Should the Law on Corporate Homicide be Reformed?

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Abstract

This work addresses whether Scots law on corporate homicide, as currently set out in the Corporate Manslaughter and Corporate Homicide Act 2007, should be reformed. Calls for reform have arisen against a backdrop of perceived inefficiency in the current law arising from the high profile public disasters and high number of industrial incidents in recent years. A consideration of this issue encompasses an examination of the legal framework on homicide in Scotland. A comparative approach is adopted to examining legal development prior to the CMCHA 2007. The effectiveness of the CMCHA 2007 is then examined with reference to English case law and issues highlighted as justification for reform are responded to. Taking into account these factors, the argument will be addressed as to whether the current law is effective or whether the reform is needed. It is concluded that there is no clear basis for reform at the present time.

Contents

Table of Cases

Attorney General Reference (No. 2 of 1999) (unreported) 15th February 2000

David T Morrison & Co Limited v. ICL Plastics, ICL Tech and Ltd and Stockline Plastics Limited [2012] CSOH 44

Donoghue v. Stevenson [1932] A.C. 562 [580]

Drury v. HMA [2001] S.L.T. 1013

Elsherkisi v. HM Advocate (2012) S.C.L. 181

Hainey v. HM Advocate (2014) J.C. 33

Health and Safety Executive v. Huntley Mount Engineering Ltd (Manchester Crown Court Manchester, 14 July 2015)

Health and Safety Executive v. Maidstone and Tunbridge Wells NHS Trust (London Crown Court 28 January 2016)

HM Advocate v. Purcell (2008) J.C. 131

Gillon v. HM Advocate (2007) J.C. 24

Petto v. HM Advocate 2009 S.L.T. 509; 2012 J.C. 105

PS and JE Ward Ltd (Norwich Crown Court, 6 June 2014)

R v. A [2020] EWCA Crim 407

R v. Adomako [1995] 1 AC 171

R v. Alan James Mark Nationwide Heating Services Ltd [2004] EWCA Crim 2490

R v. Bateman (1927) 19 Cr. App. R. 8

R v. Bilston Skips Ltd (Wolverhampton Crown Court, 16 August 2016)

R v. Cheshire [1991] W.L.R. 844

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

R v. HM Coroner for Inner London, ex parte Douglas-Williams [1998] 1 All ER 344; [1999] 1 All ER 34

R v. Lion Steel Equipment Limited: Sentencing Remarks (Manchester Crown Court, 20 July 2012)

R v. Mirsa [2005] 1 Cr. App. R. 21

R v. MNS Mining Limited (Swansea Crown Court, 19 June 2014)

R v. Mobile Sweepers (Reading) Ltd (Winchester Crown Court, 26 February 2014)

R v. P & O European Ferries (Dover) Ltd. (1990) 93 CrAppR 72 (Central Criminal Court)

R. v. Prince's Sporting Club Ltd (Southwark Crown, November 22 2013)

R v. Pyranha Mouldings Ltd (Crown Court Liverpool, January 12 2015)

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R v. Seymour [1983] 2 A.C. 493

R v. Sterecycle (Rotherham) Ltd (Sheffield Crown Court, 7 November 2014)

R v. Stone and Dobinson [1977] 2 W.L.R. 169

*R v. West London Coroner ex parte Gra*y [1988] Q.B. 467

R v. Willoughby [2005] 1 W.L.R 1880

R v. Woollin [1999] 1 AC 82

R v. Yaqoob [2005] EWCA Crim 2169

Transco Plc v. HM Advocate 2004 J.C. 29

Table of Statutes

Criminal Justice and Courts Act 2015

The Corporate Manslaughter and Corporate Homicide Act 2007

Occupiers' Liability Act 1984

Occupiers' Liability Act 1957

Road Safety Act 2006

Road Traffic Act 1988

Road Traffic Act 1991

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Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Introduction

Change to the law on corporate manslaughter was first considered in the UK by the Law Commission of England and Wales in 1994 following the first trial of this kind, *Stanley and others.*[1] "Obscurities" in the laws of manslaughter and corporate criminal liability impeded the trial and the Law Commission stated that, "a real effort should be made to put the law on a clearer footing."[2]

In particular, it was felt that companies should be held accountable for their activities, especially in light of the unsuccessful prosecution of P & O Ferries,[3] in which, passengers perished after a vessel capsized. Since then, there were several other high profile public disasters such as the Southall and Hatfield Rail Crashes and the Larkhall gas explosion. All of these caused significant numbers of fatalities however most corporate manslaughter prosecutions failed and companies were often convicted of health and safety offences instead.[4] Only a few small companies were successfully prosecuted for corporate manslaughter and they often received low fines which led to a general view that companies were not being punished severely enough.[5] A minority of commentators even said that, "corporations were getting away with murder".[6]

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[1] Law Commission, *Involuntary Manslaughter: A Consultation Paper* (Law Com No 135) 4.1 citing *Stanley and others (CCC No 900160, October 1990)*

[2] ibid 4.1

[3] ibid 4.25-4.31 citing *R. v P & O European Ferries (Dover) Ltd.* (1990) 93 CrAppR 72 (Central Criminal Court)

[4] Stuart Allan 'The Corporate Manslaughter and Corporate Homicide Act 2007 or the Health and Safety (Offences) Act 2008: Corporate Killing and the Law' (PhD thesis, University of Glasgow 2016) 136-137

[5] ibid 2

[6] ibid citing Rob Jones, 'Safety Crime: a case study of Transco' 1999) 19 <https://www.ljmu.ac.uk/LSA/LSA_Docs/RJ_Transco.pdf> accessed 24 September 2014; Maurice Punch, 'Suite violence: Why managers murder and corporations kill' (2000) 33 Crime, Law and Social Change 243

It also led to the view that “safety crimes” were not being treated as seriously as other types of crime including corporate crimes.[7]

Although the regulatory legislation, the Health and Safety at Work Act 1974, was, “considered successful in reducing deaths, injuries and ill health in the workplace”, it was felt that the issue of suitably attributing responsibility to individuals and companies needed to be addressed.[8] The Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA 2007) came into force on 26th July of the same year in response to public feeling, however, it received a mixed response[9] and, at present, there are calls for further reform to, “address an injustice that has not gone away.”[10]

The purpose of this research is to answer the question of whether the CMCHA 2007 should be reformed. To answer this question, I will attempt to address whether it adequately strikes a difficult balance between several factors. In particular, whether it avoids the over-punishment of individual managers, recognises the responsibility of a corporation as a corporation and ensures that victims’ deaths are properly acknowledged, especially to their families. This will include discussions about the test set out in the CMCHA 2007 s 1(1)(b), “a gross breach of a relevant duty of care”, and its blurring of the civil/criminal law boundary. These discussions aim to assess whether the 2007 Act suitably attributes liability for victims’ deaths or whether reform is needed.

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[7] ibid 3 citing Andrew Hopkins, 'Compliance with What?: The Fundamental Regulatory Question’ (1994) 34 British Journal of Criminology 431 435; Gary Slapper, 'Corporate Manslaughter: an Examination of the Determinants of Prosecutorial Policy' (1993) 2 Social Legal Studies 423 424; Gary Slapper and Steve Tombs, Corporate Crime (Pearson Longman 1999) 196; Steve Tombs and Dave Whyte, Safety Crimes (Crime and Society, Willan Publishing 2007) 167

[8] ibid 5

[9] ibid 1 citing Frank B. Wright, 'Criminal liability of directors and senior managers for deaths at work' (2007) Criminal Law Review 949, David Ormerod and Richard Taylor, 'The Corporate Manslaughter and Corporate Homicide Act 2007' (2008) Criminal Law Review 589

[10] Scottish Parliament, ‘Culpable Homicide (Scotland) Bill Consultation Paper’ (Edinburgh: Scottish Parliament 2018) <https://www.parliament.scot/S5MembersBills/CULPABLE_HOMICIDE_draft_4-_with_UPDATED_extended_deadline.pdf> accessed 15 December 2019 3

Firstly, it is necessary to examine the background to the 2007 Act and how it operates in practice. To this end, Chapter 1 examines the position in Scotland, in particular, it provides an overview of the different laws on homicide to show how corporate homicide fits in and that the other homicide laws do not adequately address the issue of deaths caused in the workplace. It also explains the issues with the common law prior to the CMCHA 2007 as seen in *Transco Plc.*[11]

Chapter 2 provides a comparative approach by examining the common law in England prior to the CMCHA 2007 and it illustrates this with the case of *R v. Mark.*[12] This illuminates the differences in approach across jurisdictions in terms of legal development and the English law points to how the Scots law could be changed to make it more effective in practice.

Chapter 3 explores the reasons behind the verdicts in the twenty-two English cases on corporate manslaughter as well as the penalties in order to assess the CMCHA 2007's efficiency. Academic concern about the CMCHA 2007's 'senior management' test is also discussed with a view to establishing whether the concerns translate into reality. It concludes that the CMCHA 2007 is effective as evidenced by the results of the cases and that academic concern over the 'senior management' test is unjustified which indicates a lack of need for reform.

Chapter 4 provides a theoretical discussion on how criminal responsibility should be attributed to companies in order to attempt to establish whether the CMCHA 2007 has attributed responsibility correctly. It establishes that negligence is the most suitable *mens rea* for corporate homicide/manslaughter and a fine on the company is the most suitable sanction. The CMCHA 2007 provides both of those, again, indicating a lack of need for reform.

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[11] *Transco Plc v. HM Advocate* 2004 J.C. 29

[12] *R v. Alan James Mark Nationwide Heating Services Ltd* [2004] EWCA Crim 2490

Chapter 5 concludes that there is presently no clear case for reform of the CMCHA 2007.

Chapter 1: Homicide in Scotland

1.0 Introduction

This chapter examines the current legal framework and treatment of homicide offences in Scots law. The term 'homicide' is used to denote both murder and culpable homicide. This chapter will cover the common law offences of murder and culpable homicide, the former providing context for the latter which is the greater focus. The statutory offences of causing death in the context of road traffic offences and in the workplace will then be examined. The former demonstrates a history of the legislature treating certain instances of culpable homicide separately and in a specialist manner and the latter can be seen as a further example of that. Through this overview of homicide laws, it can be seen how corporate homicide fits in with the other laws and that the others do not adequately address the issue of deaths caused in the workplace. There is then an examination of the problems inherent in the Scots law, prior to the CMCHA 2007, as set out in *Transco Pl*c where the Crown attempted to prosecute a company for culpable homicide.[13] This examination covers issues connected with the concepts of negligence, the directing mind and will of a company and aggregation.

1.1 Murder

Macdonald provided the traditional definition of murder as follows, "Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences."[14] Macdonald's definition

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[13] *Transco Plc* (n 11)

[14] John Hay Athole Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (James Walker and D.J Stevenson eds, 5th edn, Edinburgh: W Green, 1948) 89

of the dual *mens rea,* intention to kill and wicked recklessness, has since been clarified by the cases of *Drury,*[15] *Purcell*[16] and *Petto.*[17]

In *Drury,* the appellant carried out a fatal attack on his ex-partner upon being provoked by discovering her relationship with another man.[18] On appeal, the court considered the appropriate test to be applied in cases of killings provoked by infidelity.[19] Lord Justice-General Rodger went on to discuss how provocation and self-defence fitted within the structure of murder. For example, he said that Macdonald's definition of murder was, "at best incomplete and, to that extent, inaccurate."[20] In particular, he commented that Macdonald's definition did not explain why, in cases where diminished responsibility, provocation or self-defence existed, the appropriate verdict was one of culpable homicide despite the accused having an intention to kill.[21] According to Lord Justice-General Rodger, it was because the accused did not carry out the offence with what Hume called a murderer's "wicked and mischievous purpose". He altered the first strand of the *mens rea*, intention, by holding that murder required a 'wicked' intention to kill.[22]

The main question on appeal was whether the trial judge had misdirected the jury on the approach to take in deciding whether to return a verdict of culpable homicide on the ground of provocation.[23] The trial judge had stated that the jury must consider if the accused's response had been "grossly disproportionate" to the provocation. If it was, the plea of provocation could

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[15] *Drury v. HMA* [2001] S.L.T. 1013

[16] *HM Advocate v. Purcell* (2008) J.C. 131

[17] *Petto v. HM Advocate 2*012 J.C. 105

[18] *Drury* (n 15) [4] (Lord Justice-General Rodger)

[19] ibid [1] (Lord Justice-General Rodger)

[20] ibid [10] (Lord Justice-General Rodger)

[21] ibid [10] and [13] (Lord Justice-General Rodger)

[22] ibid [11] (Lord Justice-General Rodger)

[23] ibid [1] (Lord Justice-General Rodger)

not succeed.[24] In the appeal, it was held that asking the jury to assess proportionality in the context of violence in response to a revelation of sexual infidelity had, indeed, been a misdirection as the two acts are incommensurable.[25] Instead, it was held that the jury should have been asked to consider whether the accused lost self-control and whether an ordinary person, subjected to the same provocation, would have been liable to act as he did. If an ordinary man would have reacted as the accused did or provocation leaves the jury with a reasonable doubt as to whether the accused acted wickedly, the correct verdict is culpable homicide.[26] The appeal was allowed[27] and it was held that, in the circumstances, the appellant's intention was not wicked, therefore, he lacked the *mens rea* for murder.[28]

Chalmers agrees that the trial judge misdirected the jury by asking them to consider the proportionality of violence in relation to the revelation of infidelity. However, he disagrees with the route the appeal court took in reaching that conclusion. In particular, he rejects the view that Macdonald's definition of murder was incomplete as it encompassed all the elements that the Crown had to prove in order to secure a conviction, namely, the *actus reus*, *mens rea* and lack of a valid defence. 'Wicked intention' - 'wicked' referring to the absence of any justification or excuse - incorporates a defence into the offence and this is not in keeping with the rules on evidence.[29] His view is that this may lead to situations where a jury can reject provocation as a defence but, nonetheless, acquit the accused if they conclude he did not act wickedly.[30] He further disagrees with the Lord Justice-General's interpretation of Hume's notion that a provoked killer is not to be regarded as a murderer as he lacks wickedness. According to Chalmers, it is not because the killer lacks *mens rea*

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[24] ibid [6] (Lord Justice-General Rodger)

[25] ibid [27]-[28] (Lord Justice-General Rodger)

[26] ibid [34] (Lord Justice-General Rodger)

[27] ibid [36] (Lord Justice-General Rodger)

[28] ibid [17] (Lord Justice-General Rodger)

[29] James Chalmers, 'Collapsing the Structure of Criminal Law' [2001] S.L.T. 28, 241, 241-242

[30] ibid 244

but because provocation acts as a free-standing partial defence[31] and it would have been preferable if it had been allowed to continue to change a murder charge into a culpable homicide conviction.[32] He states this decision, "threatens to turn the Scottish law of criminal defences upside down"[33] and it has ramifications for the laws on self-defence, diminished responsibility and offences such as assault.[34]

The cases of *Purcell*[35] and *Petto*[36] altered the second strand of the *mens rea*, wicked recklessness. In the case of *Purcell*, the accused drove recklessly in an effort to evade police. Unfortunately, in the process, he run over and killed a child.[37] At the conclusion of the case, the presiding judge referred the matter to a bench of three judges as the accused's counsel submitted that, given the facts alleged in the murder charge, it was not open for the jury to return a verdict of murder. The accepted position was that reckless driving, however appalling, which resulted in death could be considered culpable homicide but not murder.[38]

The indictment in this case included a charge of murder and a number of instances of reckless and dangerous driving, which, had taken place before and after the collision. The Crown did not contend that the accused had had no intention of causing injury to the deceased.[39] However, the Crown had attempted to argue that the doctrine of constructive malice could supply the *mens rea* for murder. Lord Eassie explained:

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[31] ibid

[32] ibid 245

[33] ibid 242

[34] ibid 242-245

[35] *Purcell* (n 16)

[36] *Petto* (n 17)

[37] *Purcell* (n16) [1]-[2] (Lord Eassie)

[38] *Purcell* (n 16) (JC Farquharson)

[39] ibid [1] (Lord Eassie)

> In other words, under that thinking, if an accused were engaged in a serious, intentional — and usually capital — crime, guilt of murder would follow if death ensued in the course of the commission of that serious criminal enterprise, irrespective of the specific intention of the accused, his state of knowledge, or the degree of violence employed in the immediate events leading to the fatality.[40]

It was held that constructive malice had no place in the modern role of murder and, in any event, there was no serious 'capital' offence in this case in relation to which the death was ancillary, the primary offence was only dangerous driving.[41] The submission for the Crown was unsound and the submission advanced by counsel for the accused should be upheld.[42] At least in cases of reckless driving, wicked recklessness required an *intention to cause bodily harm*. As this could not be shown, the correct conviction was culpable homicide instead of murder.[43]

The case of *Petto* involved an appellant who pled guilty to murder after setting fire to a block of flats resulting in the death of one of the residents.[44] He initially appealed before a bench of three judges and sought to withdraw his plea, submitting that the charge against him described culpable homicide rather than murder. The appellant's senior council argued that the charge he had pled to did not amount to murder as it lacked the *actus reus* and *mens rea*. It did to contain any allegation that he had committed an assault or that he knew anyone was inside the block of flats at the time of the offence.[45]

Amongst other questions raised in this appeal, one was whether Macdonald was correct in stating that murder is an appropriate charge where death has

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[40] ibid [14] (Lord Eassie)

[41] ibid [17] (Lord Eassie)

[42] ibid [18] (Lord Eassie)

[43] ibid [16] (Lord Eassie)

[44] *Petto v. HM Advocate* 2009 S.L.T. 509

[45] ibid [3] (Lord Wheatley)

resulted from a serious and dangerous crime albeit there was no specific intent to kill.[46] As *Purcell* had rejected this idea and because other residents who had been in the flats were liable to be harmed, the court was of the view that the indictment may support a charge of murder.[47]

However, as this may have been seen as an extension of the existing categories of murder and there was a lack of authority on the matter, the judges were of the view that the appeal should be heard by a larger bench. It remitted to a procedural hearing[48] and was then heard by a bench of five judges. There, *Purcell* was distinguished because, in that case, there had been no intention to injure anyone.[49] The appellant in *Petto* had started the fire deliberately and in the certain knowledge that residents would be at grave risk of death or serious bodily harm.[50] This case elevated the threshold for wicked recklessness to be established, at least in cases where death results from fire-raising, by holding that there must be, *a virtual certainty* of death resulting from the perpetrator's actions.[51] As this could be shown, the appellant's guilty plea to murder could not be withdrawn.[52]

Although these cases have been controversial,[53] they have been considered by the High Court when deciding other cases and they are now the current

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[46] ibid [8] (Lord Wheatley) citing John Hay Athole Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (James Walker and D.J Stevenson eds, 5th edn, Edinburgh: W Green, 1948) 91

[47] ibid [16] (Lord Wheatley) citing *Purcell* (n 16)

[48] ibid [16] (Lord Wheatley)

[49] *Petto* (n 17) [11]-[12] (Lord Justice-Clerk Gill) citing *Purcell* (n 16)

[50] ibid [13] (Lord Justice Clerk Gill)

[51] ibid [13] (Lord Justice-Clerk Gill)

[52] ibid [32]

[53] See e.g. Claire McDiarmid, 'Something Wicked This Way Comes: The *mens rea* of Murder in Scots Law' [2012] Jur. Rev. 4, 283

authority.[54] In addition to affecting the law on murder, the case of *Drury*[55] also provided a definition of culpable homicide.

