

A COMPARATIVE STUDY OF CORPORATE CRIMINAL LIABILITY – ADVANCING AN ARGUMENT FOR THE REFORM OF CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA, BY INTRODUCING A NEW OFFENCE OF CORPORATE HOMICIDE

Dorothy Mmakgwale Farisani

A THESIS SUBMITTED IN ACCORDANCE WITH THE ACADEMIC REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY (LAW) AT THE UNIVERSITY OF KWAZULU-NATAL, PIETERMARITZBURG CAMPUS, SOUTH AFRICA

Supervisor: Professor SV Hocter

Declaration

I, the undersigned, declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any University for a degree.

A handwritten signature in black ink, appearing to be 'M. A. W.', written over a dotted line.

Signature.....

Date...03/12/2014.....

ACKNOWLEDGEMENTS

I praise and thank God for having made it possible for me to study up to this level. I thank UKZN & UNISA for funding my studies and the NRF for the Thuthuka grant. I appreciate library services rendered by Ms Sinethemba Mthethwa, Mr Mashudu Lisoga, Ms Nokubonga Mlotshwa and librarians at UKZN and UNISA libraries. I thank Prof Knut Holter and the librarians at the School of Mission and Theology library in Stavanger, Norway, for giving me access to a substantial amount of sources used, while on sabbatical. I acknowledge and thank Dr Mariette Postma who edited an earlier version of this thesis. Thanks to Prof Michael Kidd, Prof Louise Jordaan and Adv Liza Tsatsi who gave me access to some of the sources I used and to my mentors Prof Nina Mollema, Prof Mpfariseni Budeli-Nemakonde and Prof Coen Visser. Thank you very much to my supervisor, Prof Shannon Hooctor, for the prompt and critical feedback, guidance, and mentoring throughout my PhD studies.

I extend my gratitude to Dr Murray Hofmeyr, Adv George Mojapelo, Prof Simon Maimela and to my brother, Mr Molatelo Moila for their mentoring and support during my undergraduate studies, which paved the way for this achievement. The support and encouragement of my managers at UKZN (former employer) and at UNISA is appreciated. To my parents, Bishop Emeritus Prof Moeahabo Phillip Moila, my late mother Mrs Nnako Paulina Moila and my mother Mrs Thembelihle Patricia Moila, I can't thank you enough for having taught me the value of education and for your support. Mr Kennedy Farisani, Mrs Tshilidzi Farisani, my siblings, extended family, friends and colleagues thanks for your support and encouragement. To my children Khwathisedzo, Mukundi, Pembelani and Muronga thanks for your understanding and support. I also thank Ms Khwathisedzo Farisani and Ms Mercy Sedina (cousin) who assisted with the housework during the busiest period.

Last but not least, without the love, unwavering support and understanding of my dear husband, Rev Prof Elelwani Bethuel Farisani, I would not have reached this far. Honey, I appreciate the constant encouragement and everything you did to make it possible for me to spend endless hours on this, including being a father and a mother to our precious children. Ndo livhuwesa Mudau! Mudzimu a vhe na vhone, Muronga wa maḽi a mvula a no u fhalala na zwiḽula zwa lidza mifhululu! Aa!

ABSTRACT

With corporations playing a prominent role in economies worldwide, economic activities sometimes result in the negligent deaths of people. Corporate criminal liability is a concept that is accepted in many countries including South Africa. In South Africa it is currently regulated by section 332 of the Criminal Procedure Act 51 of 1977.

Despite the fact that corporations are juristic persons with no ability to think and act with intent, the concept of corporate criminal liability is in existence and several theories have been relied upon by various jurisdictions as their basis for corporate criminal liability. Two of these theories are ‘vicarious liability’ which result in the corporation being held vicariously liable for crimes committed by its officers and the ‘identification theory’ which result in the corporation being held personally liable for crimes committed by its officers. (A Pinto & M Evans *Corporate Criminal Liability* 2nd ed (2008) 24). Developments during the past twenty five years have shown that these theories are fraught with problems and these have led to corporations escaping liability, especially where there has been negligent loss of lives. To overcome these problems, jurisdictions such as England and Canada have recently resorted to having legislation that deal specifically with corporations that have negligently caused deaths. (England’s Corporate Manslaughter and Corporate Homicide Act 2007 and Canada’s Bill C-45 which became law on March 31 2004 and is now section 217.1 of the Canadian Criminal Code). In South Africa the rules governing corporate criminal liability include all crimes generally and there is a lack of successful prosecutions for deaths negligently caused by corporations.

In this research the concepts of corporate criminal liability and corporate homicide in the three jurisdictions are fully examined. It is determined that regardless of the basis that each jurisdiction relies on, there are various problems that one encounters when dealing with corporate criminal liability and corporate homicide. Problems experienced by these countries will be fully discussed and these will include accounts of situations that led directly to the acceptance of corporate criminal liability into their laws as well as the subsequent decision to treat corporate homicide as a separate offence. The research is intended to be a thorough examination of the concepts of corporate criminal liability and corporate homicide and it is aimed at serving as a guide to South Africa on how to deal effectively with the challenge of corporate crime, specifically negligent deaths caused by corporations or corporate activities.

Keywords: corporate criminal liability; corporate criminal responsibility; corporate homicide; corporate killing; corporate murder.

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PART ONE – INTRODUCTION

CHAPTER 1 - INTRODUCTION

I INTRODUCTION

During the night of December 2, 1984 in Bhopal, India, thousands of people lost their lives in a horrific way as toxic gases from a plant owned by Union Carbide Corporation spread rapidly around the city.¹ According to the Bhopal Medical Appeal

“The toxic cloud was so dense and searing that people were reduced to near blindness. As they gasped for breath, its effects grew ever more suffocating. The gases burned the tissues of their eyes and lungs and attacked their nervous systems. People lost control of their bodies. Urine and faeces ran down their legs. Some began vomiting uncontrollably, were wracked with seizures and fell dead. Others, as the deadly gases ravaged their lungs, began to choke, and drowned in their own bloody body fluids”.²

Union Carbide was never formally charged for these gruesome deaths,³ despite the fact that to date people are still suffering as a direct result of this disaster.⁴ Many are still in need of medical attention and care.⁵ In 2001 Union Carbide merged with Dow Chemical and the new

¹ S Kumar *Bhopal.net* <http://www.bhopal.net/oldsite/sunil.html> (accessed 10 December 2013).

² Ibid.

³ This is despite the decision by the Indian Supreme Court to order Dow Chemical to be tried in the Bhopal Criminal Court for Union Carbide’s 1984 Bhopal disaster. (K Gupta *Bhopal Chemical Disaster*. [Thousand Oaks, California]. UNT Digital Library <http://digital.library.unt.edu/ark:/67531/metadc31094/> (accessed 10 March 2014).

⁴ It has been noted that “more than 26 years have passed since the disaster, yet thousands in Bhopal continue to suffer and die from chronic illnesses, the UCC (Union Carbide Corporation) is still a highly contaminated industrial graveyard and justice continues to evade the people of Bhopal”. (Web Editor ‘Bhopal now: the enduring tragedy’ *The Bhopal Medical Appeal* 14 January 2011 www.bhopal.org/2011/01/bhopal-now-the-enduring-tragedy/ (accessed 20 January 2014)).

⁵ “Ailments directly linked to the disaster include blindness, respiratory difficulties, a variety of cancers and gynecological problems. Many survivors today cannot walk a few steps without gasping for breath, and others suffer sensory delusions, hearing voices in their heads”. (Saffi UA ‘The Bhopal Disaster: an ongoing tragedy’ 26 June 2010 *PULSE* <http://pulsemedia.org/2010/06/26/the-bhopal-disaster-an-ongoing-tragedy/> (accessed 20 January 2014)).

corporation became Dow Chemical.⁶ In July 2009 the Chief Judicial Magistrate of Bhopal issued an order to the Central Bureau of Investigations for the arrest of Mr Warren Anderson,⁷ who was the chairman of Union Carbide when the Bhopal disaster occurred. Mr Anderson and the company were charged with various crimes including culpable homicide and grievous assault as a result of the 1984 Bhopal disaster.⁸

In June 2010, 26 years after the Bhopal disaster eight people were convicted by the Court of the Chief Judicial Magistrate, Bhopal.⁹ These were the first convictions for the Bhopal disaster¹⁰ of individuals who were formerly employed by Union Carbide, including people in senior managerial positions.¹¹ They were convicted of ‘death by negligence’.¹² It should be noted, however, that to date, Dow Chemical (the corporation) has failed to assume criminal responsibility for the Bhopal disaster.¹³

⁶ Posted by collective at December 31 2003 ‘Bhopal: A Heinous Corporate Crime, A Humanitarian Disaster’ www.thesouthasian.org/blog/archives/2003/Bhopal_a_heinous_corporate_cri.html (accessed 10 January 2013).

⁷ Mr Anderson had been arrested soon after the disaster, but thereafter he left India. “The Indian government has since said that it did not know where he was, but CNN-IBN television recently reported that he was in the Hamptons – a wealthy area outside New York”. (Associated Press ‘Court issues arrest warrant for former CEO of Union Carbide in gas leak case’ *The Guardian* 31 July 2009 <http://www.theguardian.com/world/2009/jul/31/warren-anderson-arrest-warrant> (accessed 21 January 2014)).

⁸ International campaign for Justice in Bhopal ‘Arrest Carbide Chairman Warren Anderson: Bhopal Court orders CBI’ *Association for India’s development Delhi Chapter* 31 July 2009 <http://delhi.aidindia.org/bethechange/content/view/1117/430/> (accessed 21 January 2014).

⁹ R Keswani ‘Bhopal gas Tragedy: Chronology of Events’ *The Bhopal Post* 27 June 2010 <http://www.thebhopalpost.com/index.php/2010/06/bhopal-gas-tragedy-chronology-of-events/> (accessed 21 January 2014).

¹⁰ Mr Warren Anderson was not one of the convicted people as he had absconded, see note 7 above.

¹¹ BBC news ‘Bhopal trial: Eight convicted over India gas disaster’ <http://news.bbc.co.uk/s/hi/8725140.stm> (accessed 21 January 2014).

¹² Ibid.

¹³ After many years of evading criminal liability Dow Chemical is expected to appear in front of the Chief Judicial Magistrate, Bhopal in July 2014 to state its position regarding the Bhopal disaster. (‘Bhopal court summons Dow Chemicals in gas tragedy case’ http://articles.economicstimes.indiatimes.com/2014-03-01/news/47799438_1_dow-chemicals-gas-tragedy-case-bhopal-gas-leak-disaster_1_March_2014 (accessed 10 March 2014)).

Dow Chemical, which has been blamed for corporate crimes allegedly committed in many countries, operates worldwide and it is just one example out of the many corporations that have allegedly committed corporate crimes in South Africa.¹⁴ Corporate crimes are generally activities of corporations which result in the violation of criminal law.¹⁵ Corporate crimes include, *inter alia*, fraud, price-fixing, corruption and the unlawful killing of human beings.

II INTRODUCING THE CONCEPT OF CORPORATE CRIMINAL LIABILITY

South Africa recognizes corporate criminal liability and this is currently governed by section 332 of the Criminal Procedure Act, 1977.¹⁶ Corporate criminal liability refers to holding corporations, in spite of being artificial persons, accountable for corporate crimes that have been committed in the name of the corporation or in furthering the interests of the corporation.¹⁷ The effect of this section is that in South Africa a corporation may be prosecuted for a criminal act committed in the process of furthering the interests of the corporation. Section 332 does not specify the crimes that corporations may be held liable for. It refers to crime committed by corporations generally. This begs the question whether the provisions of section 332 of the CPA deal adequately and effectively with corporations that involve themselves in activities that result in the unlawful killing of human beings.

¹⁴ Greenpeace “Greenpeace exposes ‘Corporate Criminal’ Dow Chemical in South Africa: Calls for Corporate Liability Framework” at the Earth Summit, Johannesburg 2002. www.bhopal.net/pressrelease. (accessed 1 March 2014). An example of Dow’s activities in South Africa is illustrated by a march by Greenpeace during which “activists also taped off a drain for toxic chemicals which runs through several hundred metres of veld close to Phomolong, Birch Acres, Thembisa and Ivory Park. Greenpeace spokesperson Von Hernandez said laboratory-tested samples of the discharge from the factory showed several toxic chemicals, including chlorinated benzenes, tetrachloromethane, alkanes and the pesticide lindane...Bobby Peek, head of the SA environmental justice group groundWork, said the government was defending the interests of polluters by allowing Dow to discharge poisons into the environment close to poor communities”. (T Carnie ‘Greenpeace swoops on Chemical Factory’ 29 August 2002 www.iol.co.za/?click_id=13&art_id-ct20020829212456699S532211&set_id1 (accessed 1 March 2014)).

¹⁵ They have also been defined as “corporate activities which are perceived to involve a transgression of some aspect of criminal law”. (C Wells *Corporations and Criminal Responsibility 2ed* (2001) 1).

¹⁶ The Criminal Procedure Act 51 of 1977, hereinafter referred to as the CPA.

¹⁷ *Ibid*, section 332.

A plea for government to “commit to developing an international instrument for corporate accountability and liability in order to stop the widespread abuse of the environment and on human rights by multinational corporations”¹⁸ was made by Greenpeace at the Earth Summit in Johannesburg, 2002, as it exposed Dow Chemical, reportedly “one of the world’s most notorious corporate criminals”¹⁹ for having manufactured and sold pesticide in South Africa, where it was allegedly responsible for many people’s health troubles.²⁰ Should South Africa at some point deem it necessary for it to heed a call such as the one made by Greenpeace, it would have to begin by reflecting on the provisions of section 332 of the CPA as they regulate the accountability and liability of corporations for crimes they have committed, and it should also reflect on whether such laws require reform or not.

In this thesis a reflection on section 332 of the CPA will be made with a view to highlighting the need for reform. The focus will not be on whether corporate criminal liability is a valid concept or not.²¹ This thesis is premised on the notion that corporate criminal liability is a relevant and valid concept which is an important point of focus in this day and age²² that is characterized by harmful corporate activities.²³ Corporate criminal liability is a concept that is

¹⁸ Greenpeace (note 14).

¹⁹ Ibid.

²⁰ Ibid.

²¹ This is in line with John Coffee’s observation that “during the last decade, the long-standing debate over corporate criminal liability has shifted dramatically – from a controversy over whether it should exist at all to a dialogue about how it should be defined and structured”. (JC Coffee Jr ‘Corporate Criminal Liability: An Introduction and Comparative Survey’ in A Eser, G Heine and B Huber (eds) *Criminal Responsibility of Legal and Collective Entities* (1998) 9, 9 www.iuscrim.mpd.de/verlag/online (accessed 15 November 2013).

²² Snyman states that “...there is in practice a great need for this form of liability, especially today when there are so many corporate bodies playing such an important role in society”. (CR Snyman *Criminal Law* 5th ed (2008) 253).

²³ “There is an emerging consensus among corporate criminologists, which is that corporate crime and violence inflicts (sic) far more damage on society than all street crime combined”. (S Singh “Corporate Crime and the Criminal Liability of Corporate Entities” www.unafei.or.jp/English/pdf/RS_No76/No76_10PA_Singh.pdf (accessed 12 July 2012)).

applied in many jurisdictions.²⁴ As it deals with the relationship between individuals, communities or society on one side and corporations, which are not natural persons, on the other side, it becomes necessary to investigate this phenomenon and to have a clear understanding thereof. The economies of many countries are influenced by, if not dependent on, corporations and corporate activities. It follows therefore that corporations and corporate activities play an important role in society; however, in carrying out those corporate activities corporate crimes may be committed. When that happens, individuals, communities or the society are the ones who bear the brunt of this negative consequence of corporate activities. Corporate criminal liability then serves as a tool that a state uses to hold a corporation criminally accountable for crimes committed in its interest or under its auspices.

It is submitted that it is important to investigate and understand the concept of corporate criminal liability; the rationale for subjecting corporations to criminal law; and how the concept of corporate criminal liability is applied in South Africa. Where the application of corporate criminal liability appears to be ineffective, weaknesses may be identified and possibly remedied. It is further submitted that this exercise may lead to a more effective use of the corporate criminal liability mechanisms.

Like many other jurisdictions, South Africa relies heavily on its economy, and corporate activity regularly affects individuals, communities and the society at large. The effect of section 332 of the CPA is that in spite of its lack of a physical existence and its inability to think and

²⁴ Apart from the United States of America, England, Canada and South Africa, countries such as New Zealand, Denmark, France, Belgium, Japan, Korea, Macau, Hong Kong, People's Republic of China, Qatar, Israel and the United Arab Emirates also recognise corporate criminal liability. (M Pieth and R Ivory 'Emergence and Convergence: Corporate Criminal Liability Principles in Overview' in M Pieth & R Ivory (eds) *Corporate Criminal Liability – Emergence, Convergence, and Risk* (2010) 3, 8-13).

act, in South Africa, a corporation may be prosecuted for a criminal act committed in the process of furthering the interests of the corporation. It may also be convicted and may face punitive measures in accordance with section 332 of the CPA.

It is a fact that corporations provide services and employment for many. In post–Apartheid South Africa the number of corporations that are in existence has increased dramatically. This is due to many factors, including the lifting of sanctions, the return of exiles, Black economic empowerment policies, more and more people opting for running their own businesses rather than being employed by others, etc. The increase in corporate activities has been accompanied by an increase in the number of crimes such as fraud, corruption, as well as incidents in which people sometimes lose their lives as a result of the illegal activities of the corporations.

As a point of departure it is submitted that corporate criminal liability has a purpose and for that reason it must be retained. It is intended, as part of the findings, to show that Khanna is incorrect in averring that

“some justification for corporate criminal liability may have existed in the past, when civil enforcement techniques were not well developed, but from a deterrence perspective, very little now supports the continued imposition of criminal rather than civil liability on corporations”.²⁵

²⁵ VS Khanna ‘Corporate Criminal Liability: What Purpose Does it Serve?’ (1996) 109 *Harvard Law Review* 1477, 1534.

It is submitted that holding corporations criminally liable is an important and commendable aspect of South African law and that corporate criminal liability should be regarded as an indispensable part of the criminal law as it has a crucial role to play. It is further submitted that corporate criminal liability, depending on how it is regulated, can serve as a strong deterrent against crimes committed by corporations. The argument that is advanced in this thesis is that in its current form the law regulating corporate criminal liability in South Africa is lacking and there is a need for reform, particularly with regard to the responsibility for fatalities caused by corporate activities.

III THE NEED TO INVESTIGATE CORPORATE HOMICIDE

It is reiterated that the concept of corporate criminal liability is important. Corporate criminal liability is, however, a wide concept and it encompasses all crimes that may possibly be committed by a corporation. The focus in this thesis is specifically on deaths caused unlawfully through corporate activities. These will be referred to as corporate homicide. The reason for focusing on the criminal liability of corporations for deaths caused is that death has been described as the “most serious form of harm”²⁶ that may be caused. Moreover, when death is caused it is the right to life that is infringed upon. The South African Constitution guarantees the right to life in the Bill of Rights²⁷ by providing that “everyone has the right to life”.²⁸ The right to life is considered to be the primary right that a person has. In the Constitutional Court

²⁶ Foreword to Sentencing Guidelines Council in Sentencing guidelines generated by the Sentencing Guidelines Council in Feb 2010 ('Corporate Manslaughter & Health and Safety Offences Causing Death') http://sentencingcouncil.judiciary.gov.uk/docs/web_guidelines_on_corporate_manslaughteraccessible.pdf (accessed 10 March 2014).

²⁷ Constitution of South Africa Act 1996, Chapter Two.

²⁸ Section 11 of the Constitution.

case of *S v Makwanyane*²⁹ the right to life was described by Langa J as “the most fundamental of all rights, the supreme human right”.³⁰ In the same case Chaskalson P explains that

“the rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three [the Bill of Rights]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others”.³¹

It is submitted that it is crucial to ensure that the right to life of all who associate with corporations is protected. Those who associate with corporations are potential victims of deaths caused by corporations and they range from employees³² to people who are being rendered services³³ by the corporations and sometimes even passers-by.³⁴ In line with Whyte’s observation there is a need to focus on corporate homicide because

“corporate crime that causes death of workers and members of the public is a huge, if largely invisible, problem. Rarely are those serious offences treated with the force of the criminal law they deserve”.³⁵

²⁹ *S v Makwanyane* 1995 (3) SA 391 (CC). In *S v Makwanyane* the death penalty was found to be unconstitutional. It must be noted, however, that “Chaskalson P who wrote the leading judgment concurred in by all the other judges in *Makwanyane*, did not invalidate the death sentence on the basis of its conflict with the right to life, but held that the death penalty was a cruel, inhuman and degrading punishment. A majority of the other members of the court nevertheless found that the death penalty also violated the right to life”. (I Currie and J de Waal *The Bill of Rights Handbook* 6th ed (2013) 260).

³⁰ *S v Makwanyane* (note 29) para 217.

³¹ *S v Makwanyane* (note 29) para 144. The case was decided under the Interim Constitution in which the Bill of Rights was found in Chapter 3.

³² *R v Bennett & Co (Pty) Ltd* 1941 TPD 194.

³³ *S v Schindler Lifts (SA) (Pty) (Ltd)* 2001 (1) SACR 372 (WLD).

³⁴ For instance, 5 pedestrians were injured by a truck, transporting 23 tons of metal sheeting, whose brakes failed. One of the pedestrians died as a result. J Breytenbach ‘Runaway Truck drove into hotel’ 13 May 2009 www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn22090513051120447C876450&page_number=1 (accessed (12 July 2012)).

³⁵ D Whyte ‘The Fatal Flaws in the English Corporate Manslaughter Bill’ (2005) 67 *Employment Law Bulletin* 4, 7.

In this thesis it is argued that it is time for South Africa to move towards having its own separate offence of corporate homicide which will specifically address the problem of unlawful killings caused by corporations. England has developed to the extent that in addition to laws regulating corporate criminal liability for crime committed by corporations generally, there is a separate statutory regulation of corporate homicide, the Corporate Manslaughter and Corporate Homicide Act.³⁶ Ireland is in the process of passing separate legislation for corporate manslaughter³⁷ and in New Zealand calls have been made for corporate manslaughter legislation.³⁸ The developments in these jurisdictions indicate that corporate homicide is an area of corporate criminal liability that deserves particular attention. In this thesis the concept of corporate criminal liability will form a major part of the discussion, which will then be narrowed down to corporate homicide as it is important to trace the development of the broader concept of corporate criminal liability and to discuss it before focusing on corporate homicide.

a) Reasons for proposing the formation of a specific crime of corporate homicide

It has been stated that harm caused by corporate disregard for safety has a greater impact in terms of deaths and injuries³⁹ when compared with the impact of a crime committed by an individual. Where there is loss of life resulting from activities of corporations, in certain systems, as stated above,⁴⁰ the corporations responsible are prosecuted for corporate homicide. Corporate homicide is a newly recognized crime⁴¹ which has developed from the broader

³⁶ The Corporate Manslaughter and Corporate Homicide Act 2007, hereinafter referred to as the CMCHA.

³⁷ The Corporate Manslaughter Bill 2013.

³⁸ J Wong 'Corporate Manslaughter: A Proposed Corporate Killing Offence for New Zealand' (2006) 12 *Canterbury Law Review* 157, 174.

³⁹ L N Lacey and C Wells *Reconstructing Criminal Law: Critical Perspectives on Crime and the Criminal Process* 2 ed (1998) 513.

⁴⁰ See footnote 36.

⁴¹ The development of corporate homicide in South Africa will be discussed fully below in Chapter Three IV (b).

concept of corporate criminal liability. South African law has, however, not developed to the extent that it recognizes a separate crime of corporate homicide.

In this thesis it will be argued that section 332 of the CPA is fraught with weaknesses; that the section is inconsistent with modern developments in other jurisdictions⁴² and that the subsequent deficiencies or inadequacies lead to injustice, particularly in the prosecution of corporate homicide. It will be further argued that due to the seriousness of corporate homicide, the best approach is to have a separate legal framework for corporate homicide which will address deaths caused by corporations more efficiently and adequately and would also be in line with developments in other jurisdictions.

In this thesis corporate homicide will be approached by way of a comparative study of corporate criminal liability as well as corporate homicide in South Africa, England and Canada. Based on the comparative study, recommendations will be made as to how South Africa ought to go about reforming corporate criminal liability in such a way that corporate homicide is recognized as a specified crime.

(b) Why a Comparative Study?

It is submitted that a comparative study of South Africa and the two chosen jurisdictions that have made reforms in this regard is the best way one can illustrate the dire need for South Africa to reform its laws. In the compared jurisdictions the public outcry as a result of failed

⁴² As Jordaan observes “the conclusion is reached that the criminal liability of juristic persons in South Africa is not only out of touch with developments elsewhere, but may be found to be inconsistent with the South African Constitution”. (L Jordaan ‘New Perspectives on the Criminal Liability of Corporate Bodies’ (2003) *Acta Juridica* 49).

prosecutions following major disasters made governments review their laws. By making use of the comparative study, it is hoped that South Africa will not wait for a major disaster to take place before it considers reform in this area.

(c) Reasons for choosing the compared systems

In South Africa corporate criminal liability has formed part of our criminal law since being introduced in 1917⁴³ and since then there have been a number of convictions,⁴⁴ however when it comes to deaths caused by corporations there have been few convictions. Section 332 of the CPA⁴⁵ generally imposes criminal liability for statutory and common-law offences. The legislature is to be commended for realizing the importance of corporate criminal liability and for formally recognizing it as part of our criminal law. However, despite the existence of section 332 of the CPA, corporate criminal liability in South Africa cannot be said to have developed to the extent where one can actually say that it satisfactorily addresses the problem of corporate crime, particularly the unlawful deaths of human beings. It is submitted that section 332 of the CPA presents challenges to the concepts of corporate criminal liability and corporate homicide in South Africa.⁴⁶

⁴³ Criminal Procedure and Evidence Act 31 of 1917, section 384 (hereinafter referred to as the CPEA).

⁴⁴ See *R v Van Heerden & Others* 1946 AD 168, where the company was held criminally liable for the crime committed by its director. Even though the director “in making the representations had not been acting ‘in the exercise of his powers or in the performance of his duties as director’ within the meaning of s. 384 (1) of Act 31 of 1917, he had sold the frames and made the representation ‘in furthering or endeavouring to further the interests’ of the company within the meaning of the section and the company was therefore criminally liable for his acts”.

⁴⁵ The CPA (note 16) section 332.

⁴⁶ Some of the main problems with section 332 are its failure to hold the corporation directly or personally liable for its crimes; the fault of relatively junior employees can trigger corporate criminal liability; the fault of the employee is imputed to the corporation even where the employee or director has acted beyond his or her powers; corporate criminal liability is possible in circumstances where there is no civil liability; knowledge by the corporation of the offence is not a factor that is considered when determining whether the corporation should be held criminally liable or not; it does not allow for a defence and thus allows for a conviction even in the absence of fault on the part of the corporation; the only punishment that may be imposed on a convicted corporation is a fine; and since the provision caters for all corporate crime generally, unlawful deaths caused by corporate activities are treated in the same manner as all other corporate crimes. These will be discussed in more detail in Chapter Three V below.

Both England and Canada have well-developed laws regulating corporate homicide. Moreover, they are both regarded as systems of “full corporate criminal liability”.⁴⁷ Systems having full corporate criminal liability are those that generally impose criminal liability on corporations regardless of the type of corporation.⁴⁸

For many years, both the legal systems of England and Canada have relied on the identification theory⁴⁹ to justify corporate criminal liability. An interesting observation is the fact that their interpretation of the theory has not been the same. Whilst in England a narrow interpretation has been applied, in Canadian law the theory was developed by the courts such that a broader interpretation thereof now applies.⁵⁰ As will be seen below, the interpretations influenced the success or failure of prosecutions for corporate crimes. Despite their different interpretations of the identification theory, both English and Canadian law have encountered problems which resulted in unsuccessful prosecutions of corporations for homicide. In both countries there was a public outcry which eventually led to the passing of new laws dealing specifically with, *inter alia*, corporate homicide.

It is interesting to what extent the new laws share similarities and also to what extent they differ. The differing interpretations of the identification doctrine and the subsequent legislation

⁴⁷ “Full corporate criminal liability developed first in a modern form in the United States and Canada, then in England, and more recently in the Netherlands”. (LH Leigh ‘The Criminal Liability of Corporations and other groups: A Comparative View (1982) 80 *Michigan Law Review* 1508, 1510).

⁴⁸ *Ibid.*

⁴⁹ “The principle of ‘identification’ ...attributes the conduct and state of mind of certain high-ranking officers in the corporation (representing the ‘directing mind and will’ of the corporation) to the corporate body thus rendering the corporate body directly liable”. (J Burchell *Principles of Criminal Law* 4th ed (2013) 450.

⁵⁰ This will be discussed in Chapter Five III below.

on corporate homicide make England and Canada jurisdictions that may contribute positively towards the recognition and development of the concept of corporate homicide in South Africa, hence the decision to do a comparative study involving these systems.

IV RESEARCH QUESTIONS AND HYPOTHESIS OF THIS THESIS

Corporate criminal liability is both topical and relevant in all countries where there are corporations. The increasing number of deaths caused by corporate activities⁵¹ makes it necessary for the legislature to focus on corporate homicide. Currently in South Africa there is no separate legislation that defines corporate homicide. There is no guidance as to how to deal with this phenomenon and, as already mentioned section 332 of the CPA does not efficiently and adequately address the problem of deaths caused by corporations. As a result there is a need for regulation to be reformed in such a way that it will ensure that corporations are properly held liable for causing the deaths of people.

The questions that the research proposes to address are:

- Does section 332 of the CPA properly address the issue of corporate crime?
- Does section 332 deal adequately and effectively with the issue of deaths caused by corporations?
- Are corporations in South Africa adequately punished when they have caused deaths? Are they being punished in such a way that they are deterred in committing future crimes?
- Is there a need for South Africa to reform section 332 of the CPA, the legal framework that deals with corporate criminal liability?

⁵¹ For instance, injuries and deaths caused by faulty machinery.

- How are the compared jurisdictions dealing with corporate criminal liability and particularly corporate homicide? Can South Africa learn anything from the selected jurisdictions that would result in a more adequate and more effective legal framework of corporate homicide?

The hypotheses that inform the research questions are that:

- Death caused by corporations is a serious challenge that South Africa is faced with.
- Section 332 of the CPA deals generally with the criminal liability of corporations for crimes and does not deal specifically with the problem of deaths caused by corporations.
- Section 332 of the CPA contains many weaknesses which render it inadequate and also ineffective when it comes to the protection of society from harmful corporate activities that may result in death.
- Under section 332 of the CPA the punishment of a convicted corporation may only take the form of a fine. This gives rise to the question whether a fine provides adequate and effective punishment. Since criminal law and criminal sanctions were originally intended for natural persons, the imposition of punishment on corporations is an important aspect which must form part of the discussion on corporate criminal liability.
- As the right to life needs to be earnestly protected, there is a pressing need to formulate a separate legal framework that deals specifically with situations where corporate activities have resulted in causing deaths.

V THE PURPOSE OF THE RESEARCH

This thesis is aimed at serving as a guide to legislators and judicial institutions in South Africa on how to deal effectively with the challenge of corporate crime, particularly the unlawful killing of human beings by corporations. It is intended to be a thorough examination of the concepts of both corporate criminal liability and corporate homicide. It shall consist of a detailed comparative analysis of the manner in which the chosen jurisdictions have gradually made the move to ensure that corporations are not exempted from liability in situations where they cause death to members of society. Problems experienced by these jurisdictions will be fully discussed and these will include accounts of situations that led directly to the eventual inclusion or acceptance of corporate homicide as a separate offence that corporations may be charged with.

The South African position, including the history of corporate criminal liability in South Africa, will be fully discussed. Recent developments that have emphasized the need for South Africa to make reforms to section 332 of the CPA will be highlighted. A discussion of the inadequacy and inefficiency of section 332 of the CPA will be made with a view to proposing a new legal framework which will be specifically aimed at ensuring that corporations that cause deaths are properly prosecuted.

The thesis will be structured in such a way that it provides a thorough description of the concept of corporate criminal liability in the three legal systems. Emphasis will be placed on each legal system's historical development and its basis for the criminal liability of corporations. Questions regarding the relevance of the basis for the criminal liability of a corporation will be raised and the current regulation of corporate homicide in each jurisdiction will be discussed. Based on the comparative study, recommendations will be made on how South Africa ought to

go about reforming corporate criminal liability. Recommendations will be made for a legal framework for corporate criminal liability in the future. Further recommendations will then be made on recognising corporate homicide as a separate and specific crime having its own legal framework.

The main purpose of the thesis is thus to:

- **Highlight the relevance of corporate criminal liability as a way of combating the problem of corporate crime.**

In this thesis it will be argued that corporate crime in South Africa is rife and appears in many forms. It will be further argued that the notion of holding corporations criminally liable for corporate crimes is relevant and needs to be retained and further developed in South Africa.

- **Show that although South Africa recognises corporate criminal liability, section 332 of the CPA is inadequate and inefficient. This is more so in situations where people are killed as a result of corporate activities. It is therefore important for South Africa to introduce statutory measures aimed at dealing specifically with corporate homicide.**

The provisions of section 332 of the CPA, which deal with corporate criminal liability, will be fully analysed. Each subsection will be discussed and the relevant case law will form part of the discussion. The discussion of the manner in which South Africa deals with corporate crime will show that the legal framework is lacking and reasons will be advanced for the reform of the law, particularly when it comes to deaths resulting from corporate activities.

- **Provide a detailed comparative analysis of the English, Canadian and South African experiences and explain how each specific jurisdiction has dealt with corporate criminal liability and corporate homicide.**

A detailed comparative analysis of corporate criminal liability in the English, Canadian and South African systems will be made in which challenges experienced by England and Canada that eventually led to recent changes to the laws in both England and Canada will be highlighted and the current provisions discussed. It is submitted that South Africa can derive much benefit from looking at the way the English and the Canadian legal systems have dealt with corporate criminal liability and the challenge of corporate homicide. In this way South Africa can draw from the experiences of those jurisdictions.

- Formulate and make recommendations for reform by means of a proposed legal framework for corporate homicide.

England and Canada's recent statutes will be discussed to ascertain whether the changes have resulted in improvements to the laws and if so, how that can influence developments in South Africa with regard to corporate homicide. Lessons learnt from the compared jurisdictions can assist in the formulation of a new legal framework for corporate homicide in South Africa. Strengths of the Canadian and English legal frameworks will be drawn from recommendations made for a new, more adequate and more efficient legal framework for South Africa.

VI METHODOLOGY

The methodology that has been utilized in writing this thesis is a comprehensive literature study. Numerous relevant South African and international sources were obtained, read and analysed. These included books, journal articles, conference papers, newspaper articles, an unpublished thesis, research reports, bills, statutes, law reports (both South African and foreign ones) as well as other academic articles from the internet.

VII A BRIEF SUMMARY OF THE THESIS / CHAPTER OUTLINE

Chapter 1 provides the introduction, the purpose, methodology and scope of this thesis. It also states the reason for choosing to discuss the problem of deaths caused by corporations or corporate activities in South Africa. In chapter 1 the statement of the research problem as well as the hypotheses are made clear. The chapter also provides justification for a comparative study and for choosing the specific jurisdictions that will be compared. The need for South Africa to reform its laws in such a way that the problem of deaths caused by corporations are adequately and effectively dealt with is highlighted in chapter one and the structure of the thesis is provided.

Chapter 2 of this thesis provides the rationale behind corporate criminal liability and the theoretical discourse underpinning corporate criminal liability. The bases for holding corporations criminally liable and the reasons for punishing corporations are discussed. The discussion concludes with emphasis on the continued relevance of the concept of corporate criminal liability and the importance of holding corporations liable in a separate legal framework for deaths caused by corporations.

In chapter 3 of this thesis the South African position is critically analysed. The historical development of corporate criminal liability is traced and section 332 of the CPA is fully examined. The punishment of corporations and the specific problem of deaths caused by corporations are discussed. The shortcomings of section 332 of the CPA are highlighted throughout the chapter. The proposed provision of corporate homicide in the mining sector is also discussed in this chapter.

Chapter 4 provides a discussion of the development of corporate criminal liability in England. The discussion includes the history of corporations as legal persons as well as the initial reluctance to accept the concept of corporate criminal liability. The chapter also focuses on the basis for the criminal liability of corporations in English law. Developments in English law that eventually led to changes being made to the law as well as the current legislation on corporate manslaughter also form part of the examination.

Chapter 5 provides a study of the historical development of corporate criminal liability in Canada. The history of corporations as legal persons is also discussed. The basis for the criminal liability of corporations in Canadian law is examined and the manner in which this was broadened by the courts is highlighted. Factors leading to the legislature introducing making amendments to its laws are considered and those amendments are analysed.

Chapter 6 provides the conclusion of the research. The chapter commences by reiterating the fact, as proved in the thesis, that there is indeed a dire need for reform of the law regulating corporate criminal liability to be made. Recommendations are made for a new legal framework for corporate criminal liability. It is then suggested that deaths caused by corporations should be addressed in such a way that there is a separate provision that deals with specifically with such deaths. The many weaknesses of the current provision are highlighted to substantiate the argument for a separate legal provision for corporate homicide. Thereafter recommendations for the separate provision for corporate homicide are made and explanatory notes are provided.

CHAPTER 2 – THE RELEVANCE OF CORPORATE CRIMINAL LIABILITY AND CORPORATE HOMICIDE

I INTRODUCTION

“...as the bulk of economic activity nowadays takes place through corporations, so does economic criminality”.⁵²

⁵² G Stessens ‘Corporate Criminal Liability: A Comparative Perspective’ (1994) 43 *International and Comparative Law Quarterly* 493, 493.

This statement is an indication that corporate criminality is a serious challenge in today's society, one that is faced by various jurisdictions and one that in many jurisdictions has resulted in the imposition of corporate criminal liability.⁵³

The term "corporations" in this thesis, refers to corporate bodies as they are generally known in company law. These are legally constituted companies that have legal personality, their own obligations as well as their own rights.⁵⁴ They exist separately from their members, they can own property, they can sue and be sued and they can enter into contracts.⁵⁵ The term corporations in this context also includes non-commercial corporate entities whose legal personality is derived from statute such as universities, municipalities etc., as well as legally constituted associations such as sport associations, trade unions etc.⁵⁶ For purposes of corporate criminal liability, in this thesis the term "corporations" also extends to associations of persons that lack legal personality such as partnerships. Where corporate crime has been committed by such associations, corporate criminal liability is still applicable, however, it is directed towards those individuals who are in control of the association.⁵⁷

In this chapter the rationale for holding corporations criminally liable and the theoretical discourse underpinning corporate criminal liability will be discussed.

⁵³ "The increase in corporate crime, including breaches of health and safety regulations and environmental degradation perpetrated by companies, as well as the failure of public authorities to protect and/or rescue persons in danger, have led countries to the increasing realisation that comprehensive criminalisation, based on a coherent theory of corporate liability is required". (J Burchell (note 49) 448. See also V Borg-Jorgensen and K Van Der Linde 'Corporate Criminal Liability in South Africa: Time for Change? (part 1)' (2011) 3 *TSAR* 452, 453).

⁵⁴ D Davis and W Geach (eds) *Companies and Other Business Structures in South Africa* 3ed (2013) 29.

⁵⁵ P Delpont *The New Companies Act Manual including Close Corporations and Partnerships Student Edition* (2011) 11.

⁵⁶ This is in line with the application of section 332 of the CPA to corporate entities as discussed by Kentridge J with reference to subsection 332(5) in *S v Coetzee* 1997 SACR 379 CC para 103 and 104.

⁵⁷ Kentridge J, with reference to subsection 332(5) states that "the principle behind the subsection is that where an artificial legal person exists, the activities of which may be conducted in a criminal manner, some responsibility should rest on those who control it". (*S v Coetzee* (note 56) para 104).

II THE RATIONALE FOR SUBJECTING CORPORATIONS TO CRIMINAL LAW

As corporations started to play an important role in society, they also started impacting on those societies. Corporations as legal persons could sue and be sued; they had responsibilities and obligations;⁵⁸ and they could also cause harm. The notion of holding them criminally liable is a concept that was resisted, at first,⁵⁹ however as time went by corporate activities increased, along with corporate crime, and this led to the gradual development of the idea of holding corporations criminally liable for their unlawful actions. Although it took a long time to accept, corporate criminal liability was eventually accepted and is a concept that is currently accepted in many countries, including South Africa, England and Canada.

In imposing criminal liability on corporations “courts were confronted with the problem of how, if at all, a corporate body could commit an offence, given that it could neither act nor think for itself”.⁶⁰ Two competing theories for holding corporations liable under criminal law were formulated, namely, the nominalist theory and the realist theory.⁶¹

(a) The nominalist theory

In terms of the nominalist theory the corporation is regarded as a mere fiction consisting of a “collection of individuals and thus lacks a substantive independent identity”.⁶² It is thus an

⁵⁸ LH Leigh *The Criminal Liability of Corporations in English Law* (1969) 4.

⁵⁹ See discussion below at III (a) in this chapter and also in chapter Four II b) i) aa) to (dd) below.

⁶⁰ Borg-Jorgensen and Van der Linde (note 53) 453. As Colvin states: “What is at issue is the very nature of corporate personality within the context of criminal law. What does it mean to say that a corporation is at fault and the condemnation and punishment of it are deserved? Is the corporation truly an entity that has the capacity for culpable conduct? Or is corporate personality a fiction, so that all propositions about corporations are necessarily reducible to propositions about individual members? What are the implications for criminal law of adopting one or the other of these conceptions of corporate personality?” (E Colvin ‘Corporate Personality and Criminal Liability’ (1995) 6 (1) *Criminal law Forum*, 1, 1).

⁶¹ Colvin (note 60) 1.

⁶² Borg-Jorgensen and Van der Linde (note 53) 453. See also Wells (note 15) 85.

artificial being which owes its existence to the coming together of the individuals who have formed it and it does not exist independently without those individuals. Colvin explains that this theory regards corporations as

“nothing more than collectivities of individuals. Speaking of corporate conduct or corporate fault is seen as a shorthand way of referring to the conduct and culpability of the individual members of the collectivity. The ‘corporation’ is simply a name for the collectivity and the idea that the corporation itself can act and be blameworthy is a fiction”.⁶³

According to the nominalist theory it is not acceptable that the corporation itself is capable of being blameworthy.⁶⁴ This theory demands that for a corporation to be held liable it is imperative for individual liability to be present.⁶⁵ The absence of individual liability means that the corporation will not be held criminally liable.⁶⁶

In South Africa as well as in England and Canada the rationale behind corporate criminal liability has been that even though it has its own separate legal personality, a corporation is in fact a legal fiction, which exists through its agents, the individuals within the corporation. For that reason in imposing liability the individuals within the corporations play a crucial role. These individuals have in fact become a *conditio sine qua non* for establishing corporate liability in that without taking the individual liability for the corporate crime into consideration,

⁶³ Colvin (note 60) 2. See also E Colvin and S Anand *Principles of Criminal Law* 3rd ed (2007) 123.

⁶⁴ Colvin (note 60) 2.

⁶⁵ “Corporate criminal liability can therefore only be derived from the guilty conduct of individuals who form part of the corporate body”. (Borg-Jorgensen & van der Linde (note 53) 453). “On the nominalist approach, organizational culpability is derivative. It must always be located through the culpability of an individual actor. An individual first commits the offence; the culpability of that individual is then imputed to the organisation”. (Colvin & Anand (note 63) 124).

⁶⁶ “...If there is no individual culpability, there can be no organizational culpability”. (Colvin & Anand (note 63) 124). See also Colvin (note 60) 2.

it is not possible to impose liability on the corporation.⁶⁷ Both the derivative approach, which is followed in South Africa and the identification doctrine which has been followed in England and Canada, fall under the nominalist theory.⁶⁸ Although identifying the individual within the corporation whose action will lead to the corporation being held criminally liable is sometimes a challenge, the countries which follow the nominalist theory have had some successful prosecutions of corporate criminals.⁶⁹

(b) The realist theory

In contrast to the nominalist theory, according to the realist theory corporations have a separate existence that does not depend on their members and they may act and also have fault.⁷⁰ As Colvin states

““Realist” theories, on the other hand, assert that corporations have an existence that is, to some extent, independent of the existence of their members. Corporations can act and be at fault in ways that are different from the ways in which their members can act and be at fault”.⁷¹

The realist theory thus accepts that a corporation has a separate legal personality and exists independently of its members⁷² and may therefore be held criminally liable directly.⁷³ The realist theory makes it possible to have direct responsibility of the corporation, without having to rely on the fault of some natural person to establish the criminal liability of the corporation as

⁶⁷ This is the case with both the derivative approach and the identification doctrine.

⁶⁸ Borg-Jorgensen & Van der Linde (note 53) 453.

⁶⁹ See discussions under the current provision of corporate homicide in chapters three, four and five below.

⁷⁰ Colvin (note 60) 2.

⁷¹ Ibid.

⁷² Wells (note 15) 85. See also Leigh (note 58) 5 -6.

⁷³ “A realist perspective on corporate personality makes it possible to hold corporate bodies liable for their own acts, omissions and fault”. (Borg-Jorgensen & Van der Linde (note 53) 454).

“culpability is analysed within a realist framework by examining directly questions about what the organization did or did not do; what it knew or ought to have known about its conduct; and what it did or ought to have done to prevent harm being caused”.⁷⁴

Belgium, Romania and Australia provide examples of corporate criminal liability models based on the realist theory. In Belgium, where corporate criminal liability was established in 1999,⁷⁵ a legal entity may be held criminally liable and even be convicted without “evidence that an offence has been perpetrated by an individual who works for, or is otherwise associated with the legal person”.⁷⁶ In Romania corporate criminal liability was established through a new Criminal code in June 2004.⁷⁷ Corporate criminal liability in Romania is direct therefore there is no need to identify a natural person before the corporation is held criminally liable.⁷⁸ Australia follows the corporate culture approach which entails the direct liability of corporations. It is an approach that is found in section 12 of the Australian Criminal Code Act 1995.⁷⁹

Apart from the fact that Belgium, Romania and Australia are based on the realist theory, it is interesting to note that in all three jurisdictions the adoption of this approach is a fairly recent development and in some cases it is too soon to tell whether the approach is successful or not. In Belgium it has been stated that the judiciary has made significance use of the approach and that “by the end of April 2004, 381 judgments had been passed (in all areas of the law), using

⁷⁴ Colvin & Anand (note 63) 124. See also Borg-Jorgensen & Van der Linde (note 53) 454

⁷⁵ This was done through Article 2 of the Act of 4 May 1999. (M Ramkissoo ‘Country Report: Belgium’ in J Gobert and A Pascal *European Developments in Corporate Criminal Liability* (2011) 214, 214). Also see Jordaan (note 42) 65.

⁷⁶ Ramkissoo (note 75) 215.

⁷⁷ A Pascal ‘Country Romania’ in J Gobert and A Pascal *European Developments in Corporate Criminal Liability* (2011) 296, 296.

⁷⁸ “In order to hold a company criminally liable, it is not required to identify or convict a natural person. The company itself is liable for offences which were the result , for instance, of a faulty decision, an omission in the way it organises its operations, or deficient safety measures”. (Ibid 298).

⁷⁹ Australian Criminal Code Act 12 of 1995.

various provisions of the 1999 law”.⁸⁰ Since Romania has implemented it just over ten years ago, it is basically too soon to really determine whether the realist model is successful or not.⁸¹

With regard to Australia Van der Linde and Borg-Jorgensen aver that

“even though this fairly new approach has not yet been given much opportunity to be tested in prosecutions of truly criminal offences, it represents an innovative, potentially just and efficient method of establishing corporate criminal liability”.⁸²

It is submitted that the realist theory provides a better approach, in comparison to the nominalist theory, as the prosecution of corporations is not hampered by the inability to identify a guilty individual within the corporation.

III THE RELEVANCE OF CORPORATE CRIMINAL LIABILITY

South Africa, like many jurisdictions,⁸³ recognizes two kinds of persons: the natural person and the juristic or legal person.⁸⁴ The term natural person refers to all human beings⁸⁵ - individuals capable of having rights and duties. A juristic person, on the other hand, refers to a legally recognized artificial person⁸⁶ that has its own rights and its own obligations. South African law recognizes corporations as juristic persons.⁸⁷

⁸⁰ Ramkissoo (note 75) 219.

⁸¹ With regard to Romania Pascal states that “It is, however, too early to comment on how vigorously the new laws will be enforced. There is yet limited implementation in practice”. (Pascal (note 77) 302).

⁸² K Van der Linde and V Borg Jorgensen ‘Corporate Criminal Liability in South Africa: time for change (part 2)’ *TSAR* 2011 (4) 684, 699.

⁸³ Including England and Canada. See Chapter Four II (a) and Chapter Five II (a) below.

⁸⁴ Davis & Geach (note 54) 29.

⁸⁵ Delpont (note 55) 9.

⁸⁶ *Ibid* 10.

⁸⁷ “A duly registered company is a distinct legal persona, quite a separate entity from its members, either individually or as a body”. (P Delpont, Q Vorster & D Burdette *Henochsberg on the Companies Act 71 of 2008*, (2011) 82). See also Snyman (note 22) 253. In terms of the Companies Act 71 of 2008 ‘From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company

(a) Is a juristic person, which exists continuously until its name is removed from the companies register in accordance with this Act;

Traditionally only a natural person was held criminally liable for his unlawful acts and omissions, as only a natural person has the physical ability to perform an unlawful act and to have a blameworthy state of mind.⁸⁸ Over the years there have been developments in this regard. As a way of dealing with the problem of crimes committed by juristic persons, criminal law now allows a juristic person to be held criminally liable for its unlawful acts and omissions. This is despite the juristic person's inability to act and to think.⁸⁹ Holding a corporation criminally liable is therefore an anomaly as crimes are usually committed by natural persons within the corporation, human beings who have the ability to think as well as the ability to act with intent or negligence.

Corporate criminal liability is in fact a way of ensuring that the common-law rule that an offender should be held liable is enforced,⁹⁰ however, since a corporation is a juristic person, it relies on natural persons to think and act on its behalf. This begs the question: is holding a corporation, an entity which lacks physical existence, criminally liable for offences committed by those who act as its brains and hands really justifiable? For this question to be answered the questions whether corporate criminal liability is relevant or not and whether there is justification for imposing corporate criminal liability, while civil liability remains a basis for liability, will first have to be addressed.

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- (b) Has all the legal powers and capacity of an individual, except to the extent that –
 - (i) A juristic person is incapable of exercising any such power, or having any such capacity; or
 - (ii) The company's Memorandum of Incorporation provides otherwise; (section 19).

⁸⁸ Jordaan (note 42) 48.

⁸⁹ MA Rabie *A Bibliography of South African Criminal Law: General Principles* (1987) 29.

⁹⁰ As strictly speaking, the corporation is the actual offender, CMV Clarkson *Understanding Criminal Law* 4th ed (2005) 148.

a) Defining corporate criminal liability and establishing its relevance

Corporate criminal liability is regarded by some as an odd concept.⁹¹ It is therefore not surprising that accepting the notion of holding a corporation, an artificial entity, criminally accountable for crimes has been met with resistance.⁹² In English law the concept of corporate criminal liability has been in existence for a longer period,⁹³ however it was, at first, rejected by the English courts and its development was hampered by various obstacles,⁹⁴ which may be set out as follows:

First, it was mandatory for an accused person to make a personal appearance at the hearing,⁹⁵ something that could not possibly be done by an artificial person. The view was thus held that since a corporation was not physically able to make a personal appearance in court, it could not be held liable.⁹⁶ Second, the form of punishment that could be imposed where a felony was committed was death or imprisonment,⁹⁷ types of punishment that could not be practically imposed on a corporation.⁹⁸ Third, the artificial nature of a corporation brought about another

⁹¹ Wells, a proponent of corporate criminal liability observes that “people rarely stop to ask why we have a system of criminal law. When someone is murdered all sorts of questions might be raised: what powers should be given to the police to find the murderer and to garner sufficient evidence to prosecute? Should there be a difference between murder and manslaughter, and if so, what? What is an appropriate sentence for murder? But it is unusual to hear anyone ask ‘what is the point of punishing a murderer? In contrast the question ‘why punish a corporation? is commonly put. There are those whose answer would be that there is no justification for punishment, that it cannot be justified as a ‘necessary evil’. Nonetheless we do find the idea of a corporation being punished more odd than that of a murderer or rapist being sent to prison”. (C Wells (note 15) 13). Luna, an opponent of corporate criminal liability, states that “...corporate criminal liability is an oddity, regardless of any approval or acquiescence by courts, politicians, and the public”. (E Luna ‘The Curious Case of Corporate Criminality’ (2009) 46 *American Criminal Law Review* 1507, 1508).

⁹² “Even in jurisdictions that have long recognised corporate criminal responsibility, this concept has been treated as something of an outcast, to be tolerated rather than encouraged”. (C Wells ‘Corporate criminal liability in England and Wales: Past, Present, and Future’ in M Pieth & R Ivory *Corporate Criminal Liability – Emergence, Convergence, and Risk* (2011) 91, 93).

⁹³ In 1842 in the English law case of *R v Birmingham and Gloucester Railway Company* (1842) 3 Q.B. 223 it was accepted that a corporation could be indicted.

⁹⁴ A Pinto & M Evans *Corporate Criminal Liability* 2nd ed (2008) 18. For a full discussion of the obstacles to corporate criminal liability see Chapter Four II b) i) aa) to cc) below.

⁹⁵ *Ibid.*

⁹⁶ *Ibid* 19; D Ormerod *Smith and Hogan Criminal Law* 12th ed (2008) 246.

⁹⁷ Pinto & Evans (note 94) 18.

⁹⁸ *Ibid* 18.

challenge that was faced by the various jurisdictions. The question arose as to how a corporation, which is not a natural person, could possibly possess such an attribute as *mens rea*, an element required for committing an offence.⁹⁹ Fourth, the *ultra vires* doctrine brought about a further challenge. Since a corporation is created by law it is only able to perform the acts that the law which created it empowers it to perform.¹⁰⁰ Actions by a corporation that go beyond what it is empowered to do are *ultra vires* acts.¹⁰¹ Corporate crime would therefore be an *ultra vires* act. For that reason, strictly speaking, a corporation could not be held criminally liable for unlawful acts it has committed.¹⁰²

In spite of the above-mentioned challenges, corporations continued to play an important role in society and as they did so, the criminal activities of corporations impacted on people's lives and could not be ignored. It became clear that there was a need for corporations to be held accountable for their criminal actions.¹⁰³

Commentators have provided, *inter alia*, the following reasons for imposing corporate criminal liability on juristic persons, specifically corporations. Miester observes that criminal behaviour by corporations puts the public at large in danger.¹⁰⁴ This is in line with Bucy's assertion that activities of corporations are potentially harmful and where harm does occur, many people are exposed to such harm.¹⁰⁵ Bucy sees the criminal law route as society's most effective tool to

⁹⁹ Ibid.

¹⁰⁰ Ormerod (note 96) 247.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Pinto & Evans (note 94) 19. See also Burchell (note 49) 562.

¹⁰⁴ DJ Miester 'Criminal Liability for corporations that kill' (1990) 64 *Tulane Law Review* 919, 920.

¹⁰⁵ P Bucy 'Corporate Criminal Liability: When does it make Sense?' (2009) 46 *American Criminal Law Review* 1437, 1437.

deal with these harmful corporate activities by corporations¹⁰⁶ and she avers that it is easier to deter corporations by means of prosecuting them,¹⁰⁷ particularly, as the corporate veil may be pierced.¹⁰⁸ She also states that sentencing options make it possible for a corporation to “remedy harm, make victims whole and prevent future harm”.¹⁰⁹

Pinto and Evans refer to the harmful nature of some corporate activities and aver that without the possibility of corporations being held criminally liable for such activities, criminal law would be inadequate.¹¹⁰ Wells observes that

“since many of the victims of corporate wrongdoing are unaware of the source of the harm done to them and therefore cannot invoke the criminal enforcement system as do victims of burglary, there is a state obligation to provide that mechanism for them in the form of proactive investigation backed up by effective sanction”.¹¹¹

Leigh refers to corporate criminal liability as “one method by which states seek to control business activities”.¹¹² It is submitted that, given the harm caused by corporations, especially to the public, it is essential for states to control business activities by providing mechanisms to ensure that corporations or businesses that cause harm are held criminally liable. It is therefore

¹⁰⁶ Ibid.

¹⁰⁷ Ibid 1437 – 1438.

¹⁰⁸ Ibid. Piercing the corporate veil refers to the fact that “although incorporation can provide for the limitation of liability of those persons behind the company, this principle may not be abused. The courts have made it clear that the law looks at the substance of things, rather than at mere legal form. Courts will not allow a legal entity to be used ‘to justify wrong, protect fraud or defend crime’”. (Davis & Geach (note 54) 30).

¹⁰⁹ Bucy (note 105) 1437 – 1438.

¹¹⁰ Pinto & Evans (note 94) 4.

¹¹¹ Wells (note 15) 17.

¹¹² Leigh (note 47) 1508.

important for states to impose corporate criminal liability on corporations that commit crimes and are operating within their jurisdictions.

Wells, Bucy, Miester, Leigh, Pinto and Evans, as well as other proponents¹¹³ of corporate criminal liability see corporate criminal liability as a crucial concept and provide compelling arguments for the imposition of corporate criminal liability on corporations. It is submitted that their arguments, which show that the law would indeed be defective if corporate criminal liability was not recognized, are deserving of support, since it is clear that corporations do cause harm; members of the public usually suffer that harm; and the most effective way to address that problem is by means of the criminal law which makes it possible to impose criminal sanctions on offending corporations.

There are, however, commentators who are opposed to the notion of holding a corporation criminally liable.¹¹⁴ Their argument is mainly based on the fact that a corporation is incapable of moral blameworthiness while the purpose of criminal law is to punish those who are morally blameworthy.¹¹⁵ Some provide alternatives to corporate criminal liability and are of the view that corporate criminal liability should be done away with. For instance Podgor¹¹⁶ and

¹¹³ See SS Beale 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1481.

¹¹⁴ For instance Luna who unequivocally states that he is 'not a fan of corporate criminal liability, which should be scrapped in favour of the jurisprudentially sound approach of prosecuting individuals for their crimes and holding businesses liable in tort'. (Luna (note 91) 1511).

¹¹⁵ J Hasnas 'The centenary of a mistake: one hundred years of corporate criminal liability' (2009) 46 *American Criminal Law Review* 1329, 1330.

¹¹⁶ EA Podgor 'Educating Compliance' (2009) 46 *American Criminal Law Review* 1523, 1526.

Khanna¹¹⁷ argue that criminal liability is not necessary while it is possible to base liability on civil liability.¹¹⁸

Alschuler sees corporate criminal liability as something that punishes innocent individuals since the punishment imposed on the corporation, a “fictional entity” is borne by the innocent such as shareholders, employees, creditors etc.¹¹⁹ In refuting Alschuler’s argument, it is submitted that the fact that there may be an extension of the consequences of corporate criminal liability to shareholders, employees, creditors etc., does not provide adequate grounds for not applying corporate criminal liability when corporate crimes have been committed.¹²⁰ Corporate criminal liability is an essential component of the law and it is an important tool that is used, *inter alia*, to discourage corporations from putting peoples’ lives at risk of disasters¹²¹ such as Bhopal and to punish those corporations that have done so.

Alschuler further criticizes corporate criminal liability for putting the individuals within the corporation in a position where there is a conflict of interest.¹²² He refers to a situation where a corporation may be sacrificed by its officers through entering a guilty plea and accepting a fine for the corporation as a way of averting the imprisonment of the officers themselves.¹²³

¹¹⁷ Khanna (note 25) 1534.

¹¹⁸ See discussion on the effectiveness of corporate criminal liability as opposed to corporate civil liability below at III (b) in this chapter.

¹¹⁹ AW Alschuler ‘Two ways to think about corporate punishment’ (2009) 46 *American Criminal Law Review* 1359, 1367).

¹²⁰ T Isaacs ‘Corporate Agency and Corporate Wrongdoing’ (2013) 16 *New Criminal Law Review* 241, 254.

¹²¹ Ibid. Isaacs correctly points out that: “We should also recognize that these people are not being punished, even if they suffer the consequences of the corporation's actions. Moreover, when we think broadly about the function of law and punishment, not only in terms of their retributive elements but also their expressivist and deterrence functions, prosecuting corporations that engage in criminal acts could serve significant ends that promote adherence to the law rather than put the corporation and many of its innocent members at risk”. (Isaacs (note 120) 254).

¹²² Alschuler (note 119) 1367.

¹²³ Ibid.

This argument is not necessarily applicable to contexts where both corporate criminal liability and individual liability are applicable to the same offence. In the South African context the individual within the corporation who has committed a crime while furthering the interest of the corporation also faces prosecution in his or her private capacity. If such a person is found guilty he will be sentenced, regardless of whether the corporation's plea was a guilty plea or not.

Despite the arguments advanced against corporate criminal liability, the fact remains that harm caused whilst in the process of furthering the interests of corporations is a reality and many jurisdictions are faced with the problem of corporate activities that cause harm.¹²⁴ Moreover, as economic activities continue to increase, so does the frequency of harm in the form of corporate crimes and the pressure to ensure that the responsible parties are held criminally accountable for their actions.¹²⁵ This has led to the development of corporate criminal liability, as different jurisdictions attempt to find ways to prosecute and to punish corporations that cause harm.¹²⁶ After all, corporations continue to commit offences that expose them to criminal liability in spite of the fact that a corporation, due to its resources, is actually in a better position to ensure that it avoids committing crimes.¹²⁷

(b) The effectiveness of corporate criminal liability as opposed to corporate civil liability

¹²⁴ Some of the countries that recognise corporate criminal liability are listed in footnote 24 above.

¹²⁵ D Ormerod *Smith and Hogan, Criminal Law* 11th ed (2005) 234.

¹²⁶ "The risks associated with industrialisation and the challenges of globalisation have prompted lawmakers of the civil and common law traditions to impose criminal or quasi criminal sanctions on corporate wrongdoers". (Pieth & Ivory (note 24) 13).

¹²⁷ M Bowden and T Quigley 'Pinstripes or Prison stripes? The Liability of Corporations and Directors for Environmental Offences' (1995) *Journal of Environmental Law and Practice* 5,15.

Where there has been an illegal act or omission of a corporation, the corporation is exposed to both corporate criminal liability and corporate civil liability. Exposing corporations to both forms of liability for their unlawful conduct serves various purposes. These are summed up by Lavenue, who states that

“The civil law provided the legal means by which the victims of crime sought pecuniary or other compensation from the offender for the harm or damage caused by the crime. Criminal law on the other hand, provided sentencing to an offender either in terms of a prison sentence, the payment of a fine, or both to redress society for the harm caused to the general public. Theoretically, the civil-criminal system maintained a balance between the demands of society, which were addressed by the civil law”.¹²⁸

Civil liability thus addresses the victim’s need for compensation for damages while criminal law or corporate criminal liability ensures that offenders are justly punished for “the harm caused to the general public”.¹²⁹ Both forms of liability are important in that the corporation is held accountable for its wrongful actions and in both instances the end result is usually the payment of a sum of money by the corporation, either in the form of a fine or in the form of compensation to the victims. Furthermore, both forms of liability are aimed at (a) holding the corporation liable for its conduct and (b) deterring corporations from committing wrongful acts.¹³⁰ This gives rise to the following questions: Is corporate criminal liability a necessity when one has the right to rely on corporate civil liability? Do civil suits against corporations not have the same effect as criminal prosecutions?

It is submitted that instituting a civil claim is a costly exercise and in certain instances the

¹²⁸ LM Lavenue ‘The Corporation as a Criminal Defendant and Restitution as a Criminal Remedy: Application of the Victim and Witness Protection Act by the Federal Sentencing Guidelines for Organisations’ (1993) 18 (3) *The Journal of Corporation Law* 441, 446.

¹²⁹ Ibid.

¹³⁰ Khanna (note 25) 1492.

aggrieved party may not be in a financial position to pursue the matter.¹³¹ Even if a party does actually pursue the matter there is no guarantee that the civil action will be successful. Furthermore, in the event of a successful civil action against a corporation it is highly unlikely that the corporation will suffer as a result of the action.¹³² Moreover, successful civil claims against corporations are of no serious consequence to the corporation's image.¹³³

It is further submitted that there is no true vindication and there is no hope for justice until the corporate criminal is formally charged and forced to face criminal proceedings for the said offence.¹³⁴ Moreover, one cannot always rely on civil suits as there are situations where the victim is prohibited, by law, from suing the perpetrator.¹³⁵ In such cases the victim is obliged to make use of the provisions of the applicable statute and must adhere to proceedings as set out therein.¹³⁶

Corporate criminal liability is thus becoming more and more important as a way of ensuring justice,¹³⁷ as the offender is subject to prosecution, in addition to being subjected to the

¹³¹ Costs for civil claims are carried by the individuals concerned, particularly if their claims are unsuccessful. In South Africa victims of deaths and injuries caused through corporate activities are usually employees who are in the lowest financial positions. If they are not assisted by mechanisms such as regulatory statutes, they are usually not in a financial position that would enable them to get the best legal assistance. On the contrary, corporations are known for making use of the best legal assistance to assist them in such matters.

¹³² Such corporations usually have ample resources and are capable of financing the amount of the compensation required, without causing havoc to the finances of the corporation.

¹³³ "Civil or regulatory interventions are generally nonstigmatic and conciliatory". (SS Simpson *Corporate Crime, Law and Social Control* (2002), 20).

¹³⁴ The decision by the Indian court to order Dow Chemical to be tried in a criminal court for Union Carbide's 1984 Bhopal disaster is an example of the importance of having corporate criminal liability. (S. Shah 'Dow ordered to appear in court to answer for deadly Bhopal gas leak' *The Independent online edition* 8 January 2005 <http://news.independent.co.uk/business/news/story.jsp?story=598850>) (accessed 10 January 2013).

¹³⁵ For instance, s. 35 (1) of South Africa's Compensation for Occupational Injuries and Diseases Act 130 of 1993.

¹³⁶ This was made clear in *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) where an employee who was injured in the workplace had successfully challenged the s.35 (1) provisions in the court a quo and attempted to sue the employer. The Constitutional Court held that s. 35(1) of the Compensation for Occupational Injuries and Diseases Act was not unconstitutional.

¹³⁷ "The use of the criminal sanction to punish corporations for negligence is further reinforced by the fact that the Compensation for Occupational Injuries and Diseases Act, and its predecessor, precludes a common-law claim

possibility of being held liable for compensation for damages in civil law. It is submitted that in the South African context corporate criminal liability would have a greater effect than corporate civil liability because criminal law has the power to punish corporations and to ruin their reputation,¹³⁸ which in turn will lead to stigma, in line with Bowden and Quigley's emphasis on the corporation's susceptibility to both stigmatization and deterrence.¹³⁹ Although Khanna points out that it is unlikely that people would disassociate themselves from a corporation simply because of a prosecution,¹⁴⁰ it is submitted that a prosecution will inevitably have a direct negative effect on a corporation's image if there are appropriate sanctions in place that would result in stigmatisation and this is likely to result in people disassociating themselves with the corporation. Generally people do not want to associate themselves with corporate criminals and for the corporation itself "the application of a criminal sanction is thought to be stigmatic - that is, offenders are shamed by a 'criminal' label".¹⁴¹ With regard to sanctions that would deter a corporation through stigmatisation, it is submitted that in South Africa development in this regard is currently hampered by having the fine as the sole punishment for corporations that are convicted.¹⁴²

Podgor argues that civil liability can sufficiently deter corporations from committing crime¹⁴³ and he advances an argument for the promotion of compliance with the law by corporations.¹⁴⁴

for damages by an employee against an employer where compensation under the Act arises, without the need to prove fault on the part of the employer". (Burchell (note 49) 567).

¹³⁸ Provided that improvements are made to corporate criminal liability in such a way that in addition to or as alternatives to the fine there are forms of punishment that will stigmatise the corporation, so that deterrence is achieved in that manner.

¹³⁹ Bowden & Quigley (note 127) 15.

¹⁴⁰ Khanna (note 25) 1508).

¹⁴¹ Simpson (note 133) 20. Simpson further avers that "the shame associated with criminal processing imposes additional inhibitory effects beyond (or as a consequence of) those attached to official discovery and processing" (Ibid).

¹⁴² CPA (note 16) section 332.

¹⁴³ Podgor (note 116)1526.

¹⁴⁴ Ibid.

