequently, successfully relaid. After much wrangling, an indictment was preferred, thus avoiding the need for a preliminary inquiry. The trial began in February 1995 and promises to be a lengthy one. If there are appeals, it could be years before final disposition of all charges.³

Families of the victims filed notice of an intent to sue Curragh Resources, its Board of Directors, Clifford Frame (Curragh's chief executive officer), the manufacturers of machinery used in the mine and the governments of Nova Scotia and Canada, but they are awaiting the result of the criminal trial. Compensation for the families of miners who died is being paid by the Nova Scotia Workers' Compensation Board and it is estimated that the benefits will total \$15 million, although this could increase (or decrease) depending of future changes to pension benefit levels.⁴ An internal review of the behaviour of the mine inspectors who attended Westray was conducted by the Department of Labour. It found that the mine inspectors operated within acceptable departmental practices.⁵ An external review of the management practices and operational procedures of the Nova Scotia Department of Labour and its Occupational Health and Safety Division was conducted by Coopers & Lybrand for the provincial Auditor General. It found serious deficiencies.⁶ The Occupational Health and Safety Advisory Council in Nova Scotia was commissioned to review the Nova Scotia *Occupational Health and Safety Act* (OHSa) and regulations. It endorsed the internal responsibility system as the

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3. *R. v. Curragh Inc.* (1993), 124 N.S.R.(2d) 59 (Prov. Ct.) and (1994), 125 N.S.R.(2d) 185 (Prov. Ct.). Already, there is a cloud of legal uncertainty hanging over the trial because the presiding judge took the unusual step of calling the director of prosecutions to complain about the performance of the lead prosecutor. The judge refused to declare a mistrial and the Supreme Court quashed the application of the Crown for leave to appeal on the ground that the court had no jurisdiction to hear an appeal at this stage of the hearing. The court expressed no view of the application's merits. *R. v. Curragh*, [1995] S.C.C.A. No. 138 (QL). Another motion to stay the proceedings has been brought, based on an allegation that the prosecution is withholding evidence. "Westray Trial Hits New Snag" [*Halifax*] *Daily News* (11 May 1995).
 4. *Canadian Occupational Health and Safety News* (8 February & 24 May 1993). The possibility of benefit levels decreasing is a real one as a "reform" bill was recently passed by the Nova Scotia legislature. Benefit levels are to be calculated on after-tax rather than gross income and survivor pensions are terminated at age 65. *Workers' Compensation Act*, S.N.S. 1994-1995, c.10.
 5. "Westray Probe Clears Two Mine Inspectors" *Toronto Star* (22 April 1993) A13.
 6. Coopers & Lybrand, "Review of the Management Practices of the Nova Scotia Department of Labour: Final Report" (2 April 1993).

best means to ensure a safe workplace and recommended more education and statutory clarification of the rights and obligations of the workplace parties.⁷

A public inquiry was ordered by the provincial government, but it was stayed by the Nova Scotia Court of Appeal because of the risk that the accused's right to a fair trial could be prejudiced. The Supreme Court of Canada lifted the stay in May 1995, because the accused chose trial by judge alone, making a decision of the merits moot.⁸ Finally, Curragh is in receivership and its assets are being sold off. Functionally, if not legally, it has ceased to exist and any judgements or penalties against it will be difficult to recover.⁹

Despite all this activity, in three years, no one has been held legally responsible, there has been no official determination of the cause of the disaster, hardly any facts have been officially found, few recommendations have been made by officialdom and no laws or regulations have been amended. It is still possible that, eventually, available legal and administrative mechanisms will punish wrongdoers, identify the disaster's more immediate causes and produce some positive recommendations and reforms, but it is unlikely that systemic causes will be addressed, leading to more fundamental change.

For those concerned to advance the struggle to improve health and safety conditions at work, it is crucial to understand what caused the Westray mine disaster and why the various legal and administrative responses to it are unlikely to provide adequate analyses of its causes or to generate effective reforms. This task runs headlong into the politics of causation.

Causation analysis is densely political in at least three interrelated senses. First, causation analysis is crucial to our system of attributing responsibility, whether in a moral, legal, economic or political sense. Because of this, causation theories perform political work and are apt to be selected accordingly. Lawyers and public relations consultants are acutely aware of this and routinely use causation analysis in crudely instrumental ways to advance the interests of their clients.

Causation is political in a second, more subtle and pervasive sense. While it is not true that everything causes everything else, a large number of events and actions are, in some sense, causally connected to a particular outcome. Thus, while there may be agreement that some factors can be eliminated because they

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7. Nova Scotia, Occupational Health and Safety Advisory Council, *Taking Responsibility* (Halifax: Nova Scotia Occupational Health and Safety Advisory Council, 1995).
 8. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] S.C.M. No.36 (QL), rev'g (sub nom. *Phillips et al. v. Richards J.*) 116 N.S.R.(2d) 30 (S.C.T.D.). Argument was heard by the Supreme Court of Canada in May 1994. No decision has been issued at the time of writing.
 9. The legal proceedings include *R. v. Curragh Inc.*, [1994] O.J. Nos. 1116, 1183 and 1452 (QL). Curragh has a \$5 million trust fund which might be tapped for damages. See Jobb, *supra* note 2 at 273.

are not causal in any sense, there is room for substantial disagreement about the relative significance of the many events that are causal in some sense.

Various criteria may be used to assess the relative significance of multiple causes. One set of criteria can be derived from the goals being pursued. For example, if our goal is to prevent future harm to workers, the choice of significant causal factors is likely to be different than it would be if our goal is to find a person or entity obliged to compensate the families of the most recent victims.

Yet, even where there is apparent agreement on the goal, often more subtle differences remain. Typically, these relate to underlying disagreements over the mutability or desirability of existing social arrangements. Thus, for example, if hazardous working conditions are, in some sense, an inevitable by-product of capitalist relations of production, but capitalism is seen as good or necessary, then the goal of protecting workers will be reformulated. It will be to protect workers within capitalist relations of production. Once the goal is restated in this way, the system of production and its supporting ideology will cease to be identified as causally significant and, therefore, requiring change. This is not because they are not causal, but because there is a prior commitment to the necessity or desirability of maintaining those relations. This commitment may be unarticulated, but it nevertheless influences the selection of significant causes. The problem with many causation disputes is that their political underpinnings are so deeply concealed that the issue is never joined.

This leads to a third dimension of the politics of causation. The terrain on which judges and other public officials operate is shaped by prevailing political-economic conditions, dominant ideological assumptions and the particular institutional context in which the causal question is addressed. Not only do these factors militate against the selection of approaches to causation that emphasize systemic conditions, the opportunity to raise and interrogate the underlying political commitments that inform dominant conceptions of causation is also severely constrained. Some fora, however, are more amenable to an interrogation of systemic issues than others. In particular, public inquiries offer greater opportunities than civil or criminal trials, but there will always be formidable resistance to approaches that call into question fundamental social relations and deeply entrenched beliefs.

In the sections that follow, each of the three senses in which causation is political is examined in more detail. First, the instrumental use of causation analysis and the political work performed by some commonly used approaches is critically scrutinized. Next, the argument is made that the underlying causes of the Westray mine disaster are to be found in the particular political economy of Atlantic Canada and Pictou County and in a series of deeply rooted ideological assumptions that inform decision-making by private and public sector actors and that, unless this social context is addressed, reforms will have only limited impact. The third section considers the possibilities and limitations for raising

the underlying causes and getting them officially recognized in different institutional settings. The strategic implications of this analysis will be briefly considered in the conclusion.

The Instrumental Uses of Causation Analysis

Events typically have multiple causes. Usually, a combination of causes is necessary to produce a result and, in some cases, more than one causal factor is sufficient by itself. Moreover, one can trace the antecedents to an event back in an infinite regression. Because of this, different people can plausibly describe the cause(s) of a disaster in very different ways and disagree about whether an antecedent event or condition is properly considered causal. This condition of overdetermination makes fertile the ground for disputes over causation that are more likely to be driven by politics than by science.

One could, for example, start and end a discussion of the causes of the Westray mine disaster with a geological description of the Foord coal seam, focusing on its fault conditions and gaseousness. This approach to causation eliminates human agency from the analysis and, for this reason, is often advanced by mine operators and others potentially facing allegations of blame. Thus, in 1900, American mine inspector Thomas K. Adam, in a speech to the Western Pennsylvania Central Mining Institute, reported:

During [calamitous mine disasters] we have, as usual, a plenteous crop of apologists ... who appear on the surface ... Those men are very resourceful in offering all kinds of excuses for those who are possibly responsible for such calamities. They will tell us ... that those mine explosions are the unavoidable and natural accompaniments which give harmony to the coal mining industry.¹⁰

One such "surface" man appeared in the aftermath of the Westray disaster. Colin Benner, Curragh's Executive Vice President, Operations, was their spokesperson on the scene.¹¹ Two days after the explosion, he suggested, "some people are

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10. Quoted in D. J. Curran, *Dead Laws for Dead Men* (Pittsburgh: University of Pittsburgh Press, 1993) at 49–50.
 11. Comish, *supra* note 1 at 48, refers to Benner as "the pretty boy they had brought in from Toronto ... He did an excellent job of making the public feel sorry for the poor company ...".

assuming that human error is the only possible cause of such a tragedy ... Nature cannot always be controlled.”¹²

Another approach to workplace disaster analysis is the “unsafe acts” theory of causation. This theory identifies the careless or reckless behaviour of workers as the primary cause of workplace deaths and injuries. It too has a long historical lineage. The first factory inspectors in England and Ontario, for example, attributed most accidents to workers’ “love for amusement, their inattention, their recklessness.”¹³ It also has been relied upon to explain death and injury in underground coal mining. For example, H. S. Poole, one of the first mine inspectors in Nova Scotia and later the agent for the Acadia Coal Company, was inclined to blame accidents on the rashness and ignorance of miners, while American coal mine operators at the turn of the century asserted (without data) that 99% of all mine accidents “are due absolutely to the careless or wilful negligence of the men employed in them.”¹⁴

To date, no one has publicly asserted that the Westray miners were the authors of their own misfortune, but it would not be surprising if allegations of worker misconduct or complicity in the violation of mining regulations were to emerge in the course of some of the pending legal proceedings.¹⁵

Despite their differences, the “natural causes” and “unsafe acts” theories of causation perform similar political work; they exonerate employers and governments and obviate the need to inquire into systemic conditions which shape *their* behaviour as well as the behaviour of working miners. This is accomplished, in part, by assigning primary causation to nature or careless workers and by treating the most immediate cause as the most important one.