1.2. Culpable Homicide

In *Drury*, culpable homicide was defined as a residual offence, which, captures killings, "short of murder" but where a relevant measure of blame attaches to the perpetrator.[56] Like murder, the *actus reus* is essentially the destruction of life, however, unlike murder, there is, "no time-honoured definition to which all cases initially make reference".[57] The offence is divided into three definitions or 'types' of culpable homicide and the type that applies depends on the circumstances. According to McDiarmid, this categorisation of the offence into these 'types' renders the definition more akin to a description.[58]

Firstly, the 'voluntary act type' occurs when the *mens rea* of murder, namely wicked intention to kill or wicked recklessness, exists but provocation or diminished responsibility operates to reduce the crime to culpable homicide.[59] As discussed, in light of *Drury*,[60] it does not appear that this test would now apply to cases involving provocation upon a finding of infidelity. Secondly, the 'involuntary lawful act type' occurs where the accused, whilst acting lawfully, brings about the victim's death. The *mens rea* is recklessness.[61] Thirdly, the

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[54] See e.g. *Gillon v. HM Advocate* (2007) J.C. 24 [24] (Lord Osborne); *Hainey v. HM Advocate* (2014) J.C. 33 [55] (Lord Clarke)

[55] *Drury* (n 15)

[56] *Drury* (n 15) [13] (Lord Justice-General Rodger)

[57] Claire McDiarmid, 'Killings Short of Murder: Examining Culpable Homicide in Scots Law' in Alan Reed and Michael Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (Abingdon: Oxfordshire: Routledge 2018) 22

[58] ibid

[59] ibid

[60] *Drury* (n 15)

[61] *McDiarmid* (n 57) 24

'involuntary unlawful act type' occurs when the victim dies as a result of a criminal act such as assault. The *mens rea* is that of the underlying offence.[62]

The law on culpable homicide has been critiqued as unclear, too broad and phrased in outdated language.[63] However, the 'type' categories have been praised for being "slightly clearer" than the umbrella definition of "killings short of murder" from cases such as *Drury*.[64] A further issue is that the line between murder and culpable homicide is blurred.[65] It may be thought that this could only be exacerbated by the changes made to murder, and axiomatically, culpable homicide due to its residual nature, by the cases of *Drury,*[66] *Purcell*[67] and *Petto*.[68]

In *Elsherkisi v. HM Advocate*, Lord Hardie said that motive should be considered as a separate concept from *mens rea*. The former is rightly used as an excuse or mitigation whilst the latter is used to establish the accused's guilt.[69] The second strand of the *mens rea* as set out in *Purcell* and *Petto,* respectively, an intention to cause bodily harm[70] and a virtual certainty of death resulting from the perpetrator's actions[71] could be considered to blur *mens rea* and motive.

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[62] ibid 30

[63] Gillian Mawdsley, 'Consultation Response: Culpable Homicide (Scotland) Bill Consultation Paper' (The Law Society of Scotland, 24 April 2019) <https://www.lawscot.org.uk/media/362512/24-04-2019-crim-culpable-homicide-scotland-bill-consultation-response.pdf> accessed 2 February 2019 5

[64] *McDiarmid* (n 57) 23

[65] *Mawdsley* (n 63) 5

[66] *Drury* (n 15)

[67] *Purcell* (n 16)

[68] *Petto* (n 17)

[69] *Elsherkisi v. HM Advocate* (2012) S.C.L. 181 [10] (Lord Hardie)

[70] *Purcell* (n 16) [16] (Lord Eassie)

[71] *Petto* (n 17) [13] (Lord Justice-Clerk Gill)

1.3 Statutory Offences

1.3.1 Causing death by driving

In addition to the common law, there are a number of separate statutory offences relating to causing death. Section 1 of the Road Traffic Act 1960 creates the statutory offence of 'causing death by reckless or dangerous driving'. The modern law of 'causing death by dangerous driving'[72] and 'causing death by careless and inconsiderate driving'[73] is now enshrined in the Road Traffic Act 1988. This Act developed to include a number of offences such as causing death whilst; driving under the influence of drink or drugs[74] and driving while unlicensed, uninsured[75] or disqualified.[76] It demonstrates a history of the legislature treating certain instances of culpable homicide in a separate and specialist manner and evolving the law of homicide to reflect social change.

As regards causing death by dangerous driving, the legislation provides, "A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence".[77] A person is considered to have driven dangerously if, "the way he drives falls far below what would be expected of a competent and careful driver and it would be obvious to a competent and careful driver that driving in that way would be dangerous."[78]

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[72] Road Traffic Act 1988 (RTA 1988) ss. 1 and 2A.

[73] RTA 1988, ss. 2B and 3ZA.

[74] RTA 1988, s 3A as introduced by the Road Traffic Act 1991.

[75] RTA 1988, s 3ZB as introduced by the Road Safety Act 2006.

[76] RTA 1988, s 3ZC as introduced by the Criminal Justice and Courts Act 2015.

[77] RTA 1988, s 1.

[78] RTA 1988, s 2A(1)(a)-(b).

"Dangerous" refers to the danger of injury.[79] As regards the *mens rea,* it has been likened to the type of recklessness required for murder, namely, an utter disregard for the fatal consequences.[80] The statute provides, *"*in determining… what would be expected of, or obvious to, a competent and careful driver in a particular case, *regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused*."[81] A person can also drive dangerously if, "*it would be obvious to a competent and careful driver* that driving the vehicle in its current state would be dangerous."[82] In assessing the state of the vehicle, regard can be had to, "anything attached to or carried on or in it and to the manner in which it is attached or carried."[83]

'Causing death by careless driving when under influence of drink or drugs' occurs where a driver causes a death whilst driving without due care and attention whilst at least one of these other factors apply; he was unfit to drive because of drink or drinks,[84] his alcohol or drug level was over the prescribed limit,[85] he unreasonably refused to provide a specimen within 18 hours of the incident[86] or he unreasonably failed to provide a blood sample when required by Police to do so.[87] The accused is considered unfit to drive, "at any time when his ability to drive properly is impaired".[88]

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[79] RTA 1988, s 2A(3).

[80] Rachel McPherson and Cyrus Tata, 'Causing Death by Driving Offences: Literature Review' (Scottish Sentencing Council, September 2018) 3 citing *Transco PLC v. HM Advocate* (2004) J.C. 29

[81] RTA 1988, s2A(3). (my own emphasis added)

[82] RTA 1988, s 2A(1)(2). (my own emphasis added)

[83] RTA 1988, s 2A(4).

[84] RTA 1988, s 3A(1)(a).

[85] RTA 1988, s 3A(1)(b)-(b)(a).

[86] RTA 1988, s 3A(1)(c).

[87] RTA 1988, s 3A(1)(d).

[88] RTA 1988, s 3A(2).

The lesser offence of 'causing death by careless driving' occurs where, "A person…(is) driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place."[89] It shares a *mens rea* with 'causing death by careless driving through drink or drugs'.

The person is, "regarded as driving without due care and attention if (and only if) the way he drives falls below what would be expected of a competent and careful driver."[90] "In determining…what would be expected of a careful and competent driver in a particular case, *regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused*."[91] A person is to be regarded as driving without reasonable consideration for other persons only if those persons are inconvenienced by his driving.[92]

By contrast with causing death by dangerous, careless or inconsiderate driving, it is obvious from the provisions of the relevant sections of the 1988 Act that the offences of driving while unlicensed, disqualified or uninsured are strict liability.[93] No evidence of the accused's *mens rea* or state of knowledge is necessary in order for the Crown to secure a conviction.

To have carelessness as a *mens rea* creates anomalies in the law in as much as it is considered a lesser form of recklessness or "gross negligence".[94] It is, therefore, at odds with the common law position that negligence should not

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[89] RTA 1988, s 3.

[90] RTA 1988, s 3ZA(2).

[91] RTA 1988, s 3ZA(3). (my own emphasis added)

[92] RTA 1988, s 3ZA(4).

[93] RTA 1988, s 3A as introduced by the Road Traffic Act 1991; RTA 1988, s 3ZB as introduced by the Road Safety Act 2006; RTA 1988, s 3ZC as introduced by the Criminal Justice and Courts Act 2015

[94] *McPherson and Tata* (n 80) 4 citing Pamela Ferguson and Claire McDiarmid, '*Scots Criminal Law: A Critical Analysis*' (Edinburgh University Press 2014) 6.17

attract criminal sanctions.[95] In addition, the equating of carelessness with recklessness is in contrast with older case law specifying this should not be the case.[96]

The need for separate statutory offences to exist alongside the common law has been questioned for several reasons. Firstly, *Purcell*[97] showed that a conviction for causing death due to poor driving was possible at common law. Secondly, in terms of fair labelling, the primary consideration is that the victim's death has occurred unlawfully. The fact it occurred in the context of the accused driving is incidental. Thirdly, the creation of road traffic statutes criminalising deaths occurring in that context was due to the perceived unwillingness of juries to convict of common law murder or culpable homicide. Maher believes, that, even if this was so, it is an "unprincipled basis" upon which to justify such legislation.[98] A further and more recent example of a statute criminalising deaths caused in a particular context is the Corporate Manslaughter and Corporate Homicide Act 2007. It could be considered that this is another example of the how the legislature has evolved homicide laws to provide a separate specialism in response to social change. It is also clear from the examination of the other homicide laws that they do not adequately address the issue of deaths caused in the workplace.

1.3.2. Corporate Homicide

The CMCHA 2007 states that an organisation is, "guilty of an offence if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased."[99] From this, we see the *actus reus* is causing

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[95] ibid 4

[96] ibid citing *Sharp v. HM Advocate* (1987) S.C.C.R. 179

[97] *Purcell* (n 16)

[98] Gerry Maher, 'The Most Heinous of all Crimes: Reflections on the Structure of Homicide in Scots Law' in James Chalmers and Fiona Leverick (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press 2010) 233

[99] CMCHA 2007, s 1(1)(a)-(b).

death where there is a gross breach of the relevant duty of care and the *mens rea* is negligence. However, the offence is only committed if, "the way in which its activities are managed or organised by its senior management is a substantial element in the breach."[100]

For the purposes of the 2007 Act, a "gross breach" occurs, "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".[101] In assessing this, 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, how serious that failure was and how much of a risk of death it posed.[102] In addition, consideration may be given to 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, or to have produced tolerance of it and regard may be given to any health and safety guidance that relates to the alleged breach.[103] Any other matters the jury believe are relevant may also be taken into account.[104]

The 'relevant duty of care' is defined as the duties under the law of negligence and include duties owed; to employees or other workers, as an occupier of premises, in connection with construction or maintenance operations and in connection with any other commercial activity.[105] "Senior management" are defined as, "the persons who play significant roles in, "the making of decisions about how the whole or a substantial part of its activities are to be managed or organised" or "the actual managing or organising of the whole or a substantial part of those activities."[106]

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[100] CMCHA 2007, s 1(3).

[101] CMCHA 2007, s 1(4)(b).

[102] CMCHA 2007, s 8(2).

[103] CMCHA 2007, s 8(3).

[104] CMCHA 2007, s 8(4).

[105] CMCHA 2007, s 2(1).

[106] CMCHA 2007, s 1(4)(c)(i)-(ii).

The 2007 Act's reference to senior management as "persons" allows for aggregation. Aggregation means that, "even although a particular office holder is not guilty of that offence, an organisation would be guilty of the offence if the acts done by a number of different office holders at different times, when considered together, are sufficient to constitute the offence."[107] The concept of aggregation may cause difficulties for the Crown when it comes to proving the offence if managers differed either in their acts or their awareness of the circumstances. However, if liability is established then, unlike the other homicide offences, the company as an entity rather than the individual/s who made the decisions leading to the death is liable. This presents potential unfairness to organisations in as much as companies which may have taken considerable measures to prevent workplace deaths are still automatically held liable for managers' acts.[108] To assist in understanding why the 2007 Act was introduced the previous law on corporate homicide, as set out in *Transco Plc v. HM Advocate,*[109] will now be considered. In particular, concepts of negligence, the directing mind and will of a company and aggregation will be examined.

1.4 *Transco Plc v HM Advocate*

Prior to the 2007 Act, the legal position on corporate homicide was set out in the *Transco* case.[110] In *Transco*, the appellant company had been served an indictment containing the alternative charges of culpable homicide and contravention of the Heath and Safety at Work etc Act 1974 ss. 3 and 33(1). Transco was the gas provider to an area where a gas explosion had destroyed a house and killed the occupants. In the indictment, the charge of culpable homicide contained averments of the company's knowledge and awareness of the various risks in the 13 years prior to the explosion. It also stated that the company failed, "with a complete and utter disregard for the safety of the public and in particular for the safety of [the four deceased]" to devise and

[107] *Scottish Parliament* (n 10) 14

[108] ibid 15

[109] *Transco Plc.* (n 11)

[110] ibid

implement an appropriate management safety policy to avoid the attendant risks. A number of committees and posts were identified as being behind the company's failures, but no individual was identified in the charge.[111]

At a preliminary hearing, Lord Carloway refused to dismiss the culpable homicide charge on the ground of competency or relevancy. Transco appealed this decision.[112] It was held that the charge was competent as manslaughter was a competent charge against a company in England and Wales[113] and the applicable principles across both jurisdictions were the same.[114] However, the charge was dismissed as irrelevant.[115] In arriving at this decision, three issues arose which will be examined in turn: negligence, the 'directing will and mind' of the company and aggregation. The judiciary in Scotland and England have responded to these concepts differently. The result of this disparity in treatment is that different outcomes have been arrived at in corporate homicide and the English concept of corporate manslaughter.

1.4.1 Negligence

The court clarified that the common law crime of involuntary culpable homicide required an *actus reus* and *mens rea.*[116] In defining culpable homicide, Lord Osborne considered the starting point to be the definition from *Drury,* namely, killings short of murder.[117] He then went on to consider a definition from Macdonald:

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[111] ibid

[112] ibid

[113] ibid [13]-[18] (Lord Osborne) citing *Tesco Supermarkets Ltd v. Nattras* [1972] AC 153 [173] (Lord Reid); *R v. HM Coroner for East Kent, ex p Spooner and others* (1989) 88 Cr App R 10 [16] (Bingham LJ) ; *P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 [84] (Turner J); *R v. Great Western Trains Co Ltd* 30 June 1999 (unreported) [15 et seq] (Scott-Baker J); *Attorney General's Reference (No. 2 of 1999)* [2000] QB 796

[114] ibid [20] (Lord Osborne)

[115] ibid [26] (Lord Osborne)

[116] ibid [8] (Lord Osborne)

[117] ibid [4] (Lord Osborne) citing *Drury v. HM Advocate* (2001) SCCR 583 [589] (Lord Justice-General Rodger)

> …culpable homicide may result from neglect of proper precautions, or of moderation in the doing of what is legal, or from general carelessness and neglect of duty…(Cases) include every fatal accident which is not fortuitous, but results from some blameable conduct. The trend of legal development has been to draw a distinction between negligence which results in civil liability and negligence which results in criminal responsibility; and in the latter case to desiderate gross and wicked negligence or recklessness….(One is) guilty of homicide, only if his conduct is notably and seriously negligent or displays utter disregard for the safety of others.[118]

Despite quoting this passage from Macdonald, it is clear Lord Osborne did not want to utilise the concept of negligence in his decision. He went on to consider *Paton v. HM Advocate* where it had been said:

> Unfortunately, this law has to some extent been modified by decisions of the Court, and it is now necessary to show gross, or wicked, or criminal negligence, something amounting, or at any rate analogous, to a criminal indifference to consequences, before a jury can find culpable homicide proved.[119]

Lord Osborne critiqued this definition, saying that using the term 'criminal' before 'negligence' and 'indifference to the consequences' to describe a crime was circular and, "unprofitable". He also said that the term 'negligence' was confusing as it was rightly used in the context of the English tort of negligence or as a general English parlance conveying, "carelessness or neglect of duty in a non-legal context."[120] Instead, he preferred the terms, 'gross or wicked … indifference to consequences' and made reference to several cases which, he

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[118] ibid [4] (Lord Osborne) citing John Hay Athole Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (James Walker and D.J Stevenson eds, 5th edn, Edinburgh: W Green, 1948) 100

[119] ibid [4] (Lord Osborne) citing *Paton v. HM Advocate* (1936) J.C. 19 [22] Lord Justice-Clerk Aitchison

[120] ibid [4] (Lord Osborne)

said, conveyed that what should be assessed was the perpetrator's mind at the time of the offence.[121] Repeated reference to *Quinn v. Cunningham*[122] was made and he said that the test for *mens rea* from *Quinn* as it was stated in *Cameron v. Maguire* avoided the issues that arose in *Paton*.[123]

In *Cameron*, the test was that there should be, "an utter disregard of what the consequences of the act in question may be so far as the public are concerned" or "recklessness so high as to involve an indifference to the consequences for the public generally".[124] Lord Osborne then went on to consider and set aside the law on manslaughter, more specifically gross negligence manslaughter, although he did not make the type of manslaughter he was referring to explicit in his decision. This law was set out in the case of *Adomako,*[125] discussed below, and involved ordinary principles of negligence.[126]

Lord Osborne described manslaughter as, "fundamentally different" to the law of culpable homicide in Scotland. He commented that, in Scotland, there is no consideration of the civil laws of delict nor an objective assessment of the perpetrator's conduct.[127] It could be considered that Lord Osborne's preference for the *actus reus* and the subjective concept of *mens rea* is more consistent with the requirements for other common law criminal offences in Scots law.

1.4.2. The directing mind and will of a company

Lord Osborne then discussed the nature of an incorporated body and its implications. The implication of a company being a corporate "personality" is that there are rules of attribution determining when employees' acts are

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[121] ibid

[122] ibid [4] (Lord Osborne) citing *Quinn v. Cunningham* (1956) J.C. 22

[123] ibid [4] (Lord Osborne) citing *Cameron v. Maguire* (1999) J.C. 63

[124] ibid [4] (Lord Osborne) citing *Cameron v. Maguire* (1999) J.C. 63 [66] (Lord Marnoch)

[125] *R v. Adomako* [1995] 1 AC 171

[126] *Transco Plc.* (n 11) [5] (Lord Osborne)

[127] ibid [6]-[7] (Lord Osborne)

attributed to the company. These rules may be set out in Articles of Association or implied by company law and built upon by the principles of agency and vicarious liability. How criminal law applies to a company is a matter of interpretation and the question to ask is, "whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company?"[128] The answer was the, "directing mind and will of the company."[129] He commented that no such rules of attribution existed in Scotland that would allow a company to be prosecuted for a crime requiring an *actus reus* and *mens rea* so the English position was considered.[130]

In *Tesco Supermarkets Ltd v. Nattrass*, Lord Reid had said of a company's 'directing mind and will':

> Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn[131]….If the guilty man was in law identifiable with the company then whether his offence was serious or venial his act was the act of the company but if he was not so identifiable

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[128] ibid [9] (Lord Osborne)

[129] ibid [9] (Lord Osborne) citing *Leonard's Carrying company Ltd v. Asiatic Petroleum Company Ltd* [1915] A.C. 705 [713] –[714] (Viscount Haldane L.C.)

[130] ibid [11] Lord Osborne

[131] ibid [13] (Lord Osborne) citing *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153 [171] (Lord Reid)

> then no act of his, serious or otherwise, was the act of the company itself.[132]

Lord Osborne considered the developments in English law as regards the directing mind and will of the company. In particular, *El Ajou v. Dollar Land Holdings plc and another* held that it:

> …was not necessarily that of the person or persons who had general management and control of the company, since the directing mind and will could be found in different persons in respect of different activities. It was therefore necessary to identify the person who had management and control in relation to the act or omission in point. That person himself need not be a director of the company.[133]

Further, Lord Osborne considered that *R v. HM Coroner for East Kent and Others* conveyed that a company could be guilty of culpable homicide where the *actus reus* and *mens rea* of the offence could be established against those who were the embodiment of the company rather than those who acted for or in its name.[134] He concluded that the directing mind and will of a company must be, "in relation to the subject-matter of the action in question, responsible to no superior in the company and charged with that responsibility himself."[135]

Despite the seeming recognition in *El Ajou*[136] and *Tesco Supermarket*s[137] that the 'directing mind' need not be company directors, the definition could be considered to have applied to a very limited set of people in reality. Indeed, it

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[132] ibid [13] (Lord Osborne) citing *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153 [173] (Lord Reid)

[133] ibid [16] (Lord Osborne) citing *El Ajou v. Dollar Land Holdings plc* [1994] 2 All ER 685

[134] ibid [14] (Lord Osborne) citing *R v. Coroner (HM) for East Kent, ex Spooner and Others* (1989) 88 Cr App R 10 [16] (Bingham LJ)

[135] ibid [23] (Lord Osborne)

[136] ibid [16] (Lord Osborne) citing *El Ajou v. Dollar Land Holdings plc* [1994] 2 All ER 685

[137] ibid [13] (Lord Osborne) citing *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153 [173] (Lord Reid)

has been said that, "By definition, the controlling mind of a company can only be formed by its most senior officers: the Board of Directors."[138] This appears consistent with Lord Osborne's formulation, which, does not seem to acknowledge delegation.

It has been said that the test ignored the reality that companies' structures can be multi-tiered and complex. It may be that decisions or acts which led to the victim's death had been made by senior managers underneath directors in the company hierarchy. However, proving a link between the managers' decisions or acts and the directors' recklessness, which takes into account the state of their knowledge and fault, was difficult.[139] A converse view may be that restricting the definition in this way is acceptable as other employees may not have foreseen or thought they were signing up to this level of accountability.

Another issue with the test is that it was also thought to make it virtually impossible for the Crown to secure a conviction except in cases involving small companies with simple corporate structures.[140] It is thought, at least in theory, that it should have been "quite simple" for the Crown to secure a conviction against small companies whilst larger companies with more complex structures and several offices escape prosecution. This discrimination faced by smaller companies is said to engage Article 14 of the European Convention on Human Rights[141] which prohibits status-based discrimination.

