A: Corporate Manslaughter

In Chapter 18, the issue of directors' duties was raised and reference was also made in Chapter 2 to criminal offences that may be applicable in business law. This chapter explores these issues in relation to a specific criminal offence that may be applied to corporations – corporate manslaughter. Holding a corporation liable in criminal law is important. The *Salomon*[1] ruling established that corporations possess a legal personality separate from those who 'own' the company (shareholders) and various cases including *Gilford*,[2] *Macaura*[3] and so on established that the metaphorical veil separating the company from the actions of the directors will only be pierced or raised in very limited circumstances. Indeed, the veil will not be lifted simply in the interests of justice. Given these principles, and the actions of the corporation being (by necessity) taken on its behalf by natural persons, can or should a corporation be held to account for decisions made in its name? It is important that a corporation be held accountable for its decisions, especially where the action or omission has led to deaths. Whether this is by breach of statutory duty, a health and safety requirement, or negligence, ensuring corporations are made to account for breaches will likely improve safety in the organization, prevent future occurrences of deaths, and instil confidence in the public that the body responsible for deaths has been punished. These go beyond liability through the civil law.

Key terms

These terms will be used in the chapter and it may be helpful to be aware of what they mean or refer back to them when reading through the chapter.

Actus Reus
This is Latin term 'guilty act.' It is the offence that has been committed – hence the unlawful killing of another is the actus reus. Whether such a killing will be considered murder or manslaughter depends on the 'mens rea.'
Corporation
An entity established by registration, Royal Charter or Act of Parliament that possesses its own legal personality separate from those who own it. More commonly referred to as a company.
Crime
An act or omission against the law established by the State. The defendant is the person against whom charges are brought and following a finding of guilt a punishment may be imposed – e.g. a fine, imprisonment and so on.
Homicide
The killing of a person.
Mens Rea
The Latin term meaning 'guilty mind.' This is an element that is required in the commitment of some crimes.
Natural Person
A human being rather than a 'legal person' (e.g. a company).

A.1 Introduction

The term 'corporate manslaughter' has been used for many years. Prior to legislation action in 2007, the term referred to the common law offence of gross negligence manslaughter. As corporations possessed a legal personality different to the person(s) who owned the company (its shareholders), in order to transfer culpability of the actions of the corporation's directors to the corporation itself, it was necessary to identify a senior individual within the corporation who was its 'directing mind' who was also guilty of the offence. This was termed the 'identification doctrine' and created many problems in the successful prosecution of corporations. Despite judicial initiatives to circumvent the problems inherent with the identification doctrine (i.e. Lord Hoffmann's 'aggregation theory'), problems in holding corporations responsible for deaths due to their acts or omissions remained. Following various reports from the Law Commission, the Government introduced a

[1] *Salomon v Salomon & Co Ltd.* [1897] AC 22.
[2] Gilford Motor Co. Ltd v Horne [1933] 1 Ch 935
[3] *Macaura v Northern Assurance Company Ltd.* [1925] AC 619.

statutory offence of corporate manslaughter – the Corporate Manslaughter and Corporate Homicide Act (CMCHA) 2007 – commencing 6th April 2008.

A.2 Corporations as persons

The *Salomon* case was instrumental in demonstrating that a company correctly formed and registered afforded it a legal personality that is separate from the shareholders who own it. Assigning a personality to a corporation (an abstract concept) is of course a legal fiction, but the effects are wide ranging and are pertinent to a discussion of a corporation's liability for deaths. However, it is first important to discuss how a corporation can been liable for criminal offences. The two elements required to establish a criminal offence such as manslaughter are the actus reus and the mens rea. The actus reus is the guilty act – the death of the victim. The mens rea is the guilty mind. This is where the problems begin. As a legal fiction / an abstraction the corporation does not posses a mind of its own, hence the courts have developed rules as to when the corporation will be liable for criminal offences committed by its decision makers – namely the directors. This is the identification doctrine (considered in Section **4**).

