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## ARE CORPORATIONS FREE TO KILL? RETHINKING THE LAW ON CORPORATE MANSLAUGHTER TO BETTER REFLECT THE ARTIFICIAL LEGAL EXISTENCE OF CORPORATIONS

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### Abstract

This year, 2018, marks the 10 year anniversary of the implementation of the Corporate Manslaughter and Corporate Homicide Act 2007. It is, therefore, an appropriate time to review its effectiveness and consider whether the Act has achieved what it set out to. Its introduction was a parliamentary attempt to address the key defects<sup>2</sup> under the previous identification doctrine, where a company's liability was dependant on gross negligent manslaughter being sought in the relevant directing mind and will. This article will highlight the inadequacies of the former regime and review to what extent the 2007 Act has resolved them. Importantly, it references the recent Grenfell Tower disaster, which, if corporate manslaughter charges are pursued, will be the Act's biggest and most public challenge to date.

**Keywords:** corporate manslaughter, Corporate Manslaughter and Corporate Homicide Act 2007, gross negligent manslaughter

### Introduction

Companies, as a result of *Salomon*<sup>3</sup>, are 'distinct and independent'<sup>4</sup> entities separate from their members. However, in reality, 'corporations have no consciences, no beliefs, no feelings, no thoughts, no desires' and merely 'help structure and facilitate the activities of human beings'.<sup>5</sup> Consequently, under the original common law models, corporate criminal liability had to be found in individuals and then 'attributed' to the company. Attribution in the UK, commonly takes two forms. The first, vicarious liability, imposes liability on corporations 'for the criminal acts of employees...acting within the scope of their employment'.<sup>6</sup> It is, 'wholly derivative'.<sup>7</sup> While the principle is easily applied, 'a corporation is not...so abstract, impalpable

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<sup>2</sup> Ministry of Justice, *Corporate Manslaughter and Corporate Homicide Act 2007*, (2008, Ministry of Justice Circular), para.5 .

<sup>3</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22, HL

<sup>4</sup> Ibid para.42.

<sup>5</sup> Justice Stephens (dissenting) in *Citizens United v Federal Election Commission* [2010] 130 S Ct 876

<sup>6</sup> Brown, H. L., 'Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents,' (1995), *Loyola Law Review*, vol.41, 279.

<sup>7</sup> Minkes, J., and Minkes, L., *Corporate and White Collar Crime*, (2008), 64.

or metaphysical that it cannot be regarded as a principal or master',<sup>8</sup> its scope is limited to strict liability offences. Accordingly, it contrasts with the majority of criminal offences which require *mens rea* to be established; an act does not make a person guilty unless the mind is guilty. The second rule of attribution, therefore, 'requires...the identification of a human being who is liable for the crime'<sup>9</sup> and which can be regarded as the company acting itself. Theoretically, 'there [was] no conceptual difficulty in attributing a criminal state of mind to a corporation',<sup>10</sup> however, practically, the question 'how can an inanimate, fictional entity such as a company act, and where is its state of mind to be located?'<sup>11</sup> has proved elusive. It is the judicial and scholarly answers to this question, and more generally a review of the identification doctrine, that is of concern here.

## **1 The Former Regime: Corporate Criminal Liability**

### ***The identification doctrine***

The identification doctrine derives from a speech by Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum co Ltd*,<sup>12</sup> where it was noted that:

a corporation...has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in...an agent...who is really...the very ego and centre of the...corporation'.<sup>13</sup>

Though this is a civil case, it was affirmed in the criminal context, 'with no divergence of approach',<sup>14</sup> in *DPP v Kent and Sussex Contractors Ltd*,<sup>15</sup> enabling corporations to be found liable for *mens rea* crimes. The issue with *Lennard's*, is that it failed to 'provide much guidance on...who comprised the alter ego of the corporation',<sup>16</sup> leading to the rather ambiguous view that, 'the minds of those who control the company are the minds of the company itself';<sup>17</sup> the obvious question, being, who controls the company? Although, typically, the answer to the latter could be found by consulting the company's constitution, 'the test was not always so rigidly interpreted'.<sup>18</sup>

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<sup>8</sup> Welsh, R. S., 'Criminal Liability of Corporation,' (1946), *Law Quarterly Review*, vol.62, 347.

<sup>9</sup> Menis, S., 'The fiction of the criminalisation of corporate killing,' (2017), *Journal of Criminal Law*, vol.81(6), 470.

<sup>10</sup> *P&O European Ferries (Dover) Ltd* [1991] 93 Cr App, at 7.

<sup>11</sup> Minkes et al., *Corporate and White Collar Crime*, (2008), 61.

<sup>12</sup> [1915] AC 705.

<sup>13</sup> *Ibid* para.713.

<sup>14</sup> *El-Ajou v Dollar Land Holdings Plc (No.1)* [1994] 2 All ER 685, at para.695.

<sup>15</sup> [1944] KB 146.

<sup>16</sup> Bhandari, V., 'Meridian to Iridium: an analysis of attribution,' (2012), *International Company and Commercial Law Review*, vol.23(8), 253.

<sup>17</sup> Mujih, E., 'Reform of the law on corporate killing: a toughening or softening of the law?' (2008), *Company Lawyer*, vol.29(3), 78.

<sup>18</sup> Ferran, E., 'Corporate Attribution and the Directing Mind and Will,' (2011) *Law Quarterly Review*, vol.127, 242.

The test was revisited in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*, where Denning LJ distinguished between a company's '...brain and nerve centre which controls what it does [and its] hands which hold the tools and act in accordance with direction from the centre'.<sup>19</sup> Those acting as the 'brains' of the company being treated, in law, as the company itself. Lord Denning's segregation of 'mere servants and agents' and 'directors and managers who represent the directing mind and will', helped 'redefine and unify the law'.<sup>20</sup> However, 'the anthropomorphism of likening a company to a human body'<sup>21</sup> split opinion. Realist theorists like *French* agree that 'corporations have a metaphysical-logical identity that does not reduce to a mere sum of human members'.<sup>22</sup> In fact *Stone* even postulates that they are capable of both 'legal guilt and moral blame'.<sup>23</sup> Realists argue that 'it is...too easy to slip from thinking about a rule whereby conduct is attributed to a company... to characterising a company as a living, breathing entity'.<sup>24</sup> The latter 'limit[s] the role of corporate liability and renders sterile much of the argument about corporate structures';<sup>25</sup> what Hart labels the 'metaphysical shadow'.<sup>26</sup> It is therefore contended that Lord Denning's definition of the 'directing mind and will' is flawed.

Finally in *Tesco Supermarkets Ltd v Nattrass*,<sup>27</sup> 'a limit [as] to how far creative judges could stretch the test'<sup>28</sup> was summoned. Their Lordship's took different approaches to the rules of attribution. Lord Reid, found those who are 'the embodiment of the company' are the directing mind and will, such as 'the board of directors, the managing director and perhaps other superior officers' but not 'their subordinates'.<sup>29</sup> His Lordship took 'an abstract, universal and non-context specific' approach. Lord Diplock, in contrast, 'gave the test a constitutional focus',<sup>30</sup> by finding the answer to who can legally be regarded as the company in the 'memorandum and articles of association'.<sup>31</sup> Ultimately, their Lordships limited the identification doctrine so that it 'stop[ped] at the boardroom'.<sup>32</sup> After *Tesco*, 'holding a company liable for crimes...transfigured into a question of...whether the board of directors...could be

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<sup>19</sup> [1957] 1 QB 159.

<sup>20</sup> Ibid 530.

<sup>21</sup> Bowen, A (QC), 'Anthropomorphism and attribution; carousel fraud and the illegality defence,' (2016), *Scots Law Times*, vol.(14), 66

<sup>22</sup> French, P., *Collective and Corporate Responsibility*, Columbia University Press, (1984), 32

<sup>23</sup> Stone, C. *A Comment on 'Criminal Responsibility in Government'*, in Pennock, R., and Chapman, J., (eds.), *Criminal Justice*, (New York University Press, 1985), 241.

<sup>24</sup> Ferran, 'Corporate Attribution and the Directing Mind and Will,' (2011), 241.

<sup>25</sup> Wells, C., *Corporations and Criminal Responsibility*, Oxford, Second Edition, (2001), 85.

<sup>26</sup> Hart, H., 'Definition and Theory in Jurisprudence,' (1954) *Law Quarterly Review*, vol.70, 37.

<sup>27</sup> [1972] AC 153.

<sup>28</sup> Ferran, 'Corporate Attribution and the Directing Mind and Will,' 242.

<sup>29</sup> [1972] AC 153, paras.170,171 per Lord Reid

<sup>30</sup> Ferran, 'Corporate Attribution and the Directing Mind and Will,' 242.

<sup>31</sup> [1972] AC 153, para.200 per Lord Diplock.

<sup>32</sup> Wells, *Corporations and Criminal Responsibility*, 101.

held responsible for that particular activity'.<sup>33</sup> Though this may serve well in prosecuting smaller corporations with *de jure* management structures, it is 'manifestly at odds with...the diffusion of managerial power in large companies'.<sup>34</sup> Not only does it 'unfairly prejudice small companies with identifiable designated responsibilities',<sup>35</sup> but also 'establishes a blueprint for corporate officials who seek to insulate their companies from criminal liability'.<sup>36</sup> Since larger corporations are more likely to be the subject of criminal proceedings, Gobert contends, that 'it propounds a theory of corporate liability which works best in cases where it is needed least and works least in cases where it is needed most'.<sup>37</sup>

Clearly, the identification doctrine 'do[es] not make for a rational scheme of liability'<sup>38</sup> unfairly allowing medium and large corporations to escape conviction by requiring the prosecution to 'lay the crime at the feet'<sup>39</sup> of a single directing mind and will. More importantly it fails to define *why* corporations should be liable for culpable crimes. As Colvin states: 'What does it mean to say that a corporation is at fault?'<sup>40</sup> Accordingly, it has been argued, that 'the common law has proved unsuited to this task';<sup>41</sup> its development simply resulting in a 'period of intense confusion'.<sup>42</sup> The courts 'remained wedded' to this approach, 'prov[ing] unable to develop a model of liability which reflects the unique nature of the corporate defendant'.<sup>43</sup> That is, until the 1990s, which for some was a significant turning point.

### ***The Special Attribution test***

Such turning point can be pinpointed to Lord Hoffmann's judgments, in *El Ajou*<sup>44</sup> and *Meridian*.<sup>45</sup> In the former case, a company's chairman with no managerial power, was nevertheless found to be the directing mind and will. The case, illustrated 'a relatively flexible interpretation of the directing mind and will test',<sup>46</sup> focusing more on the context, rather than

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<sup>33</sup> Anchayli, A., 'The 'directing mind and will' test in corporate attribution: Iridium and Meridian – a comparison,' (2012), *Company Lawyer*, vol.33(8), 253.

<sup>34</sup> Ferran, 'Corporate Attribution and the Directing Mind and Will,' 242.

<sup>35</sup> Bhandari, 'Meridian to Iridium: an analysis of attribution,' 254.

<sup>36</sup> Minkes et al., *Corporate and White Collar Crime*, 67.

<sup>37</sup> Gobert, J., 'Corporate Criminality: four models of fault,' (1994), *Legal Studies*, vol.14(3), 393.

<sup>38</sup> Sullivan, G., 'The Attribution of Culpability to Limited Companies,' (1996), *Cambridge Law Journal*, vol.55(3), 518.

<sup>39</sup> Tully, S., *Research Handbook on Corporate Legal Responsibility*, (2005), 198.

<sup>40</sup> Colvin, E., 'Corporate Personality and Criminal Liability,' (1995), *Criminal Law Forum*, vol.6(1), 1.

<sup>41</sup> Clough, J., 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability,' (2007), *Criminal Law Forum*, vol.18, 268.

<sup>42</sup> Ambasta, K., 'A leap of reasoning, but for special cases: an analysis of the "expiry" of the directing mind and will test in attribution of corporate liability,' (2012), *Company Lawyer*, vol.33(8), 230.

<sup>43</sup> Clough, 'Bridging the Theoretical Gap' 267.

<sup>44</sup> *El Ajou v Dollar Land Holdings Plc* [1994] 1 BCLC 464

<sup>45</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 BCLC 116, PC.

