

The traditional common law difficulty law company business partnership essay

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Critically analyse the most significant features of the Corporate Manslaughter and Corporate Homicide Act 2007 and how it changed the law of corporate manslaughter in England and Wales. Is the Act an improvement on the common law which preceded it? Was the correct approach taken on the key issues? How could the Act be improved, in your opinion, and explain the significant strengths and weaknesses of the 2007 Act? Table of contents

Introduction

This paper analytically scrutinises the law of England and Wales that governs corporate manslaughter. The effect of the 2007 Corporate Manslaughter and Corporate Homicide Act is examined and evaluated in relation to the common law that preceded it. For the past century, this area of the law has been regarded as vastly vulnerable. The weaknesses have been clear. Essentially, since criminal liability traditionally arises from establishing personal accountability^[1] through mens rea (the guilty mind) and actus reus (the guilty act),^[2] it has somewhat been problematic to associate such to a corporation. Furthermore as they were afraid of opposing the influential corporate sector, governments became cautious in instigating any real reformation on the issue. In fact, the Conservative Party had extensively been a recipient of large financial donations from businesses and more recently, 'New Labour' has involved itself in nurturing healthier associations with large corporations to whom it once was unfriendly. This justifies partly the lengthy wait for the actual enactment of the Corporate Manslaughter and Corporate Homicide Act, which was a manifesto promise made a decade earlier.^[3] This paper ascertains whether the legislation was actually successful in achieving its main objective of installing a system, which

imposes criminal liability on businesses effectively in comparison to the earlier frail structure. Ab intio, it is fair to say that it would have been very difficult for this new enactment to further damage this area of law. This essay essentially examines the common law to recognise the difficulties, assesses the solutions offered by the new Act and also firmly discusses the improvements needed to develop the, still very weak, 2007 Act.

The Traditional Common Law Difficulty

Defamed by the common law governing corporate manslaughter, the health and safety model[4]of the twentieth century transformed away from all acknowledgement over the hundred years.[5]As mentioned, attributing criminal liability to a company was not simple; the method is noticeably weak and intricate. Such was true when establishing ordinary accountability on someone for many minor crimes, let alone imposing responsibility for the serious offence of manslaughter. One of the greatest difficulties confronted by English Law in the past century involved the fact that ' a business' is not ' a thing' with physical presence. A ' corporation' is solely a practical creation of the law[6]and principally, is not related to those who own or operate it.

[7]The case of *Salomon v Salomon and Co*[8]offered an instructive judgement that maintained the 1862 Companies Act and overturned the Court of Appeal. The court declared that the creditors were unable to claim debts from shareholders of the insolvent corporation and Lord MacNaughten viewed "[t]he company at law...[as] a different person altogether".[9]The judge regarded it entirely detached from its directors and shareholders, [10]even where they are intimately associated with business dealings.

[11]The Salomon Rule has many practical benefits[12]but are mainly outside

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the scope of this essay.[13]When considering this common law principle in a criminal law context, several difficulties arise. For instance, the author realises the injustice where victimised employees are unable to prosecute the ‘real operators’ or the company itself. The rule blatantly provides a way to escape criminal liability through a ‘corporate veil’. This was a significant problem that the 2007 legislation aimed to tackle, and succeeded in the author’s view. Before 2007, teleological jurisprudential analysis somewhat highlighted that companies should be dealt in ‘person’ as victims and offenders. Such stemmed from cases like *Jennings v CPS*,[14]where Mr Jennings and others were convicted for their actions whilst the company itself was not involved. Nonetheless in absence of legislation, corporate criminal responsibility was difficult since criminal law focuses upon finding personal guilt (guilty mind and conduct) of a distinct person.[15]The court found it difficult in associating ‘guilt’, as seen in *Tesco Supermarkets Ltd v Natrass*[16]where the store manager was not considered to be a ‘directing mind’ and the company was acquitted. Similarly, the common law was failing miserably in establishing corporate accountability for grave crimes like homicide and manslaughter, where evidence undergo further forensic examination. Even though a company is legally connected to its human proprietors, rational reasoning states that the only way to solve the issue is to cover the gap created by the Saloman principle – linking the owner’s physical conduct, with mental states, to the corporation.[17]The overall position slightly progressed with *Birmingham and Gloucester Railway Co*[18]as it held that a company could be liable by failing to act in accordance with statute. Such an omission was correlated to constitute the

actus reus. Eventually in *HL Bolton (Engineering) Co Ltd v T J Graham and Sons Ltd*,^[19] the courts recognised a company by its senior personnel. Lord Denning encouraged the anthropomorphic doctrine that identified a company's 'directing mind' and 'will'.^[20] It is argued that the common law was sufficient enough to manage this area of law. Thus the 2007 Act, which regurgitates what has already been recognised in courts, can be seen as somewhat unrequired. However, such an enactment should be welcomed, as its firmness is a main advantage. As Lord Halsbury advocated, a judge has "no right to add to the... statute" and "[t]he sole guide must be the statute itself".^[21] The 2007 Act is that written guide, which clearly promotes certainty in the law.