Podgor avers that as a result of compliance with the law by corporations, there will be no need for corporate criminal liability.¹⁴⁵ It is submitted that civil liability on its own is not sufficient to curb corporate harm and that Podgor's expectation that corporations will comply with the law, especially when there is no criminal sanction attached to non-compliance, is not realistic therefore this view should not be followed.

Khanna looks at corporate criminal liability and other avenues such as corporate civil liability and advances an argument for the substitution of corporate criminal liability with an avenue that would bring about deterrence, but at a lower cost, as corporate criminal liability, he argues, no longer serves any purpose.¹⁴⁶ Khanna's focus is mainly on deterrence as the purpose of punishing a corporation.¹⁴⁷ Although corporate civil liability may be aimed at deterring corporations from committing further misconduct,¹⁴⁸ it is submitted that corporate civil liability does not necessarily succeed in deterring corporations from committing further misconduct, especially because its aim is usually compensation as opposed to "criminal law, where punishments can be so much more severe than the compensation awarded in the civil law",¹⁴⁹ and consequently more likely to deter.

Punishment that is more likely to deter corporations from committing further crimes include alternative forms of punishment, such as corporate probation and publicity orders¹⁵⁰ that have the adverse effect of a ruined reputation. It is therefore submitted that the total disregard of

¹⁴⁵ Ibid.

¹⁴⁶ Khanna (note 25) 1534).

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ TB Barlow 'The Criminal Liability of a Company, its Directors and its Servants' (1946) 63 *SALJ* 503, 507.

¹⁵⁰ See discussion in Chapter Six IV (a) (iv) below.

corporate criminal liability as serving no purpose, would be wholly mistaken as it would bring about the untenable situation where corporations will not be properly punished for crimes they commit.

Although Larkin and Boltar question the appropriateness of regulating the behaviour of corporations via criminal law¹⁵¹ it is submitted that, given the challenges that may be faced by victims of corporate wrongfulness, if corporate criminal liability was not recognized in South Africa this would have resulted in the likelihood that corporations would totally escape liability for the harm they cause.¹⁵² If a civil claim is unsuccessful or if it is not pursued¹⁵³ the corporation is not held accountable for the harm it has caused. Moreover, one of the advantages of a prosecution, provided there is a political will to prosecute, is that the costs are borne by the state and in the event of a corporation being successfully held criminally liable this will give rise to a criminal record.

It is submitted that both civil and criminal liability are important and must be used to their full capacity to deal with corporations' unlawful activities, particularly their disregard for human safety which results in deaths. Corporate criminal liability should not lead to the exclusion of corporate civil liability and corporate civil liability should not lead to the exclusion of corporate criminal liability. It is further submitted that it is important to examine corporate criminal

¹⁵¹ "...Is resort to the criminal law the appropriate way to regulate these aspects of the behaviour of organizations in our society?" (M Larkin and J Boltar 'Company Law' (1997) *Annual Survey of South African Law* 403, 435).

¹⁵² This being the direct result of the failure of the victim to institute a civil suit against the offending corporation. Corporate criminal liability thus ensures that corporations are compelled to assume responsibility for the criminal actions of their servants and or directors, and are punished accordingly.

¹⁵³ "The use of the criminal sanction to punish corporations for negligence is further reinforced by the fact that the Compensation for Occupational Injuries and Diseases Act and its predecessor, preclude a common-law claim for damages by an employee against an employer, where compensation under the legislation arises, without the need to prove fault on the part of the employer". (Burchell (note 49) 457).

liability with a view to ensuring that it is in a form that will make it possible for it to adequately and efficiently deal with the challenges brought about by harmful corporate activities.

c) The relationship between corporate and individual liability

It has been observed that “some people worry that if we go after corporations, we allow individuals to get away with wrongdoing without suffering any consequences for it”.¹⁵⁴ This concern is a reflection of the typical reaction from skeptics of corporate criminal liability, however, it is unfounded: “This misplaced concern stems from the assumption that either corporations are responsible or their individual members are, as if there were no viable view according to which we can account for and legitimately pursue both”.¹⁵⁵ It is a reaction that does not take into account the fact that in most instances, in addition to the prosecution of a corporation, there is usually the prosecution of those within the corporation who are personally responsible for the crime.¹⁵⁶ Although there are exceptional cases,¹⁵⁷ generally corporate criminal liability does not preclude individual liability.¹⁵⁸

Moreover corporate crimes are committed in furthering the interests of the corporation. For that reason it is submitted that holding only the individual(s) or only the corporation liable creates the wrong impression that it is not possible to hold both parties liable. It is important that both the corporation and the individual be prosecuted for crime committed in furthering

¹⁵⁴ Isaacs (note 120) 249.

¹⁵⁵ Ibid 250.

¹⁵⁶ Ormerod (note 96) 247.

¹⁵⁷ As in the CMCHA 2007 section 18 (1) for example, see discussion in Chapter Four IV (a) below.

¹⁵⁸ In South Africa section 332 allows for the prosecution of both corporations and employees / directors. In England “if a corporation has been found to be criminally liable, the individual employee or director, etc can also be liable as a secondary party to the corporation’s wrongdoing under s 8 of the Accessories and Abettors Act 1861... A director can also be liable for conspiring with the company”. (Ormerod (note 96) 247).

the interests of the corporation.¹⁵⁹ One of the reasons for ensuring that both are held criminally liable is the fact that some individuals within corporations are enabled by the positions they occupy within the corporation to commit crimes.¹⁶⁰ In some cases these individuals would not be able to commit such crimes if they did not occupy particular offices within the corporation. This, however, does not mean that it is only senior employees who are capable of committing crimes.¹⁶¹ Employees at lower ranks are also capable of committing crimes but it is rare that they commit crimes that may give rise to corporate criminal liability and this is due to the fact that “the less power a worker has, the less opportunity she or he has to engage in wrongful actions that might be understood as the actions of the corporation”.¹⁶²

In South Africa section 332 of the CPA allows for the prosecution of the corporation and also of the responsible individual within the corporation. Both the corporation and the individual would therefore bear criminal liability for the crime committed. This, however, is not a universal rule and it is submitted that completely ignoring corporations and prosecuting only individuals within corporations will not solve the problem of corporate crime. The pivotal point is that when an offence has been committed and the corporation is held criminally liable, this should not have any effect on the possibility of prosecuting the responsible individual(s) within

¹⁵⁹ “With respect to the criminal law itself, there is no reason to think that both corporations and their members may not be held liable for criminal acts”. (Ibid).

¹⁶⁰ “Consider the range of actions that individuals are empowered to be able to perform in their roles within a corporation, actions that they would not be able to perform outside of the collective context. Many roles within a corporation confer powers on individuals that those individuals would not otherwise have, and the corporate context, especially in large national or multinational corporations but even in smaller companies, facilitates a wider scope and longer reach for individuals' actions. Indeed, those in the most powerful positions are even able to influence corporate policies, directions, and goals as they discharge their role-related duties. The longer reach and broader scope means that some individuals, particularly those in positions of power, have influence that brings with it increased responsibility, much in the same way government leaders and representatives have increased responsibility. Thus, functioning in a role within a corporate structure does not shield people from individual responsibility and in fact might well increase the range of criminal actions they have the opportunity to perform”. (Isaacs (note 120) 252).

¹⁶¹ “People in positions of power and authority are not the only individuals capable of criminal action in a corporate setting”. (Ibid).

¹⁶² Ibid.

the corporation. As Isaacs states “corporate criminal liability does not erase individual criminal liability in corporate contexts. Thus, the fear that attending to corporate criminality will draw attention away from individual criminality is unwarranted”.¹⁶³

IV THE BASIS OF CORPORATE CRIMINAL LIABILITY

(a) Categories of the types of offences that corporations may be held liable for

Globally the concept of corporate criminal liability has been in existence for many years.¹⁶⁴ Offences for which corporations have been held criminally liable fall under three main categories,¹⁶⁵ namely, absolute liability offences, strict liability offences as well as offences requiring *mens rea*.¹⁶⁶

(i) Absolute liability offences

Absolute liability offences are also known as ‘no fault’ offences.¹⁶⁷ Burchell makes it clear that “absolute liability involves liability for committing a prohibited act irrespective of fault and the elements of unlawful, voluntary conduct and criminal capacity...”.¹⁶⁸ The defence that the harm was not intended or that the corporation had taken reasonable steps to avoid it is not acceptable.¹⁶⁹ Absolute liability does not feature in South African law.¹⁷⁰

¹⁶³ Ibid.

¹⁶⁴ In England as far back as the 19th century. See *R v Great North England Railway Co* [1846] 9 Q.B. 315 and *R v Birmingham & Gloucester Rly. Co.* (note 93) 223.

¹⁶⁵ G Ferguson ‘The basis for Criminal Responsibility of collective Entities in Canada’ in A. Eser, G. Heine and B. Huber (eds) *Criminal Responsibility of Legal and Collective Entities*, (1991) 153, 157.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid 158. Ormerod (note 96) 152).

¹⁶⁸ Burchell (note 49) 551.

¹⁶⁹ Ferguson (note 165) 158.

¹⁷⁰ “...in the South African criminal law, absolute liability is, fortunately, unheard of”. (Burchell (note 49) 434).

(ii) Strict liability offences

Strict liability offences are found in statutes and these occur where the law makes it possible for one to be convicted without the element of *mens rea* or blameworthiness being required to be proven.¹⁷¹ This means that once the *actus reus* has been proven by the prosecution, the corporation will be found guilty.¹⁷²

Crimes of strict liability have been defined as “crimes which do not require intention, recklessness or even negligence as to one or more elements in the *actus reus*”,¹⁷³ however, capacity is still a requirement for strict liability.¹⁷⁴ It must be noted that with regard to strict liability offences even though cautionary measures may have been taken by the accused to avoid committing the crime, the mere fact that the prohibited consequence has occurred is sufficient to render a guilty verdict.¹⁷⁵

The first clear signs of corporate criminal liability were seen in regulatory offences¹⁷⁶ where corporations found themselves being held strictly liable for offences committed by their employees. The wording of regulatory offences was such that corporations were held strictly liable,¹⁷⁷ without the question of *mens rea* coming into play, as fault is not a requirement for a

¹⁷¹ Clarkson (note 90) 93; Snyman (note 22) 245.

¹⁷² Ferguson (note 165) 157.

¹⁷³ Ormerod (note 96) 150.

¹⁷⁴ Burchell (note 49) 434.

¹⁷⁵ T Storey and A Lidbury *Criminal Law* 2nd ed (2002) 47. Ormerod further points out that ‘it is important to appreciate that where an offence is interpreted to be one of strict liability, the fact that the defendant could not have avoided the prescribed harm even if he had tried to will not absolve him of liability’. (Ormerod (note 96) 151).

¹⁷⁶ *R v Birmingham & Gloucester Rly. Co* (note 93) 223.

¹⁷⁷ N Lacey, C Wells and D Meure *Reconstructing Criminal Law: Critical Perspectives on Crime and the Criminal Process* (1990) 239. See also Wells (note 15) 67.

conviction for a strict liability offence.¹⁷⁸ Doing something that is prohibited or failing to do something that should be done would lead to being found guilty. The basis for corporate criminal liability was at first strict liability.¹⁷⁹

(iii) *Mens rea* offences

With *mens rea* offences, apart from proving the *actus reus*, a “culpable state of mind”, also known as *mens rea*, must also be proven.¹⁸⁰ The rise in criminal activities committed by corporations has led to countries realizing the importance of imposing corporate criminal liability and as a way of ensuring that such liability is based on a clear and reasonable theory¹⁸¹ it was necessary to develop rules of attribution which would provide a basis on which to hold the corporation criminally accountable for crime.¹⁸²

(b) Rules of attribution and their shortcomings

Glazebrook explains rules of attribution in the following manner:

“Whatever is done in the world is done by individual human persons (or by animals) acting either singly or in co-operation with others. So, when lawyers say or think that a corporate body has done something, this is meaningful only because there are legal rules which attribute (only) certain actions of (only) certain individuals in (only) certain circumstances to the organisation that has been given this legal identity. The juristic concept would be deprived of all utility if everything done by everyone associated with the organisation were attributed to

¹⁷⁸ Snyman (note 22) 245.

¹⁷⁹ Clarkson (note 90) 93.

¹⁸⁰ Ferguson (note 165) 158.

¹⁸¹ Burchell (note 49) 562.

¹⁸² Pinto & Evans (note 94) 19.

it, for then no one would know where they stood”.¹⁸³

The need for rules of attribution arises due to the corporation’s inability to think and act.¹⁸⁴ These rules of attribution are the various theories that have been relied upon by various jurisdictions as their basis for corporate criminal liability.¹⁸⁵ There are three main models of rules of attribution for corporate criminal liability that have been utilized to establish corporate guilt, namely, (a) blaming the corporation for crimes committed by its employees and agents (vicarious corporate liability); (b) identifying senior officers whose guilt is regarded as the guilt of the corporation (the identification doctrine) and (c) “treating the corporation as itself capable of being a criminal (and moral) actor either through the aggregation of individual thoughts and behaviors or an assessment of the totality of the deficiencies in its corporate culture and organizational systems”.¹⁸⁶

(i) Vicarious corporate liability

This approach takes place when the corporation is held responsible for crimes committed by its employees and agents.¹⁸⁷ Vicarious liability only applies to statutory crimes.¹⁸⁸ Vicarious

¹⁸³ PR Glazebrook ‘A Better way of Convicting Businesses of avoidable deaths and injuries’ (2002) *The Cambridge Law Journal* 405, 406.

¹⁸⁴ “On the assumption that a corporation could neither act nor think itself, the courts were confronted with the problem of how, if at all, a corporation could commit a criminal offence; if it could not act, how could it cause a certain event forbidden by the criminal law (the actus reus), and if it could not think, how could it form the requisite state of mind in relation to the causing of the event forbidden by law (the mens rea)? Over time the courts developed two distinct rules of attribution, first vicarious liability, and, much later, the doctrine of identification”. (Pinto & Evans (note 94) 19).

¹⁸⁵ Burchell refers to the identification theory, the principle of aggregation and an organizational model of liability. (Burchell (note 49) 562). Pinto and Evans also cite vicarious liability and the principle of delegation, Pinto & Evans (note 94) 17.

¹⁸⁶ Pieth & Ivory (note 24) 13.

¹⁸⁷ Ibid.

¹⁸⁸ Snyman (note 22) 250.

liability is a principle that originates from the law of torts¹⁸⁹ which allows one party to be held responsible for the wrongful acts of another. In corporate criminal liability, vicarious liability occurs when the criminal acts of one party are attributed to another party, the corporation.¹⁹⁰ This normally occurs where there is an employment relationship between the parties.¹⁹¹ The employer (the corporation) is held liable for the wrongful acts of its employee, that take place within the employee's scope of employment. Here the employer is held liable on the basis that the employee was not acting in his private capacity, but in his capacity as employee of the corporation and on behalf of the corporation. It entails that "any actor (whether a corporate employee, officer or agent) who acts within his normal scope of responsibility and violates the criminal law with an intent to benefit the organization thereby creates liability, both for himself and his corporate employer".¹⁹² With vicarious corporate liability the guilt of the corporate employee, agent or officer is imputed to the corporation.¹⁹³

An important aspect of vicarious corporate liability is that the action and *mens rea* that is imputed to the corporation need not be that of a senior officer, it can be that of any person within the corporation regardless how senior or junior that person may be.¹⁹⁴ In the context of corporate criminal liability, vicarious liability justifies holding a corporation liable for crimes committed by its directors, members and even employees as long as it can be shown that they committed these crimes in the process of furthering the interests of the corporation.¹⁹⁵ A

¹⁸⁹ Ormerod (note 96) 140.

¹⁹⁰ Clarkson (note 90) 47. A corporation is thus held liable for the criminal acts of an individual within the corporation.

¹⁹¹ L N Lacey and C Wells *Reconstructing Criminal Law: Critical Perspectives on Crime and the Criminal Process* 2nd ed (1998) 515.

¹⁹² Coffee (note 21) 9.

¹⁹³ Ibid.

¹⁹⁴ Roy *et al.* 'Corporate Criminal liability: A Doctrinal Analysis' *A research paper for Greenpeace National Law School of India University, Bangalore* <http://greenpeaceindia.org> 2. (accessed 12 January 2013).

¹⁹⁵ J Burchell *South African Criminal Law and Procedure Volume 1 General Principles of Criminal Law* 4th ed (2011) 459).

corporation may therefore be held criminally liable for criminal actions committed by anyone from the director to the senior management to the employee, provided that the crime was committed in the process of furthering or endeavouring to further the interests of the corporation.¹⁹⁶

Vicarious liability is usually (but not always) applicable to strict liability and absolute liability offences.¹⁹⁷ Snyman points out the fact that there is usually the assumption that where a statute involves strict liability, it was the legislature's intention to also create vicarious liability.¹⁹⁸ He does caution though that "the mere fact that a particular statute provides for strict liability for the contravention of its provisions does not establish also that persons may be held vicariously liable under the statute."¹⁹⁹ He further refers to the test that is used to determine whether vicarious liability has been created, and points out the fact that it is similar to the test used to determine whether strict liability has been created.²⁰⁰

The concept of vicarious liability has been said to have originated as a result of the following

- (i) the employer would be in a better position to be able to provide compensation to the victim;
- (ii) the employer is also in a better position to give instructions for reasonable precautions to be taken to prevent the wrongful act; (iii) since the employer gains economically from the

¹⁹⁶ Pinto & Evans (note 94) 18).

¹⁹⁷ Roy (note 194) 3.

¹⁹⁸ Snyman (note 22) 251.

¹⁹⁹ Snyman (note 22) 556.

²⁰⁰ "The tests or criteria used to determine whether vicarious liability was created are reminiscent of the tests used to determine whether strict liability was created, namely: the language used by the legislature; the scope and purpose of the prohibition; the measure of punishment; whether the legislature's intention will be frustrated if one assumes that no vicarious liability was created; whether the employer gains financially by the employee's act, and whether only a limited number of people (eg licence holders), as opposed to the community in general, are affected by the provision. (If only a limited number of people are affected, it is more readily assumed that vicarious liability was created)". (Ibid 251).

employer – employee relationship, it only makes sense to let him also bear the losses emanating from the relationship.²⁰¹

At first vicarious liability was based on the common-law notion that a principal is responsible for acts of agents provided that he has “commissioned” the act.²⁰² If the principal was a corporation, the corporation would therefore be held vicariously liable, based on the command theory. Basing vicarious liability on the “command theory”²⁰³ meant that where it could not be proven that the corporation (principal) “commissioned” the act, the corporation (principal) would escape liability. This narrow interpretation of vicarious liability meant that without proof that the principal had commissioned the act, the principal would not be held liable. It is submitted that this was unsatisfactory. The scope of vicarious liability was thus too limited as it excluded situations where, without specific instruction, the employee committed an offence in the course of his or her work or whilst acting in the interest of the corporation. The “command theory” was eventually shunned by the English civil courts.²⁰⁴

The English civil courts moved away from the common-law theory of vicarious liability and accepted that the vicarious liability of the employer

“depended upon the nature of the relationship between the employer and his employee. The employer was liable for the civil wrong of his employee provided that the act was done in the course of his employment”.²⁰⁵

²⁰¹ D Hanna ‘Corporate Criminal Liability’ (1988 – 1989) 31 *Criminal Law Quarterly* 452, 454.

²⁰² Pinto & Evans (note 94)19.

²⁰³ Ibid 20.

²⁰⁴ Ibid 18.

²⁰⁵ Ibid. It must be noted that at this stage vicarious liability was only limited to civil wrongs.

The English civil courts went so far as to extend liability to situations where the employee's act had a connection to his employment, regardless of whether it was committed in accordance with the terms of employment or not.²⁰⁶ This led to a point where an employer could be held vicariously liable for the employee's misconduct as long as it was committed within the employee's scope of work even in situations where i) the employer did not commission the employee to commit the wrongful act; ii) the employer was ignorant of the commission of the wrongful act.²⁰⁷

The defence that the employee concerned acted against instructions,²⁰⁸ is not a defence that a corporation may rely on. An employer may therefore be held vicariously liable even if he has not authorized the wrongful act.²⁰⁹ The employer may not even be aware of the fact that a wrongful act is being committed, but he may still be held vicariously liable.²¹⁰ This is due to the fact that the employer is responsible for the actions of the employee while he is doing work for him.²¹¹

²⁰⁶ "Given that the employer was unlikely to command his employee to commit a tort, still less to admit doing so, the courts were prepared to regard the employer as liable provided the act of the employee was sufficiently connected with his employment that it could be characterized as doing some authorized task in an unauthorized manner. Attention was focused on whether the wrong was done within the scope of the servant's employment". (Ibid).

²⁰⁷ "The employer need not be proved to have commanded, participated or even known of the criminal conduct of his servant, provided the conduct is referable to the employment relationship, or, to put it in another way, was within the scope of his employment. This establishes the legal nexus on which the employer's liability is constructed". (Ibid 21).

²⁰⁸ Roy (note 194) 3.

²⁰⁹ "Where a statute imposes a strict duty, an employer or principal will be liable for the acts of his employees or agents whether he has authorized them or not". (Pinto & Evans (note 94) 24).

²¹⁰ Clarkson (note 90) 47.

²¹¹ Clarkson explains that the "rationale of vicarious liability is that it is the employer who is responsible for appointing the employee, who has control and authority over him or her and who is making the profits from the operation". (Clarkson (note 90) 49). "Vicarious liability means that the company is liable whenever any of its employees commits an offence in the course of their work". (Lacey and Wells (note 191) 515).

Vicarious liability did not, however, translate into the exoneration of the employee from personal liability.²¹² In the English case of *Lloyd v Grace, Smith & Company*²¹³ the principal was held civilly liable for the agent's acts; but when it came to the criminal offences the agent himself was held liable because there was "no encouragement or complicity" by the principal.²¹⁴

Although the doctrine of vicarious liability is a law of tort principle that has been made use of in the criminal law context,²¹⁵ it has generally not been welcomed in the criminal law context.²¹⁶ Hanna states that vicarious liability "has been adapted, somewhat uncomfortably, to the context of criminal law".²¹⁷ She refers to Williams, who sees vicarious liability as being justifiable in the law of torts, which is primarily aimed at compensation, as opposed to criminal law which is primarily aimed at deterrence.²¹⁸ Colvin states that in "criminal law, it has been considered unjust to condemn and punish one person for the conduct of another without reference to whether the former was at fault for what occurred".²¹⁹ Regardless of this, vicarious liability has played an important role in the development of the concept of corporate criminal liability²²⁰ in jurisdictions such as England²²¹ and Australia²²² which relied on this rule of

²¹² "According to the doctrine of vicarious liability, the company can be responsible for the acts of its employees but the acts remain those of the employees". (Pinto & Evans (note 94) 39).

²¹³ *Lloyd v Grace, Smith & Company* [1912] A.C. 716, HL.

²¹⁴ Pinto & Evans (note 94) 19.

²¹⁵ Hanna (note 201) 454.

²¹⁶ In *Canadian Dredge & Dock Co. v R* the court discusses vicarious liability at length and provides various examples of cases where this basis of liability was rejected in a criminal law context. (*Canadian Dredge & Dock Co. v R.*, [1985] 1 S.C.R. 662 (Can)).

²¹⁷ Hanna (note 201) 454.

²¹⁸ Hanna (note 201) 454 referring to G Williams *Textbook of Criminal Law* 2nd ed (1983) 952.

²¹⁹ Colvin (note 60) 6.

²²⁰ Jordaan (note 42) 49.

²²¹ Pinto & Evans (note 94) 18 – 19.

²²² C de Maglie 'Models of Corporate Criminal Liability in Comparative Law' (2005) 4 *Washington University Global Studies Law Review* 547, 553. Van Der Linde & Borg-Jorgensen (note 82) 696.

attribution at first, but later developed other rules. The Netherlands,²²³ Poland²²⁴ and Finland²²⁵ continue to rely on vicarious liability as a rule of attribution.

Even though it is mostly strict liability crimes that result in vicarious corporate criminal liability, it must be noted that vicarious liability also applies to crimes that require fault.²²⁶ Relying on vicarious liability as a rule of attribution made it possible to hold a corporation liable for the wrongful acts of its officers, without *mens rea* having to be proven on the part of the corporation, as the criminal acts of the officers are imputed.

Vicarious liability as a basis for liability has been criticized by various scholars. Some regard it as ‘underinclusive’ in that the fault required for liability must be a particular individual’s fault.²²⁷ If there is failure to find fault within that individual, the prosecution fails, despite the clear existence of corporate fault.²²⁸ On the other hand, vicarious liability has been found to be ‘overinclusive’ in the sense that once individual fault has been established, corporate liability follows automatically even if there is clearly no corporate fault.²²⁹

Vicarious liability was in many legal systems eventually replaced by other rules of attribution as it “proved insufficient”.²³⁰ Alternative rules of attribution had to be relied on. These are

²²³ BF Keulen and E Gritte ‘Corporate Criminal Liability in the Netherlands’ (December 2010) 14.3 *Electronic Journal of Comparative Law* <http://www.ejcl.org/143/art143-9.pdf> 4-5 (accessed 20 July 2014).

²²⁴ A Pascal ‘Country Report: Poland’ in J Gobert and A Pascal *European Developments in Corporate Criminal Liability* (2011) 282, 284.

²²⁵ J Gobert ‘Country Report: Finland’ in J Gobert and A Pascal *European Developments in Corporate Criminal Liability* (2011) 234, 235.

²²⁶ Pinto & Evans (note 94) 25.

²²⁷ Colvin (note 60) 8.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ WH Jarvis ‘Corporate Criminal liability – Legal Agnosticism’ (1961) 1 *Western Law Review* 1, 4.

basically forms of direct liability whereby the guilt of individuals within the corporation is imputed on to the corporation.²³¹

(ii) The identification doctrine

This is the doctrine whereby the guilt of senior officers of the corporation is regarded as the guilt of the corporation. It is referred to as the identification theory or the ‘alter ego’ doctrine or the ‘directing mind’ theory²³² and in terms of this theory the corporation is blamed for criminal acts committed only by its senior members²³³ in furthering or endeavouring to further the interests of the corporation. These senior members are regarded as ‘the mind of the corporation’ and the corporation will be held liable **only** for the wrongful acts of its senior members.²³⁴ The crux of the identification theory is thus that certain senior officials are identified within the corporation and since they are regarded as the mind of the corporation, the corporation will only be held liable if a senior official who is blameworthy for the offence is identified.²³⁵ Application of this theory “provided prosecutors with the means to convict corporations for intent-based crimes”.²³⁶

The identification doctrine regards the actions of the senior officers as actions of the

²³¹ Ibid.

²³² LJ Harbour & NY Johnson ‘Can a corporation commit manslaughter? Recent Developments in the United Kingdom and the United States’ (2006) *Defense Counsel Journal* 226, 227.

²³³ Jordaan (note 42) 54. See also Coffee (note 21) 9.

²³⁴ *Lennards Carrying Co. Ltd v Asiatic Petroleum Ltd* [1915] AC 705, 713. They do the thinking on behalf of the corporation and as human beings they have the ability to distinguish between right and wrong. “It is said that the concept equates the conduct and state of mind of certain key personnel to the conduct and state of mind of the corporate body itself so that it may commit crimes directly and not vicariously”. (Jordaan (note 42) 54). See also Coffee (note 21) 9.

²³⁵ Wells (note 15) 85. See also Ormerod (note 96) 149.

²³⁶ Harbour & Johnson (note 232) 227.

corporation²³⁷ because the senior officers are the only people who are considered to be the ‘mind’ of the corporation, and for that reason they are in fact regarded as the corporation.²³⁸ With vicarious liability the corporation is held liable for the *actus reus* and *mens rea* of the servant or agent, whereas with the identification theory the *actus reus* and the *mens rea* are imputed to the corporation and thus become the *actus reus* and *mens rea* of the corporation.²³⁹ The senior officer, and the corporation are then held liable for the *actus reus* and the *mens rea* of the corporation.²⁴⁰ The senior officer must, however, have acted within his scope of employment and in furthering the interests of the corporation.²⁴¹

The identification theory originates from the civil case of *Lennards Carrying Co. Ltd v Asiatic Petroleum Ltd*.²⁴² This was an appeal based on the conviction of a company arising from the loss of cargo resulting from a fire on its ship which was caused by its unseaworthiness. *In casu*, the court held that in the law of torts it is the act of the most senior individuals within a corporation that will be regarded as the act of the corporation.²⁴³ In *Lennards Carrying* we see the first instance in which the offence of a person who holds authority within the company is

²³⁷ Coffee (note 21) 15.

²³⁸ Coffee explains the difference between vicarious liability and the identification in the following manner: “one did not impute liability from agent to principal; rather, one decided that agent and principal were the same person”. (Ibid).

²³⁹ Ibid.

²⁴⁰ “When these high ranking agents engaged in the requisite elements of a crime with the requisite intent, then the corporation would also be held criminally liable”. (Ibid 15).

²⁴¹ Ibid.

²⁴² *Lennards Carrying Co. Ltd v Asiatic Petroleum Ltd* (note 234) 705; HL Parsons ‘The Doctrine of Identification, causation and Corporate Liability for Manslaughter’ (2003) 67 *The Journal of Criminal Law* 69, 69.

²⁴³ Viscount Haldane stated 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 operation; the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company”. (*Lennards Carrying Co. Ltd v Asiatic Petroleum Ltd* (note 234) 713).

directly imputed to the company itself so that the corporation suffers the consequences of the actions.

Ormerod sees the identification doctrine as a way which solves the company's lack of mind and body in that although a corporation has no body and mind, the *mens rea* and the acts of those senior individuals are regarded as those of the corporation.²⁴⁴ Leigh cautions, however, that where *mens rea* is a requirement a successful conviction is highly unlikely unless there is proof that a senior individual should have been aware of what was happening and failed to exercise his/her duty to act accordingly.²⁴⁵ This is supported by Ashworth who criticizes the identification doctrine as being *narrow* in the sense that a successful prosecution would not be possible without firstly, pinpointing a senior person who may be regarded as the mind of the corporation and secondly, providing proof that that person had the required *mens rea*.²⁴⁶

Clarkson points out that a difficulty posed by the identification doctrine is that when crimes have been committed by huge corporations it becomes extremely difficult to identify the individual who is personally responsible for the conduct or omission and whose blameworthiness is the blameworthiness of the corporation.²⁴⁷ This proved to be an obstacle to the successful prosecution of huge corporations as the identification theory constantly led to the unsatisfactory situation of corporations escaping criminal liability due to the fact that it is usually difficult to pinpoint a senior officer who is to blame for the crimes.²⁴⁸

²⁴⁴ Ormerod (note 96) 149.

²⁴⁵ "...If the offense requires *mens rea*, however, it would be difficult to convict, in England at least, if it could not be shown that a high managerial officer ought to have known of the circumstances triggering the duty to act and culpably failed to do so". (Leigh (note 47) 1518).

²⁴⁶ A Ashworth *Principles of Criminal Law* 4th ed 2003 118.

²⁴⁷ Clarkson (note 90) 145.

²⁴⁸ *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 73. In this case 192 people died when the ferry

In *Tesco Supermarkets Ltd v Natrass*²⁴⁹ an appeal in the House of Lords brought by Tesco Supermarkets after being convicted for having allegedly committed an offence under the Trades Description Act 1968 was heard. The company had posted an advertisement stating that they were selling Radiant washing powder at a specific lower price (2s 11d) instead of the normal price (3s 11d). A customer, William Natrass, wanted to buy the washing powder. After not succeeding in getting the one with the marked down price, he proceeded to take the available one to the counter and was charged the normal price. He paid and later complained. The company was then prosecuted under the Trade Descriptions Act 1968 in terms of s. 11 (2)²⁵⁰ which made it an offence to advertise at a lower price and actually charge a higher price. It later transpired that at some stage an employee responsible for putting stock out, had realized that the washing powder on display was finished. She had then taken out stock marked with the normal price and put it there. Tesco relied on a defence in terms of s 24 (1) b of the Trade Description Act²⁵¹ by stating that it had taken all reasonable steps to avoid commission of the offence and that “another person” had committed the offence,²⁵² this person being the manager of one of its supermarkets.²⁵³ The trial court did not accept Tesco’s argument and convicted the corporation.

they were in capsized because its bow doors had not been closed. There was no senior officer who could be pinpointed and blamed for the deaths therefore liability could not be imputed on the corporation.

²⁴⁹ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, HL.

²⁵⁰ Section 11 (2) of the Trade Descriptions Act 1968 which states that: “If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence”.

²⁵¹ The defence entailed proof by the accused that the accused “had taken all reasonable steps to avoid the commission of the offence and that it was due to the act or default of ‘another person’”. (RJ McGrane & IM Gault “Corporate Manslaughter in Major Disasters” (1991) *International Company and Commercial Law Review* 166, 168).

²⁵² Tesco’s defence was thus “that the commission of the offence was due to the act or default of another person and that they had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence by themselves or any person under their control”. (*Tesco Supermarkets Ltd v Natrass* (note 249) 2).

²⁵³ McGrane & Gault (note 251) 168.

This led to the appeal. That is where Lord Reid provided an explanation that in terms of the identification doctrine a corporation will only be held liable for the acts of senior members or controlling officers and in applying the identification doctrine Lord Reid explains clearly how the doctrine functions. He distinguishes the identification doctrine from vicarious liability and explains that under the identification doctrine it is as though the senior individual concerned is actually the corporation,²⁵⁴ hence his guilt being imputed to the corporation. In their judgments both Lord Reid and Viscount Dilhorne quote Denning LJ who stated in a previous case²⁵⁵ that

“a company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such”.²⁵⁶

It is thus clear that what the identification doctrine does is to hold the corporation liable for the conduct, the *mens rea* and even the negligence of the corporation’s senior individuals as these

²⁵⁴ “He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere and his mind is the mind of the company. If it is a guilty mind that guilt is the guilt of the company”. (*Tesco Supermarkets Ltd v Natrass* (note 249) 171).

²⁵⁵ *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 Q.B. 159.; Also reported as 3 All E.R., 624 (C.A.) 1956.

²⁵⁶ *Tesco Supermarkets Ltd v Natrass* (note 249) 7 in which Viscount Dilhorne also quotes Viscount Haldane LC’s statement in *Lennard’s Carrying* (note 234). “My Lords, 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. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company”. (*Tesco Supermarkets Ltd v Natrass* (note 249)).

are considered to be the conduct, *mens rea* or negligence of the corporation.²⁵⁷

The identification theory clearly originated as a civil law concept,²⁵⁸ however, it was subsequently applied in criminal cases. In 1944 the identification theory was applied for the first time in criminal matters and it became the basis for corporate criminal liability in England. Although the identification doctrine started off as a way of imputing a mental state to a corporation,²⁵⁹ in applying the doctrine, the courts have treated corporations as though they have their own mental state and intention.²⁶⁰ As will be seen below though, the identification doctrine has proven itself to be weak in the sense that it has hampered convictions against large corporations for manslaughter.²⁶¹

As in English law, the basis of corporate criminal liability in Canada was the identification doctrine.²⁶² Canada's interpretation of the doctrine differs from that of England.²⁶³ In *Canadian Dredge & Dock Co. v R*,²⁶⁴ the Supreme Court embraced the identification theory, however, it certainly did not interpret it in the same way as the English Court in *Tesco Supermarkets*. The idea of a directing mind was accepted, however, the Supreme Court did not accept the idea of a corporation having a single directing mind.²⁶⁵ It extended the definition of 'directing mind' in such a way that it includes not only a board of directors, but also managing directors and

²⁵⁷ Parsons (note 242) 70.

²⁵⁸ In *Lennard's Carrying* (note 234).

²⁵⁹ Leigh (note 47) 1514.

²⁶⁰ *Ibid.*

²⁶¹ See discussion in Chapter Four III (c).

²⁶² Stessens (note 52) 510.

²⁶³ Whyte (note 35) 4.

²⁶⁴ *Canadian Dredge & Dock Co. v R* (note 216) 662.

²⁶⁵ Colvin (note 60) 10.

those individuals who have been delegated authority by the board.²⁶⁶

(iii) Aggregation as a rule of attribution

Aggregation as a rule of attribution refers to “the cumulative effect of a number of different negligent acts by different persons, so as to amount, in total, to gross negligence”.²⁶⁷ As opposed to relying on the identification of a single senior officer, this rule of attribution entails accepting that a corporation is morally blameworthy “through the aggregation of individual thoughts and behaviors or an assessment of the totality of the deficiencies in its corporate culture and organizational systems”.²⁶⁸

Although proposed as a rule of attribution, aggregation has not been supported with regard to offences that require *mens rea* in the form of intention and it is mainly for offences of gross negligence that aggregation has been advanced as a possible rule of attribution.²⁶⁹ The argument that “a corporation ought to be open to prosecution for manslaughter by gross negligence on the aggregation principle”²⁷⁰ was rejected by the English Court of Appeal in *Attorney General’s Reference (No 2 of 1999)*.²⁷¹ In Canada, however, attributing liability by

²⁶⁶ Stessens (note 52) 510.

²⁶⁷ Pinto & Evans (note 94) 220.

²⁶⁸ Pieth & Ivory (note 24) 13.

²⁶⁹ Ormerod states that “it is submitted that it is not possible artificially to construct the mens rea in this way. Two (semi) innocent states of mind cannot be added together to produce a guilty state of mind. Any such doctrine could certainly have no application in offences requiring knowledge, intention or recklessness. It is in relation to offences of negligence (particularly gross negligence) that the aggregation principle has been most forcefully advocated”. (Ormerod (note 96) 252).

²⁷⁰ Ibid.

²⁷¹ *Attorney General’s Reference (No 2 of 1999)* Court of Appeal (Criminal Division) Lexis UK CD M364, [2000] 2 Cr App Rep 207; Also reported as [2000] 3 All ER 182, CA. See discussion in Chapter Four III (g) below.

means of the aggregation principle has been accepted for crimes based on negligence and it is one of the significant changes brought about by Bill C-45 to the Criminal Code.²⁷²

V CORPORATE HOMICIDE IN THE COMPARED SYSTEMS

(a) Corporate homicide in South Africa

As already mentioned, corporate criminal liability, generally, is regulated by section 332 of the CPA, however, there is no separate statute nor separate provisions within the CPA dealing directly with corporate homicide. This begs the question whether the current statutory provisions adequately address the problem of corporate homicide or whether there is a need for reform. The absence of separate laws that address the issue of corporate homicide suggests that South Africa has yet to focus its attention on corporate homicide and must seriously consider reforming its laws in this regard. It will be argued that in South Africa currently, corporations that cause deaths are not being properly held liable as section 332 of the CPA is both ineffective and inadequate.

²⁷² See discussion in Chapter Five III (a) below.

(b) Corporate homicide in England

The development of corporate criminal liability in England is rather interesting. When corporate criminal liability was first recognized in that system the basis for liability for crimes committed by corporations was strict liability.²⁷³ The corporation as an employer was regarded as the accused where its employee had committed a crime.²⁷⁴ At first, English law accepted corporate criminal liability for several crimes, but did not accept the fact that a corporation could possibly commit manslaughter.²⁷⁵

The English law, however, developed further and since 1956 it has been accepted that corporations are capable of committing manslaughter.²⁷⁶ This acceptance was brought about by the application of the identification doctrine.²⁷⁷ In terms of this doctrine when deciding whether a corporation is criminally liable or not, courts are only allowed to consider the conduct of certain people who hold senior positions within the corporation.²⁷⁸ In the English system, therefore, the blame for crimes committed only by senior members of the corporation was attributed to the corporation. It has been stated that the identification principle “provided prosecutors with the means to convict corporations for intent-based crimes”.²⁷⁹ There are successful prosecutions that have taken place where the identification principle was applied.

The identification doctrine, however, has its own shortcomings. In certain instances it has led to the unsatisfactory situation of corporations being let off the hook due to the fact that it is at times difficult to pinpoint a senior officer who is the mind of the corporation, to blame for the crimes.²⁸⁰ Following the public’s dissatisfaction with the failure of several high profile prosecutions for deaths caused by corporations, there were calls for reform. It has been stated that

“The reason for the prosecutorial failures in the work-related deaths’ cases was that under the directing mind theory two elements had to be shown beyond reasonable doubt (1) that a

person within the company was personally guilty of manslaughter through his or her own gross negligence and (2) that that person was the “directing mind” of the company”.²⁸¹

The legislature responded and this eventually culminated in the passing of legislation which deals specifically with corporate manslaughter and corporate homicide.

(c) Corporate homicide in Canada

The Canadian system also recognizes corporate criminal liability. Corporations have been held accountable for crimes they commit. The first traces of corporate criminal liability in Canada is seen with corporations being held liable for statutory offences.²⁸²

Similar to the English law the basis for liability in Canada has been the identification doctrine. Canada has, however, widely interpreted the doctrine and does not limit liability to crimes that have been committed by directors or senior management. Following the failure of the prosecution of a company and its three directors for the deaths of 26 miners in Westray in 1992, there was a public outcry that led to the establishment of the Royal Commission of Inquiry. The findings of the Commission led to amendments being made to the Criminal code through the addition of section 217.1 of the Criminal Code in 2004. It is federal legislation and one of its major features is the fact that it takes into account the conduct of “representatives” of the company. The term representative includes employees, agents and contractors of the

²⁷³ Harbour & Johnson (note 232) 227.

²⁷⁴ Ibid.

²⁷⁵ *R v Cory Bros & Co.* 1 K.B. 810 (1927).

²⁷⁶ *H.L Bolton Co. V T.J. Graham & Sons* (note 255).

²⁷⁷ Ibid 630.

²⁷⁸ Stessens (note 52) 493.

²⁷⁹ Harbour & Johnson (note 232) 232.

²⁸⁰ *R v P & O European Ferries (Dover) Ltd* (note 248) 93. When applying the identification doctrine in this case there was no senior officer who could be blamed for the deaths and for that reason, liability could not be imputed to the corporation.

²⁸¹ Harbour & Johnson (note 232) 232.

²⁸² Stessens (note 52) 497.

organization. Canadian law therefore makes it clear that corporate liability for homicide can be a result of the wrongful conduct of any employee, including junior employees.²⁸³

(d) Corporate homicide – considering a new basis of liability

Shortcomings of both vicarious liability²⁸⁴ and the identification doctrine,²⁸⁵ which have made it possible for corporations to escape liability where they should have been held criminally liable, coupled together with the rejection of the doctrine of aggregation²⁸⁶ have led to proposals being made to changing the form according to which corporate criminal liability is applied.

Reasons have been advanced for the reform of the law, particularly in cases of homicide. With regard to vicarious liability it has been averred that “it has been difficult for prosecutors to use criminal conduct of servants of the company to prove manslaughter against its directors”.²⁸⁷ The identification doctrine makes it difficult to impose criminal liability on a corporation as it requires a connection between the conduct and culpability of the corporation and of a senior individual within the corporation.²⁸⁸ A senior individual who is regarded as the mind and will of the corporation and who is guilty of manslaughter must first be identified before that guilt is imputed to the corporation.²⁸⁹ Failure to identify such an individual means that the

²⁸³ Whyte (note 35) 4.

²⁸⁴ “Vicarious liability is regarded as too rough and ready for the delicate task of attributing blame for serious harms. It has been criticised for including too little by demanding that liability flow through an individual, however great the fault of the corporation, and for including too much by blaming the corporation whenever the individual employee is at fault, even in the absence of corporate fault”. (Wells (note 92) 109).

²⁸⁵ J Gobert ‘Corporate Criminality: New crimes for the times’ *Criminal law Review* (1994) 722, 723.

²⁸⁶ *R v H.M. Coroner for East Kent, ex parte Spooner* (1989) 88 Cr.App.R.10.

²⁸⁷ Roy (note 194) 7.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

corporation escapes liability for manslaughter.²⁹⁰ The principle of aggregation has been rejected due to the fact that the aggregation of the conduct of several individuals would make the corporation liable, while in actual fact none of those are individually liable.²⁹¹

It is stated that on their own, none of these rules of attribution are suitable to circumstances where a company has caused deaths, particularly the larger companies. All three theories have in common the fact that for the corporation to have fault there must be reference to ‘individual liability’.²⁹²

“Theories of vicarious liability, identification, and aggregation require the court to proceed by a two-step process. The court first determines whether one or more persons within the company is guilty of a criminal offence. If the answer is yes, the court then must ask whether the perpetrator is an individual for whose acts the company should be responsible”.²⁹³

Instead of basing liability on doctrines that focus on the guilt of an individual, basing corporate criminal liability on corporate culture has been proposed. Corporate culture would put the focus on the corporation itself and it refers to “an attitude, policy, rule, course of conduct, or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place”.²⁹⁴ Basing corporate criminal liability on corporate culture

²⁹⁰ In addition, “difficulties created by the identification principle are such that the more diffuse the structure of the corporation and the more devolved the powers that are given to semi-autonomous managers, the easier it will be for corporations to avoid liability under the current legal regime”. (Ibid 8).

²⁹¹ Ibid 7.

²⁹² Gobert (note 285) 723.

²⁹³ Ibid.

²⁹⁴ Wells (note 92) 109.

would entail imposing liability where there is “tacit authorization or toleration of non-compliance or failure to create a culture of compliance”.²⁹⁵

The proposed new form of attributing liability would mean that corporate fault is founded in the corporation itself, without reliance on individual liability to establish corporate liability²⁹⁶ as “the company is treated as a distinct organic entity whose ‘mind’ is embodied in the policies it has adopted”.²⁹⁷

The question whether reforming the basis of liability will provide a better solution to South Africa’s problems will be considered after examining the concepts of corporate criminal liability and corporate homicide in South Africa, England and Canada.

VI THE PURPOSE OF PUNISHMENT OF CORPORATIONS

When a corporation has been prosecuted and found guilty of a crime, as in the case of a convicted natural person, there is some form of punishment prescribed by law that the court is obliged to impose. The question arises as to whether it is justifiable to impose punishment on a corporate entity, an artificial being, whilst knowing that that artificial being relies on another (a natural person) to act on its behalf.

This is particularly the case since “criminal law sentencing literature primarily focuses on the individual and not corporations”,²⁹⁸ thus showing that corporations were not taken into consideration when theories of punishment for convicted offenders were developed. This is

²⁹⁵ Ibid.

²⁹⁶ Gobert (note 285) 723.

²⁹⁷ Ibid.

²⁹⁸ N Keith “Sentencing the corporate offender: From deterrence to corporate social responsibility” (2010) *Criminal Law Quarterly* 294, 296.

confirmed by Wells' assertion that "blaming and punishing individuals inevitably has a longer history than talk of corporate liability".²⁹⁹ It is therefore not surprising that with the concept of punishment and the theories of punishment having been originally developed for natural persons, when corporations have to be punished there are challenges that are encountered. For instance, due to its nature a corporation cannot be incarcerated, consequently a sanction involving finances appears to be a more appropriate form of punishment for corporations. However, as Wells correctly points out it is a "common misconception...that corporate sanctions can only be exacted in the form of financial penalty".³⁰⁰

As the adequacy and effectiveness of a criminal sanction has a direct bearing on whether corporate criminal liability is effective or not, it is submitted that when dealing with corporate criminal liability it is essential for the issue of the punishment of corporations to be included. This entails a discussion of the reasons / theories of punishment and putting them in the context of punishing corporations as opposed to natural persons. It is submitted that the inclusion of such a discussion will make it possible for corporate criminal liability to be better understood and it will also enable one to determine whether corporate criminal liability is applied in an effective and adequate manner.

(a) Reasons for imposing punishment

Terblanche states that "any form of pain or discomfort an offender suffers as a result of his committing a crime can be seen as punishment".³⁰¹ According to Clarkson "the real distinctive

²⁹⁹ Wells (note 15) 31.

³⁰⁰ Ibid.

³⁰¹ SS Terblanche *The Guide to Sentencing in South Africa* 2nd ed (2007) 4.

hallmark of the criminal law, however, is that convicted offenders become liable to censure and stigmatic punishment”.³⁰² Criminal law is therefore aimed at punishing offenders who have been convicted. In South African law courts punish convicted criminals by imposing sentences on them.³⁰³ Since corporations are recognized as juristic persons, with rights and duties, they are also capable of committing crimes. It follows, therefore, that those corporations which have been found guilty of crimes are included in the definition of “convicted offenders” and may be subject to applicable sentences.

In deciding on a suitable sentence to impose on a convicted offender, in South Africa the court when sentencing takes into account “the triad consisting of the crime, the offender and the interests of society” as laid down in *S v Zinn*.³⁰⁴ It has been stated that theoretically when taking into account the ‘interests of society’ part of the triad, theories of punishment should form part of that enquiry.³⁰⁵

There are various theories of punishment and they have been in existence for a long time.³⁰⁶ Snyman refers us to the absolute theory, the relative theory as well as the combination theory.³⁰⁷

³⁰² Clarkson (note 90) 6. He goes on to explain that “it is the State that is exacting retribution or incapacitating a dangerous criminal and so on. In doing this the State is publicly condemning and censuring the defendant’s actions. This results in a special stigma not attaching to defendants in civil actions – hence the phrase ‘Stigmatic punishment’”. (Clarkson (note 90) 6 - 7).

³⁰³ Terblanche (note 301) 3. Terblanche goes on to explain though that some sentences are not punishment though as they do not result in the suffering of pain or discomfort for instance a “formal caution”, a wholly suspended sentence, “the forfeiture of property and the suspension of privileges, such as a driver’s licence”. (Ibid). “Punishment works through official sanctions calculated to interfere with the life, liberty or property of the offender; it is the authoritative infliction of suffering for an offence”. (Burchell (note 49) 68).

³⁰⁴ *S v Zinn* 1969 (2) SA 537 (A), in which Rumpff J articulated what was already being practised by the courts by stating “It then becomes the task of this court to impose the sentence which it thinks suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interests of society”. (*S v Zinn* 1969 (2) SA 537 (A) para 540 G).

³⁰⁵ “Usually the purposes are simply seen as considerations additional to the *Zinn* triad and there is no real indication of how they should affect the sentence which has otherwise been determined with the aid of the *Zinn* triad only. Theoretically, however, the purposes of punishment should be dealt with as part of the interests-of-society component of the *Zinn* triad”. (Terblanche (note 301) 155).

³⁰⁶ “The ideas of retribution, deterrence, prevention and (to a lesser extent) rehabilitation are ancient. Frequent references to these notions can be found in the writings of the Roman-Dutch writers, and our courts were bound, at some stage, to take note of them”. (Ibid 156).

³⁰⁷ Snyman (note 22)10.

The absolute theory refers to the retributive theory, while the relative theory refers to the preventive theory, the deterrent theory and the reformatory theory.³⁰⁸

Although Snyman refers to the position in South African law, what he states is echoed by Martin and Storey, on English law, who provide reasons for imposing punishment as the “punishment of offenders; the reduction of crime (including its reduction by deterrence and by the reform and rehabilitation of offenders); the protection of the public and the making of reparation by offenders to persons affected by their offences”.³⁰⁹ It is also echoed by Roach with regard to Canadian law, who states that

“Despite the fundamental principles that a sentence fit the crime, there are other legitimate purposes of sentencing, including deterring others from committing crimes; deterring the particular offender from reoffending; incapacitating the particular offender from committing more crimes; rehabilitating the particular offender; and providing reparation for harm done to victims or the community”.³¹⁰

It is clear that in the three jurisdictions in which corporate criminal liability and corporate homicide will be investigated in this thesis, there is agreement with regard to the rationale for punishing convicted criminals, including convicted corporations.

It is important to note that when it comes to imposing a sentence, in addition to the various factors that the judge takes into account, he is allowed to use his discretion. Even where a judge

³⁰⁸ Ibid.

³⁰⁹ J Martin & T Storey *Unlocking Criminal Law* (2004) 18.

³¹⁰ K Roach *Essentials of Canadian Law - Criminal Law* 2nd ed (2000) 18.

is limited in terms of the type of sentence he may impose he uses his discretionary powers to determine, for instance, the length of imprisonment or the amount of a fine, etc. Clarkson refers to these as “tremendous discretionary powers” and explains that the type of sentence and the length or amount imposed is determined by what the judge regards as the purpose of punishment.³¹¹ It is therefore clear that the purpose of punishment is important and for that reason the theories of punishment have to be given special attention. The importance of the theories of punishment is echoed by Snyman who states:

“The theories of punishment are of vital importance. They seek to answer not only the question as to the justification of punishment (and, by extension, the justification of the whole existence of criminal law) but also what punishment ought to be imposed in each individual case. These theories even have a direct impact on the construction of the general principles of liability and of the defences afforded an accused”.³¹²

These theories of punishment will be discussed with a view to clarifying the need for a corporation to be punished.

(i) The retributive theory

³¹¹ “It is thus clear that tremendous discretionary power is vested in the sentencing judge. Which sentence is chosen, and its length depends very much on what the sentence sees the purposes of punishment and the criminal law to be”. (Clarkson (note 90) 7-8).

³¹² Snyman (note 22) 10.

When one follows the retributive theory the purpose of punishment is to ensure that the accused pays for having committed the crime.³¹³ This is a theory of punishment that is reflected in all sentences.³¹⁴ Snyman states that “retribution restores the legal balance that has been disturbed by the commission of the crime”.³¹⁵ The legal balance that he refers to are the rights and duties that the law gives to persons for instance by giving people the right to life and imposing a duty not to infringe upon that right by killing others. Once that balance has been shaken, if the retributive theory of punishment is applied, the aim of punishment is to make the accused pay for the crime committed. When the accused is punished for the crime committed it is said that that legal balance is restored. Snyman explains that when it comes to the absolute theory the main focus is on the past, on the crime that has already been committed.³¹⁶

In explaining the retribution theory Snyman differentiates it from vengeance, which carries connotations of an eye for an eye.³¹⁷ He explains that interpreting the term retribution as vengeance refers to a situation where the accused is punished by being subjected to the same harm that was inflicted by the accused.³¹⁸ The interpretation of retribution as vengeance is an ancient way of interpreting retribution.³¹⁹ Retribution does, however, entail punishing the

³¹³ Ibid 11.

³¹⁴ “Retribution forms the current foundation of every sentence, and is present in this form in every sentence. It gives shape to every sentence and limits each sentence to the bounds of the blameworthiness of the offender, to his “just deserts”. People’s moral outrage at the commission of the crime is an important factor determining the seriousness of the crime and the blameworthiness of the offender. Thus, the courts have to take it into consideration”. (Terblanche (note 301) 178).

³¹⁵ Snyman (note 22) 11.

³¹⁶ Ibid 15.

³¹⁷ Ibid 12.

³¹⁸ Ibid.

³¹⁹ Ibid.

accused in a way that is proportionate to the crime.³²⁰ Snyman argues that retribution should not be classified as a theory of punishment, but rather, as a vital element of punishment.³²¹

(ii) The preventive theory

The preventive theory is based on the notion that the aim of punishment is to prevent crime.³²² Snyman observes that the preventive theory ‘overlaps’ with the deterrent as well as the reformative theories.³²³ This is echoed by Terblanche who states that

“In the wider sense it includes deterrence and rehabilitation. Sometimes it is even used as a synonym for general deterrence, when courts state that the sentence should “prevent” others from committing similar crimes”.³²⁴

Snyman further observes that on the contrary there are situations where the preventive theory does not have a deterrent or reformative purpose and in this regard he cites examples such as life imprisonment and the death penalty.³²⁵ When it comes to the relative theory, Snyman states that the focus is on “the object (eg prevention or reformation) that one wishes to achieve by means of the punishment”.³²⁶

³²⁰ Ibid.

³²¹ “The retributive theory therefore does not seek to justify punishment with reference to some future benefit which may be achieved through punishment (such as deterrence or prevention). Strictly speaking it is, therefore, not correct to describe retribution as a ‘purpose of punishment’. It is rather the essential characteristic of punishment”. (Snyman (note 22) 12).

³²² Wells (note 15) 19.

³²³ Snyman (note 22) 15.

³²⁴ Terblanche (note 301) 162.

³²⁵ Snyman (note 22) 15. See also Terblanche (note 301) 162.

³²⁶ Snyman (note 22) 11.

(iii) The deterrent theory

Wells describes deterrence, which forms part of the relative theory as being “forward looking”.³²⁷ According to Burchell

“The theory of deterrence is that since punishment involves pain or suffering, rational people will avoid engaging in conduct that will expose them to punishment. Since punishment can only be inflicted in respect of crimes, it follows that the conduct that will be avoided is that which has been defined as a crime. In the result then, punishment works to prevent persons from committing crime.”³²⁸

It is submitted that Burchell’s explanation captures clearly the concept of deterrence, particularly with regard to deterring corporations from committing crime. The idea is for corporations to avoid committing crime as crime is that which will cause the corporation to suffer financially through having to suffer the consequence of paying substantial fines, that may even cause the company to collapse.

The deterrent theory is twofold in that on the one hand it entails the deterrence of that particular accused who has been convicted, from committing further crimes, and on the other hand it generally deters would-be offenders from committing the crime.³²⁹ As will be seen in the

³²⁷ Wells (note 15) 19.

³²⁸ Burchell (note 49) 74.

³²⁹ “The belief is that the imposition of punishment sends out a message to society that a crime will be punished and that, as a result of this message, members of society will fear that if they transgress the law they will be punished, and that this fear will result in their refraining from engaging in criminal conduct”. (Snyman (note 22) 16).

discussions below, “generally, there appears to be an increasing acceptance that deterrence may not be so effective”.³³⁰

(aa) The theory of individual deterrence

Individual deterrence as a theory refers to the deterrence of the particular offender from committing more crimes.³³¹ Terblanche states that the

“theory behind individual deterrence is that the offender will be deterred from re-offending because he has learnt from the unpleasant experience of his punishment, or because he is fearful of what may happen if he re-offends...In the case of repeat offenders, courts often regard a sentence more severe than the previous one as the only appropriate measure since, it is argued, the offender has not learnt his lesson. It is, therefore, common practice to impose increasingly more severe sentences on an offender in an attempt to deter him...”³³²

Unfortunately, with regard to natural persons, the theory of individual deterrence in South Africa has proved to be an ineffective tool.³³³ With regard to natural persons Snyman observes that

“In South Africa the premise of this theory is undermined by the shockingly high percentage of recidivism (offenders who continue to commit crime after being released from prison) – this lies in the region of 90% and suggests that this theory is not very effective, in any event not in South Africa”.³³⁴

³³⁰ Terblanche (note 301) 159.

³³¹ “The object is to teach the offender a lesson so that he will be deterred from repeating his offence”. (Burchell (note 49) 74). See also Snyman (note 22) 15.

³³² Terblanche (note 301) 161 – 162.

³³³ Snyman (note 22) 16.

³³⁴ Ibid. Burchell also observes that “the validity of this theory is, of course, weakened every time a convicted person commits another crime; the previous punishment has obviously not deterred him from again committing a

Burchell's observation is similar to that of Snyman and Burchell concludes that "research indicates that with each conviction there is a greater chance of recidivism. This suggests that first offenders ought to be treated with leniency rather than suffer a severe (and thus deterrent) punishment".³³⁵ It is submitted that for the corporate offender the suggestion that first offenders should be treated with leniency should not be followed. Several factors ought to be taken into account: some of the corporate crime involves death and serious injury and in some cases the number of people affected is more than one; corporations depend on their finances to survive; in countries such as South Africa, the only punishment they are threatened with is a fine. By imposing fines only, the courts may be inadvertently encouraging corporations to put aside a budget for fines and this may also result in the offending corporation becoming a repeated offender, with the knowledge that the amount to pay for the crime is readily available. Moreover, a fine may not usually have the desired effect as the corporation is not likely to feel the punishment.³³⁶ It is therefore submitted that the punishment imposed on the corporation should be such that it will deter the corporation from committing crime and in that way lessen the number of corporations that become repeat offenders.³³⁷ It is further submitted that this may be achieved not only by imposing a high fine, but by also making it possible for courts to impose other forms of punishment, particularly if the crime has caused serious injury or death.

crime. If the recidivism rate among offenders is thus fairly high (second or third convictions) then it is clear that punishment does not have a deterrent effect". (Burchell (note 49) 75).

³³⁵ Ibid.

³³⁶ "A fine against an enterprise has roughly the same effect as a fine for a parking offence against a rich individual: it is merely an inconvenience with a very limited deterrent effect". (B Schunemann "Placing the Enterprise under Supervision (Guardianship) as a Model Sanction against Legal and Collective Entities" in *Criminal Responsibility of Legal and Collective Entities International Colloquim*, www.iusrim.mpd.verlag/online 294 (accessed 15 November 2013)).

³³⁷ Kruger says the "Correct application of the *Zinn* triad will avoid such aberrations: how serious is the offence really (even if it is a repetition), what are the accused's personal circumstances (even if it is aggravating that the offender was not deterred by previous punishments) and what are the true interests of the community? If the offence does not cause the community great harm, what is the sense of imposing a very expensive sentence – particularly if, in the light of previous sentences, it has little chance of preventing repetition?" (A Kruger *Hiemstra's Criminal Procedure* (2008) 28-28 and 28-28(1)).

It is hoped that the convicted offending corporation will, in future, avoid action that may result in the serious injury or death of another person.

(bb) The theory of general deterrence

The theory of general deterrence is mainly applied when the offence is serious and when the offence has become increasingly widespread.³³⁸ Terblanche avers that when it comes to “general deterrence, the sentence is used as an example to other potential offenders and the belief is that the threat of similar punishment will cause such potential offender to refrain from committing crime”.³³⁹ Snyman points out that the focus is on the effect that the imposed judgment will have on society generally and the aim of punishment is to keep society as a whole away from committing crime.³⁴⁰

Burchell states that

“the theory of general deterrence requires that all persons who commit crimes should suffer punishment and, where particular types of crime are prevalent, that ‘exemplary’ punishments should be meted out on particular offender so as to suppress the incidence of the crime in question”.³⁴¹

It is submitted that this is an effective way of deterring others from committing the same kind of crime, however such deterrence will be achieved when there are more effective forms of punishment in place.

³³⁸ Terblanche (note 301) 158. Burchell states that “the theory of general deterrence requires that all persons who commit crimes should suffer punishment and, where particular types of crime are prevalent, that ‘exemplary’ punishments should be meted out on particular offender so as to suppress the incidence of the crime in question”. (Burchell (note 49) 75).

³³⁹ Terblanche (note 301) 157.

³⁴⁰ Snyman (note 22) 16.

³⁴¹ Burchell (note 49) 75.

Moore argues that “the implications for general deterrence are more far-reaching. This is so because general deterrence relies, in addition to certainty and severity of punishment, on the uniformity of punishment”.³⁴² This is seen by Snyman as a ‘misconception’.³⁴³ Snyman goes on to explain that for the theory to succeed it does not depend on how severe the sentence is, but rather “on how probable it is that an offender will be caught, convicted and serve [out – sic] his sentence”.³⁴⁴ According to Snyman

“the theory is accordingly successful only if there is a reasonable certainty that an offender will be traced by the police, that the prosecution of the crime in court will be effective and result in a conviction, and that the offender will serve his sentence and not be freed on parole too early, or escape from prison”.³⁴⁵

It is submitted that Snyman offers a sound argument for general deterrence. He, however, proceeds to contextualize this theory of general deterrence and shows that in the South African context there are challenges that thus far have made it difficult for the criminal justice system to deter society, generally, from committing crime.³⁴⁶ The view expressed by Snyman in this regard is of the general deterrence of crime committed by natural persons. With regard to crime committed by a corporation, an inquiry needs to be made as the outcome of general deterrence may be different.

³⁴² CA Moore ‘Taming the Giant corporations? Some Cautionary Remarks on the Deterability of Corporate Crime’ (1987) July *Crime and Delinquency* 379, 382.

³⁴³ Snyman (note 22) 16.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ “It is well known that a variety of factors, such as an understaffed police force, some police officers and prosecutors lacking the required skills, possible corruption and bad administration (factors which may all be traced back to a lack of funds) considerably weaken the probability of a real offender being brought to justice and punished. In fact, in the light of statistics showing how few offenders are ultimately apprehended, prosecuted, it is difficult not to conclude that in South Africa it pays to commit crime”. (Snyman (note 22) 16 – 17).

(iv) The reformative or rehabilitation theory

The reformative theory focuses on the offender by aiming at the reformation or rehabilitation of the offender to a point where he abides by the law.³⁴⁷ Snyman makes it clear that the reformative theory is based on the premise that there is something wrong with the personality of the convicted offender.³⁴⁸ This theory is therefore more suitable for dealing with natural persons³⁴⁹ as they go through programmes aimed at rehabilitating them during their incarceration.

As it is not possible for a corporation to be incarcerated, due to its juristic personality, the discussion of the reformative theory is not necessary for purposes of punishment of corporations. As Wells puts it, “corporations already enter the criminal justice process with the advantage that they cannot have imposed upon them the hardship and degradation which incarceration entails”.³⁵⁰

(v) Restorative justice

³⁴⁷ Terblanche (note 301) 163; Snyman (note 22) 18; Burchell (note 49) 78.

³⁴⁸ “According to this theory an offender commits a crime because of some personality defect, or because of psychological factors stemming from his background”. (Snyman (note 22) 18). “It is easy to understand that a person whose crimes are caused by a drug or alcohol dependency will be unlikely to repeat these crimes if the dependency is successfully addressed. Some personality disorders also result in a predisposition to commit crime and, even though they may be more difficult to cure, further crime is unlikely if they can be managed successfully”. (Terblanche (note 301) 163).

³⁴⁹ As among other things, “before courts can properly apply the reformation theory they must have sufficient information before them regarding the offender’s personality and the treatment to which he is likely to respond”. (Burchell (note 49) 80).

³⁵⁰ Wells (note 15) 20.

Another manner in which convicted offenders are dealt with is by means of restorative justice.

Kruger explains that restorative justice

“attempts to restore the relationship between the offender and the community by means of the promotion of reconciliation, restitution and responsibility. The victim plays a bigger role. Whereas retributive justice looks backwards, reacting to something which has been done, restorative justice looks forward”.³⁵¹

With restorative justice punishment is therefore not the aim, but rather, reconciliation.³⁵²

Burchell states that this “reconciliation is achieved by a process of deliberation involving the victim, offender and representatives of the community”.³⁵³ As with the reformative or rehabilitation theory, restorative justice is directed towards an offender who is a natural person, rather than a corporate offender.

It is submitted that it may be applied to a corporate offender by means of a sentence such as community service directed toward the victims of the corporate crime that the corporation is being sentenced for, as it “gives the victim something by means of compensation or restoration of relationships”.³⁵⁴ Kruger points out however, that with regard to punishing the perpetrator for serious offences “which evoke strong feelings of outrage and revulsion in society” restorative justice is not recommended.³⁵⁵

³⁵¹ Kruger (note 337) 28-28(1).

³⁵² Burchell (note 49) 82.

³⁵³ Ibid.

³⁵⁴ Kruger (note 337) 28-28(1).

³⁵⁵ Ibid. Kruger refers to Bosielo JA’s statement in *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) par 20 that he feels the need to “caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option”. Kruger (note 337) 28-28(1). *In casu* the offence was that of rape and Bosielo JA considered the appropriateness of the sentence for that “type of crime, given its prevalence, seriousness and its deleterious effect on society”. (*Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) par 19).

(b) Corporations and the theories of punishment

Reasons for sentencing corporations may be determined by examining the concept of a corporation vis-à-vis the theories of punishment. The corporation is a juristic person with no physical body that may be personally punished. It is an artificial entity that relies on natural persons who make decisions on its behalf and carry out tasks on its behalf. Even when facing charges against it, the corporation relies on a natural person to face prosecution on its behalf. Since a corporation differs from a natural person the sentences that may be imposed on a corporation will not always be the same as those that may be imposed on a natural person. This is emphasised by Wells who points out that corporations have the benefit of not being exposed to imprisonment.³⁵⁶

Furthermore the arguments for and against the various theories of punishment may also not necessarily be applicable in the same way when it comes to the punishment of corporations. For instance one of the main criticisms of the retributive theory is its failure to take into account the fact that a large number of criminals go without being prosecuted as they are not caught.³⁵⁷

³⁵⁶ Wells (note 15) 20.

³⁵⁷ “Just deserts theory has been criticized on the ground that it ignores the essential reality of the criminal justice process, which is that only a minority of offenders is ever caught. This is particularly true of white collar crime which leads Braithwaite and Pettit to conclude that to apply just deserts to it is neither desirable nor feasible”. (Wells (note 15) 20).