<sup>46</sup> Ferran, 'Corporate Attribution and the Directing Mind and Will,' 242.

the hierarchy of the offending person. This ‘gave a hint as to what was to come later in *Meridian*’ where his Lordship’s judgment was ‘strikingly bolder’,<sup>47</sup> fashioning a “special rule” of attribution, to be adopted when the general rules of agency and primary rules of attribution were insufficient. It took a ‘context sensitive, purposive...approach’,<sup>48</sup> requiring the court to apply the ‘usual canons of interpretation’<sup>49</sup> having regard to the substantive law’s language, content and policy when determining corporate liability. In essence, this contextual approach meant that the ‘directing mind [could]...be found outside [of] executive positions’.<sup>50</sup> A point recognised by Sealy, who commended *Meridian*’s introduction of ‘flexibility into a difficult area of the law’.<sup>51</sup>

For some, *Meridian* ‘relegated the directing mind theory...to the side-lines’<sup>52</sup> and was a ‘comprehensive and bold attempt to rescue the law...from the confusing mire it had fallen into’.<sup>53</sup> Its potential ‘widening of the...scope for criminal prosecutions’,<sup>54</sup> was welcomed in a growing blameworthy society. For others, it was merely a ‘reinterpretation of the identification doctrine’;<sup>55</sup> at most it ‘added another layer’.<sup>56</sup> Payne notes that ‘it is not possible to provide a precise answer to...whose acts and knowledge will be attributed to the company since the analysis depends on the particular rule and context in question’.<sup>57</sup> Perhaps why the judiciary continued to resort to the orthodox “directing mind and will” test.<sup>58</sup> Ultimately, Cooke was correct in saying that ‘anthropomorphism [is] very hard to eradicate from this branch of law’.<sup>59</sup>

### ***The disasters leading to the CMCHA 2007***

The adverse effects of the identification doctrine were magnified in the high profile disasters throughout the 1980s-90s. Despite significant fatalities, the picture that emerged was one of ‘failed prosecutions and – crucially – the failure to bring prosecutions because of anticipated

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<sup>47</sup> Ibid 243.

<sup>48</sup> Lim, E., ‘A critique of corporate attribution: “directing mind and will” and corporate objectives,’ (2013), *Journal of Business Law*, vol.3, 333.

<sup>49</sup> [1995] 2 BCLC 116, PC, para.122.

<sup>50</sup> Bhandari, ‘Meridian to Iridium: an analysis of attribution,’ 254.

<sup>51</sup> Sealy, L., ‘The Corporate Ego and Agency Untwined,’ (1995), *Criminal Law Journal*, vol.54(3), 507.

<sup>52</sup> Wickins, R., and Ong, C., ‘Confusion worse confounded: the end of the directing mind theory?’ (1997) *Journal of Business Law*, 550.

<sup>53</sup> Ambasta, ‘A leap of reasoning, but for special cases,’ 227.

<sup>54</sup> Robert-Tissot, S., ‘A fresh insight into the corporate criminal mind: Meridian Global Funds Management Asia Ltd v The Securities Commission,’ (1996), *Company Lawyer*, vol.17(4), 99.

<sup>55</sup> Clarkson, C.M.V., ‘Kicking corporate bodies and damning their souls,’ (1996), *Modern Law Review*, vol.59(4), 565.

<sup>56</sup> Bhandari, ‘Meridian to Iridium: an analysis of attribution,’ 254.

<sup>57</sup> Payne, J., ‘Corporate Attribution and the Lessons of Meridian’ in Davies, P.S., and Pila, J., ‘The Jurisprudence of Lord Hoffmann: A Festschrift for Leonard H. Hoffmann’ (Oxford: Hart Publishing, 2015; Oxford Legal Studies Research Paper No. 17/2015).

<sup>58</sup> For example, *Attorney General’s Reference (No.2 of 1999)* [2000] QB 796.

<sup>59</sup> Cooke, R. B., *Turning Points of the Common Law*, (London, Sweet & Maxwell, 1997), 26-27.

problems of proof'.<sup>60</sup> Shockingly, out of nine disasters, four resulted in corporate manslaughter proceedings but only one was successfully prosecuted - *P&O European Ferries*<sup>61</sup> - important, because it reiterated 'the legal possibility that a corporate body is capable of manslaughter'.<sup>62</sup> The prosecution failed because no individual senior manager could be identified as the directing mind and will giving an early indication that 'the larger the company, the more likely it will be to avoid liability'.<sup>63</sup> This is exacerbated in *R v Kite*,<sup>64</sup> the first successful corporate manslaughter prosecution, it involved a small one-man company where 'the managing director was *obviously* the directing mind and will'.<sup>65</sup> It should not, therefore, be seen as a 'ground-breaking development', but rather a further example of the 'inability of the law...to bring to account those corporate bodies' that are the most dangerous.<sup>66</sup> What Tombs and Whyte refer to as a 'glaring irony'.

This early indication was brought into reality with the serious transport disasters that followed. Both prosecutions initiated in respect of *Southall*<sup>67</sup> and *Hatfield*<sup>68</sup> crumbled for the same reason as *P&O* - that the directing mind and will test acted as a 'legal barrier to potential corporate criminal liability'.<sup>69</sup> The fact that they were successfully prosecuted under the Health and Safety at Work Act 1974 made little difference, with most taking the view that it 'is not a suitable response in the most serious cases'<sup>70</sup>; there being a 'dichotomy of status and function between criminal and regulatory law'.<sup>71</sup> Ultimately, such events, increased public and legislative awareness of the unsatisfactory legal framework, which handed large organisations, who 'tend[ed] to breed the conditions for disaster',<sup>72</sup> immunity. In doing so, reform was 'catapulted on to the political agenda'.<sup>73</sup>

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<sup>60</sup> Field, S., and Jones, L., 'Death in the workplace: who pays the price?' (2011), *Company Lawyer*, vol.32(6), 166.

<sup>61</sup> (1991) 93 Cr App R 72.

<sup>62</sup> Tombs, S., and Whyte, D., 'Two steps forward, one step back: towards accountability for workplace deaths?' (2003), *Policy and Practice in Health and Safety*, vol.1:1, 11.

<sup>63</sup> Redfern, R., 'The limitations of corporate manslaughter,' (2000), *Coventry Law Journal*, vol.5(1), 37.

<sup>64</sup> [1996] 2 Cr App R () 295 CA (Crim Div).

<sup>65</sup> Hsiao, M., 'Abandonment of the doctrine of attribution in favour of gross negligence test in the corporate Manslaughter and Corporate Homicide Act 2007,' (2009), *Company Lawyer*, vol.30(4), 2.

<sup>66</sup> Tombs et al., 'Two steps forward, one step back,' 13.

<sup>67</sup> *R v Great Western Trains Co Ltd*, Central Criminal Court, 30 June 1999 (unreported).

<sup>68</sup> *R v Balfour Beatty Rail Infrastructure Services Ltd* [2006] EWCA Crim 1586.

<sup>69</sup> Parsons, S., 'The Doctrine of Identification, causation and Corporate Liability for Manslaughter,' (2003), *Journal of Criminal Law*, vol.67, 69.

<sup>70</sup> Almond, P., 'Regulation Crisis: Evaluating the Potential Legitimizing Effects of "Corporate Manslaughter" Cases,' (2007), *Law and Policy*, vol.29(3), 290.

<sup>71</sup> *R v Great Western Trains Co Ltd*, Central Criminal Court, 30 June 1999 (unreported)

<sup>72</sup> Wells, C., 'The Southall rail crash: testing the tracks of corporate manslaughter,' (1999), *Archbold News*, vol.7, 3.

<sup>73</sup> Clarkson, C.M.V., 'Corporate manslaughter: yet more Government proposals,' (2005), *Criminal Law Review*, 677.

### **A proposed offence of corporate killing**

Reforming the law 'has been driven by a public and media perception of injustice following the Crown's failure to achieve criminal convictions'<sup>74</sup> in disasters. The process, was initiated by two Law Commission Papers. The first<sup>75</sup> reviewed the law on corporate manslaughter, and, the second,<sup>76</sup> of pivotal importance here, proposed a new offence of corporate killing.<sup>77</sup> The Law Commission found the identification principle to be 'inadequate',<sup>78</sup> but saw no 'justification for applying to corporations a law of manslaughter which was different from the general law'.<sup>79</sup> Thus the favoured approach was to 'apply the elements of the "individual" offence of killing by gross carelessness to corporations in principle, but in a form adapted to a corporate context'.<sup>80</sup>

The elements of the individual offence are:

- (1) The defendants conduct caused the death;
- (2) The risk of death would have been obvious to a reasonable person in the circumstances, which the defendant was capable of appreciating; and
- (3) The defendants conduct fell far below what could reasonably be expected of him in the circumstances.<sup>81</sup>

The adapted form made a company guilty if a death was caused by a management failure which fell far below what can be reasonably expected in the circumstances. In regards to the individual offence, the adaption: kept the first requirement, satisfying *conduct* in the way of a management failure; removed the second, as corporations are incapable of foreseeing or appreciating a risk; and retained the third, ensuring that 'the offence would be confined to cases of very serious negligence'.<sup>82</sup> It therefore, 'rightly focuses on the failings of the company rather than..., on the acts or omissions of an individual within the company'.<sup>83</sup> While the proposals were generally 'well-received by commentators',<sup>84</sup> doubts remained. For example, *Wells* thought they were 'daring and innovatory',<sup>85</sup> but recognised that 'much more work need[ed] to be done'. Essentially, commentators were sceptical as to 'what [was] on the other side of the edge'<sup>86</sup> of the proposals. Unfortunately, this was not to be known until 10 years

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<sup>74</sup> Griffin, S., 'Corporate manslaughter: a radical reform?' (2007), *Journal of Criminal Law*, vol.71(2),151.

<sup>75</sup> Law Commission, *Criminal Law: Involuntary Manslaughter*, (Consultation Paper No.135, 1994).

<sup>76</sup> Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, (Law Commission No.237, 1996).

<sup>77</sup> Law Commission, *Legislating the Criminal Code*, (1996), Part VIII.

<sup>78</sup> *Ibid* para.7.8.

<sup>79</sup> Law Commission, *Criminal Law: Involuntary Manslaughter*, (1994), para.5.73 .

<sup>80</sup> Law Commission, *Legislating the Criminal Code*, (1996), para.7.36

<sup>81</sup> *Ibid* para.8.2

<sup>82</sup> *Ibid* para.8.34

<sup>83</sup> Clarkson, 'Corporate manslaughter: yet more Government proposals', (2005), 682.

<sup>84</sup> *Ibid*.

<sup>85</sup> Wells, C., 'The Law Commission report on involuntary manslaughter: the corporate manslaughter proposals: pragmatism, paradox and peninsularity,' (1996), *Criminal Law Review*, 545, 552.

<sup>86</sup> *Ibid* 545.



later, when a draft Bill<sup>87</sup> paved the way to the Corporate Manslaughter and Corporate Homicide Act 2007.

## **2 The Corporate Manslaughter and Corporate Homicide Act 2007**

The ten year gestation of the 2007 Act was a time of ‘wrangling, bartering, debate and delay’.<sup>88</sup> Its origin can be pinpointed to the Law Commission’s proposed offence of “corporate killing”.<sup>89</sup> After this, ‘the baton...passed to the Home Office [who] accepted that the current criminal law on corporate culpability was inadequate’.<sup>90</sup> A White Paper<sup>91</sup> was published in 2002 which reviewed and modified the Law Commission’s proposals including broadening the scope of potential defendants from ‘corporations’, to ‘undertakings’<sup>92</sup> (i.e. schools, hospital trusts, partnerships, as well as one or two person businesses). Not including unincorporated bodies ‘could lead to an inconsistency of approach’ and ‘appear arbitrary’.<sup>93</sup> The response was mainly negative. Sullivan labelled the proposal ‘simple and bold’ and considered a situation whereby proceedings were initiated against a sole trader, stating that it ‘will neither in form nor substance involve *corporate* liability – the liability imposed will be a personal liability’. Concluding that fines will be directly imposed on individuals which, ‘underscores the potential harshness of extending corporate killing’.<sup>94</sup>

Another, proposed secondary liability on those who ‘substantially contributed to the undertaking in question’s corporate offence’.<sup>95</sup> While the proposal, for some, ‘undeniably grasp[s] a major truth’ because targeting individuals has the greatest deterrent-effect,<sup>96</sup> others were sceptical as to ‘individuals being reluctant’<sup>97</sup> to take on senior positions. The alternative, was to disqualify directors who contributed to the management failure.<sup>98</sup> It was, therefore, less controversial than the former, and what Johnson labelled an ‘innovative proposal’ which

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<sup>87</sup> See: <https://www.parliament.uk/documents/upload/hacdraftcmgovtresponsecm6755.pdf>

<sup>88</sup> Forlin, G., ‘Worth the wait?’ (2007) *New Law Journal*, vol.157, 1165.