1.4.3. Aggregation

In contrast with the 2007 Act, which, allows for aggregation of the components of culpable homicide between different persons, *Transco* conveyed that the *actus reus* and *mens rea* could not be aggregated to allow evidence against one

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[138] *Scottish Parliament* (n 10) 9

[139] ibid

[140] ibid

[141] ibid 10-11

individual to strengthen that against another.[142] Lord Osborne considered *R v. Great Western Trains Co Ltd* which held that, "the ingredients of culpable homicide would have to be established against an individual before the company could be convicted."[143] In addition, "there is no authority for the application of any doctrine of aggregation of fault in corporate manslaughter."[144]

The need to identify an office holder as being responsible for the offence is known as the identification principle. It differs from aggregation in as much as one person must display the *actus reus* and *mens rea* for the offence instead of the two components being found in different individuals. It may be considered that the exclusion of aggregation was fairer to companies as the concept is not in keeping with other areas of criminal law where one individual must possess both the *mens rea* and *actus reus*. However, an alternative view is that, as aggregation allows for the separate components of culpable homicide to be considered where they have occurred over a period of time, not to allow it would mean that, "the longer some management failure has continued until it causes death, the less likely it is that the organisation will be prosecuted."[145]

It could be considered that holding aggregation could not apply may have made prosecuting such cases more difficult for the Crown as there may have been issues concerning insufficiency of evidence. For example, the Crown may not have had sufficient evidence of identification as it may have been difficult to tie the *actus reus* and *mens rea* of the offence to one particular individual. However, an alternative view is that, in light of the 2007 Act allowing for

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[142] *Transco Plc.* (n 11) [14] (Lord Osborne) citing *R v. Coroner (HM) for East Kent, ex Spooner and Others* (1989) 88 Cr App R 10 [16] (Bingham LJ)

[143] ibid [16] (Lord Osborne) citing *R v. Great Western Trains Co Ltd* 30 June 1999, unreported [15 et seq] (Scott-Baker J)

[144] ibid [17] (Lord Osborne) citing *R v. Great Western Trains Co Ltd* 30 June 1999, unreported [40 et seq] (Scott-Baker J)

[145] *Scottish Parliament* (n 10) 12

aggregation, the Crown are still left with evidential difficulties if managers differed either in their acts or states of knowledge.[146]

In his summing up, Lord Osborne added that the Health and Safety at Work etc Act 1974 provides for an unlimited financial penalty, which, may be considered sufficient in cases like this. It would be for Parliament to legislate to effect a change in the law if it felt cases like this should have the moral opprobrium connected to a conviction of culpable homicide.[147] However, it has been commented that the families of the deceased do not share the view that a purely financial penalty suffices in such cases and, indeed, the more appropriate conviction in such a case would be one of culpable homicide.[148]

1.5 Conclusion

The general overall framework of homicide in Scotland provided in this chapter illustrates that, incorporated into the term 'homicide', are the common law crimes of murder and culpable homicide and the statutory offences of causing death whilst on the roads and in the workplace. The common law offences of murder and culpable homicide share an *actus reus* but differ in terms of *mens rea.* The Road Traffic Act 1988 provides a plethora of offences connected with causing death whilst driving, some requiring *mens rea* and some strict liability. Causing death by careless driving is unusual in that the *mens rea* is one of negligence. The more recent statute, the Corporate Manslaughter and Corporate Homicide Act 2007, is similar in that respect as it considers whether the directors have breached their duty of care with regard given to duties under the law of negligence. Like the Road Traffic Act 1988, the CMCHA 2007 can been seen as an example of how homicide law has evolved to include specialist legislation aimed at addressing gaps in the law caused by changes in society. An examination of the other laws on homicide reveals that they do not adequately address instances of death caused in the

[146] ibid 15

[147] *Transco Plc.* (n 11) [25] (Lord Osborne)

[148] *Scottish Parliament* (n 10) 3-4

workplace and the CMCHA 2007 aims to do so. The comparable legal framework in England and Wales will now be examined.

Chapter 2: The Position in England and Wales

2.0 Introduction

This chapter examines the comparative law of homicide in England. There is a consideration of the law on gross negligence manslaughter prior to the CMCHA 2007, which, is seen in *Adomako*.[149] The English case of *R v. Mark*[150] is considered in order to provide a comparative example to *Transco.*[151] The difficulties in defining gross negligence manslaughter, especially with reference the term 'recklessness', is noted throughout. There will then be a brief discussion of the UK policy considerations used as justification for change in the law.

2.1 The Position in England and Wales

2.1.1 Murder and Involuntary Manslaughter

In England and Wales, the law on homicide has a concept of murder, which, provides the *mens rea* as an intention to kill or do serious bodily harm. To convict of murder, the jury must be "sure that death or serious bodily harm had been a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant had appreciated that such was the case."[152]

In terms of fair labelling, Gibson has questioned whether killings involving an intention to do serious bodily harm should be considered murder or should be

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[149] *R v. Adomako* (n 125)

[150] *R v. Alan James Mark Nationwide Heating Services Ltd* (n 12)

[151] *Transco Plc.* (n 11)

[152] *R v. Woollin* [1999] 1 AC 82

categorised as a separate offence.[153] His view is that it may be easier to accept that a virtual certainty of death, rather than a virtual certainty of serious bodily harm, justifies the label of murder. The former means the death is, "foreseen as *inevitable*" whereas the latter may involve no intention or foreseeability of death at all.[154]

Of less seriousness in the law of homicide, is the concept of involuntary manslaughter, which, like the Scottish concept of culpable homicide, is divided into 'types'. There is 'unlawful act' manslaughter, 'reckless manslaughter' and 'gross negligence manslaughter'. The 'unlawful act' type occurs when any dangerous criminal act results in the victim's death and the *mens rea* is that of the underlying offence.[155] 'Reckless manslaughter' occurs where an act or omission causes the victim's death. The *mens rea* is that the perpetrator was aware of a risk of death or serious injury occurring and he took the risk without relevant justification.[156] The law on gross negligence manslaughter prior to the 2007 Act was set out in the case of *Adomako*.[157]

2.1.2. Gross Negligence Manslaughter

The objective test for gross negligence manslaughter from *Adomako*[158] was:

> …the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next

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[153] Matthew Gibson and Alan Reed 'Reforming English Homicide Law: Fair Labelling Questions and Comparative Answers?' in Alan Reed and Michael Bohlander (eds), Homicide in Criminal Law: A Research Companion (Abingdon: Oxfordshire: Routledge 2018) 5 <https://www.academia.edu/37433196/Reforming_English_Homicide_Law_Fair_Labelling_Questions_and_Comparative_Answers> accessed 29 January 2021

[154] ibid

[155] ibid 7

[156] Findlay Stark, 'Reckless Manslaughter' [2017] Crim. L.R. 10, 763-784 763

[157] *R v. Adomako* (n 125)

[158] ibid

> question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the (victim), was such that it should be judged criminal.[159]

It could be considered unusual that the crime of gross negligence manslaughter was and remains heavily influenced the civil law of tort. There are elements of the *Adomako* test[160] which are worth looking at in more detail such as the duty of care, causation and grossness.

Under the law of tort, there is a duty of reasonable care to avoid acts or omissions one can reasonably foresee would be likely to injure one's "neighbour". 'Neighbours' are people so closely and directly affected by the perpetrator's acts or omissions that he should have had them in contemplation when directing his mind to same.[161] The concept of being one's 'neighbour' can be created by statue[162] or the existence of implied or contractual relations.[163]

In respect of causation, Lord Woolf said that in unlawful act and gross negligence manslaughter, it is an "essential ingredient" that the unlawful or negligent act causes the death. He said, "If there is a situation where, on

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[159] *Transco Plc.* (n 11) [5] (Lord Osborne) citing *R v. Adomako* [1995] 1 AC 171 [187] (Lord Mackay of Clashfern)

[160] ibid

[161] *Donoghue v. Stevenson* [1932] A.C. 562 [580] (Lord Atkin)

[162] Occupiers' Liability Act 1957 s 2 and 1984 s 1

[163] See e.g. *Donoghue* (n 161) [584] (Lord Atkin) citing *George v. Skivington* L. R. 5 Ex. 1; *Airedale N.H.S. Trust Respondents v. Bland Appellant* [1993] 2 W.L.R. 316 [818] (Butler-Sloss L.J.); [38]; *R v. Willoughby* [2004] EWCA Crim 3365 [20] (The Vice President) citing Wacker [30] (Kay L.J.)

examination of the evidence, it cannot be said that the death in question was caused by an act which was unlawful or negligent…then a critical link in the chain of causation is not established. That being so, a verdict of unlawful killing would not be appropriate and should not be left to the jury."[164]

There is no need for the negligent act or omission to be the main or sole cause of the victim's death.[165] However, the act must be a "significant contribution"[166] and a negligent failure to act must be a "substantial" cause of the death.[167] The act or omission must be, "more than minimally negligibly or trivially contributed to the death".[168] A 'chain of causation' can be broken by an intervening act if it is the sole cause of the victim's death and this relieves the original defendant of liability.[169] One example of such an intervening act is where the act of the victim is outwith the range of responses that may be anticipated from a victim in his situation. In a case where the victim had died following an assault, Stephenson L.J said:

> The test is: Was it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing? As it was put in one of the old cases, it had got to be shown to be his act, and if of course the victim does something so "daft," in the words of the appellant in this case, or so unexpected, not not that this particular assailant did not actually foresee it but that no reasonable man could be expected to foresee it, then it is only in a very remote and unreal sense a consequence of his assault, it is really occasioned by a voluntary act on the part of the

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[164] *R v. HM Coroner for Inner London, ex parte Douglas-Williams* [1998] 1 All ER 344 [unpaginated] (Lord Woolf)

[165] *R v. Cheshire* [1991] W.L.R. 844 [851]-[852] (Bedlam L.J.)

[166] ibid

[167] *R v. Mirsa* [2005] 1 Cr. App. R. 21 [70] (Lord Justice Judge) citing Langley J.

[168] *R v. Inner South London Coroner, ex parte Douglas-Williams* [1999] 1 All ER 344 [351] (Lord Woolf)

[169] See e.g. *R v. A* [2020] EWCA Crim 407 [28]-[30] (Simon L.J.) citing *R v. Maybin* [2012] 2 SCR 30

victim which could not reasonably be foreseen and which breaks the chain of causation between the assault and the harm or injury.[170]

In respect of grossness, it was said in the *Attorney General's Reference (No. 2 of 1999)*, "Although there may be cases where the defendants state of mind is relevant to the jury's consideration when assessing the grossness and criminality of his conduct, evidence of his state of mind is not a prerequisite to a conviction for manslaughter by gross negligence. The *Adomako* test is objective, but a defendant is who is reckless may well be the more readily found to be grossly negligent to a criminal degree."[171]

It is unclear, however, if this was actually the proposition put forward in *Adomako.*[172] In *Adomako*, Lord Mackay of Clashfern stated, "I consider it perfectly appropriate that the word 'reckless' should be used in cases of involuntary manslaughter, but as Lord Atkin put it 'in the ordinary connotation of that word.'"[173] He said that examples in which this had been done, "with complete accuracy" were in *R v. Stone and Dobinson*[174] and *R v. West London Coroner ex parte Gray.*[175] These two cases conveyed that 'recklessness' involved cases where: an obvious and serious risk to the victim's health and welfare existed, the perpetrator was indifferent to the risk or, recognising that the risk existed, he deliberately chose to run it by doing nothing about it.[176]

It could be considered that it is unclear whether Lord Mackay is discussing involuntary manslaughter generally and is referring to the 'recklessness' type, whether he intended to infer that recklessness should be considered in

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[170] *R v. Roberts* (1972) 56 Cr. App. R. 95 [102] (Stephen L.J.)

[171] *Attorney General Reference (No. 2 of 1999)* (unreported) 15th February 2000, (Rose LJ)

[172] *R v. Adomako* (n 125)

[173] ibid [187] (Lord Mackay of Clashfern)

[174] ibid citing *R. v Stone and Dobinson* [1977] 2 W.L.R. 169

[175] ibid citing *R v. West London Coroner ex parte Gray* [1988] Q.B. 467

[176] *R v. West London Coroner ex parte Gra*y [1988] Q.B. 467 [477]-[478] (Watkins L.J.); *R. v. Stone and Dobinson* [1977] 2 W.L.R. 169

determining whether the negligence was gross or whether he is providing an alternative subjective *mens rea*. An example of how the law operated prior to the 2007 Act is seen in *R. v Mark*.[177]

2.2 *R v. Mark*

R v. Mark[178] was an appeal which arose in the same year as *Transco.*[179] Mr Mark was the managing director of his company, National Heating Services. The company and Mr Mark were both convicted of manslaughter having previously pled guilty to contraventions of HASWA 1974 s 33.[180] The company was a mechanical service engineers and specialised in heating, ventilation engineering, installation and repair.[181]

Some years prior to the incident Mr Mark and Mr Smith, an engineer, had cleaned a tank owned by Princess Yachts. The cleaning involved Mr Smith and others entering the tank and using acetone-soaked rags to remove resin from the inside. This went without incident and no-one seemed to realise the dangers involved.[182]

In 2002, Nationwide Heating Services Ltd was contracted to clean the same tank. Mr Mark signed up to a code of practice and, in compliance with the regulations, he carried out a risk assessment. It made no mention of the risks of using acetone.[183] However, Mr Mark later sent Princess Yachts a quotation

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[177] *R v. Alan James Mark Nationwide Heating Services Ltd* (n 12)

[178] ibid

[179] *Transco Plc.* (n 11)

[180] *R v. Alan James Mark Nationwide Heating Services Ltd* (n 12) [4] (Lord Justice Scott Baker)

[181] ibid [8] (Lord Justice Scott Baker)

[182] ibid [10] (Lord Justice Scott Baker)

[183] ibid [11] (Lord Justice Scott Baker)

mentioning acetone and unspecified equipment[184] and they did not make any enquires about this.[185]

Upon visiting the tank, Mr Mark thought it was clean enough whilst Mr Smith thought there was a residue of resin that should be removed. Mr Smith said that a bucket of acetone should be poured in whilst Mr Mark thought acetone-soaked rags should be used.[186]

On the day the tank was due to be cleaned, the contract was carried out by Mr Jarvis, Mr Pinkham,[187] who was an apprentice,[188] and Mr Smith. Princess Yachts' new entry pass system was defective and there was no agreement regarding a safe system of working for contractors. The men collected equipment, including a force-fed air mask, from the charge hand's office without showing a work permit. A supervisor at Princess Yachts intervened and insisted a proper connection to the mask and a work permit be obtained. Mr Jarvis wore the mask and splashed acetone around the tank. Upon taking the mask off, around one and a half hours later, he was almost overcome by the fumes. Acetone was then swept up the sides of the tank. Unfortunately, when Mr Pinkham was inside the tank, he knocked over a halogen light causing an explosion.[189] He suffered extensive burns from which he subsequently died.[190] Mr Mark arrived afterwards and was overheard saying he would also have used acetone.[191] It was submitted on the applicants' behalf that any negligence on their part was insufficient to amount to gross negligence. The applicants were not specialists in the cleaning of resin tanks and Mr Mark had previously cleaned the tank with acetone. There was also the issue of causation in that Mr

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[184] ibid [12] (Lord Justice Scott Baker)

[185] ibid [13] (Lord Justice Scott Baker)

[186] ibid [14] (Lord Justice Scott Baker)

[187] ibid [15] (Lord Justice Scott Baker)

[188] ibid [9] (Lord Justice Scott Baker)

[189] ibid [15] (Lord Justice Scott Baker)

[190] ibid [9] (Lord Justice Scott Baker)

[191] ibid [15] (Lord Justice Scott Baker)

Jarvis had splashed the interior of the tank with acetone and there were substantial defects in the safety procedures of Princess Yachts.[192] The sole issue in the appeal against conviction was that Mr Mark had not appreciated the risks of using acetone. The defence contended that the trial judge's direction to the jury that, "…actual foresight or perception of the risk is not a prerequisite of the crime of gross negligence" was an incorrect statement of law.[193] *Adomako*[194] should be revisited as the courts now know recklessness was not as it was in *Caldwell*[195] and *Lawrence.*[196] However, in the appeal, Lord Justice Scott Baker agreed with the trial judge's[197] directions and refused leave to appeal.[198]

In describing gross negligence manslaughter, the trial judge, Bean J., had given the objective definition and appeared to define grossness as, "the defendants' conduct not only created a serious and obvious risk of death, but also fell so far below the standards reasonably to be expected of the defendants as to be grossly negligent and thus criminal."[199]

Lord Justice Scott Baker said that Bean J.:

> …pointed out that it was not disputed Mr Mark and his company owed Ben Pinkham a duty to take reasonable care for his safety. As to breach of duty, it was the Crown's case that acetone should never have been introduced into the tank because there was no safe way of using it, even with knowledge of its properties. He advised the jury to put aside the evidence relating to the nature and condition of the light. The thrust of

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[192] ibid [16] (Lord Justice Scott Baker)

[193] ibid [23] (Lord Justice Scott Baker) citing [9c] Bean J

[194] ibid [29] (Lord Justice Baker) citing *R v. Adomako* [1995] 1 A.C. 171

[195] ibid [29] (Lord Justice Baker) citing *R. Caldwell* [1982] AC 341

[196] ibid [29] (Lord Justice Baker) citing *R v. Lawrence* [1982] AC 510

[197] ibid [25] (Lord Justice Scott Baker)

[198] ibid [33] (Lord Justice Scott Baker)

[199] ibid [18] (Lord Justice Scott Baker)

> the case was the negligent use of acetone. Breach of duty of care had to be viewed objectively against the standards of a reasonable employer. Would a reasonably competent employer, having contracted for the task of cleaning a tank, have permitted the use of acetone within it? The judge also pointed out that the deficiencies in the system were, to a large extent, recognised by the pleas of guilty to the health and safety offences.[200]

It could be considered that the result in this case is understandable considering that Mr Mark held himself out as expert in a company dealing with the cleaning of tanks, the company failed to institute safe working practices and the use of the halogen lamp and acetone together constituted unsafe working practices. Although an accepted use for industrial grade acetone is the thinning of resins, as a highly flammable liquid, it should be treated with care and this includes being kept away from high temperatures and open flames.[201]

Separately, it appears that, not only could both charges on the indictment result in a conviction but, following Bean J., a plea to the breach of HASWA 1974 seemed to facilitate or encourage a conviction on the corporate manslaughter charge. This differs from the Scottish position seen in *Transco*[202] where, by virtue of the corporate homicide and the HASWA 1974 charges appearing on the indictment as alternatives,[203] only one charge of the two was ever going to result in a conviction. It could be considered that this presents an unfair and unequal approach in the two countries.

Like the position in Scotland, the court in England were informed by the trial judge that they must not aggregate other mistakes Mr Mark made.[204] Also like the position in Scotland, the identification doctrine was used to identify Mr

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[200] ibid [18] (Lord Justice Scott Baker) citing [4A]-[10C] Bean J.

[201] See e.g. MB Fibreglass, 'Product Datasheet', <http://www.mbfgfiles.co.uk/docs/acetone_tech.pdf> accessed 16 June 2020

[202] *Transco Plc*. (n 11)

[203] ibid

[204] *R v. Alan James Mark Nationwide Heating Services Ltd* (n 12) [19] (Lord Justice Baker Scott)

Mark as the directing mind of the company, although this was not made explicit. Lord Justice Scott Baker said the trial judge:

> …told the jury that the prosecution had to prove four things: (1) that the defendant owed a duty of care to the deceased; (2) that the defendant was in breach of that duty in failing to take reasonable care, i.e. was negligent; (3) that this breach caused the death of the victim; and (4) that the defendants' conduct not only created a serious and obvious risk of death, but also fell so far below the standards reasonably to be expected of the defendants as to be grossly negligent and thus criminal.[205]

In *Mark*, in respect of the term, 'gross' Bean J. had said:

> First there must have been an obvious and serious risk of death. This again must be assessed objectively, regardless of what risk was perceived by the defendants. On the basis that the consequence of the negligent conduct has been the introduction of a volatile liquid into an enclosed space within which the employee is working whereby all or part of that space contain an explosive mixture of gases which can be ignited by a heat source or a spark, it may be that the risk of death can be readily assessed as serious. But was it obvious to a reasonably competent employer professing any skills claimed by the defendants?[206]

Bean J. said to the jury:

> …What does 'gross' mean? It has to be exceptionally bad, in the sense of being blatant or flagrant. Perhaps a better adjective that ought to assist you in getting to grips with what grossly negligent conduct involves is the word 'reckless'. They are not synonymous, but they overlap. To act recklessly is something I suspect I do not have to elaborate on. It certainly means, for present purposes, that in circumstances where there

[205] ibid [18] (Lord Justice Scott Baker) citing [4A]-[10C] Bean J.