In arguing that corporate deterrence is not a straightforward theory that may be implemented simply by making the punishment more severe, Moore states that

“However, modern transnational corporations differ greatly from ordinary actors in their capacity to respond to changes in their legal and political environment. Even white-collar criminals have little direct influence over the legal penalties to which they are subject. Corporations do. Their purely legal persona, their vast political and economic resources, and their ability to cloak the actions of human agents in organizational anonymity make corporations formidable contenders in struggles over the uses to which a society’s formal social control apparatus is to be put. And this is especially true when it is the behavior of a specific industry or industries that is being targeted for more punitive or comprehensive regulation”.³⁵⁸

It is clear that when the theories of punishment were formulated or arrived at, the only type of person in mind was the natural person. The juristic person was not considered and with development of corporate criminal liability one finds a situation where it is necessary to provide justification for punishing corporations by referring to already existing theories, some of which fail to provide suitable arguments for the punishment of corporations. With regard to the reformatory or rehabilitation theory, the corporation was clearly not considered when this theory was developed.

Keith avers that with regard to sentencing corporations deterrence has been the theory that has been focused on and he argues that “sentencing the corporate offender should look beyond deterrence and seize the opportunity for corporate rehabilitation and the broader public interest”.³⁵⁹ Instead of relying heavily on the deterrence theory Keith proposes that when

³⁵⁸ Moore (note 342) 379.

³⁵⁹ Keith (note 298) 294.

sentencing corporations various factors need to be taken into account. He avers that “a broader set of principles that consider the nature of the corporate offender, the nature of the offence, the effect on the victim and its broader social impact is critical for a principled approach in sentencing corporations” will lead to corporations being properly punished, particularly for corporate homicide. It is submitted that the approach proposed by Keith is the best approach as it entails taking into account all the theories when deciding on the proper way to punish corporations and even additional factors. It is further submitted that we should reflect on Wells’ view that “the theories of punishment have to take account not only of the legal and political context with which they intimately relate, but also of the argument that corporate crime has to be brought into the criminal justice story and not left as an awkward afterthought”.³⁶⁰

It is submitted that the fine as punishment for convicted corporations, particularly for corporate homicide is not suitable on its own as it does not extend to some of the theories of punishment.³⁶¹ It is further submitted that the solution may be found in supplementing the fine by imposing effective punitive measures that will translate into the stigmatization and public humiliation of the corporation, as these are more likely to result in lowering the corporation’s reputation which ‘can impose greater punishment and deterrence than mere economic sanction’.³⁶² These may be in the form of sanctions such as ‘publicity orders’.

Having outlined the theories of punishment and having discussed them vis-à-vis the punishment of corporations, the concept of corporate criminally liability and the question

³⁶⁰ Wells (note 15) 20.

³⁶¹ “In recent history there is evidence that many offenders see the penalty as a risked “add on” cost to their criminal enterprise and, if the prospective gain from crime is sufficiently high, are undeterred; if caught, paying the fine will be seen by the offender simply as a form of taxation on crime”. (G Slapper ‘Corporate Punishment’ (1994) 144 *New Law Journal* 29, 29).

³⁶² *Ibid.*

regarding its effectiveness or adequacy may now be examined with the issue of sentencing being included in determining whether corporations are being effectively and adequately dealt with in South Africa. In the chapters dealing with the compared jurisdictions the applicable sentences for corporate crime generally, as well as for corporate crime resulting in death or serious injury will be discussed. The discussion will include additional sanctions that are imposed in the compared jurisdictions. The possibility of South Africa moving away from having the fine as the sole form of punishment that may be imposed on corporations will also be considered.

VII CONCLUSION

In the discussion above it has been made clear that corporate criminal liability is a concept that should be taken seriously as it has a crucial role that it plays in our society. Its relevance has been emphasised and it has been suggested that since it is the proper way to deal with corporate criminality it ought to be retained.

The discussion on the development of the concept of corporate criminal liability and the rationale behind applying criminal law to corporate entities highlight the importance of ensuring that corporations are held properly accountable for their criminal activities. It has also been further explained that corporate criminal liability as opposed to corporate civil liability is the better option and will ensure that there is justice. It is also shown that there is a need for corporate criminal liability as corporate individual liability on its own will not result in corporations that commit crimes being punished for their crimes. The different bases for liability, the purposes and theories of punishment have been put into perspective before being

dealt with in the specific contexts of the compared jurisdiction. Corporate homicide in the three jurisdictions that will be the object of the comparative study has also been introduced briefly.

From the discussion in this chapter it is clear that corporate criminal liability in South Africa has not been developed further since the coming into being of section 332 of the CPA, yet there have been further developments in other areas such as Constitutional law, which has a direct effect on section 332 of the CPA. This lack of development has led to section 332 of the CPA becoming a provision that is both inadequate and ineffective. Moreover, while corporations continue to engage in harmful corporate activities that sometimes lead to fatalities, South Africa has not developed to a point where there is a separate legal framework for corporate homicide. Clearly there is a need for reform and it is submitted that from the in-depth comparative study of corporate criminal liability and corporate homicide in South Africa, England and Canada that will follow, South Africa can derive much benefit.

PART TWO: THE COMPARATIVE STUDY

CHAPTER 3 - SOUTH AFRICA AND CORPORATE HOMICIDE

I INTRODUCTION

“South Africa experiences vast corporate activity and development. An adverse consequence of this is the proliferation of severe corporate criminality. There is rising consensus among corporate criminologists and academics that corporate crime inflicts more damage on society than all street crime combined”.³⁶³

This quotation highlights the fact that like other countries, South Africa is faced with the challenge of dealing with crimes committed by corporations, including those that result in people’s deaths. It is therefore in the interest of South Africa to see to it that there are adequate measures in place that are intended to deal with corporations that commit crimes, particularly those that result in the deaths of people.

As already stated, corporate criminal liability in South Africa is regulated by section 332 of the CPA and the punishment for corporate crimes is a fine.³⁶⁴ South Africa does not have separate legislation that deals specifically with fatalities resulting from the conduct of corporate bodies. Corporations that kill are therefore prosecuted in accordance with section 332 of the CPA, which regulates corporate criminal liability generally.

The problem with the application of the current approach is that even though there have been many occurrences of fatalities caused by corporate activities, there have been very few cases

³⁶³ Borg-Jorgensen & Van Der Linde (note 53) 452.

³⁶⁴ CPA (note 16) section 332(2).

in which corporations have been convicted for such deaths.³⁶⁵ This gives rise to two issues: (i) The question whether the manner in which corporate criminal liability is currently applied makes it possible for corporations that kill and injure people to be properly held liable for this unlawful conduct with regard to corporations;³⁶⁶ and (ii) The question of the appropriateness of a fine as the sole possible punishment for corporations,³⁶⁷ even where there is death.

It must be noted that it was only during the 20th century that it started to become common practice in South Africa to hold a corporation criminally liable.³⁶⁸ At first the common law played an important role in regulating corporate criminal liability in South Africa.³⁶⁹ However, the legislature gradually developed a legal framework for corporate criminal liability and the current position is that corporate criminal liability is mainly regulated by statute.³⁷⁰ The legislature first addressed the issue by enacting section 384 of the Criminal Procedure and Evidence Act, 1917.³⁷¹ Section 384 was later amended by section 117 of the Companies Amendment Act, 1939.³⁷² The amended section 384 was later replaced by section 381 of the Criminal Procedure Act, 1955.³⁷³ The wording of section 381 remained basically the same as it was under section 384. Section 381 was also later replaced and the current position is found

³⁶⁵ A Rycroft 'A Corporate Homicide' (2004) 17 *SACJ* 141, 141 – 142. "In South Africa about 1400 people are killed yearly in occupational accidents". (OHS Academy <http://www.ohsacademy.co.za/didyouknow.asp> (accessed March 2014). With regard to the frequency of prosecutions see discussion in chapter 6 part I below.

³⁶⁶ This will be addressed in this chapter at V below.

³⁶⁷ This will be addressed in this chapter at V(g) below..

³⁶⁸ In answering the question whether a juristic person could be held criminally liable, Pittman in 1940 stated that "A hundred years ago the answer to this question would have been in the negative, an artificial person not being regarded as *doli capax*". (W Pittman *Criminal Law in South Africa* (1940) 38).

³⁶⁹ S Selikowitz 'Corporations and their Criminal Liability' (1964) *Responsa Meridiana* 21, 21.

³⁷⁰ That is section 332 of the Criminal Procedure Act.

³⁷¹ The CPEA (note 43).

³⁷² The Companies Amendment Act 23 of 1939, hereinafter referred to as the CAA. "In the course of enacting the *Companies Amendment Act* in 1939 Parliament took the opportunity of redrafting section 384 of the Criminal Procedure Act and setting out clearly the law relating to the criminal liability of a company, its directors and servants". (Selikowitz (note 369) 21.

³⁷³ The Criminal Procedure Act 56 of 1955, hereinafter referred to as the CPA 1955.

in section 332 of the CPA.³⁷⁴ As with the previous provision, the wording of section 332 was also retained basically in the same form. Under these statutory provisions case law shows that corporations and members of associations which are not corporate bodies may be held criminally liable for their unlawful actions and some have been convicted.³⁷⁵

In terms of section 332 a corporation may be prosecuted and subsequently convicted for the criminal acts of its officers, as these individuals' acts are regarded as acts of the corporation itself.³⁷⁶ In addition to that, the current position is that an officer of a corporation may also be held criminally liable for acts of the corporation³⁷⁷ but this will be the case only if he or she took part in the commission of that crime³⁷⁸.

The criminal act of the director or servant is deemed to be an act of the corporation itself, as long as the act was performed in exercising powers or in the performance of duties as a director or servant, or if the director or servant was furthering or endeavouring to further the interests of the corporation.³⁷⁹ The guilt of the director or servant is imputed to the corporation.³⁸⁰ For this reason, in South African law, the basis of liability extends beyond the vicarious liability that natural persons are subject to.³⁸¹ Corporations may thus be held liable for common-law

³⁷⁴ It has been said that "s. 332 of the Criminal Procedure Act 51 of 1977 aims to avoid the necessity of the development of the common law of criminal liability of legal persons". (Rycroft (note 365) 150).

³⁷⁵ For instance *R v Levy & Others* 1929 AD 312 - 1917 Act; *R v Bennett & Co. (Pty) Ltd & another* (note 32) – 1934 Act; and *S v Banur Investment* 1969 (1) SA 231 (T) – 1955 Act; *S v Deal Enterprises* 1978 (3) SA 302 (T) – 1977 Act.

³⁷⁶ Snyman (note 22) 254.

³⁷⁷ The Constitutional Court in *S v Coetzee* (note 56) declared section 332(5) unconstitutional as it provided for a reverse onus whereby the servant or director bore the burden of proving his/her innocence. The *Coetzee* judgment will be discussed in more detail in this chapter at IV(a)(v)(aa) below.

³⁷⁸ Burchell (note 49) 567.

³⁷⁹ Snyman (note 22) 254.

³⁸⁰ Burchell (note 195) 475.

³⁸¹ *Ibid* 476. See discussion below on the basis for liability.

offences such as theft³⁸² and culpable homicide.³⁸³ They may also be held liable for statutory crimes.³⁸⁴ These will usually be in the form of non-compliance with a regulatory statutory provision. Corporations may also be held liable for crimes which require intention,³⁸⁵ crimes which require negligence,³⁸⁶ as well as strict liability offences.³⁸⁷

Despite the statutory regulation of corporate criminal liability, it is submitted that the concept of corporate criminal liability in South Africa has not sufficiently developed to the extent where it can be said that it satisfactorily addresses the problem of corporate crime.³⁸⁸ It is further submitted that there is an urgent need for reform,³⁸⁹ particularly where deaths occur as a result of corporate activities. There ought to be a separate legal framework for corporate homicide.³⁹⁰

In this chapter the concept of corporate criminal liability in the South African context will be examined closely. It will be argued that the law as it stands does not cater adequately for situations involving the loss of life caused by corporations. The need for a separate legal framework of corporate homicide will be highlighted. The appropriateness of a fine as the only penalty for deaths and injuries caused by corporations will also be closely examined. The discussion will include, *inter alia*, the basis for corporate criminal liability in South Africa,

³⁸² *R v Markins Motors (Pty) Ltd* 1959 (3) SA 508 (AD).

³⁸³ Snyman (note 22) 254 and *R v Bennett* (note 32).

³⁸⁴ *S v International Computer Broking and Leasing (Pty) Ltd* 1996 (3) SA 582 (W) - Contravention of section 2(1)(a) of the Usury Act 73 of 1968.

³⁸⁵ *R v Frankfort Motors (Pty) Ltd* 1946 OPD 255 - fraud.

³⁸⁶ *R v Bennett* (note 32) - culpable homicide.

³⁸⁷ "...if, however, regard be had to the embodying statute, the liability is strictly that of the corporate body itself, because the acts of the directors, servants or agents are deemed to be those of the corporate body". (Delpont (note 87) 5). Also see Snyman (note 22) 254. An example would be the holding of the corporation liable for the employee's negligent killing of another in *R v Bennett* (note 32).

³⁸⁸ As stated above, Wells defines corporate crime as "corporate activities which are perceived to involve a transgression of some aspect of criminal law". (Wells (note 15) 1).

³⁸⁹ See discussion on criticisms or shortfalls of section 332 of the CPA in this chapter at V below. For corporate criminal liability to be adequate and efficient in South Africa these need to be remedied.

³⁹⁰ See discussion below on corporate homicide in this chapter at IV(b) below.

the development of the statutory regulation thereof, the *mens rea* of the corporation, applicable sanctions and the need to regulate corporate homicide separately. Throughout, the focus will be on criminal conduct that results in the deaths or injuries of people. It is submitted that if more attention is given to this area this may lead to further development of the concept of corporate liability in such a way that it extends to corporate homicide.

II THE HISTORICAL DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA

There is very little evidence of the existence of corporate criminal liability in South Africa prior to the early 20th century.³⁹¹ In sketching the development of corporate criminal liability in South Africa, the common law³⁹² regulation of corporate criminal liability will be discussed. This will be followed by a discussion of the development of corporate criminal liability as a result of the enactment of statutory regulations thereof. In the discussion of the statutory regulations, similarities and differences between the statutes will be highlighted.

(a) Common law

Corporate criminal liability is a concept that belongs to both company law and criminal law. Given the hybrid nature³⁹³ of South African corporate law and criminal law, when attempting to identify the originality of the concept of corporate criminal liability it is important to establish if this concept existed under Roman law, Roman-Dutch law³⁹⁴ as well as English law.

³⁹¹ Selikowitz (note 369) 24.

³⁹² Snyman defines common law in the following way: "...those rules of law not contained in an Act of parliament or of legislation enacted by some other subordinate legislature, but which are nevertheless just as binding as any legislation". (Snyman (note 22) 6).

³⁹³ HR Hahlo and E Kahn *The South African Legal System and its Background* (1973) 330.

³⁹⁴ "The legal system known as Roman-Dutch law resulted from the reception of Roman law in the Netherlands and the fusion of Roman law and local customary law". (Snyman (note 22) 9). For a full discussion of the historical

South African company law is derived from English law.³⁹⁵ Criminal law in South Africa began as a hybrid system that was derived from both Roman-Dutch and English law.³⁹⁶ It has since evolved to a point where the current “system of criminal law in South Africa is a truly mixed system, blending Roman-Dutch, English, German and uniquely South African elements”.³⁹⁷

It is thus important to see if there are any traces of entities that are analogous to a modern-day corporation in Roman law, Roman-Dutch law and English law. In addition to that it is important to determine whether those entities were held criminally liable for their unlawful actions. The discussion on the development of the common-law regulation of corporate criminal liability will begin with a discussion of the Roman law position.

(i) Roman law

The earliest traces of a corporation under Roman law are that of a family under the rule of its patriarch³⁹⁸ or *paterfamilias*. In Maine’s words:

“the family, in fact, was a corporation; and he was its representative or...its public officer. He enjoyed rights and stood under duties, but the rights and the duties were, in the contemplation of his fellow-citizens and in the eyes of the law, quite as much those of the collective body as his own”.³⁹⁹

development of corporate criminal liability in South Africa see II (b) below in this chapter; England see Chapter Three II (b) and Canada see Chapter Four II (b) and (c) below.

³⁹⁵ JT Pretorius, PA Delpont, M Havenga & M Vermaas *Hahlo’s South African Company Law through the cases – A source book* 6 ed (1999) 1.

³⁹⁶ Burchell (note 195) 9.

³⁹⁷ Ibid.

³⁹⁸ Maine specifically states that “the family had the distinctive characteristic of a corporation”. (HS Maine *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1931)153).

³⁹⁹ Ibid.

The family unit resembles a company, in that it had a particular individual, the patriarch, through whom it acted.⁴⁰⁰ The patriarch represented the family, publically.⁴⁰¹ The rights and duties of the family, as a collective, were borne by the patriarch, on behalf of the family,⁴⁰² as “the head of the household”.⁴⁰³

As commercial trading increased, an entity known as a *commenda*⁴⁰⁴ came into being. It was basically a joint venture whereby traders and shipowners made contributions towards trade expeditions with a view to sharing the resulting profits.⁴⁰⁵ It has been stated that the *commenda* is probably “the earliest formalized system of commercial joint enterprise”.⁴⁰⁶ The rules of the *commenda* made it possible for the liability of an investor in a joint venture to be limited to the financial contribution he had made to the joint venture.⁴⁰⁷

A further development in Roman law, which led to the coming into being of corporations was the *societas*⁴⁰⁸ which was an association of persons that was a separate legal person in its own right.⁴⁰⁹ Since the *societas* had legal personality it had its own rights and obligations which were separate from those of its members.⁴¹⁰ It has been stated that it is the *societas* “with legal rights and duties independent from its individual members which laid the foundation of the

⁴⁰⁰ Ibid.

⁴⁰¹ The paterfamilias “had extensive power (*patria potestas*) over the other members of the family and represented the family in all affairs, political or otherwise”. (B Edwards *The History of South African Law – An Outline* (1996) 5).

⁴⁰² Maine (note 398) 153.

⁴⁰³ DH Van Zyl *History and Principles of Roman Private Law* (1983) 9.

⁴⁰⁴ Maine (note 398) 8.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid 9.

⁴⁰⁸ Van Zyl refers to the *societas* as the contract of partnership. (Van Zyl (note 403) 287).

⁴⁰⁹ Maine (note 398) 9.

⁴¹⁰ Ibid.

modern idea of the company as a separate legal entity”.⁴¹¹

At this early stage of Roman Law, criminal law was still developing and it was mainly concerned with matters affecting or threatening the security of the state.⁴¹² According to Selikowitz “when we look to the Roman Law for guidance as to the criminal liability of corporations it appears that there is an absence of such liability or where it exists there is no clear doctrine on which such liability is based”.⁴¹³ In Roman law a legal entity could not be held criminally responsible.⁴¹⁴ This assertion is supported by Kahn, who states that “a corporation cannot commit an unlawful act (*actus reus*) or have a wrongful state of mind (*mens rea*). Thus it cannot be saddled with criminal liability. So it was with Roman law and probably in classical Roman-Dutch law”.⁴¹⁵ Maine attributes that to the fact that the criminal law at that time was more concerned with matters that posed a threat to state security.⁴¹⁶ With regard to civil action the Roman law principle was that a corporation did not have the capacity to commit any offence that required intention as one of the elements.⁴¹⁷ This explains the apparent reluctance to hold a corporation criminally liable.

⁴¹¹ Ibid.

⁴¹² This is mainly due to the fact that “in the infancy of the commonwealth, every offence vitally touching its security or its interests was punished by a separate enactment of the legislature. And this is the earliest conception of a *crimen* or crime”. (Ibid 310).

⁴¹³ Selikowitz (note 369) 22.

⁴¹⁴ Although South African criminal law is derived from Roman-Dutch law and English law it appears as though in Roman law there was no clear criminal liability of corporations. (JC De Wet & HL Swanepoel *Strafreg* (1949) 18). Selikowitz is of the opinion that “The Romans seem to have realized the fact that a corporation was not a human being which could be subject to a section of the law which has as its general aim, the prevention of certain kinds of human activity”. (Selikowitz (note 369) 22). Also see Coffee (note 21) 13.

⁴¹⁵ E Kahn ‘Can a Company Be Guilty of Murder? The Criminal Liability of a Corporation -I’ (1990) 19 *Businessman’s Law* 146.

⁴¹⁶ Maine (note 398) 310.

⁴¹⁷ M De Villiers *The Roman and Roman Dutch Law of Injuries: A Translation of Book 47, Title 10 of Voet’s Commentary on the Pandects, with Annotations* (1899) 60.

(ii) Roman-Dutch law

In Roman-Dutch law a corporation was recognized as a legal persona capable of being a party to a civil suit.⁴¹⁸ The development under Roman-Dutch law seems to be in favour of a corporation being held liable for delictual wrongs committed by its servants.⁴¹⁹ It is, however, doubtful whether a legal entity was regarded as being capable of committing a crime and of being punishable for criminal conduct under Roman-Dutch law.⁴²⁰ Selikowitz⁴²¹ and Kahn⁴²² confirm that under Roman-Dutch law there appeared to be a reluctance to accept that a corporation could possibly be criminally liable.

(iii) English law

English law accepted the notion of a corporation as a legal person in the seventeenth century.⁴²³ Prior to that, corporations did exist but in a simplistic form and at that point in time they did

⁴¹⁸ “A corporation or collective body does seem in some degree identified with the members thereof, though by a fiction of law the acts of the majority acting in their corporate capacity are attributed, not to them, but to the corporation itself in such matters as it is competent to perform”. (Ibid 61).

⁴¹⁹ De Villiers’ avers that “it is undoubtedly true that a corporation cannot entertain an *animus injuriandi*...; but just as by the Roman law regulating the relations between a slave and his owner, the latter (unless he surrenders the slave to the injured party) could be held liable for the act committed *animo injuriandi* by the slave, so a corporation, where the law relating to corporations is such, may be held liable for the act committed *animo injuriandi* by the persons for whose acts it is by such law accountable”. (M de Villiers *Supplement to Roman and Roman Dutch Law of Injuries: A Translation of Book 47, Title 10 of Voet’s Commentary on the Pandects, with Annotations* (1915) 21).

⁴²⁰ De Wet & Swanepoel (note 414) 18.

⁴²¹ Selikowitz (note 369) 22.

⁴²² Kahn (note 415).

⁴²³ Pinto & Evans (note 94) 6.

not have legal personality in the same form as it is today.⁴²⁴ It took time before the acceptance of the concept of corporate criminal liability.

For corporate criminal liability as we know it today, to be accepted in English law, certain obstacles first had to be overcome.⁴²⁵ These hurdles were eventually overcome and by 1944 corporations were being held criminally liable even for crimes that require *mens rea*.⁴²⁶ Corporate criminal liability in English law has developed to such an extent that now there is specific legislation aimed at protecting individuals from injuries and deaths caused by corporations or corporate activities.⁴²⁷ It is one of few jurisdictions that has developed this concept to such an extent that it specifically legislates against the negligent killing of people by corporations.

(iv) The South African common law

“The common law of criminal liability of corporations may be described as holding a corporation ‘criminally responsible for its acts and omissions, and in the same way as an ordinary principal or master for its agents or servants acting on behalf of it or in its service’”.⁴²⁸

This statement by Selikowitz summarises the way in which the common-law regulates corporate criminal liability in South Africa. The common law position relies on vicarious

⁴²⁴ “Courts have recognized that corporations have some sort of legal personality since the seventeenth century. Initially such recognition was limited to certain situations, for example in order to own property”. (Ibid).

⁴²⁵ For a full discussion see The historical development of corporate criminal liability in English law in Chapter Five at IV(b)(i) below. See also the discussion in Chapter Two at III(a) above.

⁴²⁶ See discussion of the 1944 cases in Pinto & Evans (note 94) 39 - 44.

⁴²⁷ The CMCHA (note 36).

⁴²⁸ Selikowitz (note 369) 24.

liability as the basis for corporate criminal liability.⁴²⁹ In terms of the common-law where a corporation has committed an offence it is held criminally liable due to the fact that the corporation is the master of those individuals who committed the offence.⁴³⁰ However, where the criminal act was such that it was physically impossible for a juristic person to commit such an act,⁴³¹ the corporation would escape criminal liability.⁴³² It was mainly through the common law that corporate criminal liability was accepted.

Under common law, a corporation will not be held criminally liable where the legislature has confined the application of the law to human beings.⁴³³ This particular exception refers to those instances where the statute specifically states which people or group of people are subject to that specific rule or regulation.⁴³⁴ For instance in *R v R.S.I (Pty) Ltd and Another*⁴³⁵ a limited company escaped liability for the contravention of section 135 (3) (a) of Act 24 of 1936 as it was found that it could not “in law be guilty of committing such an offence”.⁴³⁶

Furthermore, under the common law a corporation will not be held criminally responsible

⁴²⁹ “At Common Law a corporation was criminally responsible for its acts and omissions, and, in the same way as an ordinary principal or master, for the conduct of its agents or servants acting on its behalf or in its service, unless

- a) the conduct was of such a character that an artificial person was incapable of it; or
- b) the Legislature had restricted to natural persons the application of the law alleged to have been contravened; or
- c) the penalty provided for the alleged contravention was such as could not be suffered by an artificial person”. (CWH Lansdown, WG Hoal & AV Lansdown *South African Criminal Law and Procedure* vol 1, 6 ed (1957) 78).

⁴³⁰ *Mkize v. Martens* 1914 AD 382, 382.

⁴³¹ Lansdown *et al.* (note 429) 78. Lansdown *et al.* further state that “a corporation stood at common law in an exceptional position in relation to the criminal law: there were many criminal acts which, from their nature, it was incapable of performing, and in some cases although it might be capable of committing the crime, the application of the law in question was restricted to natural persons”. (Lansdown *et al.* (note 429) 79). “Where the conduct was of so personal a character that an artificial body is incapable of committing it, here such matters as murder, assault, arson, theft, or family or sexual crimes are excluded”. (Selikowitz (note 369) 24).

⁴³² This refers to the fact that in terms of the common-law there are certain crimes (such as incest, bigamy etc) which a corporation cannot commit as their nature is such that they can only be committed by human beings.

⁴³³ As can be seen in *R v Sutherland* 1972(3) SA 385 (N).

⁴³⁴ Selikowitz (note 369) 24, refers to “the case of a statute imposing duties on solicitors or doctors”.

⁴³⁵ *R v R.S.I (Pty) Ltd and Another* 1959 (1) SA 414 (E); See also *R v Smith and Others* 1960 (4)SA 364 (O).

⁴³⁶ *R v R.S.I (Pty) Ltd and Another* (note 435).

where the only punishment that may be imposed for the said alleged offence “could not be suffered by an artificial person”.⁴³⁷ In situations where a crime committed could only be punishable via imprisonment, without the option of a fine, a corporation could escape liability.⁴³⁸ It is submitted that this is a short-coming. Surely it is not sound law to recognize artificial persons as legal persons and then allow a corporation to escape prosecution merely due to the fact that the nature of the punishment prescribed for that particular offence is such that an artificial person is incapable of being punished in that particular way. The statutory regulation of corporate criminal liability solves this problem by specifically prescribing a fine as punishment for corporations that commit crime.

Finally, the common law currently regulates the criminal liability of the directors and servants for the crimes committed by the corporation.⁴³⁹ In the past there was statutory regulation of the directors’ and servant’s criminal liability,⁴⁴⁰ however, that provision was declared unconstitutional in *S v Coetzee*.⁴⁴¹ The current common-law position is thus that a director may be held liable for offences committed by the corporation⁴⁴² “only if he took part in that other’s crime, or on the basis of vicarious liability or agency”.⁴⁴³ This differs from the position

⁴³⁷ Lansdown *et al.* (note 429) 78.

⁴³⁸ Selikowitz states that “For the purposes of a conviction the corporation was generally regarded as a “human” yet in connection with the question of sentence, the limitations of the humanising fiction were too great to overcome and therefore crimes with a punishment other than a fine or automatic loss of licence, etc., were held to be incapable of commission by a corporation”. (Selikowitz (note 369) 24).

⁴³⁹ “the common law provides for a director to be liable for the crime committed by another director if he or she participated in the other director’s crime or on the basis of vicarious liability or agency”. (M Kidd ‘Liability of Corporate Officers for Environmental Offences’ (2003) 18(2) *S.A. Public Law* 277, 278). “a director, or anyone else for that matter, whose conduct satisfies the requirement of common law accomplice liability would, as Ackermann J points out in *S v Coetzee*, be liable in his or her own right under the common law”. (Burchell (note 49) 568).

⁴⁴⁰ The CPA (note 16) section 332 (5).

⁴⁴¹ In *Coetzee* the Constitutional court held that this provision is unconstitutional because it created a reverse onus which infringed the presumption of innocence in section 35(3)(h) of the Constitution and that this violation could not be justified in terms of the limitation clause in section 36(1), *S v Coetzee* (note 56).

⁴⁴² This “in effect means for a crime committed by another director or servant”. (Burchell (note 49) 567).

⁴⁴³ *Ibid.*

prior to section 332 (5) being declared unconstitutional. That provision allowed for a director or servant to be liable for crimes committed by other directors / servants where the director had not taken part in the offence, even where vicarious liability was not applicable.⁴⁴⁴

(b) Statutory regulation

In the South African context, the common-law position was followed by the courts until the enactment of regulation of corporate criminal liability through section 384 of the CPEA, 1917. Since then corporate criminal liability in South Africa is a concept that is statutorily regulated. In South Africa both the common-law and the statutory provision have played vital roles in the development of the concept of corporate criminal liability. They have also widened the scope of corporate criminal liability in South Africa, however, much more still needs to be done as corporate activities continue to pose dangers to the South African society.

In terms of the statutory regulation it is acknowledged that whilst acting on behalf of or in the interest of a corporation, the directors or servants may commit statutory and or common-law offences. For this reason, the statutory regulation specifically states that the criminal liability of a corporation is directed at any criminal act (or omission) committed on behalf of the corporation, regardless of the nature of the offence.

(i) Section 384 of the Criminal Procedure and Evidence Act 31 of 1917

⁴⁴⁴ “In terms of s. 332 (5), however, one director was guilty of another director’s crime even though he would not normally have been vicariously liable therefore, unless it was proved that he did not take part in the other’s crime and that he could not have prevented it”. (Burchell (note 49) 567).

Section 384 (1) of the CPEA is the original statutory regulation that made provision for a corporation to be held liable for crimes committed by its directors or servants in furthering the interest of the corporation.⁴⁴⁵ This section has, however, been criticized for having being poorly drafted⁴⁴⁶ and for being a procedural provision which does not address substantive law in corporate criminal liability.⁴⁴⁷ In fact, Murray, J in *R v Bennett*⁴⁴⁸ states that “sec. 384 of Act 31 of 1917 in its original form was a procedural provision”. Section 384 simply reflected the common law position.⁴⁴⁹

It is submitted that with the promulgation of section 384 the legislature for the first time showed that it is not only aware of the importance of corporate criminal liability, but that it endorses the concept. This view is echoed by Selikowitz’s correct assertion that “this provision was merely procedural, but it did imply an approval by the State of the concept of criminal liability of a corporation”.⁴⁵⁰ Had it not been for this implied approval by the State, one wonders how the development of this area of the law would have progressed in South Africa. As it is, with the existence of statutory regulation, the development of this area of the law has been slow. It is thus submitted that if the state had not given its implied approval, chances that corporate criminal liability would have remained virtually static are quite high.

⁴⁴⁵ Prior to the enactment of this provision in South Africa the common law position prevailed.

⁴⁴⁶ “...it was a poor piece of draftsmanship”. (Kahn (note 415) 146).

⁴⁴⁷ It has been stated that it “did not deal with the substantive law in the matter of criminal liability of corporations but merely sought to deal with the procedural position and remove some of the difficulties attendant upon the question of the method of enforcing criminal sanctions where liability existed”. (Lansdown *et al.* (note 429) 79). Another criticism of s. 384 is that it “it only dealt with procedure: it did not deal with substantive liability of a corporation, and the courts had a struggle in applying the legislation”. (Kahn (note 415) 146).

⁴⁴⁸ *R v Bennett* (note 32).

⁴⁴⁹ According to Selikowitz “the common law approach was helped along its path of justification in South Africa by the Criminal law and Procedure Act of 1917, section 384 (1), which referred to who shall represent the company in criminal proceedings”. (Selikowitz (note 369) 24).

⁴⁵⁰ *Ibid.*

Section 384 is a relatively short section and its wording is rather simple and clear.⁴⁵¹ Its effect is to ensure that the corporation is held criminally liable for the unlawful acts of its directors and servants. This includes situations where the director or servant was trying to further or was furthering the interests of the corporation.⁴⁵² A representative of the corporation, usually a director or servant thereof, was the person charged and tried as ‘the corporation’. After conviction, once a sentence is imposed the corporation was obliged to pay the money payable as a fine, from its coffers. This due to the fact that the ‘director or servant’ merely stood trial on behalf of the corporation as a result of the corporation’s lack of physical existence.

In terms of the provision, as long as the state was able to show that the crime committed was allegedly committed by an individual or individuals in the process of advancing or attempting to advance the said corporation, that corporation would be prosecuted.⁴⁵³ Moreover, the

⁴⁵¹ Section 384 of the CPEA states the following:

“(1) In any criminal proceedings under any statute or statutory regulation or bye-law or at common law against a company, the secretary and every director or manager or chairman thereof in the Union may, unless it is otherwise directed or provided be charged with the offence and shall be liable to be punished therefore, unless he proves that he was in no way a party thereto.

(2) In any such proceedings against a local authority, the mayor, chairman, town clerk, secretary or other similar officer shall, unless otherwise directed or provided, be liable to be so charged with, and in like circumstances be punished for the offence.

(3) In any such proceedings against a partnership, every member of such partnership who is in the Union shall, unless it is otherwise directed or provided, be liable to be so charged, and in like circumstances punished for the offence.

(4) In any such proceedings against any association of persons not specifically mentioned in this section, the president, chairman, secretary, and every other officer thereof in the Union shall, unless it is otherwise directed or provided, be liable to be so charged, and in like circumstances, to be punished for the offence.

5) Provided that nothing in this section contained shall be deemed to exempt from liability any other person guilty of the offence”. See also PC Anders & SE Ellson *The Criminal Law of South Africa* vol. 2 (1917) 185.

⁴⁵² According to Pittman “the effect of these provisions is to impose upon the company liability for the criminal acts of its directors or servants, and so, even when such acts was done merely in furtherance or attempted furtherance of the company's interests”. (Pittman (note 368) 43). The phrase “furtherance or attempted furtherance of the company's interests” highlights the fact that for the corporation to be convicted it must be evident that the interests of the corporation were at the forefront at the time of the commission of the alleged offence. It is important, therefore, to make a distinction between the acts of an individual in his personal capacity (in his own interest) and the acts of the individual in advancing the interests of the corporation.

⁴⁵³ This will be discussed under s. 332 of the CPA in IV(a) of this chapter below.

individual concerned could also be charged and be personally punished for the offence.⁴⁵⁴ A reading of section 384 (1) makes it clear that corporate criminal liability in the South African context has been “twofold” in that it also encompasses the personal criminal liability of the individuals within the corporation who were responsible for the commission of the offence.⁴⁵⁵

Section 384 (1) had a number of shortcomings and for that reason, it has been widely criticized,⁴⁵⁶ as mentioned above. One of the main criticisms of section 384 is that “it was not clearly drafted and difficulty was experienced in interpreting it”.⁴⁵⁷ It is submitted that this view by Barlow is correct, particularly when one attempts to interpret the wording of section 384(1). When reading the section, it refers to criminal proceedings against a company, then it proceeds to state that in such proceedings, the secretary and every director or manager shall be liable. This can also be seen in the judge’s remarks in *R v Hewertson*⁴⁵⁸ where the court had to interpret section 384 (1). Davis J remarks that “the Lawgiver used words which, on (my) reading of the section, signify that these individuals shall be liable for the crimes of (for instance) the company, but expressed it as though that was a mode of bringing proceedings against the company itself”.⁴⁵⁹ It is submitted that the wording of section 384(1) may create confusion regarding whose liability the provision is concerned with. It is further submitted that since the legislature does not clearly exclude any of the mentioned parties, the section should be interpreted as dealing with both the criminal liability of the corporation and the

⁴⁵⁴ CPEA (note 43) S. 384 (1).

⁴⁵⁵ Kidd refers to corporate criminal liability, in the South African sense, as a twofold concept in that it encompasses the liability of the corporation as a legal person as well as the liability of the individuals whose responsibility it is to act on behalf of or in the interest of the corporation. (M Kidd *The Protection of the environment through the use of criminal sanctions: A comparative analysis with specific reference to South Africa* (2002) University of Natal. unpublished PhD thesis, 350).

⁴⁵⁶ “Hierdie artikel het meer probleme as wat dit opgelos het en is uiteindelik in 1939 vervang met ’n voorskif wat die vorige posisie radikaal verander het”. (I Du Plessis ‘Die strafregtelike aanspreeklikheid van regs persoon[e]: ’n mensliker benadering’ *TSAR* (1991) 635).

⁴⁵⁷ Barlow (note 149) 502.

⁴⁵⁸ *R v Hewertson and Others* (1937) CPD 77, 81 – 82.

⁴⁵⁹ *Ibid.*

criminal liability of the individuals within the corporation for the criminal acts of the corporation. It is agreed though that the provision was indeed, not clearly drafted.

Based on the above, De Wet and Swanepoel make the observation that the wording of section 384 creates ‘doubt that a legal entity could commit a crime’.⁴⁶⁰ They further explain that ‘although the legislator is talking here of a criminal process against a corporation, it is not the corporation per se that is guilty but her organ(s)’.⁴⁶¹ It is submitted that this view is not entirely correct as it is clearly stated in the provision that it is referring to criminal proceedings against a company. In addition to that, the provision refers to charging and punishing the organs of the company. Nowhere is it implied that the company is excluded from liability. It is submitted that the correct interpretation ought to be one that includes the company and its organs.

The provision is further criticized for its presumptive nature in that the servant or director's guilt is presumed without being legally established. From the outset, the legislature makes the error of presuming that people are guilty, unless they are able to prove otherwise.⁴⁶² This reverse onus, as will be seen, is inherited by the subsequent provisions regulating corporate criminal liability.⁴⁶³ The problem with the reverse onus, in this particular provision, is that instead of the prosecution bearing the onus to prove the guilt of the accused, the accused is presumed guilty and the burden of proving his innocence is borne by him.⁴⁶⁴

⁴⁶⁰ De Wet & Swanepoel (note 414).

⁴⁶¹ Ibid.

⁴⁶² “the secretary and every director or manager or chairman thereof...may...be charged with the offence and shall be liable to be punished therefore, unless he proves that he was in no way a party thereto”. (CPEA (note 43) Section 384 (1)).

⁴⁶³ This will be discussed further below.

⁴⁶⁴ The reverse onus, as found in the statutory regulation of corporate criminal liability is discussed in this chapter at IV(v)(aa) below.

It must be noted that section 384 was not only confined to proceedings relating to crimes ‘committed’ by corporations. It also dealt with those relating to crimes committed by local authorities,⁴⁶⁵ partnerships⁴⁶⁶ and other associations that lacked juristic personality. Where a local authority, a partnership and other associations with no juristic personality were concerned provision was made for the criminal liability of its organs. When a local authority was held liable for a crime, the mayor, chairman, town secretary, or other similar officer would also be charged with the same offence.⁴⁶⁷ Where the prosecution was against a partnership all the partners, present in the country, would be held liable and subsequently be punished for the same crime as the partnership.⁴⁶⁸ Dissolving the partnership in order to escape liability was a futile exercise as each of the partners could still be apprehended and could still face prosecution. It is submitted that in this way the legislature ensured that there would be a just reward for the people responsible for committing the crimes. Where any other association of persons, not specifically mentioned in the provision, committed a crime in the name of the group there would still be the possibility of criminal liability and its president, chairman, secretary and every other officer of such an association would also face prosecution for the same offence.⁴⁶⁹

It is submitted that the poor drafting of the provision is misleading with regard to entities that are not incorporated and that lack juristic personality. Although crimes could be committed in furthering the interests of such an entity, the provision is framed in such a way that it gives the

⁴⁶⁵ The CPEA (note 43) Section 384(2).

⁴⁶⁶ Ibid section 384(3).

⁴⁶⁷ Ibid section 384(2).

⁴⁶⁸ Ibid section 384(3).

⁴⁶⁹ Ibid section 384(4).

impression that the entity itself could be prosecuted, together with its organs. In actual fact, due to the absence of juristic personality in these cases the entities could not be prosecuted. In such cases the individuals concerned would be personally prosecuted, acquitted or convicted and sentenced.

(ii) Section 117 of the Companies Amendment Act 23 of 1939

Corporate criminal liability was further developed by the enactment of section 117 of the CAA,⁴⁷⁰ which provided a substitution for section 384 of the CPEA. The heading of the new provision was “The Prosecution of corporations and members of associations”. Section 117 of the CAA revamped the previous provision. The new provision was a broader provision that consisted of eleven subsections.

Apart from being held liable for acts or omissions ‘performed by or instructions given’ or ‘in the performance of his duties, the corporation could also be held liable for crimes committed ‘in furthering or endeavouring to further the interests of that corporate body’. Moreover, section 384 as amended by section 117 made clearer provisions for the criminal liability of the corporation. In subsection 1 circumstances under which a corporation would incur criminal liability for the acts or omissions of its directors and servants, were provided. The section also provided clearly for the personal criminal liability of the responsible director or servant of the corporation. Subsection 5 provided that the director or servant would incur personal criminal liability for the crime. He or she would only escape liability if he or she was able to prove that

⁴⁷⁰ The CAA (note 372) section 117. According to Barlow “In the course of enacting the Companies Amendment Act in 1939 Parliament took the opportunity of redrafting section 384 of the Criminal Procedure Act and setting out clearly the law relating to the criminal liability of a company, its directors and servants”. (Barlow (note 149) 503).

he/she had not taken part in the commission of the offence and would not have been able to do anything to prevent the commission of the offence.

Compared to the previous section 384, this provision reflected a stricter approach to the liability of directors or servants. Under the previous provision they bore the onus of proving that they were ‘in no way a party thereto’. Having done that, they would escape liability. A director or servant was therefore punished for his/her own involvement in the commission of the crime. The amended provision provided that a director or servant ‘shall be deemed guilty, unless it is proved that he/she did not take part in the commission of the offence, and that he could not have prevented it’. Firstly, the onus borne by the director or servant under the amended section 384 was clearly a heavier onus, in that one would easily be able to prove that he or she had nothing to do with the commission of a crime, however, providing proof that he or she could not have been able to do anything to prevent it, would be far more difficult. Secondly, the director’s / servant’s failure to prove that the director or servant could not have prevented the offence from being committed, in essence meant that the section allowed for a director or servant to be held criminally liable for the unlawful action of another director or servant. The section had thus been described as “a legal straitjacket from which even a Houdini of the law could not escape”.⁴⁷¹

The new provision contributed greatly to the development of corporate criminal liability in South Africa. In *R v Bennett Murray*, J states that the common law position “has been radically altered by sec. 117 of Act 23 of 1939”.⁴⁷² Murray J’s observation that the modifications to the

⁴⁷¹ Kahn (note 415) 146.

⁴⁷² He says this on the basis that “the new section not only deals with matters of procedure but makes provisions of substantive law”. (*R v Bennett* (note 32) 198).

common law that were brought about by the enactment of section 117 were radical is probably due to the fact that the twofold liability of both the corporations and the directors is even more clearly worded in this statute.⁴⁷³ In other respects section 117 continued to reflect the common-law position.

On the other hand, Selikowitz has an interesting view of section 117, that is, “this act did not, I suggest, alter or enact the Common Law but must be seen as an attempt by the legislature to give the corporate body (as a legal personality) rights and duties not under the existing Criminal Law which catered for the behaviour of human beings, but rather to create a Criminal Law for Corporations. Section 117 is in fact the Criminal Code of Corporations”.⁴⁷⁴

Section 117 explained when a corporation would be held liable for the acts performed by its directors or servants. It was applicable to statutory as well as common law offences. It also specifically provided for strict liability by including the words “with or without a particular intent”.⁴⁷⁵ Strict liability is also included under the present section 332 and will be discussed in detail below. Since the wording of the amended section 384 does not differ much from the current section 332, the individual subsections will be discussed below, when section 332 is analysed.

(iii) Section 381 of the Criminal Procedure Act 56 of 1955

⁴⁷³ “Briefly, the new legislation imposes a two-fold liability to criminal prosecutions. It holds a company liable for the criminal conduct of its directors and servant within a wide but specified field of activity. This liability is an absolute one and cannot be rebutted. Conversely, a director or servant of the company is held liable for the crimes of the company, but such liability is merely presumptive and may be rebutted”. (Barlow (note 149) 503).

⁴⁷⁴ Selikowitz (note 369) 25.

⁴⁷⁵ The CAA (note 372) section 117 (1)(a) and (b).

Section 381 was a comprehensive section in the CPA 1955,⁴⁷⁶ wherein the legislature made provisions for the criminal liability of corporations and members of associations.⁴⁷⁷ Section 381 had 11 subsections and was very similar to section 384 (1) of the CPEA, as amended by section 117 of the CAA.⁴⁷⁸ In terms of section 381 again we had a situation where the fault of a director or a servant would be regarded as the fault of the corporation. The director or servant was also held liable for offences which had been committed by the corporation, if he could prove that he had not taken part in the commission of the offence and could not have prevented the offence from being committed.⁴⁷⁹

In section 381 subsection 6 had been extended and contained part (b) which added significantly to what the previous subsection stated. It reads as follows

(6) In any proceedings against a director or servant of a corporate body, in respect of an offence –

- (a) any evidence which would be or was admissible against that corporate body in prosecution for that offence, shall be admissible against the accused;
- (b) whether or not such corporate body is or was liable to prosecution for the said offence, any document, memorandum, book or record which was drawn up, entered up or kept in the ordinary course of that corporate body's business, or which was at any time in the custody or under the control of any director, servant, or agent of such corporate body, in his capacity as director, servant or agent, shall be prima facie evidence of its contents and admissible in evidence against the accused, unless and until he is able to

⁴⁷⁶ The CPA 1955 (note 373) section 381.

⁴⁷⁷ The section is entitled "Prosecution of corporations and members of associations".

⁴⁷⁸ The CAA (note 372) section 117.

⁴⁷⁹ Due to the similarity between section 381 of the CPA 1955 (note 373) and the current legislation a full discussion of each provision will be given below under section 332 of the CPA (note 16).

prove that at all material times he had knowledge of the said document, memorandum, book or record, in so far as its contents are relevant to the offence charged, and was in no way party to the drawing up of such document or memorandum or making any relevant entries in such book or record.

The addition made by subsection 6(b) provided clarity regarding documents that would be admissible as evidence. This subsection was adopted by the subsequent provision,⁴⁸⁰ and will be discussed below under section 332.

III THE *MENS REA* OF THE CORPORATION AND THE BASIS FOR LIABILITY

(a) The *mens rea* of the corporation

It is a basic principle of South African criminal law that when an unlawful act or omission has occurred, before the person who was responsible for that act or omission is held criminally liable, it must be established that he had the necessary *mens rea* or culpability.⁴⁸¹ Snyman defines culpability as the fact that “there must, in the eyes of the law, be grounds for blaming X personally for his unlawful conduct”.⁴⁸² Culpability deals with the mindset of the person at the time of the commission of crime. When dealing with natural persons this issue is not problematic.⁴⁸³

When it comes to corporations, the corporation’s inability to have a particular mindset, does however, make it difficult to hold a corporation criminally liable for its criminal acts. A way

⁴⁸⁰ This will be discussed below in the discussion of section 332(6) at IV(a)(vi) below.

⁴⁸¹ Snyman (note 22) 149.

⁴⁸² Ibid.

⁴⁸³ “The question here is whether that particular person (X), in the light of his personal aptitudes, gifts, shortcomings and knowledge, and of what the legal order may fairly expect of him, can be blamed for his wrongdoing. If this is the case, it means that the wrongdoing can be attributed to X personally; he is “charged with the account” arising from the wrongdoing. It is possible to construe some blameworthy mindset on his part” (Ibid 150).

had to be found to make a corporation liable. In South African law this is made possible by seeing to it that the corporation is somehow able to have this attribute of *mens rea*. This is done by imputing the *mens rea* of the responsible director or servant to the corporation.⁴⁸⁴ By so doing the juristic person is placed in a position where the juristic person, despite its inability to think and act, is able to comply with all the elements of a crime.

(j) The basis for liability

With regard to the basis for liability in South African corporate criminal liability there are two schools of thought. The proponents of the first school of thought regard the basis as vicarious liability, whilst the proponents of the second school of thought see the basis as going beyond the type of vicarious liability that is applicable to natural persons. The latter refer to the derivative approach as the basis for liability.

(i) Vicarious liability

In South Africa corporations are held criminally liable for the criminal actions of their directors or servants. The statutory regulation of corporate criminal liability is mainly based on vicarious liability.⁴⁸⁵ Vicarious liability arises as a result of the relationship between persons, usually employer and employee. Snyman explains the rationale behind vicarious liability in the following way:

“The policy underlying the creation of vicarious liability is that it will encourage the employer to ensure that his employees’ conduct complies with the provisions of the law; he should not be allowed to hide behind his employees’ mistakes; their mistakes are imputed to him; he has

⁴⁸⁴ “The culpability of the director or servant is similarly ascribed to the corporate body”. (Ibid 254).

⁴⁸⁵ Jordaan (note 42) 49-50.

delegated his powers to them and more often than not gains financially from their activities. Therefore, their actions are deemed to be his actions”.⁴⁸⁶

A reading of section 332 of the Criminal Procedure Act makes it clear that as an employer, the corporation is held liable for the wrongful acts of its employees. Jordaan⁴⁸⁷ and Nana⁴⁸⁸ are among commentators who regard vicarious liability as a basis for corporate criminal liability in South Africa. They are indeed correct, but, it is submitted, only to a certain extent. Vicarious liability is applicable where the principal (the corporation) is being held liable for acts ‘authorised’ by the principal. After stating that the *mens rea* of the accused must be imputed to the corporation, White J in *S v Dersley* states that the accused “is therefore vicariously liable”.⁴⁸⁹

It is submitted that this is not an entirely true reflection of the basis of liability for corporate criminal liability in South Africa,⁴⁹⁰ because although it does entail vicarious liability, a close examination of section 332 shows that it goes further than vicarious liability.

When it comes to corporate criminal liability in South Africa section 332(1) states that a corporation will be held criminally liable even where an offence has been committed without the express or implied instructions from the ‘managers’ of the corporation and even where the

⁴⁸⁶ Snyman (note 16) 251.

⁴⁸⁷ Jordaan (note 42) 50.

⁴⁸⁸ CN Nana ‘Corporate Criminal Liability in South Africa: The Need to look beyond Vicarious Liability’ (2011) 55, 1 *Journal of African Law* 86, 92.

⁴⁸⁹ *S v Dersley* 1997 (2) SA 951 (T) 263.

⁴⁹⁰ Murray J in *R v Bennett* (note 32) 200 in passing judgment makes the observation that the accused “in carrying out his duties as a servant of the appellant company was negligent. His negligence must in terms of sec. 384 (1) (a) and (b), as amended, be deemed to be the company’s negligence and must be imputed to the company”.

‘officers’ are not in the process of exercising their powers or performing their duties. This clearly is liability beyond vicarious liability. Kidd provides a clear explanation of how section 332(1) goes further than vicarious liability. He states that

“the principal distinction between the liability imposed by section 332 (1) and vicarious liability is that this section imposes liability in cases where the director or servant acts beyond his or her powers or duties but while ‘furthering or endeavouring to further the interests of’ the corporation. Vicarious liability applies only to cases where the servant is acting within the course and scope of his or her employment”.⁴⁹¹

Based on Kidd’s argument, it is submitted that it is not entirely correct to refer to the basis of liability for corporate criminal liability as vicarious liability, as such an explanation excludes situations where the director or servant has exceeded his powers. A full picture of corporate criminal liability in South Africa includes situations where the director / servant exceeded his powers. By referring to the basis of liability as vicarious liability, one excludes situations where the director or servant has exceeded his powers but was still in pursuit of furthering the interests of the corporation, which may render the corporation criminally liable.

Burchell also supports the view that the basis for corporate criminal liability in South Africa goes beyond vicarious liability for natural persons.⁴⁹² Kahn also states that the corporations’ “criminal responsibility is much more extensive than the vicarious liability of natural

⁴⁹¹ M Kidd ‘Corporate Liability for Environmental Offences’ (2003) 18 *S.A.Public Law* 3, 3.

⁴⁹² Burchell (note 49) 563.

persons”.⁴⁹³ It is submitted that Kidd, Burchell and Kahn provide a more accurate reflection of the South African situation.

(ii) The derivative approach

It is submitted that the approach followed in South Africa is the derivative approach. Burchell avers that “the current approach to criminal liability of corporations in South Africa is, in fact, based on derivative liability (i.e. the conduct and fault of the agent or servant of the corporation is imputed to the corporation)”.⁴⁹⁴ It entails imputing the guilt of the director or servant to the corporation. Unlike vicarious liability, where the corporation is held liable for the unlawful acts of the individual, under the derivative approach the act and the *mens rea* of the servant or director are considered as the guilt of the corporation.⁴⁹⁵ Burchell explains that from the outset “the criminal liability of a corporate body in South Africa went wider than that of the vicarious liability of natural persons; and it rested upon the imputation to the corporation of the crimes of persons acting on their behalf, rather than upon vicarious liability, which required conduct in the course and scope of employment”.⁴⁹⁶

Although Kidd states that “S.332 (1) imputes the fault of its directors or servants on the corporation rather than making the company vicariously liable for the crimes of its directors or servants”,⁴⁹⁷ it is submitted that the South African approach entails liability that includes

⁴⁹³ E Kahn ‘Can a Company Be Guilty of Murder? The Criminal Liability of a Corporation – II’ (1990) 19 *Business Man’s Law* 175, 175.

⁴⁹⁴ Burchell (note 49) 563.

⁴⁹⁵ “An act by the director or servant of a corporate body is deemed to be an act of the corporate body itself, provided the act was performed in exercising powers or in the performance of duties as a director or servant, or if the director or servant was furthering or endeavouring to further the interests of the corporate body”. (Snyman (note 22) 254).

⁴⁹⁶ Burchell (note 49) 563.

⁴⁹⁷ Kidd (note 455) 355.

vicarious liability⁴⁹⁸ but also goes even further than vicarious liability.⁴⁹⁹ It is further submitted that the South African approach is the derivative approach⁵⁰⁰ and the imputation of liability where the acts fall within the scope of the duties of the director or servant also amounts to vicarious liability. The derivative approach however, goes further than vicarious liability as it includes the wrongful acts of the directors and employees of the corporation, even if these were beyond the powers of the director or servant. As long as they were committed while in the process of furthering the interests of the corporation, these are imputed to the corporation.⁵⁰¹

Regardless of the basis that a jurisdiction relies on, there are various problems that one encounters when dealing with the concept of corporate criminal liability. These include, *inter alia*, the issue of attributing *mens rea* to a corporation⁵⁰² as well as the question as to whether the current punishment imposed on corporations is sufficient to punish and deter corporations from committing crimes. As will be seen below, these issues as well as the efficiency of the derivative theory as the basis for corporate criminal liability in South Africa are in need of attention. This is supported by Burchell's assertion that "in South Africa, the theory behind corporate responsibility and the translation of this theory into a realistic form of corporate responsibility is in desperate need of review".⁵⁰³

IV THE CURRENT REGULATION OF CORPORATE CRIMINAL LIABILITY AND CORPORATE HOMICIDE IN SOUTH AFRICA

⁴⁹⁸ The corporation is held liable for actions and omissions that take place within the scope of duty.

⁴⁹⁹ The corporation is also held liable for acts and omissions that occur beyond the scope of duty, as long as they take place while furthering or endeavouring to further the interests of the corporation.

⁵⁰⁰ "The current approach to criminal liability of corporations in South Africa is, in fact, based on derivative liability (i.e. the conduct and fault of the agent or servant of the corporation is imputed to the corporation)". (Burchell (note 49) 563). Kahn states that the corporation's "criminal responsibility is much more extensive than the vicarious liability of natural persons". (Kahn (note 493)175).

⁵⁰¹ Kidd (note 455) 355.

⁵⁰² It is submitted that there is still an obstacle in that a human attribute of fault is imputed to an artificial entity.

⁵⁰³ Burchell (note 49) 565.

(a) The current regulation of corporate criminal liability in South Africa: Section 332 of the CPA

Corporate criminal liability is currently regulated by section 332 of the CPA which bears the heading ‘Prosecution of corporations and members of associations’. From the heading it is clear that the section is not only aimed at juristic persons, but it also regulates the prosecution of crimes committed by persons belonging to an association that lacks juristic personality.⁵⁰⁴ The statute regulates the criminal liability of both groups in the same section.⁵⁰⁵ In section 332 the legislature imputes the guilt of the individual within the corporation who committed the offence, to the corporation itself,⁵⁰⁶ it in fact “embodies the...principle...that the guilt of the natural person is the guilt of the corporate body”.⁵⁰⁷

Where the association of persons lacks juristic personality, the members or natural persons who are involved in running the association are personally held criminally liable.⁵⁰⁸ If members of an association of persons with no juristic personality were excluded from criminal liability, people would commit crimes in the name of an association with the knowledge that they would escape liability. Section 332 thus ensures that members of entities that do not have juristic personality are held responsible for crimes committed in furthering or endeavouring to further the interests of such entities.

⁵⁰⁴ The original statute also included the prosecution of entities that were not corporations. It can be said that the main concern of the legislature is dealing with corporate crime, regardless of the nature of the business entity that is responsible for the crime.

⁵⁰⁵ The statute regulates these in a similar manner and having a separate provision or statute is not necessary.

⁵⁰⁶ “In terms of the subsection, where a corporation is charged with such a crime the fault of the director or servant who committed the crime will be imputed to the corporation”. (Burchell (note 49) 565-566).

⁵⁰⁷ D Bailes ‘Watch Your Corporation’ (1995) 3, 1 *JBL* 24. “This subsection imputes the fault of its directors or servants on the corporation, rather than making the company vicariously liable for the crimes of its directors or servants”. (Kidd (491) 3).

⁵⁰⁸ It must be noted here that due to the absence of legal personality the entity itself cannot be charged, found guilty and punished, but the members thereof may be.

As discussed above, in its original form⁵⁰⁹ the section imposed a dual liability to criminal prosecutions. This entailed the corporation being held liable for the crimes of its directors or servants in terms of section 332 (1), and, in turn, the directors or servants being held liable for the crimes of the corporate body in terms of section 332 (5). In *S v Coetzee* section 332 (5) was constitutionally challenged and was found to be unconstitutional.⁵¹⁰ The common law position is thus applicable.⁵¹¹ The position under the current statutory regulation is that corporations are criminally liable for crimes committed by their servants and or directors.

It must be noted that in the discussion of the subsections of section 332 some of the case law emanating from the previous provisions which are relevant to the discussion will be referred to.

(i) Section 332 (1)

According to s. 332 (1)

For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law -

a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body;

and

b) the omission, with or without a particular intent, of any act which ought to have

⁵⁰⁹ Prior to the decision in *S v Coetzee* (note 56) which declared section 332 (5) unconstitutional.

⁵¹⁰ The judgment was not unanimous. The findings of the various judges are briefly discussed below.

⁵¹¹ As stated above, in terms of the common law a director may be held liable for offences committed by the corporation “only if he took part in that other’s crime, or on the basis of vicarious liability or agency”. (Burchell (note 49) 567).

been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.⁵¹²

Section 332 (1) is a replica of section 381 (1) of the CPA 1955, its predecessor. The original provision, section 384 (1) of the CPEA, was a brief provision which served merely to regulate in a statute, that which was already regulated by the common law.⁵¹³ Its substitution by section 117 of the CAA resulted in the provision being much longer and it is clear that an attempt was made at clarifying issues which could possibly give rise to confusion and misinterpretation. The latter provisions reflect a development in the area of corporate criminal liability, as the legislature explains in a clearer manner whose actions the corporation is to be held liable for and under what circumstances the corporation will be held liable. Like section 381(1) of the CPEA 1955, section 332(1) of the CPA provides more clarity about the ‘criminal imputability of a corporate body’.⁵¹⁴

In terms of subsection 1 a corporation may be held liable for ‘**any offence**’.⁵¹⁵ This may be under any legislation or under common law. Corporations have been held liable for many

⁵¹² The CPA (note 16) Section 332 (1).

⁵¹³ The CPEA (note 43) section 384(1).

⁵¹⁴ E Du Toit *Commentary on the Criminal Procedure Act* service 43 (2009) 33-5.

⁵¹⁵ Own emphasis.

offences that have arisen from other legislation. In *S v Banur Investments*⁵¹⁶ a conviction of a company and its managing director for the contravention of the Liquor Act⁵¹⁷ was confirmed by the then Transvaal Supreme Court. The conviction of three companies and their director for the contravention of section 31(1)(a) of the Road Transportation Act was confirmed in *S v Longdistance (Natal) (Pty) Ltd and Others*.⁵¹⁸ In the highly publicised case of *S v Shaik and Others*⁵¹⁹ ten corporations together with Shabir Shaik, who directly controlled them as sole or majority shareholder were convicted of the contravention of section 1(1)(a)(i) or (ii) of the Corruption Act.⁵²⁰ Corporations have also been convicted of common-law crimes including culpable homicide,⁵²¹ theft⁵²² and fraud.⁵²³ It is important to note that the term ‘any offence’ refers to offences that corporations are capable of committing.⁵²⁴ Where the legislature has confined the application of the law to human beings, the corporation will escape liability.⁵²⁵

The specific mention of the phrase ‘**under any law or at common law**’⁵²⁶ serves to eliminate confusion regarding the laws that can be contravened by corporations. At the same time the legislature has avoided prescribing a list of specific offences that can be committed by a corporation. It is submitted that doing so would be counterproductive as the provision would require constant revision to suit the ever-changing and increasing corporate activities.

⁵¹⁶ *S v Banur Investments (Pty) Ltd and Another* (note 375).

⁵¹⁷ The Liquor Act 30 of 1928.

⁵¹⁸ *S v Longdistance (Natal) (Pty) Ltd and Others* 1990 (2) SA 277 (A).

⁵¹⁹ *S v Shaik and Others* [2005] 3 All SA 211 (D). The proceedings of this case were televised and broadcast on national television and radio as a result of the fact that it also dealt with the ‘alleged corrupt’ relationship between Mr Shaik and the then Deputy President of South Africa, Mr Jacob Zuma.

⁵²⁰ The Corruption Act 94 of 1992.

⁵²¹ As illustrated by *R v Bennett* (note 32); Rycroft (note 365) 150.

⁵²² In *R v Markins Motors (Pty) Ltd* (note 384) an appeal against a conviction for theft was upheld under the 1977 Act.

⁵²³ *R v Frankfort Motors* (note 385).

⁵²⁴ “It is submitted that acts or omissions by directors or officers for which they only are made punishable under the Companies Act are not intended to be dealt with under s 332(1) so as to make the company punishable as well, ie s 332(1) refers only to an offence which the company itself can commit”. (Delpont (note 87) Appx III-5).

⁵²⁵ *S v Sutherland* (note 433) 385.

⁵²⁶ Section 332(1). Own emphasis.

Subsection 1 (a) of section 332 refers to any ‘**act performed**’⁵²⁷ and subsection (b) refers to an ‘**omission**’.⁵²⁸ From these subsections it is clear that a corporation will be held liable for any act or omission that is regarded as an offence regardless of whether it is regarded as such by legislation or by common law. Substantive law provides the acts and omissions that are regarded as offences. All offences regardless of whether they fall under common law or statutory law have been included. The corporation can thus be held liable for any act or omission that is by law regarded as a crime. In this section the legislature made an all-inclusive provision which makes it clear that corporations may be prosecuted for criminal activities regardless of the nature of the offence. As long as it is clear that a crime has been committed and that the corporation is answerable, the corporation may be prosecuted.⁵²⁹ The submission that “acts or omissions by directors or officers for which they only are made punishable under the Companies Act are not intended to be dealt with under section 332(1) so as to make the company punishable as well”⁵³⁰ is supported.⁵³¹ The reason is that those are offences made by those individuals, in their own interest and the aim is to punish those individuals only as they are the only possible wrongdoers, not corporations.

Section 332 (1) specifically refers to acts and omissions that take place ‘**with or without a particular intent**’. This clause refers to culpability⁵³² and it makes it clear that a corporation will be held liable for acts committed with either intention or negligence,⁵³³ attributes which are confined to natural persons. This is important in that it “removes the obstacle to imposing

⁵²⁷ Own emphasis.

⁵²⁸ Own emphasis.

⁵²⁹ “This section renders the corporate body liable for any act or omission of a director or servant that constitutes an offence under any law or at common law”. (Bailes (note 507) 24).

⁵³⁰ Delpont (note 87) Appx III-5.

⁵³¹ Ibid.

⁵³² “By “culpability” is meant that there must, in the eyes of the law, be grounds for blaming X personally for his unlawful conduct”. (Snyman (note 22) 149).

⁵³³ “The act or omission, whether intentional or negligent, is deemed to have been performed by the corporate body”. (Bailes (note 507) 24).

criminal liability upon an artificial person that could not be found guilty of a crime requiring fault since it has no mind”.⁵³⁴ In terms of section 332(1)(b) once it has been established that an offence has been committed, *mens rea* or blameworthiness is an element that must be proven⁵³⁵ before the accused can be blamed for the offence.⁵³⁶ Section 332 (1) does not purport to give corporations human attributes⁵³⁷ and the section should be understood to mean that *mens rea*, as a human attribute, is imputed to the corporation. In *S v Dersley*⁵³⁸ it was held that in accordance with section 332(1) (b) the *mens rea* of the responsible individual, at the time of the commission of the offence is considered to be the *mens rea* of the corporation.⁵³⁹ In this case the director’s *mens rea* was imputed to the corporation. It is thus clear that in South Africa the corporation is held liable for offences committed by individuals on the basis that the individual’s *mens rea* is regarded as the *mens rea* of the corporation.⁵⁴⁰

This was also the case in *R v Bennett*.⁵⁴¹ It must be noted that *R v Bennett* was based on the previous provision, section 384 of the CPEA. *In casu* the wrongful act and the negligence of the corporation’s servant was deemed to be the wrongful act and the negligence of the corporation. An employee of the accused company had negligently operated machinery and this caused the death of another employee. The negligent workman was convicted of culpable homicide. The company was also charged with and convicted of culpable homicide.

In *S v Joseph Mtshumayeli*,⁵⁴² the driver of a bus owned by the accused company allowed a

⁵³⁴ Burchell (note 49) 565.

⁵³⁵ As Burchell puts it “the question here is whether a particular person, in the light of his personal aptitude, gifts, shortcomings and knowledge, and of what the legal order may fairly expect of him, can be blamed for his wrongdoing”. (Ibid 144).

⁵³⁶ Snyman (note 22) 149 states that “the question of culpability arises only once it has been established that there was an unlawful conduct.

⁵³⁷ “a corporation ... possesses no *mens rea* of its own, and any mental element can exist on the part of some other individual such as a director”. (*R v Bennett* (note 32) 200).

⁵³⁸ *S v Dersley* (note 489) .

⁵³⁹ Ibid 951.

⁵⁴⁰ Du Toit (note 514) 33-5.

⁵⁴¹ *R v Bennett & Co* (note 32) 194.

⁵⁴² *S v Joseph Mtshumayeli (Pvt)Ltd* 1971 (1) SA 33 (RA).

passenger to drive the bus. The passenger lost control of the bus, which in turn overturned, causing the death of another passenger. The negligence of the employee was imputed to the company and the company was found guilty of culpable homicide. It must be noted that *S v Joseph Mtshumayeli* is not a South African court case. The reason for including it in this discussion is that liability was based on a provision in what was Rhodesian law at the time, which has the same wording as section 332(1).⁵⁴³

Holding a corporation criminally liable by imputing the fault of its directors or servants to the corporation⁵⁴⁴ has led to a situation where a corporation may also be convicted of crimes which could only be committed by natural persons. This is a contentious issue, though, because, some offences are such that they can only be committed by natural persons.⁵⁴⁵ Due to the nature of a corporation, questions regarding whether it really is possible for corporations to be held liable for any crime, have been raised. Bailes points out that “on the face of it, section 332 (1) seems to refer only to intentional acts or omissions”.⁵⁴⁶ In interpreting this provision, however, case law has shown us that it is possible for a corporation to be convicted for crimes requiring *mens rea* in the form of negligence, such as culpable homicide. This was seen in *R v Bennett Co. (Pty.) Ltd., and Another*⁵⁴⁷ and in *S v Joseph Mtshumayeli*,⁵⁴⁸ as stated above.