<sup>89</sup> Law Commission, *Legislating the Criminal Code*, (1996).

<sup>90</sup> Gobert, J., ‘The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?’ (2008), *Modern Law Review*, vol.71(3), 413.

<sup>91</sup> Home Office, *Reforming the Law on Involuntary Manslaughter: The Government’s Proposals*, (May 2000)

<sup>92</sup> The Government referred to the definition of an ‘undertaking’ in the Employment Act 1960: ‘any trade or business or other activity providing employment’. Ibid 7 at para.3.2.4.

<sup>93</sup> Ibid paras.3.2.2, 3.2.3.

<sup>94</sup> Sullivan, B., ‘Corporate killing – some Government proposals,’ (2001), *Criminal Law Review*, January ed., 34-36.

<sup>95</sup> Home Office, *Reforming the Law on Involuntary Manslaughter*, para.3.4.13.

<sup>96</sup> Sullivan, ‘Corporate Killing – some Government proposals,’ 39.

<sup>97</sup> Edgar, A., ‘Corporate manslaughter is just around the corner,’ (2001), *International Company and Commercial Law Review*, vol.12(4), 119.

<sup>98</sup> Home Office, *Reforming the Law on Involuntary Manslaughter*, para.3.4.9.

adequately highlighted both organisational and individual failings.<sup>99</sup> Ultimately, the general consensus was that the Government's broader proposals 'look[ed] sound in principle'.<sup>100</sup>

Unfortunately, it was not until 2005 that the Government published a draft bill. In brief it added a 'relevant duty of care' requirement; the senior management test, and; a range of 'statutory criteria' for assessing whether a breach was gross.<sup>101</sup> Simultaneously, it removed all individual liability - 'perhaps the most controversial proposal'.<sup>102</sup> Commentators generally embraced the Draft Bill but recognised that it was in some respects too limited.<sup>103</sup> After a thorough analysis and some last minute amendments at Committee stage, a long overdue Bill was published in 2006 which became the CMCHA 2007. For some, this delay is attributable to 'the complexity of the law and the necessity for careful reflection', however, 'a more cynical explanation...is linked to political and economic considerations'.<sup>104</sup>

## **2.1 Analysis of the CMCHA 2007**

The CMCHA 2007 came into force on 6 April 2008. Despite extensive consultation, it did not receive the most welcoming response. Gobert labelled the Act a 'disappointment'; 'limited in its vision and lacking imagination'.<sup>105</sup> Sargeant contends it is an array of 'artificial restrictions, limitations and qualifications'<sup>106</sup> and Wells deems it an 'over-complex offence...full of ambiguities and interpretative uncertainty'.<sup>107</sup> Under s.1 a company will incur liability for corporate manslaughter, if the way in which its activities are managed or organised causes a death and is a gross breach of a relevant duty of care. The prevalent feature, in comparison to the common law (abolished under s.20), is the apparent change from *individualistic* to *systemic* fault. The offence 'addresses a key defect in the law'<sup>108</sup> by 'afford[ing] a superior basis of liability'<sup>109</sup> and thus fulfils its purpose. It represents 'a quantum leap in legal

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<sup>99</sup> Johnson, C., 'Ten contentions of corporate manslaughter legislation: Public policy and the legal responses to workplace accidents,' (2008), *Safety Science*, vol.46(3), 361.

<sup>100</sup> Dennis, R., (2000) 'Reforming the law of involuntary manslaughter,' (2000), *Criminal Law Review*, July ed., 518.

<sup>101</sup> Home Office, *Corporate Manslaughter: The Government's Draft Bill for Reform*, (Cm 6497, March 2005)

<sup>102</sup> Clarkson, 'Corporate manslaughter: yet more Government proposals,' 687.

<sup>103</sup> Ibid 679.

<sup>104</sup> Griffin, 'Corporate Manslaughter: A Radical Reform?' 153.

<sup>105</sup> Gobert, 'Thirteen years in the making but was it worth the wait?' 414.

<sup>106</sup> Sargeant, C., 'Two steps forward, one step back— the cautionary tale of the Corporate Manslaughter and Corporate Homicide Act 2007', (2012), *UK Law Student Review*, vol.1(1), 1.

<sup>107</sup> Wells, C., 'Corporate criminal liability: a ten year review', (2014), *Criminal Law Review*, vol.12, 854.

<sup>108</sup> Ministry of Justice, *A guide to the Corporate Manslaughter and Corporate Homicide Act 2007*, (Ministry of Justice Circular, February 2008), para.5

<sup>109</sup> Roper, V., 'The Corporate Manslaughter and Corporate Homicide Act 2007 – a 10-year review,' (2018), *Journal of Criminal law*, vol.82(1), 48.

discourse',<sup>110</sup> in that the legislature has seemingly adopted a realist approach to what constitutes a corporation. Overall, Sargeant believes that 'the introduction of the new offence based on organisational killing, should be seen as a desirable development'<sup>111</sup> as it represents a malleable interpretation of the law. One would agree, if it were not for the various barriers that prevent successful convictions in practice. One of these appears in s.17, requiring the consent of the Director of Public Prosecutions for all corporate manslaughter prosecutions. The risk here, is the potential to embed the fate of corporate liability into the political vacuum. This is because of the DPP's duty to 'report...on the discharge of their functions,... [which] the Attorney General lays...before Parliament'.<sup>112</sup> Consequentially, where consent is withheld one 'may suspect that the DPP had been influenced by MP's who in turn had been influenced by corporate lobbyists'.<sup>113</sup> Ultimately, it tarnishes the transparency of justice and reaffirms the cynical view – corporate manslaughter is too closely linked to political and economic considerations.

Gobert argues that the offence represents a 'radical departure' from the identification doctrine, however, this is somewhat 'subdued by the effect of [s.1(3)]',<sup>114</sup> which requires a substantial element of the breach to be found in the way in which senior management organised or managed its activities. It is this, 'disastrous'<sup>115</sup> artificial barrier, which was the 'most widely criticised aspect'.<sup>116</sup> By referring directly to *persons*, the Act portends to 'return the focus...to the evaluation of the relative contribution of...individuals'<sup>117</sup> as opposed to the systemic failings of the corporation. Thus, many have argued that it 'perpetuate[s] the same evidentiary stumbling blocks that frustrated prosecutions under the identification doctrine'<sup>118</sup> and may retain a 'disproportionate effect on smaller companies'.<sup>119</sup> On the contrary, there is support for the fact that 'the actual circle of people included in the...definition of senior management is likely to be much wider than...the 'controlling minds''<sup>120</sup> and that *persons* as opposed to *person*

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<sup>110</sup> Wells, C., 'Corporate Manslaughter: Why Does Reform Matter?' (2006), *South African Law Journal*, vol.123(4), 653.

<sup>111</sup> Sargeant, 'Two steps forward, one step back,' 8.

<sup>112</sup> Attorney General's Office, *Protocol between the Attorney General and the Prosecuting Departments*, (July 2009), at para.3.4.

<sup>113</sup> Gobert, 'Thirteen years in the making but was it worth the wait?' 431.

<sup>114</sup> Ibid.

<sup>115</sup> Sargeant, 'Two steps forward, one step back', 11.

<sup>116</sup> House of Commons Home Affairs and Work and Pensions Committee, *Draft Corporate Manslaughter Bill, First Joint Report of Session 2005-2006, Volume 1: Report*, (HC 540-I, December 2005), at para.132

<sup>117</sup> Ormerod, D., and Taylor, R., 'The Corporate Manslaughter and Corporate Homicide Act 2007,' (2008), *Criminal Law Review*, vol.8, 593.

<sup>118</sup> Gobert, 'Thirteen years in the making but was it worth the wait?' 414.

<sup>119</sup> Ormerod et al., 'The CMCHA 2007,' (2008), 592.

<sup>120</sup> Legislative Comment, 'Reflections on the Corporate Manslaughter and Corporate Homicide Act 2007', (2008). *Health & Safety at Work*, vol.15(7), 3.

'suggests an aggregation principle is applied...making the task of satisfying the elements of the test easier'.<sup>121</sup> The extent to which 'senior management' has allowed large complex companies to escape convictions, is discussed later but it can be concluded that this is a 'worrying consequence that could render the CMCHA obsolete'.<sup>122</sup>

The second issue, is who is deemed as 'senior management'? s.1(4)(c), refers to persons who play significant roles in making decisions about, or the actual management, of the whole or a substantial part of its activities. The definition is, a linguistic conundrum, which is 'unduly restrictive and threatens to open the door to endless argument...as to whether certain persons...constitute senior managers'.<sup>123</sup> Notably, there have been attempts to add clarity. Wells, suggests that since 'substantial' is supplemented by 'the whole' it suggests 'that it means something close to the whole if not the whole itself'<sup>124</sup> as opposed to the narrower *de minimis* meaning enshrined in the criminal law. The CPS propose it is 'likely to be limited to those whose involvement is influential and will not include those who simply carry out the activity'.<sup>125</sup> Despite these attempts, 'we are ultimately left without guidance'.<sup>126</sup> Unfortunately, we are still no closer to understanding the senior management test, or its effects. Prosecutions have largely resulted in guilty pleas or have concerned small companies. The justification for ensuring that the offence, 'targeted...failings in the strategic management of an organisation's activities, rather than failing at relatively junior levels',<sup>127</sup> is outweighed by the need to create a level playing field between diverse enterprises. It can, therefore, be regarded as a 'disappointing compromise'.<sup>128</sup> Both Clarkson and the Joint Committee, were right to point out that the earlier Law Commission's proposal, which merely required a "management failure", 'was preferable'.<sup>129</sup>

### ***Relevant duty of care***

A company must owe the deceased a relevant duty of care (s.1(1)(b)). Duties are established under the civil law of negligence but are limited by an exhaustive list in s.2; i.e. those owed as an employer and occupier of premises. Essentially, the Act 'seeks to overlay existing legal obligations with the additional threat of criminal proceedings'.<sup>130</sup> The problem, is that the civil

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<sup>121</sup> Tariq, M., 'A 2013 look at the corporate killer,' (2014), *Company Lawyer*, vol.35(1), 19.

<sup>122</sup> Ibid 20.

<sup>123</sup> Clarkson, 'Corporate manslaughter: yet more Government proposals,' 683.

<sup>124</sup> Wells, 'Corporate criminal liability: a ten year review', 857.

<sup>125</sup> <https://www.cps.gov.uk/legal-guidance/corporate-manslaughter#a05> [Accessed March 27, 2018]

<sup>126</sup> Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – a 10-year review,' 57.

<sup>127</sup> Home Office, *Corporate Manslaughter: The Government's Draft Bill for Reform*, para.28.

<sup>128</sup> Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – a 10-year review,' 48.

<sup>129</sup> Ibid. also Home Office, *Corporate Manslaughter: The Government's Draft Bill for Reform*, para.160.

