The Fiction of the Criminalisation of Corporate Killing

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Abstract

Since the 1970s, high profile corporate killings forced the need to assess the criminal responsibility of corporations which have caused human or environmental fatalities. This enterprise proved difficult, and the task was not necessarily made easier by the 2007 Corporate Manslaughter and Corporate Homicide Act (c.19). The question to be asked is whether the Act serves any real public interest or merely pays lip service to the 'war on crime' agenda.

The Fiction of the Criminalisation of Corporate Killing

Corporate crime, as coined by Sutherland, is meant to indicate a business environment that is not necessarily corrupt but is at least tolerant, in some way, of a breach of rules and regulations. Sutherland identified a category of offences that statistics failed to record,[1] the crimes of the 'suits' and the crimes of the 'powerful'. During Sutherland's time these crimes were arguably sufficiently criminogenic to enter the realm of criminal law.[2] Nevertheless, since the 1970s, some many high profile corporate killings have led to the need to consider the criminalisation of the corporations that have caused, in some way, human or environmental fatalities. This enterprise has proved difficult, and the task was not necessarily made easier by the 2007 Corporate Manslaughter and Corporate Homicide Act (c.19) (CMCH Act). This article assesses the doctrine of corporate killing before and after the enactment of the Act. First, by addressing the Ford Pinto case, the discussion examines the dynamics of prosecution and trial of the companies that have placed profit ahead of safety; by studying the Bhopal Union Carbide case, this paper assesses the problematic nature of criminalising corporate acts. Then, the article shifts the analysis to consider the question of civil compensation for criminal liability; the article emphasises the weaknesses of common law corporate killing by investigating cases such as the Herald of Free Enterprise and the Lyme Bay. The discussion then considers the first application of the CMCH Act with the Cotswold Geotechnical Holding case. The article concludes with the examination of issues arising from the CMCH Act, such as corporate liability compared with personal liability and the (in)convenience of plea bargaining.

[1] H.E. Sutherland, "White Collar Criminality" (1940) 5 American Sociological Review 1-12; also see J. Gobet and M. Punch, *Rethinking Corporate Crime* (Cambridge University Press, 2003)
[2] H.E. Sutherland, "Is 'White Collar Crime' Crime?" (1945) 10 American Sociological Review, pp. 132-139

On the list of corporate violence, the Ford Pinto case plays an almost iconic role.[3] The Pinto case tells the story of a company that released on to the market a stylish but deadly car that, because of the location of its petrol tank, could easily erupt in flames in rear-end collisions – something which occurred at least 27 times.[4] A successful lawsuit followed against the Ford Motor Company by the heirs of a victim who was burnt to death and by a 13-year-old boy, a survivor of the accident, who suffered severe and permanently disfiguring burns on his face and body.

The Ford Pinto case's legacy lies, however, in what did not follow. A parallel trial occurred against the Ford Motor Company, this time for an indictment of reckless homicide for three deaths that followed the explosion of a Pinto.[5] In this case, the jury returned a verdict of 'not guilty', and the victims' families accepted compensation.[6] The case was labelled a 'landmark case'; it glorified the proposition that crime was socially constructed:[7] 'the prosecution of this case acted as a marker of moral indignation, and indicated that the community will not tolerate such behaviour'.[8] Other commentators suggested that 'a psychological barrier has been broken, and the big corporations are now vulnerable.'[9] The 'community', however, which was represented by the jury, found the company not guilty. This verdict was morally perplexing in the understanding that Ford anticipated the eventual victims' compensation to be cheaper than recalling its Pintos for improvements.[10] Was the psychological barrier really broken? The future proves that not for another 32 years an American corporation and its

[3] Although the Pinto case is an example related to American law jurisdiction rather than the English law, the case is cited here to exemplify the fundamental difficulty in approaching corporate killing; the same is true for the Union Carbide case.
[4] Grimshaw v Ford Motor Co. (1981) 119 Cal App 3d 757
[5] State of Indiana v Ford Motor Company 1980
[6] P.J. Becker, A.J. Jipson and A.S. Bruce, "State of Indiana v. Ford Motor Company revisited", (2002) 26 American Journal of Criminal Justice, pp. 181-202
[7] See a review on the literature in ibid.
[8] Frank and Lynch (1992), quoted in ibid. at 182
[9] National District Attorney Association, Robert Johnson, quoted in ibid. at 185
[10] See Gobet and Punch

senior personnel, in the case of the BP Deepwater Horizon oil spill, were finally and successfully charged and convicted with manslaughter.[11]

The Ford Pinto case's unsuccessful criminal conviction has tenaciously echoed into the future. It can be argued that the case emphasises a twofold ambiguity: first, the willingness, or rather the lack of it, to attach criminal liability to alleged white collar criminals, especially those individuals in senior positions; and second, the adequacy, or the lack of it, of the criminal law to identify such liability. The high profile case of the Union Carbide plant gas leak in Bhopal, India in 1984 exemplifies these issues. The Bhopal story has been a prolonged tragedy that continues to the present; it left its stigma on the thousands of exposed and surviving victims, on future generations and on the environment.[12] Who was to blame for this devastating disaster? Similar to the Pinto case, the causes for the accident were not a mystery. The evidence demonstrates fundamental fault in the safety up-keep of the plant.[13]