The interpretation of this provision has led to problems though, as can be seen in *S v Suid*

⁵⁴³ Section 401(1) of the Criminal Procedure and Evidence Act, Chapter 31 (R). In making its decision the court also relied on several South African cases, including *R v Bennet* (note 32) *S v Cairns and Another* 1969 (3) SA 523 (N) and *R v Phillips Dairy (Pty) Ltd* 1955 (4) SA 120 T.

⁵⁴⁴ Kidd (note 491) 3.

⁵⁴⁵ Lansdown *et al.* (note 429) 79 state that “thus a corporation could not be convicted of treason, murder, assault, arson, theft or such like offences”.

⁵⁴⁶ Bailes (note 507) 24.

⁵⁴⁷ Here the court had to apply section 384 (1) of the CPEA, as amended by section 117 of the CAA and Murray J averred that “the language of section 384 (1) (a) and (b) as amended is so clear that it is not competent for any Court of Law to refrain from giving the section the effect of its plain meaning”. (*R v Bennett* (note 32) 200).

⁵⁴⁸ *S v Joseph Mtshumayeli* (note 542) 33.

*Afrikaanse Uitsaaikorporasie*⁵⁴⁹ where the court interpreted section 332 (1) as excluding crimes committed negligently.⁵⁵⁰ In that particular case the court interpreted the section as meaning that “section 332 (1) is not applicable where only negligence on the part of a director or employee is proved and not on the part of the juristic person itself”.⁵⁵¹ From the outset this decision was not seen as a correct interpretation of the provision.⁵⁵²

This decision was later overruled by the Appellate Division in *Ex parte Minister van Justisie: In Re S v Suid Afrikaanse Uitsaaikorporasie*.⁵⁵³ The Appellate Division approved the decision in *R v Bennett* and in answering the question of whether section 332 (1) was applicable to negligent acts or omissions, the court correctly held that, “on a proper investigation of section 332 (1) of the Criminal Procedure Act 51 of 1977 a juristic person can be held liable for crimes of negligence committed by its directors and officers”.⁵⁵⁴ In this way even if there is no corporate fault, a corporation may still be held criminally liable.⁵⁵⁵

Section 332 (1) refers to acts and omissions ‘by or on instructions or with permission, express or implied, given by a director or servant of that corporate body’. This refers to those wrongful acts that have been committed with the director or servant’s permission and wrongful acts

⁵⁴⁹ *S v Suid Afrikaanse Uitsaaikorporasie* 1991 (2) SA 698 (W).

⁵⁵⁰ In this case “the respondent was acquitted on the basis that it could not be held vicariously liable for the crime charged as s. 332 (1) did not apply to crimes of negligence”. (Jordaan (note 42) 52).

⁵⁵¹ *S v Suid Afrikaanse Uitsaaikorporasie* (note 549) 699.

⁵⁵² “Daar kan dus, met respek, nie met die hof in hierdie verband saamgestem word nie. Op grond van die bewese feite moes die respondent eintlik skuldig gewees het. Tog sou so ’n skuldigbevinding nie die regsgevoel bevredig nie. In die sin het ’n mens dus simpatie vir die gevolgtrekking waartoe die hof kom. Die enigste oplossing vir hierdie probleem lê in die wysiging van die huidige regsposisie”. (Du Plessis (note 456) 642-643).

⁵⁵³ *Ex parte Minister van Justisie: In Re S v Suid Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (AD).

⁵⁵⁴ *Ibid* 804.

⁵⁵⁵ Snyman (note 22) 254. “The SABC case illustrates that a corporation may be convicted of a crime requiring negligence even if it can show that it had exercised due diligence. In other words corporate criminal liability may follow despite the absence of corporate fault”. (Jordaan (note 42) 53).

performed on their instructions.

The wording makes it clear that in terms of subsection (1) a corporation may be held vicariously liable⁵⁵⁶ for wrongful acts of its directors or its servants. In addition to that, it may even be held vicariously liable for an offence committed by a third party, who is neither a director nor a servant of the corporation, provided that such person received instructions or permission from a director or servant of the corporation, in the scope of their duties. An example of a corporation being held vicariously liable for the wrongful act of a third party, who had been granted permission by the employer, is that of the third party who drove the bus, in *S v Joseph Mtshumayeli*⁵⁵⁷ after having been allowed to do so by the employee.

The permission granted to the third party by the director or servant may be express or implied. This means that a corporation may be held criminally liable for the offence of a third party, even where the offence has been committed without the express instructions from the directors or servants of the corporation. Such instructions may be implied. It is therefore important for the court to look at the surrounding circumstances in each case.

Section 332(1) further makes an important proviso by stating that the corporation will be held liable where the director or servant commits an offence ‘in the exercise of his powers or in the performance of his duties’ or if the offence was committed while the director or servant was ‘furthering or endeavouring to further the interests of the corporation’.⁵⁵⁸ It is thus important

⁵⁵⁶ Vicarious liability plays an important role in corporate criminal liability in South Africa, however, as will be seen below, corporate criminal liability in South Africa goes further than that and allows a corporation to be prosecuted for crimes committed outside the scope of duty.

⁵⁵⁷ *S v Joseph Mtshumayeli* (note 542).

⁵⁵⁸ “It is submitted that a distinction should be drawn between a director or servant of a corporation who is acting solely for his own personal interests and one who is acting in furtherance, or attempted furtherance, of the corporation’s interests. The former individual should not render the corporation liable for any crimes committed

to establish and prove that the offenders were indeed acting within their powers or scope of employment or that they were furthering or trying to further the interests of the corporation. Failure to prove this beyond a reasonable doubt will result in the corporation escaping liability.

Where a bread-baking company appealed against its conviction for its servant's unlawful selling of bread at prices below the minimum price, the appeal failed because the servant was found to have been acting within the scope of his employment when he sold the bread.⁵⁵⁹ Selke J stated that the servant had indeed acted within his powers and scope of duty, it was just that he had "exercise(d) his powers and perform(ed) his duties in an unlawful manner".⁵⁶⁰

In *S v African Bank of South Africa Ltd and Others*⁵⁶¹ the corporation, a bank, did escape liability due to the fact that the prosecution failed to prove beyond a reasonable doubt that the guilty individuals within the corporation, in committing the offence had done so in 'furthering or endeavouring to further the interests' of the corporation.⁵⁶² The court found that the parties who had committed the criminal acts had done so in order to "further their own interests and, in the process, had had to further interests of bank for without doing so, they would have been unable to further their own interests".⁵⁶³

In *R v Barney's Super Service Station (Pty) Ltd* a salesman who worked for the appellant

in furtherance of his own interests, while the latter should render the corporation liable under s. 332 (1)". (Burchell (note 49) 566).

⁵⁵⁹ *Durban Baking Co Ltd v Rex* 1945 NPD 136.

⁵⁶⁰ *Ibid* 141.

⁵⁶¹ *S v African Bank of South Africa Ltd and Others* 1990 (2) SACR 585 (W).

⁵⁶² The accused were prosecuted for the contravention of Regulation 14A of the Exchange Controls Regulations, which prohibited dealings with the financial Rand without the permission of the Treasury.

⁵⁶³ *S v African Bank of South Africa Ltd and Others* (note 561) 589.

company had entered into a contract of sale with a third party for his own benefit.⁵⁶⁴ The third party had been charged a price which exceeded the fixed price and the corporation was convicted by the court a quo together with the salesman for that offence. Since there was no indication that this was done in the process of furthering the interests of the corporation, the court hearing the appeal dismissed it as it found that “the company at all stages was a stranger to the transaction”.⁵⁶⁵

In *R v Phillips Dairy (Pty) Ltd*⁵⁶⁶ it was argued that a limited company was not in a position to be held liable for contravening section 384(1) since an employer could not be held criminally responsible for the criminal acts of his employees.⁵⁶⁷ It was held that the criminal acts had been committed in the process of furthering the interests of the corporation.⁵⁶⁸ The court further accepted the Attorney General’s argument that the provision “is substantive law, and makes a limited company criminally liable as an employer, even in cases where a private employer would not be so liable”.⁵⁶⁹

In *R v Van Heerden & Others*⁵⁷⁰ the company was held criminally liable for the crime committed by its director. *In casu* an appeal by the corporation against its conviction for making false representations to its clients failed as its director had made false representations whilst furthering the interests of the corporation. The director’s unlawful acts were deemed to

⁵⁶⁴ *R v Barney’s Super Service Station (Pty) Ltd* 1956 (4) SA 107 (T).

⁵⁶⁵ *Ibid* 108.

⁵⁶⁶ *R v Phillips Dairy (Pty) Ltd* (note 543).

⁵⁶⁷ *Ibid* 122.

⁵⁶⁸ Price J states that “the facts in the present case indicate, beyond any doubt that the transaction out of which the prosecution arose was in furtherance of the interests of the appellant company”. (*Ibid* 124).

⁵⁶⁹ *Ibid* 120.

⁵⁷⁰ *R v Van Heerden & Others* 1946 AD 168, 168.

be the corporation's unlawful acts, hence the conviction. In his judgment Davis AJA states:

It was the company which was selling the frames: the 2nd appellant admitted that the frames were a source of income to the company, that everything done to get orders or make delivery was in the interests of the company and that it was his duty to sell as many frames as he could. In these circumstances, what he did was done not only for himself, but also "in furthering or endeavouring to further the interests of the corporate body", that is, of the company. The company is liable for his acts...⁵⁷¹

In interpreting the words "in the exercise of his powers or in the performance of his duties as such director or servant, or in furthering or endeavouring to further the interests of that corporate body"⁵⁷² Barlow reaches the conclusion that there are three classes of offences.⁵⁷³

These are:

- i) Those committed by directors through the exercising of their powers.⁵⁷⁴
- ii) Those committed by servants while acting within their scope of employment.⁵⁷⁵
- iii) Those committed by directors or by servants in the process of furthering or endeavouring to further the interests of the company.⁵⁷⁶

This interpretation by Barlow takes into account the terms that are used when referring to the activities of servants and of directors. The section mentions both parties without clearly stating the circumstances under which each may be liable. It is submitted that Barlow's interpretation

⁵⁷¹ Ibid 171.

⁵⁷² This is based on the forerunner to section 332, which is section 384 of the CPA 1955.

⁵⁷³ Barlow (note 149) 504.

⁵⁷⁴ Ibid 505.

⁵⁷⁵ Ibid.

⁵⁷⁶ Ibid.

is correct as, strictly speaking, when one looks at the common law definitions and duties of both directors and servants, it is clear that they differ significantly from each other. A clear explanation of the circumstances under which each may be held liable, is thus important and necessary, as it provides clarity.

Where a company has been registered for a purportedly lawful purpose, it will be treated in the same way as companies registered for lawful purposes.⁵⁷⁷ This was made clear in *R v Meer*⁵⁷⁸ where it was submitted that the accused corporation was “a non-existing thing, a phantom, and not a body corporate, and consequently that it cannot be guilty of the crimes charged against it”.⁵⁷⁹ The court found that a legal entity did indeed come into existence and for that reason, it could be convicted of the crimes with which it was charged.⁵⁸⁰ It was held that since there was a valid registration of the company, the fact that it had been registered for an unlawful purpose could not set it free from liability.⁵⁸¹

It is important to note that the liability envisaged by the legislature in terms of subsection 1 is intended for corporate bodies only. A trust created by a notarial deed is not a juristic person therefore it cannot be held liable under subsection 1. In *S v Peer*⁵⁸² the accused was a trust that had been created by a notarial deed. Henning J stated that a trust created by a notarial deed does not have legal personality, therefore it could not be held liable for the unlawful acts of its trustee.⁵⁸³

⁵⁷⁷ Du Toit (note 514) 33-6.

⁵⁷⁸ *R v Meer & Others* 1958 (2) SA 175 (N).

⁵⁷⁹ *Ibid* 176.

⁵⁸⁰ *Ibid* 181.

⁵⁸¹ *Ibid* 180 – 181. This was later approved in *S v Ismail & Others* (2) 1965 (1) SA 452 (N) 458.

⁵⁸² *S v Peer* 1968 (4) SA 460 (N).

⁵⁸³ *Ibid* 460.

Based on what is stated in the above discussion, in essence a corporation may be held liable for crimes committed with or without particular intent by:⁵⁸⁴

- Its director in exercising his/her powers or within the scope of duty or in furthering or endeavouring to further the interests of the corporation as in *R v Van Heerden*⁵⁸⁵ and *Others; R v Markins Motors (Pty) Ltd.*⁵⁸⁶
- Its servant in exercising his/her powers or within the scope of duty or in furthering or endeavouring to further the interests of the corporation as in *R v Bennett.*⁵⁸⁷
- A third party who does so on instructions of a director
- A third party who does so on instructions of a servant as in *S v Joseph Mtshumayeli.*⁵⁸⁸
- A third party who does so with express or implied permission of a director
- A third party who does so with the express or implied permission of a servant.

These acts or omissions must have occurred within the director or servant's scope of duty or in furthering or endeavouring to further the interests of the corporation. As long as it is clear that any one of the above listed parties has committed a crime under the stated circumstances, a corporation may be held liable, regardless of whether 'it' was aware of the commission of the crime or not. Section 332(1) raises several areas of concern, most of which give rise to the questions regarding the constitutionality and the effectiveness of section 332 as a whole. These issues will be discussed below, when all the subsections have been explained.

⁵⁸⁴ This breakdown is based on the breakdown made by Delpont *et al.* (note 87) Appx III – 5-6.

⁵⁸⁵ *R v Van Heerden* (note 570).

⁵⁸⁶ *R v Markins Motors (Pty) Ltd* (note 384).

⁵⁸⁷ *R v Bennett* (note 32).

⁵⁸⁸ *S v Joseph Mtshumayeli* (note 542).

(ii) Section 332 (2)

Section 332(2) states as follows:

In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question: provided that-

- (a) If the said person pleads guilty, other than by way of admitting guilt under section 57, the plea shall not be valid unless the corporate body authorized him to plead guilty;
- (b) If at any stage of the proceedings the said person ceases to be a director or servant of that corporate body or absconds or is unable to attend, the court in question may, at the request of the prosecutor, from time to time substitute for the said person any other person who is a director or servant of the said corporate body at the time of the said substitution, and thereupon the proceedings shall continue as if no substitution had taken place;
- (c) If the said person, as representing the corporate body, is convicted, the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as an alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body and may be recovered by attachment and sale of property of the corporate body in terms of section 288;
- (d) The citation of a director or servant of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, shall not exempt that director or servant from prosecution for that offence in terms of subsection (5).

Holding a corporation criminally liable has not always been part of South Africa's corporate

or criminal law and it is an extraordinary phenomenon.⁵⁸⁹ For that reason when this became a practice there were bound to be certain problems.⁵⁹⁰ These include questions such as who ought to stand trial on behalf of the corporation and whose actions and faults should be imputed on the corporation. Naturally there is a need for a human being to represent the corporation as a party in the criminal case, as the corporation is incapable of being physically present in court and of being able to speak for itself. The original section, as well as those that follow, make provision for certain officers of the corporation to stand trial on behalf of the corporation. Section 384 referred to a director or servant of the corporation. Section 332 also refers to the director or servant of the corporation.

It must be noted that the corporation may not be summonsed in its own name.⁵⁹¹ The individual who stands trial on behalf of the corporation is cited as the offender and is tried on behalf of the corporation in the same way that he would be if he was the actual accused person.⁵⁹² As Du Toit puts it “the court must deal with the representative as if he was the person accused of having committed the offence in question”.⁵⁹³ In *Ex Parte Prokureur Generaal, Transvaal*⁵⁹⁴ the court clearly set out the obligations and personal liability of a person who is summoned and tried on behalf of a corporation by stating that such a person

(a) Was personally liable and obliged to respect and comply with the judicial process and or

⁵⁸⁹ Extraordinary in the sense that natural persons have historically been the ones to bear the blame for their actions.

⁵⁹⁰ See discussions in Chapter One IV and in Chapter Two VI above.

⁵⁹¹ Du Toit (note 514) 33-6.

⁵⁹² “This means, although he appears in court technically in a representative capacity, the director or servant is dealt with during the proceedings as if he were the accused”. (NA Matzukis “Corporate Crimes Who must Pay for them?” (1987) *Businessman’s Law* 216).

⁵⁹³ P Du Toit “Sentencing the Corporate Offender in South Africa: A Comparative Approach” (2012) 2 *SACJ* 235, 235.

⁵⁹⁴ *Ex Parte Prokureur Generaal, Transvaal* 1984 (2) SA 283 (T).

court orders relating to the institution and furtherance of the proceedings, particularly as regards appearing and or remaining present at the court concerned on the appointed date(s) of the trial and / or postponed hearing;

- (b) Liable to the arrest of his person in terms of a warrant validly sought and granted under s 55 (2) or - as the case may be ...on the grounds of his omission to appear and or remain present as aforementioned.
- (c) Personally responsible and liable to conviction for a contravention of s 55(1) or...on the grounds of his unlawful omission as aforementioned...
- (d) Remained personally responsible and liable as set out in the preceding paragraphs.⁵⁹⁵

From this, it follows that the person who stands trial on behalf of the corporation is obliged to take his or her responsibility seriously. In instituting criminal proceedings it must be clear in what capacity the accused is being prosecuted, i.e. in his / her personal capacity as a director or servant or as representative of the corporation. In fact it is a requirement as provided by section 332(2) that “in any prosecution against a corporate body, a director or servant of the corporate body must be cited as the offender in his representative capacity”.⁵⁹⁶ In *Herold, N.O. v Johannesburg City Council*⁵⁹⁷ the charge was ambiguous and there was lack of clarity regarding the capacity in which the accused was being charged.⁵⁹⁸ *In casu* the court stated that the capacity in which the accused was being charged had to be clear, as the court had to decide whether the charge was directed against the accused in his personal capacity or in his capacity as representative of the corporation.⁵⁹⁹ It went further to explain precisely how the accused ought to be charged in such a way that it is clear in which capacity he is being

⁵⁹⁵ Ibid.

⁵⁹⁶ Du Toit (note 593) 235.

⁵⁹⁷ *Herold, N.O. v Johannesburg City Council* 1947 (2) SA 1257 (A).

⁵⁹⁸ Ibid 1257.

⁵⁹⁹ Ibid 1266.

charged.⁶⁰⁰ The court in *Herold NO v Johannesburg City Council* also stated that in the event that on the summons, a wrong party is cited, it is possible for an amendment to be made, as long as it is clear who should have been cited as the accused.⁶⁰¹

*R v Hammersma*⁶⁰² was a review of a matter in which two individuals had been charged in their capacity as representatives of the company. It was held that there had not been a need for both of them to be charged as representatives of the company.⁶⁰³ The decision in *Hammersma* highlights the fact that the company remains the accused, those individuals cited as the accused merely act as representatives of the company, since the company cannot be charged in its own name.

In *R v Campbell*⁶⁰⁴ the conviction and sentence from the court *a quo* were both set aside as the accused had been charged in his personal capacity instead of in his capacity as representative of the corporation. The question of clarity as to the capacity of the accused is important because it has to be clear whether it is an individual or the corporation that is being held criminally responsible. Where an individual is erroneously charged in his personal capacity, the corporation ends up not being held responsible for crimes committed in the furtherance of that corporation's interests. Such a state of affairs defeats the ultimate aim of corporate criminal liability, which is to see to it that corporations face criminal responsibility for their

⁶⁰⁰ "It is clear that when criminal proceedings are instituted under sub-sec. (2) the director or servant should be cited as representative of the corporate body, and it is equally clear that, if it is sought to charge a director or servant under sub-sec. (5) he should be cited as an individual, and the fact that he is a director or servant should be alleged in the body of the charge as one of the essential facts to be proved, and it would be an advantage if sub-sec. (5) were mentioned in order to show that he is being prosecuted under the provisions of that subsection". (Ibid 1266 -1267).

⁶⁰¹ Ibid 1257; *R v Barry* [1950] 1 All SA 250 (N).

⁶⁰² *R v Hammersma and Another* 1941 OPD 39.

⁶⁰³ Ibid 42.

⁶⁰⁴ *R v Campbell* 1947 (2) SA 1017 (E).

actions.

*R v Darwin Supply Stores (Pvt) Ltd*⁶⁰⁵ was an appeal against the conviction of a company, where an offence had been committed by a company but an individual was charged. The charge was subsequently amended and the individual accepted the amendment. The company was, however, not issued with summons and there was no proof that the company had given authorization to that individual to agree to the company's prosecution.⁶⁰⁶ The conviction and the sentence were set aside.⁶⁰⁷

In *S v Lark Clothing (Pty) Ltd*⁶⁰⁸ the court set aside a conviction and sentence that had been passed against the accused as there was no compliance with the provision in the then section 381(2) which stated that a guilty plea made on behalf of the corporation was not valid unless the corporation had authorized the accused (appearing on its behalf) to plead guilty.⁶⁰⁹ *In casu*,

⁶⁰⁵ *R v Darwin Supply Stores (Pvt) Ltd* 1957 (2) SA 519 (E).

⁶⁰⁶ Murray CJ stated:

“There appears to have been a substantial disregard of the consequences of the essential distinction between an incorporated company and the individuals who constitute it or manage its affairs. The appellant company has been convicted without observance of the statutory requirement as to the formulation of the charge. The summons has never been served on the company. The company has not been given notice that by the amendment it was placed in the position of an accused. There is neither allegation nor evidence that as a matter of fact Christopoulos is a director or servant of the company, much less that he had any authority from the company to agree to its being prosecuted in the particular manner adopted. If the Crown desired to continue against the company the prosecution initiated against Christopoulos it was, I think, necessary to establish the authority of the latter to agree to that course...by proof of his powers under the articles of association or a resolution of the board of directors”.

(Ibid 520-521).

⁶⁰⁷ Ibid 521.

⁶⁰⁸ *S v Lark Clothing (Pty) Ltd* 1973 (1) SA 239 (C).

⁶⁰⁹ Section 381 (2) provided that

“In any prosecution against a corporate body, a director or servant of that corporate body, shall be cited as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question: Provided that –

a) if the said person pleads guilty, the plea shall not be valid unless the corporate body authorized him to plead guilty”.

the second accused, the sole director of a company made an appearance in his own personal capacity and also as a representative of his co-accused, (the first accused) the limited liability company which he was the sole director of. He made a guilty plea on behalf of both accused but was not able to provide proof that he had received authorization to plead guilty on behalf of the corporation, as prescribed by the then section 381(2). That led to the conviction and the sentence imposed on the corporation being set aside. The importance of the decision in *S v Lark Clothing (Pty) Ltd* lies in the fact that the peremptory nature of the provision is emphasized. The court is not supposed to accept a guilty plea on behalf of the corporation without getting some kind of proof that the corporation has given authorisation for such a plea.

In *R v Fruit Growers Distributors (Pvt) Ltd*⁶¹⁰ the Rhodesian court was faced with a similar situation.⁶¹¹ The accused who was representing the corporation pleaded guilty. On review he failed to prove that he was given authority by the company to plead guilty. It was held that a magistrate could not sentence a company where the accused had pleaded guilty on behalf of the company, without proof of the required authority.

Where the accused is being charged in his capacity as a representative of the corporation, the form of punishment that may be imposed is a fine. The aim of section 332 is to ensure that corporations that commit crimes are duly punished for those offences. The fine that is imposed is therefore aimed at the corporation and not at the accused in his representative capacity. That

⁶¹⁰ *R v Fruit Growers Distributors (Pvt) Ltd* 1966 (2) SA 181 (R).

⁶¹¹ This pertained to section 401 (2) of the Criminal Procedure and Evidence Act of Rhodesia 1955 (equivalent to section 381 of the South African Act, 1955) which provided that where an accused was representing a company, “if the said person pleads guilty, the plea shall not be valid unless the corporate body authorized him to plead guilty”.

fine is imposed on the convicted corporation and it is payable by that corporation.⁶¹² In *R v Hammersma*,⁶¹³ where two individuals were charged as representatives of the company, the court looked at the fact that the punishment imposed upon them, was a fine which was payable by them jointly and severally.⁶¹⁴ It was held that this was wrong as the punishment is supposed to be borne by the company, as the individuals had been charged in their capacity as representatives of the company.⁶¹⁵

Imposing a fine as punishment is not unusual for corporations. In fact other jurisdictions also punish corporations by imposing a fine, for instance England and Wales.⁶¹⁶ It must be noted though, that section 332 only allows punishment in the form a fine to be imposed on the corporation. In subsection 2(c) it is stated that even where the applicable law provides for alternative punishment and does not provide for a fine as a form of punishment, where the accused is a corporate body a fine shall be made payable. In *R v Hammersma*⁶¹⁷ an alternative sentence of imprisonment was imposed by the magistrate.⁶¹⁸ This was held to be incorrect, as subsection 2 does not allow any punishment other than a fine to be imposed on the accused.⁶¹⁹ This is echoed in *R v Connock*⁶²⁰ where Steyn, J in amending the applicable sentence and limiting it to a fine stated that:

⁶¹² “The reason why a fine is the only punishment which can be imposed is of course the fact that an entity which has no physical existence cannot be thrown in gaol”. (Snyman (note 22) 255).

⁶¹³ *Rex v Hammersma and Another* (note 602).

⁶¹⁴ *Ibid* 42.

⁶¹⁵ *Ibid* 42.

⁶¹⁶ Wells (note 15) 32.

⁶¹⁷ *Rex v Hammersma and Another* (note 602).

⁶¹⁸ *Ibid*.

⁶¹⁹ Fischer JP in *R v Hammersma* (note 602) 42. In the event of a conviction of the person standing trial on behalf of the corporation “the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as an alternative, other than a fine in respect of the offences in question, and such fine shall be payable by the corporate body in terms of s 288”. (CPA (note 16) section 332(2)(c)).

⁶²⁰ *R v Connock* 1949 (2) SA 295 (C).

“in so far, however, as the magistrate imposed a term of imprisonment as an alternative, the sentence was not a competent one, in view of the provisions of section 384 (2) (d) of Act 31 of 1917 as amended, as appellant was found guilty in a representative capacity as director of a corporate body with limited liability”.⁶²¹

Having a fine as the only punishment that may be imposed on a convicted corporation is problematic and inadequate. The challenges posed by the fine as the sole punishment for a convicted corporation are discussed in more detail below.⁶²²

Since many corporations are huge business enterprises that generate a lot of money, it may be said that a fine is a just punishment for corporate criminals, after all, the corporation is hit where it hurts the most, its coffers. On the converse, the convicted corporation may have an abundance of money, which means that the punishment imposed on it will not have a significant impact on the corporation and its future activities.⁶²³ Nothing hampers such a corporation from keeping a budget for crimes.⁶²⁴ The corporation would then be in a position to commit further offences with the knowledge that it will be able to afford the fine. Imposing a fine will thus in many cases not have a deterrent, preventive, reformatory or even retributive effect on the corporation.⁶²⁵

Section 332(2)(c) further states that:

⁶²¹ Ibid 302.

⁶²² See discussion in this chapter at V (g) below.

⁶²³ See discussion in this chapter at V (g) below.

⁶²⁴ See discussion in this chapter at V (g) below.

⁶²⁵ This will be discussed below in section IV(c) of this chapter.

“The citation of a director or servant of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, shall not exempt that director or servant from prosecution for that offence in terms of subsection (5)”.

In terms of this subsection the director or servant of the corporation, as ‘the minds of the corporation’,⁶²⁶ could be held liable simultaneously with the corporation for crimes committed. By adding this, the legislature has ensured that these “controlling officers”⁶²⁷ do not escape personal criminal liability. Although the acts of the individuals in charge are regarded as acts of the corporation, provision is specifically made for those individuals to be held liable together with the corporation as they are the people whose hands and minds were literally used to commit the offence.⁶²⁸ The said individuals can only escape personal liability, if they can prove that they were not party to the offence.⁶²⁹

Although section 384(1) was worded differently, the legislature made it clear from the outset that “the secretary, every director or manager or chairman thereof”...may be charged...and shall be liable to be punished therefore”.⁶³⁰ This phrase encompasses management and employees. The legislature in confirming the common-law position⁶³¹ also emphasized the fact that the concerned individuals would also be held criminally liable in their personal capacities.

⁶²⁶ They are otherwise referred to as controlling officers, Kidd (note 439) 277.

⁶²⁷ Ibid.

⁶²⁸ This is in line with Arlen’s assertion that “corporate crimes are not committed by corporations, they are committed by agents of the corporation. These agents are rational self-interested utility maximizers who commit crimes in order to benefit themselves. In pursuit of his own self-interest an agent may commit a crime that incidentally benefits the corporation...”. (J Arlen ‘The Potentially Perverse Effects of Corporate Criminal Liability’ (1994) 23 *Journal of Legal Studies* 833, 834).

⁶²⁹ This will be discussed fully below under section 332 (5) of the CPA 1977.

⁶³⁰ Section 384 (1) of the CPEA.

⁶³¹ That despite the artificial nature of the corporation, it could be held liable and could be punished as a legal entity for crimes committed by its agents.

It is submitted that the rationale behind holding both the corporation and the individuals liable is possibly the fact that as the ones who do the thinking and the acting on behalf of the corporation they may not use the corporation as a scapegoat and thus escape personal liability. A criminal offence is a criminal offence and all parties responsible must face the full wrath of the law. If these individuals were exempted from criminal liability, nothing would keep them from committing offences in furthering the interest of the corporation and turning their backs on the corporations when the corporations are charged. Moreover, nothing would prevent them from, thereafter, forming other corporations and committing further offences which the corporations will be held liable for.

(iii) Section 332 (3)

“In criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of the corporate body within the scope of his activities as such director, servant or agent, or any document which was at any time in the custody or under the control of any such director, servant or agent, shall be admissible in evidence against the accused”.⁶³²

The subsection relates to documents and records that may be relied on as admissible evidence against the accused. The accused is the director or servant who is standing trial on behalf of the corporation. Records that were made as well as records that were kept by a director, a servant or an agent of the corporation are admissible evidence against the accused. It is interesting to note that even documents made / kept by an agent of the corporation are included in this category. It is submitted that the reason may be the fact that agents may be privy to certain information that may be helpful in determining the guilt of the accused. The subsection further

⁶³² The CPA (note 16) section 332(3)

requires that these records must have been made or kept within the scope of the director, servant or agent's scope of activities. The net is cast wider as the subsection also allows for 'any document which was at any time in the custody or under the control of such director, servant or agent'.

The term document is not defined, so it is submitted that any relevant document that was made or kept by a director, servant or agent, which is brought forth, may be used as evidence. In *S v Harper and Another*⁶³³ Milne J accepted computer printouts as admissible documents that may be used as evidence.

(iv) Section 332(4)

In terms of section 332(4):

For the purposes of subsection (3) any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his custody or under his control shall be presumed to have been made or kept by him or to have been in his custody or under his control within the scope of his activities as such director, servant or agent, unless the contrary is proved.

This subsection also deals specifically with the issue of records that may be relied on as admissible evidence. It refers to records that were, at any time, in the custody or under the control of the director, servant or agent. It states that for the purpose of the admissibility of

⁶³³ *S v Harper and Another* 1981 (1) SA 88 (D).

such records, a presumption that such records were kept or made or were in his custody or under his control, within the scope of his activities as director, servant or agent of the corporation. The leading case is *S v Harper and Another*⁶³⁴ where servants of a company which was under liquidation compiled documents after the liquidation of the company. The court accepted these documents as admissible.

In terms of section 332(4) a presumption against the director, servant or agent is made “unless the contrary is proved”. It is submitted that if constitutionally challenged section 332(4) will not survive, as it creates a reverse onus, whereby the director, servant or agent is expected to bear the burden of proving the contrary.⁶³⁵

(v) Section 332 (5)

S. 332(5) states as follows:

Where an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence, and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporation or apart therefrom, and shall on conviction be personally liable to punishment therefor.

⁶³⁴ Ibid 88.

⁶³⁵ This would be in line with the decision in *S v Coetzee* (note 56) where section 332(5) was successfully challenged for the reverse onus that it created.

Although repealed⁶³⁶ as of 6 March 1997,⁶³⁷ section 332 (5) forms an important part of the development of corporate criminal liability in South Africa. The crux of section 332 (5) is that it provided for the conviction of a director or servant of a corporate body for a crime committed by the corporate body (i.e. other directors / servants) unless he/she could prove that he/she did not take part in the commission of the crime and that he/she could not have prevented it. The director or servant could be prosecuted jointly with the corporation or could be charged and prosecuted in a separate criminal action,⁶³⁸ for the same offence and upon failure by him/her to prove that he/she did not participate in the offence and could not have prevented it, the director or servant could be found guilty of the offence. Section 332 (5) read together with s. 332 (1) is clearly an anomaly as under normal circumstances the onus is on the prosecution to prove that an offence was committed by the accused.

The predecessors of this section are s. 384(5) of the CPEA and s. 381(5) of the CPA 1955. The wording of the proviso has in each statute remained basically the same.⁶³⁹ This provision has operated very harshly on directors / servants who had nothing to do with offences, but were not able to prove that. The fact that the provision imposes a reverse onus⁶⁴⁰ on the accused i.e. the accused is presumed guilty and bears the burden of proving that he did not take part in the commission of the crime and also that he could not have prevented it, is rather problematic as it goes against the premise that an accused ought to be presumed innocent until

⁶³⁶ In *S v Coetzee* the order made by Langa J for the majority was that the provisions of “s. 332 (5) of the Criminal Procedure Act 51 of 1977 are inconsistent with the Republic of South Africa Constitution Act 200 of 1993 and are, with effect from the date of the judgment, invalid and of no force or effect”. (*S v Coetzee* (note 56) 397).

⁶³⁷ Delport (note 87) Appx 11.

⁶³⁸ Bailes (note 507) 25.

⁶³⁹ “The provision has since been part of successive Criminal Procedure Acts in substantially the same form”. (*S v Coetzee* (note 56) 446G).

⁶⁴⁰ Instead of being presumed innocent, the accused is presumed guilty and the accused bears the onus to prove unless he/she is able to prove that s/he did not take part in the commission of the offence, and that s/he could not have prevented it.

proven guilty. The accused could therefore be found guilty despite the fact that there was a reasonable doubt about his guilt.⁶⁴¹ In *S v Coetzee* the majority ruled that section 332 (5) was an infringement of the right to be presumed innocent.⁶⁴² It further found that the infringement was not a justifiable limitation.⁶⁴³

S. 332(5) has many areas of concern. As stated above, the impact it has on a director or servant who is in no way to blame for an offence which has been committed, is too harsh. The provision is worded in such a way that it was inevitable that it would be challenged. It thus comes as no surprise that even prior to being declared unconstitutional, section 332 (5) has been the subject of various court cases. The most important ones will be discussed below:

In *S v Poole*⁶⁴⁴ an individual in charge of a swimming pool was held liable in terms of subsection 5 for culpable homicide after the death of a child in the swimming pool. The child had drowned after being stuck in the outlet of the pool, as it was being drained.⁶⁴⁵ In the court *a quo*, the person in charge of the general maintenance and supervision of the pool, an engineer, was convicted of culpable homicide. This was an appeal against the conviction as an employee of the engineer had been given the specific responsibility of emptying and supervising the draining of the pool. The question here was thus regarding the vicarious liability of a corporate

⁶⁴¹ Borg-Jorgensen & Van der Linde (note 53) 459.

⁶⁴² This provision has been criticized and challenged over the years and finally, in the Constitutional court case of *S v Coetzee* (note 56) the majority of the court found that s.332(5) is unconstitutional⁶⁴² as it, *inter alia*, created a reverse onus.

⁶⁴³ As Snyman states a reverse onus is a direct violation of the presumption of innocence in section 35(3)(h) of the Constitution, hence the Constitutional court's finding that "this violation could not be justified in terms of the limitation clause in section 36(1)". (Snyman (note 22) 255).

⁶⁴⁴ *S v Poole* 1975 (2) All SA 194 (N).

⁶⁴⁵ *Ibid* 195.

body's servant for the negligence of another servant in terms of sec. 381 (1) and (5) of the CPA 1955.⁶⁴⁶

The engineer, who had been convicted as a result of the death of the child, appealed successfully against the finding as it was not him, but his employee who had been negligent. In *S v Poole* it was further held that “the requirement of section 381 (5) of the CPA 1955, realistically construed, required an accused to place objective facts before the court (unless they emerged from other evidence) proving on a balance of probabilities that reasonable steps had been taken to prevent the commission of the offence”.

In *S v Moringer and Others*⁶⁴⁷ there had been a contravention of Exchange Control Regulations. It was argued before the court that only the dealer could be held liable for the offence, not the servant of the dealer.⁶⁴⁸ In applying section 332 (5) the court found that “because of the provision of s. 332(5) of the CPA a servant of the corporation was deemed to be guilty of the offence unless it was proved that he did not take part in commission of the offence”.⁶⁴⁹ The onus is thus on the servant and it would be on a balance of probabilities.⁶⁵⁰ It is submitted that this is still a heavy burden of proof, regardless of the fact that it is on a balance of probabilities because it has the effect of ensuring the conviction of a person who finds himself in this position merely as a result of the office he holds within the corporation.

⁶⁴⁶ “Finally, the provisions of sub-sec. (5) of sec. 381 are invoked to hold the appellant vicariously liable for the offence committed - or more accurately, deemed to have been committed - by the corporate body. Thus, by the application of the provisions of the two subsections, the appellant, being a servant of the corporate body, is liable for an independent act of negligence on the part of another one of its servants (Amos) unless appellant proves “that he did not take part in the commission of the offence and that he could not have prevented it”. (Ibid 204).

⁶⁴⁷ *S v Moringer and Others* 1992 (4) SA 452 (W).

⁶⁴⁸ Ibid 476H.

⁶⁴⁹ Ibid 454G.

⁶⁵⁰ In *Herold, N.O. v Johannesburg City Council* which was decided based on the earlier provision which was similarly worded it was stated that “the onus was upon the appellant to prove upon a preponderance of probability that he did not take part in the commission of the offence and that he could not have prevented it”. (*Herold, N.O. v Johannesburg City Council* (note 597) 1257).

The effect of s. 332 (5) is that where an innocent director or servant is unable to prove that he did not take part in the commission of the offence and that he could not have done anything to prevent it, such director or servant would be found guilty without further ado.

*R v Limbada*⁶⁵¹ dealt with a challenge against s. 381 (7) of the CPA 1955 which, similarly, deemed an accused, to be guilty of an offence committed by another, if he could not prove that he had no part in that offence and could not have prevented it. Delpont emphasizes the fact that “Section 332(5) does not create a new offence: it merely deems a director or servant to be guilty of an offence for the commission of which the corporate body is or was liable to prosecution unless he proves the facts envisaged as constituting the defence”.⁶⁵²

Steyn JA in *R v Limbada* states that

what it does is to deem an accused in the circumstances described therein, to be guilty of an offence committed by another, if he does not prove that he had no part in that offence and could not have prevented it. In the circumstances so described it casts an onus of proof upon the accused and in effect directs the Court to find him guilty if he does not discharge that onus.⁶⁵³

Both *Moringer* and *Limbada* show that the onus is placed on the accused, and the accused's failure to discharge it results in a conviction.

⁶⁵¹ *R v Limbada* [1958] 2 All SA 493 (A).

⁶⁵² Delpont (note 87) Appx 12. This was stated by Steyn JA in *Limbada* (note 651) 486, with reference to the predecessor of section 332(7), section 381(7) of the CPA 1955.

⁶⁵³ *R v Limbada* (note 651) 496.

*S v Klopper*⁶⁵⁴ was an appeal against the conviction of a director of a company based on section 381 (5) of the CPA 1955. It was argued that the accused had not been aware of the commission of fraud. Even though the accused's ignorance had been caused by his failure to act with reasonable care, the director was successful with the appeal. The court applied a subjective test⁶⁵⁵ and came to the conclusion that the accused need not be held liable if he successfully proves that he had no knowledge of the commission of the crime. This is in spite of the fact that his/her failure to become aware of the offence, was in itself negligent.⁶⁵⁶ Kahn states that

“the test is a subjective one: actual ignorance of the offence carries with it nonparticipation in the offence and inability to prevent it. (Ignorance flowing from deliberate abstention from making inquiries will, however, probably not avail the accused.) For the prosecution to establish that he had been negligent in not knowing of the commission of the offence will not, on its own be sufficient for conviction...”⁶⁵⁷

The finding in *Klopper* resulted in the onus in section 381 (5) of the CPA 1955 being somewhat reduced and it is submitted that Kahn's view that the court's interpretation of this subsection in *Klopper* “provides an escape hatch”⁶⁵⁸ is correct. This is because simply not having knowledge of the commission of the crime will absolve the accused director or servant from liability, in spite of his negligence in not knowing about it. *Klopper* was a half victory for directors and servants, however the continued existence of subsection 5 resulted in the further infringement of the right of the directors or servants not to be presumed guilty.

(aa) *S v Coetzee*⁶⁵⁹ and the reverse onus

⁶⁵⁴ *S v Klopper* 1975 (4) SA 773 (A).

⁶⁵⁵ Du Toit (note 514) 33-7.

⁶⁵⁶ “For the Appellate Division of the Supreme Court held in *S v Klopper* that so long as the accused can prove that he did not know of the commission of the crime, however negligent he was in not knowing of it, he gets out”. (Kahn (note 493) 176).

⁶⁵⁷ Ibid 176.

⁶⁵⁸ Ibid.

⁶⁵⁹ *S v Coetzee* (note 56).

The coming into existence of the Constitution has inevitably led to many conflicts between certain provisions that existed prior to the Constitution and the Constitution itself. Langa J suggests that the legislature should be the one to make the necessary amendments to ensure that the provisions are in line with the Constitution.⁶⁶⁰ The reality though is that the courts are often faced with disputes regarding provisions which are in direct conflict with Constitutional provisions. With specific regard to corporate criminal liability this became evident in the important case of *S v Coetzee*.⁶⁶¹

S v Coetzee was a Constitutional Court case that dealt with, *inter alia*, the question whether section 332 (5) of the CPA was constitutional. *In casu* the section was challenged in the Constitutional Court because it contravened the constitutional right to be presumed innocent, section 25 (3) (c).⁶⁶² The applicants were facing charges of fraud etc., in the Witwatersrand Local Division and they made a request to challenge the constitutionality of two sections of the CPA, one of which was section 332 (5). The trial of the accused was thus suspended to enable them to challenge the said provisions.⁶⁶³

Although the provision was found to be unconstitutional and declared invalid this was not a unanimous decision and in passing judgment the judges made important observations and statements.

⁶⁶⁰ “Important provisions of old legislation, and in particular the (Criminal Procedure) Act, are being struck down because they are inconsistent with the Constitution, leaving gaps in the law which only the Legislature can fill. It is primarily the task of the Legislature, and not the courts to bring old legislation into line with the Constitution”. (*S v Coetzee* (note 56) 442 I).

⁶⁶¹ *Ibid*.

⁶⁶² *Ibid* 447 D-E. This refers to section 25(3) (c) of the Interim Constitution (note 31).

⁶⁶³ *S v Coetzee* (note 56) 443B.

The Constitutional Court was faced with the question whether the constitutionally entrenched fundamental right to be presumed innocent until proven guilty⁶⁶⁴ was infringed or not infringed by section 332(5) of the CPA. As stated above, section 332(5) allowed for a presumption of guilt to be made against a servant or director of the corporation that has committed a crime. In terms of the presumption, a director of a corporation that has committed a crime is deemed guilty of that crime. For the director to be exonerated, he or she is required to provide proof, on a balance of probabilities, that he or she did not take part in the offence and that he or she could not have done anything to prevent the crime from being committed. One of the arguments against subsection 5 was its violation of the constitutionally guaranteed right to be presumed innocent. The presumption made it possible for a director / servant to be found guilty, without the establishment of the guilt. It was therefore possible to have a conviction in spite of the existence of reasonable doubt that the director / servant is indeed guilty.⁶⁶⁵

Langa J delivered the majority judgment. He begins by pointing out the fact that the Constitutional Court constantly finds itself having to bring provisions of certain legislation, which have been carried over from the previous regime, in line with the Constitution.⁶⁶⁶ He emphasizes the fact that this is actually the job of the Legislature, however, it is the judiciary that ends up having to do it as the prosecution tends to rely on these provisions, which infringe upon other peoples' fundamental rights.⁶⁶⁷ An important remark made by Langa J is the fact that despite its relevance, the CPA is actually a product of "a different constitutional era in

⁶⁶⁴ The Constitution (note 27) section 25(3) (c).

⁶⁶⁵ *S v Coetzee* (note 56) 445D.

⁶⁶⁶ *Ibid* 442G.

⁶⁶⁷ *Ibid*.

which the legal validity of its provisions could not be questioned”.⁶⁶⁸ This statement is supported by the fact that in the previous cases discussed above, where section 332(5) was at issue, the courts were clearly reluctant to challenge its validity and felt duty bound to enforce it as it was.

Langa J proceeds to provide an examination of section 332 (5).⁶⁶⁹ His starting point is the origin of the subsection, which is section 384 (5) of the CPEA. He mentions the subsequent statutes in which the provision appears virtually in its original form until it became known as section 332 (5) of the Criminal Procedure Act. He then explains the basis on which the subsection is being challenged – that is the “reverse onus” which it places on the accused.⁶⁷⁰

Langa J looks at the argument that the reverse onus in section 332(5) was, in practice, a justifiable limitation,⁶⁷¹ as the prosecution still bore the onus of proving that the accused was aware of the commission of the crime. He points out that the section does not place the onus of proof on the prosecution.⁶⁷² He then explains that the ‘plain meaning’⁶⁷³ of section 332(5) is that it provides for the conviction of a person who was a director or servant at the time of the commission of the crime, as soon as the prosecution proves that a crime has been

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid 446G and 447A, B and C.

⁶⁷⁰ “It was argued that the *onus* cast upon the accused relates to an essential element of the offence created by the section and that the reversal of the *onus* meant that the accused could be convicted despite the existence of a reasonable doubt with regard to his or her guilt. This reverse *onus* was therefore said to violate the right to be presumed innocent as enshrined in s. 25 (3) (c) of the Constitution as well as the ‘cluster of rights associated with it’”. (Ibid 447D and E).

⁶⁷¹ Ibid 448A.

⁶⁷² Ibid 448B.

⁶⁷³ “the plain meaning of the words is that once the prosecution proves that an offence has been committed by a corporate body of which the accused was a director or servant at the time of commission, the latter can escape conviction only by proving that he or she did not take part in and could also not have prevented the commission of the offence”. (Ibid 448B and C).

committed by a corporate body. In order to escape being convicted such director or servant is obliged to prove that he or she did not take part in the offence and could not have done anything to prevent it. He refers to the cases relied on by the government to support its contention⁶⁷⁴ and states that in those cases the plain meaning was found to be the same as he had stated it. He goes on to clarify the meaning of the relevant passages in those cases and concludes that the cases that the Government relied on did not provide any support for its contention.⁶⁷⁵

With regard to the extension of liability to include both directors and servants, all the justices were in agreement and did not support the extension of liability to servants.⁶⁷⁶ Langa J then continued on the premise that the inclusion of ‘servant’ to the subsection is not justifiable⁶⁷⁷ and in the rest of the judgment he dealt with its reference to directors.

In dealing with the question of the constitutionality of the reverse onus, Langa J examines previous cases of the Constitutional Court and mentions the fact that the “Court has left open the question of the effect which a provision, which requires the accused to prove an exemption, exception or defence, has on the presumption of innocence”.⁶⁷⁸

As the applicants and the Government relied heavily on Canadian decisions, Langa J looks at how Canadian courts have dealt with the question of the constitutionality of a reverse onus. He begins by providing an extract of the Canadian Charter of Rights and Freedoms which provides for a presumption of the innocence of an accused person is guilty.⁶⁷⁹ He then examines the

⁶⁷⁴ These included *Limbada* (note 651) and *Klopper* (note 654).

⁶⁷⁵ *S v Coetzee* (note 56) 449B.

⁶⁷⁶ *Ibid* 449H.

⁶⁷⁷ *Ibid* 449H.

⁶⁷⁸ *Ibid* 451A and B.

⁶⁷⁹ Section 11(d) of the Canadian Charter of Rights and Freedoms which states that:

“11. Any person charged with an offence has the right. . .

decisions referred to *in casu* in defence of the reverse onus and points out the fact that the provisions referred to in those cases, “did not impose a reverse onus and that there was no danger that the accused could be convicted despite the existence of a reasonable doubt”.⁶⁸⁰ He concludes that section 332(5) is an infringement of the constitutional right to be presumed innocent particularly because it “involves elements which have to be proved by the accused and which form the substance of the offence”.⁶⁸¹ He mentions the fact that section 332(5) places a burden on the accused to “prove an element which is relevant to the verdict”⁶⁸² and goes on to explain that section 332(5) does provide a reverse onus by requiring the accused to prove that he or she did not take part in the offence and could not have prevented it, failing which, the accused will be convicted, even if there is reasonable doubt regarding that.⁶⁸³ In finding section 332 (5) to be unconstitutional he states that “the objection which is fundamental to the reversal of onus in this case is that the provision offends against the principle of a fair trial which requires that the prosecution establish its case without assistance from the accused”.⁶⁸⁴

Langa J refers to the Government’s argument that section 332(5) is a regulatory provision, therefore it does not infringe upon the presumption of innocence. Here, Langa J takes into account cases in foreign jurisdictions where courts had to distinguish between “truly criminal” and “regulatory” offences and comes to the conclusion that regardless of the category of a crime, where a reverse onus provision has the effect that an accused may be convicted even though there is reasonable doubt of guilt or innocence, the presumption of innocence is

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. *S v Coetzee* (note 56) 451G.

⁶⁸⁰ Ibid 454A.

⁶⁸¹ Ibid 454B.

⁶⁸² Ibid.

⁶⁸³ Ibid 454E.

⁶⁸⁴ Ibid 454F and G.

infringed upon.⁶⁸⁵ In this regard he quotes La Forest J in *Wholesale Travel Group Inc*⁶⁸⁶ in which he states that "...what is ultimately important are not labels (though they are undoubtedly useful), but the values at stake in the particular context".⁶⁸⁷

Having pointed out what the section means, Langa J states that section 332 (5) is not aimed at creating liability without fault on the part of the accused,⁶⁸⁸ but rather at ensuring the conviction of directors who take part in the commission of crimes or who are in a position to prevent the commission of a crime, but fail to do so.⁶⁸⁹ For that reason, fault is an important element of section 332 (5) and it has to be proven.⁶⁹⁰ Langa goes on to state that

"what causes the provision to fall foul of the presumption of innocence here is the effect of merely changing the form of the provision to require the accused, rather than the prosecution, to prove elements which are essential to his or her guilt or innocence. There is manifest unfairness where the legislature, having created an offence potentially entailing very grave penalties, goes on to subvert an important constitutionally protected right by requiring crucial elements of the offence to be proved or disproved by the accused on pain of conviction should the onus not be discharged".⁶⁹¹

With regard to whether the infringement of the presumption of innocence by section 332(5) is a justifiable limitation in terms of section 33(1) of the interim Constitution, he acknowledges

⁶⁸⁵ Ibid 455H.

⁶⁸⁶ *Wholesale Travel Group Inc* 342 US 246, 254-256 (1952).

⁶⁸⁷ *S v Coetzee* (note 56) 455I to 456A.

⁶⁸⁸ Ibid 456C.

⁶⁸⁹ Ibid 456C and D.

⁶⁹⁰ Ibid 456D.

⁶⁹¹ Ibid 456G and H.

the need to protect the society and corporations from directors who fail to prevent the commission of crimes. However, this could be done without making use of the reverse onus. He then goes on to suggest alternative measures which can be employed in order to fulfil the objectives of section 332 (5) without having to impose a reverse onus.⁶⁹²

In a nutshell the majority judgment was that section 332(5) was unconstitutional and that severance was not the solution,⁶⁹³ as was recommended by O'Regan J. According to O'Regan J there are good parts of section 332(5) and the best solution is to save the provision by severing that which is bad, while maintaining that which is good.⁶⁹⁴ She recommends curing the provision by deleting the word 'servant' and the phrase 'it is proved that he did not take part in the commission of the offence and that'.⁶⁹⁵

In her judgment Mokgoro J agrees with O'Regan J with regard to severance as a way of curing or fixing section 332(5).⁶⁹⁶ She also points out that in spite of her concerns about what she

⁶⁹² "I can see no reason, however, why the State could not, for example, impose appropriate statutory duties on directors and other persons associated with the corporate body, aimed at ensuring that its affairs are honestly conducted and that it is itself protected against dishonest conduct. This could be done in a variety of ways by means of appropriate legislative provisions which might, for instance, impose the duties of disclosure and reporting on the corporate body, its directors, servants and other persons involved with its affairs. There has been no suggestion that such measures, enforced through appropriate sanctions, could not accomplish as effectively the ends sought to be achieved by s 332(5) of the Act. It has further not been contended that such objectives could not be achieved without placing an onus on the accused to prove any aspect of his or her innocence in a criminal prosecution for a breach of such duty. I am accordingly not persuaded that the reverse onus provisions in s 332(5) are necessary". (*S v Coetzee* (note 56) 457H and I to 458A).

⁶⁹³ Langa J, Chaskalson P, Mahomed DP, Kriegler J, Sachs J, Ackermann J and Didcott J.

⁶⁹⁴ *S v Coetzee* (note 56) 516.

⁶⁹⁵ *Ibid* 516.

⁶⁹⁶ "As regards the order in this case, I concur with O'Regan J that severance of certain words from section 332 (5), so that the legal burden of proof is removed from the accused, is an appropriate remedy in this case". (*Ibid* 497 C).

refers to as “the dangers of corporate activity”,⁶⁹⁷ the infringement of the presumption of innocence is not justifiable.

In his minority judgment Madala J did not find section 332(5) to be unconstitutional.⁶⁹⁸ He acknowledges the importance of the presumption of innocence but states that it is not an absolute right.⁶⁹⁹ Sachs J concurred with the majority but also gave a separate judgment in which he raises various issues, including the history behind the coming into being of section 332(5). He explains the fact that there was a feeling that a mere fine as punishment for corporations that committed crimes was not an adequate way of dealing with such crimes.⁷⁰⁰ There was a need to punish the individuals within the company, as it was through them that companies committed crimes.⁷⁰¹

It is submitted that the judgments in *Coetzee* provide a clearer understanding of the intended purpose of section 332 (5). They also highlight the harshness of its operation, particularly on innocent directors who fail to provide the required proof. In coming to their judgments, the judges take into account foreign law on similar matters and also look at how the Constitutional Court has dealt with the presumption of innocence on previous occasions. It is clear that the

⁶⁹⁷ Ibid 497 A.

⁶⁹⁸ He states that “the mere fact that a section provides that an accused person may be convicted in circumstances in which there is a reasonable doubt is not in itself a sufficient reason for regarding such sections as unconstitutional. There may be circumstances in which the reverse onus provision is necessary and justifiable”. (Ibid 491H).

⁶⁹⁹ “I have no doubt in my mind that the presumption of innocence is a fundamental right which plays a pivotal role in our criminal justice system. However, in my view, like all other rights and freedoms guaranteed by the Constitution, this right is not absolute, but that its value and weight will differ according to a variety of factors and circumstances against which it is pitted on the scales”. (Ibid 493H-I).

⁷⁰⁰ Ibid 516D-F.

⁷⁰¹ Sachs notes that “as the eyes, ears and spokesperson of the corporation...it would not be unreasonable to hold them personally to account for the misdeeds of those obliged to do their bidding, provided that this was done by penalizing them for culpable lack of concern for keeping the company on the straight and narrow, rather than by attributing equal guilt when such could not be proven in the ordinary way”. (Ibid 518A-B).

judgment was not lightly taken and in making the final ruling, the judges took into account various factors in balancing the competing rights.

It is important to note that section 332 (5) had been inherited from a pre-Constitution era when the legislature made laws and such laws could not be freely challenged. The time and the context of the promulgation of the CPA are important as it was prior to the existence of the Constitution in South Africa. In his judgment Langa J makes this important observation and draws our attention to the fact that the section came into being at a time when there was no Constitution in South Africa.⁷⁰² This also explains why a section of this nature managed to last as long as it did, as part of our law.

In conclusion, the implications as well as the effect of section 332 (5) and its predecessors operated in such a way that innocent directors, who were not aware that their colleagues were committing offences, were held criminally liable despite their innocence, if they were unable to disprove the presumption of guilt against them. Even if *Coetzee* had not challenged this section it is submitted that it would have been challenged by another aggrieved director or servant and subsequently declared unconstitutional. The common law position is applicable and it allows for a director to be held liable for the corporations' crimes provided that that specific director satisfies the requirements for the common-law offence of being an accomplice.⁷⁰³

⁷⁰² “The Act plays a crucial role in the criminal justice system of this country; it is nonetheless legislation which was drafted and enacted in a different constitutional era in which the legal validity of its provisions could not be questioned”. (*S v Coetzee* (note 56) 442G).

⁷⁰³ “The judgment was given on 6 March 1997 but no amendment has been forthcoming. Presumably the government accepts that the liability of directors and employees for offences of their companies is determined in accordance with the common-law principles of vicarious liability”. (Kruger (note 337) 33-7). “In my view there would be a duty on the director to act to prevent the commission of acts which would render the company to

(bb) The Constitutional Court and its antipathy towards the reverse onus

S v Coetzee is just one of many cases in which the Constitutional Court has shown that provisions which allow for a reverse onus have no room in South African law. In the discussion below it is shown how the Constitutional Court has demonstrated its strong aversion against reverse onus provisions. In *S v Zuma and Others*⁷⁰⁴ the court found that the reverse onus created by section 217(b)(ii) of the CPA was invalid.⁷⁰⁵ Kentridge JA stated that the reverse onus “seriously compromised and undermined”⁷⁰⁶ the rights in question. These are “the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself”.⁷⁰⁷

In *S v Bhulwana; S v Gwadiso*⁷⁰⁸ the Constitutional Court declared section Section 21(1)(a)(i) of Drugs and Drug Trafficking Act⁷⁰⁹ unconstitutional because of its reverse onus. In finding the reverse onus provision inconsistent with the constitution and therefore invalid, O’Regan J pointed out that “there is a risk that a person may be convicted of dealing in dagga despite the existence of a reasonable doubt as to his or her guilt”.⁷¹⁰ Indeed a conviction when there is reasonable doubt regarding the guilt of the accused should be avoided at all costs as it goes against the basic principle of the prosecution’s duty to provide proof of guilt beyond reasonable doubt in a criminal case.

criminal prosecution and his intentional failure to prevent the commission of these acts, if he were in a position to do so, would render him criminally liable as a socius criminis”. (Ackermann J in *S v Coetzee* (note 56) 464B). See also Burchell (note 195) 478 – 479.

⁷⁰⁴ *S v Zuma and Others* 1995 (4) BCLR 401 (CC).

⁷⁰⁵ “Accordingly section 217(b)(ii) does not meet the criteria laid down in section 33(1) of the Constitution. It is inconsistent with the Constitution and in terms of section 98(5) of the Constitution it must be declared invalid”. (Ibid para 39).

⁷⁰⁶ Ibid para 33.

⁷⁰⁷ Ibid.

⁷⁰⁸ *S v Bhulwana; S v Gwadiso* [1996] 1 All SA 11 (CC).

⁷⁰⁹ Section 21(1)(a)(i) of Drugs and Drug Trafficking Act 140 of 1992.

⁷¹⁰ *S v Bhulwana; S v Gwadiso* (note 708) para 30.

In *S v Mbatha; S v Prinsloo*⁷¹¹ section 40(1) of the Arms and Ammunition Act, 1969⁷¹² was challenged for creating a reverse onus through its presumption of possession which arose from the mere fact that the item had at a certain time been on the premises. Langa J found that the provision infringed upon the right to be presumed innocent and mentioned that “it would be undesirable for the courts to continue applying a provision which is not only manifestly unconstitutional, but which also results in grave consequences for potentially innocent persons in view of the serious penalties prescribed”.⁷¹³

Another provision of the Drugs and Drug Trafficking Act was successfully challenged in *S v Julies*.⁷¹⁴ This was section 21(1)(a)(iii) which provided for a reverse onus by means of a presumption of dealing if there is proof that the accused had been in possession of “undesirable dependence-producing substance other than dagga”.⁷¹⁵ The provision was also found to be inconsistent with the Constitution and declared invalid⁷¹⁶ by the Constitutional Court. In this case the decision in *S v Bhulwana*,⁷¹⁷ in which section 21(1)(a)(i) of the same act had been declared unconstitutional by the Constitutional Court was one of the cases that the judge cited.

⁷¹¹ *S v Mbatha; S v Prinsloo* 1996 (3) BCLR 293 (CC).

⁷¹² Arms and Ammunition Act 75 of 1969.

⁷¹³ *S v Mbatha; S v Prinsloo* (note 711) para 30.

⁷¹⁴ *S v Julies* 1996 (7) BCLR 899 (CC).

⁷¹⁵ Ibid 899.

⁷¹⁶ Kriegler stated that “Die bepalings van a 21(1)(a)(iii) van die Wet op Dwelmmiddels en Dwelmsmokkalary Nr 140 van 1992 is onbestaanbaar met die tussentydse Grondwet van die Republiek van Suid-Afrika No 200 van 1993 en word met ingang van die datum van hierdie uitspraak ongeldig en kragteloos verklaar“. (Ibid para 5).

⁷¹⁷ *S v Bhulwana; S v Gwadiso* (note 708).

Section 20 of the Drugs and Drug Trafficking Act⁷¹⁸ also contained a presumption of guilt⁷¹⁹ and was challenged in *S v Mello and Another*.⁷²⁰ The Constitutional Court found that section 20 takes away the prosecution's burden of proving an "essential element"⁷²¹ of the offence. Mokgoro J referred to *S v Mbatha; S v Prinsloo*⁷²² and averred that just like "the presumption embodied in section 40(1) of the Arms Act, the effect of the presumption in section 20 of the Act is that it shifts the onus to the accused to prove his or her innocence".⁷²³ The shifting of the onus to the accused while in South African law all accused are presumed innocent until proven guilty by the prosecution does give rise to an unsatisfactory state of affairs.

In *Van Nell and Another v S*⁷²⁴ the Constitutional Court referred the challenge against the same section (Section 20 of the Drugs and Drug Trafficking Act) back to the lower court to make a ruling in accordance with the ruling in *S v Mello and Another*.⁷²⁵ *S v Mello and Another* had been decided by the Constitutional Court earlier during the same day that *Van Nell and Another v S* was heard by the same court.

The above are just a few examples of the many cases where the Constitutional Court has ruled that a provision containing a reverse onus is inconsistent with the South African Constitution and is therefore invalid. These examples are a clear indication that a provision which allows for a reverse onus, particularly in circumstances where this would lead to the possible

⁷¹⁸ Drugs and Drug Trafficking Act (note 709).

⁷¹⁹ Presumption relating to possession of drugs. – If in the prosecution of any person for an offence under this Act it is proved that any drug was found in the immediate vicinity of the accused, it shall be presumed, until the contrary is proved, that the accused was found in possession of such drug."

⁷²⁰ *S v Mello and Another* 1998 (7) BCLR 908 (CC).

⁷²¹ *Ibid* para 5.

⁷²² *S v Mbatha; S v Prinsloo* (note 711).

⁷²³ *S v Mello and Another* (note 720) para 5.

⁷²⁴ *Van Nell and Another v S* [1998] JOL 2378 (CC).

⁷²⁵ *S v Mello and Another* (note 720).

conviction of an accused when there is a reasonable doubt regarding the guilt of the accused is highly unlikely to stand a constitutional challenge in the Constitutional Court. It is therefore crucial to ensure that, in reforming the law pertaining to corporate criminal liability and corporate homicide, provisions that allow for a reverse onus as well as provisions that may have the effect of allowing for a conviction even though there is a reasonable doubt as to the guilt of the accused are totally eliminated.

(vi) Section 332 (6)

Section 332 (6) deals with the evidence that is admissible in criminal proceedings against the director / servant. It specifically allows for the use of evidence that was either admissible or would have been admissible in the prosecution of the corporation, to be admissible against the director or servant. The subsection further states that in criminal proceedings against the servant or director

“Whether or not such corporate body is or was liable to prosecution for the said offence, any document, memorandum, book or record which was drawn up, entered up or kept in the ordinary course of business of that corporate body or which was at any time in the custody or under the control of any director, servant or agent shall be prima facie proof of its contents and admissible in evidence against the accused, unless he is able to prove that at all material times he had no knowledge of the said document, memorandum, book or record, in so far as its contents are relevant to the offence charged, and was in no way party to the drawing up of such document or memorandum or the making of any relevant entries in such book or record”.⁷²⁶

⁷²⁶ Section 332(6)(b).

In terms of the judgment in *S v Harper & Another*⁷²⁷ a document containing summaries of the company's affairs as well as computer printouts that had been made by servants of the company, who had done so under the supervision of the company's director were admissible evidence.

(vii) Section 332 (7)

Another section that may not withstand Constitutional scrutiny is section 332(7) of the CPA. This section operates in the same manner as the repealed section 332 (5). In terms of section 332 (7):

“When a member of an association of persons, other than a corporate body, has, in carrying on the business affairs of that association or in furthering or endeavouring to further its interests, committed an offence, whether by the performance of any act, any person who was, at the time of the commission of the offence, a member of that association, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it: Provided that if the business or affairs of the association are governed or controlled by a committee or other similar governing body, the provisions of this sub-section shall not apply to any person who was not at the time of the commission of the offence a member of that committee or other body”.⁷²⁸

It is a fact that crimes may be committed in furthering or endeavouring to further interests of associations that do not have juristic personality, and when that happens, someone must be held accountable. Section 332 (7) thus provides that any person who was a member of an

⁷²⁷ *S v Harper & Another* (note 633).

⁷²⁸ The CPA (note 16) section 332(7).

association of persons (an association does not have juristic personality) when a crime was committed by the ‘association’, will be convicted of that crime, in the same way as was prescribed by section 332(5). This will be the case unless such person discharges the onus of proving that he or she did not take part in the commission of the offence and that he or she could not have prevented it. According to *R v Levy and Others*⁷²⁹ partnerships fall under the ambit of section 332(7).⁷³⁰

As can be seen from the previous paragraph, section 332(7) provides for a reverse onus, in the same way as the now, invalidated section 332(5). In *R v Kekane and Others* the accused persons were convicted as the court concluded that they had not succeeded in discharging the onus of proving that they had not taken part in the offence and that they could not have reasonably prevented it.⁷³¹ In *S v Klopper* the court found that in terms of subsection 5 and 7 of the then section 381 of the Criminal Procedure Act a subjective test is used to determine liability.⁷³²

In enacting section 332 (7), the legislature was, however, more sympathetic to a member of an association of persons than it was to a director of a corporation. The section contains a proviso that if the corporation was governed by a committee or governing body, if that member was not a member of that committee or governing body at the time of the commission

⁷²⁹ *R v Levy and Others* (note 375).

⁷³⁰ “When, therefore, a partner commits a criminal act in furtherance of the interests of the partnership each member of the partnership who is in the Union, becomes liable, in proceedings against the partnership, to be charged with the offence and to be punished for it unless he proves that he was in no way a party thereto”. (Ibid 312).

⁷³¹ *R v Kekane and Others* 1955 (4) SA 773 (A).

⁷³² “Sub-section 5 (and also sub-section (7)) of section 381 does not lend support to an argument that only an objective interpretation would give meaning to the second proviso – even a subjective interpretation establishes criminal liability which did not exist under the common law”. (*S v Klopper* (note 654) 774).

of the crime, he would escape liability. It is understandable where there is a governing body, for a person who was a member thereof to be held criminally liable. The governing body is, after all, the decision-making body of the association and a member of such a body who claims to be unaware of the fact that a crime was being committed is punished for his/her negligence. Although it is possible that the proviso in this section has kept the section from being constitutionally challenged, it has been pointed out that the proviso

“contains only exempting provisions, i.e. it exempts from the deeming (main) provisions of the subsection, if the business or affairs of the association are governed or controlled by a committee or other similar governing body, any member of the association who was not a member of such committee or other body at the time of the commission of the offence”⁷³³

In *S v Ismail and Others* it was held that a ‘regional command’ could not be equated with a committee or a governing body as the regional command had appointed itself and was neither known to nor approved by some members.⁷³⁴ In *S v Ismail* it was further held that where an association has been formed for an unlawful purpose, members of such an association will be held liable under section 332(7).⁷³⁵ In making this pronouncement Milne, J stated that the accused only had himself to blame for becoming a member of an association that had been

⁷³³ Delpont *et al* (note 87) Appx 13 – 14.

⁷³⁴ “The regional command was in no way representative of the members, nor were they leaders which the members had appointed or approved or in some cases even knew of. I take the view, then, that sec. 381(7) does not apply”. (*S v Ismail and Others* (note 581) 459).

