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When negligence is not a crime: In *Life Care Centers*, SJC draws a brighter line between criminal and civil corporate liability

By Raymond P. Ausrotas

Civil and criminal practitioners alike can easily envision the scenario — a business provides a service to the general public: a hospital, a restaurant, a stadium, a theater. A terrible thing happens — something breaks, something slips, something falls, a system that usually works goes wrong. A patron is severely hurt and there is a crisis. Firefighters and EMTs arrive as quickly as they can to help. The injured party is rushed away for emergency care and may not live. Police take statements from witnesses and employees. The local press immediately, eagerly and aggressively reports on the tragedy and speculates as to who and what may be responsible. Federal and state regulatory agencies will soon send their own inspectors.

Your client is the president and owner of the company, she has just learned of all this, and calls you. You advise her to immediately place any and all of the company's insurers on notice of a potential civil claim. But then she asks whether she needs to worry about her company being charged with a crime, which — if the company is ultimately found guilty — could put her out of business altogether. And what if, instead, you are the district attorney and get a call describing the same situation? Do you investigate and charge the company with a crime?

Of course, every case is different, and more facts are needed to analyze the question as to any particular matter (especially depending on the nature of potential criminal conduct at issue), but in the recent decision *Commonwealth v. Life Care Centers of America, Inc.*,[1] the SJC provided helpful guidance as to the proper scope and analysis of corporate criminal liability as opposed to civil liability.

Here are the facts: in 1996, Julia McCauley became a resident of a long-term care nursing home in Acton run by the corporation Life Care Centers of America, Inc. ("Life Care Centers") [2] She was not well. She suffered from brain damage and dementia.[3] A few years later, in 1999, while in a wheelchair, she was found near the foyer of the nursing home, which was near a set of stairs.[4] Medical staff ordered that a "WanderGuard" bracelet be placed on McCauley at all times, which would sound an alarm and automatically lock doors when she came close to an exit.[5] After this, she tried to leave the nursing home through its front doors several times, which the staff knew about.[6] McCauley's night nurse was required by physician's orders to check and note, daily, that the bracelet was placed on her and working.[7] These medical notes were subject to an "editorial" review each month, which called for two nurses to independently confirm that doctors' orders were clear and correct on the home's patient treatment sheets, in order to prevent any mistakes.[8]

Fast forward to 2004. The nursing director of the facility asked an assistant to "clean up" all resident treatment sheets.[9] The employee mistakenly took this to mean to erase doctors' orders, and did, including McCauley's WanderGuard instructions.[10] The monthly review of treatment orders did not uncover the error over the next few months. Two nurses went over her notes in February (including a nursing supervisor who personally knew about McCauley's WanderGuard order), one did in March, while no one looked over the notes at all in April.[11] The night of April 16, 2004, the facility was short-staffed and a substitute nurse was on duty for McCauley, and he did not personally know about her treatment needs.[12] Not seeing anything in the notes, he did not check for her bracelet.[13] The next morning, April 17, an aide wheeled McCauley to the nurses' station near the front of the home.[14] Within minutes, McCauley left the home while in her wheelchair, fell down the front steps and died.[15]

This was clearly an awful and tragic occurrence. A critically vulnerable elderly woman died who shouldn't have. Quality control systems failed, people made mistakes, and had any of a number of individuals at the facility done their jobs correctly, they could have prevented McCauley's life from ending in this terrible way. But was there a crime committed here? And if so, by whom?

As to the crime, there was no evidence of intent to cause death, or heat of passion, which left only the crime of involuntary manslaughter as a possibility. Black letter law in the commonwealth holds that involuntary manslaughter is "an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct."[16] In order to determine whether an intentional act has been wanton or reckless, i.e. "a willful act that is undertaken in disregard of the probable harm to others that may result,"[17] there need not be an intent to cause death, but rather, "intent to perform the act that causes death."[18] Failure to act can constitute the crime of involuntary manslaughter where an actor creates a life-threatening condition, giving rise to "a duty to take reasonable steps to alleviate the risk created" where "the failure to do so may rise to the level of recklessness necessary…"[19] However, the crime of involuntary manslaughter (when not vehicular)[20] "re-

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quires more than negligence or gross negligence."[21]