Profit-driven management and politically charged interests[14] not only led to the disaster but also gave birth to overwhelming, absurd and disconcerting criminal proceedings. Similar to a skilful ping-pong match, the responsibility for the explosion was shifted back and forth from the American 'mother' company's executives to the Indian subsidiary company's management and employees; even a sabotage conspiracy theory was advanced by Union Carbide's US lawyers.[15] Twenty years after the Bhopal accident, the criminal procedures are still ongoing. In June 2010, the news reported that eight former plant employees, who are

[11] S. Goldenberg, "BP to pay $4.5bn penalty over Deepwater Horizon disaster", *theguardian.com*, November 2012, http://www.theguardian.com/environment/2012/nov/15/bp-deepwater-horizon-gulf-oil-spill (accessed 03 Nov 2015)
[12] See a review in this regard in E. Broughton, "The Bhopal disaster and its aftermath: a review" (2005) 4 Environ Health
[13] See a comprehensive account in this regard in W. Morehouse, "Unfinished Business: Bhopal Ten Years After" (1994) 24 The Ecologist, pp. 164-168; also, N.D. Jayaprakash, "The Crime of Union Carbide", CounterPunch.org, September 2010, http://www.counterpunch.org/2010/09/07/the-crime-of-union-carbide/ (02 May 2013)
[14] The Indian government was reluctant to damage the economic relations that had been developed with many multinational companies (Morehouse, above n.13 at 167)
[15] Ibid. at 166

currently over 70 years of age and one who died by the time the sentence was declared, have been criminally convicted of death by negligence and were sentenced to two years of imprisonment.[16] Whether this outcome can be considered an achievement, it still stands that the alleged number-one accountable person, the 90-year-old former Union Carbide chairman and executive Warren Anderson, has been considered an 'absconder' since the 1990s. An extradition request, which has been declined several times since 2004 by the US, was presented again in April 2011; in January 2012, the US government commented that the matter was still under examination.[17] Warren Anderson died two years later in a nursing home in Florida.[18]

These events clearly show that the responsibility for the disasters lies in human mistakes; they were not caused by an 'act of God' or nature, which is defined as acts that are 'unforeseen and unconnected with the defendant's act'.[19] However, from a legal point of view, the journey to the identification of this criminal responsibility is far less clear. Indeed, the Herald of Free Enterprise tragedy's legacy, it has been argued, has been the passing of the Corporate Manslaughter Act, aimed at clarifying the issue of corporate criminal liability and making convictions more likely. Any delay in the passing of the Bill to become law, it was said, 'would be an insult to those killed'.[20] Arguably, however, the insult to the people who

[16] "Bhopal Trial: Eight convicted over India gas disaster", *BBC News*, Monday 7 June 2010, http://news.bbc.co.uk/1/hi/world/south_asia/8725140.stm (accessed 24/04/2013)
[17] L. Lall, "Bhopal tragedy: India yet to bring Warren Anderson, Union Carbide to book", *India Today.in*, November 29, 2012, http://indiatoday.intoday.in/story/bhopal-set-to-mourn-28-years-of-infamy-when-india-couldnt-bring-anderson-union-carbide-to-book/1/235289.html (accessed 02/05/2013)
[18] M. Douglas, "Warren Anderson, 92, Dies; Faced India Plant Disaster", *The New York Times*, October 30 2014, http://www.nytimes.com/2014/10/31/business/w-m-anderson-92-dies-led-union-carbide-in-80s-.html (accessed 02 Nov 2015)
[19] Crime Prosecution Service (CPS), *Prosecution Policy and Guidance, Homicide: Murder and Manslaughter, Causation*, http://www.cps.gov.uk/legal/h_to_k/homicide_murder_and_manslaughter/index.html#header (accessed 04/05/2013)
[20] P. Dix, "Executive Director of Disaster Action", a letter to The Guardian, *theguardian.com,* Tuesday 6 March 2007, The Herald's legacy, http://www.theguardian.com/news/2007/mar/06/leadersandreply.mainsection4?INTCMP=SRCH (accessed 05/05/2013)

were killed had already occurred when the prosecution against P&O European Ferries (Dover) Ltd was unsuccessful; insult occurred again when the law failed to establish criminal liability for the many corporate disasters that followed. In fact, the insult did not stop with the introduction of the Act. To evaluate these claims, it is essential to take a step back.

On the 7th March 1987, *The Times* reported that 'Hundreds are trapped after British car ferry crashes into pier' in the Belgian port of Zeebrugge;[21] this was the Herald of Free Enterprise tragedy, and it was dubiously an 'act of God'. An inquiry conducted by Mr. Justice Sheen confirmed the civil responsibility that allowed arrangements for victims' compensation; however, the inquiry found it difficult to establish criminal liability. To the question 'Was a statutory offence committed?' Justice Sheen replied with the familiar formula stating that 'if it is the view of Parliament that the taking to sea of a Ro-Ro ferry with her bow or stern doors open ought to be a criminal offence, then Parliament must enact appropriate legislation.'[22] No statutory offence could be established. Of course, no statutory offence referred to a lack of a breach of a regulatory law, which suggested that the modus operandi of the ferry (and therefore the corporation) was consistent with the standard that is defined by the relevant regulatory legislation. Thus, the question remained open regarding whether 'someone', or rather, a person, could be found to be criminally responsible for the actual devastating consequences. A reply to this question came in the form of a criminal prosecution against the owners of the Herald of Free Enterprise (P & O European Ferries (Dover) Ltd) that was prompted by a coroner inquest.[23] The inquest returned 187 verdicts of manslaughter against

