

NOTES AND COMMENTS

CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT, 2007

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Ever since corporations have emerged as major economic and social actors in our society, courts have been faced with a peculiar problem – that of subjecting them to the criminal law of the land. While corporations have regulated their own activities, their legal liability in criminal law was still debatable and over the years, a rich jurisprudence of corporate criminal liability has evolved. This article seeks to trace the sequence of events that led to the passage of the Corporate Manslaughter and Corporate Homicide Act, 2007. It further seeks to examine the provisions of the Act as regards the new offence of ‘Corporate Manslaughter’ and the promise it holds for the future of corporate criminal liability in England.

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I. CORPORATE CRIMINAL LIABILITY IN THE U.K – A BACKGROUND

*'No soul to damn and no body to kick.'*¹

The Corporate Manslaughter and Corporate Homicide Act, 2007, came into force on the 6th of April, 2008, after a lot of consultation and policy debate. This act creates a new statutory offence of corporate manslaughter, punishable with fine, a remedial order and a publicity order. It introduces the test of “senior management failure” which aggregates the faults of a group of managers to facilitate prosecution.²

The Act answers the call for greater accountability of large corporations for crimes.

The case of *Royal Mail Steam Packet v. Braham*,³ which described a corporation as a ‘person’ for the first time, marked the beginning of corporate criminal liability jurisprudence in the U.K. While the Criminal Law Act, 1827 further provided that the word ‘person’ in statutes could be construed to include corporations in the absence of a contrary intention,⁴ it was not until this was repeated in the Interpretation Act of 1889 that courts began making extensive reference to it.⁵

Over time, broadly two mechanisms for attributing criminal liability to a corporate body evolved in English Law -

- The Vicarious Liability Principle, and,
- The Doctrine of Identification

A. *The Vicarious Liability Principle*

In the early 1900s, courts in England imposed strict liability on corporations for statutory offences by using the vicarious liability principle,⁶ which

¹ H. Croall & J. Ross, *Sentencing the Corporate Offender: Legal and Social Issues*, in SENTENCING AND SOCIETY 535 (2002).

² C. WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 156 (2001), (explaining that attributing liability by aggregation means that the level of recklessness or negligence or indifference is gathered from the number of officers representative of, and responsible for, the operation and management of the affairs of the company, as opposed to that of an individual officer).

³ (1877) 2 A. C. 381.

⁴ A contrary intention may be either express or implied. *See, Wills v. Tozer*, (1904) 53 W. R. 74.

⁵ Section 2(1), Interpretation Act, 1889 states – “In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in the Act passed before or after the commencement of this Act, the expression ‘person’ shall, unless the contrary intention appears include a body corporate.”

⁶ *See, Pearks Gunston and Tee Ltd. v. Ward*, [1902] 2 K. B. 1, *Chuter v. Freeth and Pocok Ltd.*, [1911] 2 K. B. 832.

stemmed from strict liability for statutory offences, as construed from the object of the legislation.⁷

*Moussell Bros. v. London and North Western Railway*⁸ was the first case in which a corporation was held vicariously liable for a *mens rea* offence, beyond the confines of strict liability and nuisance.⁹ Though this case was expected to serve as a basis for developing further judicial dicta in the direction of imposing criminal liability on corporations, it stood out as an exception amongst cases decided during that period in which courts expressed their inability to impute criminal liability onto corporations.

B. Doctrine of Identification

The 1940s saw the emergence of a new mechanism to impute criminal liability to corporations in the form of the Doctrine of Identification. During this period, it was observed in a variety of cases that a company was capable of being malicious,¹⁰ could intend to deceive,¹¹ and could conspire.¹² This was a significant development since, till then, the courts firmly believed that it was inappropriate to prosecute a company for common law offences requiring proof of a subjective mental element. However, no significant pattern of imputing liability emerged.¹³

A glimpse of the Doctrine of Identification can be found in the case of *Lennard's Carrying Co. v. Asiatic Petroleum Co.*,¹⁴ where Lord Viscount Haldane observed that the corporation is an 'abstraction', and that its 'active and directing will' must

⁷ This doctrine is based on the maxim *respondeat superior*, which grew out of the development of the liability of a master (employer) for the acts of his servant (employee), and has been applied mainly to regulatory offences.

⁸ [1917] 2 K. B. 836, 845.