[206] ibid [19] (Lord Justice Baker Scott) citing [6F] Bean J.

> is an obvious and serious risk of death, a defendant was either indifferent to that risk — i.e. he demonstrated he couldn't care less about it — or, having recognised the risk, deliberately chose to run it.[207]

The aspect of their being overlap between the terms ‘gross negligence’ and ‘recklessness’ appears to have been the basis of the defence agent’s objection to the decision in the trial.[208] Indeed, this has been a long-standing issue in the law. The Law Commission have said that the term ‘reckless’ began to be used by judges to convey a high degree of negligence as they found the term ‘gross negligence’, “unwieldy and difficult to explain to juries.”[209]

The difficulties with defining ‘grossness’ seemed to begin in the early landmark case of *Bateman*,[210] which, provided a definition of gross negligence largely in line with the one we see in *Adomako*.[211] However, when it came to trying to define ‘grossness’, the Lord Chief Justice said:

> In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as “culpable,” “criminal,” “gross,” “wicked,” “clear,” “complete.” But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, 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 punishment.[212]

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[207] ibid [22] (Lord Justice Baker Scott) citing [8G] Bean J.

[208] ibid [29] (Lord Justice Baker)

[209] Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No 237, 1996) para 2.11 citing Consultation Paper No 135 para 3.69

[210] *R v. Bateman* (1927) 19 Cr. App. R. 8

[211] *R v. Adomako* (n 125) [187] (Lord Mackay of Clashfern)

[212] *R v. Bateman* (n 210) [11]-[12] (The Lord Chief Justice)

Despite the attempt to clarify 'grossness' by providing words that may be interchangeable, the proposition from this decision seems to be the same as we see in *Adomako*[213] - the accused can be convicted of a crime if his behaviour is criminal. Like the definition in *Adomako*,[214] this has been critiqued for its circularity[215] and uncertainty caused by inconsistent application by juries.[216] It could also be considered that the need for interchangeable words to be provided, in itself, demonstrates a lack of clarity and certainty.

After *Bateman*[217] and prior to *Adomako,*[218] the difficulties in effectively articulating 'grossness' led to judges gradually changing the law.[219] Judges, post-*Bateman*,[220] began to use 'recklessness' to covey a high degree of negligence.[221] However, some cases, such as *Stone v. Dobinson's*[222] provision of a detailed description of 'recklessness' was viewed as going "further" than that.[223] The culmination of these changes was the case of *R v. Seymour*[224] which confirmed that 'recklessness' was to be employed instead of gross negligence.

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[213] *R v. Adomako* (n 125) [187] (Lord Mackay of Clashfern)

[214] ibid

[215] *Law Commission* (n 209) para 2.10 citing J C Smith and B Hogan, Criminal Law (7th ed 1992) p 373.

[216] ibid 2.10

[217] *R v. Bateman* (n 210)

[218] *R v. Adomako* (n 125)

[219] *Law Commission* (n 209) para 2.11 citing Consultation Paper No 135 para 3.69

[220] *R v. Bateman* (n 210)

[221] *Law Commission* (n 209) para 2.11 citing *Andrews v DPP* [1937] AC 576; *Larkin* [1943] 1 All ER 217 [219D] (Humphreys J); *Lamb* [1967] 2 QB 981 [990] (Sachs LJ) *Cato* [1976] 1 WLR 110 [114] (Lord Widgery CJ.)

[222] *R. v Stone and Dobinson* (n 176)

[223] *Law Commission* (n 209) para 2.11

[224] *R v. Seymour* [1983] 2 A.C. 493

The courts had first begun to use the test of 'recklessness' instead of 'gross negligence'[225] after *Bateman.*[226] In essence, this case effected a shift away from using recklessness to define 'grossness' and, instead, it was used as the test to be employed instead of gross negligence.[227] These changes culminated in *Seymour;*[228] which, was a case of reckless driving.

Seymour held that the term to be employed was 'recklessness'[229] and it was defined by Lord Roskill following consideration of the cases *R v. Caldwell*[230] and *R v. Lawrence*.[231] He provided:

> First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road ... and Second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it.[232]

This definition was employed by judges fairly consistently for around 10 years.[233] The Law Commission of England and Wales said that *Seymour:*

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[225] Law Commission (n 209) para 2.11 citing *Andrews v DPP* [1937] AC 576; *Larkin* [1943] 1 All ER 217 [219D] (Humphreys J); *Lamb* [1967] 2 QB 981 [990] (Sachs LJ) *Cato* [1976] 1 WLR 110 [114] (Lord Widgery CJ.)

[226] *R v. Bateman* (n 210)

[227] *Law Commission* (n 209) para 2.11

[228] *R v. Seymour* (n 224)

[229] *R v. Seymour* (n 224) [500] (Lord Fraser of Tullybelton) citing *Jennings* [1983] 1 A.C. 624 [644]-[645] (Lord Roskill)

[230] *R v. Seymour* (n 224) [502] (Lord Roskill) citing *R. v Caldwell* [1982] AC 341

[231] ibid [503] (Lord Roskill) citing *R v. Lawrence* [1982] AC 510

[232] *R v. Seymour* (n 224) [503] (Lord Roskill) citing *R. Lawrence* [1982] A.C. 510 [526]-[527] (Lord Diplock)

[233] *Law Commission* (n 209) para 2.14 citing *Kong Cheuk Kwan* (1985) 82 Cr App R 18; *Madigan* (1982) 75 Cr App R 145, *Goodfellow* (1986) 83 Cr App R 23; Consultation Paper No 135 paras 3.110 – 3.118.

> ...went some way towards removing the uncertainty that had previously characterised the law. However, this certainty was bought at the cost of widening the basis of liability and introducing a degree of rigidity into the way in which juries were directed.[234]… Under the *Seymour* rule, once the defendant had been shown by her conduct to have created an obvious and serious risk of causing physical injury to some other person, it was open to the jury to find her guilty whether her conduct was a result of mere inadvertence, conscious risk-taking or poor judgment. It was not longer open to a defendant to dispute guilt on the ground that her negligence had not been "gross".[235]

It could be considered, however, that the uncertainty in the law would have persisted to the extent that, in some cases, concepts of 'gross negligence' were still utilised.[236] It can also be observed that widening liability, axiomatically, may have aided the Crown in securing a conviction. Showing the defendant's inadvertence, conscious risk-taking or poor judgement would seem to a lower threshold for guilt to be established than having to show the defendant's negligence was gross. However, a converse view may be that *Seymour*[237] seems to provide a subjective test, which, can increase the difficulty for the Crown in securing convictions as it is impossible to see into the mind of the defendant and establish their intention at the material time.

The case of *Adomako*[238] was the next landmark case concerning this issue and Lord Mackay clarified that the objective test for gross negligence was the one to be employed in manslaughter cases involving a breach of duty.[239] According to the Law Commission of England and Wales, Lord Mackay's "decision

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[234] *Law Commission* (n 209) para 2.11

[235] ibid 2.13

[236] See e.g. *R v. West London Coroner, ex parte Gray* (n 176)

[237] *R v. Seymour* (n 224)

[238] *R v. Adomako* (n 125)

[239] ibid [187] (Lord Mackay of Clashfern)

resolved the principal uncertainty in the law – whether the test of *Bateman* gross negligence or of *Caldwell* recklessness should be applied."[240] However, this is subject to the aforementioned disclarity surrounding Lord Mackay's comments on recklessness in his judgement. The Law Commission said, "It also restored to the law the flexibility of the Bateman gross negligence test, which allowed the jury to consider the accused's conduct in all the surrounding circumstances, and only punished her if her negligence was very serious."[241]

However, Gibson more recently intimated his belief that there is still no sufficient guidance on how to characterise the grossness of negligence and this may lead to issues of fair labelling. Inappropriate labelling may occur on the basis that juries may differ in their interpretations and, ultimately, their verdicts. He said it may also be the case that different verdicts may be arrived at on the basis of similar facts.[242] It could be considered, however, that the 2007 Act's provision of a host of factors the jury must consider when determining whether there was a, "gross breach" negates this difficulty to some degree.

Returning to *R v. Mark*, Lord Justice Baker Scott said:

> The judge then observed that acting recklessly is not the same as gross negligence… For instance, a defendant might appreciate a risk and intend to avoid it but show such a high degree of negligence as to justify its categorisation as gross. But, he noted, this was not a case where the prosecution was saying that the appellant had acted recklessly or even very negligently by reason of having recognised the risk, let alone the serious and obvious risk of death.[243]

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[240] *Law Commission* (n 209) para 2.16

[241] ibid para 2.16

[242] *Gibson* (n 153) 10

[243] *R v. Alan James Mark Nationwide Heating Services Ltd* (n 12) [22] (Lord Justice Baker Scott)

Lord Justice Baker Scott referred to Bean J.'s directions:

> …perception of the risk might be a strong factor in favour of the prosecution. Non-perception of the risk, as here, might be a strong factor against categorising his conduct as grossly negligent, but, he added, "it might be different if the defendant had simply turned a blind eye to the obvious". He then concluded his directions on the law with these words,"Equally you may feel that where a person has acted, if you think that may be the case here, without having perceived the risk in the first place, that might be a strong factor against categorising his conduct as grossly negligent."[244]

It could be considered that this is an approach that facilitates the Crown as, essentially, no subjective perception of the risk is needed for gross negligence to exist but its existence contributes towards proof of gross negligence.

2.3 Statutory Reform

When the UK Parliament was considering reforming the law to introduce the CMCHA 2007, their approach was influenced by the recommendations made by the Law Commission of England and Wales in 1996.[245] The Law Commission had considered there to be several drivers for reform, one of which was public opinion[246] following a series of high profile disasters. These included the Piper Alpha platform disaster which resulted in 167 deaths[247] and the Clapham rail crash which resulted in 35 deaths and almost 500 injuries.[248] In both cases, it was recognised that, respectively, the platform operator and

[244] ibid [23] (Lord Justice Baker Scott) citing [9c] Bean J.

[245] HL Deb 19 December 2006, vol 687, col 898

[246] *Law Commission* (n 209) 1.10

[247] ibid 1.13

[248] ibid 1.14

those in the higher echelons of British Rail rather than employees at ground level were at fault.[249]

It was also recognised that many people were dying from industrial incidents[250] and these deaths could and should be preventable.[251] Despite the number of incidents, levels of prosecutions were low and most prosecutions were unsuccessful. At that time, there had only been one successful prosecution involving a one-man company.[252]

In the intervening period between the Law Commission's proposals for reform and the enactment of the 2007 Act, in England, this situation seems to have improved and more prosecutions for gross negligence manslaughter over the years have been successful.[253]

2.4 Conclusion

It can be seen that the English law has developed in a different way to the law in Scotland prior to the CMCHA 2007. In particular, England, unlike Scotland, already had a notion of gross negligence manslaughter albeit there were difficulties in how the terms gross negligence and recklessness were to be used. It can be observed that Scottish law prior to the CMCHA 2007 does not facilitate the Crown in obtaining a prosecution whereas the English law does so in different ways. The policy discussions surrounding the change in law seem reactionary in relation to high profile disasters, the need to eradicate difficulties posed by the identification doctrine and to hold managers sufficiently

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[249] ibid 1.13 citing The Public Inquiry into the Piper Alpha Disaster (1990) Cm 1310; ibid 1.14 citing Investigation of the Clapham Junction Railway Accident (1989) Cm 820

[250] ibid 1.10 citing Health and Safety Executive Annual Report 1993–94

[251] ibid 1.10

[252] ibid 1.10 citing *Cory Bros Ltd* [1927] 1 KB 810; *Northern Stripping Mining Construction Ltd,* The Times 2, 4 and 5 February 1965; *P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (Central Criminal Court); *Kite and OLL Ltd,* Winchester Crown Court, 8 December 1994, unreported.

[253] See e.g. *R v. Yaqoob* [2005] EWCA Crim 2169; *R v. Willoughby* [2005] 1 W.L.R 1880

accountable for workplace incidents. The effectiveness of the CMCHA 2007 will now be considered.

Chapter 3: The Effectiveness of the Corporate Manslaughter and Corporate Homicide Act 2007

3.0 Introduction

This chapter explores the reasons behind the introduction of the CMCHA 2007 and highlights the problems with the prior law. Since the 2007 Act's introduction, there have been no prosecutions for corporate homicide in Scotland.[254] Indeed, it appears that cases which appear suitable for prosecution under the Act, such as the cases of *ICL Plastics*[255] and *Enva Scotland Ltd,*[256] are being dealt with under the HASWA 1974 instead. However, there have been 22 prosecuted cases of corporate manslaughter in England, all but one unreported.[257]

The chapter examines the reasons behind the 2007 Act and how the verdicts in these English cases have been arrived at. It then considers the factors which were instrumental in allowing the Judges to reach their decisions and notes the wider disparities in the Judges' approach when these cases are considered overall. Finally, it examines the main focus of critique of the CMCHA 2007 - the senior management test - and attempts to establish whether these critiques hold up to scrutiny.

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[254] Fiona Cameron, 'Proposed Scottish law would increase corporate liability for deaths' (Pinset Masons, 15 June 2020) <https://www.pinsentmasons.com/out-law/analysis/scottish-law-corporate-liability-deaths> accessed 6th August 2020

[255] *David T Morrison & Co Limited v. ICL Plastics, ICL Tech and Ltd and Stockline Plastics Limited* [2012] CSOH 44 [3]

[256] Judiciary of Scotland, 'Sentencing Statements: HMA v. Enva Scotland Ltd' (November 17th 2020) <https://www.judiciary.scot/home/sentences-judgments/sentences-and-opinions/2020/11/17/hma-v-enva-scotland-ltd> accessed 10 December 2020

[257] Northumbria University, 'Summary of Corporate Manslaughter Cases - April 2017' <https://northumbria.rl.talis.com/page/summary-of-corporate-manslaughter-cases-april-2017.html> accessed 6th August 2020

3.1 The Reasons Behind the CMCHA 2007

Historically, barriers to prosecution arising from the common law across England and Scotland pertained to; the identification doctrine, the consequent lack of aggregation and Crown immunity from prosecution.

Prior to the 2007 Act, the 'identification doctrine' was described as a, "major difficulty that has to be overcome".[258] This was because it was extremely difficult to pinpoint those who were the embodiment of the company as, according to one commentator, "the more diffuse the company structure, and the more devolved the powers that are given to semi-autonomous managers, the easier it will be to avoid liability."[259] It was also said that a manager's individual liability was, "a narrow and artificial basis for assessing corporate negligence."[260]

Linked to this was the difficulty posed by the practice of de-centralising safety services. One example of this was in the pharmaceutical sector where companies were using contract laboratories to conduct safety research thereby transferring responsibility to them.[261] It was noted that, "If responsibility for the development of safety monitoring is not vested in a particular group or individual, it becomes almost impossible to identify the "directing mind" for whose shortcomings the company can be liable."[262] It could be considered that this is mitigated in the 2007 Act to the extent that inappropriate delegation for safety issues may be considered a breach by senior managers in itself.[263]

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[258] *Law Commission* (n 209) 1.16

[259] ibid 1.17 citing Celia Wells, "Manslaughter and Corporate Crime" (1989) 139 NLJ 931

[260] HL Deb 19 December 2006, vol 687, col 1897

[261] *Law Commission* (n 209) 1.17 citing S Field and N Jörg, "Corporate Liability and Manslaughter: should we be going Dutch?" [1991] Crim LR 156, 158–159

[262] *Law Commission* (n 209) 1.17

[263] Simon Parsons, 'The Corporate Manslaughter and Corporate Homicide Act 2007 Ten Years On: Fit for Purpose?' The Journal of Criminal Law [2018] 82(4), 305, 307

It was recognised that changes should be made in the law which hold blame-worthy employers accountable whilst individual junior employees should not be considered liable.[264] However, there was also a need to balance employer's liability with safeguarding against situations where companies were being unduly convicted purely by virtue of being in charge at the time when a fatality occurred.[265]

It was hoped that creating a new offence of corporate homicide/manslaughter meant a new approach that, effectively shifted the emphasis away from looking at individual liability towards a collective management failure. This was thought to ensure fairness as it would not place the blame of a corporation on to one person's shoulders.[266] It would also provide justice for the victim's family as it would be recognised that what happened was not just a regulatory breach but homicide and appropriate sanctions would apply.[267]

It has been noted that a further issue arising with the common law is Crown immunity from prosecution. Thereby, government departments, civil servants and Ministers escape liability for prosecution under the English[268] and Scottish respective common laws of corporate manslaughter and corporate homicide. It was felt this showed an unfair and discriminatory preference towards the Crown[269] and this immunity should be abolished. There were also feelings at Westminster that exemptions to the lift on immunity should apply but it would not be easy to establish exactly what these should be.[270]

In Scotland, under the common law, there was the added difficulty arising from the Crown having to establish a subjective *mens rea*. It was noted that it may

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[264] *Law Commission* (n 209) 1.10

[265] ibid 1.18

[266] HL Deb 19 Dec 2006, vol 687, col 1897

[267] ibid cols 1897-1898

[268] ibid col 1898

[269] *Scottish Parliament* (n 10) 12-13

[270] HL Deb 19 Dec 2006, vol 687, col 1900

be difficult to identify senior individuals with a sufficient level of direct involvement to allow their states of mind to constitute the organisation's *mens rea*.[271] It could be considered, at least in theory as we do not have any successful Scottish prosecutions to illustrate this point, that the objective test for gross negligence set out in the 2007 Act mitigates this.

In 2005, the Scottish Executive set up an Expert Group to review the law on corporate homicide. The group published a report which envisaged a number of changes made only to the law of Scotland as opposed to the UK as a whole.[272] However, no Bill was passed as a result of this and the next development came from Westminster in the form of the 2007 Act, which, aimed to address these issues.[273]

In 2018, the Scottish Parliament published the Culpable Homicide (Scotland) Bill Consultation Paper. This seems to be a misnomer as the Bill envisages changes to the law on corporate homicide rather than culpable homicide generally. Although it suggests new legislative provisions in respect of deaths caused by a "natural person",[274] it is unclear if the proposed changes are intended to apply beyond a commercial context. Indeed, given that terms such as "natural person" has commercial connotations, it can be supposed that they are not.

This Consultation Paper ignores the fact that the CMCHA 2007 has superseded *Transco*[275] as it identifies several problems in what it calls the "existing common-law" and "the current law"[276] and references *Transco* in relation to

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[271] *Scottish Parliament* (n 10) 8

[272] Scottish Executive, 'Corporate Homicide: Expert Group Report' (2005) <https://www2.gov.scot/Resource/Doc/76169/0019246.pdf2.5> accessed 21 June 2020

[273] See e.g. HL Deb 19 Dec 2006, vol 687, cols 1897-1959

[274] *Scottish Parliament* (n 10) 14-15

[275] *Transco Plc.* (n 11)

[276] *Scottish Parliament* (n 10) 12-13

these.[277] It could be considered that the CMCHA 2007 has rectified the issues raised pertaining to *Transco*.[278] Additionally, it states that the criterion for culpable homicide is not clear and there should be well defined categories of corporate manslaughter. The alternative *mens rea* could be gross negligence as it is currently defined by the CMCHA 2007[279] or recklessness as defined by the draft Scottish Criminal Code.[280] This defines recklessness as:

> (a) something is caused recklessly if the person causing the result is, or ought to be, aware of an obvious and serious risk that acting will bring about the result but nonetheless acts where no reasonable person would do so;
>
> (b) a person is reckless as to a circumstance, or as to a possible result of an act, if the person is, or ought to be, aware of an obvious and serious risk that the circumstance exists, or that the result will follow, but nonetheless acts where no reasonable person would do so;
>
> (c) a person acts recklessly if the person is, or ought to be, aware of an obvious and serious risk of dangers or of possible harmful results in so acting but nonetheless acts where no reasonable person would do so.[281]

The Paper proposes these categories should be, "in addition to, and not in substitution for, the existing kinds of culpable homicide at common law. There is an express saving for the common law."[282] It could be considered that the addition of the three variations of recklessness to gross negligence

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[277] ibid citing *Transco Plc. v. HM Advocate* 2004 J.C. 29

[278] *Transco Plc.* (n 11)

[279] *Scottish Parliament* (n 10) 15-16

[280] *Scottish Parliament* (n 10) 7 and 14-15 citing https://www.scotlawcom.gov.uk/files/5712/8024/7006/cp_criminal_code.pdf

[281] Eric Clive, Pamela Ferguson, Christopher Gane, Alexander McCall Smith, 'A Draft Criminal Code for Scotland with Commentary' Edinburgh: Scottish Law Commission 32

[282] *Scottish Parliament* (n 10) 14

manslaughter and the common law categories of culpable homicide[283] may only unsettle the law and add to the lack of clarity in homicide law generally. In addition, to have both *mens rea* of gross negligence manslaughter and recklessness in the context of corporate homicide/manslaughter could also potentially rekindle the confusion over how to use the terms as seen from English cases post-*Bateman*[284] and pre-*Adomako*.[285]

The Paper also ignores the fact that the 2007 Act has dispensed with Crown immunity from prosecution under common law.[286] Parsons rightly believes the 2007 Act has a wider scope than the prior common law and comments that:

> Calling the offence corporate manslaughter is a misnomer because the offence can be committed by other organisations such as trade unions, partnerships and public authorities such as the police, the CPS and the departments of state.[287]

There are, however, sensible exclusions from liability provided to certain organisations in certain circumstances under the Act.[288]

The Paper was met with challenge at a Justice Committee meeting last year in which concerns were raised as to the Scottish Parliament's legislative competence to pass the Bill. In particular, it was thought that the Scottish Parliament may be encroaching on matters of health and safety and business associations reserved for the UK Parliament.[289]

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[283] Timothy H. Jones and Michael G.A. Christie, *Criminal Law* (5th edn, Edinburgh: W. Green 2012) 9.60

[284] *R v. Bateman* (n 210)

[285] *R v. Adomako* (n 125)

[286] *Scottish Parliament* (n 10) 12-13; CMCHA 2007 s 1 and Schedule 1

[287] *Parsons* (n 263) 306

[288] CMCHA 2007 ss. 3-7.