[21] R. Owen, "Hundreds are trapped after British car ferry crashes into pier: 'No hope' for the missing", 7 March 1987, *The Times* (London), Issue 62710
[22] MV Herald of Free Enterprise, Section 22 (22.3) at 31
[23] "Manslaughter not to be ruled out as Zeebrugge verdict", *The Times* (London), 8 September 1987, Issue 62868

three of the ferry operators. The critics did not fail to come. Why 'had [the coroner] excluded *the company* from the scope of the possible verdicts', it was lamented.[24]

The significance of the Herald of Free Enterprise case is twofold. On the one hand, the case recognised a corporate manslaughter offence in English criminal law; on the other hand, it identified the almost unfeasibly successful application of this doctrine. First, the prosecution against P&O European Ferries (Dover) Ltd involved both 'the company' and seven employees. All defendants, including 'the company', were charged with manslaughter. Subsequently, all defendants were cleared of the charges.[25] Judge Turner clarified that 'there is no conceptual difficulty in attributing a criminal state of mind to a corporation';[26] however, this requires, in the first place, the identification[27] of a human being who is liable for the crime. This person must be in a position in the corporation so that it can be said that he or she is the embodiment of the corporation;[28] thus, the corporation's liability will be constructed out of this person's criminal responsibility. This concept makes sense, and as emphasised by the Law Commission, 'there appears to be a widespread feeling among the public that in such cases it would be wrong if the criminal law placed all the blame on junior employees'.[29] To what extent, hypothetically speaking and except for individual fault, it is desirable that a ferry operator should be sent to prison for a faulty modus operandi that is a consequence of a decision made by a board of directors ten years before the ferry operator was even employed? Moreover, the complex structure and hierarchy of modern corporations must be considered

[24] Emphasis added. D. Sapsted, "Ferry verdict clears way for prosecutions: Manslaughter charges to be considered by DPP", *The Times* (London), October 1987, issue 62895
[25] P&O European Ferries (Dover) Ltd [1991] 93 Cr.App.; also as reported in "P&O European Ferries Acquitted Of Manslaughter", Journal of Commerce, October 22, 1990
[26] *P&O European Ferries (Dover) Ltd* [1991] 93 Cr.App. at 73
[27] See more about the 'identification doctrine' in the Law Commission Report, *Legislating the Criminal Law: Involuntary Manslaughter* (HMSO 1996), Law Com. No. 237
[28] P&O European Ferries (Dover) Ltd [1991] 93 Cr.App. at 74
[29] Law Commission*, Criminal Liability in Regulatory Contexts, Consultation Paper* (HMSO 1996), Law Com. No.195 (s. 1.10, p. 4)

when assessing the feasibility of this doctrine: responsibility is delegated and diffused; thus, it is likely to become untraceable. Here is where the doctrine collapses. For this reason, similarly, no one could be found criminally liable for, to name several tragedies, the King's Cross Underground fire in 1987, the Piper Alpha explosion in 1988, and the Clapham rail crash in 1988.[30] Despite the above, in 1994, the Crime Prosecution Service (CPS) brought about a successful conviction of corporate manslaughter.

The Lyme Bay canoe tragedy[31] is perhaps the most legally significant English case after P&O European Ferries (Dover) Ltd. However, the successful prosecution of the managing director of the leisure centre and subsequently the successful prosecution of his company is not what makes this case important; rather, it is the recognition that a corporate manslaughter prosecution is possible when the company is small. OLL Ltd could not be smaller; it was a 'one-man company' that was owned by Mr. Kite. Kite and OLL Ltd were found liable for the death of four children who were on a canoe trip. The court established that the duty of care that was owed to the individuals who participated in outdoor leisure activities was 'grossly' breached because of a 'lack of a safety policy', a 'woefully deficient safety standard' and a 'breach of guidelines issued by the British Canoe Union'.[32] Although the running of the centre was left to Mr. Stoddart, the site manager, the jury considered that Mr. Kite, notwithstanding that he worked off-site, should be accountable for the events. The leisure company OLL Ltd was thus easily, 'identified' with Mr. Kite, who was the 'directing mind' behind it. Mr. Kite was sent to prison, and the company was fined £60,000. However, the Kite and OLL Ltd case emphasised a rather delicate issue that underlines the offence of

[30] See on that regard, Law Commission Report, *Criminal Liability in Regulatory Contexts* (1996)
[31] P. Dunn and W. Benett, "The School Canoe Tragedy", *The Independent*, Wednesday 24 March 1993, http://www.independent.co.uk/news/uk/the-school-canoe-tragedy-schoolchildrens-adventure-at-sea-that-turned-father-tells-of-survivors-anger-at-delay-in-being-rescued-after-wind-drove-canoes-away-from-shore-1499565.html (accessed 13 May 2013)
[32] Peter Bayliss kite [1996] 2 Cr.App. at 298

corporate manslaughter. Although under the identification doctrine, the offence targeted the company's criminal liability for death, it would have been the 'directing mind', therefore, an actual human being who would have been sent to prison 'on behalf' of the company. Whether we agree or not with the judiciary decision to find Mr. Kite responsible for the deaths, it stands that the identification doctrine exemplifies the awkward dynamic of the offence of manslaughter in relation to causation, mens rea and actus reas. Indeed, Mr. Kite's deficient safety policy might have been recognised as 'gross', but the extent to which this grossness substantially contributed to the actual deaths is more questionable. Possibly, it is this realisation which was not to the judiciary's liking; in the case of Mr. Kite, the court felt that 'cases such as this cause the court, so far as sentence is concerned, acute difficulty and very great anxiety'.[33]