The Nettles to be grasped

The need to establish criminal liability on a company in relation to manslaughter was strongly urged during 1987 when a passenger ferry, *Herald of Free Enterprise*, owned by P&O (formerly known as Townsend Thoresen) capsized while beginning its journey from Zeebrugge (Belgium).^[22]²³ Subsequently, an investigation was launched into the deaths of 188 passengers and crewmembers. It found that the ship departed without securing its bow-doors and this enabled seawater to enter. In fact, such conduct was a habit in anticipation of minimising the turn-around time; allowing more journeys and greater productivity. Following the disaster, the media and a pressure group (steered by the victim's relatives) demanded the conviction of P&O for manslaughter by gross negligence.^[24] The issues of alienation and dilution served to protect P&O. Firstly, the 'directing minds' of the company were not part of the 'command chain' and they were not

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sufficiently proximate to the disaster. Therefore, they became alienated from the adequate level of criminal liability, which is needed for conviction. This analysis highlighted the restrictions of the common law model. Imposing liability only where the director is near the incident is irrational and impracticable. Secondly, upon examination of the chain of command, several P&O officials were found responsible for the accident and shared the blame. [25]In this sense, criminal blame had been diluted. The official investigation indicated that " all... members of the Board of Directors down to the junior superintendents, were guilty." [26]Such dilution meant that no one individual from those that were partly accountable, held sufficient culpability for the purpose of a criminal sanction; something which demands a very high degree of blame. Consequently, the litigation against P&O sank, just like its ferry. Lord Bingham, in *R v HM Coroner ex parte Spooner*, [27] explained that when finding a corporation liable for manslaughter, " the mens rea and the actus reus of manslaughter should be established... against those who were to be identified as the embodiment of the company." Although the prosecutions were unsuccessful in an unsatisfactory manner, the proceedings did contribute to the law's evolution, as it identified the possibility for a corporation to be found liable for manslaughter. Furthermore, it had been proposed that the dilution issue could be bypassed by utilising aggregation [28] so that the varying degrees of guilt scattered amongst ' directing minds' could be collaborated to complete a jigsaw puzzle of an overall ' corporate liability'. Nonetheless in subsequent decisions such as *Attorney General's Reference (No 2 of 1999)*, [29] the court were reluctant in such a method due to its incompatibility with the concept of individual

criminal culpability. The years following the P&O catastrophe intensified the need for reform. A shocking series of events insisted urgent parliamentary intervention.[30] These tragedies comprised of the King's Cross Blaze in 1987, the Piper Alpha oil rig disaster in 1988 (which viewed the Scottish law on culpable homicide also as impotent) along with the Clapham Rail accident, and also the 1989 marchioness disaster on River Thames. Despite many deaths and ample proof of gross negligence in every instance, the corporations were never successfully prosecuted. The common law model was difficult,[31] faced strong criticism and increased public concern. A newspaper highlighted the main weakness with its article stating: " Six Disasters; 368 people dead; no successful prosecutions. Now the Government acts".[32] The elected Labour Party acted and this eventually led to the enactment of the Corporate Manslaughter and Corporate Homicide Act 2007 on 6 April 2008.[33] Given its level of necessity and seriousness, it is deeply regretting that such legislation took eleven years. This delay can partly be justified by its theoretically complex nature, and partly due to the New Labour's objective of not being seen as attacking the powerful corporate sector.

Corporate Manslaughter and Corporate Homicide Act 2007

The work towards the improvement truly initiated prior Labour's election in 1997. A paper released by the Law Commission in 1994[34] eventually generated the 1996 report titled Legislating the Criminal Code: Involuntary Manslaughter.[35] It suggested that accountability should be ascertained by examining the way in which the corporation collectively manage its undertakings and its duties towards health and safety law. The views