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12. *Canadian Press* (11 May 1992). The public relations strategy followed by Benner was devised by Tom Reid, Curragh’s public relations consultant. The first “key message” he recommended was: “This is a terrible human tragedy that could not be foreseen.” Cited in Cameron & Mitrovica, *supra* note 1 at 56.
 13. These are the words of Mr. Whympster, superintending inspector of the Southern counties of England, which were reprinted by Ontario factory inspector Barber in his Annual Report for 1888. See E. Tucker, *Administering Danger in the Workplace* (Toronto: University of Toronto Press, 1990) at 160.
 14. D. MacLeod, “Colliers, Colliery Safety and Workplace Control: The Nova Scotia Experience, 1873–1910” in Canadian Historical Association, *Historical Papers* (1983), 233; *Coal Trade Bulletin* cited in W. Graebner, *Coal-Mining Safety in the Progressive Period: the Political Economy of Reform* (Lexington: University Press of Kentucky, 1976) at 25.
 15. It has been suggested by J. H. Ryan, *Coal in Our Blood* (Halifax: Formac, 1992), that the inexperience of the Westray miners made them less aware of the special hazards of the Foord coal seam and that this may have contributed to the disaster. “Author Cites Miners’ Inexperience in Westray Disaster” *Toronto Star* (30 November 1992) A13. She did not, however, allege that the workers themselves created the danger.

The latter assumption is of dubious validity.¹⁶ For example, even if it were correct to say that the immediate cause of a roof fall was unstable geological conditions, it is arguable that the more important causes included the decision by the mine developer to mine in an area known to be unstable and the existence of legal and administrative systems which allow this to occur. After all, if the practice of mining in geologically unstable environments is not closely regulated or stopped altogether, we can be sure there will be other roof falls, even if we cannot know just when and where they will occur. Overall, then, perhaps the most important political work done by these theories is to divert attention from routine business and government behaviour.

The focus on immediate causes also explains why these theories tend to construct disasters as "accidents" in the sense of being unplanned and unintentional occurrences. This characterization is contestable as well because, in retrospect, these disasters can also be viewed as the predictable result of conscious decisions to engage in, permit or encourage risky behaviour.¹⁷ Workers' compensation boards and private insurers calculate premiums based on this knowledge. Yet, when an injury is simply described as the result of an "accident" rather than as the predictable outcome of a conscious decision to engage in hazardous activities, the people who made or permitted that decision and the system which allowed or encouraged them to do so, are rendered invisible and, therefore, not responsible or, at the very least, the degree of responsibility they are made to bear is diminished.

The Political Economy of a Disaster

Because events are causally overdetermined, many observers have properly concluded that objective causation is unobtainable.¹⁸ But this does not mean that any causal analysis is as good as any other. Theories of causation can be evaluated against a set of goals. These are, of course, politically determined, but by making the goals of causation analysis explicit, we can clarify the real

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16. For an insightful discussion of causal primacy issues, see E. O. Wright *et al.*, *Reconstructing Marxism* (London: Verso, 1992) at 129–75.
 17. The somewhat paradoxical definition of accidents is captured by K. Figlio, "What is an Accident" in P. Weindling, ed., *The Social History of Occupational Health* (London: Croon Helm, 1985) 180 at 180. "It is an unforeseen event which is also expected ...The number and the kinds of accidents show regularities, but the moment of any one accident remains unknown, although it is often retrospectively 'predictable'."
 18. H. L. A. Hart & T. Honoré, *Causation in the Law*, 2d ed. (Oxford: Clarendon, 1985). On the history of "objective causation" in law, see M. J. Horwitz, *The Transformation of American Law, 1870–1960* (New York: Oxford University Press, 1992) at 54–63.

differences between positions. The argument here, then, is that if the goal is to protect workers "tout court," then the political-economic conditions and ideological assumptions that promote the creation of risky work environments must be considered as major causes. Tragically, the events leading up to the Westray mine disaster support this claim.¹⁹

The failure to control the conditions that resulted in the Westray mine disaster is fundamentally rooted in a system which privileges private wealth creation over public intervention in the economy. The starting point is that private owners should be able to do with their property as they wish. They are to be allowed to decide how much to invest, when to invest, where to invest and for how long to invest; what to produce and how to produce it; and what kind of, and how many, employees to use.

The state mediates this to a degree, depending on the relative power of capital, labour and the state. Workers in Third World nations are the most disadvantaged and the resulting environmental and occupational harm is often the greatest. Bhopal is one recent example of this.²⁰ In Canada, the power imbalance generally is not as great, but the differences between industrialized and developing countries should not be exaggerated. In Nova Scotia, conditions are particularly favourable for capital. This is because of the dominance of staple extraction in the economy. Resource development is viewed as the engine of economic growth. Historically, governments have had to subsidize resource extraction through massive infra-structure expenditures. They do so in the hope that the return on the sale of the resources will produce revenues which will both repay the government and lead to the development of local manufacturing and service industries.²¹ However, because the markets for the resources are volatile and beyond the control of government, the state has few tools to manage the economy. If the anticipated growth of local industry fails to materialize, the state's reliance on capital's willingness to invest only increases, producing a profound dependency on private actors. Close links between government and

19. This section draws heavily on Glasbeek & Tucker, *supra* note 2. Since we published that account, two books have appeared which support our analysis. See Comish, *supra* note 1 and Jobb, *supra* note 2.

20. J. Cassels, *The Uncertain Promise of Law* (Toronto: University of Toronto Press, 1993) c. 2.

21. For example, the development of the Grande Cache coal mines in Alberta in the 1960s required the construction of a new town, transport and railway facilities, and power and gas installations. This was done at public expense. When the mine faltered and employment and revenue levels dropped, a royal commission was appointed by the province. It found that the province had agreed to participate in the venture "without any realistic or independent investigation of its economic feasibility." Alberta, Grande Cache Commission, *Final Report* (Edmonton, 1973) at 114. The examples could be multiplied.

would-be investors become the norm. Under such conditions, the level of state mediation of the rights of property is likely to be low.²²

While the conditions of dependency are greater in Nova Scotia than, perhaps, in more industrialized provinces like Ontario, capital's dominant position has not been eroded significantly anywhere in Canada. Moreover, as capital becomes increasingly footloose in the new global economy, the capacity and willingness of all states to regulate employers diminishes.²³ Indeed, in this environment, the policy of the government to do everything it can to create a favourable investment climate is readily defended as being in the public interest.

The effect of this kind of political economy and its supporting ideological assumptions on the events leading up to the Westray disaster can be seen first in the decision to establish the mine and then in the failure of the regulatory regime to control the hazardous conditions in the mine.

The Decision to Mine

The decision of the provincial government to switch from oil to coal to generate electricity sparked private sector interest in the Pictou coal fields in the early 1980s. Despite the well-known history of coal mine disasters in this area, none of the feasibility studies they conducted identified the health and safety of

22. For an overview, see J. Brodie, *The Political Economy of Canadian Regionalism* (Toronto: Harcourt, Brace Jovanovich, 1990).

23. For example, see D. Drache & M. S. Gertler, eds., *The New Era of Global Competition* (Montreal: McGill-Queen's University Press, 1991); B. Campbell, *Moving in the Wrong Direction: Globalization, the North American Free Trade Agreement and Sustainable Development* (Ottawa: Canadian Centre for Policy Alternatives, 1993). It has been suggested that Nova Scotia's earlier experience of dependency may prefigure Canada's future. See M. Earle & I. McKay, "Introduction: Industrial Legality in Nova Scotia" in M. Earle & I. McKay, eds., *Workers and the State in Twentieth Century Nova Scotia* (Fredericton: Acadiensis Press, 1989) 9 at 17. By way of illustration, at the annual convention of the Prospectors and Developers' Association of Canada held in Toronto in March 1994, Robert Smith, president of the American Barrick Resources Corporation, complained that government regulations and taxes in Canada have contributed to "a climate of hostility" and is causing mining companies to direct their exploration dollars to other countries. Anne McLennan, the federal Natural Resources Minister, reassured the conventioners that the government is committed to having a viable and competitive mining industry in Canada and proudly pointed to the 1994 budget which introduced new tax write-offs for mining companies and promised to examine the investment climate and the regulatory restraints imposed on the industry. R. Haliechuk, "Mine Renounces 'Climate Hostility' Driving Industry Out" *Toronto Star* (8 March 1994) D2.

miners as an independent consideration.²⁴ This silence is remarkable. It also has deep roots. For example, in 1888 Sir William Dawson, a native son of Pictou County and a noted geologist who had become principal of McGill University, was responding to a paper by Nova Scotia mines' inspector Edward Gilpin. He commented:

The difficulties that had occurred in mining some of the pits, especially in regard to flammable gases, had caused considerable trouble and many serious accidents, notwithstanding the precautions that had been taken and the means provided for the ventilation of the mines. It was a matter of great regret that so much good coal had been lost by these accidents, and it was to be hoped that the mining companies would guard against them so that the loss of life and of money might be reduced.²⁵

As this statement suggests, the failure to consider, independently, the health and safety of working miners is, in part, attributable to a world view which puts at least as much value on coal and money as on the lives of miners.