However, the Kite and OLL Ltd case may have only been the tip of the iceberg. By the time of this case, the Law Commission was already well into refining the corporate killing offence.[34] The Labour government was promising to be 'tough on crime and tough on the causes of crime',[35] consultations and recommendations were drafted and discussed,[36] and the House of Commons was eager to receive answers,[37] where finally Her Majesty the Queen revealed that 'A draft Bill will be published to introduce a new offence of corporate manslaughter'.[38] Moreover, the 2005 draft Bill recognised that the drawbacks that were presented by the current common law offence of corporate killing 'rise the public concern

[33] Peter Bayliss kite [1996] 2 Cr.App. at 298
[34] Law Commission report, *Legislating the Criminal Law: Involuntary Manslaughter* (1996)
[35] Party Manifestos, UK General Elections, Labour Manifestos 1997, Political Science Resources, Richard Kimber, Last modified: 22 Oct 2012, http://www.politicsresources.net/area/uk/man/lab97.htm, (accessed 07 Aug 2015)
[36] Home Office, *Reforming the Law on Involuntary Manslaughter: the Government's Proposals*, May 2000, http://www.corporateaccountability.org.uk/dl/manslaughter/reform/archive/homeofficedraft2000.pdf (accessed 03 Nov 2015)
[37] See Historic Hansard 1803-2005, http://hansard.millbanksystems.com/ (accessed 03 Nov 2015), search under: corporate manslaughter, 20th and 21st century, mainly 1994-2004
[38] The Queen's Speech, HL Deb 23 November 2004 vol 667 cc1-5, (c2)

that the law is not delivering justice', especially regarding public disasters where 'large companies with complex management structures' have proven to be difficult to prosecute for manslaughter'.[39] However, despite a new collection of corporate fatal disasters that led to unsuccessful criminal prosecutions, such as the Southall rail crash (1997)[40] and the Hatfield rail crash (2000),[41] it was not until approximately ten years later that the project actually materialised with the new and certainly 'brand(ed)' Corporate Manslaughter and Corporate Homicide Act 2007 (CMCH Act). Then, the public waited another four years to see the results.

The 2011 Cotswold Geotechnical Holding case, the first to be prosecuted under the CMCH Act, comes under the category of 'fatalities at work' rather than 'public disasters' and involved the death of one person who was completing work-related tasks.[42] Perhaps for this reason, a news search reveals a certain indifference in the reporting of the events and legal procedures of this anticipated legislation. Interestingly, however, some news reports expressed confusion regarding the new law of corporate killing. For example, on the 17th June 2009, *The Guardian* reported in its headline, that the 'Company director faces first corporate manslaughter charge', whereas the subheading indicated 'Gloucestershire business accused of unlawful killing by gross negligence after death of geologist on building site'.[43] The crux of the issue lies in this unintentional but misleading reporting: a company director, as a person, may face a charge of gross negligence manslaughter, whereas according to the

[39] *Corporate Manslaughter: The Government's Draft Bill for Reform* (cm6497) 2005 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251080/6497.pdf (accessed 07 Aug 2015), p. 8
[40] Great Western Trains Co Ltd (1999) unreported
[41] See successful appeal for the reduction of the Health and Safety fines Balfour Beatty Rail Infrastructure Services Ltd [2006] EWCA Crim 1586; [2007] Bus. L.R. 77 (CA (Crim Div))
[42] Cotswold Geotechnical Holdings Ltd [2011] EWCA Crim 1337; [2012] 1 Cr. App.
[43] S. Morris, "Company Director Faces First Corporate Manslaughter Charge", *theguardian.com*, June 2009, http://www.theguardian.com/uk/2009/jun/17/mudslide-corporate-manslaughter-charge (accessed 03 Nov 2015)

new law, it is only the company, as an entity, that will face a charge of corporate manslaughter.[44] Indeed, these liabilities represent currently two unconnected and independent offences. Specifically, there is no need to identify the criminal liability of an individual (for gross negligence manslaughter) to charge the company with corporate manslaughter (as it was previously required by the identification doctrine). Parliament, in the context of the CMCH Act, had no interest in punishing a physical person; indeed, section 18 of the Act specifically excludes individual liability for 'aiding, abetting, counselling, procuring or being art and part, in the commission of an offence of corporate manslaughter'.[45]

However, a company's liability for corporate manslaughter is not assessed in isolation, and perhaps this is where the confusion lies. Although the law has moved away from the doctrine of identification (therefore, the 'controlling mind') and liability currently applies only to the corporation, the issue of causation has not in fact been resolved. The CMCH Act indicates that 'an organisation is guilty of an offence […] *only if* the way in which its activities are managed or organised by its senior management is a substantial element […]'[46] of the 'gross breach of a relevant duty of care owed by the organisation to the deceased'.[47] From a doctrinal point of view, there should be no problem, especially when the explanatory notes to the Act clarify that 'the usual principle of causation in the criminal law will apply […]'.[48] In other words, causation is assessed first on a factual (evidential) level, once this is satisfied the question to be considered is a legal one. More specifically, the aspects to ascertain are first,

