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Durham University

School of Law

Masters of Jurisprudence

An analysis of the Corporate Manslaughter and Corporate
Homicide Act (2007): A Badly Flawed Reform?

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23rd December 2011

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Declaration

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Introduction

An analysis of the Corporate Manslaughter and Corporate Homicide Act (2007):

A Badly Flawed Reform?

A conviction of a large corporation for manslaughter was in practice impossible. This statement was accurate when the prosecution was mounted using the old identification/ “directing mind and will” doctrine. The position in relation to prosecutions against small companies was very different. It was relatively straightforward to successfully prosecute a “one-man band” style company due to its simple corporate structure. The Corporate Manslaughter and Corporate Homicide Act 2007¹ (*hereafter “CMCHA”*) was enacted to resolve this issue.

It was the desire of Parliament that this Act would eliminate the difficulties that were faced by the courts when dealing with large complex corporate structures. This thesis will consider whether Parliament’s desire has been achieved or whether the same problems associated with the old doctrine still exist.

It is arguable that the *CMCHA* has simply provided a gloss upon the old identification doctrine and that we now have an “identification-plus” doctrine in the form of the “senior management test”. It is questionable whether the new test would be any more effective when tested against a large corporate structure, than the old doctrine.

¹ Corporate Manslaughter and Corporate Homicide Act (2007) (c.19)

This thesis is structured into five chapters. The first four chapters will develop a key part of the progression of the law of corporate manslaughter. The fifth chapter will consider the approach taken by another jurisdiction, Canada.

There are other relevant approaches that can be taken in relation to the regulation of companies, whether criminal or non-criminal strategies such as corporate governance and corporate social responsibility, but both are beyond the remit of this thesis.

The issue of individual liability does feature at certain points in the thesis and is referred to when necessary, but it is not the focus of the thesis.

Chapter One - The Basis of Corporate Criminal Liability

This chapter will consider the basis of corporate criminal liability in England and Wales and the approach taken by the courts by considering decisions from both the criminal and civil branches of the law. The chapter will identify the uneven approach taken by the courts that ultimately resulted in a doctrine that was largely ineffective when posed against a large and often complex corporate structure. This will be followed by a discussion of the interpretation and application of the identification/“directing mind and will” doctrine.

Chapter Two - Successful and Unsuccessful Prosecutions for Corporate Manslaughter

The second chapter will briefly consider the law relating to the common law offence of manslaughter both in respect of the earlier form of reckless manslaughter and the subsequent development of gross negligence manslaughter.

This chapter will demonstrate how all successful prosecutions for corporate manslaughter were, in fact against small companies, where identifying the requisite “directing mind and will” was straight-forward. By contrast, prosecutions against large corporate entities were invariably unsuccessful, with the “directing mind and will” test proving deeply problematic. This point is central to our discussion, particularly bearing in mind that the bigger companies that were subject to investigations and/ or prosecutions were the cause of major disasters and significant human casualties.

Chapter Three - The road to reform

The third chapter will consider the process of law reform. Given the difficulties that were encountered with the then existing law as discussed in chapter two, calls for reform of the law increased. A consideration of the recommendations from the Law Commission report in 1996 will be undertaken. The Law Commission recommended the creation of the new offence of corporate killing. Contained within this proposed

offence was a new test and the development and amendment of this test runs through this chapter.

One consistent theme is the delay in the Law's reform. The chapter will move onto the Home Office paper published in 2000 and the Private Members Bill heard briefly before Parliament in 2000 that didn't provide the catalyst to move the law reform process on.

It wasn't until the 2005 Government backed Bill that the law reform process gathered any detectable momentum. The Bill will be scrutinized and its deficiencies which will be highlighted through a consideration of the Joint Committee's pre-legislative scrutiny.

Throughout the first three chapters there will be three timelines. Each timeline of cases or events has been developed in this manner to help with the understanding of the development contained in each chapter, and for ease of reading. There are obvious cross-overs between the three time-lines but they have been separated so as to suit the topic of each chapter.

Chapter Four - The Corporate Manslaughter and Corporate Homicide Act 2007

The fourth chapter will consider the passage of the Corporate Manslaughter and Corporate Homicide Bill through Parliament, ultimately receiving Royal Assent on 26th July 2007.

The *CMCHA* itself will be analysed with particular focus on the new statutory offence of corporate manslaughter and question whether it will overcome the deficiencies associated with the old common law doctrine.

The chapter will also evaluate the likely effectiveness of the sentencing guidelines that have been created to assist sentencing judges. In these early days of the *CMCHA*'s implementation, it is highly likely that the early prosecutions will often result in appeals against sentence to the Court of Appeal and thence the Supreme Court.

The chapter will give considerable emphasis to the first prosecution to occur under this new legislation, against Cotswold Geotechnical (Holdings) Limited, including its subsequent appeal against sentence to the Court of Appeal. A second prosecution under this new legislation has commenced against Lion Steel Limited, but this is awaiting trial in June 2012 at Manchester Crown Court and will be discussed only briefly.

Chapter Five – An alternative approach to corporate criminal liability for manslaughter

Having criticised the likely modest achievements of the *CMCHA*, the fifth chapter will consider one particular alternative approach namely that taken by Canada².

Canada was chosen given the similarities between the UK and Canadian legal systems and the similar difficulties both have faced in relation to corporate criminal liability.

² Word restrictions have precluded more comparisons with other jurisdictions

The Canadian model is a non-offence specific approach and in similar vein to the experienced within the UK, law reform has been a lengthy process. Ultimately, it is arguable that the Canadians now have an “identification-plus” doctrine that can be applied to a number of offences, whereas the UK now has an offence specific “identification-plus” doctrine. Both countries have tried different solutions, but the result appears to be the same. It is suggested that this is indicative of the central problem of how a company is found criminally liable and whether it is simply too difficult to achieve and produce a solution and workable doctrine.

Methods

A number of different research methods were utilised so as to obtain the relevant material used for the preparation of this thesis.

A number of University libraries were used both in this country and abroad including, Durham University Law Library, the University of Newcastle upon Tyne Law Library and Robinson Library, the University of Toronto (Bora Laskin Law Library) in February 2010 and the University of Cape Town (Brand Van Zyl Law Library) in July 2010.

An extensive literature review was carried and a large number of textbooks and journals were considered. Alongside this, electronic sources were utilised such as electronic journals including Westlaw, Lawtel and the internet. The Internet provided access to items that were difficult to obtain from other sources such as information from the Crown Prosecution Service.

As a Solicitor, I am required to complete continuing professional development courses and I have been able to obtain access to training courses that have covered corporate manslaughter and these courses are not open to the general public.

Chapter One - The Basis of Corporate Criminal Liability

This chapter will consider the basis that a corporation can be held criminally liable by considering a number of key decisions. The “directing mind and will” doctrine/identification principle will be analysed from its inception and the crossover between civil and criminal law. There have been significant issues and problems with the interpretation and application of this doctrine. Historically it has been difficult to establish corporate criminal liability which has been exacerbated by the disjointed judicial approach where previous court decisions were overlooked or ignored by the judiciary. Further to this difficulty were the procedural obstacles that were in place at various times.

Later chapters will consider the application of the “directing mind and will” doctrine with regard to corporate manslaughter in greater detail. However, where applicable some of the early decisions analysed in this chapter do consider the offence of manslaughter.

The first substantive section in this chapter will consider the legal standing of a corporation and how it is separate from those who create it. This will be shown by considering cases that have discussed this legal concept. Beginning with the leading House of Lords decision of *Saloman v. A Saloman and Co Ltd*¹ and thereafter considering others cases that further illustrate how corporations have a separate legal personality.

¹ [1897] A.C. 22

The second substantive section will consider corporate criminal liability and the “directing mind and will” doctrine and how it has been developed through the criminal and civil law. A series of judicial decisions will be discussed, from the birth of the doctrine to the interpretation of the doctrine by various courts thereafter and it will be demonstrated how the development and implementation of this doctrine has been disjointed and uneven. The historical and procedural obstacles that were present will also be discussed. Prior to the use of the “directing mind and will” doctrine, vicarious liability was an alternative basis of corporate criminal liability, was utilised by the courts and this will be considered where it has featured in the relevant cases.

1.1. Separate Legal Personality

A corporation is a separate legal person and is distinct from those that form the corporation. The House of Lords decision in *Saloman v. A Saloman and Co Ltd* is considered to be the leading case and introduced the significance of the separate legal personality. Lord MacNaghten explained: -

“[t]he company attains maturity on its birth. There is no period of minority – no interval on incapacity ... [t]he company is at law a different person altogether from the subscribers ...; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers

or trustee for them. Nor are the subscribers, as members liable, in any shape or form, except to the extent and in the manner provided by the Act”².

The then Lord Chancellor, Lord Halsbury stated: -

“... it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself”³.

The concept of separate personality was further considered in the two following cases which provide useful illustrations, namely the House of Lords decision in *Macaura v. Northern Assurance Co Ltd*⁴ and the Privy Council decision in *Lee v. Lee’s Air Farming Ltd*⁵. In *Macaura*, the timber owned by an individual was sold to his company in which he owned the vast majority of the shares. The timber was insured against fire and the policies were in his name. The timber was subsequently destroyed by fire and Mr. Macaura tried to make a claim on the insurance policy. The insurance company stated that as the individual he had no interest and that the timber was the company’s and not his. The House of Lords heard the matter and agreed with the insurance company. As Dignam and Lowry recognise “[j]ust as corporate personality facilitates limited liability by having the debts belong to the corporation and not the members it also means that the company’s assets belong to it and not the shareholders. Thus corporate personality can be a double edged sword”⁶.

The Privy Council decision in *Lee v. Lee’s Air Farming Ltd* came by appeal from New Zealand. Mr Lee was the majority owner of the company that employed him and

² Ibid. at pp.50-51

³ Ibid. at pp.30-31

⁴ [1925] A.C. 619

⁵ [1961] A.C. 12

⁶ Dignam, A. and Lowry, J. “Company Law” (2009) 5th Edition at p.24

he was also appointed “governing director” for life. Mr Lee was killed in the course of his employment. Mr Lee’s widow and his young children were dependent on him and a claim was made against an insurance policy as it was claimed that Mr Lee was a “worker” under the terms of the Workers Compensation Act 1922. However, the Court of Appeal in New Zealand disagreed. The Privy Council accepted the separate legal status of the company, with the logical consequence that Mr Lee was able to make a contract with “his” own company. Therefore, Mr Lee was able to give orders, acting as the Director, to himself, when acting as the pilot. Lord Morris observed:-

“In their lordships’ view it is a logical consequence of the decision in Saloman v. A Saloman and Co. Ltd. [1897] AC 22 that one person may function in dual capacities. There is no reason, therefore, to deny the possibility of a contractual relationship being created as between the deceased and the company”⁷.

Therefore, a master and servant relationship was found to be in existence and compensation should be paid to the widow.

The concept of a company’s separate legal personality has been considered by a number of legal theorists. On a theoretical level, French contends that companies are more than a group of persons with a purpose “they have a metaphysical-logical identity that does not reduce to a mere sum of human-being members”⁸. Furthermore French expounds a “theory that allows treatment of corporations as fully-fledged members of the moral community, of equal standing with the traditionally acknowledged residents: human beings”⁹, namely recognising the companies as distinct and separate. As a result of this distinction the law is able to recognise a

⁷ See note 5 at p.26

⁸ French, P.A. “Collective and Corporate Responsibility” (1984) at p.32

⁹ Ibid.

company's separate legal personality, so that a company can be labelled and sanctioned/ and or punished as a criminal entity.

1.1.1. Why do we punish companies?

The question that flows from the previous discussion is why do we punish corporations? As an artificial legal creation, it has no physical existence. Therefore, the corporation cannot be punished like an individual. The corporation cannot be incarcerated nor can it receive any form of physical punishment. French argues that “justice is generally not served by the prosecution of some natural person who happens to work for the corporation”¹⁰ and further contends that there is the need for the company itself to face justice. This illustrates that even though the company is an artificial legal person, justice still needs to be done and seen to be done by the public. This is a view echoed by Leigh, who states “it is important that the public realise that powerful entities are not above the law”¹¹.

Further to the above, is the central point that the company is an artificial legal person and arguably has no conscience and as is well quoted “has no soul to be damned, and no body to be kicked”¹². How therefore can this artificial legal entity be punished? The usual punishment is that a corporation receives a fine. However, the impact of the fine on a corporation is not the same as it would be upon an individual. A corporation

¹⁰ Ibid. at p.186

¹¹ Leigh, L.H. “The Criminal Liability of Corporations and Other Groups” Ottawa Law Review (1977) Vol. 9, 247-302 at p.287

¹² Attributed to Edward, First Baron Thurlow, Lord Chancellor

does not have basic human needs and therefore will not “feel” any loss of food, heat or housing like an individual would.

It is therefore worthwhile pausing here and considering the larger implications of punishing these artificial legal entities by way of financial penalty. There will be the potential for implications for those beyond the company, namely shareholders; consumers of products by the raising of prices as an economic consequence of the sanction/ bad publicity and also the employees of the company whose employment may be placed in jeopardy. It is those individuals associated with the company that may feel the “pain” of the financial penalty imposed by the court.

As French argues, “the moral psychology of our criminal-legal system ... is based on guilt”¹³. French refers to a number of arguments put forward by various legal theorists, including Herbert Morris’s view where wrongdoing is integral to guilt and that some form of harm must have been suffered as a consequence. However, as a contrast to the guilt, there is another alternative, such as shame. This aspect of shame is a notion that is discussed in later chapters in light of the impact of Publicity Orders that can be made under the *CMCHA*. However, as the corporation is an artificial legal entity, it is impossible for it to have any sensations of shame, remorse or repentance. However, the reputation of a company can be argued to be a central or at the very least a key factor to its success. Therefore the company may have “no soul to be damned, and no body to be kicked”, but its reputation is a valuable commodity that could be weakened by public shame.

Although as French suggests that he has “made no claim that adverse publicity orders will always suffice to achieve the retributive ends of the courts. A mix of sanctions

¹³ See note 8 at p.190

will undoubtedly be required, if deterrence and retribution are to be accomplished”¹⁴. This issue will be further discussed in more detail in the fourth chapter when considering the sentencing options available under the *CMCHA*.

As with all criminal offences and the associated punitive sanctions available to the courts, there is a deterrent aspect that is integral to the criminal justice system. For example, corporations are punished as a form of control for other potential corporate defendants to be mindful of. Whether this aim is achieved is questionable and is a larger question for the whole criminal justice system to answer. The new *CMCHA* has been enacted firstly to punish the guilty, but also to deter other corporations. However, given the recidivism rates throughout the criminal justice system, it is debatable whether the deterrent effect behind the sentences handed down by the courts offers any real deterrent to defendants whether corporate or individual defendants.

It may also be asked why we need an offence specifically of corporate *killing/manslaughter*? What is the real objective and what purpose will it serve? Is the motive behind it a political decision, by providing a so-called panacea to significant corporate wrong-doing? To be sure, the death of an individual or group of persons is evocative, particularly if the death was caused by a faceless corporation, but surely, all offences caused by a corporation should be treated robustly. Given that, why do we not have a “Corporate Offences against the Person Act”, rather than one restricted merely to deaths? Some of the victims involved in the disasters outlined in the second chapter were not killed, but nonetheless suffered horrific life-changing injuries. But the justification for an offence restricted to killing is, it is argued that we already do

¹⁴ See note 8 at p.200

have a myriad of Health and Safety laws, which already deal with injuries falling short of death.

An offence of corporate manslaughter is necessary as a human life has been lost unnecessarily. From a general perspective of all homicide offences, when a death is caused whether by an individual or a corporation, society demands that the perpetrators, whether living or artificial, suffer the requisite punishment and retribution is satisfied.

1.2. Corporate criminal liability and the emergence of the “Directing Mind and Will” Theory within criminal and civil law

Historically it has been difficult for the courts to establish corporate criminal liability, leading to the disjointed and uneven development of the law. Part of the reason for this lies in a number of judicial decisions made without reference to, or consideration of, previous judicial findings.

Some of the apparent judicial reluctance that is illustrated in some of the cases can in part be explained by the procedural and practical obstacles that were in place at the time. Furthermore, it has been problematical for the courts to establish mens rea and the use of statutory interpretation features repeatedly through a large number of the cases. Some of the more straightforward regulatory offences have not posed as much of a dilemma for the courts.

Burles acknowledges that “[h]istorically, the courts did not consider it either logical or feasible to prosecute corporations for any serious offences as the punishment for

the bulk of felonies was imprisonment or death. Furthermore, the idea that a corporation could have mens rea presented insurmountable theoretical difficulties ... The great bulk of offences, however, were not thought capable of being committed by a corporate body ... This position changed dramatically in 1944 when a trio of important cases opened the doors to wider criminal corporate liability”¹⁵.

Winn, writing in 1929, referred to the position and the view taken, to that point, by the courts in relation to corporate criminal liability¹⁶. Winn continues and refers to a number of cases and outlines the exceptions¹⁷.

A key theme that features through a number of the decisions and those that follow is the significant relevance of interpretation of various statutes throughout the centuries. As Pinto and Evans recount “[e]ncouraged, no doubt, by s.2(1) of the Interpretation Act (1889), by the turn of the nineteenth century, the criminal courts accepted that a corporation could be liable for a wide range of criminal offences within the regulatory

¹⁵ Burles, D. “The criminal liability of corporations” New Law Journal (1991) Vol. 141 (6502), p.609

¹⁶ Winn, C.R.N. “The Criminal Responsibility of Corporations” Cambridge Law Journal (1927-1929) Vol. 3, 398 at p.398. I see also Winn who saw corporate liability as arising only in exceptional circumstances.

¹⁷ Ibid. at p.398 – “Where a statute has laid upon a corporation a legal duty to execute certain works and the works have not been executed, it was held in 1842 in *R v. Birmingham and Gloucester Ry. Co* (3 Q.B. 223) that the corporation may be indicted and fined for its non-feasance. But it was there said, per Patteson J., that a corporation may not be indicted “for a felony, or for crimes involving personal violence”. In *R. v. Severn and Wye Ry. Co* ((1819) 2 B and Ald. 646) it was assumed that an indictment would have lain against a railway company for not maintaining its permanent way. In *R. v. Tyler Commercial Co.* ([1891] 2 Q.B. 588) Bowen L.J. held that where a duty is imposed on a company by statute, such as the duty to register the names of its members imposed by the Companies Act, 1862, a breach of such duty is indictable in the absence of any indication to the contrary in the statute”.

sphere”¹⁸. This issue will be further expanded below and analysed throughout the cases where applicable.

1.2.1. The birth of the Directing Mind and Will theory

The “directing mind and will” theory was first enunciated in the case of Lennard’s Carrying Co. Ltd. V. Asiatic Petroleum Co. Ltd¹⁹, specifically within the judgment of Viscount Haldane L.C. and his “organic theory”²⁰.

Academics²¹ have suggested that Viscount Haldane’s views were influenced by his time spent studying German Law whilst at Göttingen University. Hicks and Goo²² contend that German Law “distinguishes between the agents and organs of the company. A German company with limited liability (GmbH) is required by law to appoint one or more directors (Geschäftsführer). They are the company’s organs and for legal purposes represent the company. The knowledge of any one director, however obtained, is the knowledge of the company”²³.

Viscount Haldane L.C., whilst trying to resolve an issue that had arisen under the Merchant Shipping Act 1894, famously stated: -

¹⁸ Pinto, A. and Evans, M. “Corporate Criminal Liability” (2008) 2nd Edition at p.33

¹⁹ [1915] A.C. 705

²⁰ See note 18 at p.44 - “In contrast to the disjointed progress of corporate criminal liability generally, the origin of identification can be traced definitively to Lennard’s Carrying Co Ltd v. Asiatic Petroleum Co Ltd”.

²¹ Davies, P.L., Worthington, S. and Micheler, E. “Gower and Davies’ Principles of Modern Company Law” (2008) 8th Edition at p.187 and Hicks, A. and Goo, S.H. “Cases and Materials on Company Law” (1999) 3rd Edition at p.130

²² Hicks, A. and Goo, S.H. Ibid.

²³ See also Foster, N.G. “German Legal System and Laws” (1996) 2nd Edition at pp.333-339

“My Lords, 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 ... somebody who is not merely a servant or agent for whom the company is liable upon the footing respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself”²⁴.

This creates a peculiarity within the law, in that in contrast to the decision in *Saloman* whereby the company and the persons behind the company are to be treated as distinct and separate, this decision “treats the individual and the company as the same person ... [t]he answer is that it is not compatible with it (*Saloman*) and the theory (directing mind and will) has probably caused more problems than it solved”²⁵.

Some academics consider that Viscount Haldane’s theory “was a narrow approach to the notion of identification ... (and) ... such an approach has been castigated by the Privy Council through Lord Hoffmann in the *Meridian Global* case as a misleading “general metaphysic of companies”²⁶. The *Meridian* decision will be considered in detail at a later juncture.

Prior to the 1944 decisions noted above, are the important and relevant cases of *Moussell Bros Ltd v. London and North West Ry. Co. Ltd*²⁷ and *R. v. Cory Bros and*

²⁴ See note 19 at pp.713-714

²⁵ See note 6 (*Dignam et al.*) at p.258

²⁶ See note 21 (*Davies et al.*) at p.187

²⁷ [1917] 2 K.B. 836

Co. Ltd²⁸. *Moussell* was the first opportunity for an appellate court to consider the liability of a corporation for a criminal offence that necessitated proof of the requisite mens rea. The case demonstrated clearly the importance of statutory interpretation, with the case turning on the court's interpretation of s.98 Railway Clauses Consolidation Act (1845).

So, Viscount Reading C.J. concluded that: -

*“I think, looking at the language and purpose of this Act, that the Legislature intended to fix responsibility for this quasi-criminal act upon the principal if the forbidden acts were done by his servant within the scope of his employment. If that is the true view, there is nothing to distinguish a limited company from any other principal, and the defendants are properly made liable for the acts”*²⁹.

Similarly, Atkin J., found that the liability of the corporation would turn on: -

*“the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed”*³⁰.

“The penalty is imposed upon the owner for the act of the servant if the servant commits the default provided for in the statute in the state of mind provided for by the statute. Once it is decided that this is one of those cases where a principal may be held liable criminally for the act of his servant, there is no difficulty in holding that a corporation may be the principal. No mens rea being necessary to make the principal

²⁸ [1927] 1 K.B. 810

²⁹ See note 27 at p.845

³⁰ Ibid.

*liable, a corporation is in exactly the same position as a principal who is not a corporation*³¹.

These early cases applied vicarious liability as the basis for corporate criminal liability. The identification doctrine did not become firmly established until the 1944 cases referred to above and discussed further below. As Wells states: -

*“[v]icarious liability grew out of the development of liability of a master (employer) for his servant (employee), and has been applied mainly to offences in the regulatory field*³².

Wells accurately assesses the situation in the judicial development at that time: -

*“In general, the process of judicial interpretation of the statutory object led to corporate liability being imposed only for regulatory offences, especially those offences which did not require proof of mens rea or a mental element. While the general principle that a company can be prosecuted for a criminal offence has long been accepted, the question whether a particular statute imposes such liability and whether the vicarious or identification doctrine will apply, is rarely if ever spelled out, and thus the process of interpretation is open-ended*³³.

However, when considering the decision in *Mousell* and given its proximity in time to the House of Lords decision in *Saloman*, there was no reference to personal liability of the corporation. As Pinto and Evans state: -

³¹ Ibid. at p.846

³² Wells, C. “The Millennium Bug and Corporate Criminal Liability” *Journal of Information, Law and Technology* (1999) (2) www.law.warwick.ac.uk/jilt/99-2/wells.html (last accessed 10th June 2010)

³³ Ibid.

*“the criminal responsibility of the corporation was established on the basis of vicarious liability for the act or acts of its servant acting within the scope and course of his employment”*³⁴.

Williams has written that “the best explanation of [Mousell] seems to be that it belongs to an intermediate stage in the development of corporate criminal responsibility”³⁵ meaning between the usage of vicarious liability as the basis for corporate liability and the identification doctrine. However, Wells suggests that “it was only later that *Mousell* became confined to its position as an exception, it could just as easily have provided a springboard for an entirely different development”³⁶.

It is debatable whether developing the law closer to vicarious liability rather than the identification doctrine would have been more effective. Vicarious liability depends upon whether the employee was acting within the scope of their employment. However, as recognised by the Law Commission³⁷ “[t]he rule that, in general, vicarious liability does not form part of the criminal law is a long-established principle of the common law”³⁸, save for three exceptions. Two of those are not relevant here, namely public nuisance and criminal libel. The third exception to this principle is statutory offences and as discussed above in the judgment of Atkin J. in

³⁴ See note 18 (Pinto et al.) at p.36

³⁵ Williams, G. “Criminal Law – The General Part” (1961) 2nd Edition at p.274

³⁶ Wells, C. “Corporations and Criminal Responsibility” (2001) 2nd Edition at p.91

³⁷ Law Commission, “Legislating the Criminal Code: Involuntary Manslaughter” Law Com. Report No. 237 (1996)

³⁸ *Ibid.* at Para 6.8. The Law Commission referred to Huggins (1730) 2 Ld Raym 1574, 92 ER 518, per Raymond CJ: - “*It is a point not to be disputed but that in criminal cases the principal is not answerable for the act of his deputy, as he is in civil cases; they must each answer for their own acts, and stand or fall by their own behaviour*”.

*Moussell Bros. Ltd v. London and North-Western Railway Co*³⁹ is a matter of how the statute is constructed.

Therefore, the use of or impact of vicarious liability arguably can be limited. A recurring theme throughout this chapter is the disjointed development of corporate criminal liability, whereby previous decisions were too often overlooked or dismissed by courts. A good example of this was the House of Lords' decision in *Vane v. Yiannopoulos*⁴⁰. Mayson, French and Ryan show, the case held, in contrast to *Moussell*, that "unless otherwise specified by statute, there could be no vicarious liability for an offence with a mental element unless the employer's proprietary or managerial functions had been delegated to the employee who committed the offence"⁴¹. Nevertheless, "Lord Evershed glossed over *Moussell Bros. v. London and North-Western Railway Co.*, saying that intent, unlike knowledge, was not "mens rea in a real sense"⁴².

Returning to the chronological treatment of the law's development, *R. v. Cory Bros and Co. Ltd.*⁴³ was the first reported case of manslaughter being brought against a corporation. The defendants were the company and three employees of the same company. The directors of the company by concord decided to erect an electrified fence to avoid looting and damage to property. A miner stumbled against the fence and was electrocuted. The basis of the private prosecution was that the company had

³⁹ See note 27 at p.845

⁴⁰ [1965] A.C. 486

⁴¹ French, D. Mayson, S. and Ryan, C. "Mayson, French and Ryan on Company Law" (2009) 26th Edition at p.640

⁴² *Ibid.*

⁴³ See note 28. For another example of an early case in which a company was charged with manslaughter, see *R. v. Northern Strip Mining (Construction Co Ltd.)* (1965) (unreported), mentioned in Welham, M.G. "Tolley's Corporate Killing – A Manager's Guide to Legal Compliance" (2002) at p.50. The company was acquitted, but the decision is unreported.

caused the manslaughter and had prepared a mantrap. The committal stage of the proceedings was successful, however at the Glamorgan Assizes; Finlay J. took a different view. He noted: -

“It is always a tempting argument to say that the common law ought to keep pace with modern developments, and therefore it ought to be decided that these authorities are antiquated and that in 1927 they do not apply. Well, all I can say to that argument is this: it may be that the law ought to be altered; on the other hand it may be that these authorities ought to still govern the law, but it is enough for me to say, sitting here, that in my opinion I am bound by authorities, which show quite clearly that as the law stands an indictment will not lie against a corporation either for a felony or for a misdemeanour ... the company cannot be indicted for these offences”⁴⁴.

Despite *Lennard’s* case being heard by the House of Lords, neither the King’s Bench Division in *Mousell* or Finlay J. in *R. v. Cory Bros.* referred to it. This is further couched with some irony in the above quote Finlay J. states that “the common law ought to keep pace with modern developments”. His judgment makes no reference to the *Lennard’s* case which was at the time a reasonably recent House of Lords decision, with the judgment handed down only 12 years before *R. v. Cory Bros.*

This omission by two different courts is illustrative of the fragmented and disjointed evolution of corporate criminal liability. It could be argued that due to this judicial insouciance, a decision from the highest court in the land was overlooked.

The decision of Finlay J. received criticism both at the time and thereafter. Writing in 1929 Winn argued that: -

⁴⁴ See note 28 at pp.817-818

“... the intra vires decisions and commands of the board of directors, are factually, and should be legally, the decisions of the corporations ... A corporation should be answerable criminally as well as civilly for the acts of its primary representatives”⁴⁵.

More recently, Pinto and Evans are critical of Finlay J., “[h]is scrutiny of the law was minimal; he referred to only four cases ... Although R. v. Cory Bros Ltd no longer represents the law, it is typical of the uneven development of corporate criminal liability. Early judicial opposition to corporate liability was couched in terms of procedural obstacles, but the opposition persisted even after those obstacles were removed”⁴⁶. We now turn to consider those procedural obstacles.

1.2.2. Procedural Obstacles

There were a number of procedural obstacles or difficulties that were in existence that were problematical for the judiciary. A company or corporation by its nature could not be imprisoned or sentenced to death. This caused practical problems in that for a felonious matter, these were the typical sentences in the 19th Century and before. Furthermore, an alternative sentencing option, namely a financial penalty, could only be enforced with regards to a felony if a statutory provision allowed it. It was only by s.13 Criminal Justice Act (1948), that this hurdle was finally overcome and this obstacle removed⁴⁷.

