

The theory of corporate manslaughter law company business partnership essay

[Law](#)



INTRODUCTION

" The existence of corporations in the commercial world is almost ghost-like. Their presence is palpable and yet, in a very physical way, they are strangely distant from the scheme of criminal liability." [1] This statement depicts exactly the paradox of the concept of corporate criminal liability whereby a corporation can now be held guilty for a criminal act such as fraud, money-laundering or even for manslaughter while the popular belief was that a company cannot possess the *mens rea* required by these criminal offences since it has no personal mind or conscience. [2] Since the 1600s where the common-law judges were adamant that " a corporation is not indictable, but the particular members of it are" [3], the concept of corporate manslaughter has come a long way. From a universal point of view on all homicide offences, when death is the result, society demands that the perpetrators, whether living or artificial, suffer the prerequisite punishment [4] to ensure fair justice, thereby purporting to the importance of corporate manslaughter as a criminal offence. Basically, this offence provides for the guilty corporation to be punished and to take remedial measures which are way above the notion of compensation and damages which are prevalent in civil law or under the law of tort. Ergo, corporate manslaughter is considered as a serious crime in most criminal law jurisdictions and this dissertation will focus only on this branch of the corporate criminal liability family. As such, since the 19th century, judges, legislators, and academics have struggled to find the most effective way of accommodating, within the criminal law, corporations whose conduct causes the death of individuals. The UK can be considered as the pioneer in this aspect through the case of *R v HM Coroner*

ex parte Spooner[5] where the Judge admitted that a corporation also can be held guilty for manslaughter through the conduct of a person acting as the embodiment of a corporation, that is, through the identification doctrine. However, the scantiness of this doctrine resides in the fact that failure to identify the controlling mind and will of a corporation as the one responsible for the death of another individual results in no charge of manslaughter being sustained against the corporation as was revealed in *R v Redfern & Dunlop Ltd. (Aircraft Division)*[6] and *R v P & O Ferries (Dover) Ltd.*[7] To counterattack this deficiency in its legal system, the UK introduced a Corporate Manslaughter and Corporate Homicide Act (CMCHA) in 2008. In essence, corporate manslaughter is now an established dogma in most western legal systems, though each country has adopted different approaches to suit their jurisdiction. For instance, the USA has recourse to the vicarious liability principle while the most European civil code countries have amended their criminal code to provide for this offence through the identification principle such as France, Finland, Norway and Spain. [8] However, in Mauritius, a company still cannot be charged with homicide, only a person can be. While the emerging corporate trends are demanding more severe legislations to prevent directors from hiding behind the corporate veil to escape punishment for their culpable acts of homicide and to sanction the culpable corporation, Mauritius is still dillydallying when it comes to the offence of corporate manslaughter. To this effect, the purpose of this dissertation is to elucidate the relevance of such an offence in the Mauritian jurisdiction and analyze the best way for Mauritius to introduce the crime of corporate manslaughter by scrutinizing two legal systems from

which Mauritius has always been influenced, the UK model and the French model as to the crime of corporate manslaughter. On that account, Chapter 1 will provide a broad analysis of what is meant by corporate manslaughter and its historical evolution in the common-law. Following which, chapter 2 will tackle the issue of whether or not the concept of corporate manslaughter has its existence in Mauritius. Chapter 3 will then follow with a scrutiny of the offence of corporate manslaughter in the UK through the CMCHA while Chapter 4 will assay the French model as to this offence. Finally, Chapter 5 will provide an analysis of the relevance of incorporating such an offence in the Mauritian legislation followed by an appraisal of the two 'systèmes de droits' along with recommendations of how to improve the Mauritian legal system to meet the worldwide corporate legal trends.

Chapter 1: The Theory of Corporate Manslaughter

1. 1 Defining Corporate Manslaughter

Corporate manslaughter can be defined as an act of homicide done by a corporation whereby it can be held criminally liable for a person's death.