⁷³⁵ “It would be anomalous, indeed, if it were held that members of a lawful association could be made liable under this sub-section in the absence of proof of non-participation and inability to prevent the crime though committed by another and that members of an association formed for unlawful purposes should be better off. The fact that the burden of showing that he could not have prevented the crime would be virtually impossible to discharge is not a sufficient reason for holding that the subsection does not apply to unlawful organizations”. (Ibid).

formed with the aim of committing criminal acts.⁷³⁶

It is interesting that this section forms part of section 332 which deals with the criminal liability of corporations (juristic persons) when an association of persons lacks legal personality. Although this has been the case since the first statutory provision regulating corporate criminal liability in South Africa came into being, one would expect a separate provision for individuals within entities lacking juristic personality.

The criticism against section 332 (7) is that the presumption of innocence is infringed. It is also submitted that the legislature, has gone too far with its presumptive clauses within the section. In *R v Limbada*⁷³⁷ one of the appellants was given a suspended sentence mainly due to the fact that “her guilt arises from the provisions of section 381 (7) and is presumptive rather than positively established”.⁷³⁸ It is submitted that Snyman’s averment that, given the decision in *S v Coetzee*, it is doubtful that the provisions of section 332 (7) are consistent with the Constitution,⁷³⁹ is correct.

(viii) Section 332 (8) and section 332 (9)

Section 332 (8) and section 332 (9) operate in the same manner as section 332(3) and section 332 (4) respectively.⁷⁴⁰ Subsection 8 deals with the admissibility of documents that are presented as evidence when members of associations are being prosecuted. In terms of

⁷³⁶ Ibid 458.

⁷³⁷ *R v Limbada & Another* (note 651).

⁷³⁸ Ibid.

⁷³⁹ Snyman (note 22) 256.

⁷⁴⁰ See discussions on section 332(3) and on section 332(4) above.

subsection 9 records or documents made or kept by a member, servant or agent of an association are presumed to have been kept or made in the scope of the activities of the member, servant or agent of the association. *S v Harper*, which allows for the admissibility of computer printouts, is also the leading case here.⁷⁴¹

(ix) Section 332 (10)

Section 332 (10) provides us with the meaning of the word ‘director’ as used in section 332. According to section 332 (10) the word ‘director’ refers to “any person who controls or governs a corporate body or who is a member of a body or group of persons which controls or governs a corporate body or where there is no such body or group of persons, who is a member of the corporate body.”

The meaning of the word director as provided in this section is open to broad interpretation as any person who controls or governs the corporation may be regarded as a director, without taking into account how the person gets the powers to control or govern.⁷⁴² The effect is that a person who at the time of the commission of the offence controlled or governed the corporate body will be regarded as a director⁷⁴³ and will be held criminally liable in terms of section 332 of the CPA.

In *R v Mall and Others*⁷⁴⁴ it was stated that the subsection is clear and its plain language is

⁷⁴¹ *S v Harper and Another* (note 633).

⁷⁴² “The word director has an extended meaning and connotes any person who governs or controls the company”. (Du Toit (note 514) 33-7).

⁷⁴³ *Ibid.*

⁷⁴⁴ *R v Mall and Others* 1959 (4) SA 607 (N).

applicable to any person who controls or governs the corporation.⁷⁴⁵ Such person does not have to be legally granted the authority to control or govern the corporation.⁷⁴⁶ Caney, J., in *Mall*'s case further states that

“...any outsider who usurps the functions of a director, by taking part in controlling the acts of a company, would bring himself within the scope of the criminal responsibility placed upon a director by sub-sec. (10) of sec. 381 of the Code. In my opinion the accused more than merely usurped the function of a director of the three companies. He was tacitly accepted by the boards of directors of the companies as the person who in fact controlled or at least predominantly influenced the conduct of the affairs of the companies and I have no doubt that the control and governance envisaged by the sub-section was exercised by the accused”.⁷⁴⁷

In *S v Marks*⁷⁴⁸ Hill J approves of and cites the decision in *R v Mall and Others*.⁷⁴⁹ He also states that “the connotation of the words “control” and “govern”, as used in the definition of “director” in sub-section (10) of Act 56 of 1955, is wide enough to include the control of the company in any of its activities.”⁷⁵⁰

Where the Companies Act or any other Act imposes criminal liability on a director, the definition of director in section 332(10) is not applicable. In *S v De Jager & Another*⁷⁵¹ an appeal against the conviction of company directors for theft was heard. According to the facts, two of the directors had resigned from their positions. The court, however, established that

⁷⁴⁵ Ibid 607.

⁷⁴⁶ Ibid.

⁷⁴⁷ Ibid.

⁷⁴⁸ *S v Marks* 1965 (3) SA 834 (W), 843.

⁷⁴⁹ *R v Mall and Others* (note 744).

⁷⁵⁰ *S v Marks* (note 748) 834.

⁷⁵¹ *S v De Jager & Another* 1965 (2) SA 616 (A).

these were purported resignations as they “continued to control the position of directors and fell within the definition of ‘director’ in section 229 of the Companies Act”.⁷⁵² The two company directors whose resignations were ostensible, were for that reason, regarded by the court as directors. Another important point from De Jager, is the fact that where a person was purported to be a director when he in fact was not, the court said such a person can be ignored “because it is common cause that despite the minutes, he was never a director”.⁷⁵³

It is stressed in *S v Van den Berg & Others*⁷⁵⁴ that the meaning of the term director as envisaged by section 332(10) is only limited to the application of section 332. Where other statutes refer to the term director, the meaning cannot be regarded as the one stated in subsection 10.⁷⁵⁵ In *S v Van den Berg & Others*⁷⁵⁶ three individuals were charged with fraud, theft and contravening section 90Bis of the Companies Act.⁷⁵⁷ Of the three only one was a ‘duly appointed’⁷⁵⁸ director and the contravention that they were accused of could only be committed by directors.⁷⁵⁹ It was held that the definition of director that is found in section 332(10) is not applicable to offences created by the Companies Act.⁷⁶⁰ Hefer J in making this judgment states that

“There are, in my view, very clear indications that the Legislature never intended to recognize persons as directors who are not appointed to that position, whether, it be for the purpose of according them the powers and authority which directors are entitled to exercise, or for the

⁷⁵² Ibid 623.

⁷⁵³ Ibid.

⁷⁵⁴ *S v Van den Berg & Others* 1979 (1) SA 208 (D); [1979] 3 All SA 133 (D) 140 .

⁷⁵⁵ With reference to the Companies Act, Hefer, J states that “It follows that when a penal provision in the Act imposes criminal liability on directors, only those who qualify as directors in terms of the Act’s own definition can commit the offence in question”. (Ibid 140).

⁷⁵⁶ Ibid.

⁷⁵⁷ The Companies Act 46 of 1926.

⁷⁵⁸ *S v Van den Berg & Others* (note 754) 214.

⁷⁵⁹ Ibid 214.

⁷⁶⁰ Ibid 216.

purpose of imposing civil or criminal liability on them”.⁷⁶¹

It is submitted that Hefer J is correct in stating that the definition in section 332(10) excludes offences in terms of the Companies Act and any other legislation that deals specifically with companies. The application of the definition in section 332(10) to such offences would indeed create a situation where individuals who were not intended to be regarded as directors by the Companies Act, would be regarded as such. It follows therefore that in the event of the contravention of the Companies Act the definition of director as provided in section 1 of the Companies Act will be applicable.⁷⁶² The definition in section 332(10) of the CPA will not apply.

It is interesting to note that section 332 does not provide us with the definition of servant, as used in this section.

(x) Section 332 (11)

S. 332 (11) provides that “The provisions of this section shall be additional to and not in substitution for any other law which provides for a prosecution against corporate bodies or their directors or servants or against associations of persons or their members”. The legislature has taken into account the fact that the CPA is not the only source of law dealing with the prosecution of corporations. As stated above, unlawful corporate activities range from the disregard of statutes regulating the maintenance of safety in the workplace, to corruption, theft, fraud, etc. These are regulated by common law and by various

⁷⁶¹ Ibid 216.

⁷⁶² Section 1 of the Companies Act (note 757) which states that “director means a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated”.

statutes. This subsection ensures that the provisions of section 332 are not applied to the exclusion of any other laws that may be relevant.

A corporation that is prosecuted under section 332 can, therefore, not escape liability under another law. An example of the application of this subsection can be seen in *S v Dersley* where ‘the accused was charged with contravening section 38(3) of the Companies Act 61 of 1973’.⁷⁶³ However, in *R v RSI (Pty) Ltd and Another*⁷⁶⁴ a limited company was found not to be able to contravene section 135 (3) (a) of Act 24 of 1936⁷⁶⁵ and in *R v Smith and Others*⁷⁶⁶ a company was found not to be capable of contravening section 185bis (3) of the Companies Act 46 of 1926 and section 135 (3) of the Insolvency Act 24 of 1936.

(xi) Section 332 (12)

In terms of section 332 (12) ‘where a summons under this Act is to be served on a corporate body, it shall be served on the director or servant referred to in subsection (2) and in the manner referred to in section 54(2)’. This subsection is a procedural provision which serves to ensure that consistency is maintained. As the corporation consists of several people, some of whom are directors and some of whom are servants, it is important to ensure that the State deals with one individual, who is prosecuted on behalf of the corporation. It is thus necessary for the State to determine beforehand who that individual is, so that in the event of issuing a summons, it will be served on the correct person. Non-adherence to this subsection may lead to confusion. In *Ex Parte Prokureur-Generaal, Transvaal*⁷⁶⁷ the court set out the obligations and personal

⁷⁶³ *S v Dersley* (note 489) 254.

⁷⁶⁴ *R v RSI (Pty) Ltd and Another* (note 435).

⁷⁶⁵ *Ibid* 414.

⁷⁶⁶ *R v Smith and Others* (note 435).

⁷⁶⁷ *Ex Parte Prokureur-Generaal, Transvaal* (note 594).

liability of a person against whom the summons is issued, in the event that the person fails to act in accordance with the summons.

(b) Corporate homicide in South Africa

(i) The challenge caused by terminology

In South African law, where the death of a person has been negligently caused by another, this crime is referred to as culpable homicide. It is defined as “the unlawful, negligent causing of the death of another human being”.⁷⁶⁸ It is a common-law crime and the elements that must be proven are i) causing the death ii) of another human being iii) unlawfully and iv) negligently.⁷⁶⁹ These elements must be proved beyond reasonable doubt, before one can be found guilty of culpable homicide.

It has been suggested that the same circumstances may lead to the perpetrator being charged with murder if *dolus eventualis* can be proved.⁷⁷⁰ In this context this would mean that where death was caused by a corporation, depending on the circumstances, the corporation may be prosecuted for murder. Whiting states that the type of risk that is taken is also important in determining whether there was *dolus eventualis*,⁷⁷¹ and whether the offence was not a positive act but rather an omission or failure to comply with a legal duty.⁷⁷² Whiting points out that “in the great majority of conscious risk-taking, the person concerned will be guilty of *dolus eventualis* if he foresaw the happening of the result in question as a substantial possibility”.⁷⁷³

⁷⁶⁸ Snyman (note 22) 451.

⁷⁶⁹ Ibid.

⁷⁷⁰ R Whiting ‘Thoughts on *dolus eventualis*’ (1988) 1 *South African Journal of Criminal Justice* 440, 442.

⁷⁷¹ He states that a “specific concrete risk...may tip the scales in favour of a finding of *dolus eventualis*”. (Ibid 441 – 442).

⁷⁷² Ibid 442.

⁷⁷³ Ibid.

Burchell is also of the view that under such circumstances a corporation may be prosecuted for murder,

“As far as homicide is concerned, there is no logical or policy-based objection to a juristic person being found guilty of culpable homicide where corporate negligence is evident (or even possibly liable for murder in the extreme situation where the death that occurs was foreseen as a real possibility by officials in the corporation)”.⁷⁷⁴

It is submitted that corporations do sometimes take risks consciously and even though they foresee death as a substantial possibility, they nevertheless carry on with the risky activity. An example is the Ford Motor Company case where the company was charged for manslaughter in the United States under circumstances that would possibly allow for murder in South Africa: “Evidence suggests that the Ford Motor Company knew of the danger in the Bridgestone/Firestone tyres fitted to its Ford Explorers, a car in which 88 people in the US and 46 people in Venezuela were killed in incidents linked to the tyres”.⁷⁷⁵ Another example is the Ford Pinto case⁷⁷⁶ in which the company was prosecuted for manslaughter after the death of three teenagers in a Ford Pinto vehicle. Their deaths were caused by the petrol tank burning after a slight impact caused by a minor accident. Apparently the company had been aware of the fact that a slight impact would cause the vehicle to burn:

“it had been revealed that the company had known that the Pinto’s design was faulty but had decided not to instigate a recall because an actuarial calculation indicated that it would be more costly to do so than to meet damage claims resulting from accidents”.⁷⁷⁷

⁷⁷⁴ Burchell (note 195) 477.

⁷⁷⁵ G Slapper ‘Corporate Manslaughter: The Changing Legal Scenery’ 10(2) *Asia Pacific Law Review* (2002) 161.

⁷⁷⁶ *State v. Ford Motor Co.*, 47 U.S.L.W. 2514, 2515.

⁷⁷⁷ A Norrie *Crime, Reason and History – a Critical Introduction to Criminal Law* (1993) 95.

From these two examples it is clear that corporations should not be excluded from the possibility of possessing fault in the form of *dolus eventualis* and being convicted with murder. It is submitted that prosecuting corporations for murder under such circumstances would be commendable as it may lead to corporations being more vigilant about avoiding situations where risks are taken in spite of loss of life being ‘a substantial possibility’.

The definition of culpable homicide does not state that the perpetrator should be a natural person. It could be any person, including a corporation, which is a juristic person. In this section, the discussion is that of culpable homicide perpetrated by a juristic person. A juristic person may be charged with culpable homicide together with the director or servant who committed the crime in the process of furthering or endeavouring to further the interests of a corporation. For the sake of clarity and as a way of advancing the call for a separate legal framework for deaths caused by corporations, as mentioned above, these deaths will be referred to as corporate homicide.⁷⁷⁸

Deaths caused by corporations occur regularly in South Africa and in many cases these are caused negligently. Such negligence may be on the part of the corporation⁷⁷⁹ or on the part of the employees.⁷⁸⁰ There is, however, the challenge that prosecutions for such deaths do not occur often.⁷⁸¹ It is submitted that with regard to deaths of employees, the main reason for the lack of prosecutions is that such deaths are usually regarded as an infringement of a regulatory

⁷⁷⁸ See Chapter One III(a) above. This is in spite of the fact that in South Africa we do not currently have a specific crime called corporate homicide.

⁷⁷⁹ This may be the case where failure to maintain equipment in a good working condition may lead to fatalities.

⁷⁸⁰ For instance, where the employee fails to operate machinery correctly.

⁷⁸¹ With regard to workplace deaths, Rycroft states that “Despite the seriousness of this...only occasionally does a death result in a criminal prosecution”. (Rycroft (note 365) 141 – 142).

statute and are dealt with in accordance with the penal provisions of that applicable regulatory statute.⁷⁸² Moreover, where there are deaths caused by machinery or equipment, the difficulty in attaining evidence of the negligence of a particular person,⁷⁸³ may be one of the reasons for the lack of such prosecutions. Furthermore, families usually accept compensation from the corporation and where none is forthcoming, they opt for civil action against the corporation. This, however, should not make it difficult or impossible for the State to institute criminal proceedings against the corporation.

One of the challenges to corporate homicide is that the term homicide is associated with natural persons, while there is the traditional reference to deaths and injuries caused by corporations as ‘accidents’, rather than homicide.⁷⁸⁴ The *South African Oxford School Dictionary* defines accident as “an unexpected happening, especially one causing injury or damage”.⁷⁸⁵ The use of the term ‘accident’ creates the attitude that corporations’ accountability for such deaths and injuries should be minimal, as the deaths and injuries are merely accidental.⁷⁸⁶ It is noted that the media plays a role in strengthening and possibly even perpetuating this attitude towards deaths caused by corporations, in their reporting of cases of corporate homicide. For instance, in the reporting of the death and injury of workers in a store, caused by the falling of shelves with corrugated iron, the media reported that “The Limpopo labour department, in conjunction

⁷⁸² For instance the Occupational Health and Safety Act 85 of 1993 and the Mine Health and Safety Act 29 of 1996.

⁷⁸³ If attained, this negligence would be imputed to the corporation.

⁷⁸⁴ Wells states that “if the deaths are called accidents then they are less likely to be seen as potentially unlawful homicides”. (Wells (note 15) 11 - 12). This is echoed by Rycroft who avers that “The most obvious reason why workplace deaths have traditionally been viewed and treated differently from culpable homicide outside the workplace is that they are viewed as ‘accidents’ – somehow inevitable, somehow the price we must pay for the mines and factories that will make the economy thrive”. (Rycroft (note 365) 142).

⁷⁸⁵ J Hawkins *The South African Oxford School Dictionary* (2003) 3.

⁷⁸⁶ Burchell states that “the use of terminology such as ‘accidents’ and ‘environmental spills’ reveals the underlying bias of the common law; crimes are committed by blameworthy individuals, accidents happen to corporations”. (Burchell (note 49) 562 - 563).

with the SAPS in Tzaneen, has launched an investigation into the cause of **a tragic accident**⁷⁸⁷ that left a worker dead and two others slightly injured at a mega store”.⁷⁸⁸ In reporting that a locomotive operator was found dead under a locomotive it was stated that “A woman died in **a mining accident**⁷⁸⁹ outside Rustenburg on Thursday”.⁷⁹⁰ I-Net Bridge reported that “BHP Billiton Energy Coal South Africa says an employee died during **an accident**⁷⁹¹ at Khutala Colliery near Witbank...The fatality occurred during the performance of maintenance work on a conveyor belt in the underground operations...”.⁷⁹²

These are just a few examples of how the media depict deaths caused by corporations or corporate activities, thus influencing people’s reaction or attitudes. It is submitted that such terminology is, to a certain extent, responsible for society’s seeming complacency and apparent acceptance of the fact that such deaths and injuries are part and parcel of corporate activity.

It is further submitted that the terminology used by the media does not only influence the public perception of such deaths but it also influences the prosecution process. In 1996, with reference to the fact that at that time there had only been one conviction of a company for culpable homicide in England, Clarkson cites one of the reasons for this as the

⁷⁸⁷ Own emphasis.

⁷⁸⁸ Michael Sakuneka ‘Falling shelves kill worker’ 25 Jun 2009.

<http://www.sowetanlive.co.za/sowetan/archive/2009/06/25/falling-shelves-kill-worker> (accessed on 17 February 2014).

⁷⁸⁹ Own emphasis.

⁷⁹⁰ Sapa ‘Woman dies in Lonmin platinum mine in Rustenburg’ August 19 2010

<http://www.iol.co.za/business/companies/woman-dies-in-lonmin-platinum-mine-in-rustenburg-1.807476> (accessed on 17 February 2014).

⁷⁹¹ Own emphasis.

⁷⁹² I-Net Bridge ‘Fatality at BHP's Khutala Colliery’ January 13 2012.

<http://www.iol.co.za/business/companies/fatality-at-bhp-s-khutala-colliery-1.1212223> (accessed 17 February 2014).

“public attitudes moulded by the media, state and companies themselves. When persons are killed or seriously injured at work (even when they are not employees), the typical response is to describe this as an ‘accident’ – which in turn structures the official response.”⁷⁹³

What Clarkson is conveying is that the terminology that is used impacts on prosecutions in that a death caused by a corporation is considered as an accident and this is so even when it comes to prosecution. It is submitted that the terminology structures the official response in the following manner: as the death is already viewed as ‘accidental’ the charge against the corporation may be less than it ought to be and the court itself may be more sympathetic towards the corporation as there is already the perception that the death was ‘an accident’, as opposed to a death that was possibly foreseen. Clarkson’s view is echoed by Wells, who correctly observes that

“The legal impediments to prosecutions for manslaughter following negligent work place deaths or other negligent deaths caused by corporate activity are reinforced by such constructions. If the deaths are called accidents then they are less likely to be seen as potentially unlawful homicides,⁷⁹⁴

It is submitted that the terminology further impacts negatively on prosecutions in that with the general perception that such deaths are accidental, it becomes easier for the defence to create doubt as to the guilt of the corporation by arguing that the deaths were accidental. If the defence is strong, the prosecution will not succeed in proving the guilt of the corporation beyond reasonable doubt, thus hampering the prosecution of the accused corporation.

⁷⁹³ CMV Clarkson “Kicking Corporate Bodies & Damning their Souls” (1996) 59, 1 *The Modern Law Review* 557, 558.

⁷⁹⁴ Wells (note 15) 11 - 12

It is further submitted that such terminology gives the impression that accountability, if any, should be minimal, as accidents are in many cases regarded as unavoidable acts of God. Referring to deaths that may have been caused by corporations as accidents ought to be avoided, and with each death case an inquest should be made with the possibility of corporate homicide or corporate murder being considered.

(ii) The prosecution of corporate homicide in South Africa

There are many instances where deaths have occurred in the workplace or where people have died while being rendered a service, such as boat riding or travelling in a bus or train. These incidents are normally published in the media and form part of news reports. At times these deaths or injuries are reported in such a way that the employer or service provider appears to have negligently caused the deaths of those people. It is, however, rare that such allegations end up in criminal courts. Moreover, the few that do reach the criminal courts usually end in acquittals.

The other problem is that in many cases, particularly where the deaths are due to motor accidents, it is usually the employee driver who faces prosecution. An example is the recent Fields' Hill carnage which took place in September 2011 when a truck plunged into four full minibus taxis and a motor vehicle, leaving more than 20 people dead, in Field's Hill, KwaZulu-Natal. The truck driver is being prosecuted for culpable homicide.⁷⁹⁵ What is of concern is that Sagekal Logistics, the company that owned the truck, has not been charged with culpable

⁷⁹⁵ He was initially charged with 22 counts of culpable homicide then these charges were upgraded by the National Prosecuting Authority to murder. It is not yet clear why the charges of culpable homicide against the driver were upgraded to murder. Charges have since been reverted to culpable homicide.

homicide. This is despite the fact that allegations have been made against the owner of the truck regarding the truck's brakes and licence.⁷⁹⁶ The question that arises is why allegations against the company owning the truck are not tested in court in the same way as allegations against the driver of the truck.

(aa) Holding the master liable for the negligence of the servant

As culpable homicide requires *mens rea* in the form of negligence to be proved, as an element of the crime, before dealing with the corporate homicide cases, it is important to show that courts allow for an employer to be held liable for the negligence of the employee. In the 1914 case of *Mkize v Martens*,⁷⁹⁷ the Appellate Division confirmed that a master could be held liable for the negligence of its servant. In this case two boys who were employed by a transport driver caused a fire which caused damage. On that particular day they completed their work and lit a fire in order to prepare a meal, as they were hungry. As a result of the boys' negligence, the fire spread and damaged trees and herbage belonging to another. In a civil case against the boys' employer, it was held by the court *a quo* that the fire had been made within the scope of the boys' employment.⁷⁹⁸ This was confirmed by the Appellate Division, which further stated that as they acted negligently, the employer is responsible for their negligence where in passing judgment De Villiers JA stated that

“In the present case the boys had had their breakfast before 7 o'clock that morning; there is no evidence they had any food left; towards noon... The defendant must, therefore, have left them at the latest at about 8 o'clock under these circumstances it seems to me it may fairly be said

⁷⁹⁶ Sapa 'Field's Hill crash driver arrested' Independentonline 6 September 2013 <http://www.iol.co.za/news/crime-courts/field-s-hill-crash-driver-arrested-1.1573873> (accessed 17 February 2014). See also Pretoria News 'Anger in KZN over crash carnage' Pretoria News 7 September 2013 <http://www.iol.co.za/pretoria-news/anger-in-kzn-over-crash-carnage-1.1574528> (accessed 17 February 2014).

⁷⁹⁷ *Mkize v Martens* (note 430) 382.

⁷⁹⁸ *Ibid* 383.

that towards noon, when the defendant had not yet put in an appearance, the boys were entitled, and could reasonably have been expected, to start preparing food; and if that is so they must be said to have lit the fire in the course of their employment by the defendant. They were at the time engaged upon his business, and they were entitled to take all reasonable measures to discharge their functions properly”.⁷⁹⁹

Holding an employer liable for the negligence of the employee is an established principle in South African law and it paves the way for the development of a legal framework for corporate homicide. This is evidenced in *R v Shikuri*⁸⁰⁰ which was an appeal against the conviction of an employer for culpable homicide and for contravening section 31(2) of Ordinance 17 of 1931 in that he had ‘aided and abetted the driver in killing the deceased’.⁸⁰¹ In *Shikuri* the employer was an individual, who had been sitting beside the driver who caused an accident which resulted in death. Though the employer in *Shikuri* was not a corporation, the case is still relevant to this context as it sets a precedent for the conviction of an employer for culpable homicide committed by its employee.

(bb) Holding corporations liable for culpable homicide

*R v Bennett*⁸⁰² is the first recorded case where a corporation was charged with and convicted of culpable homicide. An employee’s negligent causing of another’s death was imputed to the corporation.⁸⁰³ The importance of the case lies in the fact that a corporation was successfully prosecuted for a crime, which, until then, had been treated as if only natural persons could be

⁷⁹⁹ Ibid 401 - 402.

⁸⁰⁰ *R v Shikuri* 1939 AD 225.

⁸⁰¹ Ibid 225.

⁸⁰² *R v Bennett* (note 32).

⁸⁰³ Ibid.

held liable. The court in passing judgment considered and applied the principle laid down in *Mkize v Martens*⁸⁰⁴ and in *Shikuri*,⁸⁰⁵ that a master is responsible for negligent acts of its servant, including culpable homicide.

In *R v Jopp and Another*⁸⁰⁶ an explosion had taken place at the accused company causing the deaths of two people. The director and the company were committed for culpable homicide, but following a preparatory examination, they instead, were charged in the Magistrates' court for having contravened certain regulations under the Factories, Machinery and Building Work Act.⁸⁰⁷ This resulted in a conviction in the lower court for the contravention of the regulatory statute. The appeal court heard an appeal against the conviction on count 2⁸⁰⁸ and count 3.⁸⁰⁹ The conviction on count two was confirmed, while the one on count 3 was set aside.⁸¹⁰ An important issue that arises out of this case is that even though human beings have lost their lives, the corporation and its directors were not prosecuted for culpable homicide. Instead the lesser offences that appear in a regulatory statute are the ones that the corporation and its directors were charged with. It is submitted that when deaths occur, instead of prosecuting the corporation for lesser offences, corporations must be charged with culpable homicide. The statutory contraventions should be cited as additional charges or alternative charges.

⁸⁰⁴ *Mkize v Martens* (note 430).

⁸⁰⁵ *R v Shikuri* (note 800).

⁸⁰⁶ *R v Jopp and Another* [1949] 4 All SA 153 (N).

⁸⁰⁷ Factories, Machinery and Building Work Act 22 of 1941.

⁸⁰⁸ Contravening Reg. 38 (*d*) "in that they did not cause every inexperienced person called upon to operate a machine, to wit the hydrogen plant there situated, which is liable to cause injury, to be fully instructed as to the dangers likely to arise from its operation and the precautions to be observed". (*R v Jopp and Another* (note 806) 155).

⁸⁰⁹ Contravening Reg. 38 (*e*) "in that they did not cause all plant, material and other things . . . to be provided and maintained in good order and repair, to wit did fail to have a proper circulating water cooling system connected to a flow of water on a compressor in the hydrogen plant there situated". (Ibid 157).

⁸¹⁰ Ibid 159.

In *S v Cairns and Another*⁸¹¹ a corporation and its director were charged with culpable homicide in the Magistrates' Court. They were, in the alternative charged with the contravention of certain regulations in terms of the Factories, Machinery and Building Work Act.⁸¹² The court hearing the appeal had to answer the question whether the accused had been rightfully charged with culpable homicide.⁸¹³ After a thorough examination of the evidence presented in the court a quo, on appeal the conviction on culpable homicide was set aside, on the basis that the judge was of the opinion that the prosecution in the Magistrates' court had not proven a reasonable person in the position of the accused "foresaw or ought reasonably to have appreciated the possibility of harm to the deceased".⁸¹⁴ Despite the failed appeal, the case is important in that it is an illustration of the court's willingness and acceptance of the concept of corporate homicide.

*S v Joseph Mtshumayeli*⁸¹⁵ which, as mentioned above was a Rhodesian case based on a provision worded similarly to the South African provision regulating corporate criminal liability at the time, was an appeal against a conviction in a magistrates's court for culpable homicide. An omnibus belonging to the accused corporation was involved in a fatal accident. The driver of the omnibus, who was an employee of the corporation, had become very tired, and agreed to let a passenger (third party) drive the vehicle. The passenger was not licensed to drive an omnibus, but was licensed to drive a heavy vehicle. After driving for a while, he lost control of the omnibus and it overturned, causing the death of one of the passengers. The passenger who was driving was found by the magistrate's court to have been doing so in

⁸¹¹ *S v Cairns and Another* (note 543).

⁸¹² Factories, Machinery and Building Work Act (note 807).

⁸¹³ *S v Cairns and Another* (note 543) 194.

⁸¹⁴ *Ibid* 195.

⁸¹⁵ *S v Joseph Mtshumayeli* (note 542).

furthering the interest of the corporation. The corporation and that person were convicted of culpable homicide. The court hearing the appeal had to answer the question whether the corporation was criminally liable for the negligent driving of a third party. In affirming the decision of the lower court, Beadle CJ states that “the third accused drove the omnibus with the permission of the second accused, who was a servant of the appellant, and the third accused undoubtedly drove the omnibus while ‘endeavouring to further the interests of’ the appellant”.⁸¹⁶ Beadle goes on to state that in accordance with the clear wording of the criminal liability provision in the criminal procedure act, there should be no distinction between acts performed by an employee and acts performed by a third party who has been granted permission by an employee as “all these acts, if done in furtherance of the interests of the company, are deemed to be the acts of the company”.⁸¹⁷ He continues and states the important fact that the company is criminally liable, even though the company’s employee had acted totally against the company’s command by allowing the third party to drive.⁸¹⁸

S v Joseph Mtshumayeli is one of the leading cases on corporate homicide and has been referred to by South African courts and academics as authority for holding corporations criminally liable for culpable homicide. Together with *S v Bennet*, it is of importance in that the negligence of a third party, given permission to perform an act by the corporation’s employee is imputed to the corporation and the corporation is found guilty on that basis.

⁸¹⁶ Ibid 34.

⁸¹⁷ Ibid 36.

⁸¹⁸ Ibid.

*S v Bochris*⁸¹⁹ was also a conviction of a corporation for culpable homicide which was overruled by the appeal court. The accused were charged with culpable homicide for the death of a nine-year old boy. According to the facts, the family had been swimming in the swimming pool at the Wilderness Pleasure Resort and as they were about to leave the swimming pool the young boy who was described as a good swimmer, dived to the bottom of the pool.⁸²⁰ When he did not come up after about ten seconds, his father went in and found him stuck in the pool's outlet pipe near a corner of the pool. The Wilderness Pleasure Resort was owned by a corporation, Bochris Investments (Pty) Ltd ("Bochris"). In the court a quo Bochris Investments (Pty) Ltd was charged together with Mr Joubert, the resort's manager who was also a director and the majority shareholder of Bochris, as well as his wife, Mrs Joubert, who was a director and a shareholder of Bochris, and also an employee of the resort. The three accused were charged with culpable homicide. They had all pleaded not guilty. The court convicted Bochris and Mr Joubert of culpable homicide in that they "wrongfully and negligently killed Ryan Edward Andresen, in life a nine-year old male".⁸²¹

The appeal court identified the most important question that needed to be answered as whether Joubert ought to have realized that the "unguarded opening was dangerous – more specifically, ought he to have foreseen that, unless steps were taken to guard it, death could result to a user of the pool"? In reversing the court a quo's findings, Nicholas AJA states:

"Nor do I think that the diligens paterfamilias would have appreciated the magnitude of the forces involved, or the mechanism by which an accident of this kind could happen.

⁸¹⁹ *S v Bochris Investments (Pty) Ltd. and Another* [1987] ZASCA 140; [1988] 4 All SA 207 (AD) (27 November 1987).

⁸²⁰ *Ibid* 207.

⁸²¹ *Ibid* 209.

Without such appreciation the possibility of death could not reasonably have been foreseen”.⁸²²

Although the conviction was set aside, the importance of the *S v Bochrus* lies in the fact that it serves as further confirmation that in spite of minimal convictions, South African courts do accept the idea of holding a corporation criminally liable for the negligent death of a human being.

*S v Schindler Lifts*⁸²³ was an appeal against the conviction of a corporation for culpable homicide. An adult and a one-year old child had been in a lift (elevator) when it got stuck in between 2 floors. While attempting to get help, the inner door of the lift had been opened, but the outer door was closed. The child was between the inner door and the door post when the power suddenly came back on and the inner door closed, crushing the child. Schindler Lifts was prosecuted on the basis that it was responsible for the inspection and the maintenance of that specific lift. The magistrate had found that the company had been negligent and convicted it of culpable homicide. This was overturned in the Witwatersrand Local Division, which classified the incident as a freak accident. It found no negligence on the part of the corporation and explained that the same force with which the door of the lift had closed, would not have caused fatal injuries on an adult. It further stated that since a similar incident had not occurred prior to this one, the corporation could not foresee that that would occur, and for that reason could not have done anything to prevent it from happening.⁸²⁴

⁸²² Ibid 211.

⁸²³ *S v Schindler Lifts (SA) (Pty) (Ltd)* (note 33).

⁸²⁴ “...the State failed completely to establish any breach of a duty of care owed by appellant and, accordingly, any negligent conduct which caused the death of the child. It was a unique incident which could not reasonably have been foreseen by a reasonable lift maintainer and need not have guarded against it”. (*S v Schindler Lifts* (note 33) 378).

Despite the fact that the conviction of a corporation for culpable homicide was set aside, it is clear that South African courts do accept that corporations are capable of committing culpable homicide and they are willing to convict a corporation where it has been proven that the death was caused by its negligence. Here the court convincingly showed that since such an incident could not possibly have been foreseen, the corporation could not have been in a position to take any preventative measures, therefore, it should not have been found negligent.

(iii) Recent developments on corporate homicide in South Africa

Although provisions of the Criminal Procedure Act continue to govern corporate crime, there has been a move towards the recognition of corporate homicide as a separate crime that corporations may be held liable for. This came in the form of a proposal that was limited to the mining sector. It came as a result of the fact that South Africa has seen an increase in the number of mine- related deaths, injuries and illnesses. This prompted the legislature to advance a call for the criminalisation of certain activities that result in the deaths of people while they are working in the mines.

The Mine Health and Safety Amendment Bill⁸²⁵ was introduced and later enacted as the Mine Health and Safety Amendment Act.⁸²⁶ The Act has increased the regulatory powers that the Department of Minerals and Energy used to enjoy under the Mine Health and Safety Act.⁸²⁷

⁸²⁵ Mine Health and Safety Amendment Bill 54D of 2008.

⁸²⁶ Mine Health and Safety Amendment Act 74 of 2008.

⁸²⁷ I Rawoot "Corporate Homicide Bill Causes tremors" (12 March 2009) *Mail and Guardian*.
<http://mg.co.za/article/2009-03-12-corporate-homicide-bill-causes-tremors> (Accessed 16 March 2014).

The department now has the powers to, inter alia, impose fines for non-compliance that range between R200 000 and R1 million; ensure that deadlines set for companies to produce accident reports are complied with; decide whether health and safety permits should be issued or revoked; see to it that minefields that have become sites of accidents are shut down until such time that the department is satisfied that the safety standards have been complied with.⁸²⁸ The senior officers within a corporation face the possibility of spending at least five years in prison if there is a death and they are found to have been negligent.

Despite the coming into being of the Act, there is still a need for a way to be found to ensure that the deaths, injuries and illnesses resulting from mining activities are dealt with adequately and properly.⁸²⁹ One of the proposals that was included in the Bill was a provision for corporate homicide. The Bill proposed the insertion of section 86A to the Act. Although this proposal later became section 26 of the Mine Health and Safety Amendment Act⁸³⁰ which inserts section 86A to the Mine Health and Safety Act,⁸³¹ the insertion was not approved and does not form part of the amendments that were effected by the Amendment Act.⁸³² The insertion is a provision for criminal liability for the deaths, injuries and illnesses of people within the mining sector. It provides as follows:

⁸²⁸ Ibid.

⁸²⁹ “In May 2009, the Inspectorate introduced critical amendments to the Mine Health and Safety Amendment Act, 74 of 2008, which enhanced the ability of the State to address the challenges of the high rate of injuries, ill-health and deaths in the industry. The Act also introduced stricter sanctions for non-compliance with health and safety standards. While positive and encouraging milestones have been achieved in this regard, the fatalities and injuries remain unacceptably high, with recurring fatal accidents at some mines. It is evident that significant effort is still needed to effectively address this situation”. (Department of Minerals and Energy Annual Report www.dmr.gov.za/AnnualReport/Documents/DME%20Annual20Report%2009_10%20hr.pdfAnnualreport2009 (accessed 20 March 2014)).

⁸³⁰ Mine Health and Safety Amendment Act (note 826).

⁸³¹ Mine Health and Safety Act (note 782).

⁸³² Webber Wentzel attorneys ‘The intended risks and perils of mine management under the Mine Health and Safety Amendment Act 74 of 2008’ Mine Health and Safety e-alert http://mailstreams.cambrient.com/mailstreams/admin/maile_instance/view.jsp?maileid=1268&mid=2016 (accessed 20 March 2014).

86A (1) An employer, chief executive officer, manager, agent or employee commits an offence if he or she contravenes or fails to comply with the provisions of this Act thereby causing -

- (a) a person's death; or
- (b) serious injury or illness to a person.

(2) If a chief executive officer, manager, agent or employee of the employer commits an offence by performing or omitting to perform an act and such performance or omission would have constituted an offence had it been done by the employer, that employer is equally committing an offence if the act or omission fell within the scope of the authority or employment of the chief executive officer, manager, agent or employee concerned and the employer –

- (a) connived at or permitted the performance or an omission by the chief executive officer, manager, agent or employee concerned ; or
- (b) did not take all reasonable steps to prevent the performance or an omission.

(3) For the purposes of subsection (1) the –

- (a) fact that the person issued instructions prohibiting the performance or an omission is not in itself sufficient proof that all reasonable steps were taken to prevent the performance or an omission;
- (b) defence of ignorance or mistake by any person accused cannot be admitted; or
- (c) defence that the death of a person, injury or illness or endangerment was caused by the performance or an omission of an act falling within the scope of authority or employment of any individual within the employ of the employer may not be admitted.

The proposed insertion provides for the criminal liability for death, injury and illness of a person as a result of failure to comply with the provisions of the Mine Health and Safety Act.

The parties that may be held criminally liable are employees, chief executive officers, agents as well as employers. The provision envisaged a situation where both the employer or corporation and individuals within the mining sector are held criminally liable. The provision goes further than the Criminal Procedure Act in that it specifically refers to employer, employee, chief executive officer, agent and manager. By stating clearly all the parties that may be held liable, the provision prevents a situation where a person escapes liability because he cannot be pinpointed as the culprit. Moreover, clarity regarding parties that may be held criminally liable has the potential of making it easier to identify and prosecute persons who ought to be held responsible.

Employers would not only be held liable for acts and or omissions that took place within the scope of the other party's employment, but also for those where the employer "connived at or permitted the performance or an omission"; and where reasonable steps to prevent the offence had not been taken. Subsection 3 of the provision makes it difficult for the accused to rely on possible defences, as it indicates clearly the defences that cannot be relied on: the issuing of instructions forbidding the particular offence is not an indication that all reasonable steps had been taken to prevent the offence; ignorance or mistake may not be relied on as a defence; and the defence fact that the act causing the death, injury or illness is an act that falls within the scope of employment is unacceptable.

When the Act was passed section 26 was not approved therefore section 86A has not been inserted to the Mine Health and Safety Act. It is submitted though, that this provision is a milestone in the development of corporate homicide in South Africa. For the first time, we have a proposal that specifically calls for the introduction of the concept of 'corporate homicide' to

South African law. An avenue for open discussion regarding this matter was made available and the response was negative as there were fears regarding corporate homicide.⁸³³ When the Chamber of Mines commented on the Bill the fact was raised that employers were extremely worried about what they referred to as a “shift away from a system that is finely balanced between preventative and punitive measures, to a system strongly emphasizing punitive measures”.⁸³⁴ The employers were also not pleased about the wording of the proposed provision as it seemed to focus more on the criminal liability of employers.⁸³⁵

The proposed section 86A has been described as one of the “most problematic and controversial”⁸³⁶ amendments in the Act and the liability proposed in section 86A has been referred to as “far-reaching draconian liability”.⁸³⁷ Unfortunately, the negative response towards the proposal may be an indication that there is no political will to institute corporate homicide. Public awareness of developments in countries such as England and Canada may make it possible for people to understand the need for corporate homicide. It is submitted that even though at the end of the day section 86A did not come into being, this provision is a milestone in the development of corporate homicide in South Africa as for the first time, we have a proposal that specifically calls for the introduction of the concept of ‘corporate homicide’ to South African law.

Although in this case, the proposal is specifically aimed at mines, the proposal is an indication that the legislature does take deaths caused by corporations seriously and there is a realization that the current law is inadequate and ineffective. The rejected proposal may still be revived

⁸³³ Rawoot (note 827).

⁸³⁴ Chamber of Mines ‘Comments on the Mine Health and Safety Amendment Bill as published on 16 May 2008’, 30 May 2008.

⁸³⁵ Ibid 14.

⁸³⁶ Webber Wentzel attorneys (note 832).

⁸³⁷ Ibid.

and reformulated in such a way that (a) it is not limited to the mining sector, but is rather an all-encompassing provision that will deal with all deaths, injuries and illnesses caused by corporations; (b) it addresses all the shortcomings of the current provision, and (c) it makes it possible for corporations to be properly and adequately punished for deaths, caused by them.

(c) Punishing corporate criminals in South Africa

As already mentioned section 332(2)(c) prescribes the fine as the only form of punishment that can be imposed on an offending corporation. This means that there is no alternative punishment that is permissible. This begs the question whether a fine as the only available form of punishment that can be imposed on a corporation can be said to be an appropriate, adequate and effective sanction for corporate crime.

Before dealing with the fine as the sole sanction for corporations, it is important to determine why a fine is imposed as punishment for an offence. Terblanche makes it clear that punishment is the most important purpose of a fine and it is intended “to *punish* the offender by reducing the offender’s financial ability and, in this manner, to worsen the quality of her life for some time”.⁸³⁸ It is submitted that the rationale behind imposing a fine on a corporation is that corporations are dependent on their financial stability for their continued existence. Punishing a corporation by imposing a fine, is intended to have a negative impact on the corporation’s finances, which should in turn deter the corporation from committing corporate crimes. It is submitted that it is envisaged that in this way the quality of a corporation’s business will be

⁸³⁸ Terblanche (note 301) 261.

worsened for some time and that will result in the corporation avoiding committing corporate crimes in the future.

Terblanche points out that as a form of punishment, a fine ought to be a deterrent, however, questions have been raised about a fine being a deterrent.⁸³⁹ One such critic of a fine as a deterrent is the magistrate who presided over the case in the court a quo in *S v Seoela*⁸⁴⁰ who argues that the fine is not a deterrent at all.⁸⁴¹ This begs the question whether the solution lies in increasing the amount of the fine, particularly where there has been loss of life or injury, as suggested by Clarkson.⁸⁴² It is submitted that Clarkson's suggestion of an increased fine is problematic in the sense that the financial ability of corporations varies so much that an amount that seems to be exorbitant for one convicted corporation, may turn out to be too little for the next corporation. Moreover, as Schuneman points out, fining a corporation is just the same as imposing a fine for a parking offence on an individual who is rich, instead of deterring the individual from committing further parking offences it simply is "merely an inconvenience with a very limited deterrent effect".⁸⁴³ Unfortunately, as corporations normally have ample finances, even if the fine imposed is exorbitant, this kind of punishment does not necessarily deter certain corporations⁸⁴⁴ from becoming repeat offenders and some may even go to the extent of keeping aside money for purposes of paying fines when they have committed offences. It is submitted that a fine is unlikely to deter such corporations, even if it is exorbitant.

⁸³⁹ Ibid 262.

⁸⁴⁰ *S v Seoela* 1996 (2) SACR 616 (O), 619d.

⁸⁴¹ "Die boetevonnis is het geen afskrikwaarde nie. En indien landdroshowe absoluut beperk word tot boetes, sal handelaars lustig voortwoeker". (Ibid 619d).

⁸⁴² Where a corporate crime has resulted in the death or injury of a person Clarkson puts forth the following reason for increasing the fine "higher levels of fines and a wider range of sentencing options would greatly help persuade the media and the population at large that corporate violence is a serious matter that needs to be treated seriously with rigorous enforcement and punishment and not marginalized as 'accidents'". (Clarkson (note 90) 155).

⁸⁴³ Schunemann (note 336) 294.

⁸⁴⁴ "The explanation for the low deterrent effect of exorbitantly high fines, from the perspectives of the enterprise, is simply the monetary cost factor, which apparently can easily be compensated for by adequate calculations". (Ibid 294).

In other jurisdictions a fine is not the only possible sanction.⁸⁴⁵ There are ways of punishing corporations other than directly through its finances. Wells refers to sanctions ranging from “incapacitation in the form of corporate dissolution, corporate ‘imprisonment’, through to probation, adverse publicity, community service, direct compensation orders, and punitive injunctions”.⁸⁴⁶ It may be useful for the South African legislature to consider making use of some of these alternative punishments.

According to Terblanche⁸⁴⁷ there are possible alternative punitive measures for punishing natural persons. The forfeiture of assets used to commit the crime is one such alternative or even additional punishment that may possibly be considered for the punishment of convicted corporations. This is regulated by section 35 (1) (6) of the Criminal Procedure Act which allows a court, in certain circumstances “after convicting the offender, to declare certain articles used in the commission of her offence forfeit to the state”.⁸⁴⁸ This alternative punishment is aimed at offences such as “theft, housebreaking and the possession of or dealing in drugs and precious minerals or stones”.⁸⁴⁹ It is submitted that this type of punishment may be altered in such a way that it is suitable for corporate crimes and may be imposed on a convicted corporation. It is further submitted that instead of applying it to assets used in the commission of the crime, it should also be extended to assets gained through committing the crime.

⁸⁴⁵ Wells mentions Canada’s probation orders, the U.S.’s corporate imprisonment, etc. Wells (note 15) 37. These will be discussed in more detail in Chapter Five at V below.

⁸⁴⁶ Ibid.

⁸⁴⁷ Terblanche (note 301).

⁸⁴⁸ The CPA (note 16) section 35(1)(6).

⁸⁴⁹ Ibid Schedule 2 part 1.

When it comes to sanctions for corporations who have committed offences, South Africa must rid itself of the stereotype view that a fine is the only suitable form of punishment.⁸⁵⁰ Other jurisdictions also make use of the fine as punishment for corporations, but in addition to that they make use of additional sanctions that are far more effective. Moreover, our own legal scholars have made sound suggestions⁸⁵¹ as well as warnings⁸⁵² regarding alternative sanctions. All these need to be taken seriously by the legislature as they will definitely enhance the regulation of corporate criminal liability and corporate homicide in South Africa.⁸⁵³

V CRITICISMS OR SHORTFALLS OF CORPORATE CRIMINAL LIABILITY AND CORPORATE HOMICIDE IN SOUTH AFRICA

It is submitted that section 332 of the CPA is defective, inadequate⁸⁵⁴ and also unjust as it is fraught with weaknesses which present challenges to the concept of corporate criminal liability and corporate homicide in South Africa. This is echoed by Nana, who states that “the South African model (although similar to those applicable in some other influential jurisdictions) was poorly conceived, given that specific consideration was not given to the general principles of corporate criminal liability”.⁸⁵⁵

Section 332 of the CPA is a provision that has been in existence for more than thirty five years and as will be seen from the discussion of corporate criminal liability in England and in Canada

⁸⁵⁰ As Clarkson suggested, “while the fine is the only penalty currently employed against companies in England, there is no reason why other penalties could not be introduced. Such possible sentence could include corporate probation whereby the company would be forced to change those policies and procedures that allowed the offence to be committed...”. (Clarkson (note 90) 155).

⁸⁵¹ “Recent legislation providing for asset forfeiture can apply equally to individuals and corporations”. (Burchell (note 49) 569).

⁸⁵² Rycroft warns that punishing a corporation by making use of community service may have the effect of giving the offending corporation positive publicity, Rycroft (note 365) 154.

⁸⁵³ Alternative or additional punishment that involves naming and shaming policies may also be considered for convicted corporations.

⁸⁵⁴ (Jordaan (note 42) 49).

⁸⁵⁵ Nana (note 488) 89.

the South African provision has not kept abreast with developments in this area of the law. Since its inception corporations have become far more important in society and play a central role in the economy of the country and that has come together with a higher frequency of workplace deaths and other deaths caused by corporate activities, yet there have been no changes made to the law.

It is submitted that the following criticisms against section 332 of the CPA, serve as evidence that section 332 is defective and inadequate. In addition to that the criticisms also show that section 332 is, to a certain extent, an unjust provision. It must be noted that even though some of the characteristics of section 332 that are discussed in this section result in section 332 being unjust, they simultaneously tend to make it easier to prosecute corporations. It is submitted that disregarding unjust characteristics simply because they make it easier to prosecute corporations, is not the correct route to follow. It is further submitted that these unjust characteristics also need to be eliminated. This should be done with a view to ensuring that whatever model of corporate criminal liability South Africa ends up with is effective, adequate and also just. It should be a model which will lead to an effective, adequate and just application of corporate criminal liability.

(a) Although it has limited application, vicarious liability in section 332 goes against the principles of criminal law

As stated above the basis for corporate criminal liability in South Africa is the derivative approach.⁸⁵⁶ In the South African corporate criminal liability provision this approach does contain elements of vicarious liability,⁸⁵⁷ though it extends even further than that. As Nana

⁸⁵⁶ See discussion in this chapter at III (b) above.

⁸⁵⁷ See discussion in this chapter at III (a) and (b) above.

notes, “where a director or servant, in committing a crime, acts beyond his powers or duties but endeavours to further the interests of the corporation, the latter is held vicariously liable”.⁸⁵⁸ Vicarious liability is a law of tort principle that has been adopted by the criminal law for purposes of holding corporations criminally liable. Its effect is to hold one party criminally liable for crimes committed by another party.

Holding one party vicariously liable for crimes committed by another party is generally not recognised in common law.⁸⁵⁹ As Burchell avers “the general rule of the common law of crime is that a person is not liable for the crime of another unless he or she procured its commission or took part in it”.⁸⁶⁰ This means that by applying vicarious liability to corporate criminal liability, albeit to a limited extent, corporate criminal liability in South Africa is such that it goes against the general principle of not imposing on one party criminal liability for criminal acts of another party.⁸⁶¹ Nana observes that vicarious liability

“militates against the general principle of not imposing liability on one party for a crime committed by another and that any conviction obtained on this ground is unfair and tantamount to a miscarriage of justice”.⁸⁶²

It is submitted that vicarious liability is an unjust way of applying corporate criminal liability and South Africa should move away from vicarious criminal liability to holding a corporation directly liable for crimes committed in its name or on its behalf.

⁸⁵⁸ Nana (note 488) 93.

⁸⁵⁹ Burchell (note 49) 439.

⁸⁶⁰ Ibid.

⁸⁶¹ “Vicarious liability which is commonly applied in the civil law of torts, has generally been rejected in the criminal law, as criminal liability is usually based on a person’s personal acts rather than those of another”. (Borg-Jorgensen & Van der Linde (note 82) 687).

⁸⁶² Nana (note 488) 103.

(b) Reliance on the nominalist approach

In South Africa corporations are not held directly or ‘personally’ criminally liable for their unlawful acts and omissions, since South Africa follows the derivative approach.⁸⁶³ The wording of section 332 (1)⁸⁶⁴ is such that it entails ascribing the guilt of an individual to the corporation in such a way that the actions and the *mens rea* of directors and employees of corporations are imputed to corporations.⁸⁶⁵ In this way, those actions and *mens rea* of the directors or servants become the acts and *mens rea* of the corporation.⁸⁶⁶

With regard to corporate homicide an example is *R v Bennett* where the negligence of the corporation’s employee, whilst furthering the interests of the corporation, was imputed to the corporation and the corporation was prosecuted and convicted of culpable homicide.⁸⁶⁷ The current wording of section 332 of the CPA therefore relies on individual fault for corporate criminal liability to arise. It is submitted that this reliance on the nominalist approach fails to take into consideration the fact that many large corporations operate in such a way that there may be fault, but instead of it being individual fault, it may be fault arising, for instance, from the manner in which the corporation is managed.

It is submitted that the current basis of liability hampers the prosecution of corporations as the imputation of liability to the corporation makes the criminal liability of corporations to be reliant on the fault of individuals in such a way that where individuals who are at fault cannot be identified, there will be the untenable result that the corporation escapes liability, in spite of

⁸⁶³ Jordaan (note 42) 49.

⁸⁶⁴ The CPA states that the wrongful actions of the director or employee “...shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body”. (The CPA (note 16) section 332 (1)).

⁸⁶⁵ Du Toit (note 514) 33-5.

⁸⁶⁶ Ibid 33-5.

⁸⁶⁷ *R v Bennett* (note 32). Also see Du Toit (note 514) 33-5 as well as Burchell (note 49) 565.

the corporate crime having been committed.⁸⁶⁸ Similarly, it may be impossible to identify a specific individual where it is the separate acts or omissions of a number of employees and or directors that are the cause of death.

As Jordaan observes, “although broader in scope, this type of liability developed from the doctrine of vicarious liability”.⁸⁶⁹ For that reason, it is important to consider the difference between vicarious liability⁸⁷⁰ and direct liability with a view to considering whether direct liability can address this particular shortfall of the derivative approach. The difference between the two is that with vicarious liability the corporation is held liable regardless of the fact that the wrongful act was committed by a director or an employee,⁸⁷¹ whereas with direct liability “the person committing the act does not himself commit the offence because it can only be committed by the person fixed with the duty”,⁸⁷² in this case, the corporation.

⁸⁶⁸ Borg-Jorgensen and Van der Linde further state that “a problem may consequently arise where a single individual’s conduct on its own does not meet the standards required for criminal liability with the result that neither the individual nor the corporation can be held criminally liable”. (Borg-Jorgensen & Van der Linde (note 53) 462).

⁸⁶⁹ Jordaan (note 42) 48. Also see discussion on the derivative approach in Chapter Two III (b) (ii) below.

⁸⁷⁰ Though the contrast is made between vicarious liability and personal liability, it is submitted that it is relevant to the South African context as the derivative approach is an extended form of vicarious liability since it goes even further than vicarious liability. Nana explains that with section 332 (1) “where a director or servant, in committing a crime, acts beyond his powers or duties but endeavours to further the interests of the corporation, the latter is held vicariously liable”. (Nana (note 488) 93).

⁸⁷¹ Pinto and Evans state that “it is necessary to distinguish between liability for the acts of another (true vicarious liability) and liability for breach of a personal duty. In the latter category, although the act may be committed by an employee, it is the employer’s own failure to prevent the harm that renders him liable”. (Pinto & Evans (note 94) 24).

⁸⁷² Ibid 24.

(c) The low number of prosecutions of corporations

Another challenge is that under the derivative approach the number of prosecutions or convictions of corporations is low. The issue of low prosecutions has also been raised with regard to the application of section 332(1) to the Prevention and Combating of Corrupt Activities Act.⁸⁷³ South Africa is a signatory to the Convention on Combating Bribery of foreign Public Officials in International Business Transactions (Anti-Bribery Convention) of the Organisation for Economic Co-operation and Development.⁸⁷⁴ The Anti-Bribery Convention is implemented in section 5 of the Prevention and Combating of Corrupt Activities Act.⁸⁷⁵ Section 5 makes provision for an “Offence in respect of corrupt activities relating to foreign public officials”.⁸⁷⁶ Section 332(1) of the Criminal Procedure Act regulates the liability of corporations for the offence in section 5 of the Prevention and Combating of Corrupt Activities Act. In its Phase 2 Report on South Africa the OECD working group on bribery in international business transactions criticised section 332 (1). One of those criticisms is the scarcity of prosecutions or convictions of corporations for economic offences that are committed intentionally, in spite of the existence of legislation dealing with corporate criminal liability.⁸⁷⁷ It is submitted that this criticism also applies to corporate homicide. The legislation is there (section 332), however, the number of prosecutions is low.⁸⁷⁸ This is a challenge that

⁸⁷³ Prevention and Combating of Corrupt Activities Act 12 of 2004.

⁸⁷⁴ The Organisation for Economic Co-operation and Development (hereinafter referred to as the OECD). South Africa is not a member of the OECD, however it became a signatory to the Anti-bribery Convention in 2007. The OECD was formed in 1961 and it is an organisation which is “committed to democracy and the market economy, providing a platform to compare policy experiences, seek answers to common problems, identify good practices, and co-ordinate domestic and international policies of its members”. OECD (<http://www.internetsociety.org/what-we-do/policy/regionally-focused-bodies>) (accessed 12 July 2012).

⁸⁷⁵ Prevention and Combating of Corrupt Activities (note 873) section 5.

⁸⁷⁶ Ibid.

⁸⁷⁷ The concerns are in the OECD South Africa: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 recommendation for further combating bribery of foreign public officials in international business transactions by the Working Group on Bribery in International Business Transactions on 17 June 2010; updated on 13 July 2010, to reflect newly released information in OECD Economics Surveys: South Africa, Volume 2010/11. <http://www.oecd.org/dataoecd/8/39/45670609.pdf> (accessed 12 July 2012). See also Borg-Jorgensen & Van der Linde (note 51) 464.

⁸⁷⁸ It is submitted that one of the reasons for low prosecutions and convictions is the fact that the derivative approach is reliant on individual fault as “For a corporation to be prosecuted in terms of section 332(1), it is

needs to be overcome otherwise the country runs the risk of having corporations committing crimes with the knowledge that it is highly unlikely that they will be prosecuted or convicted.

(d) The limitation of the provision to corporate bodies hampers corporate criminal liability

Currently section 332(1) makes it clear that the corporate criminal liability provision is directed at corporate bodies. The authors of Henochsberg points out that “not only companies but, *inter alia*, local government bodies, universities, registered building societies and, of course, specially constituted corporations such as the South African Broadcasting Corporation, are corporate bodies”.⁸⁷⁹ Moreover, section 332(7) extends liability to members of associations, but not the associations themselves. These associations include partnerships,⁸⁸⁰ clubs⁸⁸¹ etc. Although it has been stated that “there is no imposition of liability on the association as such but only on its other members, subject to the proviso”,⁸⁸² the question that arises is whether there is any justification for the exclusion of entities other than corporate bodies from corporate criminal liability. The answer to this question is not provided in the provision. It is submitted that it is strange that these entities are excluded even though they also play a role in society, and like corporate bodies, they are capable of committing corporate crimes.

In *S v Peer*⁸⁸³ even though it was “clear from the magistrate’s reasons that he regarded the trust as the accused in the case before him, and that he did not regard A. C. Peer, in his capacity as a trustee, as a second accused” the conviction and sentence that had been handed down by the

required that an offence committed by a director or servant must be proved”. (Borg-Jorgensen & van der Linde (note 53) 462). See also *S v Dersley* (note 489) 951.

⁸⁷⁹ Delpont *et al.* (note 87) Appx 7.

⁸⁸⁰ Du Toit (note 514) 33-7.

⁸⁸¹ Delpont *et al.* (note 87) Appx 13.

⁸⁸² *Ibid.*

⁸⁸³ *S v Peer* 1968 (4) SA 460 (N).

magistrate were set aside as it was held that a trust created by a notarial deed is not a corporate body.⁸⁸⁴ For that reason it could not fall under the ambit of the corporate criminal liability provision.⁸⁸⁵ *In casu* the prosecution had been made in terms of section 381, the predecessor to section 332.

As section 332 is the corporate criminal liability provision, its exclusion of other entities means that such entities may commit corporate crimes and escape liability. Even if the individuals within such entities are held liable under other provisions, it is submitted that there is no justification for not prosecuting an entity if it has allegedly committed a crime. The mere fact that it is not a corporate body does not justify absolving it from prosecution. It is further submitted that the exclusion of unincorporated bodies or associations of persons from corporate criminal liability makes corporate criminal liability defective, as these bodies are capable of corporate criminality.

(e) The inability to summons the corporate body in its own name.

“a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question...”⁸⁸⁶

This extract from section 332(2) shows that the South African situation differs from the situation in England where the accused corporation “appear(s) before the magistrates court either by a representative as defined, or, more usually, by a legal representative”.⁸⁸⁷ Moreover,

⁸⁸⁴ See also Du Toit (note 514) 33-6.

⁸⁸⁵ Ibid.

⁸⁸⁶ Section 332(2) of the CPA.

⁸⁸⁷ Pinto & Evans (note 94) 107.

section 332(2) does not allow for the corporate body to be summonsed in its own name.⁸⁸⁸ This is in contrast with England and Canada where the accused corporations are summonsed directly and their names are included in the case citation.⁸⁸⁹ In South Africa under section 332 the case name will not include the name of the corporation, but rather that of the representative and as a result many may end up being unaware of the prosecution against the corporation. The inability to summons the corporate body in its own name affects the effectiveness of corporate criminal liability as the public becomes unaware of the case against the corporation and the subsequent verdict.

It is submitted that this subsection results in the public being deprived of details concerning the identity of the offending corporation. Instead the representative, at first sight, appears as though he or she is the actual accused. It is further submitted that such a deprivation of vital information concerning the actual accused, protects the corporate body from exposure as an alleged offender. Such exposure leads to stigma and in South Africa, while natural persons who are alleged offenders are stigmatised by the revelation of their identities, corporate offenders do not suffer the same stigma. Even when the corporate body has been convicted the case citation remains with details of its representative and not the details of the guilty corporation. People usually do not want to associate with criminals, however, if such information is not readily available they will continue to do so.

It is submitted that part of what makes corporate criminal liability effective is the negative exposure and where exposure is made impossible, the efficiency of the corporate criminal

⁸⁸⁸ Du Toit (note 514) 33-6.

⁸⁸⁹ With regard to England, "once the magistrate, District Judge or his clerk, has issued a summons from the information, it must be served on the accused". (Pinto & Evans (note 94) 104.

liability provision is diminished. Anyone with access to the law reports is able to identify that there has been a criminal case against a specific corporate body.

(f) The obligation to prove that the offence was committed in “furthering the interests of the corporation” hampers the effectiveness of corporate criminal liability.

Under section 332 as long as it can be shown that the offence in question was committed in furthering or in trying to further the interests of the corporation, the corporation will be held criminally liable.⁸⁹⁰ The prosecution bears the burden of proving that the crime was committed whilst “furthering or endeavouring to further the interests of the corporation”. It is submitted that this is not an easy burden to bear and that has a bearing on the effectiveness of corporate criminal liability. The question of whether the director or servant was furthering the interests of the corporation usually has a bearing on whether the corporation benefitted or stood to benefit from the action of the individual concerned.

It is submitted that where a crime has been committed there is a likelihood of the corporation escaping liability simply because there is no proof that the individual concerned was furthering the interests of the corporation as it is not clear whether the corporation benefitted or stood to benefit or not. It is submitted that the proviso that the crime must have been committed in furthering the interests of the corporation hampers the effectiveness of corporate criminal liability and needs to be revisited as it may lead to a corporation not being prosecuted, when it ought to be.

⁸⁹⁰ “A corporate employer may incur criminal liability for its employee’s acts although they fall outside the scope of his employment, as long as the employee was endeavouring to further the interests of the company when he acted”. (Jordaan (note 42) 51).

(g) The current provision allows for corporate criminal liability even in circumstances where there is no civil liability

By allowing the corporation to be held liable where the servant or director has exceeded his scope of employment section 332(1) has become “so wide that it can often result in criminal liability where no civil liability exists (an unusual situation, and one which raises the eyebrows of many lawyers)”.⁸⁹¹ This means that a set of facts may result in a criminal prosecution taking place, but the same set of facts may not allow for the corporation to be held civilly liable as there can be no civil liability where the servant has exceeded his scope of employment. It is submitted that this results in the provision being unjust. In explaining this Matzukis refers to

“*R v Booth Road Trading Co (Pty) Ltd* (1947 (1) PH K48 (N) where a servant of the company – who had been expressly forbidden to make any sales whatsoever – sold certain goods to a customer at a price in excess of the controlled price. In convicting the company of contravening the price control regulations, the court held that, although the servant had acted outside the scope of his duties, the company was guilty of the offence because the servant, in making the sale, had been endeavouring to further its interests. The company would not, however, have been civilly liable because the servant had not acted within the scope of his employment”.⁸⁹²

It is submitted that this is a defect of section 332 as it is illogical to have the same facts disallowing a civil action against the corporation while the same facts allow for criminal action against the corporation. A criminal action, if successful results in punishment and possible stigma to the corporation, while a successful civil action may mean compensation to the victim of the family of the victim. It is submitted that for corporate criminal liability to be just, it must be in such a way that both criminal and civil liability should be accessible to the victims.

⁸⁹¹ Matzukis (note 592) 215.

⁸⁹² Ibid 215-216.

(h) The lack of alternative sanctions

Another weakness of section 332(2)(c) is having the fine as the only form of punishment that corporations may be subject to.⁸⁹³ This means that there is no alternative punishment that is permissible. This begs the question whether a fine as the only available form of punishment that can be imposed on a corporation can be said to be an appropriate, adequate and effective sanction for corporate crime. It is submitted that Wells' assertion that the notion of punishing a corporation through its finances as being the only option is a misconception,⁸⁹⁴ is correct.

Moreover, even though Snyman explains that the rationale behind having the fine, as the only applicable punishment for corporations, is the fact that corporations cannot be imprisoned,⁸⁹⁵ it is submitted that Rycroft's observation that "the stipulation in s 332 that a fine is the only sanction that may be imposed on a convicted company indicates a very restricted view of corporate sentencing"⁸⁹⁶ is also correct.

In terms of section 332(2) the fine is the applicable punishment for corporations, even in circumstances where the statute that has been contravened does not provide for the imposition of a fine as an applicable sanction. Jefferson outlines the disadvantages of the fine as follows:

⁸⁹³ Rycroft (note 365) 152.

⁸⁹⁴ Wells (note 15) 31, cited above in Chapter Two VI.

⁸⁹⁵ Snyman (note 22) 255.

⁸⁹⁶ Rycroft (note 365) 157. This is in line with Burchell's assertion that "One of the traditional stumbling blocks to imposing a broader form of corporate criminal liability has been the rather narrow-minded focus on custodial punishment and the facile conclusion that corporations cannot be imprisoned like a human being. In conservative theory, the only remaining penalty appropriate for the sanctioning of corporations is the fine. Fines for corporate criminal responsibility have been subjected to criticism, and the imposition of such pecuniary sanctions might well prejudice innocent employees along with the delinquent corporation". (Burchell (note 195) 480).

(a) “overspill or spillover; that is, that it is not the company which pays the fine but shareholders (whose dividends may be reduced), employers (whose wages or jobs may be affected) and consumers (prices for whom may be increased);⁸⁹⁷ (b) “...a fine may have no effect on the company. ‘A fine on the corporation alone can be absorbed merely as a cost of doing business...’”;⁸⁹⁸ (c) “...overkill...they may be so large as to put the company out of business”;⁸⁹⁹ (d) “Fines are contingent on the fault of the company. They are not based on the result of the company’s fault. In other words, fines are assessed on, say, the death of an employee. The effect is that the fine may be a nominal amount in comparison with the death of the worker”.⁹⁰⁰

South Africa must rid itself of the stereotype view that a fine is the only suitable form of punishment for corporate offenders.⁹⁰¹ Other jurisdictions also impose the fine, but in addition to that they have come up with additional / supplementary sanctions to the fine that are far more effective and our own legal scholars have come up with sound suggestions⁹⁰² as well as warnings⁹⁰³ regarding alternative sanctions. South Africa needs to examine the theories of punishment⁹⁰⁴ and ensure that it allows for more forms of punishment, in addition to the fine, that will fulfill the other theories of punishment. It is submitted that doing so will definitely enhance the regulation of corporate criminal liability and corporate homicide in South Africa.⁹⁰⁵

⁸⁹⁷ M Jefferson ‘Corporate Criminal Liability: The Problem of Sanctions’ (2001) 65 *The Journal of Criminal Law* 235, 238 – 239.

⁸⁹⁸ Ibid 241 – 242.