A.3 Corporations and criminal offences

Before the issue of corporate manslaughter and the theories underlying this are examined, the broader issue of a corporation's potential liability for criminal offences is considered. The Criminal Law Act 1827 first identified that a corporation was a 'person' for the purposes of criminal prosecution. Hence, even from this early stage, the legislators ensured that corporations could be held liable for offences committed in their name.[4]

R v *Birmingham & Gloucester Rly Co*[5]

Facts:
The Railway company was authorized through statute to acquire land required to build a road and bridges that were necessary for it fulfilling its obligations in avoiding nuisance during its construction activities. However, like all secondary legislation, it had an expiry date when the power would lapse and this indeed happened before the company acquired the necessary land.

Held:
The company was guilty of committing a public nuisance. Just because a corporation could not appear in court in person (here it was represented by its lawyers), or that it could not be imprisoned or arraigned for contempt was no stop on an indictment.

Corporations have also been held liable when wrongful acts were committed by humans identifiable within the company.[6]

Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd[7]

Facts:
Lennard's Carrying Co owned a ship which was transporting goods to the Asiatic Petroleum Company. However, it never reached its destination as it sank and the cargo was lost. This was attributed to the negligent acts of Mr. Lennard although it was to be decided whether the corporation was liable for his acts.

Held:

[4] See *Mousell Bros Ltd v London & North Western Railway Co* [1917] 2 KB 836.
[5] (1842) 3 QB 224.
[6] *HL Bolton Engineering Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 (CA) 172.
[7] [1915] AC 705 (HL) 713.

The House of Lords held that the company could be liable for the acts of directors. The key issue was that the director was the directing / controlling mind of the corporation, and in such instances, the acts of this director would be attributed to the corporation.

The most significant aspect of the judgment was that of Viscount Haldane who remarked:

'... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim respondent superior the burden lies upon him to do so.'

Corporations may therefore be responsible for actions taken by directors who act as its directing or controlling mind. This requires the court to identify this person as having taken the decision which led to criminal offence – the identification doctrine.

A.4 The Identification Doctrine

Identifying the director who is deemed the controlling / directing mind and will of the corporation is the key element in holding the corporation liable for criminal offences.

The identification doctrine was used for the first time in the first of a series of cases in 1944.[8] Prior to these cases, it was largely considered that a corporation could only be vicariously liable for acts where a natural person was also guilty. This was changed with the subsequent case law which held that a corporation could be held liable in its own right where the actions of a sufficiently senior person could be imputed to the company. These subsequently became known as the '1944 cases' because of their effect on the doctrine's development. In *DPP v Kent and Sussex Contractors Co.*[9] the manager of a company falsely obtained petrol coupons at the time of war. In assessing whether the company could also be guilty of the offence Macnaughten J remarked: 'If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that, according to the authorities…his knowledge and intention must be imputed to the company'. This led to the judgment where acts of dishonest individuals could be regarded as one with the company. Hence, a distinction was drawn between vicarious liability and liability in criminal law.

In further attempts to demonstrate how a corporation could be held liable for acts of individuals within the corporation, an analogy was drawn with a human body – in part to demonstrate what the *mens rea* of the company was and how it could be discovered. In *HL Bolton Engineering Co Ltd v TJ Graham & Sons Ltd* Lord Denning stated:

'A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.'

[8] *DPP v Kent and Sussex Contractors Co.* [1944] KB 146 (KB) 156; *Moore v I Bresler Ltd* [1944] 2 All ER 515; *R v ICR Haulage Ltd* [1944] KB 551 (KB) 553.
[9] [1944] KB 146 (KB) 156.

The directing mind and will of the corporation had to be at a sufficiently senior level to truly constitute the decisions of the corporation (its mind rather than its hands using Denning's analogy above).