⁹ The court punished the corporation for the act of its manager in giving a false account with the intent to avoid payment of tolls, which was contrary to the Railway Clauses Consolidation Act, 1845. Here, Atkin J. laid down a test for establishing vicarious liability under a statute –

"Whether a particular provision imposes vicarious liability on an employer (whether natural or corporate) is a matter of construction depending 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."

¹⁰ *Triplex Glass Safety v. Lancegay Safety Glass*, [1939] 2 K. B. 395.

¹¹ *DPP v. Kent and Sussex Contractors*, [1944] K. B. 146, *Moore v. Bresler*, [1944] 2 All E. R. 515.

¹² *R. v. ICR Haulage Ltd.*, [1944] K. B. 551, *R. v. Sorsky*, [1944] 2 All E. R. 333.

¹³ Celia Wells, *The Millennium Bug and Corporate Criminal Liability*, 2 J. I. L. T. (1999), available at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999_2/wells/.

¹⁴ [1915] A. C. 705, 713.

be sought in a person who is the very ego and centre of its personality, which is an agent or the board of directors. And so Morris L.J., in *H.L. Bolton Engineering v. T.J. Graham*,¹⁵ identified the 'active and directing will' of the respondent company as the directors, having regard to their standing in the control of the business.

The case of *Tesco v. Natrass*,¹⁶ concretized the Doctrine of Identification. In *Tesco*, it was held that only those who control or manage the affairs of a company were to be regarded as embodying or acting as the company for these purposes.¹⁷ This came to be known as the 'directing mind' theory of corporate liability.¹⁸ However, this doctrine was very narrow inasmuch as it provided that only those who were in the position of managing or controlling the affairs of a company could represent it, which meant that a company could be held liable for serious offences only if its senior-most officers had acted with fault.¹⁹

II. CORPORATE MANSLAUGHTER – EARLY REACTIONS

*R. v. Cory Bros.*²⁰ was one of the first few cases to address the issue of corporate liability for manslaughter.²¹ However, Finlay J., after examining a host of authorities,²² expressed his inability to hold the corporation criminally liable for manslaughter under the law stating as follows – "*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...*"

After this case, the question of corporate liability for manslaughter did not arise till the case of *R. v. P. & O Ferries*,²³ where P & O along with five of its

¹⁵ [1957] 1 Q. B. 159.

¹⁶ [1972] A. C. 153.

¹⁷ The case concerned a charge against the company under the Trade Descriptions Act, 1968.

¹⁸ In the words of Lord Reid, "The person who acts is acting as the company and his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company."

¹⁹ WELLS, *supra* note 2, 101.

²⁰ [1927] 1 K. B. 810.

²¹ A miner was electrocuted by an electrified fence erected by the directors of the defendant company (Cory Bros.) around a power house belonging to it "for the purpose of protecting the bunkers against pilfering" during the miners' strike of 1926. As a result, prosecutions were launched against the company and three of its engineers.

²² Denman C. J., *in R. v. Great North of England Railway Co.*, (1846) 115 Eng. Rep. 1294 (Q. B.), Patteson C. J., *in R. v. Birmingham & Gloucester Railway Co.*, [1842] 3 Q. B. 223, Bowen L.J. *in R. v. Tyler*, [1891] 2 Q. B. 588, *Pharmaceutical Society v. London and Provincial Supply Association*, [1880] 5 A. C. 857.

²³ (1990) 93 Crim. App. 72.

managers were indicted for manslaughter.²⁴ It is remarkable that though this case did not result in a conviction, due to insufficient evidence to attribute *mens rea* to any of the managers who represented the company, the court admitted that the corporation may also be found guilty of manslaughter if a person identifiable as the embodiment of a corporation, and acting for the purposes of the corporation, is doing the act or omission which caused the death.

In 1996, the Law Commission published a Report on the Review of the Law of Involuntary Manslaughter which focussed on the issue of corporate manslaughter. The report rejected both tests of attributing corporate liability - the Vicarious Liability Principle and the Doctrine of Identification, and suggested the creation of a separate offence of corporate killing.

After being ignored for four long years, in May 2000, the government published a Consultation Paper citing several instances which served as a wake up call for them to act, viz. the Herald of Free Enterprise Disaster, 1987; the Kings Cross Fire, 1987; the Clapham Rail Crash, 1988 and the Southhall Rail crash, 1997.²⁵ The Consultation Paper was a response to the Law Commission Report. While agreeing with the Law Commission on most points, the Paper included some suggestions from the Government.