⁸⁹⁹ Ibid 242.

⁹⁰⁰ Ibid 243.

⁹⁰¹ Clarkson (note 90) 155.

⁹⁰² “Recent legislation providing for asset forfeiture can apply equally to individuals and corporations”. (Burchell (note 49) 569).

⁹⁰³ Rycroft (note 365) 154 warns that punishing a corporation by making use of community service may have the effect of giving the offending corporation positive publicity.

⁹⁰⁴ See discussion in chapter Two VI (a) and (b) above.

⁹⁰⁵ Alternative or additional punishment that involves naming and shaming policies may also be considered for convicted corporations.

(i) Section 332 includes provisions that amount to Constitutional infringements

One of the criticisms levelled against section 332 of the CPA is that some of its provisions will not survive a constitutional challenge. The legislation in which the provision is found predates the Constitution of South Africa and some parts of it have been successfully challenged for being inconsistent with the Constitution. It is submitted that there is a need to make changes to subsections that infringe the Constitution.

In terms of section 332(1)

“A corporation may be held vicariously liable for a crime even though it had reasonable precautions in place to prevent the occurrence of a crime and exercised due diligence. It is not entitled to raise a defence relating to the fact that it acted with due diligence. Consequently a corporate body may be held vicariously liable, without fault, on the basis that an individual is guilty, even though reasonable doubt exists as to the corporation’s own blameworthiness”.⁹⁰⁶

It is submitted that the liability in section 332(1) infringes upon the right to be presumed innocent until proven guilty, which is a Constitutional right that is meant for both natural and juristic persons. Given the outcome of *S v Coetzee* in which the infringement of the right to be presumed innocent was found to violate the Constitution, it remains to be seen whether with regard to the question of the corporation’s liability without fault, s. 332(1) will survive a constitutional challenge.⁹⁰⁷ It is submitted that it is highly unlikely that the section will survive such a challenge, especially since, unlike section 332(5) which provides a defence to the director or servant, section 332(1) does not do likewise.

⁹⁰⁶ Borg-Jorgensen & Van der Linde (53) 458.

⁹⁰⁷ “It may very well be challenged on the ground of being over-broad”. (Jordaan (note 42) 53).

Moreover, section 332(4) and section 332(7) need to be revisited in light of the Constitution and of *S v Coetzee*⁹⁰⁸ as they also both infringe upon the presumption of innocence. With regard to evidence that is admissible, in terms of section 332(4) the onus of proving that “the making of such notes took place outside the scope of that person’s activities is on the accused”.⁹⁰⁹ This is a reverse onus and as already illustrated above, such a provision is highly unlikely to survive a constitutional challenge in the Constitutional Court.

Section 332(7) also contains a reverse onus provision which is similar to the one that was in section 332(5), but with regard to ordinary members of associations. Kruger points out that the “the objections to subsection (5) apply to an even greater extent to subsection (7) and the latter will probably not survive constitutional scrutiny”.

The criticisms that have been discussed above serve as an indication that section 332 is an ineffective, inadequate and unjust provision. It is a provision that needs to be reformed. The criticisms also point towards the broad application of section 332. It is submitted that the broadness of the provision may also lead to its failure to survive a constitutional challenge.⁹¹⁰ This further strengthens the argument for reform.

VI CONCLUSION

Corporate criminal liability is a concept which needs to be taken seriously and South Africa is commended for having made an effort, through section 332 of the CPA, to ensure that corporations are held criminally liable for offences committed in their name. The current

⁹⁰⁸ *S v Coetzee* (note 56).

⁹⁰⁹ Kruger (note 337) 33-7.

⁹¹⁰ Borg-Jorgensen & Van der Linde (note 53) 457 and Jordaan (note 42) 48.

statutory provision, however, leaves much to be desired as can be seen from the shortfalls which have been highlighted in the discussion above.

In South Africa corporate criminal liability has not developed steadily⁹¹¹ and South Africa is in need of a new model of corporate criminal liability which will result in an effective, adequate and just form of corporate criminal liability. In addition to that, it is submitted that unless there is a move towards the more punitive system of dealing with corporate deaths and injuries, it will continue to be difficult to deal adequately with deaths and injuries caused by corporations.

It is further submitted that although the proposed corporate homicide clause was rejected, South Africa would benefit greatly from having a provision which will deal specifically with the criminal liability of corporations for deaths and injuries caused by corporations. The introduction of corporate homicide as a separate offence will emphasise the need for the right to life to be protected. In addition to that a separate legal framework of corporate homicide which will address problems such as the inappropriateness of a fine as the sole punishment will lead to corporations being held properly liable for deaths caused in furthering interests of corporations.

⁹¹¹ A comparison of the 1955 and the 1977 provisions shows in that the latter Act, for the most part, the earlier provision was merely restated without any further / serious developments being included. Moreover it is almost thirty years since the present provision was enacted, but even though so many corporations have continued to commit crimes, the law has uncannily, remained unchanged.

CHAPTER 4 - ENGLISH LAW AND CORPORATE HOMICIDE

I INTRODUCTION

“Corporations are a ubiquitous feature of modern life and are frequently engaged with their employees and the public in hazardous ways. The criminal law would be seriously deficient if harmful conduct carried on by those entities could not be prosecuted and punished”.⁹¹²

⁹¹² Pinto & Evans (note 94) 4.

The above quotation sums up the positive attitude of English law towards corporate criminal liability. English law accepts the notion of holding corporations criminally liable for their crimes and has reached a stage where corporate criminal liability is an integral part of the English corporate and criminal Law. Unlike in South Africa, where corporate criminal liability has not developed much over the years, in English law development in this area of the law has been far more regular and more rapid.

Currently, in English Law the contentious issue is not whether corporate criminal liability should be accepted or not. Despite the fact that it is not everyone who accepts corporate criminal liability,⁹¹³ developments in English law are some way past the stage of questioning whether corporate criminal liability should be accepted or not. At present, the contentious issue is, rather, the form that corporate criminal liability should take.

Though corporate criminal liability is accepted in English law it must be understood that this was not an easy path. Developments were hampered, at first, by several obstacles that made it difficult to embrace this concept.⁹¹⁴ English law gradually overcame these impediments and has now reached a point where there is no doubt that England is one of the jurisdictions which has fully embraced corporate criminal liability. The recognition as well as the development of

⁹¹³ This is evident in the objections to corporate criminal liability that the Law Commission was faced with, *Law Commission, The Criminal Liability of Corporations*, Working Paper No. 44, London (1973) 29 - 36. Objections are also found in Law Commission no 237 where there “the responses of the minority of the respondents who were opposed to the proposal included arguments that involved both questions of principle and practical considerations”. (Law Commission no. 237, *Legislating the Criminal Code: Involuntary Manslaughter* (1996) 91 - 94). Moreover, in the 10th edition of *Smith and Hogan’s Criminal Law* Prof Smith questions the concept of corporate criminal liability and after looking at the reasons advanced for corporate criminal liability he states that “none of these reasons seems to be very compelling and the necessity for corporate criminal liability awaits demonstration”. (JC Smith *Smith and Hogan Criminal Law* 10th ed (2002) 207).

⁹¹⁴ These will be fully discussed below at II (b) (i) (aa) – (cc).

corporate criminal liability in English law has been relatively fast compared to developments in South Africa.

With regard to deaths that have been negligently caused by corporate activities, English law has moved from holding the corporations liable for common-law gross negligence manslaughter to having a separate statutory crime of corporate manslaughter that is aimed at corporations (and other entities) that negligently cause death. Corporations that cause deaths are now held liable and punished in accordance with the CMCHA.

Although England now has the CMCHA, as with corporate criminal liability, England's road to the recognition and acceptance of corporate manslaughter / corporate homicide as an offence regulated in its own separate statute was not an easy one. Actual deaths at the hands of corporations played a vital role in the development of corporate criminal liability. These were as a result of various disasters which had claimed several lives. These disasters had resulted in unsuccessful prosecutions of the accused corporations for common-law gross negligence manslaughter.⁹¹⁵ English society became concerned about this and it is the public outcry that eventually led the government to ensure that there were developments in this area which would make it possible for corporations to be appropriately held accountable for deaths of people caused by the corporations' negligence. After several attempts at reforming the law and after public consultations the CMCHA became a reality and it has now been in existence for more than half a decade.

⁹¹⁵ The Zeebrugge disaster; the Clapham rail disaster; the Piper Alpha oil rig, etc.

In this chapter the recognition and the development of corporate criminal liability and eventually that of corporate manslaughter / corporate homicide in English law will be traced. The discussion will include the history of corporate criminal liability; factors that hampered the development of corporate criminal liability when it was still a relatively new concept; vicarious liability and the identification doctrine as bases for liability for corporate criminal liability; the challenges and obstacles encountered under the identification doctrine; the notion of holding a corporation criminally liable for manslaughter; the common-law crime of gross negligence manslaughter; reasons leading to the development of the new legislation; challenges encountered when attempting to bring separate legislation for deaths caused by corporations; and the challenges as well as commendations of the new legislation. The concept of corporate manslaughter in English law will therefore be fully examined with a view to drawing parallels between the way in which England addresses corporations that kill and the way in which South Africa addresses them. In addition to that the contentious issue of what form corporate criminal liability should take will also be discussed.

II HISTORICAL DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY

(a) The recognition of corporations as separate legal entities

The first form of corporations in English law was the peace guilds⁹¹⁶ that were in existence as early as the 13th century.⁹¹⁷ Individuals with the same goals joined each other and formed these associations.⁹¹⁸ Several types of guilds were in existence⁹¹⁹ and in England it was possible for

⁹¹⁶ These were brotherhoods formed by groups such as neighbours with the intention to protect each other. (S Williston 'History of the Law of Business Corporations Before 1800'(1888) 2 (3) *Harvard Law Review* 107 – 108).

⁹¹⁷ G Richardson "Brand Names Before the Industrial Revolution. Monopolies and Craft Guilds in Medieval England and Modern Imagination." (2001) *Journal of the History of Economic Thought*. <http://eh.net/encyclopedia/article/richardson.guilds> (accessed 26 march 2014)).

⁹¹⁸ Ibid.

⁹¹⁹ Ibid. There were social, political, religious as well as merchant guilds.

them to acquire property.⁹²⁰ Prior to the 16th century guilds were popular and they played an important role in the communities.⁹²¹ Towards the end of the 16th century the existence of guilds in England gradually came to an end.⁹²²

In 1599 a group of traders decided to form a joint trading venture⁹²³ and in December 1600 the East India Company came into being.⁹²⁴ When it first came into being, the East India Company was very different from the concept of a company as we know it today. Unlike the modern day company, the traders who were members of the East India Company continued to trade individually.⁹²⁵ When it came to overseas expeditions they would embark on these jointly and the term used to refer to the joint venture was ‘company’.⁹²⁶ Despite having the status of a company, the East India Company only acted as a company when it came to trading overseas.⁹²⁷ Upon returning from overseas trading voyages, the joint stock was divided among its individual

⁹²⁰ Ibid.

⁹²¹ Ibid. “For nearly two centuries after the Black Death, guilds dominated life in medieval towns. Any town resident of consequence belonged to a guild. Most urban residents thought guild membership to be indispensable. Guilds dominated manufacturing, marketing, and commerce. Guilds dominated local politics and influenced national and international affairs. Guilds were the center of social and spiritual life”. (Ibid).

⁹²² “The Reformation weakened guilds in most newly Protestant nations. In England, for example, the royal government suppressed thousands of guilds in the 1530s and 1540s. The king and his ministers dispatched auditors to every guild in the realm. The auditors seized spiritual paraphernalia and funds retained for religious purposes, disbanded guilds which existed for purely pious purposes, and forced craft and merchant guilds to pay large sums for the right to remain in operation. Those guilds that did still lost the ability to provide members with spiritual services. In Protestant nations after the Reformation, the influence of guilds waned. Many turned to governments for assistance. They requested monopolies on manufacturing and commerce and asked courts to force members to live up to their obligations. Guilds lingered where governments provided such assistance. Guilds faded where governments did not. By the seventeenth century, the power of guilds had withered in England. Guilds retained strength in nations which remained Catholic. France abolished its guilds during the French Revolution in 1791, and Napoleon’s armies disbanded guilds in most of the continental nations which they occupied during the next two decades”. (G Richardson ‘Medieval Guilds’ in R Whaples *EH. Net Encyclopaedia* (2008) <http://www.eh.net/?s=guilds>. (accessed 26 March 2014).

⁹²³ “On September 24, 1599, at the Founders hall in London, an illustrious group of merchants and adventurers resolved to form a company to be known as the East India Company. It was decided to entrust the day-to-day running of the company to 15 directors whose immediate task was to organize an expedition to the East Indies to buy spices, nutmeg in particular”. (Pinto & Evans (note 94) 7).

⁹²⁴ The company was “formed for the exploitation of trade with East and Southeast Asia and India”. (<http://www.victorianweb.org/history/empire/eic.html>). See also Pinto & Evans (note 94) 7.

⁹²⁵ Pinto & Evans (note 94) 7.

⁹²⁶ Ibid 8.

⁹²⁷ Ibid.

members and they could carry on trade on their own, as individuals.⁹²⁸ At first the members would join stock on a trip-by-trip basis,⁹²⁹ however, from 1614 to 1653 members would do so for a fixed period.⁹³⁰

In 1692 a prohibition was made against the individual trading of the members and a permanent joint stock was established.⁹³¹ It was only then that the East India Company became a real company, as Pinto and Evans observe, “only then did the company become a true joint commercial enterprise”.⁹³²

Although it is clear that in the 1600s English law recognized the concept of a corporation as an entity with limited legal personality,⁹³³ it must be noted that at that time the corporation was a very simple entity and not as complicated an entity as it has become.⁹³⁴ It has been stated that the corporation at this point in time did not differ much from a partnership⁹³⁵ and “early corporations were more like guilds, exercising control over the right to engage in specific business activities”.⁹³⁶

⁹²⁸ Ibid. “Till 1614 the joint stock was subscribed for each voyage separately, and at the end of the voyage was redivided”. (Williston (note 916) 110).

⁹²⁹ Ibid 110.

⁹³⁰ Ibid.

⁹³¹ Ibid. “After 1692 no private trading of any kind was allowed except to the captains and seamen of the Company’s ships”. (Williston (note 916)110).

⁹³² Pinto & Evans (note 94) 8.

⁹³³ Ibid 6.

⁹³⁴ “A corporation at the beginning of the eighteenth century was a significantly different legal creature to that which it had become by the beginning of the twentieth century”. (Ibid 7). “But the corporation was far from being regarded as simply an organization for the more convenient prosecution of business. It was looked on as a public agency, to which had been confided the due regulation of foreign trade, just as the domestic trades were subject to the government of the guilds”. (Williston (note 916) 110).

⁹³⁵ “Before 1862, there was, in practical terms, little to distinguish between unincorporated partnerships and incorporated companies”. (Pinto & Evans (note 94) 8).

⁹³⁶ Ibid 8.

It must be noted though that it is also during this period that we see the first traces of the courts' recognition of a company's legal personality as can be seen in Lord Coke's explanation of what a corporation is in the *Sutton's Hospital* case:⁹³⁷

“...the corporation itself is only in abstracto, and rests only in intendment and consideration of the law; for a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law...They cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person but by attorney.. A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor swear...”⁹³⁸

The characteristics of a corporation, as explained by Coke, include legal personality, however, based on what he said, at this point in time the criminal liability of corporations was something which did not seem possible.⁹³⁹

In 1710 the South Sea company was formed.⁹⁴⁰ It, however, sold far more stock or shares than it had⁹⁴¹ and this led to its collapse. A serious problem which was caused by the collapse of the South Sea Company was that it led to the development of many unincorporated business

⁹³⁷ *Coggs v Bernard* [1558-1774] All ER Rep 1 (also known as the *Sutton's Hospital* case (1612) 10 Rep 32.

⁹³⁸ *Ibid.*

⁹³⁹ As will be seen below, this was mainly due to Sir John Holt's declaration that a corporation cannot be found guilty of criminal offences for which death or imprisonment is the only penalty or which by their nature can only be committed by natural persons.

⁹⁴⁰ LW Hein 'The British Business Company: Its Origin and its Control' (1963) 15(1) *The University of Toronto Law Journal* 134, 134.

⁹⁴¹ T Hadden, RE Forbes & RL Simmonds *Canadian Organisation Law* (1984) 12.

undertakings which lacked legal capacity, thus hampering the development of corporate criminal liability, as they could neither be sued nor prosecuted.⁹⁴²

Following the actions of the South Sea Company, in 1719 parliament passed the Bubble Act which declared unincorporated joint stock companies illegal.⁹⁴³ In terms of section 21 of the Bubble Act “brokers dealing in securities of illegal companies”⁹⁴⁴ were held criminally liable. This is the first instance in which we see the first traces of the concept of corporate criminal liability in English law, although it was not the company per se that was being held liable.⁹⁴⁵ Even though the Bubble Act was subsequently repealed in 1825,⁹⁴⁶ it is submitted that the importance of section 21 of the Bubble Act lies in the fact that it was a step towards the eventual proper recognition and acceptance of the notion that a corporation itself, and not just its members, is capable of committing crimes and for that reason it ought to be held criminally liable.

It has been noted that, during that period, incorporation was not an easy exercise and that it was expensive to incorporate.⁹⁴⁷ This was apparently the case until the coming into being of the Joint Stock Companies Act of 1844 which allowed for the registration of corporations.⁹⁴⁸ This in turn gave the companies the right to sue and to be sued.⁹⁴⁹ In addition to that, incorporation made it possible for a corporation to exist as a legal entity on its own and it also

⁹⁴² Pinto & Evans (note 94) 9.

⁹⁴³ Hein (note 940) 145.

⁹⁴⁴ Pinto & Evans (note 94) 8.

⁹⁴⁵ Ibid 9.

⁹⁴⁶ Hein (note 940) 145.

⁹⁴⁷ Pinto & Evans (note 94) 8.

⁹⁴⁸ Hein (note 940) 143.

⁹⁴⁹ Ibid 143.

allowed the corporation to have perpetual existence.⁹⁵⁰ The Act thus gave full recognition to the concept of joint stock companies⁹⁵¹ and, as already stated, those companies that were registered attained legal personality.⁹⁵² It has been stated that business enterprises normally sought incorporation in order to attain “monopolistic rights or special powers”.⁹⁵³ It must be noted, however, that the Joint Stock Companies Act of 1844 did not include the concept of limited liability for corporations.⁹⁵⁴

It was only in the nineteenth century that corporations were regarded as entities having full legal or juristic personality.⁹⁵⁵ Wells points out, however, that several factors led to the recognition of the legal personality of corporations and it is not possible to state exactly when such recognition occurred.⁹⁵⁶ The acceptance of the term ‘person’, as a term that also describes a corporation, developed over a period of time.⁹⁵⁷ The judiciary endorsed this in *Royal Main Steam Packet Co. v Braham*.⁹⁵⁸ Wells notes, however, that the courts did not refer to this until it was repeated in the Interpretation Act, 1889.⁹⁵⁹

⁹⁵⁰ Pinto & Evans (note 94) 8.

⁹⁵¹ Hein (note 940) 145.

⁹⁵² Ibid 145-146 as well as Pinto & Evans (note 94) 9.

⁹⁵³ Pinto & Evans (note 94) 8.

⁹⁵⁴ “Although the limited liability of corporations had been recognized since the eighteenth century, recognition of the benefits it bestowed upon the members was slow to develop. The 1844 joint stock Companies act did not introduce limited liability; that did not become generally available until 1856. Even after the Limited Liability Act 1855 there were in fact instances where investors in major corporations were exposed to unlimited liability for the corporation’s debts; this frequently resulted in the investors’ ruin”. (Ibid 10).

⁹⁵⁵ “By the end of the nineteenth century courts were quite familiar with the idea that, for some purposes, the word ‘person’ in a criminal statute might include a corporation”. (Wells (note 15) 86). “...the idea of companies as separate legal entities from their shareholders and their management was established in the nineteenth century”. (Ashworth (note 246) 114).

⁹⁵⁶ “The recognition of the corporation as a legal person is not a fact whose provenance can be pinpointed, but rather it is a tidemark subject to the ebb and flow of many different factors”. (Wells (note 15) 86).

⁹⁵⁷ As stated above, in terms of section 14 of the Criminal Law Act 1827 the term ‘person’ in legislation also referred to corporations. See also Wells (note 15) 86.

⁹⁵⁸ *Royal Main Steam Packet Co. v Braham* (1877) 2 App. cas. 381. See also Wells (note 15) 86.

⁹⁵⁹ Wells (note 15) 86.

During the nineteenth century a further important development that was made towards the recognition of companies as legal persons was the handing down of the judgment in *Salomon v Salomon & Co Ltd*.⁹⁶⁰ *Salomon v Salomon & Co Ltd* has since been and continues to be a leading company law case on the separate existence of a company, apart from its members.⁹⁶¹ This was an appeal against the decision of the Court of Appeal. Salomon was a major shareholder of a company, while his wife and five of their six children held one share each.⁹⁶² Salomon had raised the capital by personally becoming a debenture holder, but due to strikes as well as a great depression affecting the shoe and boot market the company failed.⁹⁶³ During liquidation it became clear that it had insufficient assets to repay its debentures and if the existing assets were used for that purpose, that would leave nothing for the unsecured creditors.⁹⁶⁴

Lord Herschell points out that the Court of Appeal had refused to reverse the court *a quo*'s decision that the formation of a company by Salomon was "a mere scheme to enable the appellant to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862".⁹⁶⁵

This was not accepted by the court. In his judgment Lord Macnaghten draws attention to the fact that the company is separate from the subscribers to the company's memorandum:

⁹⁶⁰ *Salomon v Salomon & Co Ltd* [1897] A.C. 22, 35.

⁹⁶¹ This is not only confined to the Company law of England, but even in South Africa *Salomon v Salomon & Co Ltd* is regarded as a leading case on the concept of the separate legal existence of a company.

⁹⁶² *Salomon v Salomon & Co Ltd* (note 960) 41.

⁹⁶³ *Ibid* 49.

⁹⁶⁴ *Ibid* 41.

⁹⁶⁵ *Ibid* 46.

“The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form except to the extent and in the manner provided by the Act”.⁹⁶⁶

The House of Lords’ decision was therefore that from the time a company is incorporated it becomes a legal entity, separate from its members⁹⁶⁷ and the fact that Salomon held the majority of the shares in the company had no bearing on the fact that the company had been duly incorporated.⁹⁶⁸ The court also found no ground for accepting that the debts of the company were the debts of Salomon.⁹⁶⁹

Accordingly, the decision in *Salomon v Salomon and Co.* entrenches the principle that upon formation a company becomes recognized by law as an entity with its own legal personality, which exists separately from its members, and which has the capacity to have its own obligations and rights; “once a company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriated to it; the motives of a company during the formation of the company are irrelevant when discussing the rights and liabilities of such a company”.⁹⁷⁰ This important decision was taken by the House of Lords in 1897 and the principle entrenched is still applicable and relevant in company law today and it is “almost universally cited for the proposition that the corporation is a separate legal entity”.⁹⁷¹

⁹⁶⁶ Ibid 49 - 50.

⁹⁶⁷ As Lord McNaughten states “The company attains maturity on its birth”. (Ibid 49).

⁹⁶⁸ Ibid 36.

⁹⁶⁹ “There is no ground for the reasoning of Vaughan Williams J that...the company’s debts are those of an undisclosed principal namely the appellant”. (Ibid 36).

⁹⁷⁰ Davis & Geach (note 54) 29.

⁹⁷¹ B Welling, L Smith & LI Rotman *Canadian Corporate Law* 3rd ed 127.

It is this separate legal personality that makes it possible for a corporation to be held liable in its own capacity. Without this principle it would be the shareholders that would bear liability in the event of any wrongdoing.

Although the case dealt with the liability for debts of a company, from the decision, it follows that the obligations of a company are those of the company and not of its shareholders. Moreover, as these are legally recognized obligations, such obligations are enforceable by means of the applicable law, whether that is civil or criminal law. The separate personality of corporations is an important concept and it has led to corporations becoming an integral and essential part of society.⁹⁷²

(b) The historical development of corporate criminal liability in England

During the period between the coming into existence of companies and the coming into being of the Joint Stock Companies Act, there was hardly any difference between unincorporated partnerships and incorporated companies as the companies resembled guilds.⁹⁷³ With the coming into being of the Joint Stock Companies Act of 1844 difference between companies and partnerships became clear. In fact, factors distinguishing the unincorporated partnerships from the incorporated companies were that (a) the companies had perpetual existence, (b) they had the ability to own property and (c) they were able to sue in the company's name.⁹⁷⁴ Pinto and Evans further point out the fact that incorporation allowed a corporation to "invite

⁹⁷² "In the Common Law we call artificial persons corporations. Their existence is necessary to avoid the tedious and cumbrous processes which would otherwise be required for the carrying on of joint undertakings in which a large number of citizens are or may be interested". (F Pollock *A First Book on Jurisprudence for Students of the Common Law* (1918) 120).

⁹⁷³ Pinto & Evans (note 94) 8.

⁹⁷⁴ *Ibid.*

investment from the public”.⁹⁷⁵ They further point out that this particular feature was “in due course, the reason for the first interest shown by the criminal law in the operation of corporations”.⁹⁷⁶

The legal personality of a company has been accredited with being “the foundation of the development of principles of corporate criminal liability”.⁹⁷⁷ It is submitted that this statement is correct. After the recognition and acceptance of corporations as legal persons, corporations continued to play an increasingly prominent role in the economy⁹⁷⁸ and one of the consequences of corporate activities is that these affected human beings in many ways as “corporations began to cause damage and injury both to property and person”.⁹⁷⁹ The need for corporations to be held criminally accountable for their actions thus became an inevitable consequence of accepting or recognizing them as legal persons⁹⁸⁰ and as more business entities opted for incorporation,⁹⁸¹ the need for corporate criminal liability became distinct.

It must be noted though that “many European jurisdictions initially refused to recognize corporate criminal liability because the notion that a juristic fiction such as a corporation could possess guilt in the sense necessary for the application of criminal law seemed far-fetched”.⁹⁸²

In fact, the development of corporate criminal liability in English law was hindered mainly by

⁹⁷⁵ Ibid.

⁹⁷⁶ Ibid.

⁹⁷⁷ Ibid 14.

⁹⁷⁸ “The one-person entrepreneur was being replaced by more complex business arrangements, and in terms of activity, the development of the railways transformed the landscape, the economy and mobility”. (Wells (note 15) 87).

⁹⁷⁹ Ibid.

⁹⁸⁰ Corporations serve as employers, service providers, etc. and corporate activities impact on society, for instance death or injury while on duty or while using public transportation.

⁹⁸¹ “The one-person entrepreneur was being replaced by more complex business arrangements”. (Wells (note 15) 86).

⁹⁸² Khanna (note 25) 1490.

the fact that the idea of holding a corporation criminally liable was not welcomed at first.⁹⁸³ The concept of corporate criminal liability thus began in a very simple form as the legislature enacted regulatory offences and corporations were punished for the contravention of the provisions of such legislation.⁹⁸⁴

Before the acceptance of corporate criminal liability, civil liability against corporations that caused harm to people had already emerged.⁹⁸⁵ This was an important step towards the development of corporate criminal liability.⁹⁸⁶ It is submitted that the acceptance of the civil liability of corporations paved the way to the acceptance of the fact that it is possible for corporations to commit crimes and as legal persons, to be held accountable for those crimes. As Leigh states “statements enunciated in the field of torts were...to become accepted as principles applicable to the field of criminal law, with but isolated protests”.⁹⁸⁷

During the early days of the nineteenth century the first traces of corporate criminal liability were found in cases where courts were holding corporations criminally liable for nonfeasance⁹⁸⁸ in cases of public nuisance.⁹⁸⁹ Before the middle of the nineteenth century there

⁹⁸³ “English courts originally rejected the very idea of corporate liability”. (Stessens (note 52) 495).

⁹⁸⁴ Wells describes statutory regulation as “the most common forum in which corporations are confronted by criminal sanction”. (Wells (note 15) 3).

⁹⁸⁵ “Plaintiffs discovered that the individual at fault might not be capable of being sued or worth suing. It emerged that what was the simplest for the injured party was also the safest for management: to treat the corporation as the actor”. (Wells (note 15) 87). “In the meantime the courts had held that civilly, intent and malice could be imputed to the corporation”. (Leigh (note 58) 15).

⁹⁸⁶ “The emergence of civil claims against corporations provides only part of the background to the development of corporate criminal liability”. (Wells (note 15) 87 - 88).

⁹⁸⁷ Leigh (note 58) 15.

⁹⁸⁸ Nonfeasance is defined as the omission of some act that ought to have been performed. Dictionary (<http://dictionary.reference.com/browse/nonfeasance?s=t> (accessed 16 November 2013)). In this case it refers to the omission of the removal of a public nuisance.

⁹⁸⁹ Khanna (note 25) 1481.

was doubt as to whether a corporation could be held liable also for misfeasance⁹⁹⁰ (positive acts).⁹⁹¹ A milestone was then reached in 1840 when an indictment against a corporation, which had been ordered to remove a bridge it had erected, was upheld in *R v Birmingham & Gloucester Railway Co.*⁹⁹² The importance of the ruling in *R v Birmingham & Gloucester Railway Co.* is that it indicated clearly that even corporations “could be held criminally liable for misfeasance”.⁹⁹³ In upholding the indictment the court stated that “the liability of corporations was to be equated, so far as possible, with that of natural persons”.⁹⁹⁴ As seen from *R v Birmingham & Gloucester Railway Co.*⁹⁹⁵ the English courts played a pivotal role in the recognition as well as the development of corporate criminal liability.⁹⁹⁶

It was, however, not until towards the beginning of the twentieth century that it was accepted that corporations could commit crime.⁹⁹⁷ Although progress made by the courts in this regard was slow at first,⁹⁹⁸ since the last century there have been regular prosecutions of corporations and corporations have reportedly been convicted for crimes, including manslaughter.⁹⁹⁹

(i) Difficulties encountered with the introduction of corporate criminal liability in England

⁹⁹⁰ Misfeasance is defined as a wrong, actual or alleged, arising from or consisting of affirmative action. Dictionary (<http://dictionary.reference.com/browse/misfeasance?s=t> ((accessed 16 November 2013))).

⁹⁹¹ Khanna (note 25) 1481.

⁹⁹² Ibid. *R v Birmingham & Gloucester Railway Co.* (note 93) 223.

⁹⁹³ Khanna (note 25) 1481.

⁹⁹⁴ Ibid; LH Leigh ‘The Criminal Liability of Corporations and Other Groups’ (1977) 9 *Ottawa Law Review* 247, 249.

⁹⁹⁵ *R v Birmingham & Gloucester Railway Co.* (note 93) 223.

⁹⁹⁶ Ashworth (note 246) 5.

⁹⁹⁷ *R v Birmingham & Gloucester Railway Co.* (note 93) 223.

⁹⁹⁸ “...the courts moved slowly in this direction in the mid-nineteenth century”. (Ashworth (note 246) 117).

⁹⁹⁹ *R v Jackson Transport (Ossest) Ltd* 1996 and *R v Kite and Others* 1994 are the first two recorded convictions for manslaughter (both unreported cases).

There were factors that barred the introduction of the criminal liability of corporations. At first, corporations were originally not held liable for criminal offences as they were deemed incapable of committing offences.¹⁰⁰⁰ Several reasons have been given for such a conclusion.¹⁰⁰¹

- One of the reasons, which relates to procedure, was that personal appearance at the trial was a requirement and this could not be fulfilled by a corporation.¹⁰⁰²
- Another reason had to do with the fact that the punishment for felonies was death, a form of punishment which could not be meted out on a corporation.¹⁰⁰³
- Another reason was that it was not possible for a corporation to have mens rea, an element that was required for committing a crime.¹⁰⁰⁴
- The fact that the corporation could not be held liable for criminal acts as these were considered to be *ultra vires*,¹⁰⁰⁵ was another challenge to the acceptance of corporate criminal liability.
- The corporations' lack of personal attributes such as criminal intent¹⁰⁰⁶ was also another hindrance to holding corporations criminally liable.

(aa) Personal appearance at trial

¹⁰⁰⁰ Ormerod (note 96) 257.

¹⁰⁰¹ Leigh (note 58) 3.

¹⁰⁰² "As a matter of procedure, personal appearance was necessary at court in the assizes and quarter-sessions. Since the corporation has no physical person, it could not appear". (Ormerod (note 96) 257).

¹⁰⁰³ Miester (note 104) 925. "As a general rule, the sentence on conviction for a felony was imprisonment or death, neither of which could be visited upon by a corporate. A fine could only be imposed on conviction for a felony if such powers were expressly provided by a statute". (Pinto & Evans (note 94) 16).

¹⁰⁰⁴ *Ibid.*

¹⁰⁰⁵ Leigh (note 58) 3.

¹⁰⁰⁶ Pinto & Evans (note 94) 16 and Leigh (note 58) 15.

At first it seemed unimaginable that a company, an artificial being, lacking a brain and physical attributes, could make a court appearance and as this was a procedural requirement for liability,¹⁰⁰⁷ the prevailing view was that it was not possible to hold a corporation criminally liable.¹⁰⁰⁸ The corporation's inability to meet the requirement of making a personal appearance at a trial has been cited as a corporation's "most fundamental bar to liability"¹⁰⁰⁹ as this fact made it difficult to take action against a corporation.¹⁰¹⁰

It must be noted though that as early as 1705 in *R v Saintiff*¹⁰¹¹ a corporation was indicted for "failure to perform a public duty resulting in nuisance".¹⁰¹² This early acceptance that a corporation could be held liable for omissions resulting in public nuisance is seen by Leigh as the driving force towards the acceptance of the concept of holding corporations liable.¹⁰¹³ He explains, however, that this was not regarded as a true criminal prosecution and *mens rea* was not required.¹⁰¹⁴ Moreover, since the prosecution was particularly aimed at seeing to it that the nuisance would be removed, as opposed to aiming at punishing the defendant, there was no need for the defendant to make a personal appearance in court when judgment was made.¹⁰¹⁵

Leigh makes it clear that with regard to offences that were "punishable on summary conviction" there was no problem as the Summary Conviction Act¹⁰¹⁶ explained that

¹⁰⁰⁷ Leigh (note 58) 10. This was a requirement for indictable offences. (Ibid 10).

¹⁰⁰⁸ Ibid 9.

¹⁰⁰⁹ Leigh (note 994) 247.

¹⁰¹⁰ Ormerod (note 96) 246.

¹⁰¹¹ *R v Saintiff* (1705) 6 Mod. 255.

¹⁰¹² Leigh (note 58) 16.

¹⁰¹³ "An indictment lay against a corporation in respect of failure to perform a public duty resulting in a nuisance...The liability of corporations however derives its real impetus from liability for nonfeasance in cases of public nuisance". (Ibid).

¹⁰¹⁴ Ibid.

¹⁰¹⁵ Ibid.

¹⁰¹⁶ The Summary Conviction Act, 1848.

appearance could be made by the accused's counsel or attorney.¹⁰¹⁷ The Quarter Session Act¹⁰¹⁸ was also clear in this regard as it allowed the accused or the attorney of the accused to sign a notice of appeal.¹⁰¹⁹ The problem was with regard to indictable offences, due to a requirement that a personal appearance had to be made by the accused.¹⁰²⁰ This was impossible for a corporation, which could only do so via its attorney and this resulted in the corporation not being able to be tried at assize.¹⁰²¹

It is submitted that the acceptance of a corporation as being incapable of committing offences, due to its inability to be physically present in court, was problematic in that it gave the impression that a corporation was not in a position to commit criminal offences.

(bb) Death as a penalty

Death was the punishment meted out for felonies and since such a punishment could not be imposed on corporations,¹⁰²² corporations could not be held liable for such felonies. These sentiments had already been expressed in the *Sutton Hospital* case where it was stated that “a corporation cannot be found guilty of criminal offences for which death or imprisonment is the only penalty or which by their nature can only be committed by natural persons”.¹⁰²³ With no

¹⁰¹⁷ Leigh (note 58) 16.

¹⁰¹⁸ The Quarter Session Act, 1849.

¹⁰¹⁹ Leigh (note 58) 10.

¹⁰²⁰ Ibid.

¹⁰²¹ Ibid.

¹⁰²² The prevailing view was that “at common law corporations simply could not be held criminally liable... This notion was based in part on the practical consideration that most early punishments involved death or dismemberment and were thought to be inapplicable to corporations”. (Miester (note 104) 923 – 924).

¹⁰²³ According to Sir John Holt a corporation cannot be found guilty of criminal offences for which death or imprisonment is the only penalty or which by their nature can only be committed by natural persons. (*Coggs v Bernard Sutton's Hospital Case* (note 937) 1).

physical body to suffer the punishment, prosecuting a corporation whilst knowing that if convicted the death sentence would be passed, would have been a futile exercise.

Meting out the death sentence to individuals who stand trial on behalf of corporations was also not going to resolve the issue, as Leigh explains:

“We cannot draw an inference by analogy that the body of the human or humans who constitute its controlling organs, constitutes the body of the corporation. Clearly, in terms of existing legal concepts, that is not so. We do not sentence the corporation to death and carry out the sentence by hanging the controlling person in the corporate structure. The corporation is an abstraction and survives the death of those who act on its behalf’.¹⁰²⁴

The corporation’s inability to be handed the death sentence was clearly an obstacle to holding corporations criminally liable for felonies committed in furthering the interests of the corporation.

(cc) The corporation’s lack of *mens rea*

The fact that a corporation was regarded as a fictional entity also made it difficult to impose criminal liability on a corporation.¹⁰²⁵ Since a corporation was not a natural person it had to rely on certain natural persons to make decisions on its behalf.¹⁰²⁶ When such decisions were made and they resulted in the corporation being held criminally liable, the question arose as to

¹⁰²⁴ Leigh (note 58) 7.

¹⁰²⁵ Ibid 5.

¹⁰²⁶ Pinto & Evans (note 94) 17.

how a corporation could possibly possess such an attribute as *mens rea*, an element required for committing an offence.¹⁰²⁷

“It could not act for itself. Physical acts had to be performed not by the corporation, but in its name. Criminal liability, if imposed upon the corporation, had therefore to be vicarious liability. Vicarious liability had no place in English criminal law”.¹⁰²⁸

This meant that even though there was a possibility of imposing corporate criminal liability by holding the corporation vicariously liable for the criminal acts of those natural people who acted on its behalf, this was, at first not possible. Over the years, vicarious liability was eventually accepted as a rule of attribution, thus making it possible to hold corporations criminally liable.¹⁰²⁹ Vicarious liability was subsequently followed by the doctrine of identification, as a rule of attribution.¹⁰³⁰

(dd) Crime by a corporation is an *ultra vires* act

Another reason set forth for a corporation’s inability to commit a crime is the fact that the commission of a crime by a corporation was thought to be an *ultra vires* act by a corporation.¹⁰³¹ Since the commission of a crime could not possibly be something which companies have the mandate to do, criminal actions were considered to be *ultra vires*. The view was that a corporation could therefore not be held liable for criminal acts as these were considered to be *ultra vires* acts.¹⁰³² An act of a corporation is considered to be *ultra vires* when a corporation has acted beyond its capacities.¹⁰³³

¹⁰²⁷ Ibid.

¹⁰²⁸ Leigh (note 58) 5.

¹⁰²⁹ Pinto & Evans (note 94) 19).

¹⁰³⁰ Ibid.

¹⁰³¹ Ormerod (note 96) 258.

¹⁰³² Leigh (note 58) 3.

¹⁰³³ Leigh (note 994) 258.

In brief, the doctrine provided that a company could not pursue objects other than those specified in its objects clause. Activities falling entirely outside the ambit of those specified in the objects clause were said to be *ultra vires* the company and, in respect of such activities, the company could not be made liable.¹⁰³⁴

The reasoning here was based on the fact that as an artificial being a corporation is only able to act in accordance with its powers, therefore any act beyond its powers, such as committing a crime, is an *ultra vires* act.¹⁰³⁵ The *ultra vires* argument was advanced in *Ashbury Railway Carriage v Riche*¹⁰³⁶ in which Lord Cairns stated that the contract was

“beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract”.¹⁰³⁷

In casu Lord Cairns states that he is in agreement with Mr Baron Bramwell in the Court of Exchequer¹⁰³⁸ and he makes it clear that the mode of incorporation:

“states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary so to state, negatively, that nothing shall be done beyond that ambit and that no attempt shall be made to use the corporate life for any purpose other than that which is so specified”.¹⁰³⁹

¹⁰³⁴ Leigh (note 58) 8.

¹⁰³⁵ It was argued that “since a corporation is a creature of the law, it can only do such acts as it is legally empowered to do, so that any crime is necessarily *ultra vires*; and that the corporation, having neither body nor mind cannot perform the acts or form the intents which are a prerequisite of criminal liability”. (Ormerod (note 96) 258).

¹⁰³⁶ *Ashbury Railway Carriage v Riche* (1875) LR 7 HL 653.

¹⁰³⁷ *Ibid* 672.

¹⁰³⁸ “My Lords, I agree entirely, both with the description given here by Mr Baron Bramwell, of the nature of the contract and with the conclusion at which he arrived, that a contract of this kind was not within the words of the memorandum of association”. (*Ibid* 666).

¹⁰³⁹ *Ibid* 670.

In *Abrath v North Eastern Railway Company*,¹⁰⁴⁰ the *ultra vires* doctrine was also applied to torts. Lord Bramwell stated that a corporation could not act with malice or motive.¹⁰⁴¹ He went further to state that:

“If the directors even, by resolution at their board or by order under the common seal of the company ... if they did it from an indirect or improper motive no action would lie against the corporation, because the act on the part of the directors would be *ultra vires*; they would have no authority to do it. They are only agents of the company; the company acts by them, and they have no authority to bind the company by ordering a malicious prosecution”.¹⁰⁴²

Lord Bramwell’s assertion regarding the *ultra vires* doctrine was, however, later rejected by the court in *Citizens Life Assurance Company v Brown*.¹⁰⁴³ *In casu* the question facing the court was the liability of a corporation for libel which had been published by one of its officers.¹⁰⁴⁴ The court held that the company was legally responsible for the libel that had been published by its officer.¹⁰⁴⁵ In passing judgment Lord Lindley stated that the officer “had no actual authority, express or implied, to write libels nor to do anything legally wrong; but it is not necessary that he should have had any such authority in order to render the appellant company liable for his acts”.¹⁰⁴⁶ The *ultra vires* doctrine was therefore not upheld in this tort case and in this regard Leigh states that in tort “the courts thus adopted the view that the relevant enquiry

¹⁰⁴⁰ *Abrath v North Eastern Railway Company* (1886) 11 App. Cas 247.

¹⁰⁴¹ *Ibid* 251.

¹⁰⁴² *Ibid*.

¹⁰⁴³ *Citizens Life Assurance Company v Brown* [1904] AC 423. Leigh points out that in *Citizens Life Assurance Company v Brown* it was stated that “a corporation civilly was to be placed in the same position as a human employer with respect to liability for the torts of his employees. All employees were liable for torts involving malice committed by their employees in the course of their employment. The corporation was in the same position. The courts thus adopted the view that the relevant inquiry was not directed towards the nature of the act in question, but to whether it was done in pursuit of objects competent to the corporation”. (Leigh (note 58) 9).

¹⁰⁴⁴ *Citizens Life Assurance Company v Brown* (note 1043) 424.

¹⁰⁴⁵ *Ibid*.

¹⁰⁴⁶ *Ibid* 427.

was not directed towards the nature of the act in question, but to whether it was done in pursuit of objects competent to the corporation”.¹⁰⁴⁷

With the *ultra vires* argument rejected in the law of torts it is not surprising that with regard to the criminal liability of corporations, the argument that a corporation could not commit a crime since that would be an *ultra vires* act did not enjoy support.¹⁰⁴⁸ Leigh specifically refers to this as a limitation that was “universally rejected”.¹⁰⁴⁹ It was accepted that a corporation is capable of committing crimes¹⁰⁵⁰ and the rule is that a corporation may be held liable for crimes committed “where its activity falls within the class of activities permitted by its object clause”.¹⁰⁵¹ In this way, the *ultra vires* argument was overcome by making use of the vicarious liability doctrine to hold the corporation liable.¹⁰⁵²

(ii) Factors that paved the way for the recognition / acceptance of corporate criminal liability

In spite of the fact that the concept of a corporation as a legal person has been part of English law for several centuries,¹⁰⁵³ it took time for the idea of holding a corporation criminally liable to be fully accepted. The common-law rule was that criminal liability could not be imposed on corporations.¹⁰⁵⁴ This was emphasized by the court in *Anon* in 1701 where Sir John Holt

¹⁰⁴⁷ Leigh (note 58) 9.

¹⁰⁴⁸ “The *ultra vires* doctrine, however, seems to have been ignored in both the law of tort and crime and to apply only in the law of contract and property”. (Ormerod (note 96) 258).

¹⁰⁴⁹ “The *ultra vires* limitation was therefore almost universally rejected”. (Leigh (note 994) 248).

¹⁰⁵⁰ Leigh (note 47) 1511. “It now seems clear that *ultra vires* will be taken as referring solely to capacity and that, if a criminal act is performed in pursuance of an activity *intra vires* the corporation, the corporation will be held liable in respect of it”. (Leigh (note 58) 9).

¹⁰⁵¹ Leigh (note 47) 1511.

¹⁰⁵² See discussion on the vicarious liability doctrine in Chapter Two IV (b) above.

¹⁰⁵³ “Courts have recognized that corporations have some sort of legal personality since the seventeenth century”. (Pinto & Evans (note 94) 6).

¹⁰⁵⁴ Leigh (994) 247.

declared that “a corporation is not indictable but the particular members of it are”.¹⁰⁵⁵ Leigh attributes Sir John Holt’s declaration to (a) the fact that a corporation could not have *mens rea* (b) the corporation’s inability to physically act and (c) the fact that it was impossible for a corporation to appear in court in person.¹⁰⁵⁶ With regard to Sir John Holt’s declaration, having such a declaration being made by a court of law had the potential of closing doors to the further development of corporate criminal liability.

Leigh points out the fact that there was one exception to the declaration made by Sir John Holt and that is that “an indictment lay against a corporation in respect of failure to perform a public duty resulting in a nuisance”.¹⁰⁵⁷ This exception played an important role in the development of corporate criminal liability as confirmed by Leigh, who observes, as stated above, that holding corporations criminally liable for their offences was stimulated by the corporations’ “liability for nonfeasance in cases of public nuisance”.¹⁰⁵⁸ Leigh goes on to show how holding corporations liable for public nuisance basically laid the foundation for corporate criminal liability.¹⁰⁵⁹ He states that the prosecution was not strictly regarded as a criminal proceeding, but rather as a way of “enforcing a public duty”.¹⁰⁶⁰ He goes on to explain that *mens rea* was not a requirement, because the main issue was the failure to remove the nuisance¹⁰⁶¹ and “policy required that the corporation be made amenable for the duty to repair lay upon the corporation, and not upon its individual members”.¹⁰⁶² The corporation was held liable, however, the main

¹⁰⁵⁵ *Anon* (1701) 12 Mod. 560, 88 E.R. 1518.

¹⁰⁵⁶ Leigh (note 58) 15.

¹⁰⁵⁷ *Ibid* 16.

¹⁰⁵⁸ *Ibid*.

¹⁰⁵⁹ “Corporations were indictable for non-performance of duties laid down upon them by charter, prescription or statute when non-performance resulted in a public nuisance”. (Leigh (note 58) 16).

¹⁰⁶⁰ *Ibid*.

¹⁰⁶¹ “That the real complaint was of inaction on the part of the corporation’s officers and servants was not adverted to”. (*Ibid*).

¹⁰⁶² *Ibid*.

aim of the prosecution was removing the nuisance, as opposed to the punishment of the corporation.¹⁰⁶³ For that reason there was no need for the corporation to be physically present in court when judgment was given,¹⁰⁶⁴ which made it possible for the corporation to be held liable for the nonfeasance.

Already in the seventeenth century corporations were being held liable for nonfeasance,¹⁰⁶⁵ which would eventually make it possible for corporations to be held criminally liable for other offences.¹⁰⁶⁶ As Williston points out “it was held that a corporation could not be guilty of a true crime that is it could not have a criminal intent, but it could be indicted for a nuisance or for a breach of a prescriptive or statutory duty, and, in general, where only the remedy was criminal in its nature”.¹⁰⁶⁷

It must be noted that despite the potential of the declaration of Sir John Holt to hinder the development of corporate criminal liability,¹⁰⁶⁸ English law continued to develop gradually and in 1827 it was already clear that a corporation could be held liable for criminal conduct.¹⁰⁶⁹ In terms of section 14 of the Criminal Law Act¹⁰⁷⁰ a corporation was included in the term ‘person’ and could therefore be liable for certain crimes.¹⁰⁷¹ Leigh points out that at this point in time the common law had already reached a stage where it regarded a corporation as a person.¹⁰⁷² It

¹⁰⁶³ Ibid.

¹⁰⁶⁴ Ibid.

¹⁰⁶⁵ Ibid.

¹⁰⁶⁶ Wells avers that “local authorities’s liability for public nuisance provided a model for the application of the juristic person concept to the newly developing collective body, the corporation”. (Wells (note 15) 88).

¹⁰⁶⁷ Williston (note 916) 124.

¹⁰⁶⁸ This declaration has been described as appearing “to close the door to criminal liability”. (Pinto & Evans (note 94) 6).

¹⁰⁶⁹ Ibid 3.

¹⁰⁷⁰ Criminal Law Act 1827 (note 957).

¹⁰⁷¹ Ibid.

¹⁰⁷² Leigh (note 58) 20.

is submitted that section 14 reinforced this concept. It is further submitted that the importance of section 14 of the Criminal Law Act lies in the fact that it extended the liability brought about by other statutes to include the liability of corporations for crimes.¹⁰⁷³ This is in line with Leigh's observation that section 14 was "intended to have a wider effect"¹⁰⁷⁴ and that it is highly likely that the intention of the legislature was to put corporations in a position where they could be possibly held "*prima facie* liable for most statutory offences".¹⁰⁷⁵ This extension of criminal liability for statutory offences to corporations played an important role in the development of the concept of corporate criminal liability.

Corporations could also be held liable for non-compliance,¹⁰⁷⁶ where they had breached statutory duties.¹⁰⁷⁷ This is in spite of the fact that the contravention of regulatory statutes was not really regarded as true criminal offences. As stated above, a conviction for such an offence dates back to 1842 in *R v Birmingham & Gloucester Railway Co.*,¹⁰⁷⁸ where "the corporation was indicted for disobeying an order of the Justices, confirmed at Quarter Sessions, directing it to remove a bridge which it had erected over a road".¹⁰⁷⁹ Although this was a simplistic form of holding a corporation liable¹⁰⁸⁰ for its unlawful conduct, it formed an important part of the development of the concepts of corporate criminal liability and corporate homicide as we know it today.

¹⁰⁷³ Ibid.

¹⁰⁷⁴ Ibid 16.

¹⁰⁷⁵ Ibid.

¹⁰⁷⁶ Pinto & Evans (note 94) 3.

¹⁰⁷⁷ These were known as regulatory offences and Wells points out the fact that "they were not perceived as real crime". (C Wells 'A Quiet Revolution in Corporate Liability for Crime' (1995) *New Law Journal* 1326).

¹⁰⁷⁸ *R v Birmingham and Gloucester Railway Co.* (note 93) 223.

¹⁰⁷⁹ Leigh (note 58) 16.

¹⁰⁸⁰ Pinto & Evans (note 94) 7.

Section 2(1) of the Interpretation Act was another legislative intervention that further influenced the development of corporate criminal liability in England. In term of section 2(1)

“In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression ‘person’ shall, unless the contrary intention appears, include a body corporate”.¹⁰⁸¹

It is submitted that the express inclusion of corporations as persons who could be held criminally liable for statutory offences in the 1889 Interpretation Act paved the way for the criminal liability for commission of common-law offences to be extended to corporations.

Civil lawsuits against corporations along with the enforcement of regulatory statutes also played an important role in the development of corporate criminal liability. Wells points out the fact that corporations were considered to have legal personality did not mean that they were not regarded as having criminal capacity.¹⁰⁸² It is submitted that this is an important observation because such recognition of corporations as *quasi*-legal persons meant that corporations were becoming an integral part of society and it would be a matter of time before they would be fully recognized legal persons. The actual regulation of corporate criminal liability developed over a number of centuries¹⁰⁸³ and, as will be seen below, courts played an important role in this regard.

¹⁰⁸¹ Section 2(1) of the Interpretation Act, 1889.

¹⁰⁸² “...although corporations had been regarded as a kind of legal person for the purposes of property ownership since the seventeenth century, this did not necessarily mean that they were so regarded in other contexts, nor necessarily that they were thought to be capable of committing criminal offences”. (Wells (note 15) 84).

¹⁰⁸³ Despite the existence of corporations in the 17th century, Williston states that “the corporation was far from being regarded as simply an organization for the more convenient prosecution of business. It was looked on as a public agency, to which had been confided the due regulation of foreign trade, just as the domestic trades were subject to the government of the guilds”. (Williston (note 916) 110).

III THE *MENS REA* OF THE CORPORATION AND THE BASIS FOR CORPORATE CRIMINAL LIABILITY IN ENGLAND

(a) The Basis for Liability

Corporate criminal liability in England has become a well-regulated area of law which aims at ensuring that corporations do face consequences for their criminal actions. There are regulatory agencies which deal specifically with issues pertaining to corporations and regulatory offences.¹⁰⁸⁴ Some of these originate from the nineteenth century.¹⁰⁸⁵ The aim of the regulatory bodies is to ensure that the statutes they are responsible for, are enforced.¹⁰⁸⁶ This they do by conducting investigations and enquiries.

An important statute is the Health and Safety at Work Act, 1974¹⁰⁸⁷ which specifically states that “it shall be the duty on all employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees”.¹⁰⁸⁸ The Act further states that “it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety”.¹⁰⁸⁹ From these two sections it is clear that a duty of care is placed on the employer to ensure that its employees and all other people are in safe conditions. Moreover, in terms of the Reporting of Diseases and Dangerous Occurrences Regulations 1995, regulation 3(1) companies have a duty to report all incidents of

¹⁰⁸⁴ “They are staffed by health and safety inspectors, environmental health officers, trading standards officers, and many others”. (Wells (note 15) 3).

¹⁰⁸⁵ “Some have their origins in the nineteenth century but most have been established since the Second World War, and they are particularly a phenomenon of the 1960s onwards”. (Ibid).

¹⁰⁸⁶ Ibid 4.

¹⁰⁸⁷ Health and Safety at Work Act 1974 (hereinafter referred to as the HSWA).

¹⁰⁸⁸ Ibid section 2(1).

¹⁰⁸⁹ Ibid section 3(1).

deaths occurring as a result of its work to the Health and Safety Executive.¹⁰⁹⁰ A shortcoming of the Health and Safety Executive is, however, its failure to investigate some of the deaths that are reported to it.¹⁰⁹¹

Even though regulatory offences were not crimes as such,¹⁰⁹² it is clear that they played an important role in the development of corporate criminal liability. The contravention of a regulatory provision meant that the corporation itself would be punished accordingly. Here we see a simple form of corporate criminal liability where the question of *mens rea* does not arise.¹⁰⁹³ As long as it was clear that a regulatory offence had been committed, the corporation was held liable and there was no need to prove *mens rea*.

Where the breach of a statutory provision resulted in the death of a person, the regulatory authorities had to cooperate with relevant bodies, such as the police, for a decision to be made as to whether a prosecution for manslaughter ought to be proceeded with.¹⁰⁹⁴

(i) Strict Liability

Offences where strict liability is applicable are offences which do not require *mens rea*. A strict liability offence “is one which requires no fault for conviction: any person may be found guilty

¹⁰⁹⁰ C Belcher ‘Corporate Killing as a Corporate Governance Issue (2002) 10 (1) *Corporate Governance* 47, 47.

¹⁰⁹¹ Belcher refers to the failure to investigate at least 88% of the matters reported to the Health and Safety Executive and states that it is probably due to lack of resources that these investigations do not take place. (Ibid).

¹⁰⁹² These were not regarded as ‘true crimes’. Wells states that “what appears to lie behind the ‘true crime / quasi crime distinction is an unarticulated argument that, if an activity was not traditionally a matter for the criminal law, then it cannot achieve the status of the true crime”. Wells (note 15) 7.

¹⁰⁹³ “Crimes which do not require intention, recklessness or even negligence as to one or more elements in the actus reus are known as offences of strict liability”. Ormerod (note 96) 155.

¹⁰⁹⁴ MG Welham *Tolley’s Corporate Killing: A Manager’s Guide to Legal Compliance* (2002) 9.

simply through doing or failing to do a certain act”.¹⁰⁹⁵ Under strict liability it is therefore not necessary to prove the presence of *mens rea* for the corporation to be held liable.¹⁰⁹⁶ Regulatory offences were usually strict liability offences.¹⁰⁹⁷ The wording of regulatory offences was such that corporations were held strictly liable, without the question of *mens rea* coming into play. As a result, strict liability became the first basis for corporate criminal liability in England.

It must be noted though that, at this point in time, corporations were usually only held liable for so-called regulatory offences, which did not require *mens rea* as an element.¹⁰⁹⁸

(ii) Vicarious liability as a way of addressing the corporation’s lack of criminal intent

Despite having strict liability as the basis for liability for regulatory offences, corporate criminal liability was limited when it came to the holding of corporations criminally liable for other offences, particularly those that had *mens rea* as an element. Pinto and Evans point out that

“On the assumption that a corporation could neither act nor think itself, the courts were confronted with the problem of how, if at all, a corporation could commit a criminal offence; if it could not act, how could it cause a certain event forbidden by the criminal law (the *actus reus*), and if it could

¹⁰⁹⁵ Ashworth (note 246) 116.

¹⁰⁹⁶ “...the corporation was liable for the conduct of its employee without proof of any criminal state of mind”. (Pinto & Evans (note 94) 35).

¹⁰⁹⁷ “Strict liability is a key feature of regulatory offences”. (Lacey, Wells & Meure (note 177) 239). “Many other offences, including most regulatory offences, do not require proof of any of these mental elements and are known as offences of strict liability”. (Wells (note 15) 67).

¹⁰⁹⁸ “...by 1915 corporations were held liable for nuisance, whether at common law or under statute, for failure to perform statutory duties, for minor offences of strict liability, and for offences to which vicarious liability was recognized as applying, whether or not *mens rea* was required for their commission. Liability did not however, extend to offences, regarded as truly criminal in character, of which it was said that *mens rea* was a necessary ingredient”. (Leigh (note 58) 24).

not think, how could it form the requisite state of mind in relation to the causing of the event forbidden by law (the mens rea)”?¹⁰⁹⁹

As a response to what has been raised in the above quotation, the application of the doctrine of vicarious liability was used by the English courts to make corporations criminally liable for crimes that had been committed through the employees of corporations. With regard to nonfeasance for public nuisance Wells notes that

“the basis of local authority liability for nuisance was itself rooted in an analogy with the master / servant relationship. They were liable as ‘masters’ when their ‘servants’, the local officials, created a public nuisance in streets through failing to maintain them”.¹¹⁰⁰

Vicarious liability was also used in the context of corporate criminal liability when it was decided that corporations could be held criminally liable for misfeasance in *R v Great North of England Railway Co.*¹¹⁰¹ As observed by Khanna¹¹⁰²

“In order to hold corporations liable for misfeasance, courts imputed agent conduct to corporations, and such imputation would have been theoretically troublesome without the doctrine of respondeat superior. However the doctrine was established at common law by the time courts decided the first corporate misfeasance cases in the mid-1800s. The doctrine’s development coincided with the growth in the number and importance of corporations and with society’s subsequent demand for regulation of business activity”.¹¹⁰³

¹⁰⁹⁹ Pinto & Evans (note 94) 17.

¹¹⁰⁰ Wells (note 15) 88.

¹¹⁰¹ Wells observes that “at the same time, many of the early large corporate bodies such as the railway companies were set up under special charters or private Acts which imposed specific duties upon them, analogous to the municipal duties of local authorities. Thus, it was not a huge step to hold them liable, at first for failing in those duties, non-feasance and later for misfeasance”. (Wells (note 15) 88).

¹¹⁰² Khanna (note 25) 1481.

¹¹⁰³ Ibid 1482.

As stated above, vicarious liability entails holding an employer liable for the wrongful actions of the employee which take place within the scope of the employee's duties.¹¹⁰⁴ The employer as the principal would only be held liable if the actions of the employee or agent had been commissioned by the employer / principal.¹¹⁰⁵ It is important to note that even though the corporation is held vicariously liable for the wrongs of its employees, such acts "remain the acts of the employees".¹¹⁰⁶ The employer / principal is therefore held vicariously liable for the wrongful conduct of the employee / agent.

As explained in chapter one, vicarious liability is a concept that originates from tort law. The idea of taking this tort law concept into criminal law by holding an agent vicariously liable for the criminal actions of another person was a notion that was not welcomed. Wells, however, expresses that "the emergence of the common law principle that masters had 'vicarious' liability for their servants facilitated the development both of civil and criminal liability of corporations".¹¹⁰⁷

Vicarious liability was in the first instance applied in matters where there was no requirement of *mens rea*. Where a statute imposed a strict duty vicarious liability would be applicable¹¹⁰⁸ and in such a situation the employer or the principal could not escape liability by relying on

¹¹⁰⁴ See full discussion of vicarious liability in Chapter One V (a) above.

¹¹⁰⁵ "The doctrine of vicarious liability developed out of medieval concepts of the master/servant relationship. Originally restricted to cases where the wrong was expressly commanded by the master, by the beginning of the eighteenth century it was accepted by the civil courts that the master (or employer) could be held liable for acts done at his implied, as well as his express, command. Such implied command could be inferred from the general terms of the servant's employment". (Pinto & Evans (note 94) 18).

¹¹⁰⁶ *Ibid* 39.

¹¹⁰⁷ Wells (note 15) 88.

¹¹⁰⁸ Pinto & Evans (note 94) 21.

the defence that the acts had not been authorized.¹¹⁰⁹ It must be noted that even though vicarious liability is applicable to strict liability offences, it is incorrect to say that vicarious liability is only applicable to offences that do not require *mens rea*.¹¹¹⁰ This can be seen in the 1917 case of *Moussell v London and North Western Railway*¹¹¹¹ where the court actually held a corporation vicariously liable for an offence requiring *mens rea* committed by its employee.¹¹¹² In passing judgment Lord Atkin stated that:

“The penalty is imposed upon the owner for the act of the servant if the servant commits the default provided for in the statute in the state of mind provided for by the statute. Once it is decided that this is one of those cases where a principal may be held liable criminally for the act of his servant, there is no difficulty in holding that a corporation may be the principal. No *mens rea* being necessary to make the principal liable, a corporation is in exactly the same position as a principal who is not a corporation”.¹¹¹³

Leigh hails the *Moussell* decision as “the key to the development of corporate criminal liability” and “a milestone on the path to corporate criminal liability”.¹¹¹⁴

(iii) The identification doctrine and offences requiring *mens rea*

¹¹⁰⁹ Ibid.

¹¹¹⁰ “The extension of vicarious liability to a corporation where the offence involved required *mens rea* developed from a line of decisions holding that a corporation could be held to be vicariously liable in respect of torts, committed by corporate servants, involving malice. While the battle swirled for some time, it was gradually established that corporations could be held liable for all torts whether or not malice was a necessary ingredient. Corporate liability for malicious prosecution was established in 1900, for libel in 1904 and for slander in 1911. Liability rested, it was said, upon the ordinary principles of the law of master and servant”. (Leigh (58) 22).

¹¹¹¹ *Moussell v London and North Western Railway* [1917] 2 KB 836.

¹¹¹² “The Divisional court convicted the corporation holding it to be vicariously liable for the acts of its branch manager, and in the course of so doing, delivered the classic judgment indicating in what circumstances a master would be subject to vicarious liability”. (Leigh (note 58) 29). See also Wells (note 15) 90.

¹¹¹³ *Moussell v London and North Western Railway* (note 1111) 846.

¹¹¹⁴ Leigh (note 58) 29.

At first corporations could not be prosecuted for offences requiring *mens rea*. In fact, prior to 1944, the basis for liability in all cases of corporate criminal liability was vicarious liability.¹¹¹⁵ This was largely due to the fact that a corporation was regarded as being incapable of having *mens rea*.¹¹¹⁶ As time went by, in order to distinguish between vicarious and personal liability, the courts have made use of the identification doctrine as the basis for corporate criminal liability.¹¹¹⁷ With vicarious liability the conduct of the employee that the company is held liable for remains the conduct of the employee, whereas with personal liability the conduct of the employee that the company is held liable for, is considered to be the conduct of the company itself.¹¹¹⁸ The fact that the acts remain acts of the employee distinguishes vicarious liability from personal liability.¹¹¹⁹ Pinto and Evans explain the differences between vicarious and personal liability in the following manner:

“It is necessary to distinguish between liability for the acts of another (true vicarious liability) and liability for breach of a personal duty. In the latter category although the act may be committed by an employee, it is the employer’s own failure to prevent the harm that renders him liable. The person committing the act does not himself commit the offence because it can only be committed by the person fixed with the duty. Such duties have been described as non-delegable, not because the person fixed with the duty must carry it out personally (impossible in the case of a corporation), but because the responsibility cannot be delegated”.¹¹²⁰

The identification doctrine, that was made applicable to the criminal liability of corporations in the 1944 decisions, made it possible for corporations to be held personally liable for crimes committed.

¹¹¹⁵ Pinto & Evans (note 94) 35.

¹¹¹⁶ “...since a company was a legal device without mind or soul, it could not possess the criminal intent required to convict a person of serious crime”. (McGrane & Gault (note 251) 167).

¹¹¹⁷ Leigh (note 47) 1514.

¹¹¹⁸ Pinto & Evans (note 94) 35.

¹¹¹⁹ Ibid.

¹¹²⁰ Ibid 21.

(b) The 1944 decisions and their impact on the development of corporate criminal liability

Prior to 1944 the identification theory was applied in holding corporations civilly liable for the wrongs committed by their employees. A civil lawsuit that greatly influenced the development of the identification doctrine, which was later to be applied to criminal cases so as to hold corporations personally liable for crimes is the 1915 civil case of *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*.¹¹²¹ Lennard's Carrying Company owned a ship which was being used by Asiatic Petroleum Company. It had been brought to the attention of the owner of the ship that it had problems and repairs had been made to the ship. The ship subsequently carried benzine on behalf of Asiatics Petroleum Company but due to its alleged "unseaworthiness" it perished during its voyage.¹¹²² In finding against Lennard's Carrying Company Lord Haldane stated 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. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company... It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but

¹¹²¹ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (note 234) 705.

¹¹²² *Ibid* 713.

somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy...”.¹¹²³

Lord Haldane was pointing out that the will of a person who is regarded as the directing mind of the company is in fact the will of the company itself. That person is regarded as the *alter ego* of the company. This is the identification doctrine and though it started off as a principle that was applied to civil cases, after the 1944 cases, which are discussed below, the identification doctrine was made applicable to criminal prosecutions of corporations.

In 1944 three important cases in which the identification theory was applied in criminal matters were heard viz: *Director of Public Prosecutions v Kent and Sussex Contractors Ltd*;¹¹²⁴ *R v ICR Haulage Limited*¹¹²⁵ and *Moore v I Bresler Ltd*.¹¹²⁶ All three cases dealt with holding corporations criminally liable for offences requiring *mens rea*. These cases were a breakthrough in the development of corporate criminal liability as the employees’ states of mind were imputed to the corporations.¹¹²⁷ As a result of these three decisions it has been said that 1944 is the year in which “corporate criminal liability became firmly established in English criminal law”.¹¹²⁸

¹¹²³ *Ibid.*

¹¹²⁴ *DPP v Kent and Sussex Contractors* [1944] KB 146, DC.

¹¹²⁵ *R v ICR Haulage Ltd* [1944] KB 551, CCA.

¹¹²⁶ *Moore v I Bresler Ltd* [1944] 2 All ER 515

¹¹²⁷ Wells (note 15) 94 -95.

¹¹²⁸ Leigh (note 58) 31.