[9]The concept of corporate manslaughter originated from the common law concept of corporate criminal liability based on the evolution of different doctrines. Under the common law, this concept is known as gross negligence manslaughter where to hold a company liable for such an offence, the prosecution has to establish that an individual, senior enough to be deemed part of its 'controlling mind', has committed the act of negligence resulting in death of an individual. The case R v Adomako[10]crystallised the concept of 'gross negligence manslaughter' by recognising gross negligence as the <https://assignbuster.com/the-theory-of-corporate-manslaughter-law-company-business-partnership-essay/>

mens rea for manslaughter. According to the House of Lords, a conviction for gross negligence manslaughter requires to be proved beyond reasonable doubt that:(1) The defendant owed a duty of care to the deceased;(2) This duty has been breached;(3) The breach was a substantial cause of the death and(4) The breach was so grossly negligent as to be a crime.

Defining ‘Manslaughter’

Article 215 of the Criminal Code defines the term ‘manslaughter’ as:"

Homicide committed wilfully is manslaughter." Manslaughter as such can be defined as the "unlawful killing of another person without malice" voluntarily or involuntarily, by an unlawful and dangerous act or by gross negligence.

[11]Bingham LJ in R v HM Coroner for East Kent explained that:" For a company to be criminally liable for manslaughter... it is required that the mens rea (guilty mind) and the actus reus (guilty act of causing death) of manslaughter should be established... against those who were to be identified as the embodiment of the company itself." The same reasoning was highlighted in the case of A-G’s Reference (No. 2 of 1999)[12]where seven people died in a rail accident. The judge ruled that it was a condition precedent to a conviction for manslaughter by gross negligence for a guilty mind to be proved and where a non-human defendant was prosecuted it could be convicted only through the guilt of a human being with whom it could be identified.

1. 1. 2 Definition of a Corporation

A corporation is an artificial person created under the laws of a country and its existence is independent of the human beings who are the members of

the entity.[13]The CA at section 2(1) gives a broad meaning of the term ‘corporation’ which is a body corporate incorporated in or outside Mauritius and as such includes companies, partnerships, societies and any other body corporate. Thus, for the purpose of this dissertation, the words corporation, organisation and company will be used interchangeably. In the case *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*[14], Viscount Haldane in his judgment gave a remarkable definition for corporations stating that:"... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation..." The House of Lords' decision here was the first to enunciate the ‘directing mind and will’ theory thereby treating the individual and the company as the same person and establishing that when the director is the controlling mind of the corporation, his acts can be attributed to the corporation.

1. 2. The Theory of Corporate Manslaughter

The Origin

In the 1800s, the case of *Royal Mail Steam Packet v Braham*[15]marked the beginning of corporate criminal liability jurisprudence in the U. K when a company was described as a person for the first time. However, it was only in the 1920s that the first reported prosecution case of manslaughter was brought against a corporation in *R v Cory Bros and Co. Ltd*[16]when a miner was electrocuted by an electrified fence erected by the defendant company.

But the case failed and concluded that an indictment could not come against
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a corporation for manslaughter as a company could not have the requisite 'guilty mind' or 'mens rea'. But it is to be noted that the Cory Bros case was decided before the principle of identification was developed. After the Cory Bros case, it took 38 years before another case of corporate manslaughter was to reach the courts. By then the attitudes of the courts had changed and this was highlighted in R v Northern Strip Mining Construction Co.

Ltd[17] where the identification doctrine was already in place and judge commented that: "It is the prosecution's task to show that the defendant company, in the person of Mr. Camm, managing director, was guilty of such a degree of negligence that amounted to a reckless disregard for the life and limb of his workmen." Yet since that time 18, 151 people have been killed at work in the UK without a single company having been convicted for homicide.[18] There has been prosecution against culpable corporations but for regulatory offences under the Health and Safety legislation, rather than for offences of homicide.