[44] CMCH Act s.1(1) An organisation to which this section applies is guilty of an offence 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.
s. 1(2) The organisations to which this section applies are— (a) a corporation; (b) a department or other body listed in Schedule 1; (c) a police force; (d) a partnership, or a trade union or employers' association, that is an employer.
[45] CMCH Act s.18(1, 2)
[46] CMCH Act s.1(3), emphasis added
[47] CMCH Act s.1(1)
[48] CMCH Act, Explanatory Notes, Section 1 (point 15)

whether 'but for'[49] the senior management's gross breach of duty in managing the organisation's activities, the death would not have occurred. Second, although the gross breach does not have to be the only or even the main cause of death (which may be an action or omission of an employee), it must be 'operative and substantial' at the time of death and must have 'significantly contributed'[50] to the fatal result. The reality, however, is far less technical, and policy considerations[51] may contribute to strengthen or weaken the 'chain of causation'.[52] The evidence, circumstances and understanding of what is 'gross' in certain contexts[53] will have a significant impact on the identification of a causal connection between the senior management, i.e., the way in which the organisation's activities were conducted, and the consequential death. These factors will be even more complex when the corporation is larger.[54]

Some academics and legal and industry practitioners have welcomed the Act's provisions, whereas others have expressed their concerns regarding the un-clarity of the new doctrine and the inconsistency and incoherency of the entire concept of the new statutory corporate killing offence. Except for these concerns, however, it stands that since the Act's commencement, there have been many successful prosecutions;[55] that is, corporations have pleaded guilty and have been convicted and penalised with the payment of fines (albeit at levels that are sometimes unsatisfactory). Moreover, it could be argued that the understated nature of this statute has been overlooked. In 2005, the draft Bill to the CMCH Act made it clear that 'this

[49] Factual causation (the 'but for' test) as per White [1910] 2 K.B. 124
[50] Legal causation as per Smith [1959] 2 Q.B. 35 and Pagett [1983] 76 Cr. App. R. 279, respectively
[51] See in *Insight: Corporate Manslaughter, Decisions to prosecute* by Ponting and Balysz, 2014, Legislation, accessible via Weslaw.uk (2015 Sweet & Maxwell Ltd)
[52] A good example is Kennedy [2008] 1 A.C. 269
[53] s.8 of the CMCHA 2007 and Adomako (John Asare) [1995] 1 A.C. 171
[54] See in *Insight: Corporate Manslaughter, Decisions to prosecute* by Ponting and Balysz, 2014, Legislation, accessible via Weslaw.uk (2015 Sweet & Maxwell Ltd)
[55] See M.G. Welham, *Corporate Manslaughter and Corporate Homicide: A Manager's Guide to Legal Compliance,* 2nd edn (Bloomsbury Professional, 2007)

offence must complement, not replace, other forms of redress such as prosecutions under health and safety legislation', and it 'must be reserved for the very worst cases of management failure',[56] which implicitly affirms the centrality of policy and public interest considerations in determining liability. This situation is not surprising. First, 'manslaughter' is well known to function as a catchall offence for the killings that lack intention and cannot be classified as murder.[57] Manslaughter is an acceptable way, though not without reservations, to address culpable acts and omissions that indirectly lead to fatal consequences and it serves a rather moral function by still finding someone legally accountable. Additionally, the intention to only target the 'corporation' with this new offence rather than also a physical person, could reflect the old fashioned but clearly grounded view that 'all this' is not really a crime (and perhaps a waste of time).

However, the CMCH Act has revived a much more troubling social dilemma: to what extent is it just, legally and morally, that no physical person must necessarily be found to be also legally responsible for the fatal consequence? In the case of Cotswold Geotechnical Holding, the CPS reported that 'there was no person in the dock at Winchester Crown Court during the three-week trial' because 'it is the company, rather than an individual, which is charged with corporate manslaughter'.[58] However, despite establishing gross negligence culpability and thus charging the company's director, there was no person in the dock either to accept personal responsibility. The case of Cotswold Geotechnical Holding is unfortunate because its only director was terminally ill and required immediate treatment, which made the trial

[56] The Home Secretary, the Rt Hon Charles Clarck MP in *Corporate Manslaughter: The Government's Draft Bill for Reform* (cm6497) 2005 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251080/6497.pdf (accessed 07 Aug 2015), Forward

[57] C. Wells and O. Quick, *Lacey, Wells and Quick Reconstructing Criminal Law: Text and Materials* 4th edn (Cambridge University Press, 2010)

[58] CPS, News Centre, "Cotswold Geotechnical Holdings convicted of first corporate manslaughter charge under new Act", 15 February 2011, http://www.cps.gov.uk/news/latest_news/107_11/ (accessed 09 Aug 2015)

process impractical; for these reasons, the charge against him was dropped.[59] However, this example has set a precedent in disguise. It could be argued that, to the relief of the corporate community, as long as the corporation can respond to the charges, individual liability can then be avoided. Commenting on the Act in 2008, Ormerod and Taylor argued that 'in practical terms the Act *may* lead to a focus on organisational failures while allowing individuals to escape censure';[60] it is plausible to confirm that their concern became reality. Future prosecutions such as Lion Steel Ltd (2012),[61] JMW Farms Ltd (2012)[62] and others[63] have mirrored this reality. Indeed, these corporations were found liable against the CMCH Act whilst also individual gross negligence manslaughter was identified, but negotiations followed that 'resulted in agreement that [the company] would enter a plea of corporate manslaughter with all remaining charges against the individual directors being withdrawn'.[64] Therefore, a plea bargain was achieved.