(i) *Director of Public Prosecutions v Kent and Sussex Contractors Ltd*

In this matter a company allegedly committed offences by completing and submitting incorrect details regarding the use of a company vehicle, in order to obtain petrol coupons. The corporation was charged with an offence regulated by Regulations 82 (1.) (c) and 82 (2.) of the Defence (General) Regulations, 1939. For the offence to be committed there had to be *mens rea* in the form of “intention to deceive”.¹¹²⁹ In the court *a quo* it was held that the details submitted were indeed incorrect, and the company was acquitted because the *mens rea* of the transport manager¹¹³⁰ (intention to deceive) could not be imputed to the corporation.¹¹³¹

The Divisional Court, however, disagreed and found that there was plenty of evidence that the corporation did act with the required intention to deceive.¹¹³² In passing judgment Hallett J stated that a corporation ought to be liable in the same way as a natural person where it contravenes the statute by failing in its duty to provide correct information.¹¹³³ McNaghten J in his decision states that even though the corporation itself depends on natural persons for its knowledge and intention at times it is necessary to regard the knowledge and intention of those natural persons as that of the corporation.¹¹³⁴ Statements made by both Hallett J and McNaghten J amount to an application of the identification doctrine as the *mens rea* of the responsible individuals within the corporation was imputed to the corporation itself. The importance of this case lies in the fact that it became the first criminal matter in which the doctrine of identification

¹¹²⁹ *DPP v Kent and Sussex Contractors* (note 1124) 146; Ormerod (note 96) 260.

¹¹³⁰ “The justices dismissed the information on the ground that a body corporate could not be guilty of offences requiring proof of a dishonest state of mind”. (Wells (note 15) 94).

¹¹³¹ Pinto & Evans (note 94) 36.

¹¹³² *Ibid* 36 - 37.

¹¹³³ *DPP v Kent and Sussex Contractors Ltd* (note 1124).

¹¹³⁴ *Ibid*.

was applied.¹¹³⁵

(ii) *R v ICR Haulage Co Ltd*

In *R v ICR Haulage*¹¹³⁶ the court was faced with a decision as to whether a corporation could be held liable for conspiracy to defraud. Conspiracy to defraud was a common law offence which required proof of *mens rea*. The company and its managing director (together with others) had been charged with conspiracy to defraud and was convicted. The company appealed on the basis that where the offence required proof of *mens rea*, as a legal person, a company could not be indicted. The argument made on behalf of the company was not accepted.

The court upheld the indictment against the corporation. Its decision was based on the fact that the court accepted that the acts and the *mens rea* of the managing director were those of the corporation.¹¹³⁷ In this particular case the decision of the court in *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* was approved. This case is important in the development of corporate criminal liability¹¹³⁸ because of the “wider liability of corporations”¹¹³⁹ that is found in this case.¹¹⁴⁰

¹¹³⁵ Pinto & Evans (note 94) 36.

¹¹³⁶ *R v ICR Haulage* (note 1125) 691.

¹¹³⁷ *Ibid.*

¹¹³⁸ In passing judgement Stabile J stated that “We are not deciding that in every case where an agent of a limited company acting in its business commits a crime the company is automatically to be held criminally responsible. Our decision only goes to the invalidity of the indictment on the face of it. Whether in any particular case there is evidence to go to a jury, that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and in cases where the presiding Judge so rules, whether the jury are satisfied that it has been so proved, must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case”. (*R v ICR Haulage Co Ltd* (note 1125) 39 - 40).

¹¹³⁹ Ormerod (note 96) 152.

¹¹⁴⁰ “The Court of Criminal Appeal in *R v ICR Haulage* took the identification or alter ego theory a step further”. (Wells (note 15) 94).

(iii) *Moore v I Bresler Ltd*

This was a matter arising from the contravention of section 35(2) of the Finance (No.2) Act, 1940¹¹⁴¹ which prohibited “the use of any document which was false in a material particular with intent to deceive”.¹¹⁴² The facts of the case were interesting because in the process of committing the offence, the company itself had been deceived.¹¹⁴³ The company was tried together with the company’s secretary and its sales manager, who had secretly sold handbags, which the company was going to sell to the public, for their own benefit. False documents were then produced with the aim of covering up the fraud and as a result, the company’s tax returns reflected lower figures. They were convicted and the company was granted leave to appeal by the Recorder¹¹⁴⁴ on the basis that it had been defrauded by its employees who had acted beyond the scope of their employment.¹¹⁴⁵ The appeal was not successful.

Viscount Caldecote took into account the fact that the employees concerned were senior officials within the corporation and concluded that their acts were the acts of the corporation.¹¹⁴⁶ Humphrey J also found that the company ought to be held liable. According to him the acts of the two senior officials concerned, the general manager and the sales manager

¹¹⁴¹ As quoted in Pinto & Evans (note 94) 38.

¹¹⁴² *Ibid.*

¹¹⁴³ Wells (note 15) 95.

¹¹⁴⁴ Pinto & Evans (note 94) 38.

¹¹⁴⁵ *Ibid.*

¹¹⁴⁶ *Ibid* 39.

of that branch, bound the company.¹¹⁴⁷ It has been pointed out though, that *Moore v Besler* went “too far down the scale in identifying a controlling officer”.¹¹⁴⁸

(c) The relevance of the 1944 cases towards the development of corporate criminal liability

The above three cases are hailed as the first in which the doctrine of identification was applied to criminal cases.¹¹⁴⁹ They specifically dealt with situations where the employers of the corporate bodies had committed offences but these had been committed outside the scope of vicarious liability. In all three the corporate bodies were found to be liable on the basis that the employees had been acting on the authority of the corporate bodies. It is interesting, however, that in the three criminal cases there is no mention of the *Lennards’* case.¹¹⁵⁰ This is despite the fact that the *Lennards’* case (albeit a civil matter) had been the first case in which the doctrine of identification was applied. Wells observes that

“Although this case was not specifically mentioned in the three 1944 cases from which modern doctrine originates, it seems clear that they were impliedly based on Haldane’s views that certain officers are the company and not merely agents of it”.¹¹⁵¹

Criticism has also been levelled at the 1944 cases, particularly, for their failure to clearly indicate when the act and *mens rea* or negligence of certain individuals within the corporation

¹¹⁴⁷ Ibid.

¹¹⁴⁸ Ormerod (note 96) 262.

¹¹⁴⁹ Pinto & Evans (note 94) 35.

¹¹⁵⁰ Wells (note 15) 97. This is also observed by Pinto & Evans with regard to *DPP v Kent*. (Pinto & Evans (note 94) 36).

¹¹⁵¹ Wells (note 15) 97.

will be regarded as though they are those of the corporation.¹¹⁵² This failure led to what Parsons refers to as the courts' "expansive approach"¹¹⁵³ when identifying which individuals within the corporation could be regarded or identified as the 'mind' of the corporation. Leigh notes that where *mens rea* is a requirement, a successful prosecution in England will not be easy, unless it is proven that a senior individual should have been aware of the fact that the **circumstances**¹¹⁵⁴ required him / her to act in terms of his duty, but did not do so.¹¹⁵⁵

Another criticism concerns the fact that the three cases failed to explain the extent to which the identification doctrine could be applied.¹¹⁵⁶

(d) Difficulties posed by the identification principle

It is noteworthy that the existence of corporate criminal liability does not preclude the corporate liability of corporate officers. In addition to the corporation, corporate officers are also subject to punishment if wrongdoing is found on their part. Modern statutes containing regulatory offences clearly state that directors or officers are capable of being held liable for the offences committed by the corporation.¹¹⁵⁷ This includes those committed as a result of their negligence.¹¹⁵⁸ Here there is even a reverse onus in that the director has to prove that "he exercised due diligence to prevent commission of the offense".¹¹⁵⁹

¹¹⁵² Parsons (note 242) 70.

¹¹⁵³ Ibid.

¹¹⁵⁴ Own emphasis.

¹¹⁵⁵ Leigh (note 47) 1518.

¹¹⁵⁶ "What is clear is that none of these cases gave any clear idea as to how far this doctrine whereby the *mens rea* of certain company officers could be imputed to the company should extend". (Wells (note 15) 95).

¹¹⁵⁷ Leigh (note 47) 1524.

¹¹⁵⁸ Leigh (note 47) 1524.

¹¹⁵⁹ Ibid. The liability of corporate officers will be discussed fully under corporate manslaughter.

Following the 1944 cases it became clear that the approach followed by the courts when determining which officers could be regarded as the mind and will of the corporation was too “expansive”.¹¹⁶⁰ An example highlighted by Parsons is the identification of the transport manager, as was done in *DPP v Kent and Sussex Contractors*.¹¹⁶¹ This wide approach was brought to an end by the 1971.

(i) The restrictive approach of the identification theory

The 1971 decision in *Tesco Supermarkets v Natrass*¹¹⁶² “established that the doctrine of identification applied, in principle, to all offences not based upon vicarious liability”.¹¹⁶³ The result is that the liability imposed on the corporation would be direct criminal liability. Lord Reid in *Tesco Supermarkets v Natrass* states that a controlling officer

“is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative or delegate. He is the embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company”.¹¹⁶⁴

In essence the decision in *Tesco Supermarkets v Natrass* was that for a company to be held criminally liable the criminal liability of an individual or individuals who are regarded as the controlling mind of the company had to be identified first.¹¹⁶⁵ As Khanna observes “English

¹¹⁶⁰ Parsons (note 242) 70.

¹¹⁶¹ *Ibid.*

¹¹⁶² *Tesco Supermarkets v Natrass* (note 249).

¹¹⁶³ *Ibid.*

¹¹⁶⁴ *Ibid.* 171.

¹¹⁶⁵ Whyte (note 35) 4.

law, for example, only imputes an agent's criminal intent to the corporation if the agent is the 'alter ego' of the corporation, and the courts usually define 'alter ego' to mean an agent high up in the corporate hierarchy".¹¹⁶⁶

Tesco Supermarkets v Natrass accordingly "established that a corporation could be convicted of a non-regulatory offence requiring proof of mens rea if the natural person who had committed the actus reus of the offence could be identified with the corporation".¹¹⁶⁷

It is submitted that holding a corporation criminally liable for offences committed only by its senior officers clearly posed a threat to the development and to the success of corporate criminal liability, particularly corporate manslaughter or corporate homicide.¹¹⁶⁸ The essence of the identification theory as the basis for corporate criminal liability is that a corporation will be held liable only for the wrongful acts of its senior members.¹¹⁶⁹ Once pinpointed, the senior person must be guilty of the crime before the company can be held criminally liable for that crime.¹¹⁷⁰

Clarkson, however, points out the fact that when dealing with big companies pinpointing a senior official who has acted with the required *mens rea* is virtually impossible.¹¹⁷¹ In this

¹¹⁶⁶ Khanna (note 25) 1491

¹¹⁶⁷ Pinto & Evans (note 94) 42.

¹¹⁶⁸ "Before a company can be convicted of manslaughter proof is required that a 'directing mind' (that is, an individual at the very top of the company, who can be said to embody the company in his actions and decisions) is themselves guilty of manslaughter. Only then can the company be convicted... Without sufficient evidence to convict such an individual, the prosecution of the company must fail".

(Home Secretary 'Need for Reform in the Draft for Reform Corporate Manslaughter' www.corporateaccountability.org/dl/manslaughter/reform/billmar2005.pdf). (accessed 20 November 2013).

¹¹⁶⁹ "The 'directing mind' theory of corporate criminal responsibility imputes both the conduct and the fault of certain high ranking corporate officers to the corporation itself". (Burchell (note 195) 471).

¹¹⁷⁰ Belcher (note 1090) 47.

¹¹⁷¹ Clarkson (note 90) 151.

regard Sargason states that

“...where the corporation is one of even moderate size, the common law encounters insurmountable difficulties. The senior manager will only be guilty of manslaughter and criminally liable for the deaths where his own gross negligence is the cause of the death(s). The company will only be liable if that senior manager is guilty of gross negligence manslaughter and was an individual identified with the company itself – part of its governing mind”.¹¹⁷²

This is supported by Parsons, who also perceives the identification doctrine as a hindrance to successful corporate criminal liability.¹¹⁷³ Parsons states that “the doctrine attempts to impose the principles of criminal law relating to personal fault, which were developed against individuals, on to corporations and when it does so it assumes that only board directors make decisions of consequence in large corporations”.¹¹⁷⁴ It is submitted that Parsons’ perception is indeed correct because holding a corporation liable for acts committed only by its senior members does lead to some corporations escaping liability as a result of the difficulty in pinpointing a senior individual whose blame for the crime committed may be imputed to the corporation.

This was in fact the case in England in *R v P & O European Ferries (Dover) Ltd.*¹¹⁷⁵ This was a criminal prosecution for the deaths of 154 passengers and 38 crew members caused when the ferry, the Herald of Free Enterprise, capsized a short distance from the harbour at Zeebrugge.

¹¹⁷² A Sargason ‘Corporate Killing. The liabilities of Companies and Senior Management for Deaths on Holiday’ 2000 *International Travel Law Journal* 131, 133.

¹¹⁷³ Parsons (note 242) 70.

¹¹⁷⁴ *Ibid* 71.

¹¹⁷⁵ *R v P & O European Ferries (Dover) Ltd.* (note 248) 73

Upon investigation it became clear that the cause of the ‘accident’ was the fact that the ferry’s bow doors had not been closed.¹¹⁷⁶ The prosecution failed as there was no senior officer who could be pinpointed and blamed for the deaths therefore liability could not be imputed on the corporation.¹¹⁷⁷ Although the prosecution failed in this matter, this case is of importance to the development of corporate homicide. It was in this particular case that the trial judge held that a prosecution of a corporation for manslaughter was possible.¹¹⁷⁸

Both Clarkson¹¹⁷⁹ and Parsons¹¹⁸⁰ find the identification doctrine weak in the sense that it attempts to give corporations attributes such as *mens rea*, which are confined to natural persons. The weakness of the doctrine is clearly expressed by Clarkson, who points out¹¹⁸¹ that in huge corporations it is not easy to identify a single person who has made a specific decision.¹¹⁸²

Another weakness of the identification doctrine has been its narrow (or restrictive) approach.¹¹⁸³ This refers to the fact that there were certain situations where the doctrine was not applied, for instance in certain cases where *mens rea* was a requirement and in strict liability statutory offences.¹¹⁸⁴ This is due to the fact that “these offences tend to be of a regulatory

¹¹⁷⁶ According to the report “the Herald capsized because she went to sea with her inner and outer bow doors open”. (Justice Sheen in the Department of Transport, The Sheen Report (1987) MV Herald of Free Enterprise Report of court no. 8074 Formal Investigation, third Impression 1988, 8).

¹¹⁷⁷ The case and its merit will be fully discussed in this chapter at III (e) (ii) (aa) below.

¹¹⁷⁸ McGrane & Gault (note 251) 166.

¹¹⁷⁹ “...the law, instead of trying to look at the problem of corporate wrongdoing with fresh eyes, has tried to superimpose its individualistic constructs on to companies. It has reasoned that only human beings can ‘actually’ commit crimes and therefore it has tried to find a senior individual within the company who committed the *actus reus* and the *mens rea* of the crime”. (Clarkson (note 90) 150).

¹¹⁸⁰ “...the doctrine attempts to impose the principles of criminal law relating to personal fault, which were developed against individuals, on to corporations and when it does so it assumes that only board directors make decisions of consequence in large corporations”. (Parsons (note 242) 71).

¹¹⁸¹ “The doctrine ignores the reality of modern corporate decision-making which is often the product of corporate policies and procedures rather than individual decisions”. (Clarkson (note 793) 561).

¹¹⁸² Ibid 563.

¹¹⁸³ Ashworth (note 246) 118.

¹¹⁸⁴ This is discussed above in Chapter Two III (a) above.

nature and to apply the identification doctrine where liability stops with the controlling officers, would defeat the purpose of the legislation”.¹¹⁸⁵ The restrictive approach meant that in many cases, certain corporations, especially large corporations, would escape liability because of the difficulty of identifying the wrongdoers as officers who are the ‘mind’ of the corporation.

(ii) Overcoming the restrictive approach of the identification theory

In developing the law of corporate criminal liability the courts have questioned the restrictive approach of the identification theory and in certain cases, they have decided not to rely on the identification theory. In practice the courts thus overcome the restrictive approach of the identification theory by simply imposing liability on the corporation without identifying the senior or controlling officers.¹¹⁸⁶ An example of a case in which this was done is *Environment Agency v Empress Car Co. (Abertillery) Ltd.*¹¹⁸⁷ This was an appeal heard by the House of Lords, against a conviction for a regulatory strict liability offence.

Another important case in which the corporation was held liable despite the fact that the identification theory had not been applied is that of *Tesco Ltd v Brent LBC.*¹¹⁸⁸ An employee at Tesco had sold a video to a person below the age of eighteen, in contravention of section 11 (1) of the Video Recordings Act 1984 and Tesco was convicted on the basis of vicarious liability. Even though this was an offence requiring *mens rea*, the court, nevertheless convicted the corporation without applying the identification doctrine.

¹¹⁸⁵ Parsons (note 242) 71.

¹¹⁸⁶ “In respect of statutory crimes of strict liability, a corporation is liable in the same way as a natural person”. (Ibid).

¹¹⁸⁷ *Environment Agency v Empress Car Co. (Abertillery) Ltd.* [1998] 2 WLR 351, HC.

¹¹⁸⁸ *Tesco Ltd v Brent LBC.* [1993] 2 ALL ER 718, HC.

As another way of overcoming the obstacles of the identification doctrine, there has also been a move by the courts to apply vicarious liability by holding the corporation liable even in circumstances where it would not have been possible to do so had the courts applied the identification doctrine.¹¹⁸⁹ An example is the case of *National Rivers Authority v Alfred McAlpine Homes East*¹¹⁹⁰. In this particular case the corporation had been acquitted in the court *a quo* due to the fact that it could not be found liable on the basis of the identification doctrine.¹¹⁹¹ The law that had been contravened was a strict liability statutory regulation. The court decided to hold the corporation vicariously liable.¹¹⁹²

Another important case in which a corporation was held criminally liable without the identification doctrine being applied is that of *R v British Steel Plc*.¹¹⁹³ The matter dealt with the contravention of two sections of the Health and Safety at Work, etc Act 1974. The contravened sections were s. 3 (1) which made it a duty for all employers to conduct their business in such a way that they ensure the safety of people, including those not employed by them and s. 33 which made the deaths or injuries of such persons an offence of non-compliance. In making a judgment the court clarified the fact that the term ‘every employer’ included corporations. The court also made it clear that with regard to section 3 (1) the identification doctrine was not applicable.¹¹⁹⁴

¹¹⁸⁹ Clarkson (note 793) 563.

¹¹⁹⁰ *National Rivers Authority v Alfred McAlpine Homes East* [1994] CLR 760.

¹¹⁹¹ Clarkson (note 793) 563.

¹¹⁹² “...the Divisional Court applied the doctrine of vicarious liability. Looking at the purpose of pollution legislation, and bearing in mind it was dealing with a strict liability offence, it held that the only way of enforcing such laws, where the pollution will often be caused by persons of low positions in the corporate hierarchy, was by imposing vicarious liability on the company”. (Ibid 563-564).

¹¹⁹³ *R v British Steel Plc* [1995] 1 WLR 1356, CA.

¹¹⁹⁴ In his judgment Steyn LJ stated that “counsel for British Steel plc concedes that it is not easy to fit the idea of corporate criminal liability only for the acts of the ‘directing mind’ of the company into the language of section 3

The role of the English courts in developing corporate criminal liability and paving the way for the concept of corporate homicide is clearly important as can be seen from the above discussion. Instead of allowing themselves to be restricted by the identification doctrine, the courts have seen it as their responsibility to ensure that corporations which have committed crimes are convicted. Relying on vicarious liability, the courts saw to it that the obstacles posed by the identification doctrine were overcome. It is not possible, however, to rely on vicarious liability in each case where there is a chance that the corporation may escape liability and this has led to the notion that there are two forms of corporate criminal liability: one where vicarious liability may be used because the offence is a strict liability offence and another, where the direct liability is imputed on the corporation because of the requirement of *mens rea*.¹¹⁹⁵ In practice, however, this is not always the case.¹¹⁹⁶

In *Re Supply of Ready Mixed Concrete (No.2)* vicarious liability was applied despite the fact that *mens rea* was a requirement for the offence in question.¹¹⁹⁷ Moreover, in *Seaboard Offshore Limited v Secretary of State for Transport*¹¹⁹⁸ the notion that it is imperative to apply vicarious liability in strict liability cases was not accepted by the court.¹¹⁹⁹ Clarkson points out

(1). We would go further. If it be accepted that Parliament considered it necessary for the protection of public health and safety to impose, subject to the defence of reasonable practicability, absolute criminal liability, it would drive a juggernaut through the legislative scheme if corporate employers could avoid criminal liability where the potential harmful event is committed by someone who is not the directing mind of the company... That would emasculate the legislation". (Ibid 1362-1363).

¹¹⁹⁵ "Most people are familiar with the idea that there are two types of corporate liability for crimes. The general understanding is that the vicarious type applies to strict liability offences and the direct type to offences requiring a mental element". (C Wells 'Corporate Liability and Consumer Protection: *Tesco v Natrass* Revisited' (1994) 57, 5 *The Modern Law Review* 817, 817).

¹¹⁹⁶ "The position is, however, not that straightforward. First the doctrine of vicarious liability has now been applied beyond the confines of strict liability offences to offences of negligence or hybrid offences". (Clarkson (note 793) 564).

¹¹⁹⁷ *In Re Supply of Ready Mixed Concrete (No.2)* [1995] 1 All ER 99.

¹¹⁹⁸ *Seaboard Offshore Limited v Secretary of State for Transport* [1994] 1 AC 456 (HL).

¹¹⁹⁹ "The House of Lords... rejected the notion that vicarious liability can necessarily be imposed in strict liability offences". (Clarkson (note 793) 564).

that “the position appears to be that whether the doctrine of vicarious liability applies or not, is a matter of statutory interpretation, taking into account the language, content and policy of the law, and whether vicarious liability will assist enforcement”.¹²⁰⁰

The courts’ move against the restrictive approach of the identification doctrine are commendable, however, they still did not solve the problems caused by the existence of the identification doctrine. There were still many offences in which the courts had no leeway to overlook the identification doctrine. In practice this meant that corporations could still be able to escape liability where it is impossible to identify the wrongdoer as a senior controlling officer. This is an unsatisfactory state of affairs which necessitates further attention to the development of corporate criminal liability. As long as the identification doctrine continues to be an obstacle, it cannot be said that corporate criminal liability in English law is fully effective.

(e) Corporate Manslaughter

“More than any other aspect of corporate criminal liability, it has been the apparent inability of the criminal law adequately to punish those perceived as being responsible for corporate deaths that has sparked the most controversy”.¹²⁰¹

The above quotation refers to the frustration over the failure over the years to prosecute many corporations who were allegedly responsible for various corporate disasters that claimed many lives. These corporate disasters led to deaths of not only people employed by the said

¹²⁰⁰Ibid 565.

¹²⁰¹ Pinto & Evans (note 94) 235.

corporations, but also of members of the public and the failure to prosecute the responsible corporations inevitably led to questioning whether the law needed to be reformed.

Traditionally, manslaughter is alleged when the death of a person has occurred as a result of another person's act in circumstances where the element of intent is lacking.¹²⁰² McGrane and Gault define manslaughter as "unlawful homicide without malice aforethought".¹²⁰³ Initially, there was no formal recognition of corporate manslaughter. With the development of corporate criminal liability as well as the increase in corporate activities which affected individuals, this was bound to change.

As time went by, due to several incidents where a number of people lost their lives or were seriously injured as a result of the negligence or recklessness of employees of the corporations, corporations at last found themselves facing the possibility of criminal prosecutions for manslaughter. This would eventually lead to corporations being charged with offences such as manslaughter, which, at first was regarded as a crime which required *mens rea*.¹²⁰⁴ This of course developed over a long period of time, but prior to the coming into effect of the CMCHA a corporation could in law be prosecuted and convicted of the common law crime of gross negligence manslaughter. Such prosecutions and convictions have, however, been rare,¹²⁰⁵ hence observations such as the one made by Whyte that "corporate crime that causes death of

¹²⁰² "There are two categories of manslaughter: voluntary and involuntary manslaughter. In the case of voluntary manslaughter the defendant has the mens rea and actus reus for murder but there were circumstances that offered some form of excuse for his conduct...Involuntary manslaughter is unlawful homicide, but the mens rea for murder is not present". (Welham (note 1094) 17).

¹²⁰³ McGrane & Gault (note 251) 166.

¹²⁰⁴ Parsons (note 242) 76.

¹²⁰⁵ Wells has observed that "while the idea of corporate manslaughter has undoubtedly gained some purchase in popular vocabulary over the last fifteen years, it is still unusual for such a prosecution to be considered or pursued". (Wells (note 15) 9).

workers and members of the public is a huge, if largely invisible, problem. Rarely are those serious offences treated with the force of the criminal law they deserve”.¹²⁰⁶

R v Cory Bros and Co Ltd is the first recorded matter where an attempt at holding a corporation liable for manslaughter was made.¹²⁰⁷ *In casu* the court had to make a decision regarding the validity of an indictment where a company was being charged for manslaughter.¹²⁰⁸ A person had fallen against an electric fence and was electrocuted. The company together with three engineers who had been responsible for the erection of the electric wall had been indicted on charges requiring *mens rea*.¹²⁰⁹ Unfortunately the prosecution failed as Finlay J. felt that he had to abide by what had been set by precedent.¹²¹⁰ He relied on the premise that a company could neither be indicted with a felony nor with a misdemeanour under section 31 of the Offences against the Person Act, 1861,¹²¹¹ reason being that a company cannot be said to have the requisite state of mind, *mens rea*.

Counsel for the company based its argument on the fact that as a rule manslaughter is a crime requiring *mens rea* and a corporation is not capable of having *mens rea*.¹²¹² The court came to the conclusion that in terms of section 31 of the Offences against the Person Act¹²¹³ a

¹²⁰⁶ Whyte (note 35) 4, 7.

¹²⁰⁷ *R v Cory Bros & Co Ltd* (note 275).

¹²⁰⁸ *Ibid*.

¹²⁰⁹ The charges were manslaughter and “setting up, or causing to be set up, an engine calculated to destroy human life or inflict grievous bodily harm, with intent that the same or whereby the same might destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, contrary to s. 31 of the Offences against the Person Act, 1861”. (*Ibid* 810).

¹²¹⁰ *Ibid* 817.

¹²¹¹ *Ibid* 810.

¹²¹² *Ibid* 811.

¹²¹³ Section 31 of the Offences against the Person Act, 1861.

corporation was incapable of being charged with an offence “involving personal violence”, and ruled that the indictment was invalid.¹²¹⁴

Finlay J has, however, been severely criticized for this decision, particularly his assessment of the law when he made the decision.¹²¹⁵ According to Pinto & Evans Finlay J failed to make a sufficient assessment of the law and the number of cases referred to was insufficient.¹²¹⁶ Moreover, most of the cases he referred to were rather old.¹²¹⁷ Having referred to these cases Finlay J acknowledges the fact that the law may need to be changed,¹²¹⁸ however he concludes that he is bound by the law as it stands.¹²¹⁹ It is submitted that an opportunity at contributing to the development of corporate manslaughter was missed by Finlay, J. As Pinto and Adams correctly point out, the judge limited himself tremendously when he examined the law.¹²²⁰ He only looked at authority favouring a single view and although it was clear that the law, as it was, was unsatisfactory, the judge chose not to develop it. It is submitted that corporate criminal liability is an area which developed under common law and it was up to the courts to

¹²¹⁴ *R v Cory Bros & Co Ltd* (note 275) 810.

¹²¹⁵ “Given the major strides taken towards corporate liability in the railway cases, the food and drug cases, and the potential opportunity of using *Mousell Bros.* as the stepping stone, it would not have been inconceivable for the corporate charges to be allowed”. (Wells (note 15) 92).

¹²¹⁶ Pinto & Evans (note 94) 32.

¹²¹⁷ “His scrutiny of the law was minimal; he referred to only four cases, the most recent of which was decided in 1891”. (Ibid). The cases referred to by Finlay J were *Reg. v. Great North of England Ry. Co* (note 164); *Reg. v. Birmingham and Gloucester Ry. Co* (note 93).; *Reg. v. Tyler and International Commercial Co.* [1891]2 QB 588; and *Pharmaceutical Society v. London and Provincial Supply Association* (1880) 5 App.Cas.857:[1874-80] All ER Rep. Ext 136

¹²¹⁸ “...the common law ought to keep pace with modern developments, and therefore it ought to be decided that these authorities are antiquated and that in 1927 they do not apply”. (*R v Cory Bros & Co Ltd* (note 275) 817).

¹²¹⁹ He states: “It is always a tempting argument to say that the common law ought to keep pace with modern developments, and therefore it ought to be decided that these authorities are antiquated and that in 1927 they do not apply. Well, all I can say to that argument is this: it may be that the law ought to be altered; on the other hand it may be that these authorities ought still to govern the law, but it is enough for me to say, sitting here, that in my opinion I am bound by authorities, which show quite clearly that as the law stands an indictment will not lie against a corporation either for a felony or for a misdemeanour of the nature set out in the second count of this indictment”. (Ibid 817).

¹²²⁰ Pinto and Evans (note 94) 32.

make the necessary developments and since he clearly saw the need for reform, he should have used the opportunity to bring about the needed reform.

In the event of a death caused by a corporation, the corporation was held responsible if it was found that there was negligence on the part of the senior officers of the corporation. This was in terms of the identification doctrine which the English law relied on. As stated above, according to the identification doctrine, before a corporation can be held criminally liable, the individual within the corporation who committed the offence, must be identifiable as the mind of the corporation¹²²¹ and such individual “must first be shown him or herself guilty”¹²²² of the said crime. It is thus only the acts of the top management that are taken into account.¹²²³ In a large corporation, however, it is not easy to single out the senior officers as the persons who have committed offences¹²²⁴ which corporations may be held liable for.¹²²⁵ Application of the identification doctrine has thus made it virtually impossible to prosecute large corporations successfully for manslaughter.¹²²⁶ In this way it hampered the development of corporate criminal liability.¹²²⁷

¹²²¹ Leigh (note 994) 252.

¹²²² Belcher (note 1090) 47.

¹²²³ C Wells ‘Manslaughter and Corporate Crime’ (1989) *New Law Journal* 931.

¹²²⁴ It has been stated that the doctrine “prevents a large corporation from being held responsible for manslaughter”. (Parsons (note 242) 69). Also Clarkson (note 793) 560, 561.

¹²²⁵ As a result “the larger and more diffuse the company structure, the easier it will be for it to avoid liability”. (Wells (note 1223) 931).

¹²²⁶ “the identification doctrine prevents a large corporation from being held responsible for manslaughter”. (Parsons (note 242) 69). Clarkson states that the identification doctrine is more suitable for small enterprises where identifying senior people who may be responsible for a crime that has been committed is not problematic (Clarkson (note 793) 560).

¹²²⁷ “The identification principle was a major obstacle to securing a conviction under the common law offence of gross negligence manslaughter, particularly with a company of any size or with any complexity in its management structure...The only successful prosecutions against corporate entities for gross negligence were in relation to small companies, where there was more likely to be a single person directly and immediately responsible for the death and who was senior enough to be regarded as the ‘directing mind and will’ of the company. There were few successful prosecutions for gross negligence manslaughter against corporations”. (Ormerod (note 96) 563-564).

An example of the identification doctrine being applied successfully is the case of *Kite and Others*.¹²²⁸ Also known as the *Lyme Bay Tragedy*, this case has been cited as the first case where a corporation was successfully prosecuted for manslaughter.¹²²⁹ The corporation concerned was a small ‘owner-managed’ corporation which had organized a canoeing expedition. The expedition did not go well and it resulted in the death of four students.¹²³⁰ It transpired that the corporation had allegedly failed to maintain the required safety standards and the leaders of the expedition were not sufficiently trained to undertake such an expedition, especially in open sea.¹²³¹ The corporation was found to have been negligent. In addition to that its manager was sentenced to three years’ imprisonment¹²³² for manslaughter by gross negligence.¹²³³

Another case in which a small corporation was convicted for manslaughter is *R v Jackson Transport (Ossett) Ltd*.¹²³⁴ Wells’ assertion that the *Kite* and the *Jackson* cases lacked the challenge that usually accompanies the prosecution of large corporations,¹²³⁵ makes it clear that the identification theory inhibits the successful prosecution of large corporations.¹²³⁶ This is evident from the unsuccessful prosecutions of several corporations where it was clear that they were responsible for people’s deaths, but because of the application of the identification doctrine, they escaped liability.¹²³⁷ Public outcry over those unsuccessful prosecutions of

¹²²⁸ *R v Kite* (note 999).

¹²²⁹ Clarkson (note 793) 561.

¹²³⁰ *R v Kite* (note 999).

¹²³¹ *R v Kite* (note 999)

¹²³² On appeal the manager’s sentence was reduced to two years’ imprisonment, *R v Peter Bayliss Kite* [1996] 2 Cr. App. R. (S.) 295.

¹²³³ *R v Kite* (note 999)

¹²³⁴ *R v Jackson Transport* (note 999)

¹²³⁵ Wells (note 15)107.

¹²³⁶ “Precisely the big corporate names which people may want to blame are those which are most difficult to target under the identification rule”. (Ibid 115).

¹²³⁷ For instance the Zeebrugge disaster, Hatfield rail disaster and the King’s Cross fires.

corporations for deaths led to the enactment of the CMCHA in 2007 which allows for liability without reliance on the identification doctrine.

This piece of legislation introduces a new offence known as corporate manslaughter.¹²³⁸ The legislation came into being as a result of various developments, including the 1996 Law Commission recommendations for the reform of manslaughter¹²³⁹ by introducing a new offence of corporate killing that was not based on the identification doctrine,¹²⁴⁰ which subsequently led to the passing of the 2005 Draft Bill on Corporate Manslaughter.¹²⁴¹ The Bill introduced, *inter alia*, a new offence of “corporate killing”, dealing, specifically with deaths caused by the recklessness of corporations or by corporations’ lack of respect for human life.¹²⁴²

Within a relatively short period of time English law has moved from its initial reluctance to prosecute corporations responsible for the negligent deaths and serious injuries of people to a point where it has clear legislation dealing with corporations that cause the deaths of people. The new legislation is indeed a commendable development in English law, but it remains to be seen whether it provides solutions to problems created by the application of the identification doctrine.

(i) Gross negligence manslaughter

¹²³⁸ The Act specifically states that it is “an Act to create a new offence that in England, Wales or Northern Ireland is to be called corporate manslaughter, and, in Scotland, is to be called corporate homicide”. (CMCHA (note 36).

¹²³⁹ Law Commission no. 237 (note 913).

¹²⁴⁰ Belcher (note 1090) 47.

¹²⁴¹ Draft Bill on Corporate Manslaughter, 2005.

¹²⁴² “...manslaughter can be approached either through an unlawful act or through recklessness”. (Lacey, Wells & Meure (note 177) 243).

In English law the crime known as involuntary manslaughter may be alleged in the following circumstances:

“(1) where death results from an unlawful act which any reasonable person would recognize as likely to expose another to the risk of injury; (2) where death is caused by a reckless act or omission; or (3) where death results from criminal negligence in the performance of a duty tending to the preservation of life imposed by law or voluntarily undertaken”.¹²⁴³

There are several decisions which influenced the development of the crime of manslaughter in England and Wales. The first case to be taken into account is a case in which an individual was charged with gross negligence manslaughter for the death of a patient who died whilst undergoing an eye operation.¹²⁴⁴ This was the 1994 case of *R v Adomako* where an anaesthetist was charged with gross negligence manslaughter for failure to notice that a ventilator tube to a patient had disconnected and caused the patient’s death.¹²⁴⁵ The disconnection was for about six minutes and the patient then went into cardiac arrest and died.¹²⁴⁶ The charge against the anaesthetist was involuntary manslaughter. Prior to *Adomako* “liability for involuntary manslaughter was founded on the concept of recklessness”.¹²⁴⁷

In his judgment Lord Mackay cites *Andrews v DPP* as ‘the most authoritative statement’¹²⁴⁸ and goes on to state:

¹²⁴³ McGrane & Gault (note 251) 166.

¹²⁴⁴ *R v Adomako* [1995] 1 AC 171, [1994] 3 All ER 79, 19 BMLR 56.

¹²⁴⁵ *Ibid.*

¹²⁴⁶ *Ibid.*

¹²⁴⁷ Pinto & Evans (94) 239.

¹²⁴⁸ *R v Adomako* (note 1244).

In my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must consider whether that breach of duty should be characterized as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.¹²⁴⁹

The importance of the *Adomako* case lies in the fact that it serves as authority that it was possible to prove involuntary manslaughter by means of proving gross negligence.¹²⁵⁰ The *Adomako* case laid the foundation for holding corporations liable for involuntary manslaughter by proving gross negligence on the part of the corporation. The decision in *Adomako* is hailed as having “made clear that manslaughter is a crime of negligence”.¹²⁵¹ The principle laid down in *Adomako* was followed in subsequent cases where corporations were held liable for involuntary manslaughter.

Pinto and Evans do note however that since 1992 there were only 34 prosecutions of corporations for gross negligence manslaughter and these resulted in only seven convictions.¹²⁵² They further state that for a corporation to be liable for gross negligence manslaughter there had to be

¹²⁴⁹ Ibid.

¹²⁵⁰ Pinto & Evans (note 94) 239.

¹²⁵¹ Parsons (note 242) 76.

¹²⁵² Pinto & Evans (note 94) 239.

“proof of gross breach of the duty of care by an individual acting as the directing mind of the corporation...A duty of care may arise where an officer has expressly procured or authorized the particular act resulting in death, but some nexus between the death and the individual acting as the direct or controlling mind of the corporation is necessary”.

It is further noted that the identification principle when applied to larger companies is not effective. This is an indication that corporate criminal liability, particularly the identification doctrine¹²⁵³ was not as effective as it could have been particularly because even where convictions did occur, the said corporations were tiny companies. It is clear at this point already that there was a need for the law to be reformed.

(ii) A discussion of some of the disasters that led to the public outcry against the ineffectiveness of corporate criminal liability in cases involving negligent deaths at the hands of companies.

(aa) *R v P & O European Ferries(Dover) Ltd*¹²⁵⁴

This landmark case with regard to the liability of corporations for manslaughter is *R v P & O European Ferries (Dover) Ltd*,¹²⁵⁵ and deals with a disaster which is known as the *Zeebrugge* disaster. The facts of the case, briefly, are that on 6 March 1987 a ferry, the *Herald of Free Enterprise* owned by the corporation, P & O European Ferries (Dover) Ltd had an accident which resulted in the loss of life of 187 people.¹²⁵⁶ The ferry was a roll-on roll-off care ferry

¹²⁵³ “Within an organisation there has to be an individual who had direct involvement in the failure that caused the death and can be identified as having had involvement. The person who is identified must be a controlling or directing mind within the organisation in that they are of sufficient standing to control what happens or direct an activity. This would normally mean a director, executive or a person of similar standing”. (Welham (note 1094) 21).

¹²⁵⁴ *R v P & O European Ferries (Dover) Ltd* (note 248).

¹²⁵⁵ *Ibid.*

¹²⁵⁶ Law Commission Report 237 (note 913) para 1.15.

and it had just left Zeebrugge, heading to Dover.¹²⁵⁷ There was a prosecution, however, it was argued that the corporation could not be held liable for manslaughter as corporate manslaughter was not part of English law.¹²⁵⁸ Furthermore, it was argued, in English law manslaughter could only be committed by a natural person killing another natural person.¹²⁵⁹ A corporation could therefore not be charged with manslaughter.

It was held that the law allows the prosecution of a corporation for manslaughter. Even though a corporation could be held liable for manslaughter, the identification doctrine was applicable.¹²⁶⁰ This meant that for the corporation to be held successfully liable for corporate manslaughter, a senior officer, who was liable for the manslaughter, had to be identified.¹²⁶¹ According to the Law Commission “this decision highlighted the major difficulty that has to be overcome before a company can be successfully prosecuted, namely that the relevant acts have to be committed by those “identified as the embodiment of the company itself””.¹²⁶² As stated above, this was a serious impediment to the prosecutions of corporations for manslaughter, particularly the bigger and more complex corporations. The requirement that there had to be the identification of a senior officer who bears the guilt for the offence has been described as the “controlling officer test” and in the Zeebrugge case the failure to pinpoint a controlling officer who is guilty of the offence inevitably meant the collapse of the case against the company as the company could not face manslaughter charges without a guilty controlling officer having been identified.¹²⁶³

¹²⁵⁷ Ibid.

¹²⁵⁸ *R v P & O European Ferries (Dover) Ltd.* (note 248).

¹²⁵⁹ Ibid.

¹²⁶⁰ Wells (note 15) 109.

¹²⁶¹ Ibid.

¹²⁶² Law Commission Report 237 (note 913) para 1.16.

¹²⁶³ “This has come to be known as the “controlling officer” test...Such a narrow test has had considerable implications for prosecutors. In the Zeebrugge trial, for instance, in order to establish that P&O itself was guilty

Of relevance is that a judicial enquiry

“severely criticized P & O European Ferries. The jury at the inquest returned verdicts of unlawful killing in 187 cases, and eventually in June 1989 the DPP launched prosecutions against the company and seven individuals. But the trial collapsed after Turner J directed the jury to acquit the company and five most senior individual defendants”.¹²⁶⁴

In its Report the Law commission points out that the decision made above (by Turner J) with regard to the *Zeebrugge* disaster served to highlight “the major difficulty that has to be overcome before a company can be successfully prosecuted, namely that the relevant acts have to be committed by those ‘identified as the embodiment of the company itself’”.¹²⁶⁵

(bb) *King’s Cross fires*

A fire occurred in the underground station of King’s Cross on 18 November 1987 and 31 people perished as a result.¹²⁶⁶ “No one person was charged with overall responsibility”.¹²⁶⁷ An investigation into the King’s Cross fires was ordered and the findings were the Department of Transport’s Investigation into the King’s Cross Fires by Desmond Fennel OBE QC. In the

of manslaughter, the Crown had to prove that one of its directors was guilty of manslaughter. So it was that when the prosecution against the five senior employees collapsed, so the case against the company went too. The fact that Stanley and Sabel may have had a case to answer did not affect the position of P & O because, as assistant boatswain and chief officer respectively, they were not nearly senior enough to have acted as the company”. (D Burles ‘The Criminal Liability of Corporations’ (1991) *New Law Journal* 609, 610).

¹²⁶⁴ Law Commission Report 237 (note 913) para 1.15.

¹²⁶⁵ *Ibid* para 1.16.

¹²⁶⁶ *Ibid* para 1.12.

¹²⁶⁷ *Ibid* para 1.12.

report it was shown that due to people continuing to smoke in the railway area, particularly on the escalators, despite a ban that was in existence.¹²⁶⁸ In the report it was stated that

“Beneath each side of the treads lay the running tracks of the escalator. Those running tracks should have been cleaned and lubricated properly. They were not. There was an accumulation of grease and detritus (dust, fibre and debris) on the tracks which constituted a seed bed for a fire and it was into that bed that the match fell”.¹²⁶⁹ It was found that the throwing of a lighted cigarette down the escalator led to the ignition of the fire and that the debris, dust and fibre that it fell onto was conducive to a fire. The investigation also showed that there were previous fires that had been ignited, but these had fortunately not led to any disaster.¹²⁷⁰

The investigation showed that even though the alarm was raised the casualties happened because the staff member who became aware of the fire failed to inform the station manager and/or the line controller.¹²⁷¹ Upon investigation Fennel was of the following view regarding the operating staff of the London Underground: “(i) they had not been adequately trained; (ii) there was no plan for evacuation of the station; (iii) communications equipment was poor or not used; and (iv) there was no supervision”.¹²⁷² It was also found that from the time the fire started at 19h30 to 19h45 “not one single drop of water had been applied to the fire which erupted into the tube lines ticket hall causing horrendous injuries and killing 31 people”.¹²⁷³ In examining the ethos of the London’s Underground’s organization and management, Fennel found them to be “fundamentally in error in their approach”.¹²⁷⁴ In concluding the report Fennel

¹²⁶⁸ This was a ban that was effective from February 1985 after a fire that had occurred at the Oxford Circus Station. (D Fennel *Department of Transport’s Investigation into the King’s Cross Fires* 15 by Desmond Fennel OBE QC, 15 http://www.railwaysarchive.co.uk/documents/DoT_KX1987.pdf (accessed 10 March 2014)).

¹²⁶⁹ Ibid.

¹²⁷⁰ “When the skirting board of the escalator was examined it was clear from the burn marks that fires had started on many previous occasions. Happily they had gone out”. (Ibid).

¹²⁷¹ Ibid 16.

¹²⁷² Ibid 61.

¹²⁷³ Ibid 17.

¹²⁷⁴ Ibid.

states that “London Underground and its holding company London Regional Transport, had a blind spot – a belief that fires were inevitable coupled with a belief that any fire on a wooden escalator, and there had been many, would never develop in a way which would endanger passengers. In my view that approach was seriously flawed for it failed to recognize the unpredictability of fire, that most unpredictable of all hazards”.¹²⁷⁵ Based on the conclusion of the investigation, it is clear that blame was attributed to the corporation. Compensation orders were made, however, the corporation was not prosecuted based on the findings.

(cc)*The Piper Alpha oil rig disaster*

This disaster unfolded in the North Sea.¹²⁷⁶ As a result of several explosions and fires that rocked the Piper Alpha rig platform on 6 July 1988 a public enquiry / inquest was held and the liability for the deaths of the victims was placed on the platform operator.¹²⁷⁷ Investigating this disaster was rather a challenge though as the physical evidence had been destroyed by the fires and as a result it was mainly accounts of witnesses that made the investigation possible.¹²⁷⁸

¹²⁷⁵ Ibid 183.

¹²⁷⁶ “As shifts changed and the night crew aboard Piper Alpha assumed duties for the evening one of the platform’s two condensate pumps failed. The crew worked to resolve the issue before platform production was affected. But unknown to the night shift, the failure occurred only hours after a critical pressure safety valve had just been removed from the other condensate pump system and was temporarily replaced with a hand-tightened blind flange. As the night crew turned on the alternate condensate pump system, the blind flange failed under the high pressure, resulting in a chain reaction of explosions and failures across the Piper Alpha that killed 167 workers in the world’s deadliest offshore oil industry disaster”. (NASA ‘The case for safety – The North Sea Piper Alpha Disaster’ <http://nsc.nasa.gov/SFCS/SystemFailureCaseStudy/Details/112>. (accessed 25 November 2013)).

¹²⁷⁷ Law Commission Report 237 (note 913) at para 1.13.

¹²⁷⁸ “Subsequent investigation was hindered by a lack of physical evidence; however based on eyewitness accounts it was concluded that, most likely, a release of light hydrocarbon (condensate; ie propane butane and pentane) when a pump was restarted after maintenance”. (Building Process safety culture: tools to enhance process safety performance” *Center for Chemical Process Safety of the American Institute of Chemical Engineers* https://www.aiche.org/sites/default/files/docs/embedded-pdf/Piper_Alpha-case-history.pdf (accessed 25 November 2013).

From the inquiry it became clear that management had been aware of the fact that “the structural integrity could be lost with 10 – 15 minutes if a fire was fed from a large pressurized hydrocarbon inventory”.¹²⁷⁹ Moreover at least a year prior to the disaster “company management had been cautioned in an engineering report that a large fire from escaping gas could pose serious concerns with respect to the safe evacuation of the platform”.¹²⁸⁰ As with the other disasters that have been discussed above it was clear from the investigation that corporation was responsible for the disaster as a result of management’s failure to take heed of the warnings given to them. It has been stated that “the report provided critical commentary on what was judged as inadequate management and follow-up”.¹²⁸¹

(dd) The Clapham rail disaster

This disaster occurred on 12 December 1988. Due to ‘a signal breakdown’ there was a collision involving three trains during rush-hour. This resulted in 35 deaths and almost 500 injuries.¹²⁸² The disaster was investigated for the Department of Transport by Anthony Hidden QC in a report entitled “Investigation into the Clapham Junction Railway Accident”.¹²⁸³ The investigation found that “lax maintenance” led to the disaster.¹²⁸⁴ According to the report the disaster was directly caused by faulty wiring¹²⁸⁵ and that a Mr Hemmingway who had been responsible for the wiring was highly regarded by his colleagues, while in actual fact his work

¹²⁷⁹ Ibid.

¹²⁸⁰ Ibid.

¹²⁸¹ Ibid.

¹²⁸² Welham (note 1094) 39.

¹²⁸³ Department of Transport Report November 1989 *Investigation into the Clapham Junction Railway Accident* 147.

¹²⁸⁴ Welham (note 1094) 39.

¹²⁸⁵ “The direct cause of the Clapham Junction accident was undoubtedly the wiring errors which were made by Mr Hemmingway...”. (Department of Transport Report November 1989 (note 1283) 147).

was full of “errors of practice”.¹²⁸⁶ The report highlighted British Rail’s negligence in not monitoring how the work was being carried out. It is stated that:

“That he could have continued year after to follow these practices, without discovery, without correction and without training, illustrates a deplorable level of monitoring and supervision within BR which amounted to a total lack of such vital management actions. Further that deplorable monitoring and supervision did not confine itself to Mr Hemmingway’s immediate superiors”.¹²⁸⁷

This was clearly criticism aimed at British Rail and the manner in which the monitoring and supervision of its workers was done. The blame for the disaster was stated as the faulty wiring and that was attributed to Mr Hemmingway and British Rail. It was stated that “For Mr Hemmingway’s characteristic errors, since they were so and were his normal working practice, the blame must clearly be a shared one...It is a collective liability that lies on British Rail”.¹²⁸⁸ In the same report British Rail was criticized by Mr Anthony Hidden QC who stated that “concern for safety was permitted to co-exist with working practices which...were positively dangerous...the evidence showed the reality of failure to carry that concern through into action”.¹²⁸⁹

¹²⁸⁶ Ibid 65.

¹²⁸⁷ Ibid 65.

¹²⁸⁸ Ibid 148.

¹²⁸⁹ Law Commission Report 237 (note 913) at para 1.14. “Had the quality initiative been in place...the major weaknesses which allowed circumstances to combine in such a way as to cause the Clapham Junction Accident might well have been eradicated. Instructions should have been more clearly drafted. Staff should have been better aware of their own responsibilities and those of others, staff should have been trained to work to laid down standards, fully and at all times and the quality of the installation work and the testing process should have been regularly reviewed”. (Department of Transport Report November 1989 (note 1283) 125).

As with the King Cross disaster it is common cause that it is the corporation that was to blame for the disaster. However, as this was an inquiry and not a criminal trial, the corporation was not held criminally liable for the deaths.

(f) The significance of the failure of prosecutions for the 1987 and 1988 disasters

These disasters occurred within a short period of time and the total number of lives lost exceeds 400. Combined with the fact that all those disasters resulted in failed prosecutions, it is not surprising that a feeling of loss of confidence in the law dealing with manslaughter caused by corporations developed. The fact that it was not possible to punish the responsible corporations for the deaths of so many led to a public outcry. This took place via the media and also through academic articles by commentators who criticized the system and called for the reform of that particular area of the law.

Although it is commendable that there were investigations made into the cause of the disasters, it is submitted that this was not enough. These investigations do not amount to prosecutions¹²⁹⁰ although, they made it possible for the public to be aware of the cause of the disasters. In that way future disasters of the same nature could be averted, however, the responsible parties remained unpunished, hence the public outcry. Wells points out that these investigations were not supposed to determine criminal or civil liability.¹²⁹¹

¹²⁹⁰ In the Clapham Report it is specifically stated that “An inquiry under the Regulation of Railways Act 1871 is not a trial: it is not a test of legal liability whether civil or criminal. Its procedures are not accusatorial: no one is put in the dock or made the object of a civil suit for damages. Its procedures are instead inquisitorial, it is an investigation with the object of discovering the truth”. (Department of Transport Report November 1989 (note 1283) 147).

¹²⁹¹ “Emphasis in the coroners’ directions that the purposes of the inquests was not to determine civil or criminal liability was ignored”. (Wells C, Inquests, inquiries and indictments: the official reception of death by disaster (1991) Vol 11, Issue *Legal Studies* 76,76).

(g) *Meridian Global Funds Management Asia Ltd v Securities Commission*¹²⁹²

This case dealt with a statutory regulatory offence where the court had to determine whether the actions of the company's chief investment officer (Norman Koo Hai) and its senior portfolio manager (Norman Ng Wo Sui), who had purposely concealed their unlawful actions from the company, could be regarded as the actions of the company. In determining whether the company or the individuals concerned should be held criminally liable Lord Hoffman referred to the rules of attribution.¹²⁹³ He went on to explain how the company becomes liable for acts¹²⁹⁴ and in holding that these could be regarded as the actions of the company Lord Hoffman stated that

“By applying the usual canons of interpretation, taking into account the language of the statutory provision, its content and policy, it is possible for the court to ascertain whose act (or knowledge or state of mind) was for this purpose intended to count as the act etc. of the company”.¹²⁹⁵

¹²⁹² *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 A.C. 500; [1995] 3 W.L.R. 413; [1995] 3 All E.R. 918.

¹²⁹³ The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. (Ibid para 506 C)

¹²⁹⁴ For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself", as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the *actus reus* and *mens rea* of the defendant himself. How is such a rule to be applied to a company?

One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or a unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law *was* intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy”. Ibid para 506C.

¹²⁹⁵ Ibid para 507E-F.

Accordingly in this case it was made clear that determining whether the actions of a person within the corporation should be attributed to the corporation or not is a matter of interpretation of the statutory provision in question.¹²⁹⁶ This involves interpreting the content, policy as well as the purpose of the statutory provision. This clearly is a rejection of vicarious liability and a broadening of the identification doctrine and this approach by the Privy Council has been hailed as “a more modern, organisational concept of liability”¹²⁹⁷ and as “an innovative, flexible approach”.¹²⁹⁸ It has been stated that it is an approach that could possibly lead to the number of prosecutions and convictions of companies being increased,¹²⁹⁹ however, it does have its shortcomings.¹³⁰⁰

(h) *Attorney General's Reference (No 2 of 1999)*¹³⁰¹

This was a referral by the Attorney General to the Court of Appeal to get clarity after the failure of a prosecution of a corporation for a rail disaster¹³⁰² that had resulted in the loss of seven lives. There were two questions that the Attorney General sought clarity on under the Criminal Justice Act.¹³⁰³ One of them was whether a defendant who is not a natural person could be

¹²⁹⁶ “Whether the act of a particular individual, even a junior employee, is to be attributed to a corporation is a matter of interpretation or construction of the language, content, policy and purpose of the statute under which proceedings are brought”. (Borg-Jorgensen & Van der Linde (note 82) 687).

¹²⁹⁷ Wells (note 15) 103. See further discussion of this approach in this chapter at V(c) below.

¹²⁹⁸ Pinto & Evans (note 94) 57.

¹²⁹⁹ (Borg-Jorgensen & van der Linde (note 82) 687).

¹³⁰⁰ “including the difficulty in designating an individual with whom the corporation may be identified for the purpose of a particular offence. It has also been argued that it might to some degree have collapsed the distinction between the doctrine of identification and vicarious liability, contributing to further uncertainty. Moreover, this approach did not resolve the problems related to the lack of the principle of aggregation as: “one individual has to be the company for the relevant purpose since two or more individuals cannot jointly constitute it”. (Borg-Jorgensen & van der Linde (note 82) 687).

¹³⁰¹ *Attorney General's Reference (No 2 of 1999)* Court of Appeal (Criminal Division) Lexis UK CD M364, [2000] 2 Cr App Rep 207; Also reported as [2000] 3 All ER 182, CA.

¹³⁰² Also known as the Great Western Trains disaster.

¹³⁰³ The Criminal Justice Act 1972, section 36. The section is entitled: Reference to Court of Appeal of point of law following acquittal on indictment. In terms of sub-section (1) Where a person tried on indictment has been acquitted (whether in respect of the whole or part of the indictment) the Attorney General may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to the court, and the court shall, in accordance with this section, consider the point and give their opinion on it.

convicted of manslaughter by gross negligence without the guilt of an identified natural person, for that crime, being established.¹³⁰⁴

The Court of Appeal responded by stating that a corporation could only be held liable for manslaughter if there is gross criminal negligence on the part of an identified individual which the corporation can be blamed for.¹³⁰⁵ The Court of Appeal further pointed out that “at present, the identification principle remained the only basis in common law for corporate liability for gross negligence manslaughter”.¹³⁰⁶ By so doing, the Court of Appeal brought clarity regarding the approach to follow when a corporation is to be held criminally liable for the acts of its employees, agents etc.:

“A company’s conviction can only be established on the back of an individual director’s guilt (though at least in theory not necessarily a conviction); where a corporation is prosecuted there must be evidence proving a director’s guilt”.¹³⁰⁷

It is submitted that it is lamentable that this decision effectively put to a halt the approach of Lord Hoffman in the *Meridian* case and reverted to the strict application of the identification doctrine.

(i) The way forward

According to the then Home Secretary, the Rt Hon Charles Clarke MP corporate criminal liability as it existed at the time, particularly with regard to corporate manslaughter was failing

¹³⁰⁴ *Attorney General's Reference* (note 1301).

¹³⁰⁵ *Ibid.*

¹³⁰⁶ *Ibid.*

¹³⁰⁷ Wells (note 15) 162.

“to reflect the reality of modern corporate life, operates too restrictively and fails to deliver an effective sanction”.¹³⁰⁸ These sentiments were brought by the fact that the main impediment to corporate manslaughter was that before a corporation could be convicted, it was mandatory to identify a senior person guilty of gross negligence manslaughter.¹³⁰⁹ Something needed to be done to ensure that corporations do not continue to escape liability even in instances where it is clear that had it not been for negligence on the corporation’s part, deaths would not have occurred.

After a long process, the CMCHA came into being in 2007.¹³¹⁰ In the following paragraphs the process will be duly outlined and discussed. The process is relevant to this discussion as it shows how the idea which eventually led to the introduction of the crime of corporate manslaughter evolved and how all stakeholders were granted an opportunity to have a say in what would eventually become the Act. It will be seen that through discussions, criticisms and recommendations, parliament was able to make changes to the law by introducing the crime of corporate manslaughter.

(j) Earlier Recommendations made towards reform

The first recommendations for the reform of the English law on corporate homicide were made by the Law Commission in Working paper 44 of 1972.¹³¹¹ In 1989 the Draft Criminal Code included recommendations on reforming corporate homicide.¹³¹² It was, however, not until

¹³⁰⁸ Home Secretary “Foreword to the Draft for Reform - Corporate Manslaughter” www.corporateaccountability.org/dl/manslaughter/reform/billmar2005.pdf (accessed 25 November 2013).

¹³⁰⁹ Ibid.

¹³¹⁰ It became operational in April 2008.

¹³¹¹ Law Commission *Working Paper 44* (note 913).

¹³¹² Law Commission *A Criminal Code for England and Wales, Report No 177, London 1989, Draft Criminal Code*, clauses 29, 30.

1996 that the Law Commission gave closer attention to the reform of the law on corporate homicide. Following the failure of the prosecution for the Zeebrugge disaster the Law Commission made recommendations for the extension of the crime of manslaughter.¹³¹³

Clarkson avers that

“pressure for reform was reinforced by an increased awareness of the number of people killed or injured every year in the workplace where again, in many cases, blame could be laid at the door of the company involved. As a result of mounting concern and criticism from academics, pressure groups, trade unions and politicians, 34 prosecutions for corporate manslaughter have now been brought – but there have only been 7 convictions”.¹³¹⁴

(aa) Law Commission, Legislating the Criminal Code: Involuntary Manslaughter, Report No. 237, London 1996

Although the Law Commission deals with involuntary manslaughter the focus in this report is corporate manslaughter. Reasons advanced for this are (a) the failure of the prosecutions of companies for disasters negligently caused by them. Apart from the Zeebrugge disaster, there were other disasters¹³¹⁵ that had taken place and none of them had resulted in successful prosecutions for manslaughter. Difficulties in prosecuting corporations for manslaughter led to general dissatisfaction and public outcry for amendments to be made to the law on corporate manslaughter.¹³¹⁶ (b) the high number workplace related deaths, which the Law commission

¹³¹³ Law Commission no. 237 (note 913)

¹³¹⁴ CMV Clarkson ‘Corporate Manslaughter: Yet More Government proposals’ 2005 *Criminal Law Review* 677, 677.

¹³¹⁵ “The Piper Alpha oil rig explosion, the Clapham rail disaster, the King’s Cross fire, the sinking of the *Marchioness*” (Ashworth (note 246) 117). In the Law Commission’s Report specific reference is made to the King’s cross fire which claimed 31 lives, the Piper Alpha explosion which claimed 167 lives, the Clapham rail disaster which claimed 35 deaths and the Zeebrugge disaster which claimed 187 lives, Law Commission *Report no. 237* (note 913) at para 1.12 – 1.15.

¹³¹⁶ C. Wells “A New Offence of Corporate Killing - the English Law Commission's Proposals” (1999) *Criminal Responsibility of Legal and Collective Entities., Freiburg i. B.: Max-Planck-Institut für Ausländisches und Internationaler Strafrecht* 119.

was of the view that they were preventable. (c) the very low level of prosecutions of corporations for manslaughter and the even lower level of successful prosecution.¹³¹⁷

In the part of the report entitled “the scope and structure of this report” it is specifically stated that the report relates to the criminal liability where deaths or serious injuries have been caused without intention.¹³¹⁸ The report further clarifies the type of manslaughter that is dealt with. This is involuntary manslaughter, which is described in the report as the type of manslaughter that includes “cases where there was no intention to kill or cause serious injury, but where the law considers that the person who caused death was blameworthy in some other way”.¹³¹⁹ The Law Commission then differentiates between the two types of involuntary manslaughter, namely, “unlawful act manslaughter”¹³²⁰ and gross negligence manslaughter”.¹³²¹ After discussing the two types of involuntary manslaughter the Law Commission examines their respective problems. In the latter part of the report the Law Commission makes a recommendation for the reform of the law on involuntary manslaughter. With regard to corporations the recommended reform is through the creation of a new offence of corporate killing by gross carelessness.¹³²²

¹³¹⁷ Clarkson states that “the reason for this paucity of prosecutions and convictions has been well documented: under the identification doctrine it is necessary to find an individual in the company who committed the crime and who is senior enough to be regarded as part of the “directing mind” of the company; his/her actions can then be attributed to the company. In large modern companies with complex organisational structures, decision-making is usually buried at various levels making it almost impossible to pinpoint any one individual of sufficient seniority for the company to be identified with his/her actions. As a result, when a prosecution is brought it tends not to be corporate manslaughter but rather for an offence under the Health and Safety at Work etc. Act 1974 where a company can be convicted on the basis of vicarious liability without resort to the identification doctrine”. (Clarkson (note 1314) 678).

¹³¹⁸ Law Commission *Report no. 237* (note 913) para 1.1.

¹³¹⁹ *Ibid* para 1.3.

¹³²⁰ The Law Commission describes “unlawful act manslaughter as the one which “arises where the person who causes death was engaged in a criminal act which carried with it a risk of causing some, perhaps slight, injury to another person”. (*Ibid* para 1.4).

¹³²¹ The Law Commission explains that defining this type of manslaughter is not an easy task, however “the offence is committed by those who cause death through extreme carelessness”. (*Ibid.*)

¹³²² *Ibid* para 8.35.

This offence would be applicable where the conduct of the corporation in causing the death of a person “falls far below what could reasonably be expected”.¹³²³ Corporate killing would be a crime that a company could be found guilty of without reliance on the identification doctrine.¹³²⁴ Corporate killing would rather be based on “management failure”.¹³²⁵ That means that

“For the purposes of the corporate offence, a death should be regarded as having been caused by the conduct of a corporation if it is caused by a failure, in the way in which the corporation’s activities are managed or organized, to ensure the health and safety of persons employed in or affected by those activities”.¹³²⁶

Pinto and Evans explain that “the concept of ‘management failure’ would obviate the need to prove the requisite fault of an individual identified as the directing mind of the company”.¹³²⁷ The Law Commission further makes a recommendation that when it comes to the corporate offence, “it should be possible for a management failure on the part of a corporation to be a cause of a person’s death even if the immediate cause is the act or omission of an individual”.¹³²⁸

¹³²³ Ibid.

¹³²⁴ Belcher (note 1090) 47.

¹³²⁵ Ibid. In the report the Law Commission explains that its “proposed concept of “management failure” is an attempt to define what, for the purposes of a corporate counterpart to the individual offence of killing by gross carelessness, can fairly be regarded as unacceptably dangerous conduct by a corporation. But it must of course be proved, as in the individual offence, that the defendant’s conduct (which, in the present context, means the management failure) caused the death”. (Law Commission *Report no. 237* (note 913) para 8.36).

¹³²⁶ Ibid para 8.35.

¹³²⁷ Pinto & Evans (note 94) 241. They further state that “management failure which was a cause of death, would be sufficient for corporate liability to be established even if the immediate cause was the act or omission of an individual”. (Ibid).

¹³²⁸ Law Commission *Report no. 237* (note 913) para 8.39, recommendation 12.

The Law Commission specifies that all corporations, regardless of how they are incorporated should fall under the ambit of the proposed new offence of corporate killing. This would widen the scope to include all sorts of entities, with the exception of a corporation sole.¹³²⁹ A corporation sole refers to a single person who is given certain rights to act in a special legal capacity, for instance archbishops.¹³³⁰ The Law Commission further describes the corporation sole as “a legal device for differentiating between an office-holder’s personal capacity and her capacity qua holder of that office for the time being”.¹³³¹

According to Wells the Law Commission’s recommendation was the first time that the Law Commission showed some kind of commitment to holding corporations criminally liable for the crimes they commit.¹³³²

The two main obstacles in holding a corporation liable for manslaughter were identified as the identification doctrine’s requirement that a senior individual who had acted with gross negligence had to be pinpointed and the fact that there was no clarity regarding causation.¹³³³

In its report the Commission made an attempt at providing ways to address these obstacles.¹³³⁴

¹³²⁹ Ibid para 8.53.

¹³³⁰ Ibid.

¹³³¹ Ibid.

¹³³² Wells (note 1316) 119.

¹³³³ Parsons (note 242) 78-79.

¹³³⁴ “The Report sought to overcome the problem of the identification principle by introducing a tailor-made test of corporate liability based on management failure”. (Wells (note 1316) 123. In the report the Law commission states that they “have decided to devote special attention to corporate liability for manslaughter, for three reasons. First... a number of recent cases have evoked demands for the use of the law of manslaughter following public disasters, and 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 who may be held individually responsible, and did not also fix responsibility in appropriate cases on their employers, who are operating and profiting from, the service they provide to the public, and may be at least as culpable. Second, we are conscious of the large number of people who die in factory and building site accidents and disasters each year: many of those deaths could and should have

The Commission's recommendation of a new offence of "corporate killing" was a response to the public's general dissatisfaction¹³³⁵ with the way previous disasters had been handled.¹³³⁶

In terms of the Law Commission's recommendation the common-law crime of manslaughter was to be replaced by 3 offences:

- reckless killing
- killing by gross carelessness
- corporate killing

The first two crimes could be committed by individuals, however corporations could also be held liable for them, based on the identification doctrine. With regard to the latter offence of corporate killing, corporations were the only persons who would be able to commit such an offence.

The commission's aim was to overcome the identification doctrine,¹³³⁷ which, as already stated, was hampering the development of corporate criminal liability by making it extremely difficult to prosecute corporations (especially the large corporate entities) for crimes.

been prevented. Third, there appear to have been only four prosecutions of a corporation for manslaughter in the history of English law, and only the last of these cases resulted in a conviction; significantly, this was a "one man company". (Law Commission *Report no. 237* (note 913)).

¹³³⁵ "This is a reflection of changing attitudes to safety and risk, and to differing perceptions of transport and other disasters, which have led to the now familiar history of calls for corporations to be prosecuted for manslaughter. The present proposals testify to the contemporary social and symbolic importance of corporate accountability...". (Wells (note 1316) 119).

¹³³⁶ *Ibid* 122.

¹³³⁷ "the Report sought to overcome the problems of the identification principle by introducing a tailor-made test of corporate liability based on 'management failure'". (Wells (note 1316) 123).

In terms of Clause 4 of the Draft Involuntary Homicide Bill:

“(1) A corporation would be guilty of corporate killing if

(a) management failure by the corporation is the cause or one of the causes of a person's death;
and

(b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.

(2) (a) There is a management failure by the company if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities.

(b) Such failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual”.¹³³⁸

Wells make four important criticisms of the Law Commission’s Report. The first is with regard to the definition of management failure, which is not clarified in the report. She further reckons that the creation of a separate offence specifically for corporations may result in even more marginalisation of corporate killing rather than less.¹³³⁹ She then urges that more attention be given to the issue of the ‘individual liability of directors and senior managers’.¹³⁴⁰ Finally, she points out the Commission’s failure to deal with cases where the wrongful acts of corporations do not result in death but rather in serious injury.¹³⁴¹ The Law Commission’s recommendations

¹³³⁸ Ibid 123.