In July 2006, the Corporate Manslaughter Draft Bill was introduced in the British Parliament. After a process of consultancy and scrutiny, the Bill was passed in 2007 as the Corporate Manslaughter and Corporate Homicide Act.

III. THE CORPORATE MANSLAUGHTER AND THE CORPORATE HOMICIDE ACT, 2007

A. *The Offence*

Section 1(1) states that if the manner in which an organization carries out/manages its activities causes a person's death or 'amounts to a gross breach of the relevant duty of care owed by the organisation to the deceased', then such organization is guilty of an offence under this Act.

The essentials of the offence are-

- the corporation's conduct must result in a person's death, or

²⁴ The cross-channel ferry "Herald of Free Enterprise" capsized causing the loss of 192 lives, in the year 1987.

²⁵ Home Office, Reforming the Law on Involuntary Manslaughter: The Government's Proposals (May 2000), available at <http://www.homeoffice.gov.uk/documents/cons-2000-invol-manslaughter/consultation-paper.pdf?view=Binary>.

- must amount to a breach of the relevant duty of care;²⁶
- such duty of care must be owed by the organisation to the deceased;
- such breach must be 'gross';
- the corporation's conduct must involve an element of 'senior management failure'.²⁷

B. Relevant Duty of Care

The duty of care required under Section 2 is that owed under the law of negligence. There exists a relevant duty of care wherever the organisation owes a duty –

- as an employer;²⁸
- as an occupier of land (which the Interpretation Act defines as including premises);²⁹
- when the organisation is supplying goods or services;³⁰
- when carrying out other activities on a commercial basis.

This ensures that activities that are not the supply of goods and services, but which are still performed by companies and others commercially, such as farming or mining, are covered by the offence. The breach of this duty may be 'gross' as per section 8.

²⁶ Section 2: 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 an 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.”

²⁷ Section 1(3) clarifies that the involvement of the senior management, as defined under Section 1(4)(b), is essential to constitute the offence under Section 1(1).

²⁸ A key aspect of this will be an employer's duty to provide a safe system of work for its employees.

²⁹ This covers organisations' responsibilities, for example, to ensure that buildings they occupy are kept in a safe condition.

³⁰ This will include duties owed in the law of negligence (rather than under specific statutory provisions) for the safety of products, as well as the duties owed by service providers to their customers. Section 2(c)(1) clearly mentions that it does not matter whether or not the goods are supplied for consideration (that is, under

C. Exceptions

Sections 3, 4, 5, 6, and 7 delineate duties of care which do not qualify as “relevant” duties of care for the purposes of constituting the new offence.³¹

Section 11(2) abolishes Crown immunity by providing that a Crown organisation is to be treated as owing whatever duties of care it would owe if it were a corporation that was not a servant or agent of the Crown. This, however, seems to be more symbolic than substantive since its charm is robbed by the elaborate exceptions listed above. Nevertheless, in principle, Crown bodies have been recognised as entities that owe basic duties of care to the public.

D. Senior Management Failure

The rationale behind the “senior management failure” test is that the liability should lie in the system of work adopted by the organisation for conducting a particular activity. Senior management, as defined under Section 1(4)(c),³² identifies all those management responsibilities that relate to the overall working of the corporation, or at least a substantial part of it. This definition identifies two strands of management responsibility – the decision-making of how activities are to be managed, and the actual management of those activities. This covers not only managers who monitor workplace practices, but also those in charge of operational management.

The mechanism of imputing liability under this test has been described as one of “qualified aggregation”, in the sense that the failings of a number of individuals aggregate to constitute management failure, as opposed to a single individual identifiable as the “directing mind and will” of the company as required by the Doctrine of Identification.³³ In this respect, the “senior management failure” test provided for in the Act is broader than the Doctrine of Identification.

a contractual relationship, commonly where the goods or services are supplied in return for payment). Services that are provided to the public by public bodies, such as local authorities or NHS trusts are, therefore, covered as well as those provided on a private basis.

³¹ See Sections 3, 4, 5, 6, and 7 for more details.

³² Senior management is defined under Section 1(4)(c) as “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
- (ii) the actual managing or organising of the whole or a substantial part of those activities.”

³³ D. Ormerod et al, *The Corporate Manslaughter and Corporate Homicide Act, 2007*, 8 CRIM. L.R. 589, 592 (2008).