⁴⁵ See note 16 (Winn) at p.406

⁴⁶ See note 18 (Pinto et al.) at pp.36-37

⁴⁷ Albeit s.13 Criminal Justice Act (1948) was repealed by the Criminal Law Act (1967)

Additionally, with regard to the practicalities of bringing a criminal prosecution against the company, how would the company appear before the court? Insofar as matters to be dealt with summarily, this was addressed by virtue of the Summary Jurisdiction Act (1848)⁴⁸. However, matters to be tried on indictment were significantly more complex due to the requirement of the defendant's attendance in court. Given that the company is a separate legal entity, this posed a problematical legal obstacle. Again, it was only by a change in the law in 1925⁴⁹ that this issue was eradicated and a company could then enter its plea via its representative.

1.2.3. The landmark 1944 cases

As referred to previously and as Wells acknowledges “[a] trio of cases in the 1940s established the corporate liability principle for *mens rea* offences which is known in English law today”⁵⁰.

The first of the three cases, *DPP v. Kent and Sussex Contractors Limited*⁵¹, was initially heard by the Glamorgan Justices and thereafter by the Divisional Court. The company had been charged with two offences under the Defence (General) Regulations (1939). The Glamorgan Justices refused to convict the company, on the

⁴⁸ Section 1 allowed for service of summons to a corporation. This was confirmed by Avory J. in *Evans & Co. Limited v. London County Council* [1914] 3 KB 315. Avory J. stated that it turned on the application of s.2 Interpretation Act (1889). Furthermore Avory J. confirmed that “the fact that some of the provisions of the Summary Jurisdiction Act, 1848, are inapplicable to a company does not shew that all its provisions are inapplicable” (at p.319).

⁴⁹ S.33(3) Criminal Justice Act (1925)

⁵⁰ See note 36 (Wells) at p.93

⁵¹ [1944] K.B. 146

ground that, as Wells notes, “a body corporate could not be guilty of offences requiring proof of a dishonest state of mind”⁵². The appeal of the Prosecutor was allowed by the Divisional Court. Viscount Caldecote C.J. observed that: -

*“The offences created by the regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular ... I can see nothing in any of the authorities to which we have been referred which requires us to say that a company is incapable of being found guilty of the offences with which the respondent company was charged”*⁵³.

MacNaghten J. added: -

*“It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate”*⁵⁴.

Hallett J. also observed that: -

*“... the liability of a body corporate for crimes was at one time a matter of doubt, partly owing to the theoretical difficulty of imputing a criminal intention to a fictitious person and partly to technical difficulties of procedure. Procedure has received attention from the legislature, as for instance, in s.33 of the Criminal Justice Act 1925, and the theoretical difficulty of imputing criminal intention is no longer felt to the same extent”*⁵⁵.

However, as Pinto and Evans note, the decision although clearly based on the doctrine of identification, made no reference to Viscount Haldane’s judgment in *Lennard’s*,

⁵² See note 36 (Wells) at p.94

⁵³ See note 51 at pp.155-156

⁵⁴ Ibid. at p.156

⁵⁵ Ibid. at p.157

and “[p]erhaps for that reason, the Divisional Court gave no consideration to whether the transport manager represented the “directing mind and will” of the company”⁵⁶.

The decision in *Kent and Sussex Contractors* was approved by the Court of Appeal in the next of the 1944 trio of cases, namely *R. v. I.C.R. Haulage Limited and Others*⁵⁷. The company was charged with the common law offence of conspiracy to defraud. Clearly the common law offence has no statutory basis. For this reason this case can be distinguished from the other two 1944 decisions. Stable J. as part of the judgment, considered the decision from *Kent and Sussex Contractors* and confirmed “[t]here is a distinction between that case and the present, in that there the offences were charged under a regulation having the effect of a statute, whereas here the offence is a common law misdemeanour, but, in our judgment, this distinction has no material bearing on the question we have to decide”⁵⁸. Unfortunately, no guidance was provided by the court on the significance and consequence of the distinction between offences that flow from statute and those that are common law offences.

The offence of conspiracy to defraud requires mens rea. Nevertheless, the company was convicted of this offence (as was the company’s managing director).

As Png recognises that “[w]hile the directing mind theory as expounded in the *Lennard’s* case has since been applied in civil, criminal and regulatory proceedings, the cases of *Kent & Sussex Contractors* and *I.C.R. Haulage* provide authority for its application in criminal and regulatory offences”⁵⁹.

⁵⁶ See note 18 (Pinto et al) at p.41

⁵⁷ [1944] K.B. 551

⁵⁸ Ibid. at p.558

⁵⁹ Png, C.A. “Corporate Liability – A Study in Principles of Attribution” (2001) at p. 19

The third of the 1944 trilogy of cases, *Moore v. Bressler*⁶⁰, was heard by the Divisional Court in 1944. The Judgment was provided by Viscount Caldecote, who as stated above, provided the judgment in *Kent and Sussex Contractors Limited*. In this case, the employees embezzled the company, and thereafter the company submitted incorrect returns and avoided the requisite tax liability under s.35(2) Finance (No.2) Act (1940). Viscount Caldecote provided the leading judgment, however Humphrey J. agreeing with his senior judicial colleague, provided a clear analysis: -

*“Being a limited company, the company could only act by means of human agents. It is difficult to imagine two persons whose acts could more effectively bind the company or who could be said in the terms of their employment to be more obvious as agents for the purpose of the company than the secretary and the general manager of that branch and the sales manager of that branch”*⁶¹.

In a similar vein to the other 1944 cases, the directing mind and will doctrine was not contemplated in this case. However, this decision was referred to in *Meridian* by the Privy Council⁶².

As Pinto and Evans state: -

“These three cases mark the first appearance in the criminal law of the “doctrine of identification” which governs the criminal liability of a corporation in cases which do not fall within the scope of vicarious liability. Although they have been described as

⁶⁰ [1944] 2 All E.R. 515 K.B.D.

⁶¹ Ibid. at p.517

⁶² *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 2 A.C. 500 (PC (NZ)) at p.512

“revolutionary”, they are vulnerable to critical analysis; none considered the “directing mind and will” test, or even cited Viscount Haldane’s dictum”⁶³.

1.2.4. Lord Denning intervenes with “medieval anthropomorphism”

Lord Denning in the civil case of Bolton (Engineering) Co. Ltd. v. Graham & Sons Ltd.⁶⁴ further considered the doctrine of the “directing mind and will” and “sought to clearly establish the directing mind test as the simple overarching capstone for the civil and criminal liability of companies”⁶⁵. Lord Denning provided his own perspective on the organic theory and further extrapolated the doctrine through the use of metaphor, which has been referred to by commentators as “medieval anthropomorphism”⁶⁶: -

“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. So you will find that in cases where the law requires personal fault as

⁶³ See note 18 (Pinto et al) at p.44

⁶⁴ [1957] 1 Q.B. 159

⁶⁵ Ong, C.A. and Wickins, R.J. “Confusion worse confounded: the end of the directing mind theory?” Journal of Business Law (1997), November, 524-556 at p.529

⁶⁶ See note 41 (French et al) at p.634

*a condition of liability in tort, the fault of the manager will be the personal fault of the company*⁶⁷.

Ong and Wickins have described Lord Denning's statement as "a bold attempt ... to redefine and unify the law in terms of a simple pervasive theory, rather than to merely reiterate what already existed"⁶⁸. However, there is no reference to *Lennard's* case and again Ong and Wickins state that "... on a dispassionate reading the only authority on criminal law referred to by Lord Denning in support of his proposition, namely *R. v. ICR Haulage Limited* [1944] 1 All E.R. 691 contains no mention of the directing mind theory in name or in substance"⁶⁹. With this in mind, it further illustrates how the development of this doctrine has been disjointed. Lord Denning should surely have taken *Lennard's* case as a starting point and foundation on which to build a fuller sense of the identity doctrine.

1.2.5. A key House of Lords decision - Tesco Supermarkets Ltd. v. Natrass

Both *Lennard's* and the *Bolton* case were considered in the next judgment. Pinto and Evans note the significance of the House of Lords decision in *Tesco Supermarkets Ltd. v. Natrass*⁷⁰, where it "established that the doctrine of identification applied, in principle, to all offences not based upon vicarious liability. The decision established that a corporation could be convicted of a non-regulatory offence requiring proof of

⁶⁷ See note 64 at p.172

⁶⁸ See note 65 at p.530

⁶⁹ *Ibid.*

⁷⁰ [1972] A.C. 153

mens rea if the natural person who had committed the actus reus of the offence could be identified with the corporation”⁷¹.

Lord Reid stated: -

“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 act is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company”⁷².

The *Tesco* case has been widely discussed and analysed by a number of commentators. Png contends that the decision was important as “First, it upheld the traditional directing mind theory as expressed in the *Lennard’s* case and distinguished it from liability under employer-employee or principal-agent relationships ... Secondly, it emphasized the need to construe the relevant legislation in the context of corporations ... Thirdly, it provided that the class of individuals who may be regarded as a corporation’s directing mind does not extend beyond those of whom that are empowered under its constitution to exercise its powers”⁷³.

⁷¹ See note 18 (Pinto et al) at p.47

⁷² See note 70 at p.170

⁷³ See note 59 (Png) at pp.20-21

The view of the House of Lords in this case was significant in that as mentioned above, it confirmed that if a person had committed the physical act of the crime and if that person could be identified as a senior officer within the company, then liability could follow for the company. However, the narrow test applied by the House of Lords in this case has proven problematical as will be seen later in this chapter and certainly in the next chapter.

As Burles acknowledged “[t]he ratio of *Tesco*, however, is much more important than the decision itself. This established the general test of corporate criminal liability. The loose and flexible test of the 1944 cases was disapproved and in its place a far stricter one laid down. The actions and mens rea of a company, the new test stated, could only be derived from the actions and mens rea of those officers representing that company’s directing mind and will, i.e. only from the most senior officers of the company”⁷⁴

After considering these particular cases, a pattern begins to emerge that would cause significant difficulties and in some later cases insurmountable difficulties. These insurmountable difficulties reverberate through the cases that feature in the second chapter, specifically when trying to identify the “directing mind and will” within a complex and large corporate structure.

As Dignam and Lowry recognised from the *Tesco* case, “[t]he application of the organic theory acted effectively as an immunity from criminal prosecution for large complex corporate organisations”⁷⁵. Png realises that: -

⁷⁴ See note 15 (Burles) at p.609

⁷⁵ See note 6 (Dignam et al) at p.259

“a weakness of the directing mind theory under the decisions in Lennard’s and Tesco Supermarkets is that it tends to restrict the extent to which a corporation may incur liability ... The use of the expression “directing mind and will” seems to convey the idea that it is the individuals who are in positions of management and control whose conduct or state of mind are attributable to the corporation.

The practical implication of this interpretation is that it becomes more difficult to establish liability against larger corporations since individuals at senior managerial positions are not always directly involved in the activities that resulted in the alleged infringement and wrongdoing”⁷⁶.

By limiting the focus towards the very pinnacle of companies, the identification becomes much more difficult, inhibiting successful prosecutions. Within larger companies there are invariably many tiers of responsibility making the link between those individuals and the acts that occur simply very difficult. A point that features throughout the various commentaries and articles is that Managing Directors do not drive trains; they make decisions within board meetings and are not intrinsically involved with the day to day aspects of company.

This view is shared by Gobert: -

“This “identification” model of fault, embraced by the House of Lords in Natrass, can be criticised for the narrowness of its horizons and for its failure to capture the complexity of the modern company. When a crime occurs in the course of business, it

⁷⁶ See note 59 (Png) at p.21

is likely to be the result of a breakdown in more than one sphere of the company's operation"⁷⁷.

Taking Gobert's point further, requires a simple analysis of a typical large company. There will be a board of Directors, also various heads of department with differing portfolios such as finance or health and safety, a myriad of middle management and thereafter the remainder of the workforce. Decisions that are taken at board level will cascade down the management structure for implementation by the Heads of Department, through middle management to the employees. Similarly, there will be a process whereby information is passed up the chain of command to inform the board of problems at shop floor level. As Gobert suggests, if a crime has occurred in the course of its business, it is likely that a number of mistakes or omissions of varying significance have occurred at different levels within the company. Therefore, a number of departments may be at fault and therein lies the difficulties with this narrow test, how can the requisite senior officer be identified with the directing mind and will?

Wells continues and elaborates upon Gobert's point: -

"The relatively narrow doctrine developed via the leading House of Lords case of Tesco v. Natrass had as its governing principle that only those who control or manage the affairs of a company are regarded as embodying the company itself ... The identification principle essentially meant that a company would be liable for a

⁷⁷ Gobert, J. "Corporate Criminality: New Crimes for the Times" Crim. L.R. [1994] 722 at p.723

serious criminal offence (only) where one of its most senior officers had acted with the requisite fault”⁷⁸.

The *Tesco* decision resulted in a narrow approach being taken and adopted by the courts. It is this narrow approach - this “tight pyramidal view of decision making” - that produced a legal impediment when tested against a large and complex corporate structure. This impediment features heavily through the cases that are discussed in Chapter Two. The key problem with the identification doctrine is that within a complex management structure, it is difficult to establish that directing mind, although as will be seen, with a small company or a so-called “one man band” it is a much simpler task. It is very difficult to locate any arguments in favour of the identification doctrine, although it could be suggested that the larger corporations that feature in Chapter Two could constitute its greatest benefactors.

However, as Pinto and Evans state: -

*“Whatever criticisms there may be of the decision in Tesco Supermarkets Ltd v. Natrass it remains the general basis of corporate liability in English criminal law”*⁷⁹.

The next substantive section will discuss some of the more recent Appellate decisions that have considered and interpreted the directing mind and will doctrine.

⁷⁸ See note 36 (Wells) at p.101

⁷⁹ See note 18 (Pinto et al) at p.56

1.2.6. More recent Appellate Court considerations upon the Directing Mind and Will Doctrine

The “directing mind and will” doctrine was, according to Ong and Wickins⁸⁰, “reshaped” by the Court of Appeal decision in *El Ajou v. Dollar Land Holdings plc*⁸¹. Ong and Wickins continued, “Nourse L.J. did accept the general paramountcy of the directing mind theory. His Lordship stated that the directing mind theory had been developed with no divergence of approach in both the criminal and civil jurisdictions, and the authorities in each area were cited indifferently in the other”⁸². This was a civil case and the facts of which are particularly complex. On the fundamental point of the “directing mind and will” doctrine, the court at first instance held that “the Chairman was not a directing mind as he played only a minor and perfunctory role in the actual management of the company. The Court of Appeal disagreed”⁸³. It was arguable that the reasoning of the Court of Appeal did not run parallel to *Lennard’s* and *Tesco* and that the “re-shaping” was a judicial attempt to move away from the narrowness of *Tesco*.

“All three judges in the Court of Appeal redefined the directing mind test to cover those officers of the company who had control of a certain type or class of transaction. Thus they did not have to be in the top level of management, or be in

⁸⁰ See note 65 (Ong et al) at p.539

⁸¹ [1994] 2 All E.R. 685

⁸² See note 65 (Ong et al) at p.539

⁸³ Ibid.

control of the general management of the company. Their role could be far more limited”⁸⁴.

Despite the mixture of orthodox views suggested by Hoffmann L.J. and Rose L.J., and the novel view of Nourse L.J., this unusual conclusion was reached. As Ong and Wickins suggest “the reasoning in the *El Ajou* case runs counter to the spirit, and very probably the letter, of the line of cases based on *Lennard’s Case* and the *Tesco Supermarkets case*”⁸⁵. However, as will be seen the “orthodoxy” was restored by the House of Lords in *Seaboard Offshore Limited*.

The House of Lords decision in *Seaboard Offshore Limited v. Secretary of State for Transport: The Safe Carrier*⁸⁶ followed three months after the *El Ajou* decision. This appeal, by way of case stated, focussed on the application of the principles from *Tesco* to section 31 Merchant Shipping Act 1988⁸⁷. This particular section, which required a company to take all reasonable steps to ensure that a vessel is operating in a safe manner, was introduced following the findings of the Sheen Inquiry into the Herald of Free Enterprise disaster in Zeebrugge (see Chapter Two).

Lord Keith of Kinkel provided the courts judgment in *Seaboard* (in which all the Law Lords concurred), applied the principle from *Tesco*. Ong and Wickins provide a sound assessment of the view of the House of Lords: -

“His Lordship felt that it was not the intent of the legislation to make owners liable for the actions of every officer or member of the crew of a ship ... The Tesco

⁸⁴ *Ibid.* at pp.539-540

⁸⁵ *Ibid.* at p.544

⁸⁶ [1994] 2 All E.R. 99

⁸⁷ Section 31(1) Merchant Shipping Act 1988 – “*It shall be the duty of the owner of a ship to which this section applies to take all reasonable steps to secure that the ship is operated in a safe manner*”.

Supermarkets case was the only case cited, and no mention was made of the El Ajou case. Lord Keith thus defined the directing mind in conventional terms as encompassing only those, who ... were entrusted with the exercise of the powers of the corporation, and not those in subordinate positions. Thus orthodoxy seemed to have been re-established”⁸⁸.

Therefore the House of Lords decided to ally the law along the *Tesco* approach and by not mentioning the *El Ajou* Court of Appeal decision, made it very clear that the decision of the lower court was not relevant.

As discussed through this chapter, the common thread running through this discussion is the uneven development of this aspect of the law. Following the decision in *Seaboard* and the re-affirming of the orthodox approach, the House of Lords then considered an alternative set of circumstances in a later case.

Nakajima reflected upon this next relevant case: -

“On the other hand, as was dramatically illustrated in the House of Lords’ decision in Re Supply of Ready Mixed Concrete [1995] 1 AC 456, an employee who acts for the company within the scope of his employment, even if against the express instructions of his employer, may well bind the company as he is the company for the purpose of the transaction in question”⁸⁹.

The facts of *Director General of Fair Trading v. Pioneer Concrete (UK) Limited*, also known more commonly as *Re Supply of Ready Mixed Concrete (No.2)*⁹⁰ are relevant and require analysis. The Director General of Fair Trading had obtained injunctions

⁸⁸ See note 65 (Ong et al) at p.545

⁸⁹ Nakajima, C. “Guilty Knowledge – Attribution of guilty knowledge” *Company Lawyer* (1996) Vol. 17(6), 180 at p.180

⁹⁰ [1995] 1 A.C. 456

under s.35 Restrictive Practices Act 1976 against Pioneer Concrete and other companies. The nature of the restraint was to restrict the service agreements relating to the supply of ready mixed concrete. The companies that were subject to the injunction had explicitly instructed their staff/ employees to comply with the terms of the injunction. Failure to do so would result in a civil contempt of court action. However, some employees were acting, unknown to the company and controlling management; beyond the terms of the injunction and the Restrictive Practices Court found the company to be in contempt of court; by vicarious liability. This despite the company being unaware of the employee's activities and also having a system in place, namely instructing staff to not step outside of the injunction.

An appeal was made to the Court of Appeal, which reversed the decision of the Restrictive Practices Court. However, as will be discussed below, the House of Lords in turn disagreed with the Court of Appeal and overruled their decision.

The House of Lords held that the “company could be found to be in contempt of court by disobeying an order as a result of a deliberate act by its servant on its behalf; and that ... since the employees ... had, by their deliberate conduct, made their employers liable for disobeying the injunctions, both companies were guilty of contempt of court”⁹¹. As McKittrick recounts in relation to this decision, “the distinction between the “brains” and the “hands” was here irrelevant”⁹².

⁹¹ Ibid. at p.457

⁹² McKittrick, N. (ed.), “House of Lords – Corporate Liability for Crime and for Contempt – Re Supply of Ready Mixed Concrete (No. 2)” *Journal of Criminal Law* (1995) Vol.59, 176-178 at p.177

The proposition in the *Tesco* case can be ignored, as this case illustrates. Lord Nolan at page 476 of the judgment referred to the *Tesco* decision and distinguished it from the stance in this case: -

“... the proposition that in the case of a body corporate the necessary mens rea must be found in a natural person or persons who are the directing mind and will of the corporation. But that case was concerned with the precise terms of the statutory defence provided by the Trade Descriptions Act 1968 for those who could show that the offence in question had been committed by another person, and that the person charged had taken all reasonable precaution and exercised all due diligence to avoid the commission of the offence. The statute expressly distinguished, by section 20(1), between “any director, manager, secretary or other similar officer of a body corporate” and other persons who were merely its servants or agents ... that the Tesco Supermarkets Ltd decision does not bear”.

As seen above within this decision and in the other decisions outlined previously, with the development of corporate criminal liability, is the importance of statutory interpretation. McKittrick analyses Lord Nolan’s view of *Tesco* where His Lordship refers to the “precise terms” of the Trade Descriptions Act 1968 and comments that “[t]hose terms permitted the corporation to escape liability if the “brains” of the company could show that they had taken “reasonable precautions” to prevent a breach of the law and that it was the “hands” who had broken the law, notwithstanding the precautions. The “distinguishing” of the decision of the House of Lords reached in that case is illustrative of the fact that the criminal liability of a corporation is as likely

to depend on the rules of interpretation of statutes as on theories of corporate liability”⁹³.

As Gray confirms, the decision of the House of Lords in this matter, “is further evidence of this shift away from a formula for determining corporate responsibility based on a simple model of corporate organisation of vertically structured hierarchy with an elite cadre exercising command and control and being the only people in the company capable of imbuing it with responsibility”⁹⁴.

The decision of the House of Lords in this case and the previous Court of Appeal decision in *El Ajou* could be seen as an augmentation of the “directing mind and will” doctrine away from the narrowness of *Tesco*, although as mentioned above a great deal will depend upon the relevant statute and thereafter the statutory interpretation itself.

Png suggests a similar view and states that “[a]s part of the development of principles of attribution, the decisions in *El Ajou* and *Ready Mixed Concrete* represent expansions from the traditional directing mind theory”⁹⁵. Png continues and expands upon this point and provides four key explanations⁹⁶.

⁹³ Ibid. at p.178

⁹⁴ Gray, J. “Company directors and ignorance of the law” *Company Lawyer* (1996) Vol. 17(10) 296-300 at p.299

⁹⁵ See note 59 (Png) at p.24

⁹⁶ Ibid. at pp.24-25: -“*First, they recognise corporations as legal abstractions and the need to attribute to them the conduct or state of knowledge of their servants or agents ... Secondly, the courts also accepted that while it is useful to look to the constitutional structure of a corporation to identify the individuals who are in positions of management and control, it is not always decisive ... Thirdly, the identification of the individuals who represent the corporation’s directing mind is a question of a law. It depends on the construction of the substantive law in issue ... Fourthly, in determining the alter ego of the corporation, it is important to take into*

The following section will consider a leading Privy Council decision. The decisions from *Tesco* and *Re Supply of Ready Mixed Concrete* feature significantly in the decision of the Privy Council.

1.2.7. The Directing Mind and Will on the sidelines?

The Privy Council decision in *Meridian Global Funds Management Asia Ltd v. Securities Commission*⁹⁷ and particularly the judgment of Lord Hoffmann “seems to have relegated the directing mind theory completely to the sidelines in matters of criminal and even civil liability”⁹⁸ and as Dignam and Lowry state that “Lord Hoffmann considered the organic theory provided a misleading analysis”⁹⁹.

Lord Hoffmann placed no dependence on the decision from *El Ajou*, which could be seen as odd as he was sitting in the Court of Appeal at the time. He attempted to bring together the House of Lords decision in *Tesco* and the decision in *Re Supply of Ready Mixed Concrete (No. 2)* and started from the point that a company as separate legal entity and that it “must act through human agents... In matters of criminal liability, the persons high or low in the management structure whose actions bound the company were determined simply by issues of statutory interpretation. Thus the *Tesco Supermarkets* case was easily reconcilable with the *Re Supply of Ready Mixed Concrete (No. 2)* case. Both depended merely on the intent of the legislature in the

account the nature of the claim, the relative position of the individual in the organisational structure, other relevant facts and the circumstances of the case”

⁹⁷ [1995] 2 A.C. 500 (PC (NZ))

⁹⁸ See note 65 (Ong et al) at p.550

⁹⁹ See note 6 (Dignam et al) at p.259

relevant legislation. Up to this point Lord Hoffmann managed to erect a complete system of corporate criminal liability and civil liability without specifically mentioning the directing mind theory”¹⁰⁰.

Lord Hoffmann took the view that it was a mistake to “seize on the phrase “directing mind and will””¹⁰¹ that had been applied in the *Lennard’s* case by Viscount Haldane and “use that as a criterion for determining whose thoughts and/ or actions will be attributed to a company”¹⁰². Whilst delivering the judgment, Lord Hoffmann, confirmed “that the question is one of construction rather than metaphysics”¹⁰³ and referred to the policy behind s.20 Securities Amendment Act (1988) and there should be a “true construction of s.20(4)(e)”¹⁰⁴.

Lord Hoffmann further elaborated with regards to the interpretation of the law: -

*“given that it was (the law) intended to apply to a company, how was it intended to apply? Whose acts (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy”*¹⁰⁵.

In this case, as well as it being the actual statutory language that was interpreted, it appears that the policy that lies behind the statute was given credence by the Privy Council. Lord Hoffmann continued and made this very important observation: -

¹⁰⁰ See note 65 (Ong et al) at pp.549-550

¹⁰¹ See note 41 (French et al) at p.631

¹⁰² Ibid.

¹⁰³ See note 97 at p.511

¹⁰⁴ Ibid.

¹⁰⁵ Ibid. at p.507

*“It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company”*¹⁰⁶.

This is a key point and Lord Hoffmann provides two examples¹⁰⁷ within the judgment and states there was no inconsistency between them “[e]ach is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule”¹⁰⁸. As mentioned above, the Privy Council made clear that the policy behind the statute is of significance and should receive credence.

The significance of the particular statute being interpreted by the courts according to this decision is paramount. However, as will be seen in the next chapter, the offence of manslaughter is a common law offence and therefore there is no statute to interpret. The offence of manslaughter and its specific elements will be considered at the beginning of the next chapter.

Robert-Tissot suggested that “[t]he clarity and flexibility of this new approach is welcome. There will remain some uncertainty as to the proper construction of different statutes, and who within the company is at a sufficient level for their acts and knowledge to be attributed to the company”¹⁰⁹. Furthermore, the approach taken

¹⁰⁶ Ibid. at p.511

¹⁰⁷ Ibid. at pp.511-512 “...in a case in which a company was required to make a return for revenue purposes and the statute made it an offence to make a false return with intent to deceive, the Divisional Court held that the mens rea of the servant authorised to discharge the duty to make the return should be attributed to the company: see *Moore v. I. Bresler Ltd.* [1944] 2 All E.R. 515. On the other hand, the fact that a company’s employee is authorised to drive a lorry does not in itself lead to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaughter. There is no inconsistency”.

¹⁰⁸ Ibid. at p.512

¹⁰⁹ Robert-Tissot, S. P. “Case Comment - A fresh insight into the corporate criminal mind: *Meridian Global Funds Management Asia Ltd v. The Securities Commission*” *Company Lawyer* (1996) Vol. 17(4), 99-101 at p.100

in *Tesco v. Nattrass* was “restrictive and did not adequately reflect the management structure of many large companies by which responsibility devolves from the centre”¹¹⁰.

The view of Robert-Tissot, namely that the *Tesco* approach was “restrictive”, in essence means that the stance adopted by the House of Lords in that case was as argued by Gray, “an overly simplistic reliance on the “directing mind and will” approach to the liability of a company for the acts of its employees”¹¹¹. As mentioned and discussed above, following the fuller consideration of the *Tesco* decision, criticism did flow from the decision and the approach that was taken as Pinto and Evans state: -

*“The problem with the decision in Tesco is that the case has been understood as providing a practically exhaustive list of those whose acts or state of mind can be attributed to any corporation. This is to concentrate on the identity of company officers instead of the aim of the statutory provisions in question. Over twenty years later, this misapprehension was corrected by Lord Hoffmann in Meridian”*¹¹².

Pinto and Evans continue: -

*“The effect of Tesco, at first glance has been to limit criminal liability for practical purposes to the very bottom of the corporate scale”*¹¹³.

This approach caused many of the difficulties experienced by the cases that will be discussed in Chapter Two.

¹¹⁰ Ibid.

¹¹¹ See note 94 (Gray) at p.299

¹¹² See note 18 (Pinto et al) at p.55

¹¹³ Ibid. at p.56

As Robert-Tissot acknowledges that a Privy Council decision has no binding upon the Courts of England and Wales, however “as a unanimous decision of the Privy Council it is likely to be followed”¹¹⁴. Robert-Tissot continues “[a]fter *Meridian* the search for the directing mind and will of a company will only be appropriate where a proper construction of the relevant law provides that only the acts and intentions of persons embodying the directing mind and will of the company can be attributed to the company for the purposes of establishing whether the company is in breach of the law”¹¹⁵.

Put very simply, this decision is an illustration of the primacy of whether the particular offence or rule and its application to corporations is a question of interpretation of the particular rule as opposed to the dissection of the corporation in question and a post-mortem of its metaphysical elements. Therefore, the interpretation is the first issue to contend with was the particular offence/ rule supposed to or intended to apply to companies and if so how should it apply? Only after this has been established, the view of the Privy Council according to Ong and Wickins is “that the directing mind test in both criminal and civil cases is a very limited exception based purely on the wording of certain exceptional statutes”¹¹⁶.

Ong and Wickins contend that following this particular judgment “[t]he result, it is suggested, is the general collapse of the directing mind and will theory”¹¹⁷.

In summary, the most recent court decisions, including *Meridian* that have considered the identification doctrine despite “claiming merely to reconcile or explain”¹¹⁸, in fact

¹¹⁴ See note 109 at p.100

¹¹⁵ Ibid.