¹³³⁹ Ibid.

¹³⁴⁰ Ibid. Mainly due to the fact that “the Law commission proposed that the offence would be capable of commission by any corporation...but it should not be capable of commission by an individual, even as a secondary party”. (Pinto & Evans (note 94) 242).

¹³⁴¹ Wells (note 1316) 123.

were, however, not followed up¹³⁴² and it was only in 2000 that the government made moves towards the implementation of the recommendations.¹³⁴³

(bb) Reforming the law on involuntary manslaughter: the Government's Proposals, 2000.

Between the 1996 recommendation by the Law Commission of an offence of corporate killing and 2000, there was no movement by the government towards the implementation of the recommendation. It has in fact been stated that the recommendations were shelved and it was only in 2000 that government removed them from the shelf.¹³⁴⁴ In Attorney General's reference the Court of Appeal made it clear that with regard to common law offences, the applicable law is still the identification doctrine.¹³⁴⁵ These offences include manslaughter.¹³⁴⁶

During that same year, yet another disaster caused by corporate behavior befell the country. This was the Hatfield Railway disaster, which, once more drew the public's attention to the criminal liability of corporations for negligent deaths of people. The public outcry that followed the Hatfield crash led to the government's taking up of the Law Commission's recommendations.

The Home Office published a consultation paper entitled *Reforming the law on Involuntary Manslaughter: the Government's Proposals, 2000*. In the consultation paper the government

¹³⁴² "The Government's response to the Law Commission's Report No. 237 was generally positive, but hardly prompt". (Pinto & Evans (94) 242).

¹³⁴³ Belcher (note 1090) 47.

¹³⁴⁴ *Ibid.*

¹³⁴⁵ *Attorney General's Reference* (note 1301).

¹³⁴⁶ Parsons (note 242) 69.

proposed reform to the law of manslaughter as it applied to individuals and to corporations. A proposal was made for the introduction of a new offence of corporate killing.¹³⁴⁷ Corporate killing would be committed where the death of a person was caused by “management failure” in a company or by the corporation’s conduct having fallen “far below what could reasonably be expected”. The proposal defined management failure as “failure in the way in which an organization managed or organized its activities to ensure the health and safety of employees or those affected by its activities”.¹³⁴⁸

Comments on the proposals were requested from the public. Generally the response to the proposals was positive and there was a general consensus that reform in this area of the law was necessary.¹³⁴⁹ 102 responses were received and the majority were in favour of reform.¹³⁵⁰ Twenty of the respondents totally rejected the proposal as they felt that the Health and Safety regulations were sufficient.¹³⁵¹ In addition to that the responses showed that the public required some of the wording used in the proposal to be clearly defined.¹³⁵² These include phrases such as “falling far below” and “management failure”.¹³⁵³

(ii) The draft Corporate Manslaughter bill¹³⁵⁴

¹³⁴⁷ Pinto & Evans (note 94) 242.

¹³⁴⁸ Reforming the Law on Involuntary Manslaughter: the Government’s Proposals, 2000.

¹³⁴⁹ Corporate Manslaughter: A Summary of Responses to the Home Office’s Consultation in 2000 <http://www.homeoffice.gov.uk/documents/cons-2005-corporate-manslaughter/2000-cons-summary-responses.pdf?view=Binary> (accessed 11 March 2014).

¹³⁵⁰ Ibid.

¹³⁵¹ Ibid.

¹³⁵² Ibid.

¹³⁵³ Ibid.

¹³⁵⁴ Home office, Corporate Manslaughter: The Government’s Draft Bill for Reform Cm6497 www.corporateaccountability.org/dl/manslaughter/reform/billmar2005.pdf (accessed 11 March 2014).

As a direct result of the Law Commission's recommendations the Draft Bill on Corporate Manslaughter was passed. The Draft Bill which introduced, *inter alia*, a new offence referred to as "corporate manslaughter" was passed on 23 March 2005.¹³⁵⁵ The aim of the Draft Bill was not only to introduce a new offence which would be more effective, but also to introduce a law that would not burden business.¹³⁵⁶ This would be achieved by the fact that the new offence, instead of imposing a senior official's guilt on the corporation, would make corporations responsible for the manner in which they are run.¹³⁵⁷ The Draft bill was a "substantial revision" of the proposals made by the law commission in Report 237 and a noteworthy point is that it discarded the notion of "management failure".¹³⁵⁸

The corporate manslaughter provision in the Draft Bill does not only refer to corporations, but also includes other collective units, hence the term organization is used. The provision envisages a situation where it is determined that the death of a person was caused by the gross breach of the organization's duty of care, such organization would be convicted of the new offence.¹³⁵⁹ The organization owes a duty of care where it is an employer, a supplier of goods or services or where it occupies a building. The extent of the breach of the health and safety regulation concerned would be measured in accordance with 'statutory criteria' and the knowledge of the senior individuals. All corporations, including government departments would be capable of committing the new offence.¹³⁶⁰ The punishment would be an unlimited

¹³⁵⁵ Ibid.

¹³⁵⁶ Foreword to the Draft for Reform (note 1308).

¹³⁵⁷ Corporate Manslaughter Draft Bill, Explanatory Notes no. 6.

www.corporateaccountability.org/dl/manslaughter/reform/billmar2005.pdf (accessed 11 March 2014).

¹³⁵⁸ Pinto & Evans (note 94) 242.

¹³⁵⁹ The Draft Bill on Corporate Manslaughter 2005 (note 1241) clause 1.

¹³⁶⁰ Ibid.

fine, although the court will be able to grant remedial orders as well and the court having jurisdiction over such offences would be the Crown Court.

An interesting observation is that the offence is specifically directed at organizations and not at individuals within the organizations. Moreover, it was envisaged that if the Bill is passed as legislation, corporations would no longer be charged with the common law offence of manslaughter.¹³⁶¹

(aa) The Government's Reply to the first joint report on the draft Corporate Manslaughter bill from the Home Affairs and Work and Pensions committees¹³⁶²

In this section some of the concerns that were raised and how they were addressed will be briefly discussed. This discussion puts the provisions of the Act into perspective, as we gather insight as to the rationale behind some of the words and phrases used in the Act. A concern had been raised regarding the government's slow response to calls for reform in corporate criminal liability.¹³⁶³ The government was then urged to attend to the introduction of the Bill as a matter of urgency. The government gave assurance of its commitment to reforming the law timeously.¹³⁶⁴

¹³⁶¹ In terms of clause 13 of the Draft Bill "The common law offence of manslaughter by gross negligence is abolished in its application to corporations". (Ibid clause 13).

¹³⁶² The Government's Reply to the first joint report on the Draft Corporate Manslaughter Bill from the Home Affairs and Work and Pensions Committees Session 2005-06 HC 540 (2006) <http://www.homeoffice.gov.uk/documents/cons-2005-corporate-manslaughter/government-response.pdf?view=binary> (accessed 11 March 2014).

¹³⁶³ Ibid 3.

¹³⁶⁴ Ibid.

Reference to the new offence as ‘corporate manslaughter’ as opposed to ‘corporate killing’ was welcomed. A point of concern was, however, raised that the government had not taken into consideration large corporations that are unincorporated, such as partnerships and huge law firms.¹³⁶⁵ In terms of the Draft Bill corporations would be prosecuted for corporate manslaughter, while natural persons and unincorporated entities would be prosecuted for common-law manslaughter. As part of the response, statistics regarding the prosecution of large unincorporated corporations were requested.¹³⁶⁶ The government responded by providing the statistics and by stating that such prosecutions do not fall under the jurisdiction of the Health and Safety Executives, but rather, under local authorities.¹³⁶⁷ Government further stated that it would look into how to deal with this to ensure that there is no gap.¹³⁶⁸ The government also mentioned the fact that it would consider “extending the application of the offence to some types of unincorporated body”.¹³⁶⁹ The comprehensive list of organizations that would fall under the ambit of the Act was welcomed and a suggestion to extend the list further, as this would result in certainty, was made.¹³⁷⁰ It was also suggested that police forces should be included.¹³⁷¹

The fact that the government did not want the offence to be limited to the deaths of workers was welcomed.¹³⁷² It was recommended that even where serious injury is caused, organizations should be held liable in a similar manner, however, to avoid losing focus of the Manslaughter

¹³⁶⁵ Ibid 4.

¹³⁶⁶ Ibid.

¹³⁶⁷ Ibid.

¹³⁶⁸ Ibid.

¹³⁶⁹ Ibid.

¹³⁷⁰ Ibid 5.

¹³⁷¹ Ibid.

¹³⁷² Ibid 7.

Act, the government should consider introducing a new offence of ‘corporate grievous bodily harm’.¹³⁷³

A recommendation that the government remove the term ‘duty of care’ and revert to the original proposal of the Law commission that as long as there was a management failure on the part of an organization which results in the death of an employee or any other person the organization should be held liable, was made.¹³⁷⁴ Moreover, it was recommended that in assessing gross management failure an important factor to be considered should be whether the organization has failed to comply with the provisions of ‘any relevant health and safety legislation’.¹³⁷⁵

The proposal that where gross management failure of a subsidiary company causes death, the parent company should also be prosecuted was welcomed. A concern was raised that under the then existing law it was not possible to prosecute parent companies due to the lack of a ruling that such companies have a duty of care as far as the activities of their subsidiary companies are concerned.¹³⁷⁶

A recommendation that the government ensures that the bill includes that in the event where the gross management failure of an employment agency or main contractor is responsible for

¹³⁷³ Ibid.

¹³⁷⁴ Ibid 9.

¹³⁷⁵ Ibid.

¹³⁷⁶ Ibid 11.

the death of an agency worker or a person in a subcontracting company, such employment agency or main contractor should be held liable jointly or individually.¹³⁷⁷

Criticism had been leveled at the senior management test.¹³⁷⁸ It was stated that it may lead organizations to lessening their attention to health and safety.¹³⁷⁹ Fear that a can of worms might be opened on the issue of who is to be regarded as senior manager or not, was also expressed.¹³⁸⁰ The term senior manager was criticized in that it may lead to the unwillingness of unpaid volunteers to act in such positions.¹³⁸¹ A recommendation was made for government to reconsider the senior management test.¹³⁸² It was further recommended that the test ought to be based on management failure rather than on individual culpability at a particular level of the organization.¹³⁸³

In response the government reiterated the fact that focus is not only on senior people in the organization, but that it is mainly on failures in the manner in which the activities of the organization are managed or organized.¹³⁸⁴ The government further explains that nevertheless there is still a need to include the senior manager test as it would not be proper to hold a corporation liable where culpability lay at a 'relatively junior level'.¹³⁸⁵ Moreover, the

¹³⁷⁷ Ibid 12.

¹³⁷⁸ Ibid 14.

¹³⁷⁹ Ibid.

¹³⁸⁰ Ibid.

¹³⁸¹ Ibid.

¹³⁸² Ibid.

¹³⁸³ Ibid.

¹³⁸⁴ Ibid 14.

¹³⁸⁵ Ibid.

government states that ‘senior management test’ has been widely misconstrued.¹³⁸⁶ The government did, however, accept the recommendations of the Committee.¹³⁸⁷

It was further stated that the offence fails to address problems that have been experienced in the past as a result of the identification doctrine. In fact, the offence was seen by the Committee as a broadening of the identification doctrine. This was regarded as a major weakness of the Draft Bill. The government was urged to find an offence that would be suitable for all sizes of organizations.

(bb) Shortcomings of the Draft Bill

Criticisms levelled against the Draft Bill include the fact that it fails to provide a solution to problems that are found in cases where a corporation is prosecuted for manslaughter.¹³⁸⁸ Another criticism is the fact that the new offence deals only with corporate homicide and does not address the other aspects of corporate criminal liability.¹³⁸⁹

One of the Draft’s Bill’s main shortcomings is that it refers to senior management, which means that where the responsibility lies on a low level employee, the corporation may escape liability.¹³⁹⁰ Whyte argues that it is “inappropriate to impute liability to the corporation in a way that does not recognize clearly that corporate offences are often committed by those further

¹³⁸⁶ Ibid.

¹³⁸⁷ Ibid 15.

¹³⁸⁸ “However, the belief that the new test would entirely solve the problems inherent in corporate manslaughter cases is misplaced”. (Wells (note 1316) 126).

¹³⁸⁹ Ibid 128.

¹³⁹⁰ Whyte (note 35) 4.

down the hierarchy”.¹³⁹¹ It is submitted that this is a valid argument, as some of the prosecutions in the past failed directly as a result of the identification doctrine’s failure to take into account fault on the part of lower level employees, for liability to be imputed to the corporation. This shortcoming has been identified as a possible “unnecessary restriction upon prosecution”.¹³⁹²

Moreover, it is not clear who the Draft Bill is referring to by the term ‘senior management’. Although it is likely that the term refers to directors, the Draft Bill is criticized for not providing clarity in this regard.¹³⁹³

Another shortcoming is the fact that before a corporation can be held liable, there must be some form of organizational failure. This requirement has been criticized in that it creates “a route to establishing liability that is more restrictive than in any of the previous proposals floated by the Home Office”.¹³⁹⁴

The Draft Bill requires a “gross breach” before liability can be imputed to the corporation. The problem with this requirement is that the requirements for a gross breach are such that they may provide impediments to the successful prosecution of corporations:¹³⁹⁵ “In order to determine whether or not the conduct in question is gross, a jury is required to consider the

¹³⁹¹ Ibid 5.

¹³⁹² Ibid 4.

¹³⁹³ Ibid 5.

¹³⁹⁴ Ibid 4.

¹³⁹⁵ Ibid 5.

seriousness of the failure to comply with relevant legislation and to consider what the senior manager knew about or ought to have known about the failure to comply”.¹³⁹⁶

The jury is also required to establish whether senior managers “sought to cause the organization to profit from that failure”.¹³⁹⁷ This requirement has been identified as a possible bar to the prosecution of corporations as it “introduce(s) a requirement that may be very difficult to demonstrate”.¹³⁹⁸

Another criticism against the Draft Bill is its reference to the duty of care. As this is a civil law duty of care, the Draft Bill is criticized in that it fails to take into account the statutory duties that are found in regulatory statutes such as the Health and Safety at Work etc. Act.¹³⁹⁹

IV THE CURRENT REGULATION OF CORPORATE HOMICIDE IN ENGLAND

(a) The Corporate Manslaughter and Corporate Homicide Act 2007

On 26 July 2007 the CMCHA was passed, bringing into being a new offence of corporate manslaughter.¹⁴⁰⁰ The Act became operational on 6 April 2008.¹⁴⁰¹ In terms of the Act the common law offence of manslaughter by gross negligence, with regard to corporations and other entities that are subject to the Act, is abolished.¹⁴⁰² The wording of the Act makes it clear that the common law offence of manslaughter by gross negligence is abolished where death

¹³⁹⁶ Ibid 5.

¹³⁹⁷ Ibid.

¹³⁹⁸ Ibid.

¹³⁹⁹ Ibid 6.

¹⁴⁰⁰ Pinto & Evans (note 94) 242.

¹⁴⁰¹ Ibid.

¹⁴⁰² The CMCHA (note 36) section 20 states : “The common law offence of manslaughter by gross negligence is abolished in its application to corporations, and in any application it has to other organisations to which section 1 applies”.

has been caused by an organization, including a corporation. However, where it is a natural person who has caused the death of another, the common law offence of manslaughter by gross negligence continues to be applicable.¹⁴⁰³ This means that with regard to natural persons, the common law offence of manslaughter by gross negligence is not affected by the Corporate Manslaughter and Corporate Homicide Act.¹⁴⁰⁴

(i) The offence of corporate manslaughter / corporate homicide

As stated above, the Act abolishes the common law offence of manslaughter by gross negligence¹⁴⁰⁵ in relation to corporations and introduces a new statutory offence of corporate manslaughter. In terms of the new statutory offence, a corporation is presumed guilty of corporate manslaughter if (a) “it owes a duty to take reasonable care for a person’s safety”¹⁴⁰⁶ and (b) its activities are managed or organized “by its senior management” in such a manner that it amounts “to a gross breach of a relevant duty owed by the organization to the deceased”¹⁴⁰⁷ and (c) causes the death of a deceased.

Elements that would need to be proven are that (a) the manner in which the activities are managed or organized (b) caused death and (c) amount to a gross breach of a relevant duty owed to the deceased by the organization.¹⁴⁰⁸ It is thus important to establish how activities are

¹⁴⁰³ R Matthews *Blackstone’s Guide to the Corporate Manslaughter and Corporate Homicide Act 2007* (2008) 1.

¹⁴⁰⁴ See section 20. “Individuals will continue to be subject to the common law offence of gross negligence manslaughter”. (Ibid).

¹⁴⁰⁵ The CMCHA (note 36) section 20).

¹⁴⁰⁶ Pinto & Evans (note 94) 225.

¹⁴⁰⁷ Section 1. “The test for liability in the Act is focused on the way that an organization’s activities were managed or organized, which must be the cause of a person’s death and found the ‘gross’ breach of a relevant duty of care owed in negligence”. Matthews (note 1403) 1.

¹⁴⁰⁸ “In summary, the offence is committed where an organisation owes a duty to take reasonable care for a person’s safety and the way in which activities of the organisation have been managed or organised amounts to a

managed or organized by its senior management and since the act also refers to a relevant duty, it must be established that the corporation owed a duty to the deceased.¹⁴⁰⁹

In essence, instead of a corporation being held liable due to the fact that a senior individual within the corporation is guilty of the offence causing the death, the corporation itself will be guilty if its activities are managed in a grossly negligent manner.¹⁴¹⁰ Gobert points out that the effect of this is an implicit recognition of aggregated fault, in spite of the courts' rejection of the principle of aggregation.¹⁴¹¹ It is submitted that Gobert's observation is correct as the wording of the CMCHA does indeed allow for the aggregation of the fault of several individuals.

(ii) The relevant duty of care

The Act further explains the meaning of "relevant duty of care".¹⁴¹² With regard to incorporated and unincorporated entities, the Act specifies the meaning of 'relevant duty of care'. It states that it refers to circumstances where in terms of the law of negligence, the organisation concerned would owe a duty.¹⁴¹³ This includes situations where the organization as an

gross breach of that duty and causes the person's death. How the activities were managed or organised by senior management must be a substantial element of the gross breach". (Pinto & Evans (note 94) 243).

¹⁴⁰⁹ "The offence can only be committed if the organisation owed the deceased a relevant duty of care". (Ibid 245).

¹⁴¹⁰ "Rather than being contingent on the guilt of one or more individuals-, liability for the new offence depends on a finding of gross negligence in the way in which the activities of the organisation are run". (Ibid 242 -243).

¹⁴¹¹ J Gobert "Country Report: UK" in J Gobert and A Pascal (eds) *European Developments in Corporate Criminal Liability* (2011) 315, 318-319.

¹⁴¹² The relevant duty of care is referred to in section 2(1) which states that:

"A relevant duty of care in relation to an organization means any of the following duties owed by it under the law of negligence –

(a) a duty owed to its employees or to other persons working for the organization or performing services for it;

(b) a duty owed as occupier of premises;

(c) a duty owed in connection with –

(i) the supply by the organization of goods or services (whether for consideration or not),

(ii) the carrying on by the organization of any construction or maintenance operations,

(iii) the carrying on by the organization of any other activity on a commercial basis, or

(iv) the use or keeping by the organization of any plant, vehicle or other thing;

(d) A duty owed to a person who, by reason of being a person within subsection (2) is someone whose safety the organization is responsible".

¹⁴¹³ The CMCHA (note 36) section 2 (1).

employer owes a duty to its employees as well as to others who work in the organization or perform services for the organization,¹⁴¹⁴ where the organization is an occupier of premises¹⁴¹⁵ and where the organization supplies goods or services,¹⁴¹⁶ or performs any construction or maintenance operations,¹⁴¹⁷ or carries on any other commercial activity,¹⁴¹⁸ or where the organization uses or keeps any plant, vehicle or other thing.¹⁴¹⁹ Based on section 2(1) it is clear that the legislature tried by all means to include all people who could possibly be harmed by corporate activities. It is explained that

“a duty of care exists for example in respect of the systems of work and equipment used by employees, the conditions of worksites and other premises occupied by an organisation and in relation to products or services supplied to customers”.¹⁴²⁰

In section 2(4) it is made clear that the duty referred to is a duty under the law of negligence¹⁴²¹ and that the question as to whether one is owed the relevant duty by the organization or not, is to be decided by the judge. This means that the CMCHA is not bringing about new duties as the offence is based on duties already existing under the law of negligence.¹⁴²² Moreover, as will be seen below, the CMCHA is worded in such a way that a corporation or organization may owe several duties with regard to a single operation:¹⁴²³ “So where a company is engaged

¹⁴¹⁴ The CMCHA (note 36) section 2 (1) (a).

¹⁴¹⁵ Ibid section 2 (1) (b).

¹⁴¹⁶ Ibid section 2 (1) (c) (i).

¹⁴¹⁷ Ibid section 2 (1) (c) (ii).

¹⁴¹⁸ Ibid section 2 (1) (c) (iii).

¹⁴¹⁹ Ibid section 2 (1) (c) (iv).

¹⁴²⁰ Ministry of Justice ‘Understanding the Corporate Manslaughter and Corporate Homicide Act 2007’ 2.

¹⁴²¹ “A reference in subsection 1 to a duty owed under the law of negligence includes a reference to a duty that would be owed under the law of negligence but for any statutory provision under which liability is imposed in place of liability under that law”. (CMCHA (note 36) section 2(4)).

¹⁴²² Ministry of Justice (note 1420) 2.

¹⁴²³ Pinto & Evans (note 94) 248.

in construction or repair it will owe a duty under that head as well as under the supply of a service head and because it is operating commercially”¹⁴²⁴.

From the discussion of the duty of care, that follows, it is submitted that defining the duty of care in such a way that it encompasses all who may possibly be harmed by activities of corporations, is a good thing. By not confining the duty to cover only employees and those who are paying for services from these companies, the wording of the Act puts an obligation on corporations generally to ensure that all who may possibly be harmed by corporations are included. In other words, the legislature acknowledges the fact that corporate harm usually goes beyond affecting the corporation’s employees or people who are being rendered services by the corporation.

(aa) Duty owed to employees

The section refers firstly to employees in formal employment by the corporation and the relevant duty of care with regard to such employees would entail the duty to ensure that the employees work in safe conditions.¹⁴²⁵ As with all the other duties in the Act, the duty of care owed to employees is not a new duty of care, it is simply referring to the duty of care that existed prior to the coming into being of the Act.¹⁴²⁶

¹⁴²⁴ Ibid.

¹⁴²⁵ Ibid 229.

¹⁴²⁶ Ibid.

In addition to employees, the wording of this subsection widens the net to include people who are not in the organization's formal employment "but whose work it is able to control or direct, contractors for example".¹⁴²⁷ The Act provides the definition of employer as follows:

"an individual who works under a contract of employment or apprenticeship (whether express or implied and, if express, whether oral or in writing), and related expressions are to be construed accordingly".¹⁴²⁸

By including those who are not employees in the strict sense of the word, the Act makes it difficult for an organization to escape liability on the basis that it had no duty towards the deceased person. This should be of assistance to the families of the deceased as Pinto and Evans point out that it is not an easy task to show whether a contract of employment exists or not.¹⁴²⁹

(bb) Duty owed as occupiers of premises

Section 2(1)(b) refers to the duty owed by the corporations as occupiers of premises. Section 25 states that the term 'premises' includes "land, buildings and movable structures". The duty of care with regard to premises refers to the "organisation's responsibilities to ensure, for example, that buildings it occupies are kept in a safe condition".¹⁴³⁰

¹⁴²⁷ Ibid.

¹⁴²⁸ The CMCHA (note 36) section 25.

¹⁴²⁹ "Whether there is a contract of employment is a mixed question of fact and law. The issue is not always an easy one to resolve, indeed it has proved 'elusive'. Under the Act, it is a question of law to be decided by the judge". (Pinto & Evans (note 94) 246).

¹⁴³⁰ Ibid.

The duty of ensuring that premises are safe is inclusion of movable structures in the definition of premises means that people who are being rendered services by corporations, such as boat rides and all other individuals who may find themselves being exposed to harm, as a result of activities of corporations are owed a duty of care by the corporation.

(cc) A duty owed in connection with the supply by the organization of goods or services (whether for consideration or not)

This is the duty that organizations which supply goods or services owe to their clients. An example is the duty owed to passengers by companies that provide transport.¹⁴³¹ By specifically including organisations that supply goods or services, the legislature has made sure that all organizations, especially corporations that provide goods and services fall under the ambit of the Act. In this way, when deaths occur negligently it would be possible to hold organizations such as retailers and transport companies criminally liable for those deaths.

(dd) A duty owed in connection with the carrying on by the organization of any construction or maintenance operations

In terms of section 2(7) construction or maintenance operations refers to

- (a) Construction, installation, alteration, extension, improvement, repair, maintenance, decoration, cleaning, demolition or dismantling of –
 - (i) any building or structure,

¹⁴³¹ Ibid 230.

- (ii) anything else that forms, or is to form, part of the land, or
 - (iii) any plant, vehicle or other thing
- (b) operations that form an integral part of, or are preparatory to, or are for rendering complete, any operation within paragraph (a).

It is submitted that section 2(7) covers a very wide area of corporate activity. This is commendable as it is envisaged that organizations will find it difficult to escape liability by relying on the absence of a duty of care when it finds itself being accused of the offence of corporate manslaughter.

(ee) A duty owed in connection with the carrying on by the organization of any other activity on a commercial basis

This refers to commercial activities other than the ones specifically mentioned in the other subsections. It has been stated that this was made part of the section as a way of making sure “that activities that are not the supply of goods and services but which are still performed by companies and others commercially, such as farming or mining are covered by the offence”.¹⁴³²

In this regard Pinto & Evans correctly state that “it is hard to envisage any corporation not caught by this provision”.¹⁴³³

(ff) A duty owed in connection with the use or keeping by the organization of any plant, vehicle or other thing

¹⁴³² Matthews (note 1403) 62.

¹⁴³³ Pinto & Evans (note 94) 248.

This refers to a duty that arises as a result of the organization using or keeping anything.¹⁴³⁴ It is noted that “this extremely wide category is apparently there to sweep up a relevant activity undertaken by a public body that falls through the net of supplying goods or services or of any duty arising in respect of a commercial activity”.¹⁴³⁵ It is clear that the legislature went to extreme measures to ensure that all activities of corporations and organisations would be covered, so as to ensure that all corporations and organisations are held criminally liable for negligent deaths caused as a result of the organisation’s activities.

(gg) A duty owed to a person who, by reason of being a person within subsection (2) is someone for whose safety the organization is responsible¹⁴³⁶

The act further refers to a duty which arises as a result of the fact that the organization is responsible for that person’s safety. The list in subsection 2 includes, *inter alia*, detainees in courts or police stations, people being transported or held for purposes of prison or immigration arrangements as well as detained patients. The duty of care therefore “extends to that owed to all persons subject to compulsory detention that is, custody, remand, detention pursuant to immigration controls, secure accommodation, being transported under the Mental Health Act 1983”.¹⁴³⁷

(iii) Determining the existence of the duty of care

¹⁴³⁴ Matthews (note 1403) 63.

¹⁴³⁵ *Ibid.*

¹⁴³⁶ The CMCHA (note 36) section 2(1).

¹⁴³⁷ Matthews (note 1403) 65.

In terms of the Act, the question whether there was, indeed, a duty of care or not is a matter that must be determined by the judge. Section 2(5) specifically states that

“For the purposes of this Act, whether a particular organization owes a duty of care to a particular individual is a question of law. The judge must make any findings of fact necessary to decide that question”.¹⁴³⁸

Section 2(5) simply states that the question whether a duty of care is owed by the organization to a particular individual is a question of law, to be determined by a judge. The section, however, does not provide further guidance as to how the judge must / should go about doing this. This is also noted by Matthews who states that “the corporate offence under the act is unique in including an element of the offence to be determined by a judge who will then direct the jury of its existence as a matter of law”.¹⁴³⁹

It is submitted that making the determination of whether a duty existed or not a question for the judge is a good thing as it prevents a situation where the families of victims have to show that their loved ones were owed a duty by the corporation. Pinto and Evans point out that the burden of proving that an organization owed a duty of care to the deceased is borne by the prosecution.¹⁴⁴⁰ This is supported by Matthews, who states that “in the face of the Act’s silence, it must be that the prosecution bear the burden of proving the existence of a duty of care, and that, in making its findings of fact, the judge will have to be satisfied to the criminal standard, so that he is sure”.¹⁴⁴¹

¹⁴³⁸ The CMCHA (note 36) section 2(5).

¹⁴³⁹ Matthews (note 1403) 34.

¹⁴⁴⁰ “It is for the prosecution to prove that the particular organisation owed a duty of care to the deceased”. (Pinto & Evans (note 94) 245).

¹⁴⁴¹ Matthews (note 1403) 34.

This may be difficult to prove, particularly in circumstances where the deceased was neither an employee of the corporation nor someone who was being rendered a service by a corporation, and for that reason it is a good thing that the family of the victim does not bear the burden of proving that he was owed a duty. Matthews observes that the intention is for the offence “to apply only in circumstances where an organization owed a duty of care to a deceased victim under the law of negligence at common law”.¹⁴⁴²

(iv) Gross breach

This clause does not differ much from the proposal in the Draft Bill. The Act explains what is meant by a gross breach. The issue of gross breach only becomes applicable once it has been proven by the prosecution that that organization did owe a relevant duty of care to the deceased and that the death was caused by the manner in which the organisation’s activities were managed or organized.¹⁴⁴³ The jury must then decide if there was a gross breach of that duty.¹⁴⁴⁴

A breach is regarded as a gross breach of duty if it “falls far below what can reasonably be expected of the organization in the circumstances”.¹⁴⁴⁵ It is submitted that this is a difficult yardstick as what one may regard as being “far below” may not be the same as what another sees as conduct “far below what can be reasonably expected”. The courts will have to look carefully at the circumstances of each particular case and decide whether a gross breach has occurred or not. The Act does provide guidance in that in section 8(2) it states that Gobert’s submission that instead of asking “what can be reasonably be expected of a company in the

¹⁴⁴² Ibid 31.

¹⁴⁴³ Pinto & Evans (note 94) 232.

¹⁴⁴⁴ The CMCHA (note 36) section 8(1)(b).

¹⁴⁴⁵ Ibid section 1(4)(b).

circumstances, courts should ...be asking what the public has a right to reasonably expect of a company in the circumstances”¹⁴⁴⁶ should be taken into consideration.

The legislation provides factors which the jury must take into account when deciding whether a gross breach has occurred or not.¹⁴⁴⁷ It states that once it is clear that a relevant duty of care was owed to a person by the organization, the jury must make a decision as to whether the duty was grossly breached.¹⁴⁴⁸ Factors to be considered by the jury include the question whether there was a failure by the organization to comply with any health and safety legislation concerning the alleged breach.¹⁴⁴⁹ If there was such failure, the jury must take into account the seriousness of that failure¹⁴⁵⁰ as well as the extent of the risk of death that the failure posed.¹⁴⁵¹ Additional factors that a jury may consider include attitudes and policies within the organization which may have possibly encouraged or led to the tolerance of such failure,¹⁴⁵² as well as any health and safety guidance relating to the alleged breach.¹⁴⁵³ The Act does not limit the factors that the jury may consider. In fact it gives the jury the freedom to take into account any other factors which, in its opinion, is relevant.¹⁴⁵⁴ The reference to health and safety guidance in section 8 is defined as referring to “any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under a statutory provision or otherwise) by an authority responsible for the enforcement of any health and safety legislation”.¹⁴⁵⁵ The Act has taken into account the fact that a defendant’s conduct

¹⁴⁴⁶ J Gobert ‘Corporate Killing at Home and Abroad – Reflections on the Government’s Proposal’ (2002) *Law Quarterly Review* 72, 83.

¹⁴⁴⁷ The CMCHA (note 36) section 8.

¹⁴⁴⁸ Ibid section 8 (1).

¹⁴⁴⁹ Ibid section 8 (2).

¹⁴⁵⁰ Ibid section 8 (2) (a).

¹⁴⁵¹ Ibid section 8 (2) (b).

¹⁴⁵² Ibid section 8 (3) (a).

¹⁴⁵³ Ibid section 8 (3) (b).

¹⁴⁵⁴ Ibid section 8 (4).

¹⁴⁵⁵ Ibid section 8 (5).

may lead to the defendant being charged with the offence of corporate manslaughter as well as the failure to observe some or other health and safety regulation. In such circumstances the Act gives the jury the discretion “if the interests of justice so require” to make a ruling on each charge.¹⁴⁵⁶

Moreover, where there is a conviction of corporate manslaughter or corporate homicide, the convicted organization may also be charged with a health and safety offence based on the same circumstances, if it is in the interests of justice to charge such an organization with that offence.¹⁴⁵⁷ The Act further explains that in section 19 reference to a health and safety offence refers to a statutory offence under any health and safety legislation.¹⁴⁵⁸

(v) Entities that fall within the ambit of the Act

In English law entities without legal personality¹⁴⁵⁹ were not capable of incurring criminal liability.¹⁴⁶⁰ Instead of the entity being held criminally liable, the individual members bore personal liability for criminal offences “to which they are parties”.¹⁴⁶¹ It is submitted that the fact that the individual members were held liable only for offences which they actually took part in is commendable. This is due to the fact that members of unincorporated bodies need not fear facing personal liability for the offences committed by the other members without their knowledge.

¹⁴⁵⁶ Ibid section 19 (1).

¹⁴⁵⁷ Ibid section 19 (2).

¹⁴⁵⁸ Ibid section 19 (3).

¹⁴⁵⁹ “A group of people – for example, a club, association, or partnership – does not generally have a legal existence separate from its individual members”. (Wells (note 15) 81).

¹⁴⁶⁰ Ormerod (note 96) 154.

¹⁴⁶¹ Ibid.

It is noted that an entity which did not have legal personality could, in the event of a prosecution, be treated as if it had legal personality.¹⁴⁶² This is done via legislation which does impose criminal liability on unincorporated entities.¹⁴⁶³ An example provided by Smith and Hogan is that of trade unions and employers' organizations being guilty of the contravention of section 12 of the Trade Union and Labour Relations Act¹⁴⁶⁴ where they fail to perform specific duties imposed by the Act.¹⁴⁶⁵ The Corporate Manslaughter Act addresses this shortcoming by specifically including unincorporated entities in Schedule 1 and subjecting them to the application of the Act.

Although the legislation is named the Corporate Manslaughter and Corporate Homicide Act, it is not confined only to deaths caused by corporations.¹⁴⁶⁶ It also deals with deaths of persons that have been caused by various organizations, including certain government departments,¹⁴⁶⁷ the police force,¹⁴⁶⁸ partnerships, trade unions and employer's associations who are also employers.¹⁴⁶⁹ Some of the organizations that are included in this legislation could not be prosecuted under the common law crime of manslaughter.¹⁴⁷⁰ The wide ambit of the Act is to

¹⁴⁶² An entity "not endowed with corporate status may be treated as legal persons for the purpose of prosecution". (Leigh (note 47) 1511).

¹⁴⁶³ Leigh explains that "in some systems the problem has been resolved by legislation that specifies which unincorporated bodies may be so treated". (Ibid 1511).

¹⁴⁶⁴ Trade Union and Labour Relations Act, 1974.

¹⁴⁶⁵ Ormerod (note 96) 154. Leigh also refers to "some offenses involving trade unions". (Leigh (note 47) 1511).

¹⁴⁶⁶ The CMCHA (note 36) section 1 (2) (a).

¹⁴⁶⁷ Ibid Section 1 (2) (b). These are listed in Schedule 1 and include, inter alia, the Crown Prosecution Service, Department of Transport; Department of Health; Foreign and Commonwealth Office; Ministry of Defence; Northern Ireland Court Services, Public Prosecution Service for Northern Ireland; Scottish Executives; Serious Fraud Office; UK Trade and Investment and the Welsh Assembly Government.

¹⁴⁶⁸ The CMCHA (note 36) section 1 (2) (c).

¹⁴⁶⁹ Ibid section 1 (2) (d).

¹⁴⁷⁰ For instance "government departments and crown bodies , from whom Crown immunity in this respect is removed, and partnerships". (Matthews (note 1403) 1).

be commended as it serves as evidence that the question of bearing responsibility for the deaths of persons is seen in serious light, regardless who the perpetrator may be.

Section 1(2) makes it clear that the Act is not only concerned with deaths that have been caused by corporations. The legislature has made it possible for just about any entity to be held criminally liable for deaths it causes. Apart from the corporation, section 1(2) refers to “a department or other body listed in schedule 1”; a police force; a partnership, or a trade union or employers’ association, that is an employer”. Moreover, in terms of section 21 it is possible to extend the list. This may be done through an order by the Secretary of State to amend section 1.

(aa) corporations

In terms of section 25 of the Act a corporation sole is excluded from the application of this Act.¹⁴⁷¹ The term corporation refers to “any body corporate wherever incorporated”.¹⁴⁷² Matthews explains that this would include a situation where a corporation incorporated in a foreign country is responsible for corporate activities that have caused death in the United Kingdom.¹⁴⁷³

(bb) a department or other body listed in schedule 1

¹⁴⁷¹ This “being a vehicle used to create an office that is held successively by different individuals. Many such offices are religious but a number of such corporation sole have been recently created by statute in respect of the office of chief constable of various police forces and the commissioner of various public bodies”. (Matthews (note 1405) 23).

¹⁴⁷² The CMCHA (note 36) section 25. See also Matthews (note 1403) 23.

¹⁴⁷³ Ibid.

Schedule 1 provides a list of forty eight government departments and other bodies including: Attorney General’s Office; Crown Prosecution Service; Department for Culture, Media and Sports; Department for International Development; Department for Transport; Department of Health; Forestry Commission; Home Office; Ministry of Defence; National Archives; National School of Government; Office for National Statistics; Revenue and Customs Prosecution Services.

In terms of section 11 the government departments and bodies as listed in Schedule 1 and organizations that are servants or agents of the Crown are not immune to prosecution and will be regarded as owing a duty of care in the same way as a corporation that is not an agent or servant of the Crown.¹⁴⁷⁴ Whatever is done by the department, even though in law it is regarded as being done by the Crown or by the holder of that office, for purposes of section 2 to 7 of the Act it shall be regarded as having been done by the department or other body itself.¹⁴⁷⁵ In this way where senior management failure amounts to a gross breach of the relevant duty of care and has resulted in death that department or body will be prosecuted for corporate manslaughter.

(cc) a police force

This is defined in section 13 of the Act¹⁴⁷⁶ which further allows for the police force “to be treated as owing whatever duties of care it would owe if it were a body corporate. Section 13

¹⁴⁷⁴ The CMCHA (note 36) section 11(1) and (2).

¹⁴⁷⁵ Ibid Section 11(4).

¹⁴⁷⁶ According to the CMCHA ‘police force’ means:

- (a) A police force within the meaning of –
 - (i) The Police Act 1996 (c.16) or
 - (ii) The Police (Scotland) Act 1967 (c. 77);
- (b) The Police Service of Northern Ireland;

goes further to explain which people should be regarded as employees of the police force. It is important to provide clear guidelines in this regard, as the police force will be held liable if it is shown that the death was caused by its employee's gross breach of the duty of care. Attention is drawn to the provision of section 13(7), which states that "where, by virtue of section 13 (3), a person is treated by the Act as employed by a police force, and by virtue of any other statutory provision he is, or is treated as, employed by another organization, then 'the person is to be treated for those purposes as employed by both the force and the other organization'".¹⁴⁷⁷ This may sound absurd, as the same person is regarded as being simultaneously employed by the police force and by the organization, however, for purposes of possible liability for corporate manslaughter it is important for the legislature to spell out this dual employment.

(dd) a partnership or trade union or employers' association that is an employer

A partnership is defined in section 25 of the Act and it refers to partnerships within the scope of the Partnership Act 1890 as well as limited partnerships registered in terms of the limited Partnerships act 1907.¹⁴⁷⁸ The definition further accommodates similar or equivalent entities established in jurisdictions other than the United Kingdom.¹⁴⁷⁹

(vi) Senior management

-
- (c) The police Service of Northern Ireland Reserve
 - (d) The British Transport Police force
 - (e) The Civil Nuclear Constabulary;
 - (f) The Ministry of Defence Police (The CMCHA (note 36) section 13(1)).

¹⁴⁷⁷ Matthews (note 1403) 27.

¹⁴⁷⁸ The CMCHA (note 36) section 25.

¹⁴⁷⁹ Ibid section 25.

In terms of section 1(3) of the Act a corporation will be found guilty of the offence of corporate manslaughter only if the manner in which the activities of the corporation are managed or organized by its senior management is a substantial element in the breach.¹⁴⁸⁰ That means that the substantial failure must have been at senior level¹⁴⁸¹ and senior level refers to “the people who make significant decisions about the organization or substantial parts of it. This includes both centralized headquarters functions as well as those in operational management roles”.¹⁴⁸²

The concept of senior management failure was first seen in the Draft Bill 2005.¹⁴⁸³ It has been stated that the offence of corporate manslaughter allows for “the aggregation of the actions and culpability of several individuals”.¹⁴⁸⁴ Ormerod and Taylor point out that “of course no identifiable single individual needs to be proved to have been responsible for the management failure and the senior managers’ contribution need be only a substantial element in the breach of duty leading to death”.¹⁴⁸⁵ Aggregation is an alternative doctrine that may be relied on as a basis of liability. Instead of relying on the guilt of a senior officer for the corporation to be held liable, as it is done under the identification doctrine, aggregation as a basis for liability refers to “the cumulative effect of a number of different negligent acts by different persons, so as to amount, in total, to gross negligence”.¹⁴⁸⁶ Criticism leveled against the concept of senior management failure will be discussed below.

¹⁴⁸⁰ Ibid section 1(3).

¹⁴⁸¹ Ministry of Justice (note 1420) 1.

¹⁴⁸² Ibid.

¹⁴⁸³ See discussion in this chapter at III (h) (iii) on the Draft Bill above.

¹⁴⁸⁴ Pinto & Evans (note 94) 251. See also Gobert (note 1411) 318 – 319.

¹⁴⁸⁵ D Ormerod and R Taylor “The Corporate Manslaughter and Corporate Homicide Act 2007” (2008) 8 *The Criminal Law Review* 589, 591 – 592.

¹⁴⁸⁶ Pinto & Evans (note 94) 238.

(vii) Territorial application

This is dealt with in section 28 of the Act. The territorial application of the Act is limited to England and Wales, Scotland and Northern Ireland.¹⁴⁸⁷ Section 28 further makes it clear that the legislation is concerned with deaths caused by organizations within the United Kingdom. It does not concern itself with issues such as where the organization was incorporated etc. As Matthews puts it “neither the location or place of incorporation of the organization nor the place where any management failure or breach of a relevant duty occurs affects jurisdiction concerning an alleged offence”.¹⁴⁸⁸

(viii) Prescribed punishment

In terms of the Corporate Manslaughter and Corporate Homicide Act the punishment that may be meted out to a corporation that has been convicted of corporate manslaughter are the fine, a remedial order as well as a publicity order. Section 1(6) states that “an organization that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment

¹⁴⁸⁷ The CMCHA (note 36) Section 28. “Jurisdiction in respect of an offence of corporate manslaughter arises solely through and in relation to harm resulting in death that occurs within the territory of the United Kingdom. Proceedings for an offence of corporate manslaughter may not be instituted in England and Wales without the consent of the Director of Public prosecutions”. (Matthews (note 1403) 14).

¹⁴⁸⁸ Ibid. “Section 1 will therefore still apply if the harm resulting in death is sustained as a result of an incident involving a British vessel, but the victim is not physical on board when he suffers that harm. It seems it will not apply where, for example, a British vessel in international waters ploughs down a small non-British yacht killing the passengers”. (Ormerod & Taylor (note 1485) 610).

to a fine”.¹⁴⁸⁹ Fines “may be measured in millions of pounds”.¹⁴⁹⁰ This is a reflection of how serious corporate manslaughter is perceived to be.¹⁴⁹¹

The Sentencing Guidelines Council requested the Sentencing Advisory Panel to furnish advice with regard to the sentencing of the offence and in November 2007 a consultation paper was produced by the Sentencing Advisory Panel.¹⁴⁹² Matthews states that “the paper suggests that the primary factor in assessing the seriousness of an offence of corporate manslaughter or of a health and Safety at Work Act offence that has resulted in death is the extent to which the conduct of the offender fell below the appropriate standard of care”.¹⁴⁹³ The aggravating and mitigating factors that are found in the consultation paper are as follows:

Aggravating factors having to do with the level of harm:

- If the offence has resulted in the death of more than one person.¹⁴⁹⁴
- Serious injury to one or more person(s), in addition to the deaths.¹⁴⁹⁵

Aggravating factors affecting the degree of culpability:

- Failure to act upon advice, cautions or warning from regulatory authorities¹⁴⁹⁶
- Failure to heed relevant warnings regarding the safety of employees¹⁴⁹⁷
- Carrying out operations without an appropriate licence

¹⁴⁸⁹ The CMCHA (note 36) section 1(6).

¹⁴⁹⁰ Pinto & Evans (note 94) 260.

¹⁴⁹¹ “The offence of corporate manslaughter requires gross breach at a senior level”. (Ibid).

¹⁴⁹² Matthews (note 1403) 119 – 120.

¹⁴⁹³ Ibid 120

¹⁴⁹⁴ Pinto & Evans (note 94) 258; Matthews (note 1403) 120.

¹⁴⁹⁵ Pinto & Evans (note 94) 258; Matthews (note 1403) 120.

¹⁴⁹⁶ Matthews (note 1403) 120

¹⁴⁹⁷ Pinto & Evans (note 94) 258.

- Financial or other inappropriate motive
- Corporate culture encouraging or producing tolerance of breach of duty

Mitigating factor

- Employee acting outside authority or failing in duties

Offender mitigation

- Ready co-operation with authorities
- Good safety record¹⁴⁹⁸

In the consultation paper the Panel makes a suggestion that a fine should be imposed so as to:

- To reflect the serious concern at the loss of life
- To ensure future compliance with safety standards
- To eliminate financial benefit¹⁴⁹⁹

The consultation paper was succeeded by combined sentencing guidelines for corporate manslaughter and health and safety offences causing death.¹⁵⁰⁰ These were published in 2010 and they provide guidance as to the approach to be taken by courts when sentencing convicted corporations.¹⁵⁰¹

¹⁴⁹⁸ Matthews (note 1403) 120.

¹⁴⁹⁹ Ibid 121.

¹⁵⁰⁰ Wells (note 92) 105.

¹⁵⁰¹ According to paragraph 37 of the sentencing guidelines

“The normal approach to sentence should therefore be (in outline):

- (1) consider the questions at paragraph 6;
- (2) identify any particular aggravating or mitigating circumstances (paragraphs 7–11);
- (3) consider the nature, financial organisation and resources of the defendant (paragraphs 12–18);
- (4) consider the consequences of a fine (paragraphs 19–21);

The sentencing guidelines provide courts with guidance regarding the approach to be taken when sentencing a corporation that has been convicted under the CHCMA. They are meant for the offence of corporate manslaughter as well as offences that infringe sections 2 and 3 of the Health and Safety at Work Act 1974 (HSWA) which are capable of being committed by individuals as well the organisation.¹⁵⁰² In the guidelines it is mentioned that there may be overlaps and the differences between the two offences are highlighted: It is firstly stated that

“because corporate manslaughter involves both a *gross* breach of duty of care and senior management failings as a substantial element in that breach, those cases will generally involve systemic failures; by contrast health and safety offences are committed whenever the defendant cannot show that it was not reasonably practicable to avoid a risk of injury or lack of safety; that may mean that the failing is at an operational rather than systemic level and can mean in some cases that there has been only a very limited falling below the standard of reasonable practicability”.¹⁵⁰³

The second difference between the two is that when it comes to corporate manslaughter the onus of proof is borne solely by the prosecution. This is in contrast to a health and safety prosecution where the prosecutor only bears the onus of proving that “there has been a failure to ensure safety or absence of risk”.¹⁵⁰⁴ It is stated that this may simply be done through

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- (5) consider compensation (but see paragraphs 27–28);
 - (6) assess the fine in the light of the foregoing and all the circumstances of the case;
 - (7) reduce as appropriate for any plea of guilty;
 - (8) consider costs;
 - (9) consider publicity order;
 - (10) consider remedial order.

The effect on the employment of the innocent
The effect upon the provision of service to the public” (Sentencing Guidelines (note 26) para 37).

¹⁵⁰² Sentencing guidelines (note 26) para 2 (a).

¹⁵⁰³ Ibid para 4(a).

¹⁵⁰⁴ Ibid para 4(b).

“pointing to the injury”.¹⁵⁰⁵ When the prosecution has done so, the onus then shifts from the prosecution to the defendant. Although the prosecution is neither compelled to establish the precautions that it alleges the defendant should have taken nor to prove the manner in which the accident occurred, this is normally done by the prosecution.¹⁵⁰⁶ The final difference is that for the corporate manslaughter cases the prosecution has to prove that “the breach was a significant (but not necessarily the only) cause of death”.¹⁵⁰⁷ On the contrary it is possible to prove that there was a health and safety offence “without demonstrating that any injury was caused by the failure to ensure safety”.¹⁵⁰⁸

The sentencing guidelines further provide step-by-step guidance on how the court should approach sentencing.¹⁵⁰⁹ The court is advised to begin by considering the questions at paragraph 6 namely: (a) “How foreseeable was serious injury”?¹⁵¹⁰ In this regard if the serious injury was more foreseeable the offence should be considered to be more serious.¹⁵¹¹ (b) “How far short of the applicable standard did the defendant fall”?¹⁵¹² In this regard, the court is advised to take into account the degree by which the conduct fell short of the applicable standard.¹⁵¹³ (c) “How common is this kind of breach in this organisation”?¹⁵¹⁴ Here the court is advised to take into account the ‘frequency’ of non-compliance by that particular organisation in order to establish whether the offence was a sporadic event or if it had become the norm.¹⁵¹⁵ If the offence had become the norm this would be point to a “systematic departure

¹⁵⁰⁵ Ibid.

¹⁵⁰⁶ Ibid.

¹⁵⁰⁷ Ibid para 4(d)

¹⁵⁰⁸ It is further stated that “this guideline is for cases where it is proved that the offence was a significant cause of death, not simply that death occurred”. (Ibid).

¹⁵⁰⁹ Ibid para 37.

¹⁵¹⁰ Ibid para 6(a).

¹⁵¹¹ Ibid.

¹⁵¹² Ibid para 6(b).

¹⁵¹³ Ibid.

¹⁵¹⁴ Ibid para 6(c).

¹⁵¹⁵ Ibid.

from good practice across the defendant's operations".¹⁵¹⁶ The other issue that the court is advised to take into consideration is (d) "how far up the organisation does the breach go"?¹⁵¹⁷ It is stated that the further up in the organisation the breach is, the more serious the offence is.¹⁵¹⁸

It is submitted that taking the above four questions into consideration and obtaining answers which are a true reflection of the corporation's position in each individual case, prior to deciding what the sentence should be, will go a long way in enabling the court to make an informed decision. This will in turn result in a sentence that is appropriate for that particular corporation.

The second step that the court is advised to follow is to establish which factors are aggravating and which ones are mitigating. In this regard the court is referred to paragraph 7 to 11 of the sentencing guidelines. Paragraph 7 provides a list of factors that will aggravate the offence if they are found to exist. It is specified that the list does not include all aggravating factors that may be in existence. These factors are as follows: (a) "more than one death, or very grave personal injury in addition to death".¹⁵¹⁹ This means that serious injury and or death will serve to aggravating the offence. At this point it must be pointed out that the serious injury refers to the Health and Safety offence, as the CMCHA is only concerned with deaths. The second aggravating factor is (b) failure to heed warnings or advice, whether from officials such as the Inspectorate, or by employees (especially health and safety representatives) or other persons,

¹⁵¹⁶ Ibid.

¹⁵¹⁷ Ibid para 6(d).

¹⁵¹⁸ Ibid.

¹⁵¹⁹ Ibid para 7(a).

or to respond appropriately to ‘near misses’ arising in similar circumstances.¹⁵²⁰ Where warnings have been given and these were not taken into account to avert possible deaths, when deaths have occurred flowing from the same conditions that the organisation was previously warned about, this will serve as an aggravating factor. It is commendable that this is clearly stated and it is in a document that all organisations have access to. Prior to the coming into being of the CMCHA during investigations that took place, subsequent to some disasters that had claimed lives, it transpired that those disasters could have been prevented from happening, had previous warnings about dangers that persisted, been taken seriously and given the necessary attention.¹⁵²¹ In other cases the corporation was found to have had a close call, but instead of using that as a learning curve and ensuring that such conditions are avoided at all costs, those near disasters were simply ignored.¹⁵²² Evidence that there was failure to heed warnings and to take action when there have been near disasters will aggravate the offence. It is submitted that this is an important improvement on the previous position as corporations are warned in advance, through having access to the sentencing guidelines, to ensure that they heed all warnings of imminent danger and take seriously events that point towards potential disaster that may lead to loss of life should similar events occur again, (perhaps at a larger scale, depending on the circumstance). Averting potential loss of life if there is the opportunity to do so is important and failure to do so aggravates the offence. The next aggravating factor is (c) “cost-cutting at the expense of safety”.¹⁵²³ It is submitted that this particular aggravating factor is prompted by the fact that since corporations are usually concerned about making and retaining finances, there may be a temptation to cut down expenses that need to be incurred to ensure safety, thus compromising the safety of people. If it is clear that the defendant

¹⁵²⁰ Ibid para 7(b).

¹⁵²¹ P & O; Piper Alpha etc.

¹⁵²² For instance in the case where there were underground fire on previous occasions, Fennel (note 1270) para 18.

¹⁵²³ Sentencing Guidelines (note 26) para 7(c).

deliberately failed to obtain relevant licences or to comply with them this will also be an aggravating factor.¹⁵²⁴ Where it is “vulnerable persons” who were injured, this would also be an aggravating factor.¹⁵²⁵ It is explained that “in this context, vulnerable persons would include those whose personal circumstances make them susceptible to exploitation”.¹⁵²⁶

It is submitted that providing guidance to courts by means of the sentencing guidelines so that they approach the sentencing of convicted corporations in a particular manner makes the CMCHA more effective. This is due to the fact that courts follow a uniform approach, which will lead to more or less similar outcomes in cases having similar facts. In addition to that, the organizations have access to factors that will be considered, even before they commit crimes. It is yet to be seen whether being privy to what is at stake will not deter corporations from for instance cutting costs meant for safety measures as they would be aware of the fact that that would be regarded as an aggravating factor.

The CMCHA specifically gives the court that has convicted the corporation the power to make remedial orders. This is not a novel idea as this sanction is a possible sanction under the HSWA.¹⁵²⁷ It must be noted that a remedial order may be made only on application by the prosecution specifying the terms of the proposed order.¹⁵²⁸ In terms of section 9(5) failure by an organization to comply with a remedial order will lead to the organization being guilty of an indictable offence. The punishment for that offence is in the form of a fine.

¹⁵²⁴ Sentencing Guidelines (note 26) para 7(d) which goes on to state that this will be the case “where the process of licensing involves some degree of control, assessment or observation by independent authorities with a health and safety responsibility”.

¹⁵²⁵ Paragraph 7(e).

¹⁵²⁶ Ibid.

¹⁵²⁷ HSWA (note 1087) section 42.

¹⁵²⁸ The CMCHA (note 36) section 9(2).

Pinto and Evans commend the sanction in the form of a remedial order in that

“firstly, it enables sentencing to be a constructive measure aimed at improving the working systems of a defendant who has committed a crime; secondly, it allows the court to oversee the progress made in compliance with the remedial order, and to enforce it with the sanction that non-compliance will lead to the commission of a separate criminal offence with robust sentencing powers”.¹⁵²⁹

Under the HSWA remedial orders are not often used due to the fact that when sentencing takes place, usually efforts to remedy whatever caused the breach are made by then.¹⁵³⁰ It has been suggested that the same will happen with remedial orders for corporate manslaughter.¹⁵³¹

The Act also allows the convicting court to make a publicity order.¹⁵³² This is an order to make public, in a specified manner, the details of the conviction of the organization. An organization which has been ordered to make a publicity order is obliged to divulge publicly the following:

- a) The fact that it has been convicted of the offence
- b) Specified particulars of the offence
- c) The amount of any fine imposed
- d) The terms of any remedial order made¹⁵³³

¹⁵²⁹ Pinto & Evans (note 94) 262.

¹⁵³⁰ Ibid.

¹⁵³¹ Ibid.

¹⁵³² The CMCHA (note 36) section 10.

¹⁵³³ Ibid section 10(1) (a) – (d).

As with the remedial order, if a convicted corporation fails to comply with a publicity order it will be found guilty of an indictable offence which can only be punished by means of a fine.¹⁵³⁴

A publicity order is regarded as a deterrent, due to the stigma attached to having a conviction becoming public knowledge.¹⁵³⁵ Matthews observes that since there is no manner that is specified for publicizing the details of the conviction “the section appears to give a sentencing judge a very wide power to compel the organization to publicize its conviction in any way”.¹⁵³⁶

With regard to the punishment of partnerships, the Act envisages a situation where a partnership¹⁵³⁷ is regarded in the same way as a corporate body¹⁵³⁸ regardless of the fact that it lacks legal personality. In accordance with the Act, proceedings ought to be brought in the name of the partnership, as opposed to any of the members.¹⁵³⁹ Where, upon conviction, a fine is imposed on a partnership, the Act states that such fine ought to be paid directly from the partnership’s funds / coffers.¹⁵⁴⁰ The Act further makes it clear that in section 14 it is specifically referring to those partnerships which are not recognized as having legal personality under the laws governing them.¹⁵⁴¹ The legislator is to be commended for ensuring that entities lacking legal personality do not escape liability where a person’s death is caused by the gross breach of a relevant duty of care. By insisting on the fine being paid from the funds of the partnership, the legislator has also ensured that the partnership itself would feel the punishment imposed on it.

¹⁵³⁴ Ibid section 10(2).

¹⁵³⁵ Pinto & Evans (note 94) 261.

¹⁵³⁶ Matthews (note 1403) 130.

¹⁵³⁷ The Act defines a partnership as a partnership within the Partnership Act 1890 (c.39), or (b) a limited partnership registered under the Limited Partnerships Act (c.24), or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom, the CMCHA (note 36) section 14 (1).

¹⁵³⁸ “For the purpose of this Act a partnership is to be treated as owing whatever duties of care it would owe if it were a body corporate”. (The CMCHA (note 36) section 14 (1)).

¹⁵³⁹ Ibid section 14 (2).

¹⁵⁴⁰ Ibid section 14 (3).

¹⁵⁴¹ Ibid section 14 (4).

(ix) Exemptions

The Act includes several exemptions which are specifically aimed at public authorities. In terms of section 3(1) “any duty of care owed by a public authority in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests) is not a ‘relevant duty of care’”.¹⁵⁴² It is explained that “the offence does not apply to certain public and government functions whose management involve wider questions of public policy and are already subject to other forms of accountability”.¹⁵⁴³ Examples of functions that are exempt are child protection and the response of emergency services.¹⁵⁴⁴

V CRITICISMS / SHORTFALLS OF THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT

The CMCHA is clearly aimed at overcoming the obstacles caused by the identification doctrine and it does overcome some of the obstacles caused by the identification doctrine. It has been stated that the CMCHA “certainly represents an improvement on the common law position in which manslaughter was unlikely to be proved where a death arose from sloppy safety procedures and policies in a blameworthy organisation”.¹⁵⁴⁵ Moreover, in terms of the CMCHA, the degree of fault that is required in order to hold a corporation liable, is higher than what is required for a breach of a health and safety offence and it has been suggested that “the

¹⁵⁴² Ibid section 3(1).

¹⁵⁴³ Ministry of Justice (note 1420) 2.

¹⁵⁴⁴ Ibid.

¹⁵⁴⁵ Ormerod & Taylor (note 1485) 611.

higher degree of fault required will ensure that the new offence will be targeted at only the most serious management failings”.¹⁵⁴⁶

The Act does however, have shortcomings. It was hoped that the CMCHA would be an improvement on the identification doctrine and that the task of identifying an individual whose guilt would be regarded as the guilt of the corporation was going to be eliminated.¹⁵⁴⁷ Since the offence will occur only if “the way senior management have managed or organized activities has played a role in the gross breach”,¹⁵⁴⁸ there is a need to determine who senior management is¹⁵⁴⁹ and what senior management failure is. Gobert refers to this as “lingering echoes of the ‘identification doctrine’ in that the gross negligence causing the death needs to be traceable back to the company’s senior management”.¹⁵⁵⁰

In terms of section 1(4)(c) of the act the term senior management is defined as

“the persons 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 organized or
- (ii) the actual managing or organizing of the whole or a substantial part of those activities”.¹⁵⁵¹

This is problematic in that it does not solve the major problem of the common law manslaughter offence’s requirement to identify a senior individual guilty of the offence and may even result

¹⁵⁴⁶ Pinto & Evans (note 94) 233.

¹⁵⁴⁷ “The main weakness of the common law offence was the need to prove that an individual ‘directing mind’ of the corporation was himself guilty of the offence”. (Ibid).

¹⁵⁴⁸ Wells (note 15) 104.

¹⁵⁴⁹ Ibid.

¹⁵⁵⁰ Gobert (note 1411) 318.

¹⁵⁵¹ The CMCHA (note 36) section 1(4) (c).

in delays of the prosecution while it is being established who these individuals are within that corporation and to what extent their involvement was.¹⁵⁵² As Ormerod and Taylor observe

“This extends beyond the narrow category of senior individuals being the “directing mind and will” who would be caught at common law by the identification doctrine. It is a further limiting factor to the offence and one which brings with it the potential for time consuming technical arguments on employment law, potentially distracting and delaying the criminal trial. The question may be further complicated where the organisation is not incorporated or managed in England”.¹⁵⁵³

The inclusion of the term senior management raises the question whether this does not “reproduce the same old problems by focusing on individuals at particular level as opposed to systemic fault”?¹⁵⁵⁴ Pinto and Evans state that by including the issue of ‘senior management’ “it can be argued...that the new offence entails little more than a broadening out of the identification doctrine to permit aggregation of the conduct of several senior managers”.¹⁵⁵⁵ Moreover the fact that the involvement of senior managers only needs to be a substantial element in the breach of duty that results in the death Ormerod and Taylor point out that the “involvement and conduct” of employees who are not in senior managerial positions but still play a role in “the management and organization of activities” is also important.¹⁵⁵⁶ They further point out that for the offence the “substantial” contribution may be more than one, as in

¹⁵⁵² Ormerod & Taylor (note 1485) 591 – 592.

¹⁵⁵³ Ibid 604. Ormerod and Taylor make further observations regarding the inclusion of ‘senior management’ in the Act: “Arguably the test is too restrictive in forcing the inquiry back onto the issue of identifiable individuals and the part they play in the organisation as the identification doctrine had done”. (Ibid).

¹⁵⁵⁴ Pinto & Evans (note 94) 251.

¹⁵⁵⁵ Ibid 252. “The mechanism by which this new liability is achieved is through the abandonment of the identification doctrine as a method of attribution of responsibility to companies and organisations. This is replaced with what might be described as a qualified aggregation principle which primarily bases responsibility on the activity of the company as an aggregate or composite entity rather than on the separate activities of the senior individuals who can be artificially identified with it”. (Ormerod & Taylor (note 1485) 591 – 592).

¹⁵⁵⁶ Ormerod & Taylor (note 1485) 604.

some cases the contribution of the employees who are not in senior managerial positions may be substantial. This means that “in other words there can be more than one “substantial” contribution to the breach on the basis that substantial does not mean predominant”.¹⁵⁵⁷ This raises problems with the term substantial which will require the courts to provide its meaning.¹⁵⁵⁸

Pinto and Evans as well as Wells raise valid concerns in their criticisms of the issue of ‘senior management’ and raise the possibility that the statutory offence may be easier to prove against small corporations and more difficult to prove against large corporations, as was the case with the common law gross negligence manslaughter.¹⁵⁵⁹

Wells correctly points out that the Act does not solve the difficulties that were inherent under the common law system of the identification doctrine. She states that

“Far from addressing the difficulties in capturing organizational fault, the CMCH Act slips between two grammatical uses of the word ‘management’. The term ‘management’ can mean either ‘the action or manner of managing’ or ‘the power of managing’, or it could function as a collective noun for ‘a governing body’. By requiring the substantial involvement of ‘senior management’ and then defining this body as ‘those persons who play significant roles’, the act gives the lie to the government’s claimed commitment to an organizational version of fault that is not derivative on the actions of specified individuals”.¹⁵⁶⁰

¹⁵⁵⁷ Ibid.

¹⁵⁵⁸ “No doubt the courts will say that a “substantial” involvement is something that the jury can evaluate as an ordinary English word meaning more than trivial. All of this is further complicated by the fact that the senior managers, as individuals, must be those who play a ‘significant’ role in decisions about, or management of, the “whole or substantial part” of the activities of the organisation, thus bringing in the word “substantial” for a second and different purpose”. Ibid 604.

¹⁵⁵⁹ “Worryingly, this ingredient will inevitably favour large corporations with highly devolved day-to-day operations; proving that the way in which its activities were managed or organised by its senior management was a substantial element in the breach may be impossible”. (Pinto & Evans (note 94) 252).

¹⁵⁶⁰ Wells (note 92) 104.

The move towards a new model of corporate criminal liability which is based on the fault of the organization itself, as opposed to the identification of the conduct of specific individuals has been made and this has been supported by the government. It is therefore unsatisfactory to find that the government's opportunity to come up with that new model, has not been used. Instead semantics have been used in such a way that they may create confusion.

Section 18 of the Act does not allow for individual liability. It states that an individual cannot be guilty of aiding, abetting, counseling or procuring the commission of an offence of corporate manslaughter and of corporate homicide.¹⁵⁶¹ This omission to punish directors as well as senior managers is a serious shortfall¹⁵⁶² and has, understandably, attracted criticism.¹⁵⁶³ Although it may be argued that such individuals could still be liable under health and safety regulations,¹⁵⁶⁴ Clarkson points out that "there is a real danger that even fewer prosecutions would be brought against individuals as prosecutors could view companies as easier targets".¹⁵⁶⁵

Another shortcoming of the Act is that it only deals with situations where death has actually occurred. It does not deal with situations where there is a serious injury. As Clarkson states, "it is regrettable that a separate new offence covering the causing of serious injury has not been

¹⁵⁶¹ The CMCHA (note 36) section 18 .

¹⁵⁶² Gobert criticizes the fact that more emphasis is placed on the corporation than on individual liability. He states that "directors who bear responsibility for the strategic decisions within a company may as a result see themselves free to choose profits over safety without fear of personal criminal liability". (Gobert (note 1446) 81).

¹⁵⁶³ Gobert argues that "If deterrence of corporate wrongdoing is the goal, it may be more likely to be achieved by holding individual directors personally responsible for the company's crimes, a sort of reverse application of the identification doctrine". (Ibid 80).

¹⁵⁶⁴ "If an HSWA offence is committed with the consent, connivance or neglect of an officer of the company, he, as well as the company, can be prosecuted". (Pinto & Evans (note 94) 256).

¹⁵⁶⁵ Clarkson (note 1314) 687.

introduced”.¹⁵⁶⁶ Ormerod and Taylor also refer to the fact that, unlike the proposal of the Law Commission the CMCHA “does not make explicit that the organisation’s liability will not be avoided simply because the most immediate cause of death is the act or omission of an individual”.¹⁵⁶⁷ They make the observation that failure to include that in the Act will lead to arguments during prosecution that causation was broken by the “employee’s free deliberate informed act”.¹⁵⁶⁸ It is submitted that this is a loophole in Act and it is indeed likely that corporations will try to escape liability by putting the blame on the deceased where death was caused by the deceased’s own act or omission.

As far as the penalty for the offence of corporate manslaughter is concerned, there has not been much change in the law. The convicted corporation or organization is punishable by means of a fine imposed on it.¹⁵⁶⁹ In addition to that the convicting court is allowed to make remedial orders as well as publicity orders. Wells states that ‘the purpose of the remedial order under which an organization may be ordered to take steps to remedy the breach is unclear’.¹⁵⁷⁰ Wells further states that:

“This is another example of confusing the underlying aims of an offense of corporate manslaughter. Rather than minimizing the risk directly, which is the main function of health and safety regulation, the aim of this offense is to punish in a retributive sense. It may secondarily act as a general deterrent