On the face of it, however, the question of whether it is moral and just to exclude individuals from sharing culpability with the corporation was already resolved. The scale had been turned in favour[65] of the moral argument seeing the corporation as a 'collective agent'. As opposed to the individualistic approach which argues that the corporation's responsibility is 'reducible to claims about the responsibility of individuals',[66] the collective agent argument endorses the

[59] Cotswold Geotechnical Holdings Ltd [2011] EWCA Crim 1337; [2012] 1 Cr. App. R. (S.) 26
[60] Emphasis added. D. Ormerod and R. Taylor, "The Corporate Manslaughter and Corporate Homicide Act 2007" (2008) Criminal Law Review, p.4
[61] Sentencing remarks, Judiciary of England and Wales, before His Honour Judge Gilbart QC Honorary Recorder of Manchester, R v Lion Steel Equipment Limited, 20 July 2012, https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/hhj-gilbart-qc-sentence-remarksr-v-lion-steel.pdf (accessed 03 Nov 2015)
[62] JMW Farm Limited [2012] NICC 17 http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2012/[2012]%20NICC%2017/j_j_2012NICC17Final.htm (accessed 03 Nov 2015)
[63] C. Wells, "Corporate Criminal Liability: a ten year review" (2014) Criminal Law Review, p.9
[64] Ibid. at 8
[65] See on that regard, C.M.U Clarkson, "Corporate Manslaughter: Yet more Governmental Proposals" (2005) Criminal Law Review
[66] T. Isaacs, "Corporate Agency and Corporate Wrongdoing" (2013) 16 New Criminal Law Review, p.246

explanation that a corporation is indeed a moral agent in its own right, and as such, it is 'capable of intentional collective action'.[67] More specifically, Isaacs argues that there may be actions which are not the product of an individual person's intention, rather, they reflect the corporate intention which was materialised through a corporate policy. This perspective makes particular sense when considering, as Isaacs has suggested, that a corporation policy (and in turn, intention and action), could have been the outcome of a compromise (of one's personal views) by those participant to the consolidation of the policy.[68] Indeed, the UK Corporate Governance Guidance states that 'no single person should dominate the board's decision-making'.[69]

It is perhaps only with such a perspective that the requirement of 'management failure' as instructed by the CMCH Act could be identified in view of the structurally complex and diverse administration of modern corporations. The Act requires identifying an alignment between the ways the corporation's activities have been managed and organised by its senior management, and the eventual fatal consequence. According to the Act 'senior management' represents those persons 'who play significant role in the making of decisions' or manage and organise in practice the corporation's activities.[70] Glazebrook further emphasises the recognition that although members of the corporation might change, the corporation itself will still be 'seen to possess a continuing identity'; it is this identity which allows the corporation to 'enter into social and economic arrangements' with other corporations and individuals.[71] Indeed, as suggested by the Confederation of British Industry, an important

[67] Ibid. at 245-246
[68] Ibid. at 246
[69] *Corporate Governance Guidance*, Institute of Directors, November 2010, https://www.iod.com/MainWebsite/Resources/Document/corp_gov_guidance_and_principles_for_unlisted_companies_in_the_uk_final_1011.pdf (accessed 30 March 2016) p.7
[70] CMCH Act s.1(3, 4.c)
[71] P.R. Glazebrook, "a Better way of Convicting Businesses of Avoidable Death and Injury" (2002) Criminal Law Review, p.406

consideration to take into account is the fact that the CMCH Act operates as a tool for stigmatising the company, as such, 'with the label of having committed "corporate manslaughter", with its major effect on corporate reputation.'[72]

However, the coupling of the collective agent perspective with plea bargaining, strikes as an oddity; whilst plea bargaining in itself has been the object of contentious debate. Plea bargaining is the procedure through which an agreement is reached between the prosecution and the defendant, where the defendant agrees to plead guilty to some of the charges, or a lesser charge.[73] The advantage of this tool lies in the 'fast-forwarding' of the criminal proceedings, thus avoiding embarking on a lengthy and expensive trial.[74] This is certainly desirable. However, it has been argued that this has come at the cost of undermining core principles of the English legal system. Darbyshire points out that 'this is a stunning hypocrisy in the Anglo-American legal systems, whose rhetoric trumpets the right to trial, especially jury trial, the burden of proof and the presumption of innocence as the hallmarks of the world's finest democracies'.[75] Although the Attorney General's Office provides clear instruction on how to go about the acceptance of a plea bargain,[76] where it is advised that this should only be if it is clear that 'the court is able to pass a sentence that matches the seriousness of the offending',[77] in reality, the implication of this practice is that a defendant is being rewarded for pleading guilty to an offence which the prosecution will be exonerated to prove in the same way as if it were to submit the case in front of a jury. Prosecutors have