¹¹⁶ See note 65 (Ong et al) at p.554

¹¹⁷ Ibid. at p.550

“have thrown the law into considerable confusion”¹¹⁹. Although despite the criticism of some of the approach taken by the Privy Council in *Meridian*, it is an example of a case whereby “the acts or thoughts of an individual who is not part of a company’s directing mind and will have been attributed to a company in order to make it criminally liable”¹²⁰. Therefore, it could be argued that this decision has widened the net for those that could be identified.

As seen above, the development of corporate criminal liability has not been straightforward and a number of the judgments have not been helpful and some have added confusion to this difficult area of the law. Professor Wells appropriately summarises the state of the law: -

*“Corporate criminal liability had been a subject undeveloped in theory and little explored in practice. This changed in the 1990’s after which developments fell into two broad categories: judicial or legal changes in corporate liability generally and proposals for the reform of corporate manslaughter. The judicial changes themselves fall into two divisions: those concerning the “classification” of offences, and moves to extend identification liability”*¹²¹.

The Law Commission were equally concerned with the state of the law in a recent consultation paper where they stated: -

“It is clear from the examination of the main authorities dealing with the application of the identification doctrine that the law in this area suffers from considerable uncertainty ... Certainly, it would have been a considerable improvement if

¹¹⁸ Ibid. at p.555

¹¹⁹ Ibid.

¹²⁰ See note 41 (French et al) at p.632

¹²¹ See note 36 (Wells) at p.101

*Parliament had stepped in long ago to define the nature and scope of the identification doctrine.*¹²²”

1.3. Conclusion

This chapter has considered the development of corporate criminal liability and the “directing mind and will”/ identification doctrine. Before the use of the “directing mind and will” doctrine, vicarious liability was favoured by the courts. However, it could be argued that using vicarious liability as a basis of corporate criminal liability results in a wide liability for a company, namely being responsible for all its employees. The use of vicarious liability is limited in that it must fall within one of the exceptions for its usage, such as the offence being contained within a statute and thereafter it is a matter of statutory construction.

This can be contrasted with the “directing mind and will” post *Tesco* where a narrow and restricted approach was adopted where only those in the highest echelons of a company are held to be relevant. It is contended that a more balanced basis is required and perhaps the “senior management” test that is stipulated within section 1(3) *CMCHA* will be more appropriate. However, this test is not without its critics and will be considered more extensively in later chapters.

As Wells recognises “[i]n truth ... there is no easy history of corporate criminal liability”¹²³. This point of view is accurate in that over the years of development and

¹²² Law Commission, “Criminal Liability in Regulatory Contexts” Law Com. Consultation Paper No. 195 (2010) at p.106

¹²³ See note 36 (Wells) at p.99

application of the doctrine, the various courts have not always referred to or considered what would be seen as key decisions. For example, the trio of 1944 cases did not refer to the decision in *Lennard's* case and the judgement of Viscount Haldane L.C.; which in itself is peculiar given its significance in the history and genesis of the doctrine. Furthermore, the decision in *Bolton* where Lord Denning extrapolated the organic theory, but yet again made no reference to *Lennard's* case, which reinforces the view that the development has been uneven and disjointed.

The decision in *Tesco* is to be seen as important, but the decision was widely criticised and the reverberations from this decision are felt throughout the cases that will be contemplated in Chapter Two. However, the decision from *Tesco* remains the general basis of corporate criminal liability in English law.

As discussed previously, the doctrine was re-shaped by the Court of Appeal, moving away from *Tesco* in *El Ajou*. However, the House of Lords restored the orthodoxy after the decision in *Seaboard*, which was handed down shortly after the *El Ajou* decision and returned the understanding back towards the narrow *Tesco* stance. Just by considering these decisions it is clear why Wells sees the history of corporate criminal liability as an uneasy journey. Certainly, when considering *Re Ready Supply of Mixed Concrete* and *Meridian*, the issue of statutory interpretation and the policy behind the legislation is brought to the fore. Statutory interpretation echoes throughout a number of the decisions that have been considered. Indeed as discussed above, some have considered that the decision in *Meridian* sidelined the doctrine.

The doctrine has been criticised widely and it would be counter-intuitive to suggest that there are no arguments in favour of it. However, it appears that the only likely

proponents of this doctrine and arguably its greatest advocates are the corporations that benefitted from its difficulties that will be discussed in Chapter Two.

It is therefore a curiosity as to why the doctrine remained in place for so long? This is most likely due to a lack of plausible alternatives. Vicarious Liability had been used previously, but was of limited use. The clear thread that runs through the development of this area of the law is that there is no simple solution readily available. This issue of alternatives will be considered in Chapter Three.

There are now difficulties that are incumbent within the doctrine which will be discussed in Chapter Two. This is particularly well surmised by Pinto and Evans: -

“In the case of a substantial corporation, a director will seldom have sufficient proximity to the unlawful act to be personally liable and without such personal liability on the part of a person who is the “directing mind and will” of the corporation liability cannot be attributed to it”¹²⁴.

It is this difficulty in identifying the requisite “directing mind and will” that has caused insurmountable hurdles within the cases that will now be discussed.

¹²⁴ See note 18 (Pinto et al) at p.56

Chapter Two - Successful and Unsuccessful Prosecutions for Corporate Manslaughter

Historically, the relevant test that was applied when trying to establish corporate criminal liability for manslaughter was the identification or “directing mind and will” doctrine. This doctrine as seen previously was not without its problems and legal difficulties.

Below will follow a consideration of successful and unsuccessful prosecutions for corporate manslaughter and a number of the cases and disasters are well known, such as the Herald of Free Enterprise and the Southall Rail disaster.

Prior to the discussion of the successful and unsuccessful prosecutions for corporate manslaughter, will be a consideration of the common law offence of manslaughter.

The development of this doctrine over the years and when applied to companies charged with manslaughter, appeared to work with some success against smaller companies, but was somewhat inept when considered against a larger company. This point is central to the discussion that follows below, particularly when analysing the bigger companies that were subject to investigations and/ or prosecutions following major disasters that had resulted in significant human casualties.

The doctrine and some of the cases that developed and shaped the doctrine have been widely criticised for having too narrow a view, particularly the decision of the House of Lords in *Tesco Supermarkets Ltd. v. Nattrass*¹. It is this “narrowness” that features repeatedly in the section below that considers the unsuccessful prosecutions. As will

¹ [1972] A.C. 153

be seen, as a result of the number of unsuccessful prosecutions of larger companies, the reform was both desirable and necessary which will be discussed and analysed in Chapter Three.

The first substantive section will consider the common law offence of manslaughter. The section will outline its specific elements as considered by a number of court decisions.

The second substantive section will consider the successful prosecutions for Corporate Manslaughter. As mentioned above, these successful prosecutions have all featured small companies, where identifying the directing mind has proved significantly easier than establishing the directing mind within a larger company.

The third substantive section will consider the large number of unsuccessful prosecutions and investigations into much larger companies. The various cases and investigations have been approached in a chronological manner, so as to track the growing desire and need for reform.

2.1. The common law offence of manslaughter

To understand the application of the offence of manslaughter to corporations, it is first necessary to outline the offence of manslaughter and how it applies to individuals. There are two main forms of manslaughter, voluntary and involuntary. The relevant type for this thesis is involuntary manslaughter, specifically gross negligence manslaughter.

As with all common law offences, the offence itself is subject to court interpretation and re-statement. This offence has changed and has been modified over the years. As discussed below, the trial that followed the Herald of Free Enterprise disaster was subject to the law at the time and was tested by the application of Caldwell² type reckless manslaughter. The House of Lords in Caldwell considered the application of section one of the Criminal Damage Act (1971) and Lord Diplock provided a person is Caldwell type reckless if the risk is obvious and either that the person has not given any thought to the possibility of there being any such risk or that the individual has acknowledged that there is some risk involved but has carried on with his conduct. The House of Lords decision in R. v. Seymour³ and the Privy Council decision in Kong Cheuk Kwan v. R.⁴ suggested that there was a form of involuntary manslaughter based upon Caldwell type recklessness.

The law was, however, re-stated following the House of Lords decision in R. v. Adomako⁵, which is considered the leading judgment in this area. Lord Mackay of Clashfern, the then Lord Chancellor, provided the judgment of the House of Lords. There are four elements that must be proved for the offence to be complete. Firstly, the defendant must owe a duty of care to the victim; secondly, there must be a breach of that duty by the defendant; thirdly, the death of the victim occurred as a result of the breach of that duty; and fourthly, the nature of the breach was so gross that it would substantiate a criminal conviction.

Below will follow a brief analysis of each of the four elements in turn beginning with the defendant owing the victim a duty of care.

² R. v. Caldwell [1982] A.C. 341

³ (1983) 76 Cr. App. Rep. 211

⁴ (1985) 82 Cr. App. Rep. 18

⁵ [1995] 1 A.C. 171 (HL)

2.1.1. A duty of care

It must be established that a duty of care was owed to the victim by the defendant. Lord Mackay in *Adomako* considered the issue of the duty of care and it was decided that it should be given its usual meaning in the (civil) law of negligence⁶. Put simply, a duty is owed from one person to another if it is foreseeable that they may suffer harm as a result of an action or omission. To provide an example, a duty of care is owed by a doctor to his or her patient in their care. The Court of Appeal have dealt with many cases on this area of the law and more recently in 2009 held that the judge, rather than the jury, should make the decision whether a duty existed⁷.

2.1.2. The breach of that duty

It is for the jury to decide whether, as a result of the actions or inactions of the defendant, his conduct resulted in a breach of the duty of care owed to the victim. The standard that is applied is whether the actions of the defendant fell below that expected of a reasonable person. The Court of Appeal has said that this is a question of fact and should be decided on a case-by-case basis⁸.

⁶ *Donoghue v. Stevenson* [1932] A.C. 562. The Court of Appeal in *R. v. Wacker* [2002] EWCA Crim. 1944 also considered this issue and this view was found to still be the case save for one exception, based upon public policy.

⁷ *R. v. Evans (Gemma)* [2009] EWCA 650

⁸ *R. v. Misra and Srivastava* [2004] EWCA Crim 2375

2.1.3. The death of the victim was caused as a result of the breach of the duty

For the third element to be fulfilled, it must be shown that the victim died as a result of the defendant's breach of the duty that was owed. The usual rules of causation apply and this was explained in a straightforward manner by Herring whereby the "simplest way for the jury to consider the question would be to ask: If the defendant had acted reasonably would the victim have been killed?"⁹

2.1.4. The breach was so gross that it would substantiate a criminal conviction

It must be established that the breach of duty by the defendant was sufficiently "gross". It is a question for the jury to consider whether this breach was so serious that it requires a criminal conviction. In *Adomako*, Lord Mackay referred to a statement delivered by Lord Hewart C.J. sitting in the Court of Appeal in 1925 on this point: -

*"... the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others, as to amount to a crime against the State and conduct deserving of punishment"*¹⁰.

The *Adomako* decision left juries with the opportunity to consider all the facets of the case before them and it presented them with a sizeable discretion.

⁹ Herring, J. "Criminal Law – Text, Cases, and Materials" (2010) 4th Edition at p.276

¹⁰ *R. v. Bateman* (1925) 19 Cr. App. Rep. 8 at p.11

Given the law's movement towards gross negligence manslaughter from reckless manslaughter, one question is whether a prosecution for corporate manslaughter would be more or less likely to succeed under either approach? Failed prosecutions have arisen by courts applying each type of manslaughter, undermining any suggestions that one type or another is to blame¹¹.

The following sections of this chapter will consider the application of the offence of manslaughter to corporations and will look at the successful and unsuccessful prosecutions that have occurred. As discussed in the previous chapter, the development of the law in relation to the identification doctrine was disjointed.

2.2. Successful prosecutions for Corporate Manslaughter

As seen in the first chapter, the development and implementation of the identification doctrine was discussed in a number of cases. Notwithstanding these developments, the approach of the House of Lords in the *Tesco* case was the leading judgment and at this point formed the general basis of corporate criminal liability in English law. The narrowness of the *Tesco* approach ultimately, when tested, provided a very high hurdle for prosecutions involving larger corporations to overcome and will be discussed in the next section.

¹¹ The unsuccessful prosecution following the Herald of Free Enterprise disaster (*R. v. P&O European Ferries (Dover) Limited* (1991) 93 Cr. App. R. 72) was under Caldwell type reckless manslaughter and the unsuccessful prosecution following the Southall rail disaster (*R. v. Great Western Trains Company Limited* (30/6/1999) Lawtel 8th November 1999 (unreported elsewhere)) applied principles allied to gross negligence manslaughter.

Conversely unlike prosecutions against large corporations, it has been much easier and a less troublesome task to prosecute smaller companies for manslaughter despite some of the difficulties associated with the identification doctrine as discussed in the first chapter. In essence, as confirmed by Pinto and Evans “[i]n the case of a very small company of the “one-man band” type, there may be no difficulty in proving that there was gross negligence by an individual attributable to the corporation because of his control over it”¹².

Pinto and Evans refer to the statistics that prove that size does matter when it comes to successful prosecutions against companies, namely “[s]ince 1992 there have been some 34 prosecutions for gross negligence manslaughter against corporate defendants but only seven convictions, each which has been in a case involving a very small company”¹³.

The first corporation to be convicted¹⁴ of corporate manslaughter in English legal history was OLL Limited¹⁵. The case is more readily known as the Lyme Bay canoe tragedy, where four teenagers were drowned off Lyme Regis during a canoe trip organised by OLL Limited. During the trial, it was heard that the managing director, Peter Kite and the company had failed to ensure that the group were safe. Peter Kite was found guilty of manslaughter and was sentenced to a three-year custodial sentence and the company was convicted of corporate manslaughter and received a fine of £60,000. Clarkson states “[a]s the trial judge, Ognall J. put it: “Mr Kite and the

¹² Pinto, A. and Evans, M. “Corporate Criminal Liability” (2008) 2nd Edition at p.221

¹³ Ibid. at p.222

¹⁴ R. v. Kite and OLL Limited, Winchester Crown Court 8th December 1994, reported by the Independent 9th December (1994)

¹⁵ OLL Limited’s director, Peter Kite, was also convicted.

company, OLL ... stand or fall together. One for all and all for one”¹⁶. Welham identifies the key feature of the case that distinguishes it from the prosecution of companies such as P and O Ferries and Great Western Trains that “[i]t was a landmark case as it was the first corporate manslaughter conviction under English Law. A crucial aspect to this case was the fact that Kite had personal knowledge of the safety failings”¹⁷.

Following on from the conviction against *OLL Limited*, the second successful conviction for corporate manslaughter occurred in 1996 in the case of *R. v. Jackson Transport (Ossett) Limited*¹⁸. The company was fined £22,000 and its director, Alan Jackson received a 12-month custodial sentence and a fine of £1500. The clear similarity with the *OLL Limited* case is that the company was small and as Ormerod recognises “[t]he smaller the company the more likely the “senior managers” will have had a hand in formulating and implementing the relevant policy on safety, etc; the breach of which lead to the death”¹⁹. In this particular case it was found that the director “was totally indifferent to his statutory duties in that he failed to address the issue of a safe system of work. He also failed to take precautions against inevitable disasters, and that failure to provide a safe system of work, was only the last in a long catalogue of deficiencies”²⁰.

The other five successful prosecutions (*English Bros.* (2001) (unreported), *Dennis Clothier and Sons* (2002), *Telgard Hardwood Limited* (2003) (unreported),

¹⁶ Clarkson, C.M.V. “Kicking Corporate Bodies and Damning their Souls” *MLR* (1996) Vol.59(4) 557-572, at p.561

¹⁷ Welham, M.G. “Tolley’s Corporate Killing – A Manager’s Guide to Legal Compliance” (2002) at p.52

¹⁸ Reported in *Health and Safety at Work*, November (1996) at p.4

¹⁹ Ormerod, D. “*Smith and Hogan Criminal Law*” (2008) 12th Edition at p.536

²⁰ See note 17 at p.58

Nationwide Heating Services (2004) and Keymark Services Limited (2004)²¹) are of a similar nature in that the companies were small and this was one of the main catalysts for reform. Wells acknowledges that “[p]recisely the big corporate names which people may want to blame are those which are most difficult to target under the identification rule (or possibly any other)”²².

2.3. Unsuccessful Prosecutions

In comparison to the successful prosecutions discussed above, the narrowness of the *Tesco* decision with its “tight pyramidal view of decision making”²³ provided significant and insurmountable difficulties when applied to a large corporate structure.

During the consideration of the various disasters and failed prosecutions, on a number of occasions the CPS decided not to prosecute on the basis of there being insufficient evidence. The CPS does make press releases, but they do not explain the specific rationale behind the decision and therefore it is impossible to know exactly why there was insufficient evidence to proceed. The nature of the insufficient evidence will have been discussed between the investigating authority, such as the police, and the prosecuting authority, such as the CPS, in confidential circumstances. Unfortunately, this information is not readily accessible and unsatisfactorily leaves a sizeable lacuna in the understanding of why the prosecutions were not pursued fully.

²¹ See www.corporateaccountability.org/manslaughter/cases/convictions.htm (last accessed 19th November 2011)

²² Wells, C. “Corporations and Criminal Responsibility” (2001) 2nd Edition at p.115

²³ *Ibid.* at p.101

Below will follow a chronological consideration of a number of high profile disasters that have either been the subject of a prosecution or an investigation of some kind has occurred.

2.3.1. Herald of Free Enterprise (1987)

On 6th March 1987, the roll-on, roll-off ferry, “Herald of Free Enterprise” set sail for Dover from the Belgian port of Zeebrugge. Tragically, the vessel set sail with its bow doors open and was trimmed with its bow down. Seawater flooded into the vehicle deck, causing the ferry to capsize very quickly. It was saved from sinking completely only by the fact that the port side of the vessel had rested on the bottom in shallow water. As a result, 188 passengers and crew lost their lives, with many others suffering injuries.

A Department of Transport formal investigation (“the Sheen Inquiry²⁴), found that: -

“There appears to have been a lack of thought about the way in which the Herald ought to have been organised for the Dover/ Zeebrugge run. All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness”.

²⁴ M V Herald of Free Enterprise, Report of Court No. 8074, 29th July 1987, Department of Transport, Paragraph 14.1

The Sheen Inquiry was strongly critical of the practices implemented by Townsend Car Ferries, who were operating the vessel.

The relevant legal issues that were presented by this disaster were examined in two cases. The first came as a result of a judicial review that sought to challenge the findings at the H.M. Coroner's Inquest "that a company could not be indicted for manslaughter and that the acts or omissions of the company personnel could not be aggregated so as to render the company liable"²⁵.

As Wells states, "[t]he Coroner had told the inquest jury that they could not return verdicts of unlawful killing, an instruction which he based on two reasons. He concluded that there was no arguable case of manslaughter against any of the named individuals, and that a company cannot in law be indicted for manslaughter"²⁶. Bingham L.J., sitting in the Divisional Court, refusing the applications did state that there "was no reason why a charge of reckless manslaughter could not be established against a corporation under appropriate circumstances, it (*the court*) does not need to decide on the question since the factual issues have not been determined"²⁷. Pinto and Evans explain that the Divisional Court "concluded that a company could be convicted of the common law offence of manslaughter, the basis of such liability being the doctrine of identification: "the mens rea and actus reus of manslaughter should be established not against those who acted for or in the name of the company

²⁵ R. v. H.M. Coroner for East Kent, Ex parte Spooner and others (1989) 88 Cr. App. R. 10 (Queen's Bench Division)

²⁶ See note 22 (Wells) at p.108

²⁷ Png, C.A. "Corporate Liability – A Study in Principles of Attribution" (2001) at p. 64

but against those who were to be identified as the embodiment of the company itself”²⁸

However the Divisional Court did concur with the Coroner but not his complete analysis, in “the Coroner’s dismissal of aggregation as a possible route to corporate manslaughter”²⁹. Bingham L.J. stated that: -

“I do not think the aggregation argument assists the applicants. Whether the defendant is a corporation or a personal defendant, the ingredients of manslaughter must be established by proving the necessary mens rea and actus reus of manslaughter against it or him by evidence properly to be relied on against it or him. A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such”³⁰.

However, following the resumption of the inquest, the jury decided to ignore the directions from H.M. Coroner for East Kent, who stated there was no basis for a verdict of corporate manslaughter, and verdicts of unlawful death were returned. Following threats of a private prosecution and thanks in part to the decision of the Inquest Jury to return verdicts of unlawful killing, albeit as Wells identifies “their verdicts can be seen as technically “perverse”³¹, a prosecution was commenced. Three years after the Zeebrugge tragedy, the proceedings were brought against P and O, who had taken over Townsend Car Ferries, and also seven employees³².

²⁸ See note 12 (Pinto et al) at p.220

²⁹ See note 22 (Wells) at p.108

³⁰ See note 25

³¹ See note 22 (Wells) at p.108

³² R. v. P&O European Ferries (Dover) Limited (1991) 93 Cr. App. R. 72 (Central Criminal Court)

At a preliminary hearing, Turner J. “was asked to rule on the question whether English law recognised the offence of corporate manslaughter ... [a]fter argument he ruled that an indictment could properly lie against the company”³³.

*“Suffice it that where a corporation, through the controlling mind of one of its agents, does an act which fulfils the prerequisites of the crime of manslaughter, it is properly indictable for the crime of manslaughter”*³⁴

Turner J. relied upon three cases, namely *D.P.P. v. Kent and Sussex Contractors*³⁵, *I.C.R. Haulage Ltd*³⁶ and *Moore v. Bresler*³⁷ that established the criminal liability of corporations (see Chapter One). This case was heard post-*Tesco* but pre-*Meridian* and therefore it applied the restrictive conception of identification from *Tesco*.

However, at the conclusion of the prosecution case, following a half time submission made by the defendant company and its directors that there was insufficient evidence to proceed, Turner J. directed their acquittal. The case was then dropped against the individuals also on the Indictment.

“The reason for directing an acquittal against P&O and the senior managers was that it could not be proved that the risks of open-door sailing were obvious to any of them. The collapse of this prosecution is not surprising. There was no one individual,

³³ Harrison, R. “Central Criminal Court – P & O European Ferries (Dover) Ltd” *Journal of Criminal Law* (1992) Vol. 56 at p.201

³⁴ See note 32

³⁵ [1944] 1 K.B. 146

³⁶ [1944] 1 K.B. 551

³⁷ [1944] 2 All E.R. 515

*sufficiently high in the hierarchy of P&O, who could be said to have committed the actus reus and mens rea of manslaughter*³⁸.

This decision must have been hard for the bereaved families to accept, particularly given the Sheen Inquiry's damning view of the company in that "[f]rom top to bottom the body corporate was infected with the disease of sloppiness"³⁹.

2.3.2. Kings Cross Fire (1987)

The Kings Cross Underground Station inferno in November 1987 resulted in 31 people being killed. Following the inquiry, chaired by Desmond Fennell Q.C., it was believed that the fire was started by a discarded match on the wooden escalators where there was dirt and grease. No police investigation took place and therefore the DPP did not instigate any criminal proceedings. Significant criticism followed this decision.

2.3.3. Piper Alpha Oil Platform Disaster (1988)

The Piper Alpha Oil Platform disaster in 1988 claimed 167 lives. A Public Enquiry was chaired by Lord Cullen and the conclusions it reached, directed serious criticisms towards Occidental, the company that operated the oil platform, in essence holding it

³⁸ Clarkson, C.M.V., Keating, H.M. and Cunningham, S.R. "Clarkson and Keating Criminal Law: Texts and Materials" (2007) 6th Edition at p.251.

³⁹ See note 24

responsible for the deaths. However, the Lord Advocate decided there was insufficient evidence on which to base a successful prosecution for culpable homicide (under Scottish law), despite the criticisms identified by Lord Cullen. The specific reasoning behind the Lord Advocate's decision not to prosecute was not published and is therefore not available for analysis or further comment.

2.3.4. Clapham Rail Disaster (1988)

The Clapham Rail disaster in 1988, resulted from a collision involving three trains after a problem with signalling. Anthony Hidden Q.C. chaired a public inquiry and this report was critical of British Rail and was passed to the DPP, who: -

“took Counsel’s advice as to whether to bring manslaughter charges against British Rail and the 11 technicians. In May 1990 he (D.P.P.) announced that there was no evidence on which to bring a charge of corporate manslaughter against British Rail and “insufficient evidence” to justify manslaughter or other criminal charges against any employee. In September 1990 the jury at the inquest returned verdicts of unlawful killing in respect of all 35 victims. In spite of these findings, the DPP said that he would not reconsider bringing criminal prosecutions without fresh evidence⁴⁰”.

British Rail were, in fact, convicted for Health and Safety offences, but not for manslaughter, despite 35 people being killed. Despite this accident occurring after the Herald of Free Enterprise disaster, the decision not to prosecute for corporate

⁴⁰ Gault, I.M. and McGrane, R.J. “Corporate Manslaughter in major disasters” International Company and Commercial Law Review (1991) Vol. 2(5) 166-171 at pp.170-171

manslaughter was made before the trial in relation to the Herald of Free Enterprise. If a prosecution for corporate manslaughter had occurred, it would again have been tested against Caldwell type reckless manslaughter. Given that the trial judge in the Herald of Free Enterprise case stated that an indictment could properly lie against a company for this offence, perhaps the DPP was incorrect not to pursue this matter against British Rail, although this point is raised with the benefit of hindsight.

2.3.5. Marchioness Disaster (1989)

The Marchioness Disaster in 1989 concerned a Thames Pleasure Cruiser, the Marchioness, colliding with a dredging vessel, the Bowbelle. The Marchioness subsequently sank with the loss of 51 lives. The collision occurred as a result of a negligent look-out system on both the Marchioness and the Bowbelle. Christian describes the court proceedings: -

“The private prosecution for corporate manslaughter over the Marchioness disaster was halted at the committal proceedings at Bow Street Magistrates’ Court by the Chief Metropolitan Stipendiary Magistrate in 1994, on the grounds that he could not conclusively be satisfied on the evidence available that the collision was not caused by the Marchioness changing course at the last minute”⁴¹.

An Inquest was held and the jury returned verdicts of unlawful killing, yet the CPS decided not to prosecute, due to insufficient evidence. The CPS considered the

⁴¹ Christian, L. “Rail crash litigation – Southall and Ladbrooke Grove” Journal of Personal Injury Law (2001) Vol. 4 339-355 at p.345

evidence that had been presented to the Inquest and sought advice from Counsel. The CPS provided an official statement to the following effect: -

“Senior CPS lawyers have decided that there is insufficient evidence to institute any further criminal proceedings in connection with the sinking of the Marchioness.

The CPS conducted a thorough review of all the evidence including that presented to an inquest jury which brought back an unlawful killing verdict in April 1995.

The decision was made by the CPS following written advice from senior Treasury counsel and an independent marine expert. Representatives of the families of the victims and the survivors have been informed of the decision”⁴².

The solicitor acting for the victim’s families, Louise Christian, was quoted in the Independent newspaper: -

“This decision is immensely disappointing to the families but it is no surprise after nearly seven years of bungling by the CPS. The families did not learn all the facts about what happened until the inquest last year, because until then there had been no public inquiry and no inquest. The CPS, however, had access to all the evidence at the outset and the verdict of the inquest jury means that a successful prosecution for manslaughter could have been brought”⁴³.

⁴² Editorial, “Marchioness disaster prosecutions ruled out” The Independent 27th July (1996)

⁴³ Ibid.

2.3.6. Southall Rail Disaster (1997)

The disaster occurred at Southall, London when a Great Western Train (GWT) driver did not respond to two warning signs and therefore when the train went through a red light there was not enough distance for the high-speed train to stop before a collision with a freight train happened. It transpired that the driver of the high-speed train was not concentrating and was in the process of packing his bag before the train arrived at Paddington Station. As a result of the crash, seven passengers were killed.

Initially the driver was charged with gross negligence manslaughter. Then as a result of failings at the hands of the operator, GWT, due to not repairing the Automatic Warning System that would have provided an audible and visual caution to the driver, it was charged with corporate manslaughter. Yet again, as has been seen above with previous prosecutions, no specific individual was identified within GWT as being the “directing mind and will” of the corporation.

The trial was heard at the Central Criminal Court and Scott Baker J initially had to rule upon a preliminary matter⁴⁴. The key issue was whether the company, instead of an individual, could be criminally liable for the manslaughter. The Judge ruled that the offence of manslaughter and its requisite component parts had to be found against an individual before the company itself could be convicted. Yet again the aggregation doctrine was rejected and the identification was found to be the relevant test. Similarly with the *Herald of Free Enterprise* case, it was found to be highly difficult if not impossible, to successfully prosecute a sizeable company that centres on a system

⁴⁴ R. v. Great Western Trains Company Limited (30/6/1999) Lawtel 8th November 1999 (unreported elsewhere)

failure. Therefore, the corporate manslaughter matter did not proceed and GWT pleaded guilty to breaches of Health and Safety law and a fine of £1.5 million was imposed⁴⁵. According to the Lawtel report of the judgment the fine “reflected the risk created by the degree of its failure to reach the highest standard of care, the extent of the disaster in terms of the numbers killed and injured and the need to remind those who run substantial transport undertakings that their eternal vigilance, to prevent accidents of this nature, was required”⁴⁶. However, as Slapper and Bingham both recognise the true economic impact of fines of this level: -

“The passenger train was one of those operated by GWT, a company with an annual turnover of £300 million at the relevant time”⁴⁷; and “... fines are invariably a small proportion of profit”⁴⁸.

It is therefore questionable whether convictions for Health and Safety offences provided a realistic alternative to a conviction for corporate manslaughter as the law stood prior to the passage of the *CMCHA*. To be sure, fines of this magnitude certainly claim newspaper column inches and television news coverage. However, as Slapper and Bingham show, fines can be inconsequential to large companies.