A more recent, if perhaps extreme, illustration of this outlook is found in a book entitled, *Risk Taking in Canadian Mining*. It is composed of a series of vignettes celebrating individual mine developers. There is literally no mention of the risks faced by working miners anywhere in this volume. A comment in the "Introduction" suggests why this is so. "The risks of physical danger have never been as great as the risk of losing property and investment."²⁶ Given this perspective, there is no need to be independently concerned with the health and safety of working miners either because the risks they are exposed to are considered relatively insignificant, or because mine developers will protect underground miners insofar as it is consistent with their desire to protect their own property.²⁷

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24. On the history of disasters, see J. M. Cameron, *Pictonian Colliers* (Halifax: Nova Scotia Museum, 1974) and Ryan, *supra* note 15.
 25. E. Gilpin, *Coal Mining in Nova Scotia* (Montreal: John Lovell, 1888) at 35.
 26. J. Carrington *et al.*, eds., *Risk Taking in Canadian Mining* (Toronto: Pitt, 1979) at 11. Frank Miller, then Treasurer of Ontario, in his preface to the volume, asserts (at 6) that there has been "an over-reaction against risk taking." A foreword by E. G. Thompson, at 7, then the President of the Association, calls for an acknowledgement of the "debt of gratitude" owed to "our risk-takers." There is no suggestion that this extends to working miners.
 27. In this context, it is telling that the only time health and safety risks were highlighted as significant by the private Westray mine developers was in a memo Clifford Frame wrote, dated 9 November 1988, defending the proposed deal when it was criticized by some Ottawa bureaucrats as being too favourable to Curragh. "A lot can go wrong in the development of this mine," he warned and then proceeded to list the potential problems including unforeseen geological faults,

While the failure of private resource companies to consider workers' health and safety other than as an aspect of profit-making is readily understandable, working miners have paid dearly for this with their lives and health. Why, then, did two levels of government not require occupational health and safety assessments to be performed as a condition of granting approval for or assistance to mining operations? The federal government had the Canada Centre for Mineral and Energy Technology (CANMET) conduct a technical review of the mining plan and, while its report raised more health and safety issues than the private reports, the bottom line was, again, economic. "The real question is whether this *property* [my emphasis] can bear the cost of the learning curve ..."²⁸

Since occupational health and safety in the mine was a provincial responsibility, the federal government could and, after the explosion, did take the position that this was a matter for the Nova Scotia government. Under Nova Scotia law, however, employers are not required to establish, in advance, that a planned undertaking can be conducted safely. Rather, they must notify the Department of Labour when work is to commence. From then on, the department can insist that operations be conducted according to provincial health and safety laws. Where, however, a firm seeks financial support from the government, there is nothing to prevent the government from requiring an occupational health and safety assessment as a condition of its involvement. This was not done even though there were numerous warnings from various sources that the proposed mine development was hazardous.²⁹

The federal and provincial governments' lack of concern for occupational health and safety reflects the effect of conditions of dependent development on their priorities. Nova Scotia politicians were desperate for the investment. The fact that the mine was in the provincial riding of Don Cameron, a provincial cabinet minister at the time the Westray proposal was being negotiated, and in the federal riding of Elmer McKay, then a senior Conservative Nova Scotia member of cabinet (who had stepped aside in 1983 to give Brian Mulroney a safe seat until the next election), only strengthened the hand of the mine's principal promotor, Clifford Frame. He had the ear of particularly powerful politicians anxious to attract investment. Local people, organizations and unions were in a weak position to demand that a complete occupational health and safety assessment be conducted as a condition of government financial participation. The people of Pictou County were desperate for jobs. Between 1981 and 1986, the region's population declined as working-age people left to

poor roof and floor conditions, excess methane, unskilled and inexperienced workers and underground fires. Cited in Jobb, *supra* note 2 at 158-59.

28. Canada Centre for Mineral and Energy Technology, *Westray Coal Incorporated Pictou County Coal Project: Technical Review* [n.d.] at 8 [emphasis added].
29. On the warnings, see Jobb, *supra* note 2 at 121-22, 141, 157-61, 168-70, 176, 181; Glasbeek & Tucker, *supra* note 2 at 17.

find employment elsewhere. Unemployment in the county increased from 9.2% to 17.6% during the same period. Annual family income in the county was less than the provincial average and manufacturing jobs were rapidly disappearing.³⁰ Trade unions in Nova Scotia were also not faring particularly well. In 1989 and 1990, Nova Scotia had the second lowest rate of unionization in Canada.³¹

Under these conditions, it is not surprising that occupational health and safety considerations were all but excluded from the deal-making between the government and the Westray mine developers; government officials and private developers were not inclined to raise them, and labour and social movements were too weak to make this issue a priority.

The Regulation of Mining Activity

Effective implementation of a regulatory scheme cannot be assumed, as the political-economic environment shapes both law creation and enforcement. Occupational health and safety regulation is no exception. Beginning with the first legislation enacted in the 19th century, enforcement problems have been endemic. Inspectors have chosen not to prosecute employers found to be in violation of health and safety standards, but rather have issued directives and warnings. This approach was justified on the assumption that non-compliance was the result of ignorance or organizational incompetence, not intentional wrong-doing. After all, inspectors believed that safety paid and that profit-maximizing employers would find it was in their interest to comply with the law, especially when the law only obliged employers to take measures "reasonably required in the circumstances" and economic feasibility was taken into account by inspectors in determining what was reasonable. Because workers' interests in health and safety were presumed to be identical to their employers', there was no need for the inspector to actively involve workers, except to urge them not to be careless. With gentle prodding by the inspector, the employers' internal responsibility system (IRS) would be a reliable instrument to achieve compliance with the law.³²

Worker health and safety struggles in the 1970s brought about some significant changes to the regulatory scheme. One of the most important is the reform of the IRS. Workers obtained the right to participate in joint health and safety committees, the right to know about hazards in the workplace and the

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30. Statistics Canada data presented in Acres International Limited, *Westray Coal Mine Initial Environmental Evaluation: Final Report, January 1990* (Ottawa: Industry, Science and Technology Canada, 1990) at 4-18, 4-26.
 31. Only Alberta had a lower union density. Statistics Canada, *Annual Reports under the Corporations and Labour Union Reporting Act* (Ottawa: Statistics Canada, 1989-1990).
 32. Tucker, *Administering Danger in the Workplace*, *supra* note 13 at 137-76.

right to refuse unsafe work. The primary role of the inspector, however, still is not to police health and safety crimes, but to facilitate the operation of the reformed IRS.

For workers, the reformed regime creates some new opportunities to contest hazardous conditions at work. The rights of workers, however, are carefully circumscribed and their ability to use them effectively varies enormously, depending on a variety of factors, including their level of employment security and bargaining leverage. Non-unionized workers employed by economically marginal employers are unlikely to be able to exert much pressure through the IRS and, consequently, occupational health and safety regulations will not be enforced.³³

To some extent, the history of mine safety regulation in Nova Scotia departs from this pattern, reflecting its particular political economic history. The earliest legislation, enacted in 1873, established minimum standards to be enforced by an inspector. Subsequent amendments, brought about by the lobbying of the miners' union in the aftermath of mine disasters (some in Pictou County), strengthened both the external responsibility system and empowered miners by giving them the right to form mine committees authorized to conduct inspections and investigate accidents, and to initiate prosecutions against mine managers. Yet, despite the fact that Nova Scotia miners won limited legal control rights nearly 100 years before most other workers in Canada, the law was weakly enforced and miners suffered the consequences.³⁴

By the 1980s, health and safety laws in Nova Scotia lagged behind those in other provinces. At the time of the Westray disaster, fines for most violations of the *Coal Mine Regulation Act* were abysmally low (\$250) and charges had to be laid within six months of the date of the violation. Nova Scotia was also one of the last provinces to enact modern health and safety legislation (1985) and the fines provided for violations of that act are at the medium to low end of the national spectrum. Moreover, sanctions were infrequently used, even by Canadian standards. From 1985 to 1990, a total of 14 companies were charged with offences under the Nova Scotia OHS Act. No mining companies were prosecuted, despite the fact that, according to another tabulation, between fiscal

33. For differing assessments of the general effectiveness of health and safety committees, see C. Tuohy & M. Simard, *The Impact of Joint Health and Safety Committees in Ontario and Quebec*; E. Tucker, "And Defeat Goes On: An Assessment of Third Wave Health and Safety Regulation" in F. Pearce & L. Snider, eds., *Corporate Crime: Contemporary Debates* (Toronto: University of Toronto Press, 1995) [forthcoming]. Both studies recognize, however, that committee effectiveness will vary from workplace to workplace.