However, some believe that this test does not contribute much towards solving the “conundrum of who is the company”.³⁴ According to its definition, a senior manager is one who plays a “significant” role in decision-making, managing or organising a whole or “substantial” part of the corporation’s activities. It is expected that there will be considerable complication in interpreting the words “significant” and “substantial” while applying this test.³⁵

While determining whether or not there has been a senior management failure, thereby constituting a “gross breach”, the jury has to consider-

- the extent to which the organization failed to comply with any relevant health and safety legislation;
- awareness by the senior managers of the failure, and the risk of death or serious harm that this posed, or not being aware of these matters in circumstances where senior managers ought to have been aware. A lack of compliance, and consequent risks, is also covered;
- the extent to which the organisation sought to profit from the failure to comply with health and safety requirements.³⁶

The above are in addition to those factors covered under Section 8.³⁷

³⁴ WELLS, *supra* note 2, 125.

³⁵ Ormerod, *supra* note 33, 601.

³⁶ Section 8(5) as “Any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under a statutory provision or otherwise) by an authority responsible for the enforcement of any health and safety legislation.”

³⁷ Section 8 reads as follows – “(2) The jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so—

(a) how serious that failure was;

(b) how much of a risk of death it posed.

(3) The jury may also—

(a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it;

(b) have regard to any health and safety guidance that relates to the alleged breach.

(4) This section does not prevent the jury from having regard to any other matters they consider relevant.”

E. Liability

Section 1(6) of the Act states that an organisation found guilty of corporate manslaughter or corporate homicide is liable to pay a fine on conviction.

Under this Act, individuals cannot be held liable. It is the organisation that will face prosecution. However, individuals can simultaneously be prosecuted for gross negligence, manslaughter/culpable homicide, or health and safety offences where there is sufficient evidence, and it is in public interest to do so. It is also to be noted that corporations are no longer liable for the offence of manslaughter by gross negligence under the Common Law as per Section 20 of the Act.

F. Punishment

This Act provides for three kinds of penalties – remedial orders, publicity orders, and fines.

G. Fine

While the rationale behind imposing a fine on a company is that every corporation functions with a profit motive and aims at maximizing its financial turnover, it may be argued that for a large corporation, a financial sanction is not of much consequence.³⁸ Another possible disadvantage of fines is the ‘spill-over effect’ i.e. it may be passed on to consumers³⁹ by a rise in the price of the product produced by the offending company.⁴⁰ Hence, for effective punishments, the need for a variety of sanctions was felt.

H. Remedial Order

Accordingly, in addition to fines, courts have been empowered under Section 9 of this Act to make an order requiring the guilty corporation to remedy the breach committed by it. This is called a remedial order.⁴¹ This sanction is restorative in nature, inasmuch as it seeks to remedy the breach, and restore the *status quo ante*, by placing the victim in the same position as he/she would have been had the crime not been committed.⁴²

³⁸ WELLS, *supra* note 2, 34.

³⁹ J. GOBERT & M. PUNCH, *RETHINKING CORPORATE CRIME*, 231 (2003).

⁴⁰ For instance, if a transport company is made liable for a corporate crime and punished with the imposition of a fine, in order to recover the cost, it can simply raise its fares. In other cases, a fine may force the company to resort to retrenchment resulting in innocent employees losing their jobs.

⁴¹ It can be made only on an application by the prosecution specifying the terms of the proposed order. The particulars of a remedial order are mentioned in Section 9.

⁴² TERANCE MEITHE & HONG LU, *PUNISHMENT: A COMPARATIVE HISTORICAL PERSPECTIVE*, 24 (2005), GOBERT & PUNCH, *supra* note 39, 222.

I. Publicity Order

Under Section 10, a court can make a publicity order requiring the corporation convicted of an offence under this Act to publicize the fact that it has been convicted of the offence, specify particulars of the offence, the amount of any fine imposed, and the terms of any remedial order made.

It is believed that this will go a long way in deterring corporate crime, as the currently globalized world has rendered the reputation of a corporation valuable. Once lost, it will take years to rebuild, and the company may lose valuable customers, investors, and insurers. Therefore, a publicity order will act as an incentive for organisations to be more careful and conscious of the consequence of their acts. However, the effect of such a sanction cannot be gauged beforehand. Its effectiveness will depend upon the (unpredictable) reaction of the public, rather than on formal legal processes.⁴³

J. Community Service Order

The Act, however, has not explored community service as a possible sanction. Community service orders have the potential to remedy the 'spill-over effect' caused by fines. Community service orders compel the offending company to take up urban renewal projects, or cleaning up a river/land polluted by them. There are two objectives that community service orders seek to achieve –