As a result of this decision, the Attorney-General under Section 36 of the Criminal Justice Act (1972), on 8th December 1999, referred the following two points of law to the Court of Appeal for its opinion⁴⁹: -

⁴⁵ R. v. Great Western Trains Company Limited (27/7/1999) Lawtel 13th August 1999 (unreported elsewhere)

⁴⁶ Ibid.

⁴⁷ Slapper, G. “Corporate homicide and legal chaos” New Law Journal (1999) 9th July at p. 1031

⁴⁸ Bingham, T. “Vengeance is mine” Building (2001) March Issue No. 9 at p.62

⁴⁹ Attorney-General’s Reference (No. 2 of 1999) (2000) 3 WLR 195

1. Can a defendant be properly convicted of manslaughter by gross negligence in the absence of evidence as to that defendant's state of mind?

2. Can a non-human defendant be convicted of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual for the same crime?

Counsel for the Attorney-General, Mr Richard Lissack Q.C., suggested that under the law larger companies were much less likely to be successfully convicted of corporate manslaughter than a small company and: -

*“Furthermore, it was unnecessary and inappropriate to enquire whether there is an employee in the company who is guilty of the manslaughter who could be said to be acting as the embodiment of the company”*⁵⁰.

Mr Lissack Q.C. contended that the identification doctrine should not be applied, despite it being the existing and approved basis for “establishing corporate criminal liability for crimes requiring proof of mens rea”⁵¹ as per *Tesco Supermarkets Limited v. Natrass*⁵² and that “liability should be based on the theory that the corporate body was personally liable”⁵³.

The Court of Appeal were directed to the Privy Council decision of *Meridian Global Funds Management Asia Ltd v. Securities Commission*⁵⁴ wherein the “identification

⁵⁰ Wenham, D. “Recent Cases – Commentary – Recent Developments in Corporate Homicide” *Industrial Law Journal* (2000) Vol. 29(4) 378-385 at p.380

⁵¹ *Ibid.*

⁵² See note 1

⁵³ See note 50 at p.380

⁵⁴ [1995] 2 A.C. 500 (PC(NZ)); see Chapter One

principle was extended to include persons other than at director level whose actions were treated as those of the company”⁵⁵.

However, the Court of Appeal dismissed the contention of Counsel for the Attorney General that the decision in *Meridian* suggested a move from the identification doctrine. The Court of Appeal were of the view that the cases, as discussed in the later part of Chapter One, did not illustrate an abandonment of the identification doctrine. The Court of Appeal when considering previous authorities including *Meridian* confirmed “the concept of directing mind and will had no application when construing the statute. But it was not suggested or implied that the concept of identification is dead or moribund in relation to common law offences”⁵⁶. Additionally the Court reiterated this point and stated “[i]t therefore seems safe to conclude that Lord Hoffmann (and, similarly, the members of the Court of Appeal (Criminal Division) ... did not think that the common law principles as to the need for identification have changed”⁵⁷.

The Court stated that Lord Hoffmann’s speech in *Meridian* “proceeded on the basis that the primary “directing mind and will” rule still applies although it is not determinative in all cases. In other words, he (Lord Hoffmann) was not departing from the identification theory but reaffirming its existence”⁵⁸.

With regard to the two questions referred to the Court of Appeal, Lord Justice Rose, sitting with Potts and Curtis JJ., handed down the opinion of the Court. The Court of Appeal answered the first question affirmatively: -

⁵⁵ See note 50 at p.380

⁵⁶ See note 49 at pp.213-214

⁵⁷ Ibid. at p.214

⁵⁸ Ibid.

“that evidence of a defendant’s state of mind was not a prerequisite to a conviction for manslaughter by gross negligence, although there might be cases where his state of mind was relevant to the jury’s assessment of grossness and criminality of his conduct, so that a defendant who was reckless might well be the more readily found to be grossly negligent to a criminal degree”⁵⁹.

With regard to the second question referred to the Court of Appeal responded negatively: -

“unless an identified individual’s conduct, characterisable as gross criminal negligence, could be attributed to the corporation, the corporation was not in the present state of the common law liable for manslaughter”⁶⁰

In essence, the Court of Appeal held that “the identification principle remains the only basis in common law for corporate liability for gross negligence manslaughter”⁶¹.

As will be discussed below, the Court of Appeal was criticised for missing an opportunity to modify the law and move away from the narrowness of *Tesco*. If the Court of Appeal had decided to broaden the principle, then perhaps a successful prosecution against a larger company could have occurred.

This Court of Appeal decision occurred post *Adomako*⁶² and therefore there was no requirement to prove mens rea in the crime of manslaughter by gross negligence.

This decision of the Court of Appeal was heavily criticised by commentators: -

⁵⁹ Ibid. at p.196

⁶⁰ Ibid.

⁶¹ Ibid. at p.214

⁶² See note 5

“The Court of Appeal had the opportunity to restate the law relating to corporate liability for manslaughter”⁶³.

“There is a serious gap in the law of crime, which the Court of Appeal failed to fill, so there must be legislation. The question is when, if ever, will this be enacted?”⁶⁴

Wells confirmed that the above decision: -

“... did indeed clarify the law but only to tell us that the narrow identification doctrine of Tesco v. Natrass still applied”⁶⁵.

Therefore, when considering this Court of Appeal decision in light of the consideration of the development of corporate criminal liability discussed in the first chapter, illustrating that the House of Lords’ view in *Tesco* is still good law, despite its limitations as a result of its tight, narrow pyramidal perspective of companies and company structures.

“Tesco v. Natrass relies on an outdated and shallow theory of organisational behaviour in assuming that only directors make decisions. It also fails to see companies as an organic whole or to capture the “corporateness” of their conduct. Given that Tesco v. Natrass was 30 years old, had no direct bearing on manslaughter, and had been diluted by a number of decisions since, and given the development of theories in relation to corporate attribution in the ensuing period, this was a disappointingly blinkered decision”⁶⁶.

Clarkson, Keating and Cunningham also held an unfavourable view of this decision: -

⁶³ Parsons, S. “The Doctrine of Identification, Causation and Corporate Liability for Manslaughter” *Journal of Criminal Law* (2003) Vol. 67 69-81 at p.75

⁶⁴ *Ibid.* at p.81

⁶⁵ See note 22 (Wells) at p.112

⁶⁶ *Ibid.* at p.114

“From this, it follows that, for manslaughter at least, a company can only be liable if a person representing the controlling mind of the company actually commits the offence. This is intolerably narrow. Managing Directors do not drive trains and it would be extraordinarily difficult, if not impossible, to establish that their gross negligence in the boardroom caused the death of workers or members of the public.

Even if the more flexible Meridian approach were adopted, there would still be immense problems with the identification doctrine. It still requires an individual to be identified within the company whose acts and knowledge can be attributed to the company ... the company’s structures may be so complex and impenetrable, with decision-making buried at many different departmental levels, that it becomes impossible to pin-point any individual with responsibility for a particular area of activity”⁶⁷.

2.3.7. Paddington Train Crash (Ladbroke Grove) (1999)

The Paddington Train Crash occurred as a result of the driver of a Thames Train’s negligence, in that he went through a warning signal at Ladbroke Grove, near to Paddington Station. As a result, the Thames Train collided with a First Great Western Express Train, and 31 died. Subsequently, the CPS announced “that there is insufficient evidence to provide a realistic prospect of conviction of any individual for

⁶⁷ See note 38 (Clarkson et al) at p.241

any offences in relation to the fatal train crash at Ladbroke Grove, London, on 5 October 1999”⁶⁸.

This press release was issued in December 2005, post the decision from the Hatfield trial as discussed below and the CPS therefore elaborated on the reasons for its decision: -

“Having studied the judge’s ruling carefully, the CPS is satisfied that Mr Justice Mackay’s approach would be followed by any judge trying a case of manslaughter arising out of the Ladbroke Grove crash ... Following the Hatfield ruling Counsel provided further written advice to the CPS in September 2005, revising their earlier conclusions as to the prospects of conviction, acknowledging the effect of the trial judge’s ruling in the Hatfield case and to the verdicts of the jury at the conclusion of the trial. The CPS accepts and agrees with Counsel’s advice”⁶⁹.

Similar to the Southall disaster, Health and Safety convictions were successful against Thames Trains, and a fine of £2 million was imposed in April 2004. The Health and Safety Executive released a press statement and referred to the comments made, at the one day sentencing hearing at the Old Bailey, by Steve Walker, Assistant Chief Inspector of Railways: -

⁶⁸ Crown Prosecution Service “Press Release – CPS decision in Ladbroke Grove collision” (2005) 6th December www.cps.gov.uk/news/press_releases/166_05/ (last accessed 17th March 2010)

⁶⁹ Ibid.

“HSE’s investigation into the causes of the collision revealed what Thames Trains itself described as “serious omissions” in its driver training programme”⁷⁰.

The comments that were previously referred to above by Slapper and Bingham can be echoed at this point in that this level of fine is only a minor inconvenience to a large company. The fines imposed have no real punitive effect upon the company and its officers as it is the shareholders that are affected, if a listed company. Therefore, these fines do not hold any sway as a deterrent either in real terms.

2.3.8. Hatfield Rail Disaster (2000)

In 2000, a Great North Eastern Railway express from London to Leeds was derailed as a result of a broken rail near Hatfield in Hertfordshire and four people died. Balfour Beatty and Network Rail, the successor to Railtrack, were charged with corporate manslaughter along with a number of employees who were also charged with manslaughter. Verkaik confirmed that “[t]he charges are the first to be brought against senior employees arising out of the deaths of railway passengers and represent the biggest corporate manslaughter prosecution of its kind”⁷¹. However, before the trial commenced, the charges of corporate manslaughter against Network Rail were dismissed. At the conclusion of the prosecution case on 14th July 2005, Mr Justice

⁷⁰ Health and Safety Executive “Ladbroke Grove rail collision: sentencing of Thames Trains – Statement by the Health and Safety Executive” Press Release E045:04 5th April (2004) www.hse.gov.uk/press/2004/e04045.htm (last accessed 14th May 2010)

⁷¹ Verkaik, R. “Six rail bosses charged with manslaughter over Hatfield” Independent (2003) 10th July www.independent.co.uk (last accessed 17th March 2010)

Mackay directed the jury to find Balfour Beatty and the individuals not guilty of manslaughter. Clement stated that “[h]is decision highlighted the difficulty of securing convictions against companies for corporate manslaughter under present legislation. Fresh calls have been made for an urgent change in the law”⁷².

The CPS issued a press release⁷³, where the then Director of Public Prosecutions, Ken Macdonald Q.C. said: -

“We would be failing in our duty to the public if we ignored evidence that in our view showed a case should properly go before a judge and jury...

I stand by the decision to prosecute for manslaughter and breaches of health and safety law. We felt there was sufficient evidence in this case and the seriousness of what was alleged meant the public interest demanded a prosecution...

However, the judge’s ruling on manslaughter demonstrates again the very real difficulties the Crown has in securing convictions against corporate businesses or individuals”⁷⁴.

However, Health and Safety convictions in relation to this disaster resulted in a £10 million fine for Balfour Beatty and a fine of £3.5 million for Network Rail. It is at this point worthwhile to consider again the views raised by Slapper and Bingham in light of the level of fines imposed against these companies, given their corporate size. It is questionable whether the level of fine is commensurate with the level of offending

⁷² Clement, B. “Balfour Beatty fined £10M for Hatfield disaster” Independent (2005) 8th October www.independent.co.uk (last accessed 25th March 2010)

⁷³ Crown Prosecution Service, “Press Release – CPS was right to prosecute over Hatfield train crash, says DPP” (2005) 6th September www.cps.gov.uk/news/press_releases/144_05/ (last accessed 17th March 2010)

⁷⁴ Ibid.

and also whether it will have any real punitive effect. According to Hencke and Milner, “Balfour Beatty’s culpability for the crash was described by Mr Justice Mackay as “one of the worst examples of sustained industrial negligence”⁷⁵. Balfour Beatty duly appealed to the Court of Appeal⁷⁶ as they contended the level of fine was manifestly excessive. As part of their grounds of appeal, Balfour Beatty quoted Mr Justice Mackey as above and furthermore stated that their fine was significantly higher than that applied to Network Rail/ Railtrack. The Court of Appeal were unimpressed by part of the grounds of appeal, although the Lord Chief Justice of England and Wales, Lord Phillips when providing the judgment did state that “[t]he fine of £10 million on Balfour Beatty was severe”⁷⁷. The original fine of £10 million was quashed and an alternative fine was imposed of £7.5 million.

2.3.9. Potters Bar Rail Disaster (2002)

Shortly after the Hatfield disaster, in 2002, a London to King’s Lynn service was derailed due a faulty set of points at Potters Bar and seven people died. The CPS decided in 2005 that: -

“After giving careful consideration to the large volume of evidence provided, the CPS has advised that it does not provide a realistic prospect of conviction for an offence of gross negligence manslaughter against any individual or corporation ...

⁷⁵ Hencke, D. and Milner, M. “Hatfield victims and unions call for new corporate killing law” Guardian (2005) 8th October www.guardian.co.uk (last accessed 25th March 2010)

⁷⁶ R. v. Balfour Beatty Rail Infrastructure Services Ltd [2006] EWCA Crim 1586

⁷⁷ Ibid. at para 48.

... No individual was identified as having committed that breach of care, in the first instance because it was impossible to pinpoint when the faults occurred which caused the points failure. Without an individual being identified, no prosecution could proceed against a corporation”⁷⁸.

Yet again as no specific individual could be identified as having responsibility there was no realistic prospect of convictions against the company for manslaughter, thus illustrating again the core difficulty with the identification doctrine.

The Health and Safety Executive’s Director of Rail Safety, Allan Sefton in 2005 confirmed “that a decision on whether to prosecute for health and safety offences in relation to the Potters Bar train derailment will be taken after a Coroner’s Inquest is held”⁷⁹.

The accident occurred in 2002, yet it took 8 years until the conclusion of the Inquest. The Coroner, Judge Michael Findlay Baker Q.C. stated: -

“Whatever the causes, the passage of eight years from the derailment to the conclusion of the hearing of the inquest is indefensible”⁸⁰.

Given the nature of the complexity and size of this inquest and the number of interested persons it is understandable that there would be some delay, but inquests are usually heard more quickly than after an eight year hiatus, meaning that a number

⁷⁸ Crown Prosecution Service “Press Release – CPS Statement: Potters Bar rail crash” (2005) 17th October www.cps.gov.uk/news/press_releases/151_05/ (last accessed 17th March 2010)

⁷⁹ Health and Safety Executive “HSE prosecution decision on Potters Bar train derailment” Press Release E132:05 17th October (2005) www.hse.gov.uk/press/2005/e05132.htm (last accessed 14th May 2010)

⁸⁰ Railnews.co.uk “Criminal probe may restart after Potters Bar verdict” Railnews (2010) 30th July <http://www.railnews.co.uk/news/general/2010/07/30-criminal-probe-may-restart-after.html> (last accessed 6th August 2010)

of the safety issues that were integral to the disaster were potentially unaddressed for a long period of time.

The Coroner confirmed that a “Rule 43” letter would be sent to the relevant parties to address the issues raised during the inquest⁸¹. In essence, the purpose of a Rule 43 letter/ report is to advise the relevant parties and to hopefully prevent similar deaths occurring in the future.

The Inquest lasted for seven weeks and the jury: -

“said the points were in an unsafe condition and there had been failures to inspect or maintain them”⁸².

According to various articles⁸³, the Office of Rail Regulation, the CPS and the Health and Safety Executive would be “re-examining whether criminal charges could be brought in light of evidence at the hearing ... Neither manslaughter nor health and safety charges have been ruled out”⁸⁴.

On 10th November 2010, the Office of Rail Regulation (ORR) stated that it had commenced proceedings against Network Rail Infrastructure Limited and Jarvis Rail Limited under the Health and Safety at Work Act 1974. However, the ORR had

⁸¹ Rule 43 Coroners Rules 1984/552 (as amended by The Coroner (Amendment) Rules 2008/1652)

⁸² BBC Online “Potters Bar Inquest jury blames crash on points failure” BBC News UK (2010) 30th July <http://www.bbc.co.uk/news/uk-10772410?print=true> (last accessed 1st August 2010)

⁸³ Bingham, J. “Potters Bar inquest judge warns rail passengers still at “risk”” Telegraph (2010) 31st July <http://www.telegraph.co.uk/news/uknews/road-and-rail-transport/7919194/Potters-Bar-inquest-judge-warns-rail-passengers-still-at-risk.html> (last accessed 1st August 2010) and Meikle, J. “Potters Bar crash investigation reopens as inquest blames unsafe points” Guardian.co.uk (2010) 30th July <http://www.guardian.co.uk/uk/2010/jul/30/potters-bar-crash-unsafe-points/print> (last accessed 1st August 2010)

⁸⁴ Bingham Ibid.

received notification from the CPS that they had found no grounds to reconsider their decision from October 2005. The ORR had considered the decision of the recent inquest and found that this opened up the opportunity for breaches of Health and Safety to be brought against the offending companies. Network Rail were prosecuted as the successors to Railtrack and Jarvis Rail Limited, despite being insolvent, were prosecuted as they had the responsibility to maintain the track at the station.

The first appearance occurred in January 2011 before Watford Magistrates' Court. Network Rail indicated that it would plead guilty to health and safety failings. In light of the intended plea by Network Rail, on 18th March 2011, the ORR decided that it would not continue to prosecute Jarvis despite there being sufficient evidence to do so, but the prosecution was no longer in the public interest. A significant consideration for the ORR would be the cost of the proceedings and as it had a guilty plea from one defendant, it would be sufficient rather than a lengthy and costly trial against Jarvis standing alone.

Network Rail was sentenced on 13th May 2011 before St. Albans Crown Court following a guilty plea to s.3(1) Health and Safety at Work Act (1974) and received a £3 million fine and were ordered to pay costs of £150,000. In light of the decision, Ian Prosser, Director of Rail Safety at ORR stated: -

“Today marks the end of a long process in which we have sought to gain a sense of justice for the families of the victims of the Potters Bar derailment”⁸⁵.

⁸⁵ Office of Rail Regulation “Network Rail fined £3m over Potters Bar derailment” Press Notice ORR/08/11 (2011) 13th May <http://www.rail-reg.gov.uk/server/show/ConWebDoc.10395> (last accessed 7th August 2011)

It was indeed a long process, taking almost nine years from the date of the accident to the conclusion of the health and safety prosecution. Despite the level of the fine, the General Secretary of the National Union of Rail, Maritime and Transport Workers, Bob Crow said that the directors of Railtrack and Jarvis should have been held personally responsible and he added that “[i]nstead of coming out of the pockets of those actually responsible, this £3m fine will come out of precious, public NR (*Network Rail*) funds that could and should have been invested in improving and maintaining safety on our railways”⁸⁶. This can be seen as an example where a fine is imposed by the court as a punitive sanction, but sadly it will be re-paid using public money, rather than it being used to develop a safer railway.

2.3.10. Legionnaire’s disease outbreak – Barrow in Furness (2002)

An outbreak of Legionnaire’s disease occurred in Barrow in Furness in Cumbria in 2002 and seven people died as a result. The outbreak was traced to a poorly maintained air conditioning unit within an arts centre controlled by the local council. This set of circumstances is different to the others considered within this section, as it involves a Council rather than a corporation, but still requires limited attention.

The Council’s senior architect and head of the Design Services Group, Gillian Beckingham of Barrow in Furness Council was prosecuted along with the Council and faced seven charges of manslaughter as the prosecution contended she was the

⁸⁶ Haigh, P. “Network Rail handed £3m fine for Potters Bar crash” Rail (2011) Issue 671, June 1 - June 14 at p.23

Council's directing mind. The main thrust of the prosecution's case was that Beckingham had an integral involvement in the cancelling of the contract of maintenance and that the new contract did not provide for the monitoring of water treatment.

Despite the Crown's contention, the trial judge in 2005 decided that Beckingham was not a directing mind of the Council, given her position within the Council. Therefore, the Council were cleared of corporate manslaughter but pleaded guilty to breaches of Health and Safety legislation and were fined £125,000 with £90,000 costs. The irony in this case with regard to the fine, is that as a Council, the fine itself would in turn be paid by the local council tax payers that lived in and around the Barrow area that may have been affected by the tragedy.

However, the jury in relation to Beckingham were unable to reach a verdict and she faced a re-trial at Preston Crown Court in 2006. At the re-trial, facing manslaughter charges as an individual, she was acquitted of the seven manslaughter charges but was convicted of a Health and Safety offence and fined £15,000.

Unfortunately, no closer examination of the Judge's reasoning is possible as the case was not reported as Crown Court trials are not formally reported in law reports.

Matthews summarises the situation left as a result of the lack of successful prosecutions against large companies as follows: -

“In each prosecution that was brought, what proved insurmountable was the common law doctrine of identification. This required the prosecution to prove that the act or omission causing the death was the act or omission in breach of a duty of care owed by an individual who was the embodiment of the corporation.

Government, the unions and practitioners had each observed that the law needed reform. Industry, too, acknowledged that the common law offence provided no certainty in respect of liability”⁸⁷.

The position was assessed perfectly by Wells: -

“We do not imagine that we are transacting with the managing director of Marks and Spencer when we shop there, nor that when a plane takes off the airline’s board of directors has specific knowledge of its activities, route or condition that day. We do however expect that large companies operate according to a set of rules and procedures and that these, particularly in relation to public transport systems, have addressed the potential risks and developed safety procedures to ensure that those risks are minimised. And if they haven’t we look for solace in the criminal law”⁸⁸.

2.4. Conclusion

This chapter has considered the difficulties and limitations of the identification doctrine when applied to companies in relation to corporate manslaughter. In light of the first chapter, that plotted the development of corporate criminal liability and the disjointed nature of that development.

⁸⁷ Matthews, R. “Blackstones’ Guide to the Corporate Manslaughter and Corporate Homicide Act 2007” (2008) at p.9

⁸⁸ Wells, C. “The Millennium Bug and Corporate Criminal Liability” Journal of Information, Law and Technology (1999) (2) www.law.warwick.ac.uk/jilt/99-2/wells.html (last accessed 10th June 2010)

It could be said that a consequence of the uneven and disjointed development of the law which resulted in the tight and narrow *Tesco* approach being applied by the judiciary, has created difficulties when trying to identify the requisite “directing mind and will” in large and complex corporate organisations. It is arguable that this has highlighted the deficiencies within the “directing mind and will” doctrine.

This chapter has shown, when applied to a small company, the identification of the directing mind can be relatively straight-forward, such as in the *OLL* case whereby the managing director was explicitly involved in the day to day running of the company and had full knowledge of its activities. Therefore, identifying the directing mind and will of that particular company did not present significant difficulty.

This can be contrasted with the difficulties in relation to bigger companies, whereby identifying the directing mind opens up a plethora of corporate layers and decision making. The Court of Appeal had the opportunity to consider this and provide real guidance, yet as discussed above decided to ally the law along the *Tesco* approach with its much maligned narrow approach.

As discussed previously, Managing Directors do not drive trains; they make decisions in boardrooms but are still involved in the running of the company. Yet there are many levels of corporate hierarchy between them and those who perform the duties of the company. This is where the doctrine finds itself in difficulty and it becomes very difficult to identify the relevant person within the company who has the requisite knowledge. This problem has also been encountered in other jurisdictions, particularly within Canadian law and this will be considered in a later chapter.

The identification doctrine when tested against a large corporate structure has proved to be ineffective theory. It does not take into account the various levels of

management that a large corporate structure may have. It is arguable for this reason that larger corporations may have been the doctrine's only proponent.

Following, on from these disasters, in 2003 the Government confirmed they would publish a bill in relation to the creation of the offence of corporate killing. The consideration and analysis of the reforms proposed by both the Law Commission, Members of Parliament and by the Government will be considered in the next chapter.

Chapter Three - The road to reform

This chapter will consider the process of law reform that commenced in the early part of the 1990's. This process continued throughout the remainder of that decade into the new century. The principal catalyst for reform was the difficulties that were experienced during the cases involving larger companies discussed in the previous chapter, specifically following the *Herald of Free Enterprise* disaster.

These difficulties were considered by the Law Commission (*hereafter* LC) within their 1996 report¹. Following on from this report a number of Government proposals and Bills attempted to solve these difficulties and will be considered in a chronological order in this chapter.

The first substantive section of this chapter will consider the LC consultation paper that was issued in 1994 and subsequent report that was released in 1996. The report proposed a new offence of "Corporate Killing" that could only be committed by a company, with an alternative test based upon "management failure".

The recommendations of the LC will be considered and compared, in the second substantive section, with the Government proposals and Bills. The process of Law Reform was considered by the Home Office in 2000² (*hereafter* HO 2000) and its proposals are considered in the second section. In addition, the recommendations of

¹ Law Commission, "Legislating the Criminal Code: Involuntary Manslaughter" Law Com. Report No.237 (1996)

² Home Office, "Reforming the law on involuntary manslaughter: The Government's proposal" May (2000)

the Joint Committee³ of the House of Commons will be discussed, as the Government's 2005 Bill⁴ (*hereafter*, the “2005 draft Bill”) was subject to pre-legislation scrutiny; which highlighted a number of areas for attention for the Government to consider.

The third substantive section will discuss the continuing process of reform and the movement from the “management failure” test suggested by the LC, to the adoption of the “senior management” test that was ultimately enacted within the *CMCHA*.

3.1. The Law Commission Consultation Paper and Report

Prior to the LC publishing their report in 1996, it initially released a consultation paper in 1994⁵. This consultation can be seen as the beginning of the protracted process of reform that ultimately resulted in the enactment of the *CMCHA* some thirteen years later. Law Reform is generally not renowned for swiftness, although 13 years is a substantial period of time. During the consultation process they liaised with a number of interested individuals, including the view from academia, from the judiciary and from practitioners.

³ House of Commons – Home Affairs and Work and Pensions Committees “Draft Corporate Manslaughter Bill” First Joint Report of Sessions 2005-06 December (2005) HC 540 I-III

⁴ Home Office, “Corporate Manslaughter: the Government’s Draft Bill for Reform” (2005) Cm6497

⁵ Law Commission, “Criminal Law: Involuntary Manslaughter” Law Com. Consultation Paper No. 135 (1994)

3.1.1. Law Commission Report (1996)

The LC published its report on 4th March 1996⁶ and provided it to the then Lord Chancellor, Lord Mackay of Clashfern. The LC made it very clear within the opening remarks of their report that their intention was to “highlight the problems with the present law”⁷ and in due course considered the disasters that had occurred at the time of the report being published, such as the King’s Cross fire, Piper Alpha, the Clapham Rail disaster and the Herald of Free Enterprise disaster. The Herald of Free Enterprise disaster was particularly relevant as it ultimately resulted in an unsuccessful prosecution, as discussed in the second chapter, and at the time of the report was a principal example of the deficiencies within the law.

The Herald of Free Enterprise case was considered at length in the previous chapter and the LC again acknowledged the limitations of the identification doctrine, particularly when trying to prosecute a company whereby the relevant acts have to be committed by those who can be identified as “the people who are the embodiment of the company”⁸.

The LC stated that at the time of their report being published, there had only been one successful prosecution (OLL Limited, as discussed in the previous chapter) that was a one-man company, thus illustrating the problems with the law as it stood at that time.

The LC saw deficiencies within the current law as it stood and they: -

⁶ See note 1

⁷ Ibid. at Para 1.11

⁸ Ibid. at Para 1.17

“welcomed the opportunity to reconsider the principles of corporate liability in the light of the great obstacles now confronting those wishing to bring a prosecution; but we are also conscious of the need to ensure that companies are not unjustly convicted merely because they are in charge of an operation or a vessel on which there has been a disaster”⁹.

The most important parts of the LC report are contained in parts Six, Seven and Eight of the report. Part Eight will be considered after the alternative bases of liability evaluated by the LC.

Part Six of the Report, “Corporate Manslaughter: The Present Law”, considered the law as it stood at that point by looking at the procedural issues and the interpretation of statutes. In addition the LC considered the principles of vicarious liability and the identification doctrine that had developed on a case by case basis as discussed in the first chapter. The LC identified the difficulties that had been faced by the courts as discussed in earlier chapters.

In Part Seven, “Our Provisional Proposal in Consultation Paper No 135, and our present view” the LC identified and considered the responses by those consulted, including the general view that corporations should be held liable for the offence of manslaughter. The reasons, provided by various individuals and organisations, included the consideration of the impact on public confidence and the inadequacy of the offences under Health and Safety legislation. Considering public confidence specifically, especially following the unsuccessful prosecutions such as the Herald of Free Enterprise, it was acknowledged that trust in the criminal justice system and industry generally was adversely affected. This was seen where “the “perpetrator”

⁹ Ibid. at Para 1.18

appeared to escape prosecution “on a technicality rather than having his culpability tested in court by the same standards as that court would apply to a private individual on charge of manslaughter”¹⁰. This echoes the thread that runs through the entire criminal justice system whereby justice must be seen to be done and that no-one is above the law, regardless of whether they are an individual or an artificial legal creation.

3.1.2. The Law Commission considers alternative bases of liability

The LC specifically considered four options in Part Seven, to extending liability for corporations: firstly vicarious liability, secondly the principle of aggregation being implemented to extend the doctrine of identification, thirdly the creation of a new corporate regime and fourthly the creation of a new offence of corporate killing consisting of the application of the elements of manslaughter by gross carelessness to a corporation but without the identification requirement.

3.1.2.1. Vicarious Liability

Turning to vicarious liability first, the LC confirmed that “[t]he rule that, in general, vicarious liability does not form part of the criminal law is a long-established

¹⁰ Ibid. at Para 7.12

principle of the common law”¹¹, save for three exceptions. The first two exceptions are not relevant for the purposes of this thesis (public nuisance and criminal libel), but the third and relevant exception, discussed in the first chapter, is statutory offences.