34. MacLeod, *supra* note 14 at 232-41; I. McKay, "The Realm of Uncertainty: The Experience of Work in the Cumberland Coal Mines, 1873-1927" (1986) 16 *Acadiensis* 3 at 43-53. Miners in British Columbia obtained the legal right to inspect in 1877.

years 1987–1988 and 1991–1992, 1037 directives were issued to mining companies. As the Westray example sadly demonstrates, it should not be assumed that the reasons directives do not lead to charges is because mining companies comply promptly.³⁵

Shaun Comish, a Westray miner, vividly describes the horrific conditions he encountered in the Westray mine before it exploded. Cave-ins occurred regularly, methane levels rose above permissible levels, flammable materials were kept in the mine, improperly designed equipment was used underground, fires occurred and little or no rock dust was spread to reduce the risk of explosion from the accumulation of coal dust. Other workers have given similar accounts of the unsafe conditions in the mines.³⁶ These serious hazards did not go undetected by mining inspectors but, despite the employer's failure to improve conditions, they never halted mine operations or initiated prosecutions. Instead, time lines for achieving compliance were extended. For example, after at least six months of prodding, the first order to resolve the coal dust problem was issued on 29 April 1992, 10 days before the explosion. Despite the fact that the order required an immediate clean-up, the inspectors failed to monitor compliance.³⁷

Although the pattern of non-enforcement at the Westray mine was not exceptional, and then Minister of Labour, Leroy Legere was probably accurate when, in defending his department against charges of favouritism before the explosion, he declared that "the people in the Department of Labour are not treating the Westray Mine any differently than they are treating any other mine in the province,"³⁸ there were specific conditions at the mine that exacerbated the situation. Curragh was in dire financial straits in 1991. It was losing money from its other mines and desperately needed a cash flow from the Westray mine. This was not materializing because it could not meet its supply commitments. Local mine management was under pressure to produce, and workers were offered production bonuses and unlimited overtime. Under these conditions, the incentive to cut corners on safety to increase production is great.

The cosy relationships between the mine owners and the politicians may also have influenced Department of Labour enforcement practices. Although no

35. Data was compiled from Nova Scotia, Department of Labour, *Annual Reports* (1985–1986 to 1991–1992) and from letter from Jim LeBlanc, Director, Occupational Health/Safety Training, Nova Scotia Department of Labour to Eric Tucker (19 August 1992). There are some discrepancies in the data. For evidence of enforcement deficits in other jurisdictions, see R. Brown, "Theory and Practice of Regulatory Enforcement: Occupational Health and Safety Regulation in British Columbia" (1994) 16 *Law & Policy* 63.

36. Comish, *supra* note 1; Glasbeek & Tucker, *supra* note 2 at 22–23; Jobb, *supra* note 2 at c. 2 and c. 11.

37. Jobb, *ibid.* at c. 11.

38. Nova Scotia, House of Assembly, *Debates and Proceedings* (10 July 1991).

hard evidence has emerged, a number of former Westray miners have voiced their suspicion that there was political interference with the mine inspectors.³⁹

The internal responsibility system also seems to have been particularly ineffective at the Westray mine. A joint health and safety committee was only established in the fall of 1991, at the prompting of the Department of Labour, and, according to Randy Facette—an experienced miner who was an employee representative on the committee—it was a “joke.” Complaints he passed along from workers were ignored.⁴⁰ Attempts by workers to bring their concerns directly to management’s attention were equally futile.⁴¹

The absence of a union at Westray prior to the explosion contributed to this state of worker powerlessness. Out of either ignorance or fear, non-unionized workers rarely exercise their right to refuse unsafe work.⁴² Quitting was the only other option, and while some miners took this route, many others stayed on despite the existence of conditions they knew to be hazardous. The reasons for this may not, at first glance, be apparent, even to the miners themselves.⁴³ One powerful incentive, especially for workers in an industry in which employment is often precarious and in a region in which there are few jobs, was the promise of steady work. Comish writes: “A lot of people ask me why we kept working there. I guess the only answer I can give is that nowadays when you have a job it is very scary to quit and hope to get a job somewhere else. I often felt that maybe things would get better someday ... The promise of fifteen years of steady work weighed heavy on your mind.”⁴⁴ In addition, processes of socialization that

39. For example, Comish, *supra* note 1 at 22 states: “From what I have heard and seen so far of the Labour Department ... I truly believe the mine inspectors’ hands were tied and their mouths were tightly gagged by some political power.” Also see Jobb, *supra* note 2 at 23–24, 206 and 210–12 for additional expressions of concern.

40. Quoted in N. Robb, “The History of Westray” (July/August 1993) Occupational Health and Safety Canada 43. Also see Jobb, *supra* note 2 at 205.

41. Comish, *supra* note 1 at 13, states: “Mining has come a long way over the years, but this place was like stepping back in time. The ‘my way or the highway’ attitude was alive and well at Westray.” Also see Jobb, *ibid.*

42. The overwhelming majority of work refusals occur in unionized workplaces. For example, in Ontario in 1991, 79% of all work refusals occurred in unionized premises (Data provided by the Ontario Ministry of Labour, 22 October 1992). Moreover, the question of when a work refusal is legally justified is not altogether clear. For example, when some of Curragh’s unionized employees at the Faro mine refused to work because there had been an “unusual” number of sulphur dioxide fume-producing fires in its ore mill, the arbitrator upheld the disciplinary sanctions imposed on them, in part because their work was not sufficiently unsafe at the time that they walked out. *Curragh Resources Inc. v. U.S.W.A., Local 1051* (1990), 5 C.O.H.S.C. 81.

43. Comish, *supra* note 1 at 27, writes: “I still can’t figure out why I didn’t quit a dozen times.”

44. *Ibid.* at 28.

encourage male workers to view hazardous conditions as something which strong men endure, and cognitive dissonance that leads to excessive discounting of the objective reality of danger, operate to reduce collective or individual resistance to imposed risk and to discourage exit from the situation.⁴⁵

In sum, the political-economic conditions under which the decision to mine was made and under which occupational health and safety regulation was conducted weighed heavily against serious attention being given to the health and safety of workers. As a result, a profit-driven mining company, heavily subsidized by two levels of government, was permitted by the authorities to mine in an extremely hazardous physical environment more or less as it saw fit. While it is important to understand the immediate causes of the explosion, the underlying conditions that allowed those immediate causes to materialize must be understood if there is a serious commitment to prevent such disasters in the future.

The Aftermath: The Institutional Politics of Causation

Will the systemic causes of the Westray explosion be identified and addressed in any of the post-disaster proceedings? Clearly, it is too early to offer definitive answers but, by drawing on historical experience, we can assess its likelihood in three contexts: tort proceedings, criminal trials and public inquiries.

Tort

Workers' compensation replaces the loss of income suffered by surviving family members reasonably well but, because benefits are awarded regardless of fault, inquiry is only made into the work relatedness, not the causes, of death and disablement.⁴⁶ Other provisions in workers' compensation legislation that ostensibly aim to create economic incentives for employers to improve health and safety conditions, including experience rating or penalty assessments based

45. Generally, see P. Willis, *Learning to Labor* (New York: Columbia University Press, 1981) and G. A. Akerlof & W. T. Dickens, "The Economic Consequences of Cognitive Dissonance" (1982) 72 *American Economic Review* 307. On Nova Scotia coal miners, see McKay, *supra* note 34 at 52–57.

46. A. Bale, "America's First Compensation Crisis: Conflict over the Value and Meaning of Workplace Injuries under the Employers' Liability System" in D. Rosner & G. Markowitz, eds., *Dying for Work* (Bloomington: Indiana University Press, 1989) 34, argues that American entrepreneurs supported the creation of a workers' compensation system to bar workers from challenging the moral legitimacy of capital through the fault system.

on claims' experience, also do not, typically, trigger an inquiry into the causes of lost-time injuries or fatalities.⁴⁷

The tort system is attractive to some because it involves fault-finding and because exemplary and non-pecuniary damages can be awarded. That is, it is seen as a vehicle through which wrongdoers can be labelled and held fully financially accountable for their actions.⁴⁸ In Canada, however, exemplary damages are extremely rare and damages for pain and suffering have been capped.⁴⁹ Moreover, in Nova Scotia and other Canadian jurisdictions, workers' compensation is the exclusive remedy and civil actions against the victim's employer, co-workers and most other employers in the province are barred by statute.⁵⁰ Assuming that a way can be found around this obstacle, would a civil action help reveal and condemn the underlying causes of the Westray disaster?

Historically, the tort system has not responded favourably to injured workers' claims for compensation from their employers. The strong support of mid-19th-century courts for private enterprise and laissez-faire ideology manifested itself in the creation of a trilogy of employer defences that effectively shielded them from liability.⁵¹ By the end of the century, however, some legislatures narrowed the scope of employer defences and some judges adopted those changes even when not required to do so by statute. For example, in *Grant v. Acadia Coal Company*,⁵² a case arising from a gas explosion which killed a miner in Pictou County, the Supreme Court of Canada held that a company could be liable for injuries arising out of the failure to maintain the mine in a safe condition, notwithstanding that competent officials had been hired to operate the mine safely but had failed to do so. This decision, in conjunction

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47. Although Nova Scotia law allows for "merit rating," no scheme has been established. In any event, there is little evidence that these incentives induce employers to improve significantly their health and safety performance. See P. Lanoie, "Government Intervention in Occupational Safety: Lessons from the American and Canadian Experience" (1992) 18 Can. Pub. Pol. 62 at 66-67.
 48. For example, A. Bale, "The American Compensation Phenomenon" (1990) 20 International Journal of Health Services 253 and L. West, "The Employer's Intentional Tort: Should it Be Recognized in Canadian Jurisdictions?" (1990) 13 Dalhousie L.J. 594.
 49. See Ontario Law Reform Commission, *Report on Exemplary Damages* (Toronto, 1991) at 22-24 and S. M. Waddams, *The Law of Damages*, 2d ed. (Toronto: Canada Law Book, 1991) para.3.510-3.700.
 50. *Workers' Compensation Act*, R.S.N.S. 1989, c. 508. Actions against out-of-province manufacturers of equipment used in the mine are not barred.
 51. The courts created a legal presumption that workers voluntarily assumed the risk of injury from hazards present in the workplace, including the negligence of co-workers. Contributory negligence on the part of the victim also constituted a full bar to recovery. E. Tucker, "The Law of Employers' Liability in Ontario, 1861-1900: The Search for a Theory" (1984) 22 Osgoode Hall L. J. 216.
 52. (1902), 32 S.C.R. 427.

with other legal changes, made it possible to use the tort system to scrutinize the safety of the employer's system of operation. If a worker could prove the employer failed to provide a reasonably safe system of working and that that failure caused her or his injury, the employer could be made to pay.