Given these legal elements, who exactly would a prosecutor charge? The commonwealth did not proceed against any individual employee of the nursing home — presumably because it determined there was insufficient evidence as to the requisite elements of intent as to any single individual or in connection with a single causative act as would be required under the law of involuntary manslaughter set forth above.[22] This left the corporation, itself, acting collectively through its several employees, as the potentially culpable actor. Life Care Centers was indeed indicted by a grand jury for involuntary manslaughter.[23]

A corporation can only act through people, and of course may be held civilly and criminally liable for their actions. "Pursuant to the theory of *respondeat superior*, a corporation is responsible for both the acts and omissions of any one of its employees."[24] The position of the commonwealth in charging Life Care Centers was that "criminal liability may attach to a corporation based on the aggregate knowledge and conduct of its employees even where no individual employee has committed a crime."[25] Defense counsel moved to dismiss, challenging the "aggregation theory" of criminal liability as having been unsupported under the law of the commonwealth.[26] This was not decided right away, but eventually, on a motion *in limine*, the trial judge reported the question to the Appeals Court, and the SJC took direct review, on the following issue: "May a corporation be found guilty of involuntary manslaughter … based upon a theory of collective knowledge and conduct of multiple of its employees, in the absence of one specific employee who is criminally liable for the commission of that crime?"[27]

The SJC, through Justice Cowin, answered "No."[28] In doing so, it stated that the commonwealth's theory of aggregation "is not supported by logic or law. If one person's act of simple negligence caused a death, there would be insufficient evidence to convict that person of involuntary manslaughter. The result is the same when the death is caused by multiple individuals who act merely negligently rather than wantonly or recklessly."[29] The SJC also observed that to allow for criminal liability through such an aggregation theory would raise due process concerns.[30]

Significantly, too, the SJC did not limit its discussion concerning corporate liability to criminal matters. It stated "[O]ur conclusion is consistent with the law governing corporate liability in the civil context."[31] The Court drew a distinction between a corporation's "knowledge" (in which aggregation of the knowledge held by multiple corporate actors is appropriate), as opposed to its "mental state" (where such aggregation cannot be imputed).[32] The Court observed that "the majority of federal courts to consider the issue have reached the conclusion that, in both the criminal *and civil* contexts, a corporation acts with a given mental state only if at least one employee who acts (or fails to act) possesses the requisite mental state at the time of the act (or failure to act)."[33] The SJC distinguished its holding from regulatory offenses in which the only *mens rea* required to establish liability is that a corporation possesses knowledge (e.g. disregard for a statute and indifference to its requirements), rather than a specific mental state.[34] Civil practitioners on both the plaintiff and defense sides of the bar should certainly be aware of and consider this analysis when confronting issues of corporate liability that are grounded in a theory of *respondeat superior*.

Any party facing a criminal proceeding confronts potentially grave consequences. Although a corporation cannot go to jail,[35] it can be effectively shut down through remedial administrative action, as the defendant Life Care Centers would have been due to its loss of Medicare and Medicaid licensure.[36] Often, when confronting a criminal investigation, parties face the potential for civil liability as well, and can expect an accompanying civil suit. In these circumstances, individual defendants facing both civil and criminal liability can seek a stay of parallel civil proceedings due to the potential for a "whip-saw" effect — that is, being forced into compelled disclosure through civil process that could potentially be shared with the government and used against them.[37] In *Digital Equipment Corp. v. Currie Enterprises*, Magistrate Judge Bowler for the U.S. District Court of Massachusetts set forth the factors to be considered in such a situation, stating, "[t]he decision of whether to stay a civil case because of a pending criminal action involves a balancing of interests. The pertinent interests include:

> (1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendant; (3) the convenience to the courts; (4) the interest of persons not parties to the civil litigation; and (5) the public interest."[38]

Because a corporation does not hold a personal Fifth Amendment privilege,[39] however, its private interest and burden as a factor in any such balancing does not carry as much weight as an individual's would. Any determination will necessarily be subject to a trial court's discretion, which can be unpredictable: "A court … has the discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions 'when the interests of justice seem to require such action, sometimes at the request of the prosecution … sometimes at the request of the defense.'"[40]

In light of the challenges that are faced by companies when a terrible accident has happened (including substantial civil exposure), in its *Life Care Centers* decision, the SJC has at least helped prevent the initiation of criminal proceedings against a corporate defendant unless there has been adequate proof that an individual whose action will properly bind the company to such exposure exists in the first place. The decision will be sure to have significant ramifications for both prosecutors and criminal defense counsel — and potentially civil litigators as well — in the future.