The LC referred to Atkin J. in *Moussell Bros Ltd v. London and North-Western Railway Co*¹² and the issue of statutory construction; particularly whether the specific section imposes vicarious liability as it is contingent upon “the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed”.

However, the LC recognised in light of the above limited exceptions and as manslaughter is governed by the common law, that “the introduction of vicarious liability for an offence that requires negligence ... seems to us to be open to objections of principle, since it would automatically, and in our view unfairly, penalise a company for the fault of one of its employees even where it had taken considerable pains to prevent the kind of incident that caused the death”¹³. Additionally, the LC recognised the practical difficulties that would follow if vicarious liability was preferred as the basis, such as it would be “unrealistic to expect the directors and senior management of a company to oversee in person the actions of a workforce that may be numbered in thousands”¹⁴. The implications of adopting vicarious liability as the basis would largely be unworkable in a practical sense.

¹¹ *Ibid.* at Para 6.8

¹² [1917] 2 KB 836 at p.845

¹³ See note 1 at Para 7.29

¹⁴ *Ibid.* at Para 7.31

Therefore, the LC in light of these issues, rejected vicarious liability as an alternative given its limitations and considered the second potential basis for liability for corporations.

3.1.2.2. The principle of aggregation extending the doctrine of identification

The LC secondly considered the application of aggregation extending the doctrine of identification. In simple terms aggregation is the adding together of faults not in themselves sufficiently significant to satiate the elements of the offence, but by the actions or omissions of a number of relevant persons combined together to make up the requisite elements of the offence. However, the LC did not find favour with this basis and suggested that this approach “would be no more than a gloss on the identification principle”¹⁵. It is interesting that the LC was mindful of avoiding the process of simply adding to or enhancing the identification doctrine, when arguably the test that was ultimately adopted within the *CMCHA* potentially carries with it some of the deficiencies associated with the identification doctrine.

The report also recognised that this approach could be problematical when trying to ascertain what particular individuals were aware of and whether they were in agreement or maintained a different version of perhaps pertinent information.

¹⁵ Ibid. at Para 7.33

3.1.2.3. A new corporate regime?

On a theoretical level, the LC contemplated a potential third basis. This was in light of a reference made in the consultation paper to a recommendation of the Committee of Ministers of the Council of Europe (No R(88) 18 of 1988). However, given that the recommendation was looking at the criminal law more from a macro perspective as opposed to a specific offence, the LC did not feel it was appropriate to consider it any further.

3.1.2.4. The fourth and favoured option – A new offence of corporate killing

The fourth option as mentioned above was to apply the elements of the individual offence of manslaughter by gross carelessness to a corporation and create a new offence “but with such adaption as is dictated by the peculiar characteristics of corporations”¹⁶. By its nature and given the difficulties outlined in the first and second chapter of this thesis, this was not a straight-forward process, but nevertheless the LC persevered and produced a sensible and potentially workable alternative to the identification doctrine.

Contained within section Eight of the report, the LC re-capped its findings and given the failings of the identification doctrine, it was recommended by the LC “that the use of the identification principle alone, when applied to the individual offences ... would impose unacceptable limitations on the scope of corporate liability for involuntary

¹⁶ Ibid. at Para 8.1

homicide”¹⁷. As mentioned previously in the above sections, the LC believed it to be “wrong to adopt, solely for the purposes of the law of homicide, any wider principle of corporate liability such as vicarious liability or aggregation”¹⁸.

Therefore, contained within Part Eight of the report, the LC at paragraph 8.35 made the following recommendations: -

- “(1) that there should be a special offence of corporate killing, broadly corresponding to the individual offence of killing by gross carelessness;*
- (2) that (like the individual offence) the corporate offence should be committed only where the defendant’s conduct in causing the death falls far below what could reasonably be expected;*
- (3) that (unlike the individual offence) the corporate offence should not require that the risk be obvious, or that the defendant be capable of appreciating the risk; and*
- (4) that, for the purposes of the corporate offence, a death should be regarded as having been caused by the conduct of a corporation if it is caused by a failure, in the way in which the corporation’s activities are managed or organised, to ensure the health and safety of persons employed in or affected by those activities.”*

Wells stated “... the Report sought to overcome the problems of the identification principle by introducing a tailor-made test of corporate culpability based on

¹⁷ Ibid.

¹⁸ Ibid.

“management failure”¹⁹. Contained within Appendix A of the report, the LC prepared a draft bill “to create new offence(s) of ... corporate killing to replace the offence of manslaughter in cases where death is caused without the intention of causing death or serious injury”²⁰. The relevant aspects of the draft bill will be considered below. Clause 4 reads as follows: -

“4.(1) A corporation is guilty of corporate killing if –

- (a) a management failure by the corporation is the cause or one of the causes of a person’s death; and*
- (b) that failure constitutes conduct failing far below what can reasonably be expected of the corporation in the circumstances.*

(2) For the purposes of subsection (1) above –

- (a) there is a management failure by a corporation if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities; and*
- (b) such a failure may be regarded as a cause of a person’s death notwithstanding that the immediate cause is the act or omission of an individual”.*

The “management failure” test was central to the LC’s proposed offence and they confirmed it was “... an attempt to define what, for the purposes of a corporate counterpart to the individual offence of killing by gross carelessness, can be fairly be

¹⁹ Wells, C. “The Reform of Corporate Criminal Liability” contained within De Lacy, J. (ed.) “The Reform of United Kingdom Company Law” (2002) at p.302

²⁰ See note 1 (Law Com.) at Appendix A: Draft Involuntary Homicide Bill

regarded as unacceptably dangerous conduct *by a corporation*²¹. However it remains imperative that the death was caused as a result of the defendant's conduct, which in relation to this proposed offence, means the management failure. As stated above, the draft bill contained clause 4(2)(b), as "... an express provision to the effect that in this kind of situation the management failure may be *a* cause of the death, even if the *immediate* cause is the act or omission of an individual. Whether in all the circumstances the management failure *is* a cause of the death, in spite of the intervening act or omission of an individual, will be a matter for the common sense of the jury"²².

A number of commentators have considered the "management failure" test as proposed by the LC. Pinto and Evans believed that "[t]he concept of "management failure" would obviate the need to prove the requisite fault of an individual identified as the directing mind of the company. Management failure which was a cause of death, would be sufficient for corporate liability to be established even if the immediate cause was the act or omission of an individual"²³.

To see the proposed offence in practice, the LC posed a hypothetical illustration of it in action, in relation to the Herald of Free Enterprise disaster²⁴. As discussed previously, the prosecution failed against P & O European Ferries. The LC stated that "[t]he principal ground for this decision in relation to the case against the company, was that, in order to convict it of manslaughter, one of the individual defendants who could be "identified" with the company would have himself to be guilty of

²¹ See note 1 (Law Com.) at Para 8.36 (emphasis in original)

²² Ibid. at Para 8.39

²³ Pinto, A. and Evans, M. "Corporate Criminal Liability" (2008) 2nd Edition at p.224

²⁴ See note 1 (Law Com.) at Paragraphs 8.45-8.50

manslaughter. Since there was insufficient evidence on which to convict any of those individual defendants, the case against the company had to fail”²⁵.

The LC was of the view that if the same set of circumstances occurred again, that the company could be convicted of their proposed new offence. The basis for this conclusion was that they thought “... it would probably be open to a jury to conclude that, even if the immediate cause of the deaths was the conduct of the assistant bosun, the Chief Officer or both, another of the causes was the failure of the company to devise a safe system for the operation of its ferries; and that that failure fell far below what could reasonably have been expected”²⁶.

By applying the proposed new offence in this hypothetical way, it opened up the possibility that a number of the unsuccessful prosecutions discussed in the second chapter could have had alternative outcomes, or at least led to the cases being tested in court, if this new offence was enacted. It is not suggested that this proposed offence was the perfect solution to the difficulties experienced when applying the identification doctrine, but it would perhaps remove some of the problems that had been previously encountered.

3.1.2.5. Other issues considered by the Law Commission

The LC considered a number of ancillary issues that were required to further elaborate upon its proposed new offence including potential defendants, territorial jurisdiction,

²⁵ Ibid. at Para 8.49

²⁶ Ibid. at Para 8.50

mode of trial and powers on conviction. These issues will be considered in turn below.

The LC confirmed in paragraph 8.58 that they had no intention for an individual to be liable for prosecution for the corporate matter as a secondary party and they made this very clear in their list of recommendations (number 15).

With regard to territorial application, the LC considered a number of statutory provisions, such as the Merchant Shipping Act 1894 and the Civil Aviation Act 1982. In light of these provisions and also generally “that nothing done outside England and Wales is an offence under English criminal law”²⁷. Therefore the LC recommended that “there should be liability for the corporate offence only if the injury that results in the death is sustained in such a place that the English courts would have had jurisdiction over the offence had it been committed by an individual other than a British subject”²⁸. Therefore, as the LC stated, their proposed offence would have had jurisdiction and would have applied to the disaster at Zeebrugge.

With the creation of any offence it is imperative that the procedural issues are considered. Insofar as the practicalities involved in a prosecution for the proposed offence of Corporate Killing, the view of the LC was that it would be inappropriate for the matter to be heard before a Magistrates’ Court. Therefore, the proposed mode of trial was that this offence would be triable on indictment only²⁹. This would be in line with other offences of a similar significance and gravity and as seen below would allow for greater sentencing powers given the limitations of the Magistrates’ Court.

²⁷ Ibid. at Para 8.59

²⁸ Ibid. at Recommendation 16, Part IX Summary of our recommendations.

²⁹ Ibid. at Para 8.67

Equally, with any new offence it is important the sentencing powers are stated with clarity. Contained within the draft Bill³⁰, the LC identified that following a trial and conviction on indictment that the sentence would be a fine.

With all cases that involve a death that has occurred within a work context, there will be a clear overlap with the provisions of Health and Safety legislation, particularly sections 2 & 3 of the Health and Safety at Work Act 1974. The LC took the view that “where the jury finds a defendant not guilty of any of the offence ... it should be possible (subject to the overall discretion of the judge) for the jury to convict the defendant of an offence under section 2 or 3 of the Health and Safety at Work etc. Act 1974”³¹. A clause to this effect was included in the draft Bill mentioned above³².

The LC considered the other powers that the courts should have on conviction of the proposed offence of corporate killing. It took the view that the court should be able to order compensation as per its usual powers. An additional option for the courts to consider is the power to order remedial action. This option will be further discussed in the next chapter where remedial orders are now contained within section nine of the *CMCHA*.

However, at this juncture it is appropriate to focus upon the LC’s view of this potential order at the time in 1996. Bearing in mind that the reason the jury have found the defendant guilty as a result of a management failure as per the proposed offence, the LC took the view it was “necessary to make it clear that the court’s remedial powers will extend to requiring the corporation to remedy any matter which appears to the court to have resulted from the failure and been the cause or one of the

³⁰ Ibid. at Clause 4(3) Appendix A: Draft Involuntary Homicide Bill

³¹ Ibid. at Recommendation 19, Part IX Summary of our recommendations.

³² Ibid. at Clause 6(3) Appendix A: Draft Involuntary Homicide Bill

causes of the death”³³. Again a clause to this effect was included in the draft Bill³⁴. The purpose of remedial orders is to take steps to ensure that a similar occurrence, such as a death or serious injury, does not flow from a similar set of circumstances. Therefore, the options available to the court would not be solely punitive they would also have the option to approach sentencing with a preventative aspect in mind.

The final recommendation of the LC was that “the ordinary principles of corporate liability should apply to the individual offences that we (they) propose”³⁵. Although it was made clear that there should not be individual liability for the corporate killing offence.

3.1.2.6. Would this report provide the catalyst for reform?

The proposals suggested by the LC were commonsensical and provided a good test with the “management failure” test. The hypothetical application of the proposed corporate killing offence to the facts of the *Herald of Free Enterprise* disaster gave some indication that this proposed offence could be successfully applied to larger corporate structures that had eluded conviction before as discussed in the second chapter.

The consultation paper was released in 1994 but it took thirteen years for the *CMCHA* to be enacted in 2007. The report did provide the catalyst for reform, but this process

³³ Ibid. at Para 8.73

³⁴ Ibid. at Clause 5 Appendix A: Draft Involuntary Homicide Bill

³⁵ Ibid. at Para 8.77

was slow moving. Despite the good intentions offered, these intentions were mired with inactivity.

3.2. Progress or lack of progress post Law Commission Report (237)

The recommendations of the LC were included within the General Election manifesto of the Labour Party who were at the time in opposition and confirmed they would implement them if they were elected. Its manifesto of 1997 reiterated this intention. However, many years passed and nothing made its way before Parliament, therefore the recommendations contained in the report were not acted upon.

The lack of progress with the reform process was recognised by the judiciary and the following observation has been noted by a number of commentators³⁶. Scott Baker J., at the 1999 trial of GWT, commented: -

“There are many who say that the present state of the law is unsatisfactory and that the present obstacle to prosecuting large corporations for manslaughter should be removed. However, if the law is to be changed it is up to Parliament to do so. The Law Commission recommended legislation over three years ago but nothing has been

³⁶ Slapper, G. “When an “accident” is more than just bad luck” 16th March (2004) www.fentons.co.uk ; Forlin, G. “The new corporate killing proposals: Where are we now and where are we going?” International Society for the Reform of Criminal Law 19th International Conference Edinburgh 26-30th June (2005); Forlin, G. “The new corporate killing proposals and general climate: Where are we now and where are we going?” International Society for the Reform of Criminal Law 20th International Conference Vancouver 22-26th June (2007); and see note 23 (Pinto et al) at p.224

*forthcoming. There is little purpose in the Law Commission making recommendations if they are to be allowed to lie for years on a shelf gathering dust*³⁷.

The above comment by Scott Baker J. has been referred to by Slapper as being “in the finest tradition of measured criticism delivered from the bench”³⁸, thus illustrating the independence of the judiciary, separated from the legislature.

3.2.1. Corporate Homicide Bill 2000 – “10 minute rule” procedure

During the 1999-2000 session of Parliament, a backbencher MP, Andrew Dismore, presented a corporate homicide Bill under the 10-minute rule procedure to the House of Commons on 18th April 2000. The Bill did share some similarity with the LC’s proposals with regards to the basics of the offence of corporate killing by a corporation.

The significant distinction between the LC’s draft Bill, and Dismore’s Bill, was that clause two of the latter proposed an offence of corporate killing by an officer, an offence of individual liability. The proposed offence of corporate killing by an officer was fundamentally based upon the offence that could be committed by a corporation. The proposed penalty for this offence on indictment would be a fine, imprisonment or both for the individual. Clause five of the draft Bill defined an officer as “the chairman, managing director, chief executive or secretary of a corporation”.

³⁷ R. v. Great Western Trains Company Limited (30/6/1999) Lawtel 8th November 1999 (unreported elsewhere). See transcript at pp.45-46

³⁸ See note 36 (Slapper)

However, as mentioned above, this Bill was introduced implementing the “10 minute rule” procedure. Zander states “Standing Order No.13 allows any MP to make a speech of up to ten minutes in support of the introduction of some piece of legislation”³⁹. There are a number of procedural obstacles that a Bill presented to Parliament under this rule has to overcome. The most sizeable hurdle is Government opposition. If the Bill is backed by the Government, there is a good chance that it will receive Royal Assent and become law.

This Bill however, was not supported by the Government and like the vast majority of Bills with Government opposition; it did not proceed beyond the second reading. However, as Sheikh stated “... it was understood that the Government would use some of the provisions of this Bill for the new offence of corporate killing”⁴⁰. The Government proposals will be considered below.

Arguably, the inclusion of individual liability proposed within this Bill was highly contentious. Given that the creation of such an offence would require considerable thought from the Government and would entail significant Parliamentary scrutiny; as such this is possibly one of the underlying reasons why this Bill did not succeed.

³⁹ Zander, M. “The Law-Making Process” (1994) 4th Edition at p.69

⁴⁰ Sheikh, S. “Corporate Manslaughter and Corporate Homicide Bill: Part 1” International Company and Commercial Law Review (2007) Vol.18(8) 261-278 at p.275

3.3. The Home Office's proposals – May (2000)

The Labour Government published a consultation paper in May 2000⁴¹ (HO 2000). The then Home Secretary, the Rt. Hon Jack Straw MP, confirmed that their consultation paper had embraced “the vast majority of the Law Commission proposals ... (*and*)... the law relating to corporate liability for involuntary manslaughter is in need of radical reform”⁴². The foreword further stated that the law as it stood in relation to corporate manslaughter was ineffective, therefore the Government was acknowledging that the law at that time was not fit for purpose.

This paper stated that it accepted the LC's proposal for the new offence of corporate killing. However, they stated “that while there may prove to be difficulties in proving a “management failure” there is a need to restore public confidence that companies responsible for loss of life can be properly held accountable in law”⁴³.

As mentioned below, a significant part of the document focussed upon the potential defendants other than corporations, such as unincorporated bodies and the impact the proposed offence would have upon Crown bodies. The Home Office (*hereafter* HO) stated they would welcome the view or comments of those with regard to the application of Crown immunity to the proposed offence and again this was one of the reasons for the delay in progressing reform in this area. With regard to unincorporated bodies, the Government's proposals, “favours the extension of the offence of corporate killing to non-corporate “undertakings”, an undertaking being, “any trade or

⁴¹ See note 2 (Home Office 2000)

⁴² *Ibid.* at p.3

⁴³ *Ibid.* at Para 3.1.9

business or other activity providing employment”⁴⁴. Sullivan continues “the consultation paper is under no illusion as to the ramifications of this proposal; on its own estimation a total of three and a half million enterprises could become potentially liable for the offence of corporate killing”⁴⁵. This is a significant widening of the impact of the proposed offence, as stated a great number of organisations would be included.

However, a significant difference between the recommendations of the LC and those preferred by the HO related to the liability of individuals. As discussed above, the LC took the view that there should be no liability for individuals, yet the HO made it very clear that they did not agree with this contention. Contained within the HO 2000, is a copy of the draft Bill prepared by the LC with a number of observations. The HO stated “the Government considers that there is no good reason why an individual should not be convicted for aiding, abetting, counselling or procuring an offence of corporate killing and therefore proposes that clause 4(4) of the Law Commission’s draft Bill should be removed”⁴⁶.

Sullivan is of the view that “[t]he proposal for secondary liability for corporate liability is misconceived. The elements of liability are not easy to identify. Liability of this kind would constitute a significant extension of the law of homicide”⁴⁷. The HO’s view was also not welcomed by those in business “who were troubled by the potential damage to their personal reputation which could result merely from the bringing of a

⁴⁴ Sullivan, B. “Corporate Killing – Some Government Proposals” Crim. L.R. [2001] 31-39 at p.31

⁴⁵ Ibid. at p.35

⁴⁶ See note 2 (Home Office 2000) at p.32. Clause 4(4) reads: “No individual shall be convicted of aiding, abetting, counselling or procuring an offence under this section but without prejudice to an individual being guilty of any other offence in respect of the death in question”.

⁴⁷ See note 44 at p.39

prosecution – even if it subsequently failed – and by the possible prospect of jail if it were to succeed”⁴⁸. This perspective from those in the business community could be seen as stating the obvious. No individual or organisation would welcome an investigation or prosecution, but few are in such a beneficial position to be able consult with the Government with such influence. Nevertheless, as discussed below and in the next chapter, the business leaders lobbied successfully and s. 18 *CMCHA* provided that there would be no individual liability.

Evaluating HO 2000, Matthews stated “the proposals set out a number of issues and posed various questions upon which the government thereafter started a protracted period of consultation”⁴⁹. The main reason for this delay was due to application of the proposed offence to organisations other than companies and also the issue of Crown immunity. Sullivan suggested that “[t]he Government’s proposals go considerably beyond the Law Commission’s recommendations”⁵⁰. The Government did receive a large number of responses to this paper and this in part could have added to the delay that occurred before the Government took the next step.

It is worthwhile pausing here and looking beyond the legal dimension and considering the wider implications that would flow from the creation of the offence of corporate killing from a political perspective. The Government would be mindful of the implications of creating a new offence that would apply to corporations and to individuals within corporations. The Government would consider the impact it may have on the economy and future growth of the economy. For example, if a law was

⁴⁸ Gobert, J. “The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?” *Modern Law Review* (2008) Vol.71(3) 413-433 at p.422

⁴⁹ Matthews, R. “Blackstone’s Guide to the Corporate Manslaughter and Corporate Homicide Act 2007” (2008) at p.10

⁵⁰ See note 44 at p.38

passed that created an additional form of liability for corporations, it could make the UK a less attractive business option and could deter companies from operating within the UK and companies could choose to do their business in another country with less onerous laws.

Additionally, under these proposals with the suggested introduction of individual liability, this could have the effect of dissuading senior corporate executives from operating in this country due to this new form of liability. It could create, in theory, a reverse “Delaware” effect.

3.4. The Government’s draft Bill for reform – March (2005)

It was not until after the Hatfield and Potters Bar disasters, that the Government again stated its desire to legislate in this area. In 2003, the Government confirmed that it would be producing a Bill to create the new offence of corporate killing. The Government propounded that they would not be pursuing any form of individual liability and that they intended to focus upon corporate liability.

However, the Government Bill was not published until March 2005 and by this time the name of the offence had changed from corporate killing to corporate manslaughter⁵¹. There was no explanation provided by the Government as to why the name of the proposed offence had changed from corporate killing to corporate manslaughter. It is possible that this change of name was as a result of further lobbying by the business community. Clarkson argued “that “corporate killing” better

⁵¹ See note 4 (Home Office 2005)

describes the wrongdoing involved in such cases ... The more neutral term “corporate killing” should be employed”⁵². Nevertheless, the proposed offence retained the title of corporate manslaughter and it remains as this.

Alongside the *2005 draft Bill*, the Government published a further consultation document seeking comments upon the draft Bill. Following lobbying from a number of organisations including the Confederation of British Industry (CBI) and the Institute of Directors (IoD) who were generally in favour of the reforms but had some reservations on some aspects and these views will be considered at the relevant points in the discussion below.

The then Home Secretary, the Rt. Hon Charles Clarke MP, confirmed that the Bill would be published for pre-legislative scrutiny and that the *2005 draft Bill* proposed “a new test that looks more widely at failings within the senior management of an organisation”⁵³.

Clause 13 proposed that the application of the common law offence of gross negligence manslaughter to companies be abolished and replaced by a new offence of corporate manslaughter. The Government hoped that this proposed offence would “capture truly corporate failings in the management of risk ... therefore applies to management failings by an organisation’s senior managers”⁵⁴.

The Government broke down the offence into this simple analysis: -

“The organisation must owe a duty of care to the victim that is connected with certain things done by the organisation ...

⁵² Clarkson, C.M.V. “Corporate Manslaughter: Yet more Government Proposals” Crim. L.R. [2005] 677-689 at p.688

⁵³ See note 4 (Home Office 2005) at p.4

⁵⁴ Ibid. at p.9 Para 14

... The organisation must be in breach of that duty of care in the way its senior managers manage or organise a particular aspect of its activities. This introduces an element of “senior management failure” into the offence ...

... This management failure must have caused the victim’s death. The usual principles of causation in the criminal law will apply to determine this question ...

... The breach of duty must have been gross”⁵⁵.

As Clarkson recognised, the proposed new offence, in light of the aspects specific to corporations, “broadly follows the contours of the current law of manslaughter by gross negligence”⁵⁶.

It’s most significant difference, compared both to the LC’s draft Bill and the recommendations contained within HO 2000⁵⁷, was that the central test had altered from the management failure test recommended by the LC now to the “senior management failure” test. The HO contended that the “heart of the new offence lies in the requirement for a management failure on the part of its senior managers. This is intended to replace the identification principle with a basis of corporate liability that better reflects the complexities of decision taking and management within modern large organisations, but which is also relevant for smaller bodies”⁵⁸. Therefore, in suggesting the “senior management failure” test, the HO intended to move the law

⁵⁵ Ibid. at p.33 Para 7

⁵⁶ See note 52 at p.679

⁵⁷ See Law Commission Report (237) Para 8.35 and Clause 4 Appendix A: Draft Involuntary Homicide Bill and also Home Office, “Reforming the law on involuntary manslaughter: the Government’s proposal” May (2000) at paragraphs 3.1.8 and 3.1.9

⁵⁸ See note 4 (Home Office 2005) at p.12 Para 25

away from the requirement under the identification doctrine whereby “liability (*was*) contingent on the guilty of a particular individual”⁵⁹.

However, it has been contended “the “senior management test” reintroduces the problems of the “identification principle”, with the requirement of identifying a “directing mind” simply being replaced by that of identifying senior management ... By focusing on failures made by individuals within an organisation it is maintained ... does little to address the problems that plagued the common law offence of gross negligence manslaughter”⁶⁰. However, this is a moot point as it is dependent upon how the courts interpret this. The HO stated that its “intention is to target failings where the corporation as a whole has inadequate practices or systems for managing a particular activity”⁶¹.

Arguably, it could be suggested that identification of the senior managers within a corporation could lead to lengthy arguments in court when trying to establish who is or is not a senior manager, a concern shared by the CBI⁶². For this reason, the LC’s approach could be seen as a preferred alternative.

Therefore, the question is raised as to whether the adoption of this new test would be stepping back into the problems that dogged the prosecutions discussed in the second chapter using the existing doctrine of identification. Clarkson preferred the LC’s test as it “removed the need to identify “managers” and placed the emphasis on the

⁵⁹ Ibid. at p.33 Para 6

⁶⁰ Editorial, “Legislative Comment – Reflections on the Corporate Manslaughter and Corporate Homicide Act 2007” Health and Safety at Work (2008) Vol.15(7), 1-3 at p.3

⁶¹ See note 4 (Home Office 2005) at p.12 Para 28

⁶² CBI “CBI Response to Home Office Consultation Document: Corporate Manslaughter, The Government’s Draft Bill for Reform June 2005” (2005) 17th June www.scotland.gov.uk/Resource/Doc/1099/0019150.pdf

activities of the company ... This places the focus where it should be: on the activities and organisational practices of the company”⁶³.

As explained within the explanatory notes to the *2005 draft Bill*, there must be a gross breach of duty due to the senior management failure, whereby the conduct fell far below what could be reasonably be expected of an organisation in the circumstances, such as death or serious injury. The paper confirms that this has some symmetry with the level required under gross negligence manslaughter. The paper on this point was similar to the proposals of the LC and HO 2000, although as Clarkson states, the “problem ... is how to identify conduct that does fall far below what can be reasonably be expected in the circumstances”⁶⁴.

With regard to the application of this proposed offence, the HO changed the view stated in 2000. The new offence would not apply to unincorporated bodies, although the Police Forces would be considered separately during this process of consultation. However, understandably corporations were the primary recipients of the paper’s attention. As mentioned above, the application to Crown bodies had caused delay during the reform discussion sparked by HO 2000 but contained within this document⁶⁵ was the decision that there would be no general Crown immunity for the proposed offence.

However, the Government had altered its view in relation to individual liability from its previous stance in 2000. The Government confirmed that it’s “proposal to tackle this focuses on changing the way in which an offence of manslaughter applies to

⁶³ See note 52 (Clarkson) at pp.683-684

⁶⁴ Ibid. at p.682

⁶⁵ See note 4 (Home Office 2005) at p.15 Para 38

organisations, and this is a matter of corporate not individual liability”⁶⁶ and therefore decided not to pursue individuals or indeed impose secondary liability, again this was a decision “welcomed” by the CBI⁶⁷. The possibility for an individual to face a charge under the Health and Safety legislation or a charge of gross negligence manslaughter still remained, however the decision of the Government not to pursue individual liability could be viewed as a key deficiency in their proposals and Clarkson added “the fact that individuals cannot be liable under the proposals represents a grave shortcoming”⁶⁸. There had been significant feeling that individual liability of some form should have been included within the Bill, as opposed to the Bill focussing entirely on the corporate offence.

The remainder of the paper discussed issues such as causation, appropriate sanctions and extent. These will be considered in turn beginning with causation. The Government stated the usual rules of causation would apply meaning “that the management failure must have made more than a minimal contribution to the death and that an intervening act did not break the chain of events linking the management failure to death”⁶⁹. The position in the *2005 draft Bill* was different from the position taken by the LC whereby a specific provision in their draft Bill dealt with causation. However, the HO argued that the law of causation had sufficiently developed and therefore there was no need for a specific provision in the Bill. Given the passage of time between the LC report in 1996 and the *2005 draft Bill*, the law had developed sufficiently.

⁶⁶ Ibid. at p.17 Para 47

⁶⁷ See note 62

⁶⁸ See note 52 (Clarkson) at p.689

⁶⁹ See note 4 (Home Office 2005) at p.17 Para 49

With regard to proposed sanctions, the Government considered that the correct punitive approach would be that of a financial penalty and that it would be an unlimited fine. Additionally, the imposition of remedial orders was deemed acceptable so that the offending corporation could be ordered by a court to remedy the failures that led to the death or deaths.

Insofar as jurisdictional extent was concerned, the new offence would apply to England and Wales and also to places where the English courts have jurisdiction. The paper confirms that the offence would not be applied extra-jurisdictionally as this would pose a number of significant practical difficulties that could lead to the offence being unenforceable.

3.5. Pre-legislative scrutiny of the Government's draft Bill

The *2005 draft Bill* was subjected to pre-legislative scrutiny. When a draft Bill and its clauses are explored through pre-legislative scrutiny, it allows for a freer debate to occur where less partisan views can be offered. It has been suggested that if a draft Bill has undergone this process, it ultimately produces better and more informed law. Smookler states that the usage of pre-legislative scrutiny “has become an important tool in the exercise of Parliament’s legislative function and achieves far more than the “pre-legislative” part of its title would suggest”⁷⁰. However, despite the recommendations of the pre-legislative committees, the Government can decide to dismiss them if it disagrees with the recommendations.