The systemic causes of dangerous working conditions were rarely considered relevant in such an inquiry. Injured workers were most likely to recover where they could prove that the conditions at work were below those prevailing in the industry or in violation of the law. Only where this was not true would a worker try to establish that the defendant employer's conduct was a manifestation of a larger phenomenon, and that the industry standard should be judged unacceptable. While courts occasionally do condemn widespread employer practices, they are reluctant to do so. In any event, the primary question in a tort action is whether unacceptably dangerous conditions caused the harm. The underlying reasons why those conditions arose is of secondary importance.

Two arguments have been offered to explain how tort litigation can disclose the systemic nature of the problem of unsafe and unhealthy working conditions and lead to fundamental reforms. The first is that tort actions have educational and ideological impacts. If many injured workers individually prove that their particular employers were negligent, then workers and their communities might conclude that the problem of unsafe working conditions was systemic and that it was the fault of capitalism or of employers as a class.⁵³ The second argument points to a material effect of tort liability: general deterrence. As damage awards pile up, the cost of taking workers' lives and health increases and employers will take steps to improve working conditions in order to reduce their legal exposure.

Both arguments are problematic. Although Bale argues that litigation had a delegitimizing effect in the United States at the turn of the century, his evidence is not entirely persuasive. One of the problems with successful claims is that they are just as likely to legitimate the system as to delegitimize it. After all, they demonstrate that the system worked; it provided a remedy. Indeed, more antagonism and delegitimation seems to have been generated by the failure of the tort system to adequately compensate injured workers and their families than by its success in showing the employing class to be at fault. This was because proving fault and causation in individual cases remained extremely problematic, even under a reformed common law regime. Most cases were settled for small sums, with no official findings being made and no publicity.⁵⁴ This result

53. This is the argument of Bale, *supra* note 46.

54. Indeed, some settlements require the plaintiff's lawyers not to disclose damaging evidence that had been gathered and not to take further cases. For examples, see M. Cherniak, *The Hawk's Nest Incident* (New Haven: Yale University Press, 1986) at 65-66, 72-73; P. Brodeur, *Outrageous Misconduct* (New York: Pantheon, 1985) at 91-92.

delegitimated the courts more than it did the unsafe systems of production. Contrary to Bale, it is arguable that not only is no-fault workers' compensation better at replacing the lost income of injured workers, but that it more clearly reveals work-related disability to be a systemic problem in an industrial capitalist society; workers recover lost wages without proof of fault and employers' collectively pay the cost of compensation claims.⁵⁵

An additional problem with the delegitimation thesis is the implicit claim that litigation strategies can readily be linked with mobilization strategies.⁵⁶ The current asbestos litigation in the United States raises the problematic nature of this claim. Even though joined in "class actions," workers are not mobilized to act after a claim is filed. Workers cede control to lawyers and judges and await the outcome of legal processes. If the claim succeeds, mobilization around health and safety issues is unlikely to follow because the system provided a remedy (money for health). It is the failure of the claim that is likely to stimulate political action, but valuable time, energy and resources will have been lost, and the object of the struggle is more likely to be compensation than prevention.

The general deterrence effect of tort liability system also is exaggerated. Although the value of employer liability claims was rising steadily in several jurisdictions in the late 19th and early 20th centuries, individual incentives to care were diluted as employers insured themselves against this risk. Indeed, the shift to workers' compensation schemes may have increased economic incentives for employers to reduce risks because it caused total compensation costs to increase.⁵⁷ Moreover, when faced with the possibility of large damage

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55. Admittedly, there is nothing inherently "anti-capitalist" in this, but workers' compensation was an early step toward the creation of social insurance and a welfare state.
56. For a thoughtful discussion on this point, see M. W. McCann & H. Silverstein, "Social Movements and the American State: Legal Mobilization as a Strategy for Democratization" in G. Albo *et al.*, eds., *A Different Kind of State? Popular Power and Democratic Administration* (Toronto: Oxford University Press, 1993) 131.
57. On the rising cost, see Bale, *supra* note 46 at 38–41 and R. C. B. Risk, "'This Nuisance of Litigation': The Origins of Workers' Compensation in Ontario" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1983) 418 at 435. On the incentive effects of the shift to workers' compensation, see D. Brody, *Steelworkers in America* (New York: Harper, 1960) at 167–68 and Graebner, *supra* note 14. Also see D. Dewees & M. Trebilcock, "The Efficacy of the Tort System and its Alternatives: A Review of Empirical Evidence" (1992) 30 *Osgoode Hall L.J.* 57. They conclude (at 131) that workers' compensation has had stronger deterrent effects than tort liability. Of course, the relative cost of employer liability and workers' compensation systems depends on how each are structured. It may be that, in the United States, employers have been more successful at holding down benefit levels and limiting recognition of claims in workers' compensation systems than their Canadian counterparts, and that American courts have been more generous to injured workers than Canadian

claims, corporations have exhibited great ingenuity in limiting their financial exposure by hiving off hazardous operations, stripping assets or by declaring bankruptcy. Again, the American asbestos litigation is instructive. The corporate form makes it difficult to achieve the goals of corrective justice or deterrence.⁵⁸

A tort action against the government of Nova Scotia for negligent inspection and regulation of the Westray mine raises some interesting possibilities. Decisions of the Supreme Court of Canada in the mid-1980s established that public authorities may be sued for negligently discharging their operational duties. None of these cases involved occupational health and safety officials but the principles developed in those cases would apply to them, unless they are given statutory immunity.⁵⁹ To succeed, a plaintiff must show that the authority was negligent, that the negligence caused the harm, and that the harm was a reasonably foreseeable consequence of the misconduct.⁶⁰

It would not be difficult to establish that fatal injuries to workers are a reasonably foreseeable consequence of negligently enforcing occupational health and safety laws. Workers are, after all, the intended beneficiaries of the law. The causation requirement could be satisfied by showing that the harm was caused by unlawful conditions. The more difficult legal issues relate to the standard of inspection applicable to the defendants and the policy/operation distinction. Obviously, a determination will depend on the facts of the case. Operational negligence in respect of the Westray mine might be found, for example, in not properly following up orders in respect of coal dust. Indeed, the Coopers & Lybrand review found serious deficiencies in this aspect of the department's work.⁶¹ Yet, given the widespread practice of gentle persuasion in

courts. The treatment of silicosis-related diseases by American workers' compensation boards and courts in the 1930s is suggestive, but neither American courts nor compensation systems were very generous. See D. Rosner & G. Markowitz, *Deadly Dust* (Princeton: Princeton University Press, 1991) at 78-86 and 91-96; Cherniak, *supra* note 54 at 52-73.

58. See H. Hansmann & R. Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts" (1991) 100 *Yale Law Journal* 1879 at 1885 and M. J. Roe, "Corporate Strategic Reaction to Mass Tort" (1986) 72 *Virginia Law Review* 1. For a more extended critique of tort litigation from which I have drawn freely, see H. J. Glasbeek, "Outrage Is Not Enough" (1987) 7 *Windsor Y.B. Access Just.* 209.
59. For example, *City of Kamloops v. Nielsen* (1984), 10 D.L.R. (4th) 641 (S.C.C.) [hereinafter *City of Kamloops*]. In some jurisdictions, occupational health and safety officials are given statutory immunity from negligence actions in respect of the good faith execution of their duties. This immunity would also extend to the crown. For example, in Ontario see *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 65. There is no equivalent provision in Nova Scotia.
60. For an overview, see K. M. Woodall, "Private Law Liability of Public Authorities for Negligent Inspection and Regulation" (1992) 37 *McGill L.J.* 83.
61. In *City of Kamloops*, *supra* note 59, the failure to enforce a stop-work order issued by a building inspector was found to constitute negligence.

health and safety enforcement, a court might be hesitant to conclude that this behaviour was negligent.

This brings us to the policy/operation distinction. Courts have taken the view that it would be improper to hold governments liable in negligence for *bona fide* policy decisions. The distinction, however, can be easily manipulated. The Supreme Court's latest judgments stipulate that decisions which involve or are dictated by financial, economic, social or political factors or constraints will be classified as policy decisions.⁶² If it was the policy of the government not to enforce orders vigorously because under the scheme primary responsibility for achieving compliance was assigned to the workplace parties, a court will not likely find the government liable, even if the policy was naive or misconceived and could be said to have caused the loss. A similar result could be expected if a policy of gentle persuasion or infrequent inspections was justified on the ground that limited resources did not allow closer monitoring. Recall that the internal review of the inspectors' activities found them to be within accepted practices.⁶³ Sadly, the review may be right. The ironic (or, perhaps, intended) result is that the more systemic the problem, the less likely it will be that a court will condemn it as wrongful. This is not because policy decisions and systemic conditions are not causal, but because the court has decided not to extend liability for legal, political and institutional reasons.