Tesco Supermarkets Ltd v Nattrass[10]

Facts:
Tesco had advertised a special offer on a washing powder product through a poster campaign displayed in its ships. These products were designated in specific low-price packets. Having no further supplies of the product at the special offer price, the store had forgotten to remove the advertising displays. Higher priced stock of the same product was put onto the shelves and a consumer purchased the product and was charged the full price. This consumer thought they had purchased the product advertised at the lower price and an action was brought for breach of the Trade Descriptions Act 1968 (relating to misleading prices).

Held:
Tesco argued that it was not to blame for the offence but rather it was the individual store manager who was at fault. It identified that this was 'an act / omission of another person' (the store manager) and it had taken all reasonable precautions to ensure a breach had not occurred. The House of Lords agreed that this was the act of the store manager ('another person') and that Tesco had demonstrated due diligence in avoiding transgression of the law.

In *Tesco*, the store manager was working for Tesco, but could not be considered its 'directing mind and will' to impose liability on Tesco as a corporation. Evidently, Tesco operates many, probably running into the hundreds of, stores and the board of directors had not delegated their responsibilities to these individuals. Hence, the actions of the store manager was not the actions of Tesco as a body corporate.

Lord Reid's judgment here is particularly important:

'I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company…

Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion.'[11]

Therefore, following the Tesco decision, the responsibility of corporations for criminal offences will be satisfied:

- → if acting through its directing mind & will (regulatory or *mens rea* offence);
- → liability was attributed by identifying 'directing mind and will';
- → this was achieved by identifying the mental state of a senior person within the company; and
- → they must have the requisite *mens rea* – and this mental state is imputed to the company to hold it liable

Having established that corporations could be liable of criminal offences – e.g. conspiracy to commit fraud,[12] tax evasion[13] and so on, the law developed to hold corporations guilty for deaths – corporate manslaughter was now being applied to their actions.

[10] [1972] AC 153 (HL).
[11] Page 170 of the judgment.
[12] *R v ICR Haulage Ltd* [1944] KB 551 (KB) 553.
[13] *Moore v I Bresler Ltd* [1944] 2 All ER 515.

A.5 Gross negligence manslaughter – The common law offence

The offence that corporations could be held liable for was involuntary manslaughter by gross negligence.

The tests for this offence were outlined in the following case:

R. v Adomako[14]

Facts:
The defendant was an anaesthetist who, during an eye operation, failed to notice that a tube in the victim's mouth had become detached from the ventilator. As a result, the victim died following a heart attack.

Held:
The defendant was guilty of gross negligence manslaughter. In reaching this verdict the following factors were identified as necessary for such an offence:

1. A duty of care owed and breach of that duty
2. Death caused by that breach
3. Breach so great as to be characterised as gross negligence

Whilst highlighting the relevant tests to be applied there was a problem with the identification doctrine and its use in prosecuting corporations. Several high profile disasters, where many hundreds of people were killed, led to claims for prosecutions of the corporation involved or considered by the victims and public as responsible. However, in cases such Zeebrugge (*R. v HM Coroner for East Kent Ex p. Spooner* (1989) 88 Cr App R 10 (QBD) 17), Pipa Alpha, Marchioness, Kings Cross, Clapham, Southhall etc. the cases collapsed. There was no way of identifying the directing mind and will of the corporation as being responsible for the deaths. In *R v P&O European Ferries (Dover) Ltd*[15] a seamen, captain and five other crew-members had failed to close the loading bay doors on the ferry conveying passengers. The company was charged with gross negligence manslaughter but the case collapsed as there was insufficient evidence to identify the 'controlling mind' of the company as being sufficiently reckless. Hence, the identification theory demonstrated its greatest weakness. Where corporations possessed complex internal structures and hierarchies, it would be less likely to find a person as the directing mind and will and attribute his/her decisions which led directly to the deaths as being that of the company. Likewise, smaller companies with more simplistic management structures would be more susceptible to successful actions.