The Identification Doctrine

The UK has, since the 1940s, dealt with corporate criminal liability on the basis of the doctrine of identification which originated from the Lennard's case where Lord Viscount Haldane observed that the corporation is an 'abstraction', and that its 'active and directing will' must be sought in a person who is the very ego and centre of its personality which is an agent or the board of directors. In H. L. Bolton Engineering v T. J. Graham[19], following Lord Denning's analogy, the directing mind and will of the corporation had to be at a sufficiently senior level to truly constitute the decisions of the corporation that is, it has to be its mind rather than just its

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hands. The first successful prosecution of a corporation for gross negligence manslaughter was the Kite case[20] where the company and its managing director, were both found guilty of gross negligence manslaughter since four students died on a canoeing trip following the breaches of health and safety by the director of the company who was aware of the lack of equipment and qualified instructors. This case was immediately followed by R v Jackson Transport (Ossett) Ltd[21], R v Roy Bowles Transport Ltd[22], R v Teglgard Hardwood Ltd[23] and R v Nationwide Heating Systems[24] where prosecutors recorded success when both the companies and their directors were convicted of manslaughter due to gross negligence. However, in R v English Brothers Ltd,[25] only the company was charged for corporate manslaughter as the charges against the director were dropped when the company pleaded guilty.

1. 2. 3 Limitations of the Identification Doctrine

However, it is to be noted that it took until 1994 and a relatively small company for a successful prosecution of gross negligence corporate manslaughter. The heart of the problem is: who can be identified with the company? The leading case Tesco Supermarkets Ltd. v Natrass[26] established that only those who control or manage the affairs of a company can be regarded as embodying or acting as the company for the company to be criminally liable. However, this is a rather narrow doctrine. This explains why until the Kites case, there had been no successful corporate manslaughter prosecution as shown by R v Redfern & Dunlop Ltd and R. v P & O Ferries (Dover) Ltd where there was insufficient evidence to identify the controlling mind of the company as being sufficiently reckless. As

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the Court rightly stated in *Meriden Global Funds Management Asia Ltd. v Securities Commissioner*[27], it is easier to convict small companies since the relationship between the culprit and the company can be identified with more ease and certainty. That is not the case in larger companies with complex and wide-spread organizational structure since it becomes difficult to determine one of the limited few ‘directing minds’ at the top who intended the commission of a specific crime.[28]As such several high profile disasters such as the sinking of the *Herald of Free Enterprise*, the Southall Rail disaster[29]and the Hatfield rail disaster in 2000, where hundreds of people were killed, prosecutions against the corporations collapsed since there was no way of identifying the directing mind and will of the corporation as being responsible for the deaths. For instance in *M v Herald of Free Enterprise*[30], 188 passengers and crew members lost their lives when the *Herald of free enterprise* sank after the seamen, captain and other crew members failed to close the loading bay doors on the ferry. However, the defendants, including directors and managers, were acquitted due to insufficient evidence to attribute the necessary mens rea to the corporations’ directors. The same scenario was repeated in the Southall Rail disaster case in 1997 and the legionnaire’s disease outbreak case[31]in 2002, whose cause was traced back to poorly maintained air conditioning by the Council which resulted in the death of seven persons. In other cases such as in the Kings Cross Fire in 1987, the Piper Alpha Oil Platform disaster in 1988 and the sinking of the *Marchioness* in 1989, prosecution charges for manslaughter were abandoned by the Crown due to insufficient evidence to find sufficiently senior person in the company who could be said to be acting