[289] Scottish Parliament, *Stage 1 Report on the Culpable Homicide (Scotland) Bill* (November 2020) Edinburgh: Scottish Parliament cols 28-30

Most recently, the Scottish Law Commission has announced it is devising a Discussion Paper on the mental element in homicide law so future proposals for reform may result from that.[290]

3.2 The Reasons Behind the Guilty Verdicts

In 2011, Cotswold Geotechnical (Holdings) Ltd[291] became the first company to be charged with[292] and convicted after trial of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007 s 1(1).[293] The company's application for appeal against conviction and sentence were refused.[294]

The small company was primarily concerned in soil investigation and its one director, Mr Eaton, had total control of the ways in which its affairs were managed and the work was organised. There were eight employees, however, Mr Eaton and the deceased, a geologist, were the only two people who carried out soil investigations.[295] The deceased entered a pit that subsequently collapsed and he died from asphyxiation.[296] Mr Eaton had been charged with gross negligence manslaughter but this charge was permanently stayed by the Crown due to his ill-health.[297] The company was fined £385,000.[298] The Crown had argued that the company should have strictly prohibited employees from

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[290] Scottish Law Commission, 'Homicide' <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/> accessed 28 January 2021

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

[292] PLC Construction, 'Company found guilty in first corporate manslaughter trial' (*Practical Law*, 16 February 2011) <https://uk.practicallaw.thomsonreuters.com/9-504-8276?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 30 June 2020

[293] *R v. Cotswold Geotechnical (Holdings) Ltd* (n 291) [H3]

[294] ibid [10] and [35]

[295] ibid [2]-[3] (Lord Judge C.J.)

[296] ibid [H3]

[297] *Northumbria University* (n 257)

[298] *R v. Cotswold Geotechnical (Holdings) Ltd* (n 291) [H3]

entering unsupported pits deeper than 1.2 meters and, in not doing so, the company had grossly breached its duty of care.[299]

In an argument that could be considered to exemplify the elasticity that still exists in the term 'gross', the defence had argued that, if the company had breached its duty of care, the breach was not gross. It was reasonable to leave the issue of pit safety to Mr Eaton's discretion given that he was highly experienced and the deceased was qualified. It had been further argued that, if the breach was found to be gross upon examination, the cause of death was the fact that the deceased had entered the pit unsupervised contrary to the company's practices.[300] The Crown had argued that there had been a gross breach in any event as, in essence, there was a system of work whereby the employer and deceased entered dangerous, unsupported pits.[301]

On appeal, Lord Judge C.J. stated, "The judge found, and we agree, that it was plainly foreseeable that the way in which the company conducted its operations could produce not only serious injury but death. The standard by which it fell short of its duty of care was found by the jury to have been gross."[302] It was noted that the employer had not honoured assurances given to the HSE that pits deeper than 1.2 meters would be supported after a previous incident involving another employee.[303]

It has been noted that, "Some commentators have argued that the Act was not designed to prosecute small businesses like Cotswold. However, the case was seen as a test case for the legislation…The successful prosecution of Cotswold demonstrates the importance for businesses to have a health and safety culture and to ensure that everyone takes responsibility for improving health and

[299] ibid [5] (Lord Judge C.J.)

[300] ibid [6] (Lord Judge C.J.)

[301] ibid [7] (Lord Judge C.J.)

[302] ibid [28] (Lord Judge C.J.)

[303] ibid [28] (Lord Judge C.J.)

safety." It was also thought that larger companies may look to the judgement in this case and deduce the risks of non-compliance to their own business.[304]

In the cases that followed, common themes emerged as regards the evidencing of systematic failures by companies. These themes included a lack of safety equipment and precautions that would have prevented the deaths and ensuring the employees had adequate supervision, training and qualifications. Other themes included companies ignoring previous warnings and advice about risks[305] and machinery being badly maintained, unclean and defective. In most cases, a dim view was taken of companies concerned more with production and profits rather than safety.[306] However, in one case, evidence of this was considered neutral[307] and, without further information, it is unclear how the Judge arrived at that view.

Most companies pled guilty to corporate manslaughter, which, resulted in other regulatory charges against the company and/or the director either wholly or partly being dropped.[308] In one case, after the company pled guilty to corporate manslaughter and a HASWA offence, a charge of gross negligence

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[304] *PLC Construction* (n 292)

[305] See e.g. *R v. Lion Steel Equipment Ltd: Sentencing Remarks* (Manchester Crown Court, July 20 2012) [20]-[25] (HHJ Gilbert Q.C.); Rod Hunt and Bethan Casinelli, 'The First Publicity Order, And A Company Fined The Entirety Of Its Assets - The Latest Corporate Manslaughter Conviction!' (*Clyde & Co*, 12 March 2014) <https://www.mondaq.com/uk/corporate-crime/298846/the-first-publicity-order-and-a-company-fined-the-entirety-of-its-assets--the-latest-corporate-manslaughter-conviction> accessed 18 July 2020; BBC News, 'Water sports firm pleads guilty to Mari-Simon Cronje death charge' (22 November 2013) <https://www.bbc.co.uk/news/uk-england-london-25056230> accessed 20 July 2020; RSA, 'Director fined in £183,000 in corporate manslaughter case' <https://www.rsabroker.com/news/director-fined-£183000-corporate-manslaughter-case> accessed 20 July 2020

[306] See e.g. Jane Meredith, 'Reading man fined £191,000 after Calcot man's 2012 death' (Newbury Today, 27 February 2014) <https://www.newburytoday.co.uk/news/news/10298/reading-man-fined-191-000-after-calcot-man-s-2012-death.html> accessed 20 July 2020 citing *R v. Mobile Sweepers (Reading) Ltd* (Winchester Crown Court, 26 February 2014) (HHJ Guy Boney); British Safety Council, 'Waste firm Sterecycle fined £500k for corporate manslaughter after autoclave explosion' <https://www.britsafe.org/publications/safety-management-magazine/safety-management-magazine/2014/waste-firm-sterecycle-fined-500k-for-corporate-manslaughter-after-autoclave-explosion/> accessed 5 August 2020

[307] *Northumbria University* (n 257) citing *R. v CAV Aerospace Ltd* (Central Crim Court, 31 July 2015)

[308] *Northumbria University* (n 257)

manslaughter against the director was replaced with a HASWA charge.[309] In another case, after the company pled guilty, weak charges against the two directors were dropped and a third fell away at trial.[310] There were six cases where the company was found guilty of corporate manslaughter after trial.[311] One case involved two companies, where, it appears, one pled guilty and the other was found guilty, both, of corporate manslaughter and regulatory offences. All directors charged either pled or were found guilty of regulatory offences.[312] There were two acquittals[313] and one case was dismissed as 'no case to answer'.[314]

3.3 The Reasons Behind the Three Acquittals

R v. PS and JE Ward Ltd[315] involved a nursery plant operator who died as a result of electrocution when he drove his tractor under live power cables. Although the full facts of this case are not available, it appears the acquittal was due to the fact that the employee was experienced and trained to drive under power cables and he was acting under his own initiative at the time rather than in accordance with his employer's instructions.[316] Indeed, it was not clear to anyone why he had been in that particular area at the time.[317]

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[309] ibid citing *Health and Safety Executive v. Peter Mawson Ltd (Preston Crown Court, 3 February 2015)*

[310] *R v. Lion Steel Equipment Limited: Sentencing Remarks* (n 305) [13] (HHJ Gilbert Q.C.)

[311] *Northumbria University* (n 257)

[312] ibid citing *Health and Safety Executive v. Koseoglu Metal Works Ltd (Chelmsford Crown Court, 19 May 2017)*

[313] ibid citing *PS and JE Ward Ltd (Norwich Crown Court, 6 June 2014)* and *R v. MNS Mining Limited (Swansea Crown Court, 19 June 2014)*

[314] *Health and Safety Executive v. Maidstone and Tunbridge Wells NHS Trust (London Crown Court 28 January 2016)*

[315] *PS and JE Ward Ltd (Norwich Crown Court, 6 June 2014)*

[316] Ridouts Solicitors, 'Corporate Manslaughter Acquittals – Could prosecutors be encouraged to bring more charges against directors?' <https://www.ridout-law.com/corporate-manslaughter-acquittals-could-prosecutors-be-encouraged-to-bring-more-charges-against-directors/> accessed 18 July 2020

[317] BBC News, 'Norfolk flower farm must pay £97,932 over tractor death' (6 June 2014) <https://www.bbc.co.uk/news/uk-england-norfolk-27741154> accessed 2 August 2020

In *R v. MNS Mining Ltd,*[318] the company and mine manager were acquitted of four counts, respectively, of corporate manslaughter and gross negligence manslaughter following miners perishing in a tunnel flood.[319] The acquittals were due to the fact that expert evidence showed the mine manager had adequately inspected the relevant section of the mine several times prior to the incident, the flood water probably accumulated after that and the shot firer who breached the mine wall used multiple shots instead of one against the manager's instructions.[320] It could be viewed that, in these two cases, the correct approach has been taken to the deceaseds' actions breaking the chain of causation.

In *Executive v. Maidstone and Tunbridge Wells NHS Trust,* the case was dismissed as 'no case to answer'. The NHS and a consultant anaesthetist were acquitted, respectively, of corporate manslaughter and gross negligence manslaughter after a fortnight of evidence. This conveyed that the deceased, who suffered complications from childbirth, should not have died but there were no systematic failures and her statistics had not indicated the need for immediate further treatment.[321]

Overall, the fact that most of the cases under the 2007 Act have resulted in convictions and the few acquittals have been understandable, based upon the information available, shows that the Act is effective. It could be considered that the acquittals seem understandable as, otherwise, the companies may have been convicted of a crime that was unforeseen. The acquittals also fall in with the Law Commission's view that one wishes to avoid situations where companies were being unduly convicted purely by virtue of being in charge at

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[318] *R v. MNS Mining Limited (Swansea Crown Court, 19 June 2014)*

[319] *Ridouts Solicitors* (n 316)

[320] BBC News, 'Gleision: Malcolm Fyfield and MNS Mining not guilty' (19 June 2014) <https://www.bbc.co.uk/news/uk-wales-27923572> accessed 6 August 2020

[321] *Northumbria University* (n 257) citing *Executive v. Maidstone and Tunbridge Wells NHS Trust (Crown Court London, 28 January 2016)*

the time when a fatality occurred.[322] However, despite these outcomes, there are some critiques of the 2007 Act.

3.4 The Concerns about the CMCHA 2007's Senior Management Test

It has been stated that the 2007 Act is ineffective as evidenced by the fact that there have been no successful prosecutions under it in Scotland to date[323] and the 'senior management' test has been blamed for this.[324] However, without knowing the Crown's reasons for the lack of prosecutions, it is difficult to attribute this to the lack of effectiveness of the legislation.

Field states that a point of concern in England is that, since 2015, the rate of prosecutions have seemed to slow down, suggesting they may have peaked, however, it could be considered it is too early to determine this.[325] However, a converse view following the acquittals in *R v. PS and JE Ward Ltd*[326] and *R v. MNS Mining Ltd*[327] was that the Crown was "picking up the pace" in prosecuting such offences and, in doing so, this served as a reminder to employers to implement robust health and safety procedures and policies that operate at ground level.[328]

It has also been stated that the more complex structures of these larger companies provides "persistent invulnerability" as it is hard for the Crown to show a senior management failure.[329] This creates an inequality in the law as it

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[322] *Law Commission* (n 209) 1.18

[323] *Scottish Parliament* (n 10) 10

[324] ibid 3

[325] Sarah Field, 'Ten Years on: the Corporate Manslaughter and Corporate Homicide Act 2007: plus ca change' I.C.C.L.R. [2018] 29(8) 511, 514

[326] *PS and JE Ward Ltd* (n 315)

[327] *R v. MNS Mining Limited* (n 318)

[328] Philip Crosbie, 'PS & JE Ward corporate manslaughter trial commences' (*SHP*) <https://www.shponline.co.uk/legislation-and-guidance/ps-je-ward-corporate-manslaughter-trial-commences/> accessed 18th July 2020

[329] *Field* (n 325) 516

is - at least theoretically - relatively easy for the Crown to convict a small company with a simple structure but "extremely difficult" to convict medium or large ones.[330]

It is true that all companies prosecuted under the Act have been small or micro-companies with the exception of the medium company, Lion Steel, and the medium-large CAV Aerospace.[331] It is unclear why there have not been more prosecutions of larger companies but the fact the former company pled and the latter was convicted after trial[332] conveys there is no reason similar results cannot be achieved by the Crown in future. It has been said, "While such prosecutions remain infrequent, their very initiation suggests that the net of liability under the CMCHA 2007 may be widening and that its reach now encompasses more than just micro/small companies."[333]

Parsons believes that the 2007 Act's inclusion of the 'senior management' test essentially allows for, "…the conduct of *all* management within a corporation to be taken into account when ascertaining whether there were systemic failures in respect of safety that caused a death." He believes this will assist the Crown in establishing liability for corporate homicide/manslaughter in relation to companies, big and small.[334] This is in line with Lord McNally's view, "The new offence allows an organisation's liability to be assessed on a wider basis, providing a more effective means of accountability for very serious management failings across the organisation."[335]

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[330] *Scottish Parliament* (n 10) 3

[331] *Northumbria University* (n 257) citing *R v. Lion Steel Equipment Ltd (Manchester Crown Court, July 20 2012)* and *R v. CAV Aerospace Ltd (Central Criminal Court, 31 July 2015)*

[332] ibid

[333] *Field* (n 325) 517

[334] *Parsons* (n 263) 305

[335] HL Deb 05 July 2011, vol 729, col 80

However, Menis states of the test:

> …causation is assessed first on a factual (evidential) level, once this is satisfied the question to be considered is a legal one. More specifically, the aspects to ascertain are first, whether 'but for'[336] the senior management's gross breach of duty in managing the organisation's activities, the death would not have occurred. Second, although the gross breach does not have to be the only or even the main cause of death (which may be an action or omission of an employee), it must be 'operative and substantial' at the time of death and must have 'significantly contributed'[337] to the fatal result. The reality, however, is far less technical, and policy considerations[338] may contribute to strengthen or weaken the 'chain of causation'.[339] The evidence, circumstances and understanding of what is 'gross' in certain contexts[340] will have a significant impact on the identification of a causal connection between the senior management, that is, the way in which the organisation's activities were conducted, and the consequential death. These factors will be even more complex when the corporation is larger.[341]

As regards the comments on causation, the fact that different policy considerations, which, are changeable over time, can influence the chain of causation may cause unfair and disparate results. It could also be considered that the author has acknowledged the dubiety over the definition of 'grossness' and she seems to indicate that this is still an ongoing issue. However, possibly

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[336] Susanna Menis. 'The Fiction of the Criminalisation of Corporate Killing' The Journal of Criminal Law. [2017] 81(6):46, 472 citing White [1910] 2 K.B. 124.

[337] ibid citing Smith [1959] 2 Q.B. 35; Pagett [1983] 76 Cr App R. 279

[338] ibid citing Insight: Corporate Manslaughter, Decisions to prosecute by Ponting and Balysz, 2014.

[339] ibid citing Kennedy [2008] 1 A.C. 269

[340] ibid citing Section 8 of the CMCHA 2007 and Adomako (John Asare) [1995] 1 A.C. 171.

[341] ibid 472-473 citing Insight: Corporate Manslaughter, Decisions to prosecute by Ponting and Balysz, 2014.

more corporate homicide/manslaughter trials, and their reporting, would be needed in order to establish that.

Other issues regard the requirement that 'senior managers' are individuals with a significant role in managing, or making decisions on, how the whole or a substantial part of an organisation's activities are managed.[342] It appears to narrow the scope of the offence as the role of middle managers must not render that of senior managers insubstantial.[343] It could be considered that it may lead to confusion over who precisely was responsible for the death. It also leads to concern that managers may try to inappropriately delegate health and safety to middle managers to avoid responsibility, however, such inappropriate delegation could, in itself, be considered a gross breach of duty.[344]

A converse view is that the 'senior management' test, in practice, applies only to the board of directors. The test does not reflect the commercial reality that managers below directors in the company hierarchy, acting under authority delegated by the board of directors, "are the company"[345] and reform is needed to allow for aggregation.[346] It could be considered that this is untrue as there have been several cases where the actions of non-directors have resulted in the company being successfully prosecuted for corporate manslaughter in England.

Indeed, *R v. MNS Mining Ltd*[347] was the first instance of a non-director's actions leading to the company being charged with corporate manslaughter. Following this, it was commented that it, "may lead to judicial consideration of what amounts to "senior management" under the Act."[348] It could be

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[342] CMCHA 2007, s 1(4)(c).

[343] *Parsons* (n 263) 307

[344] ibid

[345] *Scottish Parliament* (n 10) 9-10

[346] ibid 14

[347] *R v. MNS Mining Limited* (n 318)

[348] CQMS Ltd, 'Corporate Manslaughter Prosecutions' <https://cqms-ltd.co.uk/landmark-corporate-manslaughter-case/> accessed 18 July 2020

considered that this case conveys that the term is an elastic concept so much so that it may have been a case, like *Lion Steel*[349] discussed more below, in which the company should never have been charged. In this instance, due to the individual responsible not actually being "senior management". In light of *R v. MNS Ltd*[350] and *PS and JE Ward Ltd*,[351] it was also commented that:

> Individual prosecutions of senior management can assist in bolstering the chances of securing a conviction for corporate manslaughter. The recent acquittals may lead to prosecutors looking more closely into bringing legal proceedings against individual directors and senior management in the future.[352]

It can be considered that it is not completely clear what the commentator means as regards prosecutors "looking more closely" into bringing legal proceedings. It can be observed that any willingness from the Crown to prosecute obviously has to be tempered to the extent that only sensible prosecutions with sufficient evidence against senior management should be brought.

In *R v. Sterecycle (Rotherham) Ltd*[353] a former director, a former maintenance manager and a former operations manager were individually charged but these were withdrawn at trial. The company was found guilty of corporate manslaughter[354] and it was commented:

> …One interesting feature of this case is that the prosecution relied not on the specified acts of individuals, but on the aggregation of failures

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[349] *R v. Lion Steel Equipment Limited*: *Sentencing Remarks* (n 305)

[350] *R v. MNS Mining Limited* (n 318)

[351] *PS and JE Ward Ltd* (n 315)

[352] *Ridouts Solicitors* (n 316)

[353] *R v. Sterecycle (Rotherham) Ltd (Sheffield Crown Court, 7 November 2014)*

[354] *British Safety Council* (n 306)

throughout the company. This is a basis for prosecution that would not have been possible prior to the passing of this Act.[355]

Then, in *Health and Safety Executive v. Huntley Mount Engineering Ltd,*[356] the company pled guilty to corporate manslaughter and two individuals described as "the two most senior managers" pled guilty to HASWA offences having both originally been charged with gross negligence manslaughter. One of these individuals was the sole director, however, the other was a merely a supervisor.[357]

Thereafter, was the aforementioned case of *Health and Safety Executive v. Maidstone and Tunbridge Wells NHS Trust,*[358] where the individual acquitted was a consultant anaesthetist and, following the acquittal, the Crown was unsure whether to continue proceedings against a second consultant who had gone abroad.[359] Due to a lack of information, it is unclear what the outcome of this was.