⁷⁰ Smookler, J. “Practitioners – Making a Difference? The Effectiveness of Pre-Legislative Scrutiny” *Parliamentary Affairs* (2006) Vol.59(3) 522-535 at p.533

A report was produced by the House of Commons Home Affairs and Work and Pensions Committees and published in December 2005⁷¹. The Committee welcomed the introduction of the *2005 draft Bill* albeit after some delay and recognised the deficiencies of the current law namely the use of the problematical identification doctrine. However, the Joint Committee claimed⁷² that the introduction of the “senior management failure” test was taking the law back to the problems associated with the identification doctrine which is disadvantageous given that the desirability of a new offence/ test was to avoid the previous difficulties that were encountered.

One point that the Joint Committee made early in the report was to remind the Government of the period of time that had elapsed between the LC report and the Government taking any action and they reminded the Government of their frequent commitments to reform of this area of law. Furthermore, the Joint Committee made it clear that they wished the Government would ensure no further unnecessary delays occurred and that the Bill be introduced, in light of the Joint Committee’s recommendations, within the same Parliamentary session.

3.5.1. The title of the new offence

On this point, the Joint Committee heard evidence from a number of eminent scholars who viewed the use of the term manslaughter as outdated and criticised the decision to alter the name from “corporate killing” to “corporate manslaughter”. However, given that at that point a review of the law of murder was proposed to commence

⁷¹ See note 3 (Joint Committee)

⁷² *Ibid.* at p.3

whereby the term manslaughter could be obsolete, which would be a lengthy process in itself, the Joint Committee confirmed they were satisfied with the name change.

3.5.2 Causation

On the subject of causation, the Joint Committee took the view that the LC's approach was the appropriate one and that the *2005 draft Bill* was uncertain as it did not have a specific provision to deal with causation.

As mentioned above, the Government took the view that the law of causation had sufficiently developed whereby a specific provision was unnecessary. However, the Joint Committee received evidence from the Law Reform Committee of the Bar Council who stated that the insertion of a causation clause "would give statutory effect to the development in the case law and have the merit of clarity within the provisions specifically drafted for the purpose of corporate manslaughter"⁷³.

However, the view of the LC was sought and they stated "although the clause does add "some value" they "do not regard this point as one of major importance"⁷⁴. The Joint Committee were of the view that the insertion of a causation clause would be of benefit as it would state the position for this offence and it would have a statutory basis. Therefore, the Joint Committee recommended that the Government should include the LC's causation clause into their Bill.

⁷³ Ibid. at Para 92

⁷⁴ Ibid. at Para 93

3.5.3. The Joint Committee's view on the "Senior Management Test"

Some of the Joint Committee's most stringent criticism was reserved for the senior management test, which the Joint Committee considered a step back to the existing doctrine of identification. The proposed offence, as drafted: -

*" ... does appear simply to broaden the identification doctrine into some form of aggregation of the conduct of senior managers. This is a fundamental weakness in the draft Bill as it currently stands. By focusing on failures by individuals within a company in this way, the draft Bill would do little to address the problems that have plagued the current common law offence"*⁷⁵.

Additionally, the Joint Committee observed that if this proposed offence was to be tested within a court, it would undoubtedly lead to legal argument as to who is and who is not a senior manager. The Joint Committee heard evidence from a number of witnesses who described the definition of a senior manager as too vague and also as too broad. Therefore, the Joint Committee recommended that the HO review the senior management test.

The Joint Committee further confirmed their view that the test should be based upon the LC's test as a starting point, namely that of a management failure, but that "related to either an absence of correct process or an unacceptably low level of monitoring or application of a management process"⁷⁶. The Joint Committee acknowledged that the LC test was not without its issues, primarily that it has been contended that the management failure test is too vague and that this "test could cover failings within a

⁷⁵ Ibid. at Para 140

⁷⁶ Ibid. at Para 169

company that occur at too low a level to be fairly associated with the company as a whole”⁷⁷. In light of this as mentioned above, the Joint Committee recommended that the HO should deal with this, but to bear in mind the LC’s position.

3.5.4. Other relevant considerations raised by the Joint Committee

The Joint Committee considered other aspects contained within the draft Bill and they are considered in turn below.

On territorial application, the Joint Committee took the view that the offence should apply to the entire UK and in due course to also apply to the entire European Union. This is significantly more than was proposed within the *2005 draft Bill* and this recommendation would not be without its procedural difficulties particularly given the differences between the law in England and Wales with that in Scotland.

The *2005 draft Bill* proposed that as sanctions, corporations could be subject to an unlimited fine or a remedial order. The Joint Committee recommended that following the successful passage of the Bill that Sentencing Guidelines should be produced and the fines to be imposed “should reflect the gravity of the offence”⁷⁸. The Joint Committee stated that they were of the view that before sentence, a Judge should have the benefit of a pre-sentence report that has been prepared and it should contain the company’s financial position and also a record of the company’s health and safety issues.

⁷⁷ Ibid. at Para 199

⁷⁸ Ibid. at Para 268

With regard to remedial orders, the Joint Committee did see them as “an additional safeguarding power”⁷⁹, but also heard evidence that suggested ways in which remedial orders could be enforced. The Joint Committee recommended that the Bill have a provision added that would provide a mechanism to ensure that remedial orders were complied with. Secondly, with an emphasis placed on the director’s shoulders, that the Bill be amended “in order to make it possible for directors to be charged with contempt of court if the company has failed to take the steps required by the court”⁸⁰.

The Joint Committee did hear suggestions of other sanctions that could be implemented into the *2005 draft Bill*. However they confirmed that due to time limitations, they were not in position to make any formal specific recommendations, although they did state that corporations should be made to pay compensation. They recommended that the HO look again at the issue of sanctions and try to provide the courts with suitable room for manoeuvre when dealing with the “broad range of cases that might come before them”⁸¹.

On the issue of individual liability, the Joint Committee heard evidence whereby half agreed with the HO and the contents of the *2005 draft Bill* in that there should be no individual primary or secondary liability. The Joint Committee heard from Lord Justice Judge (as he was then) who stated that if the Bill were enacted, the offence of corporate manslaughter would exist, but that the law relating to ordinary manslaughter would still exist and that individual responsibility would still remain.

⁷⁹ Ibid. at Para 275

⁸⁰ Ibid. at Para 278

⁸¹ Ibid. at Para 298

Unsurprisingly, the Joint Committee heard other evidence that “the lack of proposed punitive sanctions against individuals would provide an insufficient deterrent and would be unsatisfactory for those who wish to see justice delivered for the families of victims”⁸². In light of the evidence heard, the Joint Committee recommended that the *2005 draft Bill* should allow for secondary liability and that the offence should carry a maximum term of imprisonment that could be set at 14 years, by analogy to that of causing death by dangerous driving. Additionally, the Joint Committee stated that upon conviction, individuals should then face director disqualification proceedings so that it would act as a further method of control over non-effective or poor directors.

With regard to the final relevant issue namely the requirement to obtain the consent of the DPP before the commencement of a private prosecution. The HO 2000 suggested that it was not required, although following the responses received; the HO took the view that there was a requirement to add this to the *2005 draft Bill*. This was based upon the responses received that stated that without the necessity for consent that “this would lead to insufficiently well-founded prosecutions, which would ultimately fail, and would place an unfair burden on the organisation involved with possible irreparable financial and personal harm”⁸³. The Joint Committee were of the view that this should be removed from the draft bill in the interests of justice.

The Joint Committee made some detailed observations and appropriate criticisms of the *2005 draft Bill*. As mentioned above, the criticism of the new test contained within the *2005 draft Bill* was well made and did recognise that the proposed test could be seen as a step backwards and would open up the problems experienced with the doctrine of identification. Clarkson stated that the Joint Committee did “strongly

⁸² Ibid. at Para 306

⁸³ See note 4 (Home Office 2005) at p.19 Para 60

support(*ing*) the Government's plans to introduce such a new offence"⁸⁴ but the report did require the Government to consider again its proposals on a number of fronts. The Government had the opportunity to consider the number of recommendations outlined above and their response will be outlined below in the next section.

3.6. The Government's response to the pre-legislative scrutiny

The Government published its reply to the Joint Committees' report in March 2006⁸⁵. The Government stated within the introduction to their response that they had "given very careful consideration to the Committees' comments and recommendations" and they "warmly welcome(*s*) the Committees' strong support for a statutory offence of corporate manslaughter"⁸⁶. However, it was made clear by the Government that they would not be accepting all of the recommendations suggested by the Joint Committee. Therefore, it is questionable as to how effective the process of pre-legislative scrutiny is, if the Government has the option to disregard its suggestions and observations and press on regardless.

This next section will detail and comment upon some of the more pertinent issues contained within the response, such as the issue of causation, the "senior management" test, sanctions, individual liability of directors and the consent from the DPP to commence private prosecutions.

⁸⁴ Editorial "Corporate Manslaughter" Crim. L.R. [2006] 95-96 at p.95

⁸⁵ Home Office, "The Government reply to the First Joint Report from the Home Affairs and Work and Pensions Committees Session 2005-06 HC 540 - Draft Corporate Manslaughter Bill" (2006) Cm6755

⁸⁶ Ibid. at p.1

Firstly, on the issue of causation, the Joint Committee were of the view that the *2005 draft Bill* should incorporate the LC's clause so as to provide certainty within the legislation. However, the Government retained its 2005 position stating that they felt the inclusion of an explicit clause was unnecessary as the law had developed since the LC report was published in 1996. The Government referred to a recent decision⁸⁷ that outlined the position on causation and felt that if the clause was included that this would lead to uncertainty with its inclusion rather than what it would with its exclusion. Additionally, the Government stated that if this specific clause was inserted into the Bill that it would apply only to this offence. Therefore it would create a difference between the causal test applied to the corporate to that that would be applied to the individual offence and the Government were of the view that this would not "be either equitable or satisfactory"⁸⁸.

Secondly, as mentioned above, the Joint Commission had concerns with the "senior management" test proposed by the *2005 draft Bill*. The Government recognised that this new test was central to the draft Bill and acknowledged that the "Achilles heel of the current law"⁸⁹ was the focus upon the actions of individuals rather than the new test that would be concerned with the "systems of work and their implementation"⁹⁰. The Government were concerned that the new proposed test had been interpreted differently to how they had intended and expressed the following view: -

"... the test represented a minimal development of the Law Commission's proposal, designed primarily to ensure that systems and processes throughout an organisation

⁸⁷ *Environment Agency v. Empress Car Co (Abertillery) Ltd* [1999] 2 A.C. 22

⁸⁸ See note 85 at p.8

⁸⁹ *Ibid.* at p.14

⁹⁰ *Ibid.*

for managing a particular activity were considered and that, properly applied, would not in practice have had the adverse impacts that witnesses were concerned about”⁹¹.

However, in light of the Joint Committee’s recommendations, the Government confirmed that test should be reevaluated as the offence needs to be “clear, properly understood and command(s) confidence”⁹².

The third relevant area to consider is the Government’s response to the Joint Committee’s recommendations in relation to sanctions. In light of the Joint Committee’s recommendations, with which the Government agreed with and confirmed that guidelines should be produced by the Sentencing Guidelines Council to “ensure sentences are set at an appropriate level”⁹³ and additionally that those guidelines hopefully would be in existence before the offences exist in law. The Government also shared the view of the Committee with regard to knowledge that the judiciary should have certain information at their disposal before passing sentence, such as the financial position of the defendant company along with their previous health and safety record.

On the additional sanction available to courts, the Government stated they were pleased that the Joint Committee were similarly aligned in relation to the use of remedial orders, although accepted they could be used rarely. The Government, on the issue of enforcement of remedial orders did state they would consider the issue of whether the Bill could be enhanced by implementing a procedural framework for them. However, in light of the recommendation by the Joint Committee to allow for contempt of court proceedings whereby a remedial order had not been complied with,

⁹¹ Ibid. at pp14-15

⁹² Ibid. at p.15

⁹³ Ibid. at p.26

the Government was more resistant. The Government suggested that this route would be both “complicated ... and contentious⁹⁴” and provided what they believed to be a better and preferred alternative, whereby if an order was not complied with, that the matter would be returned to the court where the judge would have the option to impose an unlimited fine.

In answer to the Joint Committee’s concern that alternative sanctions were not provided the Government replied by confirming that a consultation was underway and that it would take some time to conclude.

The fourth relevant area the Government considered was the key recommendations in relation to individual liability of directors. The Government again referred to the difficulties associated with the identification principle as discussed in the previous chapters. The Government’s view was that existing law of manslaughter and Health and Safety offences was sufficient and could be implemented against individuals. The Government acknowledged that there would be difficulties with secondary liability given that “the tests for secondary liability generally require that an accessory has a similar state of mind as the main offender or at least knew or intended that the offence would be committed”⁹⁵.

However, the Government contended that if an individual was aware of any failing in the company and then act in a way that supported the negligence act/s could face an individual charge separate from this proposed legislation. On the subject of director disqualification, the Government suggested that the current legislation provides for the disqualification if a director was convicted of an indictable offence but that the

⁹⁴ Ibid. at p.27

⁹⁵ Ibid. at p.29

Government would review how that worked in practice and the symbiosis between the two areas of law.

Finally, with regard to the consent from the DPP to initiate a prosecution and the view of the Joint Committee. The Joint Committee recommended that the provision be removed from the *2005 draft Bill*. The Government referred to the tests applied by the CPS namely that the prosecution must be in the public interest and that there must be sufficient evidence to prosecute and that the DPP is governed by the same tests.

The Government believed it would be a sensible filter to apply whereby an independent view would be obtained upon a proposed private prosecution. The Government did note that the decision of the DPP whereby consent is refused is open to judicial review. In light of the above, the Government confirmed that the provision would remain in the Bill.

In evaluating the Government's response to the Joint Committee's report, the Government did agree with a number of the recommendations and a limited re-working of the Bill did occur. However, the Government did retain their resolute stance on a number of key issues, such as the "senior management" test and the individual liability of directors.

Wells evaluated the reform process and the *2005 draft Bill* and accurately summarised the position: -

"It is hard to escape the impression that this Bill is akin to an unwanted pregnancy. The government began the reproductive process with promises made in the reckless and carefree days at the start of Labour's period in office in 1997. By the time the egg was fertilized, a strong case of parental cold feet appeared to have set in. It might

*have been too late to renege the consent entirely but the infant has by no means received the loving care that would nurture its full potential*⁹⁶.

3.7. Conclusion

Law reform is typically not a swift process and this area of the law is no exception. We have looked at a number of stages in the reform process starting with LC report in 1996, the HO 2000 and the *2005 draft Bill*. Now, we will now move to the *CMCHA* itself in the next Chapter.

⁹⁶ Wells, C. "Corporate Manslaughter: Why does reform matter?" *South African Law Journal* (2006) Vol. 123(4), 648-664 at p.663

Chapter Four – The Corporate Manslaughter and Corporate Homicide Act 2007

This chapter will consider the *CMCHA* and its legislative passage through both Houses of Parliament. This Act followed the process of reform discussed at length in the third chapter. The Sentencing Guidelines Council's intention to provide sentencing guidelines for criminal offences will also be considered.

Since enactment, only one case involving this new legislation has been fully heard by the Courts. The first prosecution under the *CMCHA* was heard at Winchester Crown Court against Cotswold Geotechnical Holdings. It was the first opportunity for the new legislation to be tested and determine whether the pitfalls associated with the pre-legislation approach could be overcome. The second prosecution under this legislation has recently commenced against Lion Steel Limited, but it will be well into 2012 before any trial is heard.

The first section of this chapter will consider the passage of the Corporate Manslaughter and Corporate Homicide Bill through both the House of Commons (HC) and the House of Lords (HL). This Bill was passed backwards and forwards between both Houses due to a number of disagreements causing some delay in the Bill receiving Royal Assent. The reasons for this delay will be considered alongside the relevant excerpts from Hansard.

The second section will analyse the *CMCHA* itself. The nature of the *CMCHA* will be considered and in particular determine whether it has revolutionised this area of the law or whether, the law has taken a step backwards towards the problems associated with the identification doctrine.

The third section will discuss the Sentencing Guidelines that have been produced and will look at the options available to sentencing judges.

Finally, the *CMCHA* will be tested in relation to the prosecution against Cotswold Geotechnical Holdings. It is only when an offence is tested before the courts that its effectiveness can be assessed properly as to whether the difficulties associated with the previous law have been removed or at the least reduced. Comment will be made upon the second prosecution, as this is still awaiting trial at the present time.

4.1. The passage of the Corporate Manslaughter and Corporate Homicide Bill

The purpose of this section is to consider the relevant debates that occurred during the passage of the Corporate Manslaughter and Corporate Homicide Bill through both Houses of Parliament. The Bill received its first reading/ introduction before the HC on 20th July 2006.

The intention of this Bill was to apply to all jurisdictions of the UK. The Bill featured no individual liability for directors, despite concerns raised by the Joint Committee¹ following the process of reform discussed in the previous chapter.

One issue identified by the Joint Committee was the concerns over the use of the “senior management” test and whether this would potentially take the law back towards the deficiencies associated with the identification doctrine. However, under the terms of the Bill the definition of the “senior management” test was unchanged

¹ House of Commons – Home Affairs and Work and Pensions Committees “Draft Corporate Manslaughter Bill” First Joint Report of Sessions 2005-06 December (2005) HC 540 I-III

but that now “the way that the organization’s activities were managed or organized by senior management now had only to be a “substantial element” in the breach”² as opposed to the whole element in the breach.

The then Home Secretary, John Reid M.P., during the second reading, made the Government’s intention clear in that they wanted the law relating to corporate manslaughter to be just and also that the “Bill aims to create a clear and effective criminal offence”³.

4.1.1. Concerns in the House of Commons

In general, the Bill received support from all political parties during its time in the HC. However, reservations with the Bill were made clear during the second reading of the Bill on the 10th October 2006.

The Home Secretary confirmed that it was his intention that some of the disagreements would be resolved and that the Bill would be subject to the “greatest scrutiny possible”⁴.

As discussed in the previous chapter, there were reservations about the punitive sanctions available under the Bill particularly that the proposed maximum sentence was an unlimited fine. This issue was raised by Simon Hughes, M.P. for North Southwark and Bermondsey and the Home Secretary responded that the “extent of the

² Matthews, R. “Blackstone’s Guide to the Corporate Manslaughter and Corporate Homicide Act 2007” (2008) at p.11

³ Hansard HC Deb 10th October (2006) Vol.450 c196

⁴ Ibid. at c192

finer should have some effect”⁵. Furthermore, the issue of imprisonment as a means of punishment was dispensed with by the Home Secretary who confirmed that individuals would not be liable but that it was more important that organisations were seen by the public and victims to be held to account for this offence.

During this debate, the detail of the Bill was analysed carefully by the members of the HC. The debate considered the impact of the sanctions available under the Bill. However, yet again the removal of any individual liability was lamented, particularly by Andrew Dismore, M.P. for Hendon. Mr Dismore had in 2000, introduced his own Private Member’s Bill, as discussed in the previous chapter, and stated: -

“Since 2003, the Government have ruled out individual directors’ liability in criminal law, which I consider to be a tragic mistake. The strongest incentive for an individual director would be that he could stand in place of his company in the dock as a result of its failings, leading to the deaths of employees or members of the public”⁶.

In addition, comments were made alluding to the lengthy delay that had passed before this Bill was presented to the House by Mr Edward Davey, M.P. for Kingston and Surbiton. Mr Davey was also concerned that the Bill had been “watered-down” by the delay and that it was his hope that following proper debate, the HC could “put some teeth back into it”⁷.

However, on the point of individual liability, there were views suggested that individual liability did not need to be contained within this Bill as there already existed law to deal with individuals beyond this Bill. The then Under-Secretary of

⁵ Ibid. at c193

⁶ Ibid. at c220

⁷ Ibid. at c222

State for the Home Department, Mr Gerry Sutcliffe M.P. clarified the view of the Government upon the Bill not creating individual liability and stated that the Bill “establishes a new basis for liability that shifts the focus from the conduct of individuals and places it on the management of systems and processes. The Bill is concerned with creating an effective corporate offence, not individual liability”⁸. The focus of the Government was on corporate, not individual, liability.

On the subject of the “senior management” test this was repeatedly commented upon by members of the HC and a number stated they were grateful that the Home Secretary was prepared to reconsider this issue if appropriate as they had a number of concerns. The Under-Secretary, Mr Gerry Sutcliffe M.P. further clarified this by confirming that they would “bring forward a new test in Committee that will achieve our aims in a way that does not risk the reintroduction of an identification obstacle”⁹. It is clear from comments such as this, that the Government were alive to the concerns of re-introducing the identification doctrine under a different title.

The Bill was carried over into the next session of Parliament on 16th November 2006 where the Bill received its second reading.

The amendments of the Committee were considered on 4th December 2006 at the report stage and third reading of the Bill. The first amendment suggested was a new first clause providing for the individual liability of an officer of a corporation and a new second clause provided the penalties that would apply against individual liability.

⁸ Ibid. at c265

⁹ Ibid.

The members of the HC debated these amendments, at some length. The House voted against the amendments in relation to individual liability for officers of an organisation and this aspect was considered by the Lords in due course.

The other key amendment tabled dealt with deaths in custody as a result of gross negligence. This particular issue would lead to significant delay as the Bill was passed backwards and forwards between the two Houses as the Lords ultimately wanted this included in the *CMCHA* immediately which was contrary to the view of the Commons.

The most significant concern however, in relation to the “senior management” test taking the law back towards previous problems associated with the identification doctrine, was addressed by the Under-Secretary, Mr Gerry Sutcliffe M.P.: -

“The test for the offence has been improved during the Bill’s consideration. The “senior manager” test has been removed, replaced by a wider formulation that is based on the management of the organisation’s activities. There remains a need to show a substantial failing at a senior level. We are satisfied that that gets the balance right”¹⁰.

However as will be discussed below, the test despite the re-shaping was still not perfect and the relevant critical views will be discussed below during the consideration of the Act.

The Bill was then passed to the HL and it received its introduction on 5th December 2006, with the second reading on 19th December 2006.

¹⁰ Hansard HC Deb 4th December (2006) Vol.454 c116

4.1.2. The House of Lords considers the Bill

Baroness Scotland, the Minister of State for the Home Office in the Lords moved for the Bill to be read for the second time in the HL. The Minister referred to the limitations of the existing law with it being “a narrow and artificial basis for assessing corporate negligence”¹¹. Baroness Scotland confirmed the Government’s desire to develop the law and expressed the two ways in which the *CMCHA* will achieve this: -

*“First, it will provide a new test for the application of corporate manslaughter to companies. This will allow the courts to look at collective management failure within an organisation, enabling for the first time a proper examination of corporate negligence. Secondly, it will remove Crown immunity. This is a far-reaching development. For the first time, government departments and other Crown bodies will be liable to prosecution in the criminal courts”*¹².

In response to some of the concerns surrounding the new proposed test, Baroness Scotland referred to the “senior management” test and how it had been amended in the HC so as “to introduce a wider and more effective test which seeks to strike a balance between taking into account the management of the fatal activity generally within the organisation and not allowing a prosecution to succeed unless a substantial element of the organisations failure lay at a senior management level”¹³. As mentioned above, the proposed test was not perfected during the passage through both

¹¹ Hansard HL Deb 19th December (2006) Vol.687 c1897

¹² Ibid. at c1898

¹³ Ibid. at c1898-1899

Houses and received criticism for this from commentators when the *CMCHA* received Royal Assent and this will be discussed below.

Again the Government's view was clear that this new proposed offence should not apply to individuals but should be entirely concerned with corporate offenders. In addition, it was confirmed that the existing law of manslaughter and Health and Safety offences were more than sufficient to deal with any individual offending. However, Lord Cotter took the view that in light of the amended Bill that "[i]ndividual liability is a key issue that must be scrutinized"¹⁴ and the first proper opportunity would be when the Bill went before the Grand Committee of the House.

There was some support at this early stage to segregate corporate and individual offending. Lord Lyell was of the view that "[t]he Government are quite right to divorce corporate manslaughter from individual liability"¹⁵ and Lord Brennan agreed and stated "that the target should be the company"¹⁶. Lord Hunt seemed to concur with his colleagues and stated "[t]o add individual sanctions to the Bill would dilute it and confuse people as to the intentions of Parliament"¹⁷.

Following the Grand Committee in the HL and the report and third reading, the Bill was passed backwards and forwards between the two Houses of Parliament for amendments to be made to the Bill. There was some difference of opinion between the views of the two Houses as to the final form of the Bill. In particular, the Lords made recommendations that ultimately were included within the *CMCHA* that

¹⁴ Ibid. at c1906

¹⁵ Ibid. at c1912

¹⁶ Ibid. at c1936

¹⁷ Ibid. at c1951

widened the number of organisations that would be covered by the *CMCHA*. The type of organisations included trade unions and employer's associations.

However, the most significant issue that delayed the passage of this Bill was not the arguably contentious issue of individual or secondary liability of individuals or the reservations and concerns with the new test for the proposed offence. It was the application of the offence to those persons detained in custody which the HC was reluctant to include and the HL wished to include.

The compromise, given that the 12-month passage limit of the Bill was already extended by one week, was that the section relating to deaths in custody would be included in the *CMCHA*. However, this was with the caveat that it would require approval and consent from both Houses of Parliament before it could be brought into force. The reason for the reluctance in the Commons in relation to the impact of this section that if brought into force immediately it would place substantial pressure on the prison service and police forces.

Following significant delay as the Bill was passed between the two House of Parliament, ultimately the *CMCHA* received Royal Assent on 26th July 2007, but came into force largely by 6th April 2008. The next substantive section will consider the provisions contained within the *CMCHA*.

4.2. The Corporate Manslaughter and Corporate Homicide Act (2007)

After many years of waiting and delays, through many years of proposed reforms promised by politicians, the *CMCHA* was finally on the statute books, some thirteen

years after the LC Consultation Paper in 1994. This section will consider the implications of the new law by analysing the key sections and reflect whether the *CMCHA* has gone far enough especially given the criticisms of its supposed limitations.

Initially, this section will consider the new statutory offence of Corporate Manslaughter and the requisite elements of the offence that need to be proved for the offence to be made out. Critically, it will assess and consider whether the new test is sufficiently robust to be tested against a large corporation, compared to the problems with the old approach.

Secondly, this section will analyse the other relevant sections of the *CMCHA* such as the sentencing powers (s.1(6)) including remedial orders (s.9) and publicity orders (s.10), the required consent of the DPP to bring proceedings (s.17), no individual liability (s.18) and the abolition of liability of corporations for manslaughter at common law (s.20).

4.2.1. The offence of Corporate Manslaughter

The most significant part in this new piece of legislation is the brand new statutory offence of corporate manslaughter that is contained within section one of the *CMCHA*: -

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised-

(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

(2) The organisations to which this section applies are-

- (a) a corporation;*
- (b) a department or other body listed in Schedule 1;*
- (c) a police force;*
- (d) a partnership, or a trade union or employers' association, that is an employer.*

(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1)."

4.2.2. The elements of the offence

For this offence to be made out, the prosecution will need to prove the requisite elements of the offence, which will be considered and analysed individually in turn. Compared to the difficulties associated with the common law approach, there is now a statutory guide to each element.

4.2.2.1 Qualifying Organisation

Firstly, the *CMCHA* applies to organisations and therefore the organisation must be a qualifying organisation such as a corporation. However, the *CMCHA* goes beyond

mere corporate liability and applies to trade unions, police forces and a large number of Government departments listed in Schedule One of the *CMCHA* such as the Attorney General's Office, the Forestry Commission and the Royal Mint for example. Section 11 unusually expressly removes Crown immunity for the purposes of this Act.

4.2.2.2 A relevant duty of care?

Secondly, the organisation must have owed a relevant duty of care to the victim. The meaning of this relevant duty of care is provided within section 2(1): -

(1) A "relevant duty of care", in relation to an organisation, means any of the following duties owed by it under the law of negligence-

(a) a duty owed to its employees or to other persons working for the organisation or performing services for it;

(b) a duty owed as occupier of premises;

(c) a duty owed in connection with –

(i) the supply by the organisation of goods or services (whether for consideration or not),

(ii) the carrying on by the organisation of any construction or maintenance operations,

(iii) the carrying on by the organisation of any other activity on a commercial basis, or

(iv) the use or keeping by the organisation of any plant, vehicle or other thing;

(d) a duty owed to a person who, by reason of being a person within subsection (2), is someone for whose safety the organisation is responsible.

Section 2(1)(d) relates to persons in custody was brought into force on 1st September 2011¹⁸. This was discussed above during the passage of the Bill through both Houses of Parliament and was one of the main points of delay and consternation between the Houses.

This is a question of law, it is for the judge and not for the jury to make the requisite determination as to whether the particular organisation owes a duty of care to a particular individual and this is made clear within s.2(5) that the “judge must make any findings of fact necessary to decide that question”.

As Matthews recognises the “corporate offence under the Act is unique in including an element of the offence to be determined by a judge who will then direct the jury of its existence, as a matter of law”¹⁹. However, it is for the prosecution to prove that there is a duty of care and thereafter the judge must make findings of fact and determine whether the criminal standard of proof is reached. The Judge will consider the three-point approach²⁰ devised by Lord Bridge in the HL decision in *Caparo Industries plc v. Dickman*²¹ to decide whether a duty of care is present.