<sup>130</sup> Almond, P., *Corporate Manslaughter and Regulatory Reform*, (2013, Hampshire, Palgrave Macmillan), 31.

and criminal law have juxtaposing purposes and their rules cannot be so simply transferred.<sup>131</sup> Consequently, trying to adapt the civil law duties, which 'provides ample opportunity for...legalistic pedantry',<sup>132</sup> to the criminal law, leaves us with an over complex task allowing defendants to 'detour on...time-consuming and likely contentious disputes on issue[s] of dubious relevance'.<sup>133</sup> The only advantage is that it is a question of law, and so concerns around complexity may be circumvented. Considering legal and natural persons are already under a duty not to kill, the 'superior'<sup>134</sup> approach, would be the Law Commission's proposal to merely consider whether the corporation was a cause of death.<sup>135</sup>

### **Causation**

The Act states that the management failure must cause the death (s.1(1)(a)) and that senior management must have substantially contributed (s.1(3)); it leaves the causation element 'curiously under-defined'.<sup>136</sup> The idea being that 'the usual principles of causation in the criminal law...apply'.<sup>137</sup> Considering these are well established, Menis argues that 'from a doctrinal point of view, there should be no problem',<sup>138</sup> especially since 'the management failure need not have been the sole cause of death; it need only be a cause'.<sup>139</sup> Nevertheless, others argue that 'causation is fraught with problems'.<sup>140</sup> As Ormerod and Taylor recognise, there is still scope for 'the organisation [to] argue that employees' free deliberate informed fatal acts breaks the chain of causation',<sup>141</sup> which can be seen in the first case brought under the Act: 'it was...the deceased who had acted in breach of the company's system of work.'<sup>142</sup> Consequently, prosecutions may result in '...a much closer examination of the conduct of individuals at quite the other end of the chain of seniority'.<sup>143</sup> Ultimately, causation 'is [at]...centre stage under the 2007 Act'<sup>144</sup> and so in depth arguments about whether it is established are to be expected particularly given the grave nature of the offence.

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<sup>131</sup> *R v Wacker* [2003] 1 Cr App R 329, para.338

<sup>132</sup> House of Commons Home Affairs and Work and Pensions Committee, para.101.

<sup>133</sup> Gobert, 'Thirteen years in the making but was it worth the wait?' 417.

<sup>134</sup> Clarkson, 'Corporate manslaughter: yet more Government proposals,' 683.

<sup>135</sup> Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, para.1.21.

<sup>136</sup> Wells, 'Corporate criminal liability: a ten year review,' 855.

<sup>137</sup> Corporate Manslaughter and Corporate Homicide Act 2007, Explanatory Notes, at para.15 (<http://www.legislation.gov.uk/ukpga/2007/19/notes>)

<sup>138</sup> Menis, 'The fiction of the criminalisation of corporate killing', 472.

<sup>139</sup> Craig, R., 'Thou shall do no murder: a discussion paper on the Corporate Manslaughter and Corporate Homicide Act 2007,' (2009), *Company Lawyer*, vol.30(1), 18.

<sup>140</sup> Wells, 'Corporate criminal liability: a ten year review, 855.

<sup>141</sup> Ormerod et al., 'The CMCHA 2007,' (2008), 605. The principle of a free deliberate and informed act breaking the chain of causation stems from *R v Kennedy* [2007] UKHL 38.

<sup>142</sup> *R v Cotswold Geotechnical (Holdings) Ltd* [2011] EWCA Crim 1337.

<sup>143</sup> Connal, R. C., Metcalfe, K., 'Into the unknown: prosecutions for workplace accidents in the era of the Corporate Manslaughter and Corporate Homicide Act 2007,' (2008), *Scottish Criminal Law*, 969.

<sup>144</sup> *Ibid.*

### ***The fault element***

It is important to note that the Act will not bite for every single breach of duty - only 'the most serious management failings warrant the application of a...criminal offence'.<sup>145</sup> The breach must have been 'gross' i.e. 'falls far below what can reasonably be expected of the organisation in the circumstances' (s.1(4)(b)). Considering this definition is not 'sufficiently clear'<sup>146</sup> and the common law one is circular - 'so bad in all the circumstances...that it should be judged as criminal' - certain questions are left unanswered. What is the reasonable standard? How far below the standard constitutes gross? And whose conduct can be taken into account? Gobert argues 'to an extent [these]...are addressed in s.8 of the Act',<sup>147</sup> which provides factors for the jury to consider, Wells disagrees stating 'these seem to complicate rather than clarify'.<sup>148</sup>

The first compulsory factor, is the organisation's non-compliance with health and safety legislation (s.8(2)). Applying this to the test, will the reasonable standard of compliance 'be of a universal standard applicable to companies of a similar size or...industry?'<sup>149</sup> If so, there is the potential for 'an across-the-board lowering of industry standards'.<sup>150</sup> Further, in relation to how far below the reasonable standard equates to a gross breach, 'are companies...expected to expend more energy and income on installing and maintaining a first-class health and safety regime or will economic circumstances dictate [otherwise]?' which, again, will allow for detraction from health and safety compliance. Lastly, given that 'a significant connection is required between the gross failure...and the senior management of the organisation',<sup>151</sup> a further concern is whether the jury will be able to aggregate the actions of junior members with senior management. If they can, then, 'the difficulty...will lie in piecing together the 'jigsaw' of blameworthiness'.<sup>152</sup> In light of these ambiguities, Wells' view that s.8 causes more confusion rather than clarification, is well-founded.

Additionally, under s.8(3) the jury may also consider the organisations 'attitudes, policies, systems or accepted practices' and relevant health and safety guidance. The issue with the former, is that, a consideration of the company's culture, with particular regard to their health

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<sup>145</sup> Home Office, *Corporate Manslaughter: The Government's Draft Bill for Reform*, para.32.

<sup>146</sup> House of Commons Home Affairs and Work and Pensions Committee, para.173.

<sup>147</sup> Gobert, 'Thirteen years in the making but was it worth the wait?' 417.

<sup>148</sup> Wells, 'Corporate criminal liability: a ten year review,' 857.

<sup>149</sup> Griffin, 'Corporate Manslaughter: A Radical Reform?' 161.

<sup>150</sup> Gobert, 'Thirteen years in the making but was it worth the wait?' 417.

<sup>151</sup> Harris, J., 'The Corporate Manslaughter and Corporate Homicide Act 2007: unfinished business?' (2007), *Company Lawyer*, vol.28(11), 321.

<sup>152</sup> Dobson, A., (2009) 'The Corporate Manslaughter and Corporate Homicide Act 2007: A Symbolic Response,' (2009), *Asia Pacific Law Review*, vol.17(2), 193.

and safety record, could create a 'danger...that the "reasonable standard" test will be made subject to mitigating factors'.<sup>153</sup> So, whilst the breach may fall far below the reasonable standard, an excellent record of compliance could encourage the jury to find against corporate liability. In terms of the latter, the argument is that 'guidance was not designed to have legal force and should not be used to establish criminal liability'.<sup>154</sup>

## **2.2 Practical or symbolic?**

In light of these criticisms the Act's practical purpose to 'secure in a wider range of cases a conviction',<sup>155</sup> needs to be reviewed. The Regulatory Impact Assessment estimated 'between 10–13 additional prosecutions a year',<sup>156</sup> so by now there should have been in excess of 100 prosecutions. To date, although 'an avalanche of cases was never expected'<sup>157</sup> there has been *only* 25 convictions and three acquittals. Compared to the 137 deaths recorded by the HSE in 2016/17,<sup>158</sup> and the fact that the 'total ranks highly in comparison with virtually all other recorded causes of premature death in the UK',<sup>159</sup> elucidates the Act's prosecutorial failings. Its commencement order has been a means of justifying the lack of prosecutions as only 'acts, failures, decisions...that occurred'<sup>160</sup> on or after 2008 qualified. Consequently, 'it may well be...that the paucity of cases... is simply...the time-lag in its effect',<sup>161</sup> which 'appears even more plausible when one notes that 12...convictions under the Act have been secured in...2015 and 2016'.<sup>162</sup> The legitimacy of this justification has been doubted. In the House of Commons, Emily Thornberry MP questioned why there had been so few prosecutions under the CMCHA 2007. The Attorney General, Dominic Grieve, responded there were 'in the region of 50 cases where corporate manslaughter is one of the potential offences under consideration'.<sup>163</sup> Further, a Freedom of Information Request to the CPS in November 2012 revealed that, since coming into force, 152 cases had been referred under the Act and that

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<sup>153</sup> Griffin, 'Corporate Manslaughter: A Radical Reform?' 163.

<sup>154</sup> House of Commons Home Affairs and Work and Pensions Committee, para.182.

<sup>155</sup> Home Office, *Corporate Manslaughter: The Government's Draft Bill for Reform*, para.6.

<sup>156</sup> Home Office, *Corporate manslaughter and corporate homicide*, para.25.

<sup>157</sup> Tombs, S., 'The UK's corporate killing law: Un/fit for purpose?' (2017), *Criminology & Criminal Justice*, Aug 2017 ed., 5.

<sup>158</sup> Health and Safety Executive, *Health and Safety Statistics 2016/17*, (London: HSE), at: <http://www.hse.gov.uk/statistics/>

<sup>159</sup> Tombs, S., 'Still killing with impunity: corporate criminal law reform in the UK,' (2013), *Policy and Practice in Health and Safety*, vol.11:2, 63.

<sup>160</sup> Centre for Corporate Accountability, *Guidance on the Corporate Manslaughter and Corporate Homicide Act 2007. A comprehensive briefing for the layperson and expert*, (London: Centre for Corporate Accountability, 2008), 25.

<sup>161</sup> Tombs, 'Still killing with impunity: corporate criminal law reform in the UK,' 69.

<sup>162</sup> Tombs, 'The UK's corporate killing law: Un/fit for purpose?' 5.

<sup>163</sup> Attorney General (2012) Letter to Emily Thornberry, 4 April. Available at: <http://data.parliament.uk/DepositedPapers/Files/DEP2012-0608/AG%20-%20Emily%20Thornberry%20MP%204%204%2012.pdf>

'there are currently 74 cases under review'.<sup>164</sup> Considering that, four years later the CPS have only '33 cases under active consideration',<sup>165</sup> the prediction of a 'simple accumulation or upwards trajectory of cases over time',<sup>166</sup> is evidentially misconceived.

One would think that after 10 years in force, we could now discern trends and practices that have occurred in the Act's application but so far, out of the 25 convictions, 16 have comprised guilty pleas and virtually all of the cases have involved small companies. Consequently, not only does this leave the "senior management" test unchallenged,<sup>167</sup> but represents a serious deficiency in 'facilitat[ing] the prosecution of medium and larger organisations'.<sup>168</sup> In other words, 'the vast majority of cases brought under the new law could have succeeded under common law'.<sup>169</sup> Ultimately, we still await a 'sufficiently complex [case] to test the capacity of the new attribution mechanisms'.<sup>170</sup> The Grenfell disaster, if prosecuted, will bring such an impetus. However, until those 'prosecutions ensue...much remains speculative'.<sup>171</sup> For now, Almond and Colover's observation, that the Act is 'conservative in form and is unlikely fundamentally to change'<sup>172</sup> the law, remains credible.

Nevertheless, numerous scholarly articles on the subject, have tended to balance the Act's practical shortcomings, on the one hand, with its 'symbolic significance'<sup>173</sup> on the other. Gobert points out that its symbolic significance 'may ultimately transcend its methodological deficiencies',<sup>174</sup> because 'it signifies that companies...are not above the law and are capable of committing crimes as grave as manslaughter'. In essence, the threat of being prosecuted for a "real" crime, 'should...lead to greater attention being paid to the calculus of risk management decisions, with higher priority...given to health and safety'.<sup>175</sup> However, given 137 workplace deaths occurred 2016/17<sup>176</sup> 'vastly understates those killed by work',<sup>177</sup> suggesting that such symbolic deterrence was overstated. Almond and Colover argue that

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<sup>164</sup> Crown Prosecution Service, *Freedom of Information Request*, (Reference no: 3539, 2012).

<sup>165</sup> Crown Prosecution Service, *Freedom of Information releases 2016*, (Reference no: 6573, 2016).

<sup>166</sup> Tombs, 'The UK's corporate killing law: Un/fit for purpose?' 8.

<sup>167</sup> Wells, 'Corporate criminal liability: a ten year review,' 860.

<sup>168</sup> Tombs, 'Still killing with impunity: corporate criminal law reform in the UK,' 63.

<sup>169</sup> Tombs, 'The UK's corporate killing law: Un/fit for purpose?' 9.

<sup>170</sup> Almond, P., 'Political culture and corporate homicide liability in the UK and Europe,' (2015) (eds.) Erp, V., Huisman W., and Walle, G., *The Routledge Handbook of White-Collar and Corporate Crime in Europe*, (London & New York, Routledge, 2015) 369

<sup>171</sup> Connal et al., 'Into the unknown,' 970.

<sup>172</sup> Almond, P., and Colover, S., 'Communication and social regulation: the criminalisation of work-related death,' (2012), *British Journal of Criminology*, vol.52(5), 1000.