The most recent instance of a non-director's actions resulting in a corporate manslaughter charge against a company was in *R. v Bilston Skips Ltd.*[360] The company and non-director manager, respectively, were found guilty after trial of corporate manslaughter and gross negligence manslaughter after both pleading guilty to HASWA offences.[361] It could be considered that, these English cases show that the "senior management" test is, in reality, extending to managers throughout the companies and aggregation is taking place. As this is taking place in England, there is no reason why the same should not occur in

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[355] ibid

[356] *Health and Safety Executive v. Huntley Mount Engineering Ltd (Manchester Crown Court Manchester, 14 July 2015)*

[357] *Northumbria University* (n 257)

[358] *Health and Safety Executive v. Maidstone and Tunbridge Wells NHS Trust* (n 314)

[359] *Northumbria University* (n 257)

[360] *R. v Bilston Skips Ltd (Wolverhampton Crown Court, 16 August 2016)*

[361] *Northumbria University* (n 257)

Scotland. However, it seems that the 2007 Act is even capturing individuals who are potentially not the "senior" management legislators had envisaged.

In addition to cases involving non-directors, *Lion Steel*[362] posed a separate problem as, there, it seemed that directors were being unduly prosecuted. Due to the complexity of the case, two separate trials were due to take place, one involving charges against the directors and one for corporate manslaughter against the company.[363]

In the first trial, evidential issues in the Crown case meant that two of the three directors individually charged with gross negligence manslaughter were acquitted on the basis of their being 'no case to answer'.[364] It can be considered surprising that one of these directors was a Finance Director who was not involved in how the workforce operated and the other was in charge of a sister site 50 miles away from the factory the incident occurred in.[365] It is difficult to fathom the Crown's justification for bringing charges against these individuals.

The judge commented that the case against them, "…should never have been brought" and the case against the remaining director was, "weak but arguable".[366] The Crown then agreed to drop the gross negligence manslaughter charge against him as well as the health and safety charges against all directors on the basis that the company would plead guilty to corporate manslaughter prior to the trial against it commencing.[367] Indeed, Story took the view that the Crown brought a weak case against the individual directors in order to pressurise the company into making such a plea.[368]

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[362] *R v. Lion Steel Equipment Limited: Sentencing Remarks* (n 305)

[363] ibid [5]-[9] (HHJ Gilbert Q.C.)

[364] ibid [12]-[14] (HHJ Gilbert. QC)

[365] Tony Story, *Unlocking Criminal Law* (6th edn, Oxon: Routledge 2017) 199

[366] *R v. Lion Steel Equipment Limited: Sentencing Remarks* (n 305) [12] (HHJ Gilbert Q.C.)

[367] ibid [13] (HHJ Gilbert Q.C.)

[368] *Story* (n 365) 199

The excessive number of charges as well as defendants on the indictment could be seen as supporting Story's view. However, his view is undermined by the fact that the company had offered a guilty plea in 2012 but, at that time, the Crown had not accepted it on the basis that it also wished to pursue the directors individually.[369] The Crown only accepted the plea after its case against the directors encountered real difficulty at trial.[370] The fact that the charges against the directors were trialled at all in light of the original plea would convey that the Crown felt justified in pursuing them. A further theory may be that the Crown were utilising new and relatively untested legislation with the 2007 Act. It may have been thought sensible and safer to include other tried and tested charges on the indictment as doing so would maximise the chances of securing a conviction.

It could be considered that it would have been interesting to see the result of the case against the company had it trialed. Given that the Crown seemed to be individually prosecuting two directors mis-identified as responsible and one there was merely a weak case against, it could be considered the "senior management" test may not have been met.

Parsons rightly states that all cases prosecuted under the 2007 Act to date:

> …could have been successfully prosecuted for manslaughter under the identification doctrine with its 'controlling officers' test. The cases, therefore, do not illuminate the potential impact of the Act in respect of large organisations.[371]

He believes that the 'senior management' test may be, itself, put to the test in relation to large organisations if any charges are brought against the Royal Borough of Kensington and 'Chelsea Council and Kensington and Chelsea

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[369] *R v. Lion Steel Equipment Limited*: *Sentencing Remarks* (n 305) [44] (HHJ Gilbert Q.C.)

[370] ibid [45] (HHJ Gilbert Q.C.)

[371] *Parsons* (n 263) 310

Tenant Management Organisation' for the Grenfell Tower incident.[372] However, Field is not confident that CPS will utilise the Act in light of the fact they recently prosecuted the similar case of Southwark Council using fire safety regulations instead.[373] It could be considered that speculations of how the CPS will decide to deal with Grenfell are fairly futile and time will tell.

3.5 Effectiveness of Penalties

The aims of penalties are; punishment, deterrence and rehabilitation.[374] The penalties under the CMCHA 2007 include unlimited fines,[375] disqualification, publicity orders and remedial orders[376] the latter of which have never been used.[377] One view is that fines are not always viewed by deceaseds' families as satisfactory penalties, however significant.[378]

3.5.1 Prison

Some believe a conviction of corporate homicide/manslaughter should result in prison sentences being imposed on individual senior managers.[379] It has been seen in English cases of corporate manslaughter, however, that prison sentences are already one possible outcome for senior managers convicted of gross negligence manslaughter and, across England and Scotland, HASWA

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[372] ibid 310

[373] *Field* (n 325) 517 citing "Southwark council fined £570,000 over fatal tower block fire" (28 February 2017), The Guardian available at: https://www.theguardian.com/uk-news/2017/feb/28/southwark-council-fined-570000-over-fatal-tower-block-fire [Accessed 4 June 2018]

[374] *Scottish Parliament* (n 10) 6

[375] Sentencing Council, 'Corporate Manslaughter' <https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/> accessed 6th August 2020

[376] CMCHA 2007, ss. 9-10.

[377] *Northumbria University* (n 257)

[378] *Scottish Parliament* (n 10) 3-4

[379] ibid 6-7

offences.[380] It could then be considered that amending the 2007 Act to include prison sentences as a penalty is unnecessary as this can already be achieved by the existing law and it has clearly not acted as a deterrent to date as a high number of workplace fatalities continue to occur.[381]

In terms of the rehabilitative quality of prison, there is no data to show whether those imprisoned for gross negligence manslaughter or HASWA convictions go on to commit similar offences. It may be presumed from the lack of media publicity that they have not. The English cases on corporate manslaughter show that around half of those imprisoned served a short sentence of under 12 months.[382] General statistics for England and Wales have shown prisoners serving a short sentence of 12 months or less, for all crimes, actually have higher re-offending rates than those serving community-based orders[383] showing that short sentences are not the most effective method through which to rehabilitate offenders.

In addition, it could be considered that prison sentences, in themselves, sometimes do not offer the deceaseds' families the catharsis they seek. For example, the family of the deceased in *R v. Pyranha Mouldings Ltd*[384] had been noted as having expressed satisfaction with the outcome of the case, which, included a 9-month prison sentence imposed on a director, however, they were dissatisfied with the fact that the company and individuals went to trial instead of pleading guilty and admitting their failings.[385] It could be considered that

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[380] *Northumbria University* (n 257); See also e.g. Scottish Legal News, 'Sole director jailed after employee killed by excavator' (17 October 2019) <https://scottishlegal.com/article/sole-director-jailed-after-employee-killed-by-excavator> accessed 20 August 2020

[381] HSE, 'Workplace Injuries in Great Britain, 2019' <https://www.hse.gov.uk/statistics/pdf/fatalinjuries.pdf> accessed 29th August 2020 3

[382] *Northumbria University* (n 257)

[383] Georgina Eaton and Aiden Mews, 'The Impact of Short Custodial Sentences, Community Orders and Suspended Sentence Orders on Re-Offending' (Ministry of Justice, 2019) 1 citing Mews et al. (2015)

[384] *R v. Pyranha Mouldings Ltd (Crown Court Liverpool, January 12 2015)*

[385] BBC News, 'Oven death firm Pyranha Mouldings guilty of manslaughter' (12 January 2015) <https://www.bbc.co.uk/news/uk-england-merseyside-30717512> accessed 6th August 2020

restorative justice could be useful in facilitating the families achieving closure.[386]

3.5.2 Fines, Publicity Orders and Directors' Disqualification

As regards the penalties already available under the Act, it is clear some of the judiciary are deliberately fining companies either large sums of money or their entire assets[387] to ensure a severe punishment.

In *R v. Princes Sporting Club*,[388] HHJ McCreath said:

> I propose to fine the company every penny that it has. I have no greater power to do anything other than impose a fine and I cannot impose a greater fine than all of its assets.[389]

In *R v. Mobile Sweepers*,[390] it appears that where this has not been considered sufficient, the Judge has, rightly or wrongly, turned to penalising the director. *R v. Mobile Sweepers* involved an employee being crushed by the sweeper he had been instructed to repair and it had been found that the sweeper lacked any functioning prop to elevate it. The company pled guilty to corporate manslaughter, was fined £8,000 and ordered to pay costs of £4000, which, represented its entire assets.[391] The sole director pled guilty to a HASWA 1974 s 2 offence and was fined £183,000, a Publicity Order was granted and this was also the first case where the director was disqualified for five years.[392]

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386 Humza Yusuf, 'Restorative justice: action plan' (Scottish Government, 28 June 2019) <https://www.gov.scot/publications/restorative-justice-action-plan/> accessed 29 August 2020

387 *Northumbria University* (n 257)

388 *R. v. Prince's Sporting Club Ltd (Southwark Crown, November 22 2013)*

389 *BBC News* (n 305)

390 *R. v Mobile Sweepers (Reading) Ltd (Winchester Crown Court, 26 February 2014)*

391 Croner-i, 'Waste firm fined £8,000 for corporate manslaughter' <https://app.croneri.co.uk/feature-articles/waste-firm-fined-8000-corporate-manslaughter> accessed 20 July 2020

392 *RSA* (n 305)

HHJ Boney said it was, “one of the most serious offences of its kind that these courts are ever likely to encounter.” but it was commented in the media at the time that the fine imposed on the company was, “the lowest fine for corporate manslaughter to date”[393] obviously due to being restricted to the value of the company’s limited assets. It is notable that this was the first case where the Judge was willing to impose a large fine on the director personally. Indeed, the alternative for the director was to face three years imprisonment.[394]

It could be considered that where a company has been put out of business through a fine, there is no hope of rehabilitation for the company. Fines carrying a death sentence for the company are considered by one commentator to be “more appropriate” than lower ones as these conveyed that, “deterrence and the public condemnation of the company’s behaviour were the primary considerations”.[395]

One view is that the imposition of a fine on the company also inadvertently punishes the directors as their reputations may be tarnished by association.[396] This view is mirrored in relation to publicity orders and it was stated:

> The possibility of a publicity order is clearly designed to act as another deterrent to lax health and safety practices. A publicity order may potentially be more damaging than a fine as it has reputational implications and it has been articulated that it could also affect share prices and lead to higher insurance premiums.[397]

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[393] *Croner-i* (n 391)

[394] *Meredith* (n 306)

[395] *Field* (n 325) 8

[396] Julie Bond, ‘Court imposes tough penalties inc corporate manslaughter cases’ (Pennington Manches Cooper, 15th April 2015) <https://www.penningtonslaw.com/news-publications/latest-news/courts-impose-tough-penalties-in-corporate-manslaughter-cases> accessed 5 August 2020

[397] Victoria Roper, ‘The Corporate Manslaughter and Corporate Homicide Act 2007 - a 10-year review’ J. Crim. L. 2018, 82 (1), 48, 70 citing 'Corporate Manslaughter and Corporate Homicide Act 2007' (2008) 849 *IDS Employment Law Brief* 14

It could also be considered, however, that the media attention such cases receive renders these orders unnecessary. As regards director disqualification, there is no data to show whether this meets any of the aims of punishment. It could be presumed a severe penalty as it is removing the directors' livelihoods. One observation is that one of the disqualified directors in the English corporate manslaughter cases went on to subsequently become a director of another company after the period of disqualification expired.[398] It, therefore, appears to be a role he would have wished to continue had it not been for the disqualification. It could be considered that fines, whether on the company or directors, and disqualification may have a deterrent and rehabilitative impact on the individuals to the extent that, presumably, they would be less likely to make the same mistakes in future should they go on to direct other companies.

3.5.3 Sentencing Generally

The disparate approach by the judiciary in sentencing is seen most clearly when the first and second cases of corporate manslaughter to arise, *R v. Cotswold Geotechnical (Holdings) Ltd*[399] and *R v. Lion Steel Equipment Limited*[400] are compared.

In the appeal for *Cotswold Geotechnical (Holdings) Ltd,* Lord Judge C.J. noted the following factors. The sentencing judge had had regard to the Sentencing Council's Definitive Guidelines, which, explained the factors determining the seriousness of the offence. The first was whether serious injury was foreseeable[401] and it was deemed to be "plainly foreseeable".[402]

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[398] *Northumbria University* (n 257)

[399] *R v. Cotswold Geotechnical (Holdings) Ltd* (n 291)

[400] *R v. Lion Steel Equipment Limited*: *Sentencing Remarks* (n 305)

[401] ibid [27] (Lord Judge C.J.)

[402] ibid [28] (Lord Judge C.J.)

The Lord Judge C.J. said:

> Having reflected on the seriousness of the offence, the judge turned to the financial position of the company. He acknowledged that it was parlous. It had been kept going by Mr Eaton. It was just about breaking even. Given his illness, it did not have a very bright future. The judge also recognised that a substantial fine would inevitably put the company into liquidation and therefore its employees out of work. He recognised, too, that all this would have an impact on Mr Eaton's family at a time when they would have troubles enough. He accepted the genuineness of Mr Eaton's expressions of deep remorse and regret. Finally, he had in mind the moving victim impact statement provided by the mother of the deceased.[403]

The judge had then considered the guideline's suggestions on the general level of fines and noted that the company was a small-scale operation as reflected in its turnover and financial state. He acknowledged that a fine of £385,000 - 250% of the company's turnover - would inevitably liquidate the company but it, "would be sufficient to mark the gravity of the offence and to send the necessary message about the need for employers generally to attend to their duties to provide safe places of work."[404]

Despite provisions in the Guidelines and legislation stating that the level of fine should be one the company is capable of paying,[405] it was held the level of fine correctly reflected the seriousness of the offence.[406] Indeed, Lord Judge C.J. said the Guidelines state the court should have regard to the question of,

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[403] ibid [29] (Lord Judge C.J.)

[404] ibid [30]-[31] (Lord Judge C.J.)

[405] ibid [31] (Lord Judge C.J.) citing Corporate Manslaughter, Current Sentencing Practice B 1-3.3K [16] and Criminal Justice Act 2003 s 164

[406] ibid [34] (Lord Judge C.J.)

"whether the fine will have the effect of putting the defendant out of business…in some bad cases this may be an acceptable consequence."[407]

In *R v. Lion Steel*,[408] Mr Berry, a maintenance man[409] in one of Lion's Steel's factories who usually carried out small repairs[410] had attempted to fix a leak on the roof. He stepped on to a skylight, which, became detached under his weight and he fell 13 meters to the floor, sustaining fatal injuries.[411] The company pled guilty to corporate homicide.[412] It was fined £480,000[413] and ordered to pay costs of £84,000.[414]

In this case, as regards the sentence passed, in assessing the seriousness of harm, the risk of injury or death was foreseeable. The company had not done enough to deal with obvious risks such as installing inexpensive safety measures and attention to safety was lax compared to its sister site. There were no aggravating factors identified[415] but mitigating factors included the company's reasonable health and safety record, the fact it had stopped using its own men to conduct roof repairs and its willingness to accept health and safety advice from various sources.[416] It was also noted that there had been an unreasonable delay between the deceased's death and the Crown bringing charges.[417]

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[407] ibid [32] (Lord Judge C.J.)

[408] *R v. Lion Steel Equipment Limited*: *Sentencing Remarks* (n 305)

[409] ibid [15] (HHJ Gilbert Q.C.)

[410] ibid [21] (HHJ Gilbert Q.C.)

[411] ibid [19] (HHJ Gilbert Q.C.)

[412] ibid [1] (HHJ Gilbert Q.C.)

[413] ibid [47] (HHJ Gilbert Q.C.)

[414] ibid [54] (HHJ Gilbert Q.C.)

[415] ibid [32] (HHJ Gilbert Q.C.)

[416] ibid [33] (HHJ Gilbert Q.C.)

[417] ibid [34] (HHJ Gilbert Q.C.)

It could be considered that a common theme between *Cotswold*[418] and *Lion Steel*[419] may be the potential aspect of a break in the chain of causation due to the deceaseds failing to heed the employers' instructions and breaching their systems of work.[420] However, due to *Lion Steel*[421] being unreported, it cannot be established with certainty whether or not this was so.

In *Lion Steel*, the deceased had been advised to instruct independent outside contractors to attend if he was in any doubt as to his ability to carry out a task.[422] However, the Judge said, that Mr Berry was devoid of blame for the incident and "met his death when he took just the sort of chance which the advice and regulations are designed to protect against."[423] It could be considered that this seems rather self-contradictory as it appears that there is some recognition by the Judge that the deceased should have been aware of the risks involved but carried on regardless.

The financial position of the company was then considered and it seems that there was an obvious and unfair disparity between how this company and Cotswold were treated. In this case, at the time of the incident, the company had six directors,[424] 142 employees[425] and a turnover of £10 million per annum.[426] Unlike Cotswold, the company was, "holding its own financially",[427] however, the Judge said "If a substantial fine were imposed with a short

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[418] *R v. Cotswold Geotechnical (Holdings) Ltd* (n 291)

[419] *R v. Lion Steel Equipment Limited: Sentencing Remarks* (n 305)

[420] *R v. Cotswold Geotechnical (Holdings) Ltd* (n 291) [6] (Lord Judge C.J.).; *R v. Lion Steel Equipment Limited: Sentencing Remarks* (n 305) [21] (HHJ Gilbert Q.C.)

[421] *R v. Lion Steel Equipment Limited*: *Sentencing Remarks* (n 305)

[422] ibid [21] (HHJ Gilbert Q.C.)

[423] ibid [27] (HHJ Gilbert Q.C.)

[424] Companies House, Lion Steel Equipment Limited <https://beta.companieshouse.gov.uk/company/01580003/officers> accessed 16 July 2020

[425] *R v. Lion Steel Equipment Limited: Sentencing Remarks* (n 305) [42] (HHJ Gilbert Q.C.)

[426] ibid [36] (HHJ Gilbert Q.C.)

[427] ibid [40] (HHJ Gilbert Q.C.)

payment period, it would have a potentially severe impact on the company's ability to sustain itself in business."[428] He said:

> I am very mindful of the 142 people who work at Lion Steel. I would regard it as a most regrettable consequence, which would add to the terrible consequences of Mr Berry's death, if the effect of an order of this court were to imperil the employment of his former colleagues and those who would have been had he lived.[429]

Balanced against the need for "significant punishment" to attach to the offence, the Judge felt an extended payment period would allow the company to raise a loan.[430] The judge further considered the companies earlier guilty plea and,[431] given these factors, the fine was discounted by 20%.[432]

It can be seen from this that there is a disparity in the Judges' treatment of Cotswold and Lion Steel. It seems unfair that Lion Steel, a much larger and more prosperous company than Cotswold, was given a fine it could afford to pay whilst Cotswold was given a fine that would force it to liquidate. Whilst there were some factors that may have justified Lion Steel receiving an affordable fine, the disparity in the attitude taken towards the employees losing their jobs is surprising. The jobs of those in Cotswold, although fewer in number, were no less significant. It is questionable whether the number of people who work for a company should have any bearing on the decision. It potentially raises an ECHR Article 14 argument if smaller companies are being discriminated against.

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[428] ibid [41] (HHJ Gilbert Q.C.)

[429] ibid [42] (HHJ Gilbert Q.C.)

[430] ibid [43] (HHJ Gilbert Q.C.)

[431] ibid [44] (HHJ Gilbert Q.C.)

[432] ibid [46] (HHJ Gilbert Q.C.)

In *Cotswold*, the judge clearly considered the circumstances surrounding the death to constitute a "bad case" under the Sentencing Guidelines[433] justifying the companies liquidation and employees being put out of work. The judge in Lion Steel seemed to be eager to avoid this, stating he was, "very mindful of the 142 people who work at Lion Steel."[434] It could be submitted that the circumstances surrounding the death in Lion Steel, although different, were no less "bad".