triggered the Government paper of 2000,[36]which aided the emergence of the Corporate Manslaughter Bill in 2005. After two years in Parliament, Royal Assent was obtained.[37]As contained within section 1(1) of the 2007 Act, a corporation is liable "...if the way in which its activities are managed or organised -(a) causes a person's death, and(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased." This test signifies improvement and a breakthrough in the area of criminal law. Its introduction represented the dismissal of theoretically weak and complicated efforts of employing the attribution or directing mind theory of identification, and instead welcomed a gross negligence category in corporate organisation, as seen in Hsiao's paper concerning this development.[38]As in section 1(2), the offence is not merely subject to corporations but also governs other bodies including trade unions and the police department. [39]This is a strength since there were groups that were not liable under the common law, but are now prosecutable.[40]Section 1(2) is again appealing as it features the fundamental criterion and chief invention of the legislation. The statute dissociates itself from the conventional obsession with the ' individual criminal liability' concept. It caters to the corporate world by concentrating solely on indications of gross collective negligence; focusing on the corporation's organisation and " management failure", which represents "...the cause of death."[41]This advancement is most appreciated by the author and considered the Act's advantage. The development effortlessly disposes of the dilution difficulty and thus, it is now irrelevant to find sufficient diluted blame for prosecution where several managers are involved. The vital factor that establishes gross breach is the collective

management failure, as discerned in section 1(3). Nonetheless, this essay highlights concerns in relation to section 1(3). The concept therein may resurrect the 'directing mind' theory from the common law.[42] Such is unquestionably not a desired step forward, but rather a possible weakness or infirmity that is implanted in the 2007 legislation, next to its most significant quality (the 'collective management failure' criterion). The actual threat is that, where grave health and safety violations occur amongst junior employees, the company will escape liability. However, Lord Bassam supported the test while asserting that the subsection was present to limit accountability. He viewed it to be "right in principle that organisations cannot be guilty of corporate manslaughter without fault at the senior level." [43] Nonetheless, this paper disagrees as the problem is strikingly clear. As a matter of fact, health and safety risks are normally associated to the 'the coalface' of a corporation where lower-ranked employees work. In essence, life-threatening accidents generally take place on the factory level - on stocking floors or drilling surfaces - and not in boardrooms or on the luxurious floors at company headquarters. Section 1(4)(c) explains the term 'senior management' as those "who play significant roles in -(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or(ii) the actual managing or organising of the whole or a substantial part of those activities." This paper suggests these provisions to be the weakest. Such a definition will only function to restrict the Act's potential use. Corporate culpability should be established irrespective of whether the breach occurred amongst the seniors or the juniors. It is blatantly obvious that the victim's relatives will be dissatisfied

where a corporation dodges accountability merely because the failure is caused by younger employees as opposed to higher-ranked directors. This would maintain the injustices of the common law model. As a matter of fact however, the senior managers are regarded to be responsible – in a direct and non-delegable manner – for the behaviour of lower-ranked workers. With this observation, section 1(3) contains a distinction that is not only irrational and inapt in the opinion of this essay, but also unjustifiably limits the Act's application. The emphasis placed upon the 'senior management' would revive the judgement of H. L. Bolton^[44] and the unrequired directing mind doctrine, and previous jurisprudence that labelled a corporation as an "abstraction", that 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 directing mind and will of the corporation".^[45] This essay explains that by gripping onto the out-dated principle, section 1(3) is deemed as offering plain continuity. Although such has benefits like certainty, the continuity here is disadvantageous. Agreeing with Burles, this paper asserts that the Act is actually replicating a previous mistake and hindering its effectiveness.^[46] In this analysis, it is important to note that the tortious 'duty of care' doctrine^[47] has been imported into the 2007 legislation. It is a convoluted and delicate, but adaptable, concept that is constantly refining (nonetheless, reasonable foreseeability is still the central principle in most situations) – as displayed in cases including *Caparo Industries v Dickman*^[48] and *White v Chief Constable of South Yorkshire Police*.^[49] Also in relation to the gross breach of that duty, section 1(4)(b) of the 2007 Act defines such to be the case where conduct "...falls far below

what can reasonably be expected of the organization". This is essential when satisfying section 1(1)(b) for a prosecution. Hence this would confirm that simply an unintentional error marginally below accepted standards would not be sufficient to find liability. Since blameworthy behaviour is one that falls short 'significantly' from the quality reasonably expected,[50]this can lead to injustice and also, a problem in determining what constitutes as 'significant'. Thus, the task of deciding this becomes subjective and opinionated - something which a statute primarily aims to prevent. That being said, section 8(2) of the Act however does provide some assistance on the manner in which a breach shall be regarded as gross. It places emphasis upon the jury to consider"... whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach and if so,(a) how serious that failure was;(b) how much of a risk of death it posed." Furthermore, section 8(3) continues to advise the jury to reflect upon the degree to which the evidence indicates any "attitudes, policies, systems or accepted practices within the organisation..." that had the potential to welcome the failure in question or instil the acceptance of it. The statute also promotes the consideration towards any applicable health and safety regulations. However, this still does not resolve the author's dilemma. It is important for the jury to know the boundaries of the word 'serious' and also the level of 'seriousness' needed to support prosecution. Subsection 3 uses terms such as "jury may also" and this reinforces the subjective attitude. It becomes more problematic where, in subsection 4, the jury are directed to view anything "they consider relevant." The section, to a certain extent, poorly highlights the