<sup>173</sup> Tombs, 'Still killing with impunity: corporate criminal law reform in the UK,' 63.

<sup>174</sup> Gobert, 'Thirteen years in the making but was it worth the wait?' 413, 431.

<sup>175</sup> Ibid 432.

<sup>176</sup> Sargeant, 'Two steps forward, one step back,' 1.

<sup>177</sup> Tombs, 'Still killing with impunity: corporate criminal law reform in the UK,' 63.



symbolism 'provides a degree of reassurance and control, but this is undercut by a fundamental commitment to the maintenance of a functioning capitalist economy'.<sup>178</sup> In other words, the Act works as a 'confidence trick',<sup>179</sup> inducing 'a sense of complacency that something has...been done to improve safety levels when no improvement has actually occurred'.<sup>180</sup> Ultimately, the Act is complementary to a neo-liberal climate, where enforcement and investigation into work-place deaths is seen as an 'unjustified intervention into natural, efficient, free markets and thus as something to be avoided'.<sup>181</sup>

### ***Inadequate enforcement***

So far, the discussion has concentrated on the Act's shortcomings but its enforcement has also 'become an increasingly high-profile issue'.<sup>182</sup> The police, HSE and the CPS are all subject to the *Work-related death protocol of liaison*,<sup>183</sup> which determines that the primacy of the investigation lies with the police. Whether the police are suited to such a task is questionable. Grimes, contends that, 'the lack of cases to date is...the result of those with responsibility to investigate and prosecute lacking the necessary resources, co-ordination and training'.<sup>184</sup> The police are 'instinctively drawn towards establishing the immediate cause',<sup>185</sup> which deflects focus from being concentrated on systemic failings. Essentially, this change of investigatory technique marks 'a considerable departure from their normal responsibilities of investigating serious personal crime',<sup>186</sup> and demonstrates a potential reason as to why the corporate defendant, so far, has predominantly been small companies. This is exacerbated, by the budgetary cuts of the HSE whose 'resources have been reduced by successive governments',<sup>187</sup> and the willingness of the CPS to prosecute 'only the safest cases'.<sup>188</sup> These deficiencies combined, creates an opportunity for corporate giants to abuse the system. Thus, the CMCHA will is only effective, if 'the prosecuting authorities are willing to make use of the new offence'.<sup>189</sup>

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<sup>178</sup> Almond et al., 'Communication and Social Regulation,' 1001.

<sup>179</sup> Ibid.

<sup>180</sup> Haines, F., and Hall, A., (2004), 'The Law and Order Debate in Occupational Health and Safety,' (2004) *Journal of Occupational Health and Safety: Australia and New Zealand*, vol.20, 263–73.

<sup>181</sup> Almond et al., 'Communication and Social Regulation,' 1001.

<sup>182</sup> Almond, 'Regulation Crisis', 285.

<sup>183</sup> CPS, ACPO, HSE, LGA et al., *Work-related deaths: a protocol for liaison (England and Wales)*, (London: National Liaison Committee for the Work-related Deaths Protocol, WRDP1 09/11, 2011)

<sup>184</sup> Grimes, J., 'Call to get tough on corporate manslaughter,' *The Times*, 5 April 2005.

<sup>185</sup> Warburton, C., 'Corporate manslaughter: in deep water,' (2017), *Health & Safety at Work*, Sept ed.

<sup>186</sup> Slapper, G., 'Justice is mocked if an important law is unenforced,' (2013), *Journal of Criminal Law*, vol.77(2), 93.

<sup>187</sup> Tombs, 'Still killing with impunity: corporate criminal law reform in the UK,' 71.

<sup>188</sup> Tombs, 'The UK's corporate killing law: Un/fit for purpose?' 9.

<sup>189</sup> Field, S., and Jones, L., 'Five years on: the impact of the Corporate Manslaughter and Corporate Homicide Act 2007: plus ça change?' (2013), *International Company and Commercial Law Review*, vol.24(6), 245.

### 3 The Obstacles of the CMCHA 2007

#### *Medium/large companies escaping conviction*

The failure of the identification doctrine was fundamentally linked to its individualistic focus; it being harder to identify individuals in larger, complex, companies. That same focus, is recognised, albeit with a modernised face, in the CMCHA. It is suggested that the senior management test operates as a façade, behind which the ‘identification principle still dominates the corporate manslaughter regime’.<sup>190</sup> The test requires that senior management must be a substantial element in the breach (s.1(3)). The modernised face appearing in the plural “senior management”, as opposed to “senior manager”. The significance being, that corporate liability would seemingly be satisfied by ‘an aggregation of decision making’,<sup>191</sup> as opposed to identifying one culpable individual under the former regime. It can be viewed as superior to the identification doctrine, as it makes ‘the task of satisfying the elements of the test easier’.<sup>192</sup>

However, even if an aggregation element would slightly improve the law from its predecessor, the test still emanates serious deficiencies in prosecuting large corporations. Firstly, the senior management requirement places a ‘reliance upon individuals as proxies for organisations, and with individual fault as a proxy for organisational culpability’.<sup>193</sup> Finding corporate liability through aggregation, still requires finding fault in *individuals* in the first place. Applied to multi-layered organisations, where ‘individual actors are hidden under corporate shrouds’,<sup>194</sup> the prospect of convictions remains doubtful. Hence why Gobert, found the Act to be ‘regressive’.<sup>195</sup> This judicial relapse on individual focus, can be observed in cases decided under the Act so far; although, it is accepted that the latter has comprised of small companies:

- *Geotechnical Holdings Ltd*<sup>196</sup> The company was convicted because the victims death, ‘...was caused by the gross breach by the company, acting through its Managing Director Mr Eaton’.
- *J Murray & Son Ltd*<sup>197</sup> The company was convicted on the basis that the controlling director, ‘personally devised and directed the operations at...[the] mixing plant’ which led to a death.

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<sup>190</sup> Tariq, ‘A 2013 look at the corporate killer,’ 18.

<sup>191</sup> Ferguson, P., ‘Corporate Manslaughter and Corporate Homicide Act 2007,’ (2007), *Scots Law Times*, vol.35, 253.

<sup>192</sup> Tariq, ‘A 2013 look at the corporate killer,’ 19.

<sup>193</sup> Price, L., ‘Finding fault in organisations – reconceptualising the role of senior managers in corporate manslaughter,’ (2015) *Legal Studies*, vol.35(3), 394.

<sup>194</sup> Harlow, J., ‘Corporate criminal liability for homicide: a statutory framework,’ (2011), *Duke Law Journal*, vol.61(1), 149.

<sup>195</sup> Gobert, ‘Thirteen years in the making but was it worth the wait?’ (2008), 413.

<sup>196</sup> *R v Cotswold Geotechnical Holdings Ltd*, Winchester Crown Court, 17 February 2011 (unreported)

<sup>197</sup> *R v J Murray & Son Ltd* [2013] NICC 15, at 19.

- *Pyranha Mouldings Ltd*<sup>198</sup> During the sentencing of the company, the judge made 'it clear that the whole purpose of the sentences...is to punish the directors who are responsible for the state of affairs that led to this fatal accident'.<sup>199</sup>

The senior management test, by continuing to rely on individuals, 'may simply reproduce the failings of the common law offence it replaced'.<sup>200</sup> The law remains ignorant to the fact that 'the larger the company, the greater the confusion over responsibility'<sup>201</sup> and so identifying the senior management, much like the directing mind and will, remains elusive. Indeed, the only element working to soften the blow, is that culpability need not be found in one person, but aggregated over many thus the CMCHA represents an 'expanded form of the identification doctrine'.<sup>202</sup>

The possibility of aggregating individual fault, begs the question, which individuals can be included? Unfortunately, the 'senior management' definition, 'those making decisions about, or actually managing, the whole or a substantial part of the organisation's activities (s.1(4)(c)), fails to provide detail on whether middle or junior levels, carrying out such activities under delegation would be incorporated. If they are not, then, as the Centre for Corporate Accountability has pointed out, 'an incentive could exist for directors to...delegate responsibility'.<sup>203</sup> Tariq, labelling such levels as 'scapegoats', agrees, stating 'this restriction would fit perfectly into the palms of senior management'.<sup>204</sup> Though this remains untested under the Act, the likelihood of the judiciary taking a broad approach, so as to include other management levels, 'is discouragingly dim'.<sup>205</sup> Some argue that this issue has been circumvented, at least to some degree, by s.19. This allows for additional proceedings under the Health and Safety at Work Act 1974. The positive is that liability is established 'without any requirement to prove a senior manager's failure'<sup>206</sup> and thus, the immunity that large companies appear to enjoy under the CMCHA diminishes. Nevertheless, the HSWA fails to provide a practical alternative in many respects. Field and Jones contend that prosecuting 'through this channel may not satisfy public demand'.<sup>207</sup> The Act makes no distinction between non-fatal and fatal accidents, so when a fatality does occur, the public response is that a "mere" health and safety breach'<sup>208</sup> has occurred, as opposed to condemning the company

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<sup>198</sup> *R v Pyranha Mouldings Ltd*, Liverpool Crown Court, 12 January 2015 (unreported)

<sup>199</sup> *R v Pyranha Mouldings Ltd and Peter Mackereth* (Sentencing remarks) [2015] All ER (D) 292.

<sup>200</sup> Tombs, 'Still killing with impunity: corporate criminal law reform in the UK,' 69.

<sup>201</sup> Craig, 'Thou shall not do murder,' 18.

<sup>202</sup> Price, 'Finding fault in organisations,' 392.

<sup>203</sup> Harris, 'The Corporate Manslaughter and Corporate Homicide Act 2007: unfinished business? 322

<sup>204</sup> Tariq, 'A 2013 look at the corporate killer,' 19.

<sup>205</sup> Ibid.

<sup>206</sup> Griffin, 'Corporate manslaughter: a radical reform?' 164.

<sup>207</sup> Field, S., et al, 'Death in the workplace: who pays the price?', (2011), 169.

<sup>208</sup> Ibid 168.

as a “corporate killer”. This ‘breach of fair labelling’, was only intensified by the ‘failure to extend the criminal label’<sup>209</sup> in the major disasters previously discussed, causing the HSWA to suffer a ‘legitimacy deficit’.<sup>210</sup> Furthermore, the HSWA is enforced by the Health and Safety Executive (HSE) who adopts a ‘compliance strategy and prefers advice and assistance to companies over prosecution’;<sup>211</sup> a “law as a last resort” approach. Consequently, prosecution is only brought in ‘some 20 % of cases where death has occurred at work’.<sup>212</sup> Clearly, then, the HSWA is not an appropriate “back-up” to prosecuting large companies which escape the CMCHA.

Recent suggestions are that we may now be experiencing ‘a more diverse corporate defendant’<sup>213</sup> in light of the successful prosecution against *CAV Aerospace Ltd*,<sup>214</sup> a medium-large company, with a complex management structure. Although, *prima facie*, this is to be welcomed as a ‘triumph over all the potential barriers to conviction’,<sup>215</sup> the fact that there was evidentiary correspondence showing a senior manager’s disregard for safety, perhaps suggests the case was not the long awaited challenge to the CMCHA that so many hoped it would be. Arguments that ‘now we have had a conviction of a large company, accusations that the Act is impotent...appear less tenable’<sup>216</sup> must be doubted. This is especially so, considering the decision, even after three years, remains isolated. Nevertheless, it is certainly plausible to conclude that the law is moving in the right direction. *R v Maidstone and Tunbridge Wells NHS Trust* is noteworthy. Firstly, it being an NHS Trust is “ground-breaking”<sup>217</sup> in itself, secondly, the judge decided that rather than having to stipulate specific individuals, it is sufficient that the court identify the lowest “tier” of management whose culpability will qualify.<sup>218</sup> It is, hoped that ‘the opaqueness of the senior management test has potentially been clarified’<sup>219</sup> affording judges greater knowledge on how to interpret and apply it to larger companies. For now, the question of whether the net of ‘corporate liability under the CMCHA

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<sup>209</sup> Almond, ‘Regulation crisis’, 289.

<sup>210</sup> Almond et al., ‘Communication and Social Regulation,’ 998.

<sup>211</sup> Field, S., et al, ‘Death in the workplace: who pays the price?’ 170.

<sup>212</sup> Ibid.