Looking at the corporate manslaughter cases in the round, it could be considered that two drawbacks to sentencing is its, "…unjustifiable inconsistency"[435] and, in some cases, the lack of practical impact of the fines and publicity orders on the offenders. As regards the former, it is clear that in some cases, a company may be fined in such a way so as to put it out of business whilst in some cases it is fined in such a way so as to allow it to continue. In some cases, a publicity order is granted whilst in some, it is not. In some cases, directors are disqualified whilst in some they are not. There seems to be no particular justification for these disparities.[436]

As regards the imposition of fines, imposing fines the companies cannot pay forces them to liquidate and, as such, it is unlikely the fine will ever be paid.[437] Where a publicity order is also imposed upon a company in this position, again, this will have no practical impact as the company has ceased trading. It was commented such sentences have, "little more than symbolic value",[438] however, they serve to warn other companies that safety must be prioritised.[439] It could be considered that the message of deterrence may be clearer if sentencing was more consistent.

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[433] *R v. Cotswold Geotechnical (Holdings) Ltd* (n 291) [32] (Lord Judge C.J.)

[434] *R v. Lion Steel Equipment Limited*: *Sentencing Remarks* (n 305) [42] (HHJ Gilbert Q.C.)

[435] *Roper* (n 397) 1

[436] *Northumbria University* (n 257)

[437] *British Safety Council* (n 306)

[438] See e.g. *Bond* (n 396)

[439] See e.g. *Hunt and Casinelli* (n 305)

3.6 Conclusion

Across the UK, barriers to prosecutions have historically included the identification doctrine, a lack of aggregation, Crown immunity and, in Scotland, the need to show the *actus reus* and *mens rea*. The CMCHA 2007 has corrected all of these issues and, although there have been no prosecutions under the Act in Scotland, there have been several in England which have met with guilty pleas and verdicts.

It has been noted one main concern with the CMCHA 2007 is the 'senior management' test and its perceived restrictiveness. However, case law shows this perception has no basis in reality and several individuals below 'senior managers' in the company hierarchy are being charged under the Act.
Case law also shows that the same types of reasons for finding companies guilty of corporate manslaughter have arisen, however, it is clear there are disparities in sentencing. In terms of ensuring the aims of penalties are met, it could be considered a clearer and more consistent approach should be employed by the judiciary. Overall, the CMCHA 2007 appears effective which indicates a lack of need for reform. It will now be considered how criminal responsibility should theoretically be attributed to companies.

Chapter 4: Attributing Responsibility

4.0 Introduction

This chapter considers how criminal responsibility should be attributed for the crime of corporate homicide/manslaughter. In particular, the first section examines two different theories of criminal responsibility and its function. With reference to these theories, the second section examines when a company should be held criminally liable for an employee's death. The third section considers whether companies' liability for corporate homicide/manslaughter should fall under civil or criminal law. The fourth section then considers how the *mens rea* of corporate homicide/manslaughter should be defined.

4.1. Criminal Responsibility

4.1.1. Criminal Responsibility as a Mechanism for Enforcing Norms

For Loughnan the "most dominant account" of responsibility sees it as the "normative heart of the criminal law".[440] She states:

> …this idea connects legal responsibility and moral responsibility, legal wrongs and moral wrongs, and legal blaming practices and moral blaming practices, with criminal law understood as a system of official censure and sanction or punishment for certain types of conduct.[441]…On this account, the structure of moral wrongdoing – requiring both harm and fault – is carried over to the criminal law.[442] Indeed, on this view, criminal responsibility is derivative of moral practices of calling individuals to account for their conduct. Thus, on this basis, the

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[440] Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (Law in Context) (Cambridge: Cambridge University Press 2019) 49

[441] ibid citing See A. Ashworth and J. Horder, Principles of Criminal Law, 7th ed. (Oxford: Oxford University Press, 2013), p. 1

[442] ibid citing L. Farmer, Making the Modern Criminal Law: Criminalization and Civil Order. Series: Criminalization (Oxford: Oxford University Press, 2016), pp. 108–9

> application of the ordinary principles of liability and punishment – the standard criminal law practices of evaluation, attribution and blame – is taken to be an acknowledgement or affirmation of an individual's ('normal') status as a moral subject.[443]**…**criminal responsibility is taken to assume a relation with individuals which seeks to maximise their freedom from interference by the state, and in which the individual experiences himself or herself as free. As a result, criminal responsibility operates as a limit on the criminal law and the power of the state: it creates a space beyond which criminal law is inappropriate or illegitimate, on the basis that it exceeds the boundaries of a liberal legal system and impermissibly impinges on the sovereign self.[444]

It seems paradoxical, however, that individuals need to be subjected to norms in order to have maximum freedom. It may be that individuals really just have the maximum freedom *that the state allows*. It has been said that norms impose duties on individuals, however, both the norm and the duty are products of normative cognition.[445] There is no scientific test to confirm the validity of norms, whether these be legal norms or other types, and their validity is only pre-supposed.[446] In essence, the concept of norms can be critiqued for simply describing a duty that "ought to be" instead of explaining why it exists.[447]

It could be considered that theories have sought to fill in the blanks such as Durkheim's theory on the division of labour which provides that, law reinforces societal norms and conversely, in the absence of law, societal norms break down and crime occurs.[448] The concept that obeying the law is a societal norm also lends itself to the idea that criminal law is instrumental in "othering"

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[443] ibid 49

[444] ibid 51

[445] George E. Glos, 'The Normative Theory of Law'(1969) 11 Wm. & Mary L. Rev. 151, 159

[446] ibid 184

[447] ibid 159

[448] Emile Durkheim, The Division of Labour in Society (W.D. Halls, intro, Lewis A. Coser eds, New York: Free Press 1997) 11

criminals. In other words, criminals are branded as something "other" than mainstream society by virtue of the fact they have not complied with this norm.[449]

Labelling theorists would probably suggest that society's detection of the norm violation is of more significance than the violation itself as one is labelled a 'criminal' when processed through the criminal justice system. It has been suggested that, "…the person does not become criminal by violating the law but by being labelled a violator of the law."[450] One issue with this is that the acceptance and internalisation of the label 'criminal' may lead individuals to commit further crimes as the stigma of a conviction may impact negatively on employment opportunities[451] and social capital.[452]

The theory of criminal responsibility as a mechanism for enforcing norms centralises the rational actor and submits that, as the actor can choose to carry out the *actus reus* and form the *men rea* for crime,[453] he should be held accountable via the criminal justice system if he does so.[454] One observation of this theory is that framing the *mens rea* in this way renders it a constraint on state power as, even if an actor carries out the *actus reus*, his act may not be considered criminal if he lacks the *mens rea*.[455] An alternative view of criminal responsibility is as an institution.

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[449] See e.g. Susan J. Stabile, 'Othering and the Law' 14 U. St. Thomas L.J. [2016] 12(2) 381, 395-399

[450] Charles Wellford, 'Labelling Theory and Criminology: An Assessment' Social Problems [1975] 22(3) 332, 336-337

[451] See e.g. Laurence Thomas, 'Social Exclusion and Criminality: Theory and Practice' UCL Juris. Rev. [2009] 15, 172, 184 citing S Box, Recession, Crime and Punishment (Rowman & Littlefield Publishers, London, 1987) 47

[452] ibid 184

[453] *Loughnan* (n 440) 50 citing Cane, Responsibility in Law and Morality, pp. 4, 49

[454] ibid 150 citing N. Lacey, 'Responsibility and Modernity in Criminal Law' (2001) 9(3) Journal of Political Philosophy 249–76, 255

[455] Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press 2016) 166

4.1.2. Criminal Responsibility as an Institution

Farmer understands responsibility from an institutional perspective, which, sees government devising more forms of responsibility through enacting laws and, therefore, widening the scope of criminality.[456] He moves away from ideas of the *mens rea* acting as a constraint on state power and towards something that shapes the substantive content of law. Therefore, responsibility is linked to pre-existing expectations about the scope of our duties in relation to others.[457]

Responsibility has, through history to modern day, become central to law's form and is a way of securing civil order and this provides a different perspective on criminalisation. In particular, it allows for discussions on how individuals are subject to the law, "responsibility as liability"[458] and how responsibility shapes understandings of the criminal law's scope and structure.[459]

Law, as a normative order, designates legal 'persons'[460] who, are considered rational actors and, thus, both capable to being subject to the law and of the law.[461] Those deemed to be 'persons' are subject to law as a normative order and are institutionalised to provide a link between legal personality and responsibility.[462] Ideas of 'persons' are shaped by cultural and political ideas with reference to ideas about the persons' powers and capacities.[463]

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[456] ibid 165-166

[457] ibid 166

[458] ibid

[459] ibid 167

[460] ibid 168

[461] ibid 169

[462] ibid 168 citing N MacCormick, *Institutions of Law* (Oxford: Oxford UP, 2007), p.78

[463] ibid 168 citing N Naffine, Law's Meaning of Life. Philosophy, Religion, Darwin and the Legal Person (Abingdon: Hart Publishing, 2009), Chs.2–5

Personhood may be active in as much as the person can be guided by law or passive in as much as the law protects persons' interests.[464] Farmer states, "Capacities depend on features of the person that are treated as legally relevant at any given point in time or for particular purposes" and this may include natural features such as usage, sex or institutional status such as citizenship or role,[465] the latter of which is relevant for our purposes as those in senior manager roles are synonymous with the company.

Farmer states active personality applies to those capable of, "making their actions conform to or violate norms of conduct" and those who can conform to norms can equally be held accountable for breaching them.[466] Further implications of being a responsible agent involve that responsibility should only be attributed to those who are recognised as having the capacity to understand and follow the rules.[467]

4.2 When Should a Company be Held Responsible for Corporate Homicide/ Manslaughter?

The CMCHA 2007 holds a company, as a legal personality, responsible for corporate homicide/manslaughter resulting from the *actus reus* and *mens rea* of its senior managers.[468] This is in keeping with the concept of corporate liability as the acts of senior managers are deemed to be the acts of the company. This also acknowledges that individual senior managers may not have been involved in the fatality in a direct sense so they are not held individually responsible. This section focuses on establishing when a company should be held responsible for the actions of its senior managers given the two theories on responsibility.

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[464] ibid

[465] ibid

[466] ibid 169 citing N MacCormick, *Institutions of Law* (Oxford: Oxford UP, 2007), p.89

[467] ibid 170

[468] CMCHA 2007 ss. 1(1) and 1(3)

The author, Weigend, seems to endorse the dominant view of responsibility. He states:

> In a rational system, it makes no sense to blame and punish a person for harmful occurrences that he has no possibility to prevent or that she was unable to foresee. It is therefore a universal principle that attribution of a harmful event to a person in criminal law requires not only a causal link between the person's conduct and the event but also a mental link between the person and the occurrence.[469]

In the context of corporate homicide/manslaughter under the 2007 Act, it would not be the senior managers but the company who would be blamed and punished. The attribution of the harmful event - the victim's death - to the company requires causal links between the senior managers' conduct and mental states and the death. However, following Weigend, the company should not be held criminally responsible and punished if senior managers did not know or could not have known their actions would result in death.[470] In criminal law generally, criminal liability requires the *actus reus* along with intention or negligence.[471]

It seems more careful judicial consideration of cases under the 2007 Act would avoid potential unfairness to companies. In particular, more careful consideration of whether a senior manager actually did organise or manage activities that led to the employee's death or did actually possess the *mens rea* of negligence needs to take place. It appears from cases such as *R v. Lion Steel,*[472] that this careful consideration does not always take place. Indeed, in that case, it was difficult to detect *any* blameworthiness or negligence by most of the managers.

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[469] Thomas Weigend, 'Subjective Elements of Criminal Liability' in Markus D. Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press 2014) 491

[470] ibid 491

[471] ibid 492

[472] *R v. Lion Steel Equipment Limited*: *Sentencing Remarks* (n 305)

Weigend states, "…it is not enough to show that an average person could have avoided the harmful result, but must be proved that the individual defendant could have done so. In other words, due diligence is what is required of "this" person."[473] He provides that an individual's defects, which may serve as an excuse, should be considered and he provides the example, "a severely short-sighted driver cannot in fairness be expected to see an obstacle from afar. However, a diligent person with individual defects must avoid situations that are potentially risky, given his defects. For example, a motorist afflicted with night-blindness must refrain from driving his car at night; if he drives at night it is foreseeable for him that he might harm others; for him, driving at night is therefore per se negligent conduct."[474]

This raises the question of whether a person's position in an organisational hierarchy, which in practice could be expected to link in with their level of knowledge or risks, could or should be considered to be a type of 'defect' serving to excuse the company. Specifically, we see from case law that people below senior managers in the company hierarchy are, in practice, being treated as senior managers for the purposes of the Crown prosecuting companies under the 2007 Act. Aside from deviating from the black letter of the law, it could be considered that these individuals may lack the same level of foresight as someone who is, in reality, a senior manager and, as such, they have an excuse. Similar questions arise in relation to senior managers who are, in reality, senior managers but may be new to the role or lack experience. It may be considered that someone new or inexperienced may also possess such a 'defect' serving to excuse the company. Therefore, the 2007 Act's capacity to hold such individuals as synonymous with the company may cause unfairness.

Given Farmer's notions of personhood, this also poses issues as, in some cases, companies have been held responsible for incidents senior managers could not have had any conception of. As senior managers have had no conception of them, it could be considered that notions of active personality cannot apply and

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[473] *Weigend* (n 469) 512

[474] ibid

senior managers did not have any chance to follow the rules. As this was the case, their companies should not be held accountable. It may be a different matter if a death was caused in instances where senior managers had been fully aware of health and safety issues in the workplace and turned a blind eye to them. In such an instance, it could be considered that responsibility should attach to the companies.

To be considered a legal 'person', it is assumed one has an "understanding of intentionality, or the capacity to plan action over time."[475] However, in reality, senior managers may not appreciate the cumulative consequences of their predecessors' actions or the fatal result for an employee. It would be fundamentally wrong to assume than any employer would "plan" the death an employee. If they did, it would probably be treated as murder rather than corporate homicide/manslaughter. Some of the case law illustrates that the death appears to be the result of an unfortunate conflation of events rather than a result that could in any way have been shown to be intended by a manager.

The legal person should be able to identify with others thus control his behaviour and this, in turn, means that he is responsible. As he is responsible, he is subject to legal norms and, as he is subject to legal norms, he consequently justifies punishment as a consequence of breaching them.[476]

Farmer states:

> If we understand responsibility in this way, then we see criminal responsibility in particular as rooted in the practices of defining the scope of responsibilities and of holding to account by particular legal institutions[477]**…**The link between personhood and responsibility has primarily been recognized in relation to what has been called 'outcome'

[475] *Farmer* (n 455) 170

[476] ibid citing Bender, *Imagining the Penitentiary*, p.221

[477] ibid citing P Strawson, 'Freedom and Resentment' in J Fischer & M Ravizza, *Perspectives on Moral Responsibility* (Ithaca: Cornell UP, 1993); C Kutz, 'Responsibility' in JR Coleman et al., The Oxford Handbook of Jurisprudence and Philosophy of Law (Oxford: Oxford UP, 2004) pp.552–9.

> or 'historic' or retrospective responsibility, that is to say that we responsible to others for our past conduct…[478]

Given this, it would seem acceptable that a company can be held responsible for the acts of its current and past senior managers and this concept is in line with aggregation.

4.3 Should Criminal or Civil Liability Attach to Corporate Homicide/ Manslaughter?

Farmer states that notions of active responsibility includes both:

> …'prospective' responsibility - the imposition of obligations and duties on a person who is deemed capable of adapting their conduct to norms and planning their conduct over time - and that of respective liability - being held responsible for past conduct (answerability and accountability).[479] Indeed, the latter to a great extent depends on the former: a person cannot be answerable to others unless there is a form of prospective responsibility in the sense of the existence of recognised norms of conduct. These obligations may range from the general (do not kill, respect the person and property of others), to more specific duties, such as those which go along with understandings of…particular social roles[480]… An account of criminal responsibility may be therefore just as much concerned with the specification of roles and responsibilities in modern society as with the attribution of 'retrospective responsibility'.[481] It thus follows that what has to be justified is not only the imposition of

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[478] ibid 171 citing T Honoré, *Responsibility and Fault* (Abingdon: Hart Publishing, 1999) p.29

[479] ibid 171 citing P Cane, *Responsibility in Law and Morality* (Abingdon: Hart Publishing, 2002), p.33; N MacCormick, *Institutions of Law* (Oxford: Oxford UP, 2007), p.91

[480] ibid 171

[481] ibid 171 citing HM Hart, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems*, pp.401–41

> punishment but the distribution of social responsibilities, explicitly linking responsibility and criminalization.[482]

Following this, it could be considered that the existence of corporate homicide/ manslaughter laws have given senior managers the chance to adapt and plan their conduct over time, making the company answerable for the prospective and past conduct of its senior managers. However, it should be carefully considered whether senior managers have been able to plan their conduct in such a way so as to avoid the fatality, especially if it is a consequence of a culmination of events over a lengthy period. It appears a company should only be criminal liable in the event that senior manager could foresee risks to the employee and allowed the employee to continue to operate in that environment in any event.

Farmer states:

> It has been argued that specification of responsibilities is beyond the scope of the criminal law - the civil law is concerned with the identification of rights and duties and the criminal law merely with specifying the principle of liability for those breaches.[483] However, criminal law as a matter of fact routinely articulates responsibilities and duties, either explicitly or implicitly, even in areas where the established regime of rights is civil law. The failure to recognize this link in theories of criminalisation leads to a significantly narrower view of the relevance of responsibility.[484]

Depending on individual perception, the duty of care provisions in the 2007 Act could fall within either of these two views - either the civil law is continuing to identify the responsibilities and the criminal statute merely

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[482] ibid 171

[483] ibid 171-172 citing J Bentham, *Introduction to the Principles and Morals of Legislation (IPML)* (ed. JH Burns & HLA Hart) (Oxford: Oxford UP, 1982); Concluding Note, HLA Hart, *Punishment and Responsibility*, (Oxford: Clarendon, 1968), p.217

[484] ibid 172

provides the sanction for breaching them or, by virtue of the duty existing within a criminal statute, the criminal law has taken ownership of articulating the duties.

Farmer further states that there are ideas that:

> Criminal law deals with responsibility for acts and tort law for outcomes, or that criminal law should be concerned with more serious forms of fault and wrong-doing, or those wrongs deserving of punishment. The distinction is not really so clear-cut (there are different standards of fault in both crime and tort, and attempts to distinguish between crime and tort are hard to sustain).[485]

The 2007 Act appears to be an example of where the distinction is not clear-cut and the duty of care provisions in the Act only add to the confusion. Indeed, if it was thought distinct roles for criminal and civil law *should* exist, it could be considered that the 2007 Act blurs the distinction between and interchanges the roles of criminal and civil law by providing criminal outcomes for companies whose managers breach civil law responsibilities. It would be more straightforward and less confusing to have civil provisions within a civil statute. Recently proposed reforms seek to perpetuate this issue by retaining the duty of care provisions.[486]

However, the HASWA 1974 ss. 2–7 could also be considered to provide a further example of the law providing criminal outcomes for breaches of civil law responsibilities so the 2007 Act is in keeping with this. Unlike the 2007 Act, the HASWA 1974 provides prison sentences, generally considered to be a criminal sanction, can attach to individuals.

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[485] ibid 172

[486] *Scottish Parliament* (n 10) 7

It may be thought that, as the 2007 Act states that fatalities in the workplace are committed through negligence rather than intention, criminal sanctions should not attach and this is a view in line with the aims of punishment.

On that topic, Weigend states:

> With regard to preventative purposes of the criminal law, one might say that intentional conduct lends itself to being deterred more than mere inadvertence, and a person showing anti-legal tendencies may be in greater need of reform than someone who just does not pay attention. Because the law plausibly reserves the most severe punishment for intentional conduct, the issue of distinguishing between intentional and non-intentional conduct is of great legal relevance.[487]

Following this, it seems that more severe penalties, such as prison, should be imposed upon intentional rather than negligent conduct. Given this, it would seem the current legislation's provision of a fine on the company rather than the proposed reform of prison sentences on individual managers would be preferable.

The *mens rea* for crimes are often inferred and so policy reasons for imposing harsher penalties upon intentional offending are important.[488] These include that an intentional offender has consciously broken[489] or ignored the law,[490] he should have been able to refrain from criminality due to his knowledge of the all relevant facts,[491] and his intentional offending contributes to public

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[487] *Weigend* (n 469) 494

[488] ibid

[489] ibid 494 citing Claus Roxin, *Strafrecht Allgemeiner Teil*, Vol. I (4th ed., 2006), 446

[490] ibid 494 citing Carl-Friedrich Stuckenberg, *Vorstudien zu Vorsatz und Irrtum im Völkerstrafrecht (2007)***,** 428–432.