R v Kite & OLL Ltd

Facts:
The case involved the Lyme Bay Canoe disaster were four young people died following breaches of health and safety by the managing director – Peter Kite. Several members of staff had resigned informing the director of their concerns over lack of equipment and suitably qualified instructors. These concerns went unheeded. On the fateful day, 8 students were taken on a two-mile trip with unqualified instructors, four of the students died as a result of the negligence of the staff who, the court heard, should never had taken the trip in the weather conditions.

Held:
Kite and the company were both found guilty of gross negligence manslaughter. Peter Kite was clearly the directing mind and will of the company. He had been expressly informed of the dangers present in the way the company was operated and he took no action to remedy this.

[14] [1995] 1 AC 171 (HL).
[15] (1991) 93 Cr App R 72 (CCC) 84.

The significance of the Kite case was that this was the first successful prosecution of a corporation for gross negligence manslaughter. Despite the case law that proceeded it and the issue of a corporation having its own legal personality and being capable of committing criminal offences, it took until 1994 and a relatively small company, for a successful prosecution.

A.6 Aggregation Theory

To avoid the problems and limitations imposed by the identification theory, Lord Hoffmann developed what was known as the aggregation theory in the case *Meridian Global Funds Management Asia Ltd v Securities Commission.*[16] Lord Hoffmann considered that the identification doctrine was too narrow and instead, he suggested a two-part test be developed:

1) If the doctrine would defeat the purpose of a statute; and
2) Liability could be imposed by attributing the knowledge of a person who had authority, even if they were not the 'directing mind.'

This was an attempt to aggregate the decisions of persons in the corporation even if they could not, individually, be seen as its directing mind and will. Not only was the theory rejected in the Meridian case, but it was also criticised in other cases,[17] and led to Rose LJ remarking 'The identification theory, attributing to the company the mind and will of senior directors and managers, was developed in order to avoid injustice: it would bring the law into disrepute if every act and state of mind of an individual employee was attributed to a company which was entirely blameless.'[18]

A.7 Corporate manslaughter – the statutory offence

Reform of the law on corporate killings was a (relatively) long time coming. Papers from the Law Commission began in 1994, leading to the Act of 2007:

- → Law Commission – Consultation Paper, 'Involuntary Manslaughter',(Law Com No 135, 1994);
- → Law Commission 'Legislating the Criminal Code: Involuntary Manslaughter, (Law Com No 237, HC Papers 1996);
- → *Reforming the Law on Involuntary Manslaughter: the Government's proposals* (Home Office: London, 2000);

Subsequently leading to the Corporate Manslaughter and Corporate Homicide Act 2007.

It is necessary to remember that the issue of corporate killings had been a politically sensitive issue for several years. High profile cases such as the Kings Cross Fire; the fire at the oil rig Piper Alpha; the sinking of the ferry the Herald of Free Enterprise in Zeebrugge (among many others) led to many deaths, and the publics concern that corporations were not held responsible. Whilst individuals within these organizations had taken decisions which may, through various tiers of management and implementation via committees and agents, led to the deaths, it was at an organizational level that responsibility had to be levelled. In the absence of corporate liability, individuals could be blamed, dismissed or otherwise sanctioned, but the problem within the organization may go unremedied. Structural changes were often required.

Therefore, to remedy these problems at every level of management, finding the corporation responsible, punishing it through fines and having to publicise its breaches / culpability in the deaths, would assist in

[16] [1995] 2 AC 500 (PC).
[17] *R v HM Coroner for East Kent 1989*; *Armstrong v Strain* [1952] 1 KB 232 (CA) 246; *R v Great Western Trains Co Ltd 1999; Attorney General's Reference (No.2 of 1999)* [2000] QB 796 (CA) 809.
[18] *Attorney General's Reference (No.2 of 1999)* [2000] QB 796 (CA) 809.

ensuring changes were made. If for no other reason, shareholders may expect or demand changes to be undertaken in response to the finding of guilt and for evidence that no similar acts or omissions could recur.