<sup>213</sup> Field, S., ‘Criminal liability under the Corporate Manslaughter and Corporate Homicide Act 2007: a changing landscape,’ (2016), *International Company and Commercial Law Review*, vol.27(7), 229.

<sup>214</sup> *R v CAV Aerospace Ltd*, Central Crown Court, 31 July 2015 (unreported)

<sup>215</sup> Roper, ‘The Corporate Manslaughter and Corporate Homicide Act 2007 – a 10-year review,’ 51.

<sup>216</sup> Ibid 59.

<sup>217</sup> Field, ‘Criminal liability under the CMCHA 2007: a changing landscape,’ 232.

<sup>218</sup> *R v Dr Errol Cornish and Maidstone and Tunbridge Wells NHS Trust*, Inner London Crown Court, 27 January 2016 (unreported), para.74

<sup>219</sup> Roper, ‘The Corporate Manslaughter and Corporate Homicide Act 2007 – a 10-year review,’ 50.

may be expanding<sup>220</sup> remains elusive; it being, 'an ugly hybrid of individualist corporate liability and acceptance of organisational culpability'.<sup>221</sup>

### ***Punishment***

A fine is the predominant punishment for corporate manslaughter. Under the common law, such punishment proved disappointing: fines 'approximated in a range of £4,000 to £90,000'.<sup>222</sup> It is, therefore, no wonder why the CMCHA, threatening an unlimited fine (s.1(6)), and the 2010 Definitive Guidelines<sup>223</sup> emphasising 'punitive and severe penalties',<sup>224</sup> are to be 'welcomed at their inception'.<sup>225</sup> The Guidelines advocate that fines will 'seldom be less than £500,000' and 'may be measured in millions of pounds'. In reaching such figures, the courts are required to assess the seriousness of the offence and any aggravating or mitigating features, before turning to the company's financial position. Although statute advises that fines should be at a level which the defendant is capable of paying, the Guidelines recognise that in the gravest cases, putting the company out of business may be an appropriate consequence.<sup>226</sup> The Guidelines bark but the extent to which this is turned into bite, can only be measured through a reflection of their application in cases so far.

The first case *R v Cotswold Geotechnical Holdings Ltd* resulted in a £350,000 fine. Although this falls short of the minimum threshold, the company's financial position was 'parlous'; the fine representing 116% of its turnover.<sup>227</sup> The judge recognised the possibility of liquidation, stating that while it is 'unfortunate', it is 'unavoidable'.<sup>228</sup> Thus, initially, the guidelines appeared to send a strong message that fines reflect the severity of the offence. This momentum was short-lived. A series of cases that followed *Cavendish Masonry Ltd*<sup>229</sup> and *JMW Farms*<sup>230</sup> resulted in fines of £150,000 and £187,500 respectively. Not only is this a significant departure from the threshold, but of greater concern, represents the courts' attitude

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<sup>220</sup> Field, 'Criminal liability under the CMCHA 2007: a changing landscape,' 232.

<sup>221</sup> Price, 'Finding fault in organisations,' 393.

<sup>222</sup> Ibid.

<sup>223</sup> Sentencing Guidelines Council, *Corporate Manslaughter & Health and Safety Offences Causing Death: Definitive Guideline*, (2010).

<sup>224</sup> Field, S., and Jones, L., 'The Corporate Manslaughter and Corporate Homicide Act 2007 and the sentencing guidelines for corporate manslaughter: more bark than bite?' (2015), *Company Lawyer*, vol.36(11), 327.

<sup>225</sup> Field, 'Criminal liability under the CMCHA 2007: a changing landscape,' 229.

<sup>226</sup> Sentencing Guidelines Council, *Definitive Guideline*, (2010), para.19

<sup>227</sup> 'Company fined £385,000 in first corporate manslaughter case', *Health & Safety at Work*, vol.17(2), 4.

<sup>228</sup> *R v Cotswold Geotechnical Holdings Ltd*, Winchester Crown Court, 17 February 2011

<sup>229</sup> *Cavendish Masonry Ltd*, Oxford Crown Court, 22 May 2014 (unreported).

<sup>230</sup> *R v JMW Farms Ltd* [2012] NICC 17.

to prioritise ‘the adverse financial impact of a hefty fine on the defendant’,<sup>231</sup> over ensuring sentences are punitive and sufficient, in effect keeping companies solvent. Ironically, this fixation on financial viability has resulted in ‘widely varying fines for similar offences’.<sup>232</sup> During the Guideline’s consultation process, various interest groups petitioned for a 2.5-10% correlation between fines and turnover,<sup>233</sup> in order ‘to have an equal economic impact on organisations of different sizes’.<sup>234</sup> The Sentencing Guidelines Council rejected such proposals, arguing that the circumstances of the defendant and the financial impact of the fine will vary too much and could provide ‘a perverse incentive to manipulation of corporate structure’.<sup>235</sup> The SGC initiated ‘a wholesale review’<sup>236</sup> in a 2014 consultation paper to form ‘an approach to sentencing, that more closely links the means of the offender – alongside the seriousness of the offence – to the final sentence’.<sup>237</sup> The renewed Guidelines,<sup>238</sup> effective from 1 February 2016, require the court to focus on the annual turnover of the company to set a proportionate range and starting point. For medium and large-sized organisations £3 million and £7.5 million respectively. If we were to apply this to *CAV Aerospace*,<sup>239</sup> whose turnover was in excess of £100 million, there would have been potential for a £20 million fine to be levied, as opposed to the mediocre £600,000 imposed. Equally, the range is broader, reducing the starting point for smaller organisations, a “micro organisation”,<sup>240</sup> which would encapsulate most of the companies prosecuted to date, would face a £300,000 starting point, which ‘may better reflect the realities of sentencing’.<sup>241</sup>

In the seven cases the guidelines have been applied, six comprised micro-organisations: three resulted in £300,000 fines,<sup>242</sup> two £500,000<sup>243</sup> and one £600,000.<sup>244</sup> Although the fines concur

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<sup>231</sup> Field et al., ‘More bark than bite?’ 329.

<sup>232</sup> Ibid 330.

<sup>233</sup> Sentencing Advisory Panel, *Advice to the Sentencing Guidelines Council: Sentencing for Corporate Manslaughter and Health and Safety Offences Involving Death*, (2009), 23.

<sup>234</sup> Ibid para.55

<sup>235</sup> Sentencing Guidelines Council, *Definitive Guideline*, para.15.

<sup>236</sup> Field, ‘Criminal liability under the CMCHA 2007: a changing landscape,’ 229.

<sup>237</sup> Sentencing Council, *Health and safety offences, corporate manslaughter and food safety and hygiene offences guidelines consultation*, (2014)

<sup>238</sup> Sentencing Council, *Health and safety offences, corporate manslaughter and food safety and hygiene offences: Definitive Guidelines*, (2015).

<sup>239</sup> *R v CAV Aerospace Ltd*, Central Crown Court, 31 July 2015 (unreported).

<sup>240</sup> Referring to an organisation with a turnover of up to £2 million.

<sup>241</sup> Field et al., ‘The Corporate Manslaughter and Corporate Homicide Act 2007 and the Sentencing Guidelines for corporate manslaughter: more bark than bite?’ (2015), 332

<sup>242</sup> *Health and Safety Executive v Sherwood Rise Ltd*, Nottingham Crown Court, 5 February 2016 (unreported); *Health and Safety Executive v SR and RJ Brown*, Manchester Crown Court, 16 March 2017 (unreported); *Health and Safety Executive v Koseoglu Metalworks Ltd*, Chelmsford Crown Court, 19 May 2017 (unreported).

<sup>243</sup> *R v Monavon Construction Ltd*, Central Criminal Court, 27 June 2016 (unreported); *Health and Safety Executive v Ozdil Investments Ltd*, Chelmsford Crown Court, 19 May 2017 (unreported).

<sup>244</sup> *R v Bilston Skips Ltd*, Wolverhampton Crown Court, 16 August 2016 (unreported)

with the relevant sentencing ranges, they still fail to reflect the level of culpability; each case was found to be a “category A” offence. For example, the case against *SR and RJ Brown*<sup>245</sup> resulted in a £300,000 fine, falling short of the £450,000 starting point, and in particular, the £800,000 maximum. Ultimately, ‘the courts appeared to be...more punitive, just not as punitive as they possibly could’.<sup>246</sup> That is until *Health and Safety Executive v Martinisation (London) Ltd*,<sup>247</sup> a small organisation deemed to have committed a category A offence, fined £1.2 million when two of its employees died while trying to haul a sofa onto a balcony. The relevant starting point was £800,000, the range £540,000–£2,800,000, appearing to ‘make the punishment fit the crime – or size of the offender’;<sup>248</sup> a robust response to corporate manslaughter cases that has been long-awaited.

This is merely one case and ‘it would seem premature to conclude that penalties of this magnitude will become the norm’.<sup>249</sup> Fields argues that ‘the 2015 guidelines are not ideal, it still does not allow for organisations which are...turnover poor but asset rich’<sup>250</sup> meaning there is still a gap for abuse. Furthermore, it is argued that the guidelines are not the appropriate means of reform, since they target imposing higher fines against large corporations *once* they have been convicted; the conviction itself continuing to elude the courts. While it is hoped that the approach taken in *Martinisation* will signify the way forward, for now, we can at least rely on the guidelines strong symbolic message, that ‘it will be cheaper to comply with the law than break it’;<sup>251</sup> much like the CMCHA it accompanies.

### ***Plea bargaining***

The blinding paradox of the CMCHA, is that while the senior management test requires identifying culpable individuals, the Act explicitly excludes individual liability (s.18). This is ‘possibly influenced by...the CBI and Institute of Directors’,<sup>252</sup> who only showed ‘vociferous support for a change in corporate manslaughter law’<sup>253</sup> once s.18 was added. This does not mean that individuals enjoy complete immunity from prosecution, they may still be prosecuted

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<sup>245</sup> *Health and Safety Executive v SR and RJ Brown*, Manchester Crown Court, 16 March 2017 (unreported).

<sup>246</sup> Roper, ‘A 10-year review,’ 69.

<sup>247</sup> *Health and Safety Executive v Martinisation (London) Ltd*, Central Criminal Court, 7 July 2017 (unreported)

<sup>248</sup> Field, ‘Criminal liability under the CMCHA 2007: a changing landscape,’ 229.

<sup>249</sup> *Ibid* 231.

<sup>250</sup> *Ibid* 230.

<sup>251</sup> Sentencing Council member Michael Caplan QC at:

<https://www.sentencingcouncil.org.uk/news/item/new-sentencing-guidelines-proposed-for-corporate-manslaughter-health-and-safety-and-food-safety-offences/>

<sup>252</sup> Wright, F., ‘Criminal liability of directors and senior managers for deaths at work,’ (2007), *Criminal Law Review*, Dec ed., 950

<sup>253</sup> Tombs, ‘The UK’s corporate killing law: Un/fit for purpose?’ 4.

for gross negligence manslaughter or s.37 of the HSWA, if they have consented to the offence or their negligence is attributable to it. The difficulty with this, is that it results in a 'plethora of potential charges...arising from the same death',<sup>254</sup> which in turn creates a dynamic for plea bargains. Guidance suggests that the prosecution should only accept pleas, where the sentence 'matches the seriousness of the offending', and must never do so just 'because it is convenient'.<sup>255</sup> In practice this is rarely abided by. Consequently, the liability of individuals, no matter how severe, 'is absorbed by the liability of the corporation'.<sup>256</sup> This is problematic, since it was the Government who recognised that 'without punitive sanctions against company officers, the proposed new offence might not provide a sufficient deterrent'.<sup>257</sup>

One of the most notable cases in which plea bargaining occurred was *Lion Steel Equipment Ltd*. The company and three of its directors were charged with corporate manslaughter and gross negligence manslaughter respectively, after an employee carrying out maintenance work on a roof fell to his death. Interestingly, the judge severed the corporate manslaughter charge because, 'a joint trial would have required directions to the jury of baffling complexity'.<sup>258</sup> Yet when the trial for the common law offences ensued 'the two individual directors...plea bargained their personal liability by accepting guilt on behalf of the corporate body'.<sup>259</sup> In other words, Lion Steel 'pleaded guilty to corporate manslaughter even though it was not on trial for that offence at the time'.<sup>260</sup> What is more, not only did those involved escape liability, but the prospect of individuals being prosecuted in the future was diminished when the Judge laid out the height of the bar to be grappled with in cases of gross negligence manslaughter.<sup>261</sup> Since this case, plea bargaining has become the "norm", which may explain why out of the 25 cases brought under the Act, 16 have consisted of guilty pleas. Generally, plea bargaining is used as a mechanism to "fast-forward" proceedings.<sup>262</sup> However, there are two lines of reasoning as to why it has become such a regularity under the CMCHA. Firstly, it is suggested that this is a coercive tool adopted by the prosecution. *Morrison, Hunt and Ollier* recognise that when directors are charged with common law manslaughter, which can lead to

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<sup>254</sup> Wells, 'Corporate criminal liability: a ten year review', 861.