[491] ibid 494 citing Bernd Schünemann, "Vom philologischen zum typologischen Vorsatzbegriff," in *Festschrift für Hans Joachim Hirsch* (1999), 363, 371; Karsten Gaede, "Auf dem Weg zum potentiellen Vorsatz?," (2009) 121 *ZStW* 239, 267–268.

insecurity about social order therefore harsher sanctions helps to restore public faith in the justice system.[492]

Weigend states:

> It is a matter of policy (and not of great practical consequence) whether the criminal law exempts instances of slight negligence from its reach and limits responsibility to gross negligence. Doing so creates a margin of appreciation for prosecutors and courts, but if serious harm has been caused by a person courts are likely, for psychological reasons, to find that he behaved in a grossly negligent manner (if that is the legal requirement for liability). Liability for negligence is, after all, greatly result-oriented—its role is to satisfy the victim's and society's need to hold someone responsible when disaster strikes. It is for that reason that individual responsibility in practice plays a very minor role in determining negligence.[493]

Despite what Weigend states, there are great practical consequences for those involved in a case. In particular, it could be considered that the "margin of appreciation" referred to may have allowed proceedings to be brought against some of the aforementioned companies more due to the serious harm that befell the deceased rather than due to any fault of the senior managers. It seems unfair that, "society's need to hold someone responsible when disaster strikes" should mean such companies being caught under the 2007 Act or any proposed reform.

An alternative approach to health and safety offences can be seen in the US Model Penal Code where such offences are considered non-imprisonable "violations".[494] It seems that this is more proportionate and the 2007 Act is in

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[492] ibid 494 citing Wolfgang Frisch, *Vorsatz und Risiko* (1983), 47–49

[493] ibid 511

[494] ibid 492 citing American Law Institute, *Model Penal Code* (1962) § 2.05(1)(a) and (2)(a) in connection with § 1.04(5); Wayne R. LaFave, *Substantive Criminal Law* (2nd ed., 2003), 392 fn. 47.

keeping with that. In Scotland, recent proposed reform suggested that the law may be going in the opposite direction with a focus on tougher criminal sanctions in line with political perceptions about the public's wishes.[495]

On balance, it is difficult to say whether liability should be civil or criminal. However, it seems the most severe sanctions should attach to intentional crimes rather than ones committed through negligence. Therefore, the 2007 Act's provision of a fine which attaches to the company rather than individuals seems the most acceptable solution.

4.4 What Should the *Mens Rea* of Corporate Homicide/Manslaughter be?

Mens rea is used to distinguish intentional from negligent homicides as the act involved in both, namely, causing the death of another, is the same. Therefore, according to Weigend, "*mens rea* does not characterise blameworthiness as such but wrongful conduct."[496] It could be considered, however, that concepts of blameworthiness and wrongful conduct are inseparable: the more wrongful the conduct, the more the actor is to blame.

Weigend firstly sets out knowledge and will as 'elements of intention',[497] suggesting that both comprise the concept of intention. However, he then goes on to describe knowledge and will in the next section of his article as 'modes of intention', suggesting that each can form a different type of intention.[498] Initially, this seems confusing, however, he later explains that different 'modes' of intention are formed depending on the different levels of the accused's knowledge and will at the time of the offence.[499] It could be considered that this explanation would have been more helpful earlier in his article. An

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[495] *Scottish Parliament* (n 10) 3

[496] *Weigend* (n 469) 493

[497] ibid 494-497

[498] ibid 496-502

[499] ibid 496-502

aforementioned point could be re-raised here in that will is associated with motive, which, should be distinguished from *mens rea*.[500]

However, Weigend justifies his view by stating that:

> …intentional fault is of greater gravity than non-intentional (negligent) fault. Yet, a person can do just as much harm as someone who commits an intentional offence, and a negligent person likewise fails in his obligation to take other persons' legitimate interests into account when he acts.[501]

It could be considered a matter of individual perception whether one would consider the negligent fault of senior managers, under the 2007 Act, to be of lesser gravity than intentional fault. It is true that they have done just as much harm in terms of the outcome of the destruction of life. However, it is arguable if they have failed to take into account the deceased's legitimate interests in the same manner as an intentional actor. In intentional killings, there is typically a directness and personal one-to-one dynamic between the parties that is lacking in this instance. As we have seen from the case law, some of the fatalities involve circumstances where the senior manager was not even present and could not realistically have foreseen, never mind tried to prevent, the death occurring.

Intentional fault involves the accused acting with a hostile attitude towards the victim's protected interest whereas negligence does not.[502] However, it could be considered that if intention were reverted to as the mode of fault in Scots law, it would go without saying that the problems inherent in *Transco*[503] would re-arise and there would be a disparity again between Scottish and English law.

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[500] *Elsherkisi v. HM Advocate* (n 69)

[501] *Weigend* (n 469) 494 citing Christoph Burchard, *Irren ist menschlich* (2008), 231–232 and Section VII.

[502] ibid 501

[503] *Transco Plc.* (n 11)

Weigend submits that someone who intentionally kills possesses both the knowledge and will that their actions will cause death.[504] He further submits that where harm is caused in cases where the accused had little or no will to cause it but a knowledge and awareness of the risks involved he will still be held liable. However, he does not go on to say exactly what that level of liability is or should be,[505] which, is unhelpful. It could be supposed that he is referring to recklessness. In the context of homicide, this is a strand of the *mens rea* for murder and so subject to the same critiques about its inappropriateness in a corporate homicide/manslaughter context as intention.

In respect of recklessness, this is described as a, "conscious disregard of a substantial risk" where the accused knows his behaviour is likely to cause serious harm but he carries on regardless. Other issues with recklessness include that the concept of a, "substantial risk" is not always easy to articulate.[506] It can cover a spectrum of situations and can depend on the accused's purpose and the level of harm that befalls the victim.[507]

In English law, the notion of reckless manslaughter is controversial.[508] Some feel the other forms of involuntary manslaughter are better established and there is some unwillingness to acknowledge reckless manslaughter as a distinct crime.[509] Few prosecutors rely on reckless manslaughter as it is easier to argue their case based on unlawful act or gross negligence manslaughter.[510] The

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[504] *Weigend* (n 469) 495

[505] ibid 495-496

[506] ibid 500

[507] ibid 500 citing Wayne R. LaFave, *Substantive Criminal Law* (2nd ed., 2003), 376-377 fn. 47.

[508] Stark (n 156) 763 citing E.g. D. Ormerod and K. Laird, Smith and Hogan's Criminal Law, 14th edn (Oxford: Oxford University Press, 2015), pp.644–645; A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G.J. Virgo, Simester and Sullivan's Criminal Law: Theory and Doctrine, 6th edn (Oxford: Hart Publishing, 2016), pp.422–423; J. Rogers, "The Law Commission's proposed restructure of homicide" (2006) 70 J. Crim. L. 223, 227; B. Mitchell and R.D. Mackay, "Investigating involuntary manslaughter: an empirical study of 127 cases" (2011) 31 O.J.L.S. 165, 165–166.

[509] ibid citing J. Horder, Ashworth's Principles of Criminal Law, 8th edn (Oxford: Oxford University Press, 2016), p.302.

[510] ibid 764 citing J. Herring, Criminal Law: Text, Cases and Materials, 7th edn (Oxford: Oxford University Press, 2016), p.278.

broad scope of these heads has minimised the need for recklessness.[511] However, some contend that reckless manslaughter as a distinct crime is needed to secure convictions in cases unlawful act and gross negligence manslaughter cannot cover[512] and it should capture those "who currently fall just short of … murder".[513] It could be considered that this is similar to the residual role of the Scottish concept of culpable homicide.[514]

Negligence occurs where the accused has recognised the risks but acts regardless. Weigend states he acts with an unfounded sense of "optimism" that, despite the risks, no harm will occur and this should be irrelevant for the purposes of determining whether an offence is intentional or negligent.[515]

Weigend states that as negligence has no *mens rea,* "in the proper sense", some have suggested offences carried out negligently should not come under the gambit of criminal law.[516] However, he states, "But legislatures nevertheless tend to provide for criminal liability for inadvertent negligence in a variety of areas, typically relating to serious harm (negligent killing and wounding) but also to business misconduct."[517] It could be considered that the 2007 Act provides a prime example of this.

He also states that negligence:

> …is characterized by a self-contradictory state in the offender's mind: she knows that a serious risk exists but does not take it seriously; instead

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[511] ibid 764 Herring, Criminal Law (2017), p.160.

[512] ibid 765

[513] ibid 764 citing Mitchell and Mackay, "Investigating involuntary manslaughter: an empirical study of 127 cases" (2011) 31 O.J.L.S. 165, 166. See, similarly, H. Keating, 'The Law Commission report on involuntary manslaughter: the restoration of a serious crime" [1996] Crim. L.R. 535, 538.

[514] *Drury v. HM Advocate* (n 15) [13] (Lord Justice-General Rodger)

[515] *Weigend* (n 469) 600

[516] ibid 510 citing Jerome Hall, *General Principles of Criminal Law* (2nd ed., 1960) p.138; Andrew P. Simester (ed.), *Appraising Strict Liability* (2005), pp. 158-159

[517] ibid 510 citing 90

> she "trusts" that nothing bad will result from her conduct. If this situation exists, it implies that a perpetrator is intellectually aware of the risk that an offense will be committed; it is thus appropriate to characterize this kind of "conscious negligence" as a type of *mens rea*. …The situation is fundamentally different where a risk exists but the actor is unaware of it…the law cannot reproach an actor for having a "guilty mind", because he is not even aware of the possibility that his conduct might be harmful to another person.[518]

This could describe some corporate homicide/manslaughter cases particularly where acts constituting the offence have occurred over a long time. It may be that a specific senior manager could not have foreseen that his acts, combined with that of others, would have resulted in the culminated risk.

In cases of death caused by negligence, it suffices that an accused lacked will but had knowledge that the circumstances could have led to a death.[519] Weigend gives the examples of, "assault causing death" or "robbery causing death".[520] He states that, in such cases, it is sufficient only to show the accused intended the principle act i.e., the assault or robbery, and he will then be held responsible for any naturally flowing consequence of the act such as the death on the basis that he was negligent as he could have foreseen it.[521] The author states that in common law jurisdictions a defendant in the same circumstances would probably be found guilty of murder regardless of whether he did or could have foreseen the death.[522]

It could be considered that the first alternative would be fairer to the accused. However, neither of these alternatives reflect what happens in a corporate

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[518] ibid 510

[519] ibid 510

[520] ibid 497 citing § 86 Austrian StGB; arts. 222-7, 311-10 *Code pénal*, §§ 227, 251 StGB.

[521] ibid 497 citing § 7(2) Austrian StGB, § 18 StGB and § 251 StGB

[522] ibid 497 citing Wayne R. LaFave, *Substantive Criminal Law* (2nd ed., 2003), 444-474 fn. 47; Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th ed., 2013), 74–75; A. P. Simester et al, *Criminal Law: Theory and Doctrine* (5th ed., 2013) 196–200.

homicide/manslaughter situation. In such circumstances, the senior managers are not actively or directly harming the deceased and the death occurs in a more remote and impersonal manner.

In addition to the consideration of the different *mens rea*, a further option is strict liability, which, only requires the *actus reus* to be proved and the notion dispenses with *mens rea* entirely. Strict liability offences exist to cover instances where the actor's behaviour creates grave risks and it may be hard to prove *mens rea*. Weigend states that, "The idea of dispensing with proof of intention or negligence is to increase the pressure to conform to safety rules on the part of those who act in the areas."[523]

It could be considered that Weigend's words could describe the 2007 Act and proposed reform in both its purpose and its ability to potentially dispense with notions of individual *mens rea*. The 2007 Act and proposed reform both allow for aggregation and, respectively, convictions for companies and individual managers. However, in relation to the proposed reform, this may result in individual senior managers, in practice, being held strictly liable for negligence. This is a very strange idea as the concepts of strict liability and negligence should not co-exist in a single offence, it should be one or the other. Under the proposed reform, the fact that a prison sentence can also be imposed means that the senior managers may be dealt with overly harshly.

4.5 Conclusion

As regards how responsibility should be attributed, Weigend's theory centralises the rational actor[524] whilst Farmer's centralises responsibility as an institution in the legal system.[525] Both theories seem to convey that criminal liability should attach where senior managers foresaw the risks but continued to act regardless. Overall, it is difficult to determine whether liability for

[523] ibid 492

[524] ibid 491

[525] *Farmer* (n 455) 166

corporate homicide/manslaughter should be criminal or civil. However, negligence appears to be the most suitable *mens rea.* It seems the most fitting manner of dealing with cases of corporate homicide/manslaughter would be to hold companies liable for the negligence of the senior manager if, in fact, "she knows that a serious risk exists but does not take it seriously; instead she "trusts" that nothing bad will result from her conduct."[526] However, as "it makes no sense to blame and punish a person for harmful occurrences that he has no possibility to prevent or that she was unable to foresee.",[527] the circumstances of the case should be more carefully assessed than they have previously sometimes been. If it cannot be shown that senior managers could not have avoided or foreseen the risk, then it would follow that their companies should not be held liable and punished under criminal law. Following Weigend, it seems the most severe penalties should attach to intentional rather than negligent offending.[528] Therefore, the current penalty under the CMCHA 2007 of a fine on the company seems more fitting than the penalty of prison sentences for individual senior managers under recently proposed reform. Given this and that the most suitable *mens rea* for the offence is negligence, as we currently have under the 2007 Act, there appears to be a lack of need for reform.

[526] *Weigend* (n 469) 510

[527] ibid 491

[528] ibid 494

Chapter 5: Conclusion

This work aimed to answer the question of whether the law on corporate homicide should be reformed.

The current Scottish legal framework on homicide encompasses murder, culpable homicide, causing death by driving and corporate homicide. The laws of murder, culpable homicide and causing death by driving do not adequately address instances of deaths arising in the workplace. The crime of corporate homicide in Scotland, or corporate manslaughter in England, is currently regulated by the Corporate Manslaughter and Corporate Homicide Act 2007. It is shown by senior managers, or in practice, sometimes those under the level of senior managers in the company hierarchy, acting negligently in relation to workplace health and safety practices to such a degree that a death results.[529] In breaching their duty of care towards the deceased, the company itself rather than the senior mangers is held liable.[530]

In relation to legal development, English law showed how the Scots law should be changed. Prior to the CMCHA 2007, in Scotland, *Transco*[531] set out the law in relation to culpable homicide in a commercial context. An appeal that arose in England in the same year as *Transco,*[532] *R v. Mark,*[533] exemplified how the law in England operated in relation to the similar offence gross negligence manslaughter, a type of involuntary manslaughter. *Transco*[534] provided alternative charges of culpable homicide and HASWA 1974 whereas, in *R v. Mark,* guilty pleas to HASWA 1974 breaches seemed to facilitate the company

[529] CMCHA 2007, ss. 1-2.

[530] CMCHA 2007, s 1(6).

[531] *Transco Plc.* (n 11)

[532] ibid

[533] *R v. Alan James Mark Nationwide Heating Services Ltd* (n 12)

[534] *Transco Plc.* (n 11)

also being found guilty of gross negligence manslaughter.[535] However, one problem in the English law was trying to define gross negligence manslaughter and the use of recklessness only seemed to confuse the issue more.[536]

In *Transco*, it was held that a company could commit culpable homicide if the *actus reus* and *mens rea* for the offence could be shown.[537] Using the identification doctrine, the elements of culpable homicide had to be shown to rest in the "directing mind and will" of the company, in essence, the directors.[538] Like the position in England, the elements of the offence could not be aggregated between individuals.[539] Unlike the position in England where negligence is the *mens rea* in gross negligence manslaughter,[540] its use in *Transco* was explicitly rejected.[541]

The Law Commission of England and Wales felt there were several drivers for reform including a perception that prosecution rates were unsatisfactory against a backdrop of high numbers of industrial incidents. It was recognised that senior managers, rather than employees at ground level were to blame, however, it was also recognised that senior managers should not be held responsible merely for being in charge at the time when disaster strikes.[542] It could be considered, looking at some of the post-reform case law, this was not wholly achieved. A separate consideration was that the Crown should not be

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[535] *R v. Alan James Mark Nationwide Heating Services Ltd* (n 12) [18] (Lord Justice Scott Baker) citing [4A]-[10C] Bean J. [18] (Lord Justice Scott Baker) citing [4A]-[10C] Bean J.

[536] *Law Commission* (n 209)

[537] *Transco Plc*. (n 11) [14] (Lord Osborne) citing *R v. Coroner (HM) for East Kent, ex Spooner and Others* (1989) 88 Cr App R 10 [16] (Bingham LJ)

[538] ibid [23] (Lord Osborne)

[539] *R v. Alan James Mark Nationwide Heating Services Ltd* (n 12) [19] (Lord Justice Baker Scott); *Transco Plc* (n 11) [17] (Lord Osborne) citing *R v. Great Western Trains Co Ltd* 30 June 1999, unreported [40 et seq] (Scott-Baker J)

[540] *R v. Alan James Mark Nationwide Heating Services Ltd* (n 12) [18] (Lord Justice Scott Baker) citing [4A]-[10C] Bean J.

[541] *Transco Plc.* (n 11) [5]-[7] (Lord Osborne)

[542] *Law Commission* (n 209) 1.10, 1.13-1.14, 1.18

immune from prosecution for instances of corporate homicide/manslaughter,[543] which, could be considered fair.

Following the introduction of the CMCHA 2007, there have been no successful prosecutions in Scotland and cases that appear suitable for prosecution seem to be being dealt with under the HASWA 1974 instead.[544] It is unclear why this is happening, especially as the 22 successfully prosecuted English cases[545] show that the 2007 Act is effective. There is however, a disparate approach in England to decision making as illustrated in the case law. The success of the 2007 Act is further illustrated by the fact that most companies pled guilty to corporate manslaughter although these pleas resulted in other regulatory charges against the individual directors being dropped. Three cases under the Act have resulted in acquittal,[546] but, looking at the circumstances, these decisions appear to be understandable.

A main concern about the CMCHA 2007 is the lack of prosecutions brought under it,[547] however, it could be considered that, without knowing the Crown's reasons for this, it cannot be assumed it is because the CMCHA 2007 itself is ineffective. Another concern is the restrictiveness of the 'senior management' test,[548] however, the test has, in fact, captured a host of individuals who are not senior management.[549] It could therefore be considered that these concerns do not survive scrutiny.

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[543] *Scottish Parliament* (n 10) 12-13

[544] E.g. *David T Morrison & Co Limited v. ICL Plastics, ICL Tech and Ltd and Stockline Plastics Limited* [2012] (n 255); Judiciary of Scotland (n 256)

[545] *Northumbria University* (n 257)

[546] *PS and JE Ward Ltd* (n 315); *R v. MNS Mining Limited* (n 318); *Health and Safety Executive v. Maidstone and Tunbridge Wells NHS Trust* (n 314)

[547] *Cameron* (n 254)

[548] See e.g. *Scottish Parliament* (n 10) 9-10

[549] *Northumbria University* (n 257); *R v. Sterecycle (Rotherham) Ltd* (n 353)

The main sanctions under the CMCHA 2007 are fines on the company or a publicity order,[550] however, it has been suggested prison sentences for individual directors may be more suitable.[551] Senior managers prosecuted for HASWA 1974 offences on corporate manslaughter indictments are typically given short sentences.[552] In terms of the aims of punishment, this would seem to provide retribution but not deterrence. Fines, publicity orders and director disqualification may be thought more effective in terms of deterrence and rehabilitation as it could be assumed that directors would learn lessons for the future. Overall, however, it could be considered that the message of deterrence may be clearer if more consistency was applied in decision-making between cases.

As regards how responsibility should be attributed, Weigend centralises the actor[553] whilst Farmer centralises responsibility as an institution.[554] In both theories, it seems that criminal liability should attach where senior managers foresaw the risks but continued to act regardless.

As regards whether civil or criminal liability should attach to corporate homicide/manslaughter, it is difficult to say, however, it can be observed that Weigend believes severe sanctions should be imposed on intentional rather than negligent offending.[555] This would appear to be more in line with the current 2007 Act than the proposed reform. Having considered what the most suitable *mens rea* for the offence of corporate homicide should be, it could be considered that it is negligence as we currently have under the 2007 Act. The case law illustrates there is no element of active intention on the part of senior managers. Therefore, the current penalty of a fine on their companies rather

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[550] CMCHA 2007, ss. 1(6) and 10.

[551] *Scottish Parliament* (n 10) 6-7

[552] *Northumbria University* (n 257)

[553] *Weigend* (n 469) 491

[554] *Farmer* (n 455) 166

[555] *Weigend* (n 469) 494

than the proposed reform's more serious penalty of prison sentences for individual senior managers would seem suitable.

Overall, there is no clear case for reform and the current law as it stands appears to be satisfactory. However, it could be recommended that greater use of the CMCHA 2007 by the Crown rather than relying on the HASWA 1974 would be of benefit in addressing any doubts as regards the Act's efficacy. In terms of providing the victims' families with catharsis, retributive justice may be of value.

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