Crime

Criminal prosecution, like tort liability, is a means of holding wrongdoers accountable and, potentially, of promoting systemic changes because of its ideological and material effects. Unlike tort liability, criminal law is a public means of redress rather than a private one. Notionally, society as a whole has been harmed, not just the immediate victim and, because of the seriousness of the misconduct, the offender is to be punished and stigmatized.

Harry Glasbeek has made the strongest case for criminal prosecution of employers in the occupational health and safety context.⁶⁴ To greatly oversimplify, he argues that prosecutions demonstrate society's intolerance of employers who seek to profit by knowingly or recklessly exposing workers to

62. For example, in the two most recent Supreme Court of Canada decisions in this area, *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 and *Swinamer v. Nova Scotia (A.G.)*, [1994] 1 S.C.R. 445, the plaintiffs lost because the court found that policy, not operational negligence, was the subject of the complaint.

63. *Supra* note 5.

64. H. J. Glasbeek, "A Role for Criminal Sanctions in Occupational Health and Safety" in *New Developments in Employment Law: Meredith Memorial Lectures* (Montreal: Yvon Blais, 1989) 125.

hazardous conditions. Prosecutions also challenge employer claims that the hazards they created were natural and unavoidable, or that workers consented to the risk of being harmed by them. Thus, in addition to having specific and general deterrence effects, prosecutions can change popular conceptions which might also spur regulatory authorities to treat hazardous working conditions more seriously, leading to stricter standards and more enforcement.

Despite its appeal, the criminalization strategy faces enormous hurdles. First, criminal law does not stand in an external relation to society; it is a product of and an instrument for maintaining unequal social relations, and a ground of struggle.⁶⁵ This becomes manifest when distinctions are made between those activities that warrant criminal prosecution and those that are to be remedied, if at all, through civil litigation. Nowhere is this more true than in respect of killing and injuring at work. For example, in the 19th century, railway workers were frequently prosecuted because, railway officials claimed, worker negligence or breaches of operating procedures were the principal cause of fatal injuries to passengers, pedestrians and co-workers. Juries, however, were sceptical and frequently did not convict workers charged in these circumstances. In contrast, employers were rarely prosecuted even though deaths and injuries could be attributed to unsafe systems of operation they had created. Moreover, employers were generally able to avoid trials or convictions through various legal maneuvers.⁶⁶

This asymmetrical treatment of misconduct by workers and employers was also reproduced in the legislative arena. Attempts to have the federal government enact factory legislation pursuant to its criminal law power were rebuffed by other parliamentarians on jurisdictional grounds; the protection of workers' lives and health was said to be a matter of property and civil rights within provincial jurisdiction. Employer conduct endangering the lives and health of workers was not seen to fall within the class of "those wrongs committed against society which are themselves bad, and which are prosecuted and punished in the name of the Sovereign."⁶⁷

In the 20th century, occupational health and safety-related criminal prosecutions of workers⁶⁸ and employers are exceedingly rare and convictions

65. G. Slapper, "Corporate Manslaughter: An Examination of the Determinants of Prosecutorial Policy" (1993) 2 *Social and Legal Studies* 423 at 436-41 and L. Snider, "Feminism, Punishment and the Potential of Empowerment" (1994) 9:1 *C.J.L.S.* 75 at 78-85.

66. For a summary and references to other sources, see Tucker, *Administering Danger in the Workplace*, *supra* note 13 at 66-75.

67. Canada, House of Commons, *Debates* (21 May 1888) at 883 (David Mills).

68. For example, see *R. v. Baker*, [1929] S.C.R. 354, *aff'g.* (1928), 63 O.L.R. 275 (C.A.) which quashed the conviction of a hoistman employed by Inco Ltd. for criminal negligence. Nearly 60 years later, another Inco worker was charged with criminal negligence. He was acquitted at trial. See *R. v. Kuhle* (1990), 3 C.O.H.S.C.

almost impossible to obtain. Research to date has uncovered only eight criminal prosecutions of employers in Canada this century and one conviction that withstood appeal. A corporation convicted of manslaughter in respect of a methane gas explosion that killed 29 coal miners was fined \$5000. The most common reason for acquittals was that the Crown failed to prove that the employers' conduct was so wanton and reckless that it should be branded as criminal.⁶⁹ In short, the dominant occupational health and safety ideology shapes the response of the criminal justice system.⁷⁰

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- 53 (Ont. Prov. Ct.) and M. Lowe, "Wanton and Reckless Disregard? The Case of Joseph Kuhle" (1988) 10:6 *At the Centre* 14.
69. For an egregious instance of government failing to lay charges even after a coroner's jury found employer negligence in the death of 21 coal miners in 1910, see D. J. Bercuson, "Tragedy at Bellevue: Anatomy of a Mine Disaster" (1978) 3 *Labour/Le Travailleur* 221. For the unsuccessful prosecutions, see: *R. v. Great Western Laundry Co.* (1900), 13 Man. R. 66 (K.B.) (held that an indictment does not lie against a corporation for manslaughter since it could not be punished; this position was doubted by the Supreme Court of Canada in *Union Colliery Co. v. R.* (1900), 31 S.C.R. 81); *Rex v. Canadian Allis-Chambers Ltd.* (1923), 54 O.L.R. 38 (C.A.) (conviction quashed on the basis that no evidence upon which conviction could be sustained); *R. v. Canadian Liquid Air Ltd.* (1973), 20 C.R.N.S. 208 (B.C.S.C.) (at close of prosecution's case, jury directed to bring in a verdict of not guilty on charge of criminal negligence); *R. v. International Paper Co.* (1979), 50 C.C.C. (2d) 231 (Que. C.A.) (manslaughter conviction overturned on grounds that the prosecution failed to prove wanton or reckless disregard for the safety of others); *R. v. Noranda Mines Ltd.* (January 1983), (Ont. Prov. Ct.) [unreported] referred to in Lowe, *ibid.* (criminal negligence causing death charge dismissed for lack of evidence of wanton and reckless disregard); *R. v. Syncrude Canada Ltd.* (1983), 48 A.R. 368 (Q.B.) (acquitted because no reckless disregard for safety of workers; *Québec (A.G.) v. Belmoral Mines Ltée*, [1989] 1 S.C.R. 422 (case arose out of a cave-in at a mine in Val D'Or, Québec that killed eight miners). At trial, held six years after the event, the corporation was acquitted. On appeal, a new trial was ordered and the Supreme Court of Canada upheld that decision. Despite this, charges were dropped in 1990 because the company had agreed to pay \$25,000 compensation to each victim's family and because the prosecutor could see no useful purpose in pursuing the case ten years after the event.) B. McKenna & P. Poirier, "Charges Dropped Against Mining Firm" *The [Toronto] Globe & Mail* (2 February 1990) A1. The only successful prosecution was brought against Brazeau Collieries. An explosion at its Nordegg mine on 31 October 1941 killed 29 workers. As in Westray, the defendants brought a motion to quash the charge because it lacked particulars. The motion was dismissed. See *Rex v. Brazeau Collieries Ltd.* (1942), 3 W.W.R. 570. A conviction was obtained for criminal negligence based on evidence indicating frequent occurrences of high levels of methane gas in the mine before the explosion. Despite complaints by the miners and their union, precautions had not been taken. Chief Justice Ives explained that he did not impose a substantial penalty because of the close and friendly

The legal process itself creates further impediments to the successful use of the criminal law. The prosecution must prove all elements of the offence beyond a reasonable doubt. The rights of persons suspected of or charged with criminal offences limit state authorities in gathering and presenting evidence. Accused persons who are sophisticated and can afford experienced legal counsel are able to ensure that their rights are scrupulously respected throughout the process. Thus, in the Curragh prosecution, the first set of charges was quashed on the ground that they failed to describe the events giving rise to the alleged offences with sufficient particularity.⁷¹ Items seized under a search warrant had to be returned because the Crown failed to apply to retain them within the time limit.⁷² During the trial, evidence has been excluded because of irregularities and a motion has been brought to stay the proceeding because of an alleged withholding of evidence. Finally, additional problems arise when the accused is a corporation.⁷³

The legal process also discourages inquiries into the systemic factors that produce the behaviour which is the subject of the prosecution. Attention will be directed to the most immediate events (thereby separating them from their social context) and the actions of particular individuals. Indeed, it may be difficult to persuade the court to consider evidence of systemic problems in the workplace, let alone their systemic causes. The processes of decontextualization and individualization are driven by the need of prosecutors to focus the court's attention on the elements of the criminal offence the law requires them to prove, as well as by the ideological commitments of judges who are unlikely to

association between mine officials, pit bosses, fire bosses and miners. "Outside of the mine conditions, the company ... acted in the interests of the men". "Nasdegg Mine is Fined \$5,000", *Calgary Herald*, (18 (?) January 1943). I am indebted to Dean Jobb for bringing this conviction to my attention.