A.7.1 Corporate Manslaughter – A Definition

The CMCHA 2007 identifies that an organization to which this section applies is guilty of an offence if the way in which its activities are managed or organized –

(a) causes a person's death, and
(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

A.7.2 Organisations to whom the law applies

The CMCHA 2007 identifies that 'organisations' may be guilty of an offence. Despite this still being termed 'corporate' manslaughter, s. 2 goes further and provides that corporations; a police force, a partnership, or a trade union or

A.7.3 The Effects of Reform of the Law

This was a new Act that attempted to make the prosecution of corporations easier (and hence make them accountable to a greater extent) than was available under the common law offence. Importantly, in England, Wales and Northern Ireland it is no longer possible to initiate proceedings against corporations for the (now abolished) common law offence of gross negligence manslaughter. The law is not retrospective,[19] and hence any offences that occurred before the commencement of the 2007 Act (6th April 2008) cannot be prosecuted under the Act. Offences that occurred prior to the 6th April 2008 would be heard under the common law.

Like the previous common law offence, individuals will be able to initiate proceedings under the 2007 Act where they have the consent of the Director of Public Prosecutions (whose authority may be provided by any Crown Prosecutor).

A.8 Penalties

The offence of common death by gross manslaughter negligence can result in a fine of the individual found guilty of the offence, and imprisonment. This can be evidenced in the first successful case of the common law offence in *Kite* where the managing director was imprisoned for a term of three years (reduced to two years on appeal). Further, the fine applied was £60,000.

In relation to the statutory offence under the 2007 Act, clearly it is impossible to imprison a corporation. Hence the following are penalties available:

1. A **fine**. There is no upper limit to what the fine may be but as identified in the sentencing guidelines published in February 2010, this should be up to 10% of the annual turnover of the offending corporation. Such a fine is sufficient to demonstrate the significance of the offence and the seriousness with which the State takes the deaths. However, it is also not so great a fine as to cause the corporation to be insolvent as a result. This fine may act as an incentive, if nothing else, for the shareholders to require changes to the internal structure of the corporation to lessen any future occurrences of similar gross acts that may lead to deaths.

There are certain issues that the courts will take into account when determining the quantum of the fine, and these are generally in line with quantifying fines for breaches of health and safety legislation. Therefore, considerations include whether the breach was a result of seeking to make a profit, the danger with which the public were exposed, and the need to protect the public. The fine is also dependent to some degree on the size and resources of the offending corporation. For example, in the 1999 Ladbroke Grove fatal rail crash, Thames

[19] CMCH 2007 s. 27(4).

Trains was fined in excess of £2 million for its role in the deaths, and Network Rail was fined £4 million (in 2003). These were as a result of the deaths due to breaches of health and safety legislation. A further example of significant fines was in the 1999 fatal explosion in Larkhall. Transco was fined £15 million for its health and safety breaches. Indeed, these larger fines are expected following conviction of manslaughter under the 2007 Act.

Guidance as to how fines are assessed for breaches of health and safety legislation was provided in *R v F Howe & Co. (Engineers) Ltd*.

2. A **publicity order**. The publicity order requires the corporation to publicise the fact that it had been convicted of an offence under the Act, and identify court-specified details which led to the conviction.
3. A **remedial order**. This provides the court with an option to impose conditions upon the corporation to address the failings that led to the deaths and conviction due to breaches of health and safety legislation rather than deaths related to manslaughter under the 2007 Act. It will be considered where the prosecution, in consultation with the appropriate regulator,[20] apply for the order, along with supporting information regarding its terms of use.