as the embodiment of the company.[32]Meanwhile, even if the cases for corporate homicide failed against these corporations, in the Ladbroke Grove Collision case[33]and the Hatfield Rail Disaster[34]in 2000, the corporations were successfully convicted on health and safety legislation and had to pay fines. As it was observed that the identification doctrine was too narrow, Lord Hoffmann developed what was known as the aggregation theory in the Meridian Global case. This was an attempt to aggregate the decisions of persons in the corporation even if they could not, individually, be seen as its directing mind and will. Not only was the theory rejected by the House of Lords in other cases[35], but it also led to Rose LJ remarking:" The identification theory, attributing to the company the mind and will of senior directors and managers, was developed in order to avoid injustice: it would bring the law into disrepute if every act and state of mind of an individual employee was attributed to a company which was entirely blameless". Thus, it can be said that the identification doctrine was the favorite doctrine to apply to corporate homicide cases. The principle of aggregated liability is prevalent in the Dutch criminal legal system while common-law jurisdictions such as Canada, New Zealand and Australia and even the French criminal law have adopted the identification approach to held companies criminally liable.[36]But the UK has even gone a step ahead by introducing a CMCHA which adopts more the ' aggregation liability' principle and abolishes the identification doctrine. Mauritius, on the other hand, is still lagging behind, with the concept of corporate criminal liability being almost alien concept. The next chapter will shed light upon the Mauritian legal system as to the existence of this offence.

Chapter 2: Corporate manslaughter:

Does it have its identity in Mauritius?

2. 1. Overview

When it comes to the crime of corporate manslaughter in Mauritius, the legislation is completely silent on this matter. There is no specific act which has been provided for and neither does the Criminal Code includes legal bodies in its definition of ' persons'. This chapter will lay much emphasise on the laws in Mauritius which cater for the responsibility of corporations in cases where the latter caused the death of a person, that is, in cases of homicide committed by them. In the quest of looking for a semblance of corporate manslaughter in the Mauritian legislation, the nearest that could be found was through the combination of section 239(1) of the Criminal Code and section 44 of the IGCA as will be shown below.

2. 1. 1 The Criminal Code (Code Pénal Mauricien)

The Criminal Code at Section 239 (1) provides that:" Any person who, by unskilfulness, imprudence, want of caution, negligence or non-observance of regulations, involuntarily commits homicide, or is the unwilling case of homicide shall be punished by imprisonment and by a fine not exceeding 150, 000 rupees." However, as commented by the judges in CEB v State[37]:" Our Criminal Code is silent as regards the basis on which criminal liability whether human or corporate, may be imposed." Since the Criminal Code unlike the France ' Nouveau Code Penal'[38]has not been equipped with specific provisions dealing with corporate criminal responsibility,

Mauritian courts are left with no choice than to fall back on the IGCA as pointed out in *L. Vigier de La Tour v. State*[39] to invoke the criminal liability of a corporation.

2. 1. 2 The Interpretation and General Clauses Act (IGCA)

Section 44 of the IGCA provides for offences made by an agent or body corporate and at section 44(1)(b) it provides: "Where an offence is committed by a body corporate, every person who, at the time of the commission of the offence was concerned with the management of the body corporate or was purporting to act in that capacity, shall commit the like offence, unless he proves that the offences as committed without his knowledge or consent and that he took all reasonable steps to prevent the commission of the offence." Thus, this section seems to apply the identification doctrine inspired by the common-law when it comes to corporate criminal liability as it was remarked upon in the case of *R v Dookee*[40] where the Court stated that: "where the offence is in fact "le fait" of a corporate body, the prosecution has to show that the individual took part in the offence, had the necessary mens rea and was concerned in the management of the corporate body or was purporting to act as such..." As it was highlighted in *CEB v. State*, "in Mauritian law, it makes sense... in the absence of a legislative text on the circumstances in which corporate criminal liability may be established, to adopt the identification principle." And it was further noted that: "One may not impute criminal liability in such circumstances to the corporate body without identifying the person whose negligence resulted in the injury." Furthermore, it was accentuated in *Toorbuth Z v State & Anor*[41] and *Desvaux de Marigny v State*[42], that both

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a corporation and its representative or either of them can be prosecuted under this section. However, the information needs to contain the appropriate averments for a conviction of an individual to stand. All the same, it is to be noted that when it comes to the offence of manslaughter, due to the ambiguity about whether the Criminal Code extends the offence of manslaughter to corporations, most cases where a corporation would have been prosecuted for manslaughter under both English and French law, in Mauritius, these cases have instead been dealt with under the OSHA, instead of under the Criminal Code.