70. Ideology also influences the conduct of police investigations. D. Bergman, *Deaths at Work: Accidents or Corporate Crime?* (London: WEA, 1991) at 12–18. At Westray, for instance, the police failed to take timely steps to obtain search warrants and secure evidence, presumably because they assumed, initially, that no crime was committed. See Cameron & Mitrovica, *supra* note 1 at 59–60.
71. A second set of charges was laid, and their validity was upheld when challenged. *Supra* note 3.
72. *R. v. Curragh Inc.* (1994), 126 N.S.R.(2d) 159 (S. Ct.); "Westray Judge Agrees to Strike 'Edited' Safety Report, Testimony" [*Halifax*] *Daily News* (25 April 1995); and "Westray Trial Hits New Snag", *supra* note 3.
73. This is not the place to elaborate upon these difficulties. The literature is vast. For a good beginning, see C. Wells, *Corporations and Criminal Responsibility* (Oxford: Clarendon Press, 1993) and H. J. Glasbeek, "Why Corporate Deviance is Not Treated as a Crime: The Need to Make Profits a Dirty Word" (1984) 22 *Osgoode Hall L.J.* 394.

sympathize with attempts to condemn as criminal conduct what they see as socially beneficial.⁷⁴

In sum, although employers can be successfully prosecuted in some circumstances,⁷⁵ their material and ideological effects of criminal prosecutions are limited because of the prevalence of the very attitudes that criminalization strategies aim to change and the limitations of the criminal justice system. Because criminal prosecutions are likely to succeed only in cases of egregious misconduct, the “normal” business (mis)conduct that is responsible for the overwhelming majority of injuries and diseases is unlikely to be delegitimized, and the systemic causes of this behaviour are unlikely to be named or blamed.⁷⁶

Public Inquiries

The mandate of public inquiries into disasters is much broader than criminal or civil courts because they do not make legal determinations of fault or guilt. Legal conceptions of causation that narrow the parameters of what is properly before a court do not apply in an open-ended examination of “what went wrong.” Thus, there is no legal barrier to the inquiry entertaining the claims that socio-economic conditions create an environment conducive to bad occupational health and safety practices and that unsafe practices are widespread. Rules limiting the admissibility of similar fact evidence and other legal conceptions that promote decontextualization and individualization of causation are less important in this forum.

74. This last point is made particularly well by R. Johnstone, “The Legal Construction of Occupational Health and Safety Offences in Victoria: 1983–1991” in R. Johnstone, ed., *Occupational Health & Safety Prosecutions in Australia*, Occasional Monograph Series No. 1, (Melbourne: Centre for Employment and Labour Relations Law, 1994) 78.

75. The criminal law has been used most successfully in the United States. M. Bixby, “Workplace Homicide: Trends, Issues and Policy” (1991) 70 *Oregon Law Review* 333. There was also a recent conviction of an employer for manslaughter in Australia. *R. v. Denbo Pty Ltd.*, (14 June 1994) (Sup. Ct. of Victoria) [unreported] See Johnstone, *ibid.*

76. I have not considered the role of prosecutions for regulatory offences even though this is the most common way that employers are legally sanctioned in Canada. There is a debate over the relative merit of regulatory and criminal prosecutions. There is less stigma associated with conviction for a regulatory offence. The advantages of regulatory prosecutions are that there are likely to be more of them and a greater percentage will succeed. See K. Webb, “Controlling Corporate Misconduct through Regulatory Offences: The Canadian Legal Experience” in Pearce & Snider, eds., *supra* note 33 [forthcoming]; K. Carson & R. Johnstone, “The Dupes of Hazard: Occupational Health and Safety and the Victorian Sanctions Debate” (1990) 26 *Australia-New Zealand Journal of Sociology* 126.

In the case of the Westray inquiry, the Order-in-Council's terms of reference are broad indeed, and include a general authority to inquire into "all other matters related to the establishment and operation of the Mine which the Commissioner considers relevant to the occurrence." This could involve examination of the failure to consider health and safety as an independent concern in the decision to mine, the enforcement practices of the mine inspectors and the Occupational Health and Safety Division of the Department of Labour, and the dangerous production decisions of Curragh.

Yet, the tragic cycle of disasters, public inquiries, recommendations and more disasters warns us that, despite its greater possibilities, other factors operate to limit the effectiveness of inquiries.⁷⁷ Although generally good at identifying the immediate technical causes of disasters, the treatment of systemic causes of occupational health and safety disasters by inquiries has been much less consistent. In some, only the most immediate causes are considered. Examples include: the 1914 inquiry into the explosion at the Hillcrest coal mine in Alberta that killed 189 miners; the 1935 inquiry into the explosion at the Imperial mine in Coalhurst, Alberta that killed 16 miners; the 1956 royal commission on the explosion at the No. 4 coal mine in Spring Hill, Nova Scotia that killed 39 miners; the 1958 inquiry into the "bump" at the No. 2 coal mine in Spring Hill, Nova Scotia that killed 78 miners and the 1980 inquiry into the cave-in at the Reiff Terrace Mine at Grande Cache, Alberta that killed four miners.⁷⁸

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77. In one of the first inquiries into an industrial-type disaster in Canada, commissioners found that the Great Western Railway had put its trains into operation, over the objection of its chief engineer, before the track was adequately secured and proper systems of management in place. The major recommendation, however, was that workers should be made criminally responsible for breaches of the railway's operating procedures. Despite this and numerous other inquiries into railway hazards, employment on the railways remained one of the most dangerous occupations in Canada. See P. Craven, "The Meaning of Misadventure: The Baptiste Creek Railway Disaster of 1854 and its Aftermath" in R. Hall *et al.*, eds., *Patterns of the Past* (Toronto: Dundurn Press, 1988) 108.
78. Alberta, *Report of the Commission appointed for the Investigation and Enquiry into the Cause and Effect of the Hillcrest Mine Disaster* in Alberta, Department of Public Works, Mines Branch, *Annual Report, 1914*, (Edmonton: J. W. Jeffrey, Government Printer, 1915) at 161-69; Alberta, *Report of an inquiry into the cause of the explosion the 9th day of December, 1935 in a coal mine known as the "Imperial Mine" operated by the Lethbridge Collieries Limited*, (Calgary: [s.n.], 1936); Nova Scotia, *Report of the Royal Commission Appointed to Inquire into the Explosion and Fire in the No. 4 Mine at Springhill, N.S. on the 1st Day of November, 1956* (Halifax: Queen's Printer, 1957); Nova Scotia, *Report of the Royal Commission Appointed to Inquire into the Upheaval or Fall or other Disturbance sometimes referred to as a Bump in No. 2 Mine at Springhill, in the County of Cumberland operated by Cumberland Railway and Coal Company, on the 23rd of*

Other inquiries have considered broader questions of causation, but handled them badly. For example, when the Royal Commission on the Ocean Ranger disaster turned its mind to the question of why the workers were not as well protected as they could have been, its answer was "economics." "In the real world, some measure of safety must be surrendered, some degree of risk accepted, if an economical and useful drilling unit is to be constructed."⁷⁹ But how was acceptable risk to be determined? The Commission rejected the idea of leaving it up to market forces entirely, but seemed to stumble badly in formulating an alternative. Acceptable risk was defined as what is "acceptable to society and capable of being tolerated by those directly involved."⁸⁰ While acknowledging that risk perceptions were socially constructed, the report failed to consider that inequality between workers desperate for jobs and large multi-national companies might shape workers' willingness to accept hazardous conditions and employers' level of commitment to providing safety. One critical commentator noted, "this final Report has not seen fit to grapple adequately with this broader context which could all too easily turn out to be the context for further disasters."⁸¹

Still other inquiries have exhibited somewhat greater sensitivity to these issues. The Royal Commission into the Hinton train collision, for example, emphasized the role of the culture of risk-taking that pervaded railway operations and led to collusion between management and workers in the violation of safety rules. It also recognized, however, that the work scheduling and pay systems created incentives for workers to engage in risky behaviour.⁸² The Beaudry Commission into the 1980 Belmoral mine disaster in Québec also drew attention to the negative role of production bonuses in mine safety. However, the report denied that there was any real conflict between worker safety and profit-maximizing behaviour by employers. Indeed, its conclusion

October, 1958, (Halifax: Province of Nova Scotia, 1959); Alberta, Coal Mine Safety Board of Inquiry, *Final Report*, vol. 1, (Edmonton: Workers' Health, Safety and Compensation, 1981) (Commissioner: H. G. Stephenson). For a discussion of the underlying causes of the 1958 "bump" and the failure of the inquiry to consider them, see I. McKay, "Springhill 1958" (1983-1984) 4:2 *New Maritimes* 4. For a discussion of the Stephenson inquiry and particularly of its failure to censure local mine officials, including Gerald Phillips who was underground manager in the year leading up to the cave-in at the Reiff Terrace mine, see Jobb, *supra* note 2 at 113-15.

79. Canada, Royal Commission on the Ocean Ranger Marine Disaster, *Report Two: Safety Offshore Eastern Canada* (Ottawa: Ministry of Supply and Services, 1985) at 15.

80. *Ibid.* at 14.

81. W. G. Carson, "Learning from Experience" (1985) 8:4 *At the Centre* 7 at 9.

82. Canada, *Commission of Inquiry: Hinton Train Collision* (Ottawa: Ministry of Supply and Services, 1986) [hereinafter *Hinton Commission*].

was that "safety paid" and that, with experience (and some government and union prodding), mine managers would learn this.⁸³

Rarely do inquiries consider inequality and conflict between workers and employers to be causally relevant. Those that do stand out. The inquiry into the 1941 explosion at the Brazeau Colliery in Nordegg, Alberta was one such inquiry. Having found that, "there was on the part of all the officials actively engaged in the operation of the mine a general disregard of the safety provisions of The Mines Act and a general indifference to, and contempt for the dangers incident to gas accumulations in the mine,"⁸⁴ the commissioner, A. F. Ewing, considered why this attitude had developed. Although not fully spelled out, the report noted that the apparent willingness of workers to accept this state of affairs was conditioned by their lack of authority over, and inability to obtain information possessed by, management. The report also pointed to the harassing effect of pressures exerted on low level mine officials (fire bosses) by more senior ones for whom safety was secondary to output. The report recommended that fire bosses be appointed by the state to put them beyond the control of mine operators.