- To undo the harm caused by the offending act, and,
- To remind the corporations of their duty towards society.⁴⁴

For example, in the case of *U.S. v. Danilow Paatry Corporation*,⁴⁵ the convicted bakeries were ordered to supply freshly baked goods absolutely free of cost to needy organisations for a year. Ordering private corporations to undertake community service, however, provides the State with an opportunity for misuse. If there is any venture the Government is unable or unwilling to pay for, it may order the next convicted company to undertake the same as "community service". Also, the potential of a prospective corporate offender of performing valuable community service must not become a consideration when the State is deciding whether or not a case merits prosecution. Further, it is feared that a successful completion of community service will bring the offending corporation undeserved fame, completely defeating the purpose of adverse publicity orders.⁴⁶ Nevertheless, community service may be considered in the future, having regard to specific facts and circumstances.

⁴³ GOBERT & PUNCH, *supra* note 39, 238.

⁴⁴ This has partly been taken care of in the form of remedial orders provided for by the Act.

⁴⁵ 563 F. Supp. 1159 (SDNY 1983).

⁴⁶ GOBERT & PUNCH, *supra* note 39, 234-236.

IV. ANALYSING AND EVALUATING THE ACT

The trend of corporate criminal liability indicates that most successful convictions of corporations were for statutory offences, by reading the word 'person' in the applicable provision of law to include a corporation. Successful convictions for non-statutory offences have been rare. As regards corporate liability for manslaughter, prior to this Act the courts did not succeed in imputing *mens rea* to any of the accused - be it in the case of *R. v. Cory Bros*⁴⁷ or *R. v. P & O Ferries*.⁴⁸ The main problem was that a corporation could be held liable only through one or more of its employees, for which it was essential to identify an individual as the 'directing mind' of the accused corporation.⁴⁹

The new legislation has addressed the problem simply. The Act creates a new offence of Corporate Manslaughter under which the liability of a company is no longer contingent on the personal liability of any of its employees.⁵⁰

Considering that there has not been a successful conviction of a corporation for manslaughter, one can hope this legislation results in one. However, it is too early to comment on the working of the Act, and one can only make predictions.

The Act indicates that a company can be convicted for manslaughter, once a gross breach of a relevant duty of care on the part of the corporation, due to a senior management failure, is proved. But will it be that easy after all?

Firstly, there are many 'layers of technicality' within the Act, involving complex issues of civil law. Initially, one has to determine whether the composition of the alleged offending body falls within the definition of 'corporation' under the Act. Further, the 'senior management failure' test also requires considerable examination of the complex decision making and organisational structure of the accused corporation. These factors, it is believed, will make a corporate manslaughter prosecution a complex one to handle.⁵¹

⁴⁷ [1927] 1 K. B. 810.

⁴⁸ (1990) 93 Crim. App. 72.

⁴⁹ *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, [1915] A. C. 705, 713, *Tesco v. Natrass*, [1972] A. C. 153.

⁵⁰ Rosemary Craig, *Thou Shall Do No Murder: A Discussion Paper on the Corporate Manslaughter and Corporate Homicide Act, 2007*, 30(1) COMP. LAW. 17 (2009), Julian Harris, *The Corporate Manslaughter and Corporate Homicide Act, 2007: Unfinished Business*, 28(11) COMP. LAW. 322 (2007).

⁵¹ Ormerod, *supra* note 33, 606.

It is undeniable that the law of corporate criminal liability has come a long way. By making it possible to hold the organization liable for the death of a person in its own capacity, the Corporate Manslaughter and Corporate Homicide Act, 2007 is a bold step in the direction of holding a corporate body liable for its criminal acts. But considering that the incidence of corporate crime has been crying out for attention for many decades, a legislation dealing solely with the offence of corporate manslaughter is slightly disappointing. Serious injuries due to workplace accidents, not necessarily resulting in death, and other offences resulting in the loss of property are far more common than workplace deaths. It has been suggested that these issues be addressed in the form of a general model of corporate criminal liability.⁵²

That law changes to suit the society it serves is exemplified by this statute. When it was found that the corporation, a juristic fiction, was capable of causing harm in the course of its activities, the construct of criminal law was not equipped to deal with this new offender. This legislation is an effort by law makers to welcome a new subject into the fold of criminal law.

⁵² J. Gobert & E. Mugnai, *Coping with Corporate Criminality - Some Lessons from Italy*, 621 CRIM. L.R. 619, 619-629 (2002).