2. 2 The Occupational, Safety and Health Act 2005 (OSHA)

Under the labour law, an employer has a duty of 'hygiene et sécurité' towards its employees. To this effect, in 2005, the OSHA was introduced in Mauritius[43], which depicts the general duties[44] as well as the special duties[45] of an employer towards its employees. As such, when the employer is a corporation, the latter can be prosecuted for non-compliance with the provisions of the OSHA. Section 5(1) provides that: "Every employer shall, so far as is reasonably practicable, ensure the safety, health and welfare at work of all his employees." Of course, as highlighted in *Deonarain v. Souchon*[46], the employer will be held liable for a breach of duty only when the accident of the employee resulting in injury or death occurred in the course of employment. Even if no definition has been given for the terms 'safety', 'health' and 'welfare', in *Samlo-Koyenco Steel Co Ltd v PS MLIRE-OSHI*[47], the court noted that: "Safety, Health and Welfare" must be interpreted as a composite and generic term. They are so intrinsically linked that it would be absurd to read them disjunctively and to

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treat each word as a separate concept each resulting in the commission of a separate offence." By the same token, in *FD Garments Industries Ltd. v Factory Inspectorate*, MLIRE[48], the Court established that non-compliance with the OSHA is a criminal offence to be proved beyond reasonable doubt by the prosecution. For instance, in *OSHI v PADCO*[49], one of the employees of the accused died after falling down from a height of 9 m at a construction site. The Industrial Court held the defendant company was guilty for non-compliance with the duties imposed by the OSHA. It is worth noting that as it was pointed out in *DPP v Gumboots Manufacturers Ltd*[50], our case-law has drawn a distinction whereby in purely criminal offences such as manslaughter, there is an absolute need to prove the mental element while there is no such need for technical offences such as laws relating to insurance, health and safety, revenue or environment. This principle goes in line with the reasoning of Dr. Fokkan[51] who stated that under the OSHA, to hold a company liable, it is sufficient for the prosecution to establish that the accused corporation did not respect the duty imposed by the Act and there is no need to apply the identification doctrine making it easier to hold a company liable. The same principle was applied in previous cases tried successfully under the OSHA whereby companies were held guilty for wilfully and unlawfully failing, so far as is reasonably practicable, to ensure the safety, health and welfare at work of their employees and were imposed fines accordingly, such as *OSHI v. Plaspak Ltd*[52] where the victim passed away when he got squeezed between the wall and the extruder machine, *Meaders Feeds Ltd v MLIRE*[53], *OSHI v Expanda (Mauritius) Ltd*[54], *OSHI v The General Construction Company Ltd*[55], *OSHI v Flacq United Estates*

Ltd[56], OSHI v Ramnarain Soogundha[57], Transinvest (Mtius) Ltd. v MLIRE[58]and DPP v Flacq United Estates Ltd.[59]

2.3 The Workmen's Compensation Act (WCA)

The WCA provides for an automatic remedy to a worker who has sustained injury out of and in the course of employment, that is, compensation to be paid by the employer. Section 3(1) of the WCA provides that:" The compensation shall be payable to or for the benefit of the workman, or where death results from the injury, to or for the benefit of his dependents as provided by this Act." As a result, in cases where employees die in the course of employment, his dependents are automatically entitled to compensation by the employer. However, section 22 as highlighted in Jumayeth H. v Municipality Of Quatre Bornes[60]imposes as condition that where an injury is caused by the personal negligence or wilful act of the employer or his representative, " the plaintiff has to elect whether to claim from the employer under the WCA or to sue him under the Civil Code."