However, in the guidance document supporting the 2007 Act, it was acknowledged that these orders will be used sparingly as the regulating authority will in practice have been involved in the investigation of the incident from the outset. These regulators will most likely use their existing powers to identify and address dangerous practices before the case is heard in court. This is quite reasonable given the time taken between the incident leading to the deaths, the investigation and subsequent court case, leading to the imposition of penalties upon conviction. Hence, the remedial order is a powerful weapon to be used where the judge feels it necessary, but the quicker mechanisms currently in existence ensure further dangerous practices are brought to an end in as timely a fashion as possible.

The order is also an important tool as a failure to follow it can result in an unlimited fine for breach (the responsibility for enforcing this rests with the Crown Prosecution Service).

Families of the victims of the breach will still be able to seek compensation through the civil courts on the basis of a damages claim.

A.9 Problems with the statute

Many limitations and problems with the Act have been identified by the academics writing on the topic. These are produced in bullet point form because they are extensive and each can be found adequately critiqued in the directed reading material identified at the end of this chapter:

→ The Senior Management Test – s.1(3) & s.1(4)(c). This is very closely linked with the identification doctrine and may run into similar problems and limitations;
→ Collective culpability – benefitting larger companies;
→ Arguments about who is a senior manager (Clarkson);
→ Aggregation - including Govt (2005) - 'nor does it involve aggregating individuals' conduct to identify a gross management failure' / Select Committee - '... the offence does appear simply to broaden the identification doctrine into some form of aggregation of the conduct of senior managers' / Griffin – aggregation is implicit in the Act;
→ Gross Breach – s.1(1)(b) & s.1(4)(b); s.8 - Jury look at H&S compliance; seriousness of fault & risk of death. Griffin questions how is it possible to quantify reasonable standard? How will it apply? variable size of companies & differing industries; is it inequitable that jury can consider past H&S record? - Griffin - 'Surely, a case should be judged solely on the facts and circumstances surrounding the particular incident that resulted in the death of a person. It is submitted that a company should, as with an individual, be judged

[20] For example the Health and Safety Executive, Food Standards Agency and so on.

guilty or not of the offence of manslaughter following the jury's examination of the nature and extent of the alleged negligent conduct. The jury should not be in the position of being potentially influenced by cultural issues relating to the company's compliance record in health and safety issues.'

→ Major issues with the Act over the common law - No individual liability under this Act – s.18 (although individual liable under common law still); the company can still be convicted even though no individual has; what do bereaved families & the public want? (Wells (1997) argued it is not 'the separated and de-humanised company on which people have trained their sights'); CBI (2000) – argue individual scrutiny will be unfair; Penalties - (no jail for companies!) but there are unlimited fines – s.1(6) ; remedial order – s.9 ; and publicity order – s.10. It may also be appropriate to question whether fines achieve the necessary purpose and what alternatives exist.

→ Section 20 - whilst individuals may bring a private prosecution for the new statutory offence, it is not possible for proceedings to be brought for common law gross negligence manslaughter against an organization to which the 2007 Act applies.

→ Whilst it has removed the Crown liability and it could be argued to make prosecutions somewhat easier essentially it could be questioned as to why the Act was needed in the first place (politics perhaps / the needs and wishes of the public and the family of the victims)? Massive fines can be imposed under H&S legislation; and Whyte (2005) predicted a paltry 5 prosecutions per year 'this is likely to be a low impact piece of legislation.'

Conclusion

It may be questioned why the CMCHA 2007 was enacted. It replicated aspects of existing legislation, some of the provisions may not have been particularly helpful in holding corporations to account, and one of the main limitations of the effectiveness of the common law offence – the identification doctrine – has not been resolved in this Act. Further, legislation that is led by events is often not the most appropriate way to legislate as it may fail to be given the time and resources needed to establish an effective deterrent and punishment to offenders.

Many of the academics and commentary provided in the further reading section included at the end of this chapter provide an overview of the development of the Law Commission's work on legislating against corporate manslaughter. It appears to have lost its strength and direction in the subsequent reports and ultimately the 2007 Act.

Further Reading

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