<sup>255</sup> Crown Prosecution Service, *Accepting Guilty Pleas*, para.9.2.

<sup>256</sup> Menis, 'The fiction of the criminalisation of corporate killing', 477.

<sup>257</sup> House of Commons Library, *The Corporate Manslaughter and Corporate Homicide Bill*, (Bill 220 of 2005-06), 34.

<sup>258</sup> *R v Lion Steel Equipment Ltd*, Manchester Crown Court, 20 July 2012 (unreported) Remarks of His Honour Judge Gilbert QC at para.9.

<sup>259</sup> Woodley, M., 'Bargaining over corporate manslaughter – what price a life?' (2013), *Journal of Criminal Law*, vol.77(1), 34.

<sup>260</sup> Morrison, C., Hunt, R., and Ollier, R., 'Corporate Manslaughter – Are Directors The Bait?' (2012), *Health, safety & environment*, July 2012 ed.

<sup>261</sup> *R v Lion Steel Equipment Ltd*, para.12.

<sup>262</sup> Wells, C., and Quick, O., *Lacey, Wells and Quick Reconstructing Criminal Law: Text and Materials*, fourth edition, (Cambridge University press: Cambridge, 2010), 51.



life imprisonment, they are made to feel ‘sufficiently vulnerable’<sup>263</sup> so that any opportunity to evade such liability is welcomed. The benefit for the prosecution, is that while they exert pressure on defendants, they relieve their own. As *Pizzi* identifies, if the CPS cannot trust their ‘trial apparatus... to convict the guilty and acquit the innocent, it needs to find a way to avoid trial’,<sup>264</sup> prosecutors are using directors as the “bait” of corporate manslaughter convictions.<sup>265</sup> Alternatively, it may be directors instigating this agreement. After all, it is in their personal interests to evade liability, their ‘initiative is ‘to offer a corporate guilty plea in the hope or knowledge that any individual liability will be dropped with the added “bonus” of a reduction in any subsequent fine’.<sup>266</sup> This is problematic, since directors have a fiduciary duty to ‘promote the success of the company for the benefit of its members’ and part of that, entails a consideration of the effects of decision-making in the long-term.<sup>267</sup> Clearly, the decision to trade a guilty plea of corporate manslaughter, for personal immunity, does not align with this duty and could ‘potentially expose [directors] to future civil action’.<sup>268</sup>

#### **4 Overcoming Obstacles to the CMCHA 2007**

##### ***Reform to make medium and large corporations accountable***

To comprehend an holistic regime of liability <sup>269</sup> one must recognise companies as ‘free-standing entities, culpable for their own policies, procedures and systems’.<sup>270</sup> On 6 March 1987, the *Herald of Free Enterprise* capsized killing 193 passengers and crew. An investigation<sup>271</sup> found the assistant bosun, who failed to shut the bow doors, to be the immediate cause. But a far greater contributory factor lay in the systemic failings of the corporation ‘from top to bottom the body corporate was infected with the disease of sloppiness’.<sup>272</sup> The structure of managerial roles, or lack of, meant that duties were left unclear resulting in senior management failing to exert directions in respect of specific functions and an absence of any clear lines of communication. Clearly, the behaviour of ‘individuals...will never fully explain corporate culpability [and] organisations will always add an additional

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<sup>263</sup> Morrison et al., ‘Corporate Manslaughter – Are Directors The Bait?’

<sup>264</sup> Pizzi, W. T., (1998) ‘Punishment and procedure in the US: That theory and practice differ markedly’, *New Law journal*, vol.148, 988.

<sup>265</sup> Morrison et al., ‘Corporate Manslaughter – Are Directors The Bait?’

<sup>266</sup> Woodley, ‘Bargaining over corporate manslaughter,’ 39.

<sup>267</sup> Companies Act 2006, s.172

<sup>268</sup> Morrison et al., ‘Corporate Manslaughter – Are Directors The Bait?’

<sup>269</sup> See Dan-Cohen, M., *Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society*, (University of California Press, 1986) for a detailed analysis of the holistic approach

<sup>270</sup> Cavanagh, ‘Corporate criminal liability: an assessment of the models of fault,’ 415.

<sup>271</sup> Department of Transport, *The Merchant Shipping Act 1984 mv Herald of Free Enterprise*, (Report of Court No.8074, 1987).

<sup>272</sup> Ibid para.14.1.

dimension'.<sup>273</sup> The focus here is finding culpability within that additional dimension, i.e. the company's system.

Corporate structure, is the formal framework established to promote corporate goals, or overcome corporate pressures.<sup>274</sup> It does so, by acting as a "system of control", spanning across: planning objectives, establishing standards of performance, monitoring actual performance, comparing achievement with targets, and taking corrective action.<sup>275</sup> So, if a company's objective is to maximise profits, it may focus on increased productivity at the expense of health and safety. For example, in *R v Sterecycle (Rotherham) Ltd*,<sup>276</sup> an employee was killed due to 'dangerous operating practices...[being] allowed to develop under commercial pressure'.<sup>277</sup> If *Sterecycle* was a larger company, increased productivity would have been achieved through their internal structure. Those more senior in the hierarchy, would introduce a set of incentives 'to increase the likelihood that individuals will behave in desired ways'.<sup>278</sup> Thus, the corporate structure 'coerces compliance with corporate goals or aims';<sup>279</sup> why Price labels it a 'psychic prison'. Alternatively, returning to the situation in *P&O*, the company may be structured in a way where roles are disjointed and isolated, so that responsibility for criminogenic activities remains elusive. Though, this may have evaded derivative schemes of liability, under this holistic approach, the very fact that the company has been organised in such a manner and failed to avert foreseeable risks, would render the company liable. Additionally, it is suggested that corporate intentionality will be borne out of the company's policies. These are an expression of the corporate will, representing 'a synthesis of views or a compromise of views'.<sup>280</sup> For a safe system of work, Gobert argues that it is 'the company's responsibility to collect information regarding potential dangers..., collate the data, and implement policies which will prevent reasonably foreseeable risks from occurring'.<sup>281</sup> Policies to the contrary, which encourage risk taking, should be condemned as a breach of duty by the company and provide evidence that liability should arise. Not all companies operate under a formalised structure, with clearly expressed procedures and policies, it is just as common for companies to operate within its 'informal practices [than]...in

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<sup>273</sup> Price, 'Finding fault in organisations,' 386.

<sup>274</sup> Thompson, G., 'The Enterprise as a Dispersed Agency,' (1982), *Economy and Society*, vol.11, 236

<sup>275</sup> Mullins, L. J., *Management and Organisational Behaviour*, (London: Pitman, 1985), 307.

<sup>276</sup> *R v Sterecycle (Rotherham) Ltd*, Sheffield Crown Court, 7 November 2014 (unreported)

<sup>277</sup> <https://www.penningtons.co.uk/news-publications/latest-news/courts-impose-tough-penalties-in-corporate-manslaughter-cases/> [Accessed 18/04/18]

<sup>278</sup> Brickley, J., Smith, C., and Zimmerman, J., (2002) 'Business ethics and organizational architecture,' (2002), *Journal of Banking & Finance*, vol.26, 1822.

<sup>279</sup> Price, 'Finding fault in organisations,' 399.

<sup>280</sup> Gobert, 'Corporate criminality: four models of fault,' (1994), 408.

<sup>281</sup> Ibid 409.

its official decisions',<sup>282</sup> or to 'create a climate which discourages obedience to known rules'.<sup>283</sup> It is argued here, that a lack of policy, shows just as much about a company's attitude towards safety than a flawed one and that a disregard for known rules, would give a greater indicator that the company fell far below what is reasonably expected of them in the circumstances.

A company which transgresses the law, would have the defence of due diligence. The burden of proof lies with the company, to prove their system of work ensured safeguards against a risk of death. The practicality of such a defence is two-fold. Firstly, it would limit the offence to that which is inherently corporate and encourage the courts to make a distinction between the 'corrupt organisation', and the 'organisation of corrupt individuals'.<sup>284</sup> Secondly, it would ensure greater compliance with health and safety legislation, since the only possibility of escaping conviction, is to demonstrate that 'stringent procedures to combat illegal activity'<sup>285</sup> were in place. A move away from the individualistic criminal law, to a more systemic approach is favourable. The evidentiary problems inherent in the former will be ousted, as the courts will no longer have to 'attempt to squeeze corporate square pegs into the round hole of criminal law doctrines'.<sup>286</sup> Empirical evidence has shown that large companies are more likely to have formalised structures and rules in response to their diffused management systems.<sup>287</sup> Thus, under this reform, size will no longer dominate liability.

### ***Increasing the level of fines***

Punishment is 'the skeleton of the criminal justice system'<sup>288</sup> and encourages compliance with accepted standards of behaviour. The 2015 Guidelines aims to achieve this, by levying fines that 'bring home to management and shareholders the need to achieve a safe environment for workers and members of the public affected by their activities'.<sup>289</sup> Its object is 'the removal of gain derived through the...offence and the reduction of offending through deterrence'.<sup>290</sup> To some extent, the new guidelines are a significant step in the right direction. The average fine

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<sup>282</sup> Colvin, 'Corporate personality and criminal liability', 35.

<sup>283</sup> Field, S., and Jorg, N., (1991) 'Corporate Liability and Manslaughter: Should We Be Going Dutch?' (1991), *Criminal Law Review*, March ed.166.

<sup>284</sup> Pinto, J., Leana, C. R., and Pil, F. K., 'Corrupt organizations or organizations of corrupt individuals? Two-types of Organizational-level corruption,' (2008), *Academy of Management Review*, vol.33(3), 685.

<sup>285</sup> Wells, *Corporations and Criminal Responsibility*, 159.

<sup>286</sup> Gobert, J., 'Corporate criminality: new crimes for the times,' (1994), *Criminal Law Review*, Oct ed., 724.

<sup>287</sup> Pugh, D. S., and Hickson, D. J., *Writers on Organisations* (Harmondsworth: Penguin, 1989), 9-16

<sup>288</sup> Slapper, G., 'Corporate punishment,' (2010), *Journal of Criminal Law*, vol.74(3), 181.

<sup>289</sup> Sentencing Council, *Health and safety offences, corporate manslaughter and food safety and hygiene offences guidelines consultation*, (2014), 25.

<sup>290</sup> Field, 'Criminal liability under the CMCHA 2007: a changing landscape,' (2016), 230.

has increased from £251,138 to £528,571.<sup>291</sup> *Health and Safety Executive v Martinisation (London) Ltd*<sup>292</sup> resulted in the highest fine to be executed under the Act yet. Thus, the willingness of the judiciary to utilise the guidelines to their fullest extent is improving. Having said that, their primary purpose was to ensure that ‘fines on larger organisations were fulfilling the purposes of sentencing’;<sup>293</sup> hence, the ‘ramping up’<sup>294</sup> of fines at the top end. Given that the ‘apparent invulnerability of larger organisations to prosecution’<sup>295</sup> has yet to be rectified, it is difficult to quantify just how effective these new guidelines will turn out to be.