2.4 The Civil Code : ‘ La responsabilité délictuelle’ or Liability in Tort

The Mauritian Civil Code, inspired by the French civil law, imposes by its articles 1382, 1383 and 1384, the concept of ‘ responsabilité délictuelle’ (tortious liability) whereby in this context, a corporation also can be held liable in tort for the damage caused to an individual or his family by its representative or organ. As shown in Rose Belle S. E Board V Chateauneuf Ltd[61], a corporation can also be held liable in tort for an act of negligence done by its ‘ préposé’ or of the one who has ‘ la garde de la chose’, in this case, the lorry.[62]As a result, if held guilty for the death of a person, a <https://assignbuster.com/the-theory-of-corporate-manslaughter-law-company-business-partnership-essay/>

corporation has to compensate the victim's family under the concept of 'victimes par ricochets' but first the causal link between the 'fait dommageable' that is, the act of negligence of the corporation, and the death of the victim has to be established. For instance, in *Velvindron Y & Ors v PS, Ministry of Health*[63], the plaintiffs who are the heirs of the de cujus, Mr. Kissing, were entitled to the losses and moral damages which Mr. Kissing could have claimed, had he lived, if not for the medical negligence of the hospital. However, if the victim's death was caused by his own negligence, the corporation cannot be liable in tort unless there was a certain act of carelessness or negligence by the company also. For instance, in *Widow and Heirs Batty and Anor. v Colonial Government, & Others*[64], the principle of mitigation of damages was applied since even if the victim had been somehow negligent, it was not enough to completely exonerate the defendants as the primary cause of the accident was the excessive speed of the train and the insufficiency of warning as a result of which damages were accorded to the victim's widow and heirs by the railway company. However, in *Beau Plan Sugar Estate v Ww S. Pultee*[65], the Supreme Court quashed the decision of the lower court which had held the appellant liable in tort towards the victim's widow, since it was finally found that the death of the employee did not result from the appellant's acts of negligence or imprudence. Moreover, unlike with the WCA, in cases such as *Parmowtee Alleear v Beau Plan Sugar Estate & Co. Ltd*[66], *Kassory v Rose Belle S. E.* [67], *New Light Match Manufacturing Co. Ltd v Mrs Ww M. L. Ono & Ors*[68], the Supreme Court held that the employer of the victim, had to award moral damages to the victim's widow in addition to the pension required under the

National Pensions Act. But the question remains, are compensations and damages a suitable remedy for the loss of a person's life?

2. 5 CONCLUSION

As it could be seen, Mauritian legislation is completely silent about the concept of corporate manslaughter. Death of individuals caused by a corporation can only result in damages being awarded to the victim's family under the WCP and the Code Civil and in fines for the corporation under the simple health and safety legislation for which death is too serious an offence to be awarded justice under. In all the above cases, the directors or managers of the corporations were not even prosecuted[69]unlike under the English and French legal system. On that account, the next two chapters will provide an analysis of how the offence of corporate manslaughter is handled under the two ' systemes de droits' from which Mauritian legal system is highly inspired.

Chapter 3: Analyzing and evaluating the Corporate Manslaughter and Corporate Homicide Act 2007

3. 1 Overview

It is an undisputed fact that the law on corporate criminal liability has come a long way. The Parliament in the UK after years of discussions, wait and delays, came up with the CMCHA with great fanfare in 2007. The act which came into force on 6th April 2008, sweeps away the common-law offence of gross-negligence manslaughter by creating a new statutory criminal offence of corporate manslaughter which is based on corporate liability whereby an

individual does not need to be identified.[70]In the last five years since the CMCHA was introduced, there has been only three prosecutions under this act which have all been successful and a fourth one is in progress which is against MNS Mining Ltd following the death of 4 of its miners which allegedly has been caused by a gross breach of duty from the company's management.[71]This chapter will explain the workings of the CMCHA, its edge over the old law and also its failings.