Perhaps the inquiry that went furthest in considering socio-economic conditions as an underlying cause was the one conducted by R. H. Elfstrom into an explosion at the Cape Breton coal mine that killed 12 miners in 1979. Elfstrom found that "[t]he social and industrial expectations and acceptance of unnecessary risks over many years against the possible loss of employment had fostered attitudes and environmental conditions that made this explosion and previous fires almost inevitable."⁸⁵ Further, he found that the "[p]roduction of coal was given a priority over almost all other considerations."⁸⁶ This resulted in a variety of unsafe and, in some cases, unlawful practices to which workers

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83. A number of other inquiries during this period operated from the same premise. These included the Ham Commission and the Burkett Inquiry, both of which promoted the creation and development of an internal responsibility system for regulating health and safety in which workers would have a consultative role. Ontario, *Report of the Royal Commission on the Health and Safety of Workers in Mines* (Toronto: Ministry of the Attorney General, 1976) (Commissioner: James M. Ham) ; Canada, *Towards Safe Production: The Report of The Joint Federal-Provincial Inquiry of Commission into Safety in Mines and Mining Plants in Ontario* (Toronto: Joint Federal-Provincial Inquiry Commission into Safety in Mines and Mining Plants in Ontario, 1981) (Commissioner: Kevin M. Burkett).
 84. Alberta, *Report of an Enquiry into a Disaster whereby twenty-nine men lost their lives on October 31, 1941, in a coal mine known as Number 3 Mine, owned & operated by Brazeau Collieries Limited, at Nordegg, Alberta* (Edmonton: [s.n.], 1941) at 21.
 85. Canada, *Report of Commission of Inquiry, Explosion in No. 26 Colliery Glace Bay, Nova Scotia on February 24, 1979* (Ottawa: 1979), (Commissioner: R. H. Elfstrom) at ix-x [hereinafter *Elfstrom Report*].
 86. *Ibid.* at 32.

acceded out of fear of job loss or retaliation by the employer if they complained to mine inspectors.

Elfstrom also found that the regulations were not consistently applied nor comprehensively enforced. Mine inspectors never stopped production because of high methane concentrations or the continued presence of correctable ignition problems. The relations of the inspectors with union representatives were formal at best. Harmonious relations, however, were maintained with the corporation despite the difficulties the chief inspector experienced in enforcing directives. In part, this was attributed to personal loyalties and associations and "other social pressures brought about by residing in the coal mining community."⁸⁷ These findings, unlike those arising from the Ocean Ranger, begin to recognize the illusory nature of "consent" in an economic context where workers have few choices. Although the recommendations did not challenge this broader context, stronger enforcement and more worker participation were suggested.

Liora Salter has noted the contradiction between the radical potential of inquiries and their disappointingly limited results.⁸⁸ Inquiries into health and safety disasters confirm this observation. What are its causes? The commissioners themselves often may share many of the same assumptions that are held by private entrepreneurs and government officials. Aside from the sheer pervasiveness of these views, commissioners are often selected because they are seen as "sound." Moreover, as Salter notes, there is an implicit understanding that the inquiry is to produce a report and recommendations that the government of the day will find acceptable. This promotes self-censorship and the dominance of narrow pragmatism.

Occasionally, these tendencies are counterbalanced, but we need more detailed studies of health and safety inquiries to understand how and why this happens. In addition to the presence of particularly strong-minded and independent commissioners, another important factor may be the ability of groups to mobilize their members, influence public opinion and exert pressure on the commissioners.

Even if favourable recommendations are made, the government may not act on them. For example, the Hinton train collision inquiry report noted that no action had been taken in response to an earlier report made by the Gallagher Inquiry in 1972 calling for changes in work scheduling and pay systems.

87. *Ibid.* at xi, xiii, 17-18, 36-38.

88. L. Salter, "The Two Contradictions in Public Inquiries" in A. P. Ross *et al.*, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990) 174. For more positive assessments of the radical potential of royal commissions, see J. Jenson, "Commissioning Ideas: Representation and Royal Commissions" in S. D. Phillips, ed., *How Ottawa Spends 1994-95: Making Change* (Ottawa: Carleton University Press, 1994) 39; N. Bradford, "Ideas, Institutions and Innovation: Economic Policy in Canada and Sweden" in S. Brooks & A.-G. Gagnon, eds., *The Political Influence of Ideas* (Westport: Praeger, 1994) 83.

Similarly, Elfstrom noted that most of the conditions and practices that led to the 1979 explosion had been identified as problems by commissions of inquiry in 1974 and 1975.⁸⁹ Other examples of political inaction abound.⁹⁰ A study of the history of American coal mining legislation shows that safety laws were not enacted simply in response to major disasters; economic conditions favourable to workers also had to be present before political action would be taken.⁹¹ This helps explain why health and safety reforms were enacted in Ontario following the Ham Commission report. The commission itself was appointed as a response to growing worker militancy over health and safety in the mid-1970s. Uranium miners in Northern Ontario were particularly active, buoyed by the increased demand for uranium that provided them with a degree of security they had not enjoyed in nearly two decades. That militancy continued, both inside and at the margins of the official labour movement, and received the strong support of the Ontario NDP.⁹²

Conclusion

The arguments presented here can be summarized briefly. Debates about the causation of occupational health and safety disasters are densely political because they are driven instrumentally and because causation analysis is, almost invariably, informed by assumptions arising from and about the social context in which the disaster occurred. More specifically, assumptions about the inalterability or desirability of the political economic order are so deeply embedded that this context is rarely seen as significantly causal. Instead, attention is focussed on the most immediate causes. The resulting approach, however, only provides a partial explanation of the causes of most disasters. Any attempt to explain the Westray mine disaster that does not accord great

89. *Hinton Commission*, *supra* note 82 at 91–92 and *Elfstrom Report*, *supra* note 85 at xii.

90. On the Alberta and British Columbia governments' lack of responsiveness to recommendations of coroners' inquiries and special commissions in respect of coal mine disasters early this century, see J. A. Green, *Calculated Risks: Worker, Owner and Government Attitudes Towards Safety in the Crow's Nest Pass Mines, 1900–1915* (M.A. Thesis, University of Calgary, 1990) [unpublished] at 186–89.

91. Curran, *supra* note 10 at 104–08.

92. The history of this health and safety movement has yet to be written. For a beginning, see H. Sequin & A. King, "Some Reflections on the Health and Safety struggles of Northern Ontario Miners" (paper presented to the New Solutions Conference, 9 September 1994) [unpublished] and B. Walker, "Government Regulation of Health Hazards in the Ontario Uranium Mining Industry, 1955–1976" in M. Bray & A. Thompson, eds., *At the End of the Shift* (Toronto: Dundurn Press, 1992) 130.

significance to the political-economic environment that shaped the decision to mine, the conduct of the mining operations and the state's regulation of those operations will be terribly and, perhaps, tragically flawed.

When major health and safety disasters like Westray occur, it becomes possible to make visible and challenge hidden assumptions that inform everyday understandings about the causes of accidents and that legitimate a system of regulation which regularly permits workers to be exposed to dangerous conditions. These assumptions (for example, that workers freely consent to risk, that risks are equally shared by workers and employers and that workers materially benefit from risk) seem less plausible when workers are killed *en masse* because of persistently dangerous working conditions. The claim that capitalist relations of production, and the ideological structure that supports them, are a significant cause of unsafe and unhealthy working conditions will be strongly resisted in court rooms and before public inquiries, but differences in the institutional environments in which the politics of causation are conducted can be significant.

Tort actions (particularly against government for negligent regulation and enforcement) and, even more so, criminal charges against individuals (and possibly organizations) whose decisions and (in)actions were the immediate causes of a disaster, provide opportunities to contest some practices and beliefs. However, the legal setting requires that claims or charges be framed in particular ways that limit the scope of inquiry and make it difficult to identify systemic conditions as legally relevant causes. Nevertheless, criminal prosecutions are important to pursue in appropriate cases because of their strong symbolism; they condemn some killing and injuring at work as fundamentally anti-social conduct, not merely the unfortunate but incidental result of socially useful activities, repairable by the payment of compensation to the victims. Commissions of inquiry provide even greater opportunities to broaden the public debate by putting the systemic causes of disasters onto the agenda. Resistance, however, is substantial.

Clearly, legal strategies alone will never be enough. There are pressures operating in each setting that undermine their potential to deter or delegitimize. Perhaps the most important political work performed by mainstream causal analysis is to keep at bay approaches to health and safety that demand a radical re-examination of fundamental social relations and widely held beliefs. Moreover, even if a judge or commissioner does challenge the normalcy or acceptability of deeply entrenched practices, social change will not follow automatically. The history of health and safety reform provides ample evidence that, to achieve even moderate reforms, legal strategies must be linked to mobilization strategies. The slogan, "workers' lives can only be saved by the

workers themselves”⁹³ captures a basic truth and poses a real challenge to all those concerned with the aftermath of Westray. Can engagement with the multitude of legal responses to the disaster be used to strengthen a grassroots health and safety movement?⁹⁴ The challenge is a formidable one, as economic restructuring and neo-conservative policies combine to create an increasingly insecure environment for the vast majority of workers.

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93. B. Zeluck, “Organizing for Our Lives” (1994) 9:1 [new series] *Against the Current* 6 at 9.
 94. For some interesting observations on tactics for joining legal and mobilization strategies, see McCann & Silverstein, *supra* note 56 at 140-42.