It is notable that the CMCHA was implemented to ‘complement, not replace, other forms of redress such as prosecutions under health and safety legislation’.<sup>296</sup> Since the latter is also covered by the 2015 guidelines, and has been more accessible for prosecuting large companies, it may be possible to glean some indications as to the judicial approach when applying them. Encouragingly, prior to the implantation of the Guidelines, ‘fines had already started to dramatically increase’.<sup>297</sup> For example, *Total E&P UK Ltd*<sup>298</sup> were fined £1.125 million following a gas leak and *Balfour Beatty*<sup>299</sup> £1 million for a road worker’s death. Better yet, in 2016/17 – the first full year with the Guidelines in operation – the total amount of fines reached £69.9 million, a huge increase from the £38.8 million recorded the previous year.<sup>300</sup> What is pivotal, is the size of the organisations being captured. One illustration, is the case against *Merlin Attractions*,<sup>301</sup> where 16 people were injured on one of its rollercoasters. The corporate giant showed an annual turnover of £385,000,000 and was sentenced to a fine of £7,500,000 reduced to £5,000,000 for an early guilty plea; this being ‘greater than the prescribed range for this specific type of offence’.<sup>302</sup> Beyond this, there has been ‘more fines

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<sup>291</sup> Roper, ‘A 10-year review,’ 66.

<sup>292</sup> *Health and Safety Executive v Martinisation (London) Ltd*, Central Criminal Court, 7 July 2017.

<sup>293</sup> Sentencing Council, *Health and safety offences, corporate manslaughter and food safety and hygiene offences guidelines consultation*, 5.

<sup>294</sup> Forlin, G., ‘The Sentencing Council consultation document relating to health and safety offences, corporate manslaughter and food safety and hygiene offence guidelines: “up up and away”,’ (2015), *Archbold Review*, vol.1, 6.

<sup>295</sup> Field et al., ‘More bark than bite?’ 327.

<sup>296</sup> Home Office, *Corporate Manslaughter: The Government’s Draft Bill for Reform*, 4.

<sup>297</sup> Forlin, G., ‘The Guidelines have finally arrived: “when the levee breaks”,’ (2016), *Archbold Review*, vol.3, 6.

<sup>298</sup> *Crown Office and Procurator Fiscal Service v Total E&P UK Ltd*, Aberdeen Sheriff Court, 22 December 2015 (unreported)

<sup>299</sup> *Health and Safety Executive v Balfour Beatty Plc*, Canterbury Crown Court, 25 January 2016 (unreported)

<sup>300</sup> Health and Safety Executive, *Enforcement in Great Britain 2017: Enforcement action taken by HSE, local authorities and, in Scotland, the Crown Office and Procurator Fiscal Service*, (2017), 3.

<sup>301</sup> *Health and Safety Executive v Merlin attractions Operations Ltd*, Stafford Crown Court, 27 September 2016 (unreported)

<sup>302</sup> Betts, G., ‘Sentencing very large corporations,’ (2016), *Journal of Criminal Law*, vol.80(6), 406.

of £1m or more, than in the previous 20 years'.<sup>303</sup> One potential deficiency is the absence of any reference to the company's assets when considering the impact of 'other financial factors' on the fine,<sup>304</sup> which could prevent fines from being proportionate. Currently, the process for calculating fines begins with determining the seriousness of the offence; consideration of the company's annual turnover to decide the appropriate starting point and range and then other financial factors to ensure proportionality with the overall means of the offender. Such factors include the profitability of the company, economic benefits derived from the offence and whether it could put the company out of business.<sup>305</sup> Since the company's assets do not directly fit into any of the above, it is suggested that an additional factor be added into the final step 3 along the lines of:

*An organisation's net assets will be a relevant factor where they enhance an organisation's value to such an extent, that merely considering turnover would improperly reflect their ability to pay a fine.*

If a company, based on turnover, was categorised as 'micro', yet had a considerable amount of assets, the court should consider an upwards adjustment. 'Assets' are defined by the International Financial Reporting Standards as, 'a resource controlled by the enterprise as a result of past events and from which future economic benefits are expected to flow to the enterprise'.<sup>306</sup> They may be categorised into **current assets** – short-term economic resources which can easily be converted into cash or **fixed assets** – long-term resources such as land or buildings. By way of illustration, in *Pyranha Mouldings Ltd*, a manufacturer of kayaks was fined £200,000 for the death of one of its employees. It enjoyed total audit exemption, suggesting the company was 'micro'. The court believed that any higher fine 'could not be absorbed without the risk of driving the company into liquidation'.<sup>307</sup> Nevertheless, its net assets at the end of 2014 totalled £1,015,771 a large part comprising current assets easily convertible into cash, it is suggested the fine would not 'inflict painful punishment' as it should.

There are those who argue that fines are not an appropriate form of punishment. Tombs objects to fines on the basis that they do not aid rehabilitation, deflect money from being spent on developing safer systems and are counter-productive since it is typically the innocent (employees and customers) that end up worse off – what is known as "overspill".<sup>308</sup> From a

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<sup>303</sup> Knutt, E., 'Updated: Total UK safety fines triple in first year under new sentencing guideline,' (2017), *Health & Safety At Work*, Jan 2017 ed.

<sup>304</sup> See, "step three" in Sentencing Council, *Health and safety offences, corporate manslaughter and food safety and hygiene offences: Definitive Guidelines*, (2015).

<sup>305</sup> Sentencing Council, *Definitive Guidelines*, 26.

<sup>306</sup> WILEY - VCH., *International Financial Reporting Standards (IFRS)*, (WILEY, 2011), 21.

<sup>307</sup> *R v Pyranha Mouldings Ltd*, Liverpool Crown Court, 12 January 2015 (unreported)

<sup>308</sup> Tombs, S., 'What to do with the Harmful Corporation,' (2016), *Justice, Power and Resistance*, Sep ed., 200.

different perspective, Forlin raises the concern that with higher fines, businesses may be persuaded to either scale down their operations<sup>309</sup> or move them outside of the UK.<sup>310</sup>

Contrary to these views, the opinion here is that the CMCHA, through fines, remedial<sup>311</sup> and publicity orders,<sup>312</sup> does impose the correct channel of punishment against corporations. In response to Tombs it is suggested that remedial orders ensure that safer systems are adopted and the focus on turnover in the renewed guidelines minimises the risk of overspill. For Forlin, it is unlikely that the risk of a fine would drive large businesses to move their operations or scale down, when a far-cheaper and efficient alternative is to merely adopt a safer working system. In fact, the argument here is that if fines were reduced, companies would perceive them as ‘calculable, rational risk[s] to take as a cost of doing business’.<sup>313</sup>

### ***Individual liability***

So how should the Act make scope for personal liability? A good starting point is to refer back the Act’s thorny consultation process where individual liability was a reality. In 2000 the Home Office proposed that any individual who could be shown to have had ‘some influence on, or responsibility for’ the offence should be subject to disqualification,<sup>314</sup> or if they have ‘substantially contributed’ to it, subjected to the harsher penalty of imprisonment.<sup>315</sup> Although, the inclusion of personal liability is to be welcomed, it is suggested that having two separate strands of secondary liability would add more confusion to an Act that is already ‘over-complex’.<sup>316</sup> A better alternative would be to adopt something akin to s.37 HSWA. If the offence has been committed ‘with the consent or connivance of, or to have been attributable to any neglect’ of those persons named above, they shall incur secondary liability. Clearly, with the individualistic attitude adopted under the Act so far and the concentration of cases against small companies, there would be little difficulty in satisfying these requirements; especially when in some cases it has been the director themselves at fault. Nevertheless, this proposal needs to complement the systemic reform already discussed. To do so, it is suggested that rather than imposing liability on persons for their direct actions to the death, liability would ensue from their involvement in a flawed corporate structure.

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<sup>309</sup> Forlin, ‘The Guidelines have finally arrived: “when the levee breaks”,’ 7.

<sup>310</sup> Forlin, ‘The Sentencing Council consultation document: “up up and away!”,’ 6.

<sup>311</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s.9

<sup>312</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s.10

<sup>313</sup> Tombs, ‘What to do with the Harmful Corporation,’ 200.

<sup>314</sup> Home Office, *Reforming the Law on Involuntary Manslaughter: The Government’s Proposals*, (May 2000), para.3.4.9

<sup>315</sup> *Ibid* para.3.4.13.

<sup>316</sup> Wells, ‘Corporate criminal liability: a ten year review,’ 854.

On the finding of guilt, it is suggested that individuals be disqualified and may be liable to imprisonment and/or an unlimited fine depending on the level of involvement and magnitude of harm caused. In respect of fines, it is suggested that the courts should review the remuneration that those in question were receiving in and around the time the offence was committed. If this is significantly high, the courts should be permitted to claw it back through an upwards adjustment of the fine to target “fat cat” directors who often tend to profit from their fatal shortcuts. Ultimately, incorporating personal liability into the CMCHA, and removing s.18 will prevent individuals who are clearly clothed with culpability from abusing the corporate veil. Through such exposure, the Act will become an effective deterrent, as directors and other senior members will be conscious to avoid the looming threat of personal punishment. Additionally, it would prevent the occurrence of the ‘phoenix phenomenon’ which means that companies can essentially evade their liability by entering into liquidation and directors can simply regroup under a new entity.<sup>317</sup> On the whole, it is suggested that a more systemic approach, harsher fines, and the inclusion of personal liability, will give the Act the grip it really needs to ensure that corporations stop ‘valuing deaths...as mere externalities’.<sup>318</sup>

## **Conclusion**

Clearly, the CMCHA 2007 has not achieved what it set out to. Even after ten years, the case law gives a vibrant indication that the largest and most complex companies, which the Act intended to bring to account, remain unscathed. The root of the problem, is that the Act’s ‘senior management’ test maintains a focus on individualistic rather than systemic fault, meaning that companies prosecuted so far could have been successfully prosecuted under the identification doctrine. Ultimately, it would seem that the symbolic legislation is little more than a ‘fudged compromise’,<sup>319</sup> which plays lip service to the public opprobrium while ensuring that relations are not vanquished with the business community. Despite this, recent cases, such as *CAV Aerospace* have appeared to signify a tougher rhetoric in applying the law. While this is to be welcomed, it is far too premature to assume that this represents the way forward thus we await a challenge to accurately determine the fitness of the Act.

This may be forthcoming, in light of the potential charges of corporate manslaughter following the recent tragedy at Grenfell Tower. On 14 June 2017, an electrical fire broke out on the fourth floor of a 24-storey tower block in North Kensington, killing 72 people. The flats, which were owned by Kensington and Chelsea London Borough Council, were reduced to a ‘charred

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<sup>317</sup> Gobert, ‘Thirteen years in the making but was it worth the wait?’ 426.

<sup>318</sup> Tombs, S., and Whyte, D., *The Corporate Criminal: Why Corporations Must Be Abolished*, (Routledge: London, 2015), 15.

<sup>319</sup> Roper, ‘A 10-year review,’ 50.

skeleton<sup>320</sup> after fire rapidly engulfed the building.<sup>321</sup> Initially, the overriding cause was pinpointed to the combustible cladding, which was applied during the 2014-16 refurbishment. It was found that a 'more fire resistant cladding could have been supplied at the small cost of an additional £2 per square metre'.<sup>322</sup> Nevertheless, the ongoing public inquiry has since revealed 'serious deficiencies in the installation of the windows, cavity barriers'<sup>323</sup> and fire doors, as well as poor safety management. Worryingly, therefore, fault spans across a range of local authorities and multi-national companies. This raises various challenges for the Act: can the senior management test finally stand up to large complex systems? Will it be possible to aggregate fault amongst a range of contributing companies, or, is merely being one of the causes of death enough? If so, how would this work with the criminal burden of proof, where a jury must be beyond reasonable doubt that the company caused the death? All of these questions will need to be carefully considered as the inquiry intensifies. If corporate manslaughter convictions are secured, then a safer and more promising future lies ahead where companies are no longer considered superior to the law. If they are not, then, the capability of the law will be seriously compromised and some major amendments will need to be immediately sought after. Based on the discussion throughout, the latter outcome is terrifyingly probable.

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<sup>320</sup> Bowcott, O., and Gentleman, A., 'Grenfell labelled a "national atrocity" as lawyers begin giving evidence', *The Guardian*, 11 December 2017

<sup>321</sup> Rodgers, L., 'The terrible speed with which the Grenfell fire spread', *BBC News*, 8 June 2018.

<sup>322</sup> Davies, R., Connolly, K., and Sample, I., 'Cladding for Grenfell Tower was cheaper, more flammable option', *The Guardian*, 16 June 2017.

<sup>323</sup> Bulman, M., 'Refurbishment turned Grenfell Tower from safe structure into major fire hazard, says leaked report', *The Independent*, 16 April 2018.