Notes

1. *Commonwealth v. Life Care Centers of America, Inc.*, 456 Mass. 826 (2010).
2. *Id.* at 828.
3. *Id.*
4. *Id.*
5. *Id.* at n. 5.
6. *Id.*
7. *Id.* at 829.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

14. *Id.*

15. *Id.* at 830.

16. *Id.* at 832.

17. *Id.*

18. *Id.*

19. *Id.*

20. *See* M.G.L. c. 90 § 24G(b)

21. *Id.*

22. *Id.* at 830, n.6 & 7, 831 n. 11. The trial judge did initially determine that the nursing supervisor who had twice missed the erased doctor's order could have been charged individually but that question was not before the Court where the commonwealth had not charged her. *Id.*

23. The defendant was also charged with neglect of a resident of a long-term care facility, under a since-repealed statute, M.G.L. c. 265 § 38. The SJC's analysis tracked that as to the crime of involuntary manslaughter. *Id.* at 836.

24. *Id.* at 831.

25. *Id.*

26. *Id.* at 830. There were subsequent proceedings leading to a motion *in limine* to exclude collective knowledge evidence when a trial was to be held over *respondeat superior* liability arising out of the nursing supervisor's role alone, which led to the eventual reporting of the question. *Id.*

27. *Id.* at 827-28.

28. *Id.* at 836.

29. *Id.* at 834 (citation omitted).

30. *Id.*

31. *Id.*

32. *Id.* at 835.

33. *Id.* (italics added) (citing for support *First Equity Corp. of Fla. v. Standard & Poor's Corp.*, 690 F. Supp. 256, 259-60 (S.D.N.Y. 1988); *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004); *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n. 6 (D.C. Cir. 1996); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1435 (9th Cir. 1995); *United States v. LBS Bank-N.Y., Inc.*, 757 F. Supp. 496, 501 n. 7 (E.D. Pa. 1990)).

34. *Id.* at 835-36. *See also Commonwealth v. Springfield Terminal Ry. Co.*, 77 Mass. App. Ct. 225, 230 (2010) (declining to stay execution of a sentence pending appeal by corporate criminal defendant where company had failed to notify DEP about diesel fuel leak and statute at issue was therefore a regulatory offense requiring only proof of knowledge of release of hazardous material).

35. *Springfield Terminal, supra*, 77 Mass. App. Ct. at 230.

36. *Life Care Centers, supra*, 456 Mass. at 834 n. 12.

37. In these circumstances the government also often shares a similar concern but in the other direction — that a criminal defendant may use civil discovery to reach beyond what would be allowed under criminal discovery proceedings, or otherwise interfere with the government's own investigation. *See, e.g. Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); *United States v. Maine Lobstermen's Ass'n*, 22 F.R.D. 199, 201 (D. Me. 1958) (defendants in criminal antitrust cases cannot take advantage of companion civil case to obtain prosecution evidence); *LaRouche Campaign v. FBI*, 106 F.R.D. 500 (D. Mass. 1985) (granting government's and bank's motion to stay due to pending criminal investigation); *Del Valle v. Bechtel Corp.*, No. 06-3654, *reprinted at*, 2008 Mass. Super. LEXIS 248, 24 Mass. L. Rep. 410 (Mass. Super. – Suffolk, July 29, 2008) (government motion to stay civil action denied).

38. *Digital Equipment Corp. v. Currie Enterprises*, 142 F.R.D. 8, 12 (D. Mass. 1991) (citations omitted). *See also Int'l Floor Crafts, Inc. v. Adams*, 529 F. Supp. 2d 174, 176 (D. Mass. 2007) (individual employee's motion to stay civil action due to pending criminal investigation denied).

39. *Wilson v. United States*, 221 U.S. 361, 382-83 (1911) (unlike private individuals, corporations have no privilege against self-incrimination); *see also United States v. Kordel*, 397 U.S. 1, 8 (1970) ("It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers who, because he fears self-incrimination, may thus secure for the corporation the benefits of a privilege it does not have.").

40. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987). (citations omitted).