3. 2 The New Offence under the CMCHA

The CMCHA introduces a new statutory offence of corporate manslaughter to deal with the problem posed by the identification doctrine under the old common law offence as witnessed in *M v Herald of Free Enterprise* and the Southhall Rail disaster case. Prosecutors are no longer required to identify an individual who is deemed to be the controlling mind and will of the corporation to be guilty of gross negligence to be able to hold the corporation guilty. Instead liability for the new offense relies on a finding of gross negligence in the way in which the activities of the organization are carried out or managed. As such, the highlight of the CMCHA is not to focus on 'who' has erred but instead of 'how' companies are managed which makes it easier to prosecute large organisations.[72]Indeed, section 1(1) of the CMCHA states that if the way in which an organization carries out or manages its activities " causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organization to the deceased", then such an organization is guilty of the offence of corporate manslaughter under this act. A substantial part of the breach must have been in the way activities were managed by senior management.

3. 2. 1 Gross Breach of Duty of Care

Instead of creating new duties, the act simply creates circumstances where an existing breach of a duty of care will constitute a criminal offence. As such, the new offence will only apply when a duty of care is owed to a deceased victim under the law of negligence at common law.[73]A relevant duty of care has been described as:" an obligation that an organisation has to take reasonable steps to protect a person's safety."[74]Section 1(4) (c) of the CMCHA sets out the relevant test: for a breach of duty of care to be gross, it has to fall " far below what can reasonably be expected of the organisation in the circumstances." To establish such a gross breach of duty as provided by section 8, the juries have to consider any health and safety breaches by the organization and how serious and dangerous those failures were and section 2(5) requires the judge to decide if a duty of care is owed to the victim. The new offence is intended to complement health and safety legislations[75]. Prosecution under the CMCHA will be of the corporate body while the directors or management can simultaneously be prosecuted under health and safety breaches or general criminal law such as gross negligence or manslaughter. For instance, the case of R v Cotswold Geotechnical (Holdings) Ltd[76]is a prime example of how the CMCHA works alongside health and safety legislations in that while the company was prosecuted under the CMCHA, the director of the said company faced prosecution for manslaughter and health and safety charges under the HSW Act and the HSOA.

3. 2. 2 Senior Management Failure

The new offence does not require the prosecution to establish failure on the part of specific individuals and managers; the test here instead is how an activity was managed within the organisation as a whole, and not confined to the director who is the controlling mind and will of the company.

[77]However, it is not possible to convict an organisation unless a substantial part of the organization's failure lay at a senior management level. As it is preconized by section 1(4)(c) of the CMCHA, senior management identifies all those management responsibilities which relate to the overall working of a corporation, or at least a substantial part of it. Two strands of management responsibility are identified: firstly, the decision-making of how the activities are to be managed and secondly the actual management of those managers. This concerns thus both managers who monitor workplace practices and those in charge of operational management. This senior management failure test has a wider berth than the identification doctrine in the sense that as opposed to a single individual identifiable as the company's directing will and mind, the new test has been described as 'qualified aggregation liability' whereby the failings of a number of individuals aggregate to constitute management failure.[78]If the CMCHA was applied to cases such as R v Herald of Free Enterprise, where finding mens rea was the problematic issue which led to the failure of the case, most probably, it would have been easier to attribute the gross breach of duty to the seamen and other crew members by the way the activities were managed and hence have a successful case of corporate manslaughter.

3. 3 Successful cases under the CMCHA

3. 3. 1 R v Cotswold Geotechnical (Holdings) Ltd

This is a landmark case in the UK as Cotswold Ltd was the first company to be convicted under the CMCHA in 2011. In this case, a junior geologist was taking soil samples in a 3.8 metre excavated pit when it collapsed and caused him to be buried, and consequently killed as a result of the company's failure to adhere by health and safety measures. In his summing up, the judge stated that it was "clearly foreseeable that the failure to address the hazard would lead to serious injury and indeed that the consequences could well be fatal". As such the company had fallen far short of the standard expected in relation to such an operation and as the director, Mr Eaton, was in control of the forklift, he was identified as senior management. The company was convicted and ordered to pay £385,000 over a 10 year period.

3. 3. 2 R v Lion Steel Equipment Ltd[79]

This was the second case decided under the CMCHA it was held that: "the defendant...being an organisation, namely a corporation, and because of the way in which the organisations' activities were managed or organised by its senior management, caused the death of..... Steven Berry by failing to ensure that a safe system of work was in place in respect of work undertaken at roof height, which failure amounted to a gross breach of a relevant duty of care owed by it, to the deceased." Lion Steel Ltd was fined £480,000 over a period of three and a half years.