In addition, the duty of care contained within this section is subject to sections 3 to 7, which contain the exceptions to the duty of care and they are briefly as follows,

¹⁸ The Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No. 3) Order 2011 (2011/1867)

¹⁹ See note 2 (Matthews) at p.34

²⁰ Firstly, there must be a foreseeability of harm; secondly there must be proximity between the victim and the defendant; and finally it must be reasonable to impose the duty of care

²¹ [1990] 1 All ER 568

section 3 – Public policy decisions, exclusively public functions and statutory inspections, section 4 – Military activities, section 5 – Policing and law enforcement, section 6 – Emergencies and section 7 – Child-protection and probation functions. Again, as the cases appear before the courts, it will be seen how these will be applied.

However, there has been criticism of the insertion of a relevant duty of care being included in the *CMCHA*. Gobert suggests that it is “in fact otiose”²² explaining that the LC²³ and HO 2000²⁴ did not include this requirement. Equally, the Joint Committee²⁵ that considered the *2005 draft Bill*, as discussed in the previous chapter suggested that the relevant duty of care should not be included. Gobert’s argument that the inclusion of the relevant duty of care is superfluous is because he suggests that companies are “already under a duty not to kill innocent persons”²⁶. Nevertheless despite the criticism, the relevant duty of care provisions was included by Parliament within this Act and it will be seen how it is applied and interpreted by the judiciary.

4.2.2.3 Causation

This aspect is contained within section 1(1)(a): -

“... the way in which its activities are managed or organised –

²² Gobert, J. “The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?” *Modern Law Review* (2008) Vol.71(3) 413-433 at p.416

²³ Law Commission, “Legislating the Criminal Code: Involuntary Manslaughter” Law Com. Report No.237 (1996)

²⁴ Home Office, “Reforming the law on involuntary manslaughter: the Government’s proposal” May (2000)

²⁵ See note 1 (Joint Committee)

²⁶ See note 22 at p.416

(a) *causes person's death*".

The Explanatory Notes to the Act at paragraph 15 refer to how "[t]he usual principles of causation in the criminal law will apply to determine the question. This means that the management failure need not have been the sole cause of death; it need only be a cause (although intervening acts may break the chain of causation in certain circumstances)"²⁷.

This can be contrasted with the common law offence of manslaughter, discussed in the second chapter, where as Forlin notes "the law that required the failure to be a *substantial* cause of death. The courts might imply a "substantiality" requirement into the new offence. We will have to wait and see!"²⁸. This point will only be clarified when the offence has been properly tested against a number of defendant corporations.

Gobert is critical of the Government's decision to reject the LC's "conception of causation in favour of the more conventional approaches used by the courts, which themselves have long been a source of controversy and confusion"²⁹. As discussed in the previous chapter, the LC did recommend at paragraph 8.39 of the 1996 report, that there should be an express provision "to the effect that in this kind of situation the management failure may be a cause of the death, even if the immediate cause is the act or omission of an individual". Given the passage of time between the 1996 report and the time of this piece of legislation, there have been a significant number of judicial decisions on causation such as the HL decision in *R. v. Kennedy (No.2)*³⁰

²⁷ Corporate Manslaughter and Corporate Homicide Bill HL 19 at Para 15

²⁸ Forlin, G. and Smail, L. "Corporate Liability: Work Related Deaths and Criminal Prosecutions (2010) 2nd Edition at p.5

²⁹ See note 22 at p.419

³⁰[2007] UKHL 38

whereby the chain of causation can be broken by voluntary acts of *compos mentis* adults. In light of this and other decisions, “the Law Commission’s formulation may be needed more than ever if the Act is to have any bite”³¹.

4.2.2.4 A “gross breach” of the relevant duty of care

Fourthly, as per s.1(1)(b), the death must amount to a “gross breach” of the relevant duty of care. Section 1(4)(b) states as follows: -

“(b) a breach of duty of care by an organisation is a ‘gross’ breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances”.

This is a matter for the jury to determine. Section 8 specifies factors for the jury to consider, including whether the corporation/ organisation “failed to comply with any health and safety legislation that relates to the alleged breach”. In light of that the jury must consider “(a) how serious that failure was” and “(b) how much of a risk of death it posed”³². In contrast to the obligation within s.8(2), the jury may under s.8(3) consider Health and Safety policies and guidance along with the corporate culture of the defendant organisation and under s.8(4) provides the wide discretion to consider “any other matters they consider relevant”.

As Forlin states, given the infancy of this offence, “how far does a company’s management failure need to fall below what can reasonably be expected? The answer

³¹ See note 22 at p.419

³² s.8(2)

is uncertain, as it will take considerable time and a series of appellate decisions to build up significant binding case law”³³. Until then, we might turn to the existing case law on “gross negligence” manslaughter. In the decision in *R. v. Bateman*³⁴, Lord Hewart C.J. stated that “gross negligence” required that: -

“... the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others, as to amount to a crime against the State and conduct deserving of punishment”.³⁵

4.2.2.5 The “senior management” test

Finally, as per s.1(3), the way in which the organisation activities were managed or organised by its senior management is a substantial element in the gross breach. The “senior management” test has received significant criticism and many commentators have suggested that this test has taken the law back towards the deficiencies associated with the identification/ “directing mind and will” doctrine. The *CMCHA* provides some clarity as to what it means by use of the term “senior management” in s.1(4)(c): -

“(c) ‘senior management’, in relation to an organisation, means the persons who play significant roles in-

- (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or*

³³ See note 28 at p.6

³⁴ (1925) 19 Cr. App. Rep. 8, CCA

³⁵ *Ibid.* at p.11

(ii) *the actual managing or organising of the whole or a substantial part of those activities*".

Given that the legislation has been enacted and this new test is at the heart of the new offence, Matthews states that "[o]n its face, the definition of an organisation's senior management under the Act has a far wider compass than merely those, under common law, who constituted the "directing minds" of a company, which was effectively limited to a company's Board of Directors"³⁶. Therefore the view is that the test itself is wider than that applied when utilising the directing mind and will approach.

Conversely, Card recognises that this new test "still restricts the range of people whose misconduct can result in liability for corporate liability"³⁷. Furthermore, Card contends that the test is in fact "too narrow" and that there "is a risk that cynical organisations will delegate their decision-making and management and organisation in areas related to health and to safety to people falling outside the definition"³⁸. This is a fair criticism, given that organisations and corporations will always try to limit their liability on a number of fronts, such as tax liability. Indeed, companies receive training so as to limit their various liabilities and many legal firms and accountants firms actively advise companies on how to limit liabilities. It is not inconceivable that law firms will provide advice on how to deal with this legislation, so as to prepare organisations for it. It goes without saying that this training will not attempt to pervert the course of justice, but nevertheless organisations and their representatives will be "prepared" for the implications of this legislation.

³⁶ See note 2 (Matthews) at p.113

³⁷ Card, R. "Card, Cross and Jones Criminal Law" (2010) 19th Edition at p.314

³⁸ Ibid.

The key point in relation to this new test is, as Matthews recognises, the “difficulty with the definition of “senior management” is that it is constructed of terms that have no established meaning in either legislation or case law”³⁹. This will undoubtedly cause problems when this new offence is tested in courts and will lead to a number of appeals. To echo Forlin’s point raised earlier, it will take a significant number of appellate decisions that will in due course provide guidance in the form of binding decisions that will assist the trial courts on this very difficult aspect of the new offence.

4.2.3. Other relevant aspects contained within the legislation

For completeness, this section will address the other relevant issues contained within the *CMCHA*. This section will analyse the other relevant sections of the *CMCHA* such as the sentencing powers (s.1(6)) including remedial orders (s.9) and publicity orders (s.10), the required consent of the DPP to bring proceedings (s.17), no individual liability (s.18) and the abolition of liability of corporations for manslaughter at common law (s.20).

³⁹ See note 2 (Matthews) at p.113

4.2.3.1 Sentencing Powers under the Act

The sentencing powers under this Act stipulates that on conviction on indictment⁴⁰ for corporate manslaughter the sentence will be a fine. Sentencing Guidelines have been produced and these are discussed in full below. The *CMCHA* also provides two further options to be placed at the disposal of the sentencing judge and these are Remedial orders and Publicity orders and are discussed in the next sub-section.

4.2.3.2 Remedial orders/ Publicity Orders

The *CMCHA* provides sentencing judges with two additional orders that can be imposed following a conviction for corporate manslaughter; namely remedial orders⁴¹ and publicity orders⁴².

The remedial order contained within this legislation is similar to the power available under s.42 Health and Safety at Work Act (1974). However, the power available under s.42 is not exercised with any great frequency as the offending health and safety infringement is usually rectified during the proceedings. The order available under this legislation can require the offending organisation to undertake the steps so as to remedy: -

“(a) *the breach mentioned in section 1(1) (“the relevant breach”)*

⁴⁰ s.1(6)

⁴¹ s.9

⁴² s.10

- (b) *any matter that appears to the court to have resulted from the relevant breach and to have been a cause of the death;*
- (c) *any deficiency, as regards health and safety matters, in the organisation's policies, systems or practices of which the relevant breach appears to the court to be an indication.*⁴³

The prosecution must apply for the remedial order to be imposed and the terms of the order must stipulate the terms of the order they require⁴⁴. However, the prosecution must consult and seek the input of the appropriate regulatory authority such as the Health and Safety Executive⁴⁵. The order itself must state a period for the remedial work to be completed, but this period can be extended by order of the court⁴⁶. The *CMCHA* provides that a fine can be imposed for failure to comply with the remedial order⁴⁷.

The other order available to the sentencing judge is to impose a publicity order. However, publicity orders only apply to offences of corporate manslaughter committed on or after 15th February 2010. The court can order that the offending corporation publicises the following: -

- “(a) *the fact that it has been convicted of the offence;*
- (b) *specified particulars of the offence;*
- (c) *the amount of any fine imposed;*

⁴³ s.9(1)

⁴⁴ s.9(2)

⁴⁵ s.9(3)

⁴⁶ s.9(4)

⁴⁷ s.9(5)

(d) *the terms of any remedial order made.*⁴⁸

The approach taken in relation to publicity orders is similar that of remedial orders, but in this instance, the court must seek the view of the regulatory/ enforcement authorities but also acknowledge any representations made by the prosecution⁴⁹. In a similar vein to remedial orders, the court must stipulate the period in which the publicity order is to be complied with⁵⁰ and failure again to comply with this order can result in a fine⁵¹.

Considering the impact of these orders, companies and shareholders will not welcome the name of the company/ organisation being publicised in a detrimental light. The “name and shame” approach may be very effective if it is used regularly and this could prove to be a significant deterrent to potential offending corporations. However, in relation to remedial orders, it is questionable how effective these will be. In legal proceedings, the offending companies would be advised by their legal teams that they should remedy the cause of death to ensure that it doesn’t occur again to illustrate contrition and learning and that this would be used as a point of mitigation at the sentence hearing. It is to be seen how often these orders are made and whether they will have the impact intended.

⁴⁸ s.10(1)

⁴⁹ s.10(2)

⁵⁰ s.10(3)

⁵¹ s.10(4)

4.2.3.3 Consent of the DPP to commence proceedings

Section 17 stipulates that the DPP must give consent for criminal proceedings to be commenced under this Act. This is in direct contrast with the recommendations of the LC⁵² and HO 2000⁵³.

The inclusion of this requirement creates a potential political dimension that could cause some significant criticism of the DPP and bring into question that individual's impartiality. The DPP is required to report to the Attorney General, who is a member of the Government. Given that this legislation removes Crown immunity, this issue could cause significant furore if consent to prosecute a Crown department was withheld.

4.2.3.4 No Individual liability under this Act

Section 18 stipulates that there will be no individual liability under this Act. The inclusion of this particular section is controversial, as it limits the *CMCHA* solely to the organisational/ corporate level and the "offending" directors and chief executives are not covered within this legislation. As a result of this section, there is no possibility of secondary liability of directors for corporate manslaughter.

Some commentators consider this to have been a glaring error on the part of the Government. Gobert states that "[t]he lobbying efforts of the business community

⁵² See note 23 (Law Com.) at Para 8.66

⁵³ See note 24 (Home Office) at 3.7.6.

against personal liability bore fruit”⁵⁴ but nevertheless that “[t]he government’s rationale for eschewing accessorial liability in the corporate manslaughter context – its professed desire to focus on the liability of organisations – is hardly a convincing reason for ignoring the culpability of corporate executives, senior managers and directors”⁵⁵. There is still the option for charges of gross negligence manslaughter to be preferred against the individual directors/ chief executives/ senior managers if the prosecution are satisfied that the two tests for prosecution are satisfied.

4.2.3.5 The Abolition of liability of corporations for manslaughter at common law

For completeness and to confirm the current position, the terms of section 20 are clear: -

“The common law offence of manslaughter by gross negligence is abolished in its application to corporations, and in any application it has to other organisations to which section 1 applies”.

In essence, this means that this legislation has now replaced the former system.

⁵⁴ See note 22 (Gobert) at p.422

⁵⁵ Ibid.

4.3. Was the Act worth waiting for?

I'll argue that, on balance, it was indeed worth waiting for, notwithstanding certain deficiencies. The central question to this thesis is whether we have replaced one deficient system with a new system with similar deficiencies? The benefits and detriments of the new legislation will be considered in turn below.

On a positive note, we do now have a statutory offence compared to the previous common law doctrine. It could be suggested that having a defined statutory criminal offence gives more significance to deaths in the workplace, rather than them being seen simply as a regulatory matter. Conversely, given that the penalties available to the sentencing judge are analogous to those available following conviction for regulatory offences, will this offence be considered as anything more than an extension to regulatory law? As there is no individual liability to enforce, the *CMCHA* has no individual to imprison as a punitive sanction; it simply puts a price on the life lost by way of a fine which is significantly different to the sentences available for murder or for other types of manslaughter.

The question that flows from this is whether the *CMCHA* will present a suitable deterrent for companies. For example, if a company ignores health and safety laws and saves money by doing so, will the fine imposed for this offence be sufficiently high to act as an effective deterrent against its illegal activities? As the main sentence that can be imposed is a financial one, it is questionable whether this could be seen as a business expense and the cost of the fine is simply passed onto the consumers to make up the shortfall. By doing so the company could suffer competitively, but if the

company has a monopoly, such as a train operating company, then the competitive impact can be nullified.

Griffin takes the view that the *CMCHA* “is to be welcomed as a statute which identifies a company’s liability for the offence of manslaughter in a manner that extends the probability of a successful prosecution”⁵⁶. Yet, and this point is discussed further below, Griffin identifies arguably the *CMCHA*’s greatest deficiency in that it “discards a golden opportunity in its failure to contain provision for the secondary liability of a culpable senior manager”⁵⁷.

However, as identified in the third chapter the *CMCHA* could have gone further, for example by allowing for individual liability, and the potential deficiencies in the *CMCHA* may be highlighted once it is tested in a prosecution against a large corporation.

Elliott and Quinn take the view that the *CMCHA* “is disappointing, as it significantly waters down the original proposals to the point that the new offence looks very similar to the old common law, and will be almost as difficult to prosecute. The Home Office has stated that the 2007 Act will allow easier prosecution of big companies, but this is far from certain”⁵⁸. There are aspects to the legislation that will cause problems for the first courts and judges that encounter it. There are a number of points that will require elucidation from the appellate courts and this will take some time for a wealth of judicial guidance and jurisprudence to come into existence.

⁵⁶ Griffin, S. “Corporate Killing – the Corporate Manslaughter and Corporate Homicide Act 2007” *LMCLQ* (2009) 1 (Feb) 73-89 at p.89

⁵⁷ *Ibid.*

⁵⁸ Elliott, C. and Quinn, F. “Criminal Law” (2010) 8th Edition at p.313

As mentioned above, a further key criticism of the new legislation is that individual liability is not allowed under this Act. This is despite the role that the “offending” directors and chief executives play “who significantly contribute to their organisation’s offence”⁵⁹. Gobert argues that Parliament had its attention focused upon the corporate failing and that it “appears to have lost sight of the fact that senior managers and directors are responsible for conceiving, formulating, approving and implementing corporate policies, including those which turn out to be criminogenic”⁶⁰. There is of course, the option for the Crown to pursue charges of gross negligence manslaughter against the individual directors.

With the focus of the *CMCHA* being solely on the corporate entity, there is the possibility that if a company is convicted of corporate manslaughter, the directors may make the decision to simply wind the company up and move onto a different venture with another company. If that occurs, all the impact of this legislation, whether it is the deterrent effect or the punishment becomes irrelevant as the original company is treated as dissolved within the law. There is however the possibility that the directors could be pursued under the Company Directors Disqualification Act 1986, although this is beyond the scope of this thesis.

From a practical perspective, it will need to be seen how often charges of corporate manslaughter are preferred. In light of this, given the current economic climate and its associated austerity measures proposed in the public sector, mounting a prosecution for corporate manslaughter will be costly for the prosecuting authorities. Further to this is whether the CPS is the appropriate body to prosecute such an offence. Should it not be dealt with by a body that has experience or knowledge of corporate culture?

⁵⁹ See note 22 (Gobert) at p.414

⁶⁰ Ibid.

The CPS does have specialist prosecution departments, but will these have the required knowledge of corporate structures. Allied to this is whether the Police have sufficient resources in the current climate to have a specialised team of officers that will be able properly investigate this crime. It is unlikely that each of the 43 Police forces in England and Wales will each be able to sustain a specialist department, when they are undergoing significant cuts to their budgets.

4.4. Sentencing Guidelines

Following a consultation process, the Sentencing Guidelines Council published its definitive guidelines⁶¹ on 9th February 2010 for sentencing for corporate manslaughter and Health and Safety offences causing death. The guideline properly acknowledges that offences that fall within this guideline will always involve harm that is very serious.

The aggravating and mitigating factors provided within the guidelines are non-exhaustive and are listed within the body of the document and therefore it is not relevant to repeat them here.

However, one aspect of the document requires close examination due its potentially controversial implementation. As with all criminal proceedings, an individual or corporation must provide a breakdown of its financial position, company accounts or statement of means so that the sentencing court is aware of its available funds. In light of this, the sentence guidelines deals with this in Annex A the type of information the

⁶¹ Sentencing Guidelines Council “Corporate Manslaughter & Health and Safety Offences causing death – Definitive Guideline” (2010) February

court should have at its disposal such as for companies, it should have published audited accounts, whereas for local authorities and public bodies should provide the Annual Revenue Budget. The guidelines make it clear at paragraph 15 that “a fixed correlation between the fine and either turnover or profit is not appropriate”⁶², yet the court should still be conscious of the turnover and/ or profit of the organisation if relevant.

The nature of the guidelines could be problematical in that the defendant corporations that will be subject to the financial penalty will be significantly varied in their size and ability to meet the financial penalty imposed by the sentencing court. The aim of the Sentencing Guidelines in respect to all offences and offenders is not just limited to the offence of corporate manslaughter, is for sentencing to be consistent and not be dependent upon which court the offender appears before. This is the aim, but in practice there will always be differences and nuances in sentencing practices between the many different courts and different members of the judiciary. This may lead to a number of appeals to the Court of Appeal on the grounds that the fines imposed by the courts are “manifestly excessive”. Given that this is a new area of the law, it is likely that a large number of the first sentences for corporate manslaughter offences will be appealed and hopefully the appellate courts will provide clear guidance for the first instance courts.

When a court imposes the financial sanction, the guidelines outlines’ a number of financial consequences that the courts should take into account. The list at paragraph 19(i) includes the consequence, namely the “effect on the employment of the innocent may be relevant”⁶³; this factor did not apparently weigh heavy upon the sentencing

⁶² Ibid. at p.5

⁶³ Ibid. at p.6

judge's mind in the Cotswold Geotechnical case discussed below. However, one of the consequences that was relevant in the Cotswold Geotechnical case is at paragraph 19(viii) namely "whether the fine will have the effect of putting the defendant out of business will be relevant; in some bad cases this may be an acceptable consequence"⁶⁴.

The guidelines carefully state that a financial penalty imposed by a court does not "attempt to value a human life in money"⁶⁵; however it does state a figure should rarely be below £500,000 and that the amount could be into the millions of pounds.

Finally, the sentence guidelines do cover the other options available to the courts such as compensation that can be ordered, publicity orders and remedial orders.

4.5. The first prosecution – R. v. Cotswold Geotechnical (Holdings) Limited

The first prosecution under the *CMCHA* followed an accident that occurred in September 2008. A junior geologist, Alexander Wright an employee of the firm was involved in an accident whilst he was obtaining soil samples. Mr Wright was working alone in a trench that collapsed and he died from crushing and traumatic asphyxiation.

The CPS made a charging decision on 23rd April 2009 and authorised a number of charges. The CPS authorised a charge of corporate manslaughter against the company, Cotswold Geotechnical (Holdings) Limited. Additionally, it charged one of the directors, Peter Eaton with gross negligence manslaughter. Furthermore, it

⁶⁴ Ibid.

⁶⁵ Ibid. at p.7

authorised Health and Safety charges against the company and against Mr Eaton. This demonstrated clearly that the CPS had contemplated its strategy carefully and had covered a number of potential eventualities and as Bastable suggests the approach taken by the CPS showed it was “willing to deploy the full arsenal of applicable criminal offences following a fatal accident”⁶⁶.

The trial was listed to commence at Winchester Crown Court in February 2010, but was adjourned. During the period of adjournment, the proceedings against Mr Eaton for gross negligence manslaughter and health and safety offences were stayed due to his ill health as he was unfit to stand trial. Nevertheless the proceedings against the company continued. However and strangely the Judge, Mr Justice Field, suggested that the Health and Safety offence alongside the Corporate Manslaughter charge could confuse the jury and therefore the Health and Safety offence was discontinued. This is surprising given that the new legislation is designed to work hand in hand with the Health and Safety offences.

One of the key aspects raised by the Prosecution was the depth of the trenches. Mr Wright was working alone in a 3.5 metre deep trench, at the end of the day finishing up the day’s activities when the company director left.

On Tuesday 15th February 2011, the jury returned a unanimous guilty verdict in under 90 minutes. The jury found that the depth of the trenches, which should be no deeper than 1.2 metres according to industry standards, was wholly dangerous.

Mr Justice Field on 17th February 2011 sentenced the company to pay a fine of £385,000. This was despite the Judge hearing representations as to the company’s

⁶⁶ Bastable, G. “Corporate Convictions” Criminal Law and Justice Weekly (2011) 16th April Vol.175, 237-238 at p.238

financial state that was described as “parlous”. The Judge directed that the company could pay the fine over a period of ten years and that no costs were to be paid.

The case itself was not formally reported, but the following sentencing remarks of Mr Justice Field have been widely referred to in a number of articles: -

“It may well be that the fine in the terms of its payment will put this company into liquidation. If that is the case it’s unfortunate but unavoidable. But it’s a consequence of the serious breach ...”

As discussed above, in light of the sentencing guidelines, judges when passing sentence should not allow the issue of company liquidation to affect the level of the fine if the breach was so gross.

The company appealed the sentence decision on the basis that it was manifestly excessive. Given the nature of the appeal and that it was the first conviction under the new legislation the matter was heard before the Lord Chief Justice, Lord Judge in the Court of Appeal on 11th May 2011⁶⁷. The central contention of the company was based upon the level of the fine in that represented 250% of its turnover and therefore would ultimately result in liquidation of the company.

Despite the arguments that were propounded by the appellant company, the appeal was dismissed by the Court of Appeal. Lord Judge held that even though as a result of this fine the company could go into liquidation, this was “unfortunate but unavoidable and inevitable”. The original sentence of Mr Justice Field was not criticised as he had properly referred to the fact that the company had been convicted of corporate manslaughter following a gross breach of duty.

⁶⁷ R. v. Cotswold Geotechnical (Holdings) Ltd [2011] EWCA Crim 1337

4.5.1. The impact of the first prosecution?

The first prosecution under this legislation was much anticipated and it was hoped that it would demonstrate the effectiveness of the new legislation compared to the deficiencies associated with the old approach. Sadly, despite the conviction of the company, the expectation was not completely satisfied. The company involved in this case was a small “one man band” and therefore the failing of the “senior management” was not examined in depth and was not thoroughly considered. However, as McCluskey states: -

“The true test of the new legislation will come with a prosecution of a large company which has multiple directors which already purports to have compliant health and safety procedures”⁶⁸.

The point suggested by McCluskey is absolutely pertinent, the new legislation and the “senior management” test must undergo rigorous legal debate in court proceedings. However, this will only occur when it is tested in a prosecution against a large corporation with a complex and sophisticated management structure.

Nevertheless, the conviction was treated as a success by the CPS and also the Health and Safety Executive. However, the conviction was not significantly overemphasised

⁶⁸ McCluskey, D. “Legal Update: corporate manslaughter” Law Society Gazette (2011) 3rd March, 16-17 at p.17

by the Crown given that the “nature of *this* case is such that it unfortunately tells us nothing whatsoever about how these new principles operate”⁶⁹.

A further issue commented upon by academics was the level of the fine. Mr Justice Field suggested that level of the fine was commensurate with the offence. As with all criminal proceedings, the judge does have the discretion with regard to the level of sentence and the guidelines are indeed guidelines and not law. However as discussed above, the sentencing guidelines at paragraph 24 state that “the appropriate fine will seldom be less than £500,000 and may be measured in millions of pounds”⁷⁰. Field and Jones argue that by awarding a fine less than the starting point suggested by the guidelines “will be viewed by some as an indication that the Act lacks bite”⁷¹. On reflection, given that this is the first conviction under this legislation, it is arguably premature to suggest that the Act lacks teeth, the option to award a higher fine when required is available to sentencing judges.

It is understood that the CPS are considering a number of cases that may involve corporate manslaughter. In the next subsection, a recent prosecution has commenced that is in the early stages of court proceedings and will be discussed briefly.

4.5.2. The second prosecution – Lion Steel Limited

The second prosecution under the *CMCHA* received its first hearing before Tameside Magistrates’ Court on 2nd August 2011. The CPS authorised charges of Corporate

⁶⁹ *Ibid.*

⁷⁰ See note 61 (Sentencing Guidelines) at p.7

⁷¹ Field, S. and Jones, L. “Death in the workplace: who pays the price?” *Company Lawyer* (2011) Vol.32(6), 166-173 at p.173

Manslaughter against Lion Steel Limited, along with individual charges of gross negligence manslaughter against three of the company directors. In addition, charges for Health and Safety offences have been preferred against the company and also the three directors.

The charges arise from an incident on 29th May 2008 where an employee of the company, Steven Berry, fell through a roof and died as a result of his injuries.

In contrast to the first prosecution against Cotswold Geotechnical, Lion Steel Limited is a larger company with 100 employees. Therefore, the new law should face a greater test given the size of the company structure. However, Lion Steel is not a large company with a complex management structure, as those described in the second chapter and therefore the law still awaits its first true significant test.

The trial has been listed at Manchester Crown Court and will commence on 12th June 2012. Unfortunately, this is beyond the time-limits permitted for the submission of this thesis.

4.6. Conclusion

The central question to this thesis is whether the *CMCHA* has resolved the former doctrine's deficiencies. There are significant concerns that the same problems will exist but in slightly different forms. However, the *CMCHA* has provided a statutory offence of corporate manslaughter, but the offence with its new test is not perfect.

Law reform is supposed to develop and take the law forward, not to hold station or to carry the deficiencies of the old system with it. We appear to now have an identification “plus” model with the focus on the senior management. This may well provide a lacuna in the law whereby the test in practical terms could be either too narrow or oddly, too wide.

It was hoped that the first prosecution would provide an example of how effective the new legislation would or could be. However, the company involved was not a large corporation therefore the first real test is still awaited. This case demonstrated the sentencing powers available to the court, with the fine imposed causing significant difficulty for the offending corporation that resulted in an unsuccessful appeal.

The impact, extent and effectiveness of the *CMCHA*, is still very much in its infancy. In contrast, in the next chapter we will consider a different approach that is applied in Canada that is very much moving into adolescence.

Chapter Five – an alternative approach to corporate criminal liability for manslaughter

This chapter will consider the approach taken by Canada to corporate criminal liability for manslaughter.

The similarities with the new system in the UK will be discussed along with the differences and areas that could have been adopted that could have improved our new law.

The first section will consider the historical Canadian approach to corporate criminal liability that was based on the identification doctrine much maligned on both sides of the Atlantic.

The second substantive section will consider the reform process that followed the Westray Mine Disaster in 1992 that ultimately resulted in the passage of Bill C-45¹ that amended the Criminal Code² in Canada. In a similar vein to the delay experienced in the UK, it took 11 years between the Westray Mine Disaster and the Federal Government of Canada tabling Bill C-45.

The chapter will then discuss both the first prosecutions that followed under Bill C-45 and briefly the sentencing position.

¹ An Act to Amend the Criminal Code, S.C. 2003, c.21, proclaimed in force 31st March (2004) (save for s.22). Introduced as Bill C-45, 2nd Sess., 37th Parl., (2003)

² R.S.C. 1985, c. C-46

5.1. The Canadian Approach

Historically in Canada the approach taken to corporate criminal liability was based upon the identification doctrine. Canada approved the identification doctrine as a basis of corporate criminal liability before it was accepted into the criminal law in England³.

5.1.1. The identification doctrine in Canada

The leading case in Canadian Law in this area is the Supreme Court of Canada decision in *R. v. Canadian Dredge & Dock Company*⁴. Prior to this Supreme Court decision, the application was similar to the narrow approach taken by the courts in England and Wales. The Supreme Court considered the approach taken by the HL in *Tesco Supermarkets Limited v. Nattrass*⁵, as discussed in the first chapter, with the general view being that it was too narrow.

However, the doctrine was widened by the Supreme Court in *Canadian Dredge* and the Court held that a corporation could have more than one “directing mind”. The difference between the approach taken by the HL in *Tesco* and the Supreme Court in *Canadian Dredge* is that the Canadian courts were prepared to identify the directing mind at a lower and broader level within a corporation compared with the English approach.