[72] CBI response to the Home Office Consultation Document: Corporate Manslaughter, the Government Draft Bill for Reform, June 2005, http://www.gov.scot/Resource/Doc/1099/0019150.pdf (accessed 04 April 2016), p.2
[73] CPS, Code for Crown Prosecutors, Accepting Guilty Pleas, https://www.cps.gov.uk/publications/code_for_crown_prosecutors/guiltypleas.html (accessed 09 Feb 2016)
[74] Wells and Quick, n.57 at 51
[75] P. Darbyshire, "The Mischief of Plea Bargaining and Sentencing Reward", (2000) Criminal Law Review, p.4
[76] The acceptance of pleas and the prosecutor's role in the sentencing exercise, Attorney General's Office, 30 Nov 2012, https://www.gov.uk/guidance/the-acceptance-of-pleas-and-the-prosecutors-role-in-the-sentencing-exercise (accessed 09 Feb 2016)
[77] Code for Crown Prosecutors, https://www.cps.gov.uk/publications/code_for_crown_prosecutors/guiltypleas.html

been warned not to accept pleas 'because it is convenient';[78] however, judges have recognised that their 'hands are being tied by lawyers keen to strike deals with thieves, muggers and burglars which has resulted in offenders walking free'.[79]

Within the context of corporate manslaughter, as mentioned previously, a number of corporate directors pleaded guilty; this was to secure a corporate manslaughter charge while guaranteeing that individual charges for gross negligence manslaughter were dropped. Plea bargaining in this context, however, acquires an interesting format, something which does not seem to be dealt with by any of the CPS instructions: two different charges are made against two different persons (the corporation and the director); a plea bargain is agreed by the director which subsequently shifts liability to be sustained solely by the corporation. However, it is not clear how the above dynamic reflects the collective agent perspective; surely, if this perspective was to be sustained, and the corporation was to be considered not only a legal but also a moral entity, a plea bargain concerning another individual should have no effect on the proceedings taking place against the corporation. Put in a different way, how can the director plea bargain on corporate manslaughter if the offence can only be committed by the corporation and no secondary liability is allowed? But this is not all. Whilst the collective agency perspective allows for the attribution of liability to the corporation in its own right, the understanding is less clear in relation to this corporation being able to 'voice out' a plea, and how could it? However, guilty pleas on behalf of corporations have been accepted without reservations; innocence until proven guilty and a fair trial by jury is at stake, especially considering that it should be the 'job' of the jury to deliberate whether the corporate failure has been gross enough to enter the realm of criminal law. It could be argued

[78] Code for Crown Prosecutors, https://www.cps.gov.uk/publications/code_for_crown_prosecutors/guiltypleas.html

[79] J. Narain, "Judge attacks 'absurd' deal that saved serial thief 4 years' jail", *Mail Online*, 28 April 2011, http://www.dailymail.co.uk/news/article-1381121/Judge-rages-serial-burglars-absurd-plea-bargain-forced-light-sentence.html (accessed 21 Feb 2016)

that CPS has had no choice but to resort to such a strategy in order to secure convictions. Indeed, Pizzi suggests that when a system does not trust its 'trial apparatus […] to convict the guilty and acquit the innocent with a high degree of reliability, it needs to find ways to avoid trial'.[80] In any case, it is doubtful whether the CPS spends sleepless nights on a potential miscarriage of justice concerning a person who is not flesh and blood; it is more likely that pressure will be felt in the event of non-conviction.

Apart from unanswered questions related to the awkward dynamic of the plea bargain in this context however, the CMCH Act has enforced a powerful tool, not so much for the criminal justice system, but for the corporations themselves, or rather, for their 'fat cat' directors. This tool has been termed as 'creative compliance'. Nelken further explains that because of the limitation in finding the company directors directly responsible for actions attributed to the corporation, it has been much more desirable to seek compliance rather than prosecution. Compliance could include anything from self-regulation to the enforcement of health and safety measures.[81] The crucial point of creative compliance, in the words of McBarnet, is 'the use of technical legal work to manage the legal packaging' so as to 'fall on the right side of the boundary between lawfulness and illegality'.[82] It could be argued that the CMCH Act has further allowed[83] this compliance to enter the sphere of criminal prosecutions, where the 'fat cat' director complies with the law in order to ensure his or her own impunity and possibly immunity from a stigma attracted by a prison sentence.[84] Arguably, the CPS' "failed" attempts at pursuing individuals' criminal prosecutions has paved the way back to the 'comfort-zone' of regulatory offences where compliance could not get more creative, such as

[80] Pizzi, 1998, cited in Darbyshire, n. 75 at 2
[81] D. Nelken, "White-Collar and Corporate Crime", in M. Maguire, R. Morgan, and R. Reiner (eds), *Oxford Handbook of criminology*, 5th edn (Oxford University Press, 2007), pp. 642-643
[82] D. McBarnet, "After Enron will "Whiter than White Collar Crime" still wash?" (2006) 46 Brit. J. Criminology, p.2
[83] Albeit perhaps not in those cases where the corporation is uncomplicated in its structure
[84] McBarnet, n.82 at 3

in the case of Pyranha Mouldings Ltd. This company was charged with corporate manslaughter for the death of an employee who was trapped in a kayak moulding oven; the company was successfully convicted and sentenced to the payment of a fine. The company itself was convicted of a criminal offence, however, it could be argued that creative compliance was set forth once the company director, Peter Mackereth, was also found liable under the Health and Safety at Work Act 1974,[85] but instead of serving the nine months prison sentence, he was given a suspended sentence for two years with a fine.[86] In other words, it is likely that Mr Mackereth was quickly back to business with little harm attached to his reputation.