factors/characteristics of a ' gross' breach. Such needs to be written in its entirety for the betterment of cases and creating/maintaining certainty.

The First Prosecution Under The 2007 Act: A false hope?

The case of R v Cotswold Geotechnical (Holdings) Ltd^[51] illustrates a successful prosecution on 17th February 2011. It involved a negligence-led death of Alexander Wright (an employee) as he gathered soil samples for a housing project in a trench, which collapsed because of inadequate earthwork protection. The company was fined £385, 000.^[52] Unfortunately, the prosecution provides minimal reassurance – the facts did not actually examine the efficiency of the 2007 legislation. In the case, the corporation was led by one director who was present at the location of the mishap (unusual in corporate manslaughter instances). Furthermore, the Cotswold case was so convincing that the appalling common law model would have been sufficient to obtain an effective prosecution. The issues of dilution or alienation did not matter. Within the context of the old system, trials against small organisations have succeeded.^[53] The 2007 Act will only be scrutinised where the ' collective failure' condition can be engaged and examined effectively in relation to an extensive corporation that has isolated and complex management arrangements. The application of the Act was very weak in itself and the £385, 000 fine was also not encouraging.

Primarily, there was a recommendation, from the Sentencing Council, of a minimum sanction of £500, 000.^[54] The ultimate lesser fine is regarded as an unjustifiable mitigation, and to further the setback, the court allowed a decade to the company to pay it off. Thus, despite capturing the chance to apply the 2007 legislation with full force and enlarge the deterrent effect on

hazardous company procedures by issuing an extreme sanction, the court chose to 'nudge' forward the 2007 Act with a mumble and not a roar. In February 2010, decisive standards on punishing corporations for manslaughter were provided by the Sentencing Guidelines Council.[55]The guidelines seem to consider the financial position of the company in question, and do not place appropriate emphasis on the nature of the actual offence. This, in the view of this paper, is totally detrimental. In short, it is submitted that sanctions must be decided entirely by considering the severity of damage together with the gravity of the negligence. Examining an organisation's turnover and ability to pay the fine is, as suggested, the main limitation embedded in the functioning of the 2007 legislation. To successfully govern this area of law, the Act requires 'sharp teeth' that will create the best possible deterrence on such crimes. The prosecution of Cotswold ignored many issues. It is not possible to render the Act as weak purely due to its lack of involvement. Such legislation was needed as John Reid noted – it was not "enough for... failings to be punished under health and safety law".[56]Such an Act is a quality in itself and needs to be celebrated. That being said, this does not mean that previous unsuccessful cases would now result in prosecutions.[57]Primarily, the enactment was to provide solutions to the common law's "key difficulties".[58]This paper asserts that such has not been totally achieved. Unfortunately, the brutal fact is that without a deadly disaster caused by the gross-negligent behaviour of a big corporation, it will not be possible to scrutinise the 2007 Act further.

Conclusion

Overall, the 2007 legislation is definitely a positive step-forward from the profoundly condemned common law system.[59]Honestly, it was incapable of further deteriorating the law. As portrayed, the Act's main strength is its innovation of the ' collective management' failure rather than clinging onto ' individual liability'. This approach was correct as it solved the issue of establishing the personal mens rea and actus reus of a company. A major drawback of the Act is its attachment to the old system in considering the conduct of senior workers. In summary, this paper asserts a simple amendment to section 1(3) so that a corporation can be liable where" the way in which its activities are managed or organised by its employees is a substantial element in the breach." Still making senior officials accountable, this would also maximise the Act's scope and usefulness (advancing away from the Victorian ' master-servant' idea enshrined in the old law). Although the essay further proposes a steadier and assertive sanctioning policy, it is believed that such will unavoidably develop as the Act settles and a precedent bank emerges. The Corporate Manslaughter and Corporate Homicide Act 2007 is far from being perfect. For it to succeed, the interpreters need to assist its application. If such means issuing harsher fines that destroy the corporate sector in order to increase the Act's deterrent effect, so be it.

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