³ *R. v. Fane Robinson Ltd.* [1941] 3 D.L.R. 409 (Alberta Court of Appeal)

⁴ [1985] S.C.J. No. 28, [1985] 1 S.C.R. 662 (S.C.C.)

⁵ [1972] A.C. 153

There are a number of examples of where the Canadian courts have indicated an ability to implement a broader approach to the identification doctrine⁶. As Hanna confirms and compares the situation between Canada and England at the time of preparing his article: -

“In Canada it seems evident that the directing mind of the corporation may reside in fairly low-level officials. This is to be contrasted to the position taken by the House of Lords in the leading English case of Tesco Supermarkets v. Natrass”⁷.

The approach and application of the identification doctrine has developed in Canada as it has in the UK. The Supreme Court of Canada revisited this issue in the case of Rhone (The) v. Peter A.B. Widener (The)⁸. This case dealt with civil damages and on some level suggested that in future cases, the directing mind could only be found in the higher echelons of the corporation where there are higher levels of authority.

⁶ Hanna, D. “Corporate Criminal Liability” Criminal Law Quarterly (1988-1989) Vol.31, 452-480 at p.464: - “The following results have been reached in Canada: a used-car sales manager who was not a director or officer of the corporation and who defied orders of senior officials by turning back odometers was held to be a directing mind and will for the purpose of holding the corporation liable for fraud (R. v. Waterloo Mercury Sales Ltd. (1974), 18 C.C.C. (2d) 248, 27 C.R.N.S. 55, [1974] 4 W.W.R. 516 (Alta. Dist. Ct.); transactions of a salesman which required only *pro forma* approval by a corporate official were held to be acts of the corporation making it liable for fraud (R. v. P.G. Marketplace (1979), 51 C.C.C. (2d) 185 (B.C.C.A.); in a company of four thousand employees, permit issuers with authority to implement safety procedures were held not to be the directing mind and will of the corporation as they were simply carrying out a policy already in place (R. v. Syncrude Canada Ltd. [1984] 1 W.W.R. 355, 48 A.R. 368, 28 Alta. L.R. (2d) 233 (Q.B.); bid-rigging on a road surface treatment contract by a company superintendent, held to be a directing mind and will, was sufficient to ground liability of the corporation (R. v. J.J. Beamish Construction Co. [1967] 1 C.C.C. 301, [1966] 2 O.R. 867, 50 C.P.R. 97 (H.C.J.), affd. [1968] 2 C.C.C. 5, 65 D.L.R. (2d) 260, [1968] 1 O.R. 5 (C.A.); theft by an accountant was held to be an act of the corporation (R. v. Spot Supermarket Inc. (1979) 50 C.C.C. (2d) 239 (Que. C.A.)); and the only employee of a realty company who was responsible for renting properties was held to be a directing mind and will for the purpose of holding the company liable under the Ontario Human Rights Code (Karen Reese v. London Realities & Rentals (1986) 7 C.H.R.R. D3587 (Ont. Bd. Of Enquiry)”.

⁷ Ibid.

⁸ [1993] 1 S.C.R. 497

In a similar vein to the experiences in England discussed in the first chapter, the identification doctrine in Canada has not been without criticism. Norm Keith a leading expert on Occupational Health and Safety Law in Canada acknowledged that “[l]egal and policy criticisms of the narrow nature of the identification theory were widespread”⁹ and Manning and Sankoff echo this view where “[a]pplication of these principles has proven somewhat troublesome given the intricate ways in which corporations are established and organized”¹⁰.

The uneven development of the law relating to the identification theory has yielded uncertainty and this has caused difficulties when focussed upon corporations with large and diffuse corporate structures. As Keith shows “[t]he identification theory, therefore, had the effect of reducing the likelihood of corporations being held criminally responsible for offences committed by lower level managers and mere representatives of the corporation”¹¹. Macpherson explains the main deficiency with the identification theory and there are significant correlations that can be drawn with the experience in the UK: -

“.... at common law, the corporation is generally immune from criminal sanction for the actions of mid- to low-level managers and other employees”¹².

Historically the development of the identification doctrine in Canada was also disjointed which caused problems thereafter, not too dissimilar from our experiences in the UK as considered in the first chapter.

⁹ Keith, N. “Workplace Health and Safety Crimes” (2009) 2nd Edition at p.39

¹⁰ Manning, M. and Sankoff, P. “Manning, Mewett and Sankoff – Criminal Law” (2009) 4th Edition at p.236

¹¹ Keith, N. “Sentencing the Corporate Offender: From Deterrence to Corporate Social Responsibility” Criminal Law Quarterly (2010) Vol.56, 294-327 at p.297

¹² Macpherson, D.L. “Extending Corporate Criminal Liability: Some thoughts on Bill C-45” Manitoba Law Journal (2003-2004) Vol.30(3), 253-284 at p.255

5.2. The Westray Mine Disaster (1992)

As discussed in the previous chapters, law reform usually requires a catalyst. On 9th May 1992, 26 miners were killed in the Westray Mine disaster in Pictou County, Nova Scotia.

Very shortly after the disaster, Justice Peter Richard was appointed to chair an inquiry into the disaster. However, the inquiry was temporarily stayed, pending any resolution of potential criminal charges, following an application to the Nova Scotia Supreme Court¹³. However, the Supreme Court of Canada¹⁴ overruled this decision some years later and allowed the Inquiry to continue albeit the decision was “on very narrow legal grounds”¹⁵.

5.2.1. The criminal proceedings

An investigation into the Westray Mine disaster was commenced by the Royal Canadian Mounted Police. There were a number of attempts made to hold the management of the mine, both the company Curragh Inc. and two individuals (Gerald Phillips, the manager of the mine and Roger Parry – the underground manager) legally responsible, however all of the attempts were unsuccessful.

¹³ Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy) [1992] N.S.J. No.391, 116 N.S.R. (2d) 30 (N.S.S.C.)

¹⁴ Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy) [1995] S.C.J. No.36, 124 D.L.R. (4th) 129 (S.C.C.)

¹⁵ See note 9 at p.22

The first charges of manslaughter and criminal negligence causing death under the Criminal Code were laid on 20th April 1993. However, on 20th July 1993 the Judge decided¹⁶ to stay the charges that had been laid as it was decided that the charges were unclear but left open the possibility for new charges to be laid in the future.

New charges were laid against the same defendants and the Judge resisted an application for those to be stayed and a trial date was secured. The trial started in February 1995¹⁷, however most of the trial focussed upon the limited disclosure provided by the Crown rather than on the issues in dispute. The trial took a peculiar twist when the Judge made a telephone call and requested the prosecutor be taken off the case. On the basis of the lack of disclosure, the defendants were able to stay the prosecution.

An appeal¹⁸ was made to the Nova Scotia Court of Appeal in December 1995 who overturned the trial judge's decision to stay the proceedings and ordered that a new trial should take place. This decision was further appealed to the Supreme Court of Canada¹⁹ who upheld the decision in March 1997 of the Nova Scotia Court of Appeal and confirmed that a new trial should be heard. However, despite this decision from the highest court in Canada, no new trial was ever commenced and this was announced over a year later on 30th June 1998. The basis for this decision was that there was no reasonable prospect of a conviction. As Keith recalls "[t]his dissatisfaction, not completing the first trial and then the decision not to proceed with a second trial, was a central factor in the call for political action and changes to the

¹⁶ R. v. Curragh Inc [1993] N.S.J. No.279, 124 N.S.R. (2d) 59 (N.S. Prov. Ct.)

¹⁷ R. v. Curragh Inc [1995] N.S.J. No.275, 146 N.S.R. (2d) 163 (N.S.S.C.), revd [1995] N.S.J. No.512, 146 N.S.R. (2d) 161 (N.S.C.A.), affd [1997] S.C.J. No.33, 113 C.C.C. (3d) 481 (S.C.C.)

¹⁸ R. v. Curragh Inc [1995] N.S.J. No.512, 146 N.S.R. (2d) 161 (N.S.C.A.)

¹⁹ R. v. Curragh Inc [1997] S.C.J. No.33, 113 C.C.C. (3d) 481 (S.C.C.)

Criminal Code”²⁰. This echoes the point raised in the second chapter whereby society wishes to see justice being done and when that justice is not seen through it creates displeasure and raises concerns with the legal system and its capabilities.

5.2.2. The Inquiry

As discussed above, there was a delay to the inquiry due to the above proceedings or lack of proceedings. Justice Peter Richard of the Nova Scotia Supreme Court chaired the inquiry²¹ that was given a wide remit. The United Steel Workers of America attended the inquiry and called for a specific offence of corporate killing to be included in the Criminal Code in a similar vein to the specific “offence” approach taken by the UK. Justice Richard was very damning of the approach taken to safety at the Westray Mine and made a number of comments similar to those outlined by the Sheen Inquiry, following the Herald of Free Enterprise disaster, such as “there was a palpable disregard for even the most basic rules of safety”²².

The final report made 74 recommendations and the 73rd recommendation is to be considered as the true catalyst for reform. The report did not recommend a specific offence of corporate killing but recommended at 73 that: -

“The Government of Canada, through the Department of Justice, should institute a study of the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation and should introduce in the Parliament of Canada

²⁰ See note 9 (Keith) at p.26

²¹ Richard, K.P. “The Westray Story: A Predictable Path to Disaster” (Pictou: Westray Mine Public Inquiry) (1997)

²² Ibid.

such amendments to legislation as are necessary to ensure that corporate executives and directors are held properly accountable for workplace safety.”

In a similar experience to the process of law reform in the UK where the LC’s report was not acted upon for some time, the Canadian approach to law reform in this area seemed to suffer from delay also. One explanation for the delay in reforming this area of the law, given that both the UK and Canada appeared to take a number of years to progress the reform may well be indicative of the difficulties associated with reforming corporate criminal liability. Law reform is not a simple process and a number of alternatives demand consideration and a loss of time is somewhat inevitable.

5.3. Reforming the Canadian approach to Corporate Criminal Liability

Following the unsuccessful attempts at the prosecution following the Westray Mine disaster, the Canadian Government took some time to respond with new legislation. Initially, the reform was taken forward with two private members bills C-259²³ in October 1999 and C-284²⁴ in February 2001. Both bills were ultimately unsuccessful, however as Keith states “[t]he introduction of Bill C-284 marked the beginning of a move towards broad legislative change in Canadian criminal law, and away from the directing mind theory of corporate liability”²⁵.

²³ An Act to Amend the Criminal Code (Criminal Liability of Corporations, Directors and Officers), 2nd Sess., 36th Parl., (1999) (1st reading 21st October (1999))

²⁴ An Act to Amend the Criminal Code (Offences by Corporations, Directors and Officers), 1st Sess., 37th Parl., (2001) (1st reading 26th February (2001))

²⁵ See note 9 (Keith) at p.32

5.3.1. Bill C-45 – An Act to Amend the Criminal Code

When the Government finally responded, they decided to move away from the liability being at the door of the director to a much broader approach that was in contrast to recommendation 73 of the Westray Inquiry. In a similar timescale to that experienced in the UK, the Canadian Government tabled the proposed new legislation contained within Bill C-45²⁶. This Bill went before Parliament over eleven years after the Westray Mine disaster. During the passage of Bill C-45 it received wide support, for example Ms. Sarmite Bulte M.P. for Parkdale-High Park stated that: -

“... Bill C-45 would give Canada rules that are appropriate for the complex, modern corporate world where often a company has many places of business, various subsidiaries, parts of the business contracted out to specialists, decentralized control over some parts of the business and a great deal of discretion vested in its managers”²⁷.

The Bill received Royal Assent on 7th November 2003 after passage through Parliament and came into force on 31st March 2004.

²⁶ An Act to Amend the Criminal Code (Criminal Liability of Organizations), 2nd Sess., 37th Parl., (2003) (1st reading 12th June (2003))

²⁷ Hansard (Canada) HC Deb 15th September (2003) Vol.119 c1725

5.3.2. Bill C-45 – The key elements

There are two key aspects that were introduced by Bill C-45. Firstly, the extension of potential liability to organizations including companies and secondly the two formulae under which organizations can now be held criminally liable.

Section 1 of Bill C-45 amended Section 2 (Interpretation) of the Criminal Code and added the definitions of an “organization”, “representative” and “senior officer”. The key new term is that of “organizations”²⁸ rather than “corporations”. The reason behind this usage was so that a broad approach could be taken that didn’t just focus on corporations but could affect other bodies as well such as trade unions or public bodies. The other two new terms mentioned above are relevant when considering the two formulae under which organizations can be held criminally liable.

The first formula is now contained within Section 22.1 of the Criminal Code: -

“22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

(a) acting within the scope of their authority

(i) one of its representatives is a party to the offence, or

(ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one

²⁸ R.S.C. 1985, c. C-46 Section 2 “organization” – “means (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or (b) an association of persons that (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons”.

representative, that representative would have been a party to the offence; and

(b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs – or the senior officers, collectively, depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence”.

Section 22.1 deals with offences that require negligence to be proved. As stated above, the new definitions of “representative”²⁹ and “senior officer”³⁰ are highly pertinent. It has been suggested by Macpherson³¹ that the definition of “senior officer” “appears largely to codify the common law” and that the second portion of the definition “clearly extends the attribution of criminal corporate liability to the actions of mid-level managers” with the ultimate result being that “Bill C-45 extends corporate criminal liability”.

Section 22.2 of the Criminal Code now contains the second formula for offences not based on negligence (such as intention/ recklessness or wilful blindness): -

²⁹ R.S.C. 1985, c. C-46 Section 2 “representative” – “in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization”.

³⁰ R.S.C. 1985, c. C-46 Section 2 “senior officer” – “means a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer”.

³¹ See note 12 (Macpherson) at p.259

“22.2 In respect of an offence that requires the prosecution to prove fault – other than negligence – an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence;*
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or*
- (c) knowing that a representative of the organization is or about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence”.*

As discussed at length in the third chapter, the central question that has to be raised is whether the law reform has been successful and whether it is an improvement on the old common law system. Given the limited academic coverage on this subject, it has been difficult to obtain a full and detailed critique. This is in contrast to the position in the UK where the academic commentary on the *CMCHA* has been extensive. Keith confirms that: -

“Bill C-45 was intended, among other objectives, to modernise the law of establishing criminal liability for a corporation. Sections 22.1 and 22.2 of the Code – for the first time – provided a statutory framework for the mens rea and of organisations, including corporations ...

Both provisions significantly redefined how an organisation, including a corporation, may be proven to have committed an offence. These changes lowered the mens rea

*threshold from the identification theory to senior executives to the conduct of all representatives of the corporation*³².

Dusome in certain aspects extols the virtues of the new law and suggests that: -

*“Bill C-45 makes two significant changes to the criminal law. First, it broadens the scope of the identification theory of corporate criminal liability well beyond the directing mind theory of the common law, and perhaps beyond what the drafters foresaw ... Secondly, Bill C-45 greatly broadens the category of persons who may be charged and convicted, beyond the individual and the corporation, to trade unions, partnerships and “association of persons”, then applies the expanded identification theory of corporate criminal liability to those additional persons*³³.

However, it is debatable whether the new law has achieved its aim. It has arguably broadened the identification doctrine and has it simply replaced the term “directing mind” with that of the “senior officer”. It could be said that the UK has done exactly the same thing. Macpherson argues that “the new legislation codifies the common law”³⁴ and if that is the case then surely that is not law reform that is merely changing the form of the law but not the substance?

Some of the commentators do see limitations with the new law and problems for the future. Dusome suggests that “Bill C-45 does not go far enough. Even with the changes ... the law remains firmly within the very confining limits of the

³² Keith, N. “Evolution of Corporate Accountability: From moral panic to corporate social responsibility” *Business Law International* (2010) Vol.11(3) 247-276 at pp. 253-254

³³ Dusome, P. “Criminal Liability under Bill C-45: Paradigms, Prosecutors, Predicaments” *Criminal Law Quarterly* (2007) Vol. 53(2) 98-148 at p.147

³⁴ See note 12 (Macpherson) at p.283

identification theory ... it remains necessary to identify the senior officer(s) who have the requisite fault, in addition to identifying the representative who is a party to the offence”³⁵. Further to this point is whether the new law will be effective and the one true test for any new law is whether it will be effective in court in actual proceedings. Dusome suggests that “[t]he most likely outcome of the Bill C-45 provisions is no additional prosecutions of organizations in the foreseeable future”³⁶. To date, there have been a limited number of prosecutions under Bill C-45 particularly against individuals and these will be discussed in the section below.

5.3.3. The first prosecutions under Bill C-45

There have been a number of prosecutions that have commenced as a result of the Bill C-45 amendments to the Criminal Code.

The first was against an individual, Mr. Fantini³⁷, who was charged with one count of criminal negligence causing death and eight matters under the Ontario Health and Safety Act. Mr Fantini was in charge of a construction site and a worker was killed when a trench collapsed. However, following plea bargaining and pleas of guilty to three Health and Safety matters, the charge of criminal negligence causing death was withdrawn by the Crown³⁸; on the basis that it was not in the public interest to proceed with this charge and therefore there was no trial on this point. The commencement of this case was much heralded in a similar vein to the prosecution

³⁵ See note 33 at p.147

³⁶ Ibid. at p.148

³⁷ R. v. Fantini [2005] O.J. No.2361 (Ont. C.J.)

³⁸ Ibid. at Para 38

against Cotswold (Geotechnical) Holdings as discussed in the fourth chapter. However, the result was a significant anti-climax, again similar to the view post Cotswold. Mr Fantini received a fine of \$50,000 which is relatively modest. However, Gorewich J. did indicate that “if this were a corporate defendant that the fines would be far greater than it is with respect to you, a small contractor”³⁹.

The second was against a company, Transpave Inc.⁴⁰ where a death was caused in October 2005 and this was the first conviction of a company/ organization under Bill C-45. This matter was not contested at trial and the company pleaded guilty and received a fine of \$100,000 and a victim surcharge of \$10,000 (a form of tax). There were a number of points forwarded in mitigation, such as the company employed a psychiatrist to come in to assist the employees the day after the accident, which were accepted by the court and was reflected in the amount of the fine. This illustrated that if a company was prepared to engage with the court, that the level of the fine would reflect that.

The terms of Bill C-45 were finally tested at trial in *R. v. Scrocca*⁴¹. Mr Scrocca was convicted of criminal negligence causing death and received a custodial sentence of two years less a day and the sentence will be spent in the community with condition, including a curfew.

However, it is the pending prosecutions that will be of most interest as they illustrate the usage of Bill C-45 against another company⁴² and also a number of prosecutions

³⁹ Ibid. at Para 30

⁴⁰ *R. v. Transpave Inc.* [2008] QCCQ 1598 (Quebec)

⁴¹ *R. v. Scrocca* [2010] QCCQ 8218 (Quebec)

⁴² *R. v. Metron Construction et al.* (Ontario)

of individuals, in particular an individual in relation to a ferry disaster⁴³ in British Columbia. These matters are awaiting trial at the current time.

There have been acquittals that have followed prosecutions under Bill C-45⁴⁴, but as seen above the new provisions have received some usage. However, as Beeho confirms “it is difficult to discern any reliable trends or patterns on the case law”⁴⁵. This can be contrasted with the position in the UK, where we await the second trial under the *CMCHA*. The UK is very much in its early stages of trying to ascertain whether our new law will be effective.

5.3.4. Sentencing under Bill C-45

The Criminal Code provides a fundamental principle when sentencing offenders whereby it must be proportionate to the gravity of the offence⁴⁶. Furthermore, Bill C-45 further amended the Criminal Code by adding s.718.21 and this provided additional factors that must be taken into account when sentencing organizations.

⁴³ “Queen of the North” (BC Ferry Services Inc.) (British Columbia)

⁴⁴ R. v. Gagne and Lemieux [2010] QCCQ 12364 (Quebec)

⁴⁵ Beeho, J. “Occupational Health & Safety Amendments Revisited: Bill 168 and Bill C-45”

www.blakes.com/seminars/L&E2011/Occupational_Health_Safety_Jason_Beeho.pdf
(last accessed 5th October 2011)

⁴⁶ s.718.1 R.S.C. 1985, c. C-46

5.4. The Canadian view of the position in the United Kingdom

The focus of this chapter has been upon the Canadian system and how the UK could learn from their experiences. In a similar vein, the Canadians have considered the developments in the UK with interest. However, as discussed above, the Canadian approach is holistic so that the new formulas can be applied to a large number of criminal offences rather than focussing on a specific offence. The Canadian Government decided against a specific corporate killing offence when they were reforming their law and decided that it would “be too narrow ... as it would not respond to corporate crimes against the environment and other corporate harms”⁴⁷. However, the most significant concern of the new law in the UK was that “[t]he major limitation of the CMCHA is the fact that it only applies to corporations and does not apply to individuals, even corporate directing minds”⁴⁸. This concern from a major voice in Occupational Health and Safety in Canada was well rehearsed by a large number during the passage of the *CMCHA* as discussed in the fourth chapter.

5.5. Conclusion

Despite the similarities between the UK and Canadian legal systems, there are also distinct differences. Canada has taken a holistic approach to corporate criminal liability at the Federal level. It is debatable as to whether such a system would successfully apply in the UK.

⁴⁷ See note 9 (Keith) at p.66

⁴⁸ Ibid. at p.190

Wells⁴⁹ speaks positively of the Canadian approach and takes the view that the reforms in Canada “capture(s) the essence of organizational decision-making in more imaginative way(s)” and that “[t]his seems far more likely “truly” to capture corporate failings than the proposed senior-manager test” we now have in the UK.

The Canadians have taken a non-specific offence approach to corporate criminal liability rather than focussing on the specific offence of manslaughter as has been done in the UK. The Canadian approach is tailored to offer wide coverage over a number of offences. It is unlikely that the test that we have enacted in the UK would suit a similarly large number of offences. Given that we do not have a Criminal Code and our criminal law is a mixture of common law offences and statutory offences it is unlikely that it would work or indeed it would prove very difficult. However, if our criminal law was codified into one document, this approach could be re-visited and it could have the potential to work. Although, the possibility of our criminal law being codified in the near future is extremely unlikely given that it would be a mammoth undertaking that would have serious cost implications and given the current financial situation this makes the possibility even more unlikely.

One similarity between the jurisdictions is the time taken to reform the law in this very complex area. It is arguable that given the difficulties reforming this area of the law that a significant passage of time is likely. It is an evocative subject matter, but one that is contended would not be at the top of the list of reforms within any country and this appears to have been the case in both Canada and the UK.

The Canadians appear to have considered every scintilla, but has the time been spent wisely or do they simply have an identification “plus” model of corporate criminal

⁴⁹ Wells, C. “Corporate Manslaughter: Why does reform matter?” *South African Law Journal* (2006) Vol.123(4) 648-664 at pp.658-659

liability albeit not focussed on a specific offence as we have in the UK? Despite the concerns with the identification doctrine on both sides of the Atlantic, arguably both the UK and Canada now have a development on the identification doctrine albeit that it is now called something different in the two jurisdictions.

Unfortunately, the Canadian approach does not offer any real model for improvement with the law that we now have in the UK. However, there are parallels with the Canadian experience of law reform. For example as discussed in the previous chapters, those with vested interests such as large corporations or powerful business representative bodies such as the CBI in the UK have had an effect upon the reform process and has the same occurred in Canada whereby ambitious reforms were mitigated and watered down? The most significant parallel however, given the long standing usage of the identification doctrine in both the UK and Canada, is whether the process of moving away from it has been too difficult to achieve? Law-makers are often reticent to dispose of established, albeit flawed legal concepts, particularly when they are very difficult to replace effectively.

Given that the Canadian reforms occurred before those in the UK, the Canadians have seen more prosecutions under their new law, than we have in the UK to date. However, as discussed above, it takes significant time for any true patterns to emerge and it may take decades before either system can be truly analysed for effectiveness or otherwise.

Chapter Six - Conclusion

The central issue for this thesis is whether the *CMCHA* has overcome the difficulties associated with the identification doctrine or whether the *CMCHA* has carried the same problems with it. We will consider below the relevant points identified within the thesis discussion.

In answer to the central issue, we do now have a statutory offence of Corporate Manslaughter. However, the new “senior management” test does appear to have strong echoes with the former identification doctrine. It could be said that despite the time it took to pass the *CMCHA* into law, that it was worth the wait but the ultimate result is disappointing. We now have a statutory offence that can be amended if required in a manner that is more transparent than if it were still a common law matter.

The identification doctrine has proved to be an ineffective theory when posed against a large corporate structure. The doctrine was not assisted by its fractured and disjointed development. The doctrine was widely criticised, particularly following the narrow approach favoured by the House of Lords in *Tesco Supermarkets Limited v. Nattrass*¹ and this caused the problems outlined in the Second Chapter. However, there were no apparent arguments in favour of the retention of this doctrine. It was suggested in the thesis, that the only proponents of this doctrine were the large corporations that benefitted from its lack of ability to identify anyone within their respective companies.

¹ [1972] AC 153

The Second Chapter considered the successful and unsuccessful prosecutions for corporate manslaughter. The clear pattern that formed was that if the prosecution featured a “one-man” type company with a simple corporate structure, then the identification was relatively straightforward. Conversely, when the doctrine was faced with a large corporate structure it simply failed either when tested in court or before court when the CPS decided not to charge. It was these large-scale disasters that drew significant attention to the deficiencies of the identification doctrine when tested in this way. The narrowness of the *Tesco* approach caused significant problems given that the proximity of the directors to the disaster lacked the requisite immediacy and the nexus was insufficient for the doctrine to be effective. The Court of Appeal² considered this issue and had they answered the two questions posed differently it could have altered the development of the doctrine. If the Court of Appeal had decided to move away from the narrowness of *Tesco*, the *CMCHA* may not have been required.

The thesis also considered the law reform process. This process was not swift and took thirteen years from the Law Commission consultation paper in 1994 to the enactment of the *CMCHA* in 2007. The Law Commission did consider other alternatives, but recommended that a specific offence of corporate killing be created based on management failure.

The Government decided to “enhance” the test of the Law Commission and turned it into the “senior management” test. It is arguable that the Law Commission’s original test could have been more effective. Despite commentators and those involved in the pre-legislative process suggesting that this new test was a step back towards the

² Attorney-General’s Reference (No. 2 of 1999)[2000] 3 ALL ER 182, 3 WLR (2000) 195

identification doctrine, the Government carried on regardless. It was suggested that under the proposed new test arguably courts would be trying to “identify” the senior management. The new test was identified by the Joint Committee as a “fundamental weakness” in the Bill and that it could be interpreted as a broadening of the identification doctrine.

The proposed new test polarised commentators. Some suggested that it could be perceived to be too wide, but alternatively some contended that it could be too narrow. The Government claimed that their test had been misinterpreted and that they considered it to be a mere development of the Law Commission’s test.

This can be seen as a missed opportunity. The Law Commission test was not perfect, but it was an improvement on the “senior management” test that ultimately is now within the *CMCHA*. It is arguable that we now have an “identification-plus” model. This claim would be denied by the Government, but on the face of the test, it appears that Courts will now have to establish who is and who is not the senior management.

It is the inclusion of the “senior management” test that will ultimately decide whether the new law will be an improvement on the old. Given that all law reform should improve the law and move away from well-known deficiencies, it is surprising that the Government wished to carry with it some of the same potential problems.

It may well be the case that despite the concerns raised in this thesis, the new test may work with some success and that the concerns outlined in the thesis are proved to be incorrect. This will only be gauged appropriately when a number of prosecutions have occurred. To date, the *CMCHA* has featured in two prosecutions, firstly, the completed prosecution of Cotswold Geotechnical (Holdings) Limited and secondly the recently commenced prosecution of Lion Steel Limited. However, the first

prosecution provided a limited view of what the new legislation was capable of given that the company concerned was a relatively small entity. Although, this first prosecution did give an indication of the sentencing approach albeit in a limited capacity. The sentencing decision in this case was appealed to the Court of Appeal³ and this is likely to be indicative of the approach taken in the early cases whereby defendant companies will be testing the limits of the guidelines.

The second prosecution is due to be tried in summer 2012 against a larger company. The *CMCHA* will receive a more robust test but it still awaits a significant test against a corporation such as the size of P & O or a train company with a diverse corporate structure.

Also contained within the thesis was the brief discussion on the contentious issue of individual liability. This is an argument that could justify a full thesis discussion on this point alone. It has been discussed in passing as it was a major issue contained within the passage of the *CMCHA*. The exclusion of individual liability for this offence under the *CMCHA* was seen to be a massive oversight.

The fifth chapter consider the Canadian approach to see if there was anything the UK could learn or adopt from their approach. The Canadian's have adopted a holistic approach to corporate criminal liability and have integrated new sections into the Canadian Criminal Code in contrast to the UK's offence specific approach. However, when one considers the Canadian approach it is arguable that they despite the long law reform process they have amended their law with an "identification plus" theory as well. It was hoped that the Canadian experiences would be able to shed some light on where the UK's law could be improved. The Canadian's have seen more

³ R. v. Cotswold Geotechnical (Holdings) Limited [2011] EWCA Crim 1337

prosecutions under Bill C-45 than we have under the *CMCHA*, yet they still await a sizeable test against a large corporation. The key similarity between the UK and Canada's experiences with this area of the law is that the law reform process was not swift and despite the time being spent, the result is arguably a gloss on what was there before.

In conclusion, as discussed at length above, the central aim of law reform is to improve and develop the law and improve upon what was there before. The *CMCHA* does have some merits, but the central test is simply a gloss on the identification doctrine and the same problems linger in the background. It is with some concern and trepidation of what the outcome will be when it is finally tested against a large corporation. It is contended that the same problems will exist although we now have a new test to blame.

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