The above-discussed issues have significant implications on a number of levels. First, according to Wright, the rationale behind the criminalisation of corporate criminality was the need to deter the managerial 'directing mind' behind the corporate failure.[87] It appears that the Home Office was critical of the lack of connection between corporate and individual liability, as it was recommended by the Law Commission;[88] whilst it was concerned that the future Act would facilitate the preclusion of individual liability when there was not enough evidence to prove that indeed the individual had contributed to the corporate offence.[89] When the government first approached the reform in 2000, it argued for the need of individual

[85] CPS, News Centre, "Pyranha Mouldings Ltd sentenced for corporate manslaughter following death of an employee in manufacturing oven", 25 March 2015, http://www.cps.gov.uk/news/latest_news/pyranha_mouldings_ltd/ (accessed 20 Sep 2015)
[86] This means that the offender does not go to prison immediately but is given the chance to stay out of trouble and comply with up to 12 requirements that are set by the court (Sentencing Council, Suspended sentence, https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/suspended-sentences/ accessed 20 Sep 2015)
[87] F.B. Wright, "Criminal Liability of Directors and Signor Managers for death at work", (2007), Criminal Law Review, p.1
[88] Cited in P. Almond, *Corporate Manslaughter and Regulatory Reform* (Palgrave Macmillan, 2013), p. 27-28, 30.
[89] The Corporate Manslaughter and Corporate Homicide Bill, Bill 220 of 2005-06, Research Paper 06/46, 6 Oct 2006, House of Commons Library, p. 35

'punitive sanctions' in order to guarantee 'sufficient deterrent'.[90] Since then, however, the government has changed its view, and on the second reading of the Bill a number of Lords expressed dissatisfaction with the exclusion of secondary liability. The Lords believed that a 'provision of this kind in legislation would have a significant deterrent effect'.[91] Arguably, however, it is not so much the fact that no 'fat cat' has been convicted of a criminal offence since the enactment of the Act; rather, what fuels the creative compliance here is the inconsistent application of the law. As best put by Nagin, 'certainty of apprehension, not the severity of ensuing legal consequences, is the more effective deterrent.'[92]

Moreover, it could be argued that the CMCH Act created a dangerous illusion, that is, that the corporation is a stand-alone entity. The Act and the criminal procedures have 'forced' the construct of dangerousness to be seen as related *only* to the corporation's behaviour. This understanding, however, is awkward and it is almost reminiscent of 17th century criminal trials against animals. It is possible that the crux of this criminalisation has been lost in between the first Law Commission consultation in 1996, the Bill in 2005, the enactment of the Act in 2007 and its implementation since 2011. For those companies whose fate was decided by the jury, the Act proved to be successful – they were found guilty.[93] However, the payment of a fine can hardly equate with the life which has been lost and the tragedy suffered by the family. Perhaps if corporate killing did not come under the umbrella of criminal law, such moral consideration would have been almost insignificant – the expectation would have

[90] The Corporate Manslaughter and Corporate Homicide Bill, Bill 220 of 2005-06, Research Paper 06/46, 6 Oct 2006, p. 34

[91] Baroness Turner, Monday 5 Feb 2007, Volume No. 689, HL, Corporate Manslaughter and Corporate Homicide Bill, Colum 537

[92] D.S. Nagin, "Deterrence in the twenty-first century: a review of the evidence",(2013) 42(1), Crime and Justice, p.1

[93] See Summary of Corporate Manslaughter Cases – Update April 2015, Northumbria University library, http://readinglists.northumbria.ac.uk/page/summary-of-corporate-manslaughter-cases-updated-april-2015.html (accessed 12 Feb 2016)

been different. However, this is not the case and therefore such moral consideration should be born in mind.

Sutherland did not live long enough to witness corporate killing; it may be interesting to speculate what he would have thought regarding the ways in which the criminal justice system and criminal law have dealt with companies who place profit before safety and cause human and environmental fatalities. The justification behind the drafting of the CMCH Act was the need to demonstrate that the crimes of the 'suits' and the crimes of the 'powerful' are being taken seriously in contrast with a common law that appeared to be incapable of delivering justice. How 'justice' has been perceived in this context, however, is unclear. Having a previous common law offence that addressed both 'the company' and the 'fat cat' director made us erroneously believe that the CMCH Act would function as an excellent condemnation and deterrence tool. In reality, the Act was drafted as a rather unpretentious supplementary tool. Moreover, the Act has created a socio-legal problem. On its face, the Act does not require the identification of criminal liability that pertains to a physical person in order to find the corporation, as an entity, liable for corporate manslaughter. However, the dynamics of these proceedings are proving surprisingly perplexing. It appears that plea bargaining is now the norm where the culpability of the individual for manslaughter is absorbed by the liability of the corporation. Thus, the 'fat cat' is set free after all, and the question to be asked is whether the CMCH Act serves any real public interest or merely pays lip service to the 'war on crime' mantra.