3. 3. 3 R v JMW Farm Ltd[80]

In this case, , the respondent company was found guilty of corporate manslaughter and was fined £187, 500 under the CMCHA, following the death of an employee who was crushed when an unsecured metal drum fell from a forklift, driven by one of the company's directors. The Court remarked that:" Yet again the Court is faced with an incident where common sense would have shown that a simple, reasonable and effective solution would have been available to prevent this tragedy."

3. 3. 4 Observations

It is to be noted that all three companies mentioned above were given such considerable high fines despite the fact that they had obvious financial difficulties. In the case of Cotswold Ltd, the Court of Appeal even commented that " in some cases, putting the company out of business may be inevitable". The imposition of such heavy fines along with the other varied means of imposing sanctions such as remedial orders[81]and publicity orders[82]are intended to encourage corporations to be more rigid with the implementation of their health and safety policies especially when it comes to jobs which bear considerable safety risks.

3. 4 Failures of the CMCHA

3. 4. 1 Senior management test

As it was observed earlier, the CMCHA substitutes the identification principle with the senior management failure test which makes it easier to convict large companies as there is no absolute need to identify the controlling mind and will of the company as the individual responsible for the breach of duty

owed to the victim. However, on the flip side it can be seen that the senior management test is not so different from the identification doctrine. As it was pointed out by the Joint Committee," by focusing on failures by individuals within a company in this way,....(the act) would do little to address the problems that have plagued the current common law offence".

[83]The problem is still who can and who cannot be qualified as 'senior management under this act'. The three cases were unable to shed light as to what exactly amounts to 'senior management' as they concerned rather small companies with simple organisation structures which made it easy to identify the senior management. It remains to be seen how the act copes with a larger company with greater layers of management

3. 4. 2 Liability of individuals

A further criticism of the CMCHA is its inability to hold individuals culpable as stipulated by section 18 as a result of which there is no possibility of secondary liability of directors for corporate manslaughter.[84]Instead, they will have to be prosecuted under health and safety legislations or criminal offences of manslaughter or gross negligence which complicates the work of the prosecutors and demand more time and finance. In R v Cotswold Geotechnical (Holdings) Ltd, only the company was sanctioned to pay a heavy fine while the sole director went scot-free as charges were abandoned against him because of his illness. In R v Lion Steel Equipment Ltd, the charges of gross negligence manslaughter against the directors were dropped when an agreement was reached between the prosecution and the respondent company when it pleaded guilty. Thus, can fines, even as heavy as those imposed, commensurate for the loss of a person's life? The CMCHA

did go further than to impose fines as sanctions by providing for remedial orders and publicity orders as additional sanctions, but it did not provide for custodial sentences. As such, in this respect, cases tried under the old common-law offence at least provided for liability of culpable directors such as *R v Kite & OLL Ltd*, *R v Jackson Transport (Ossett) Ltd* and *R v Roy Bowles Transport Ltd* where both the companies and their directors were convicted of manslaughter due to gross negligence as a result of which the directors had to face a jail sentence.

3. 5 Conclusion

It may be questioned as to why the CMCHA was enacted when in essence it is a replica of the old common-law offence of corporate manslaughter and does not seem to solve the identification principle problem entirely.

[85]However, the CMCHA is still in its infancy. It will take a few more years along with the prosecutions of other companies, especially large ones in order to assess the real effectiveness of the act over the old common law. In theory and following the successful cases under the CMCHA, the new offence seems to working. As such, if the legislators' intentions are respected, while corporations will be prosecuted under the CMCHA, the accused directors can be prosecuted under health and safety legislations or criminal law offences. This assures that even if the charges against the directors fail, this will not mean automatically that the charges against the corporation should fail also, that is unlike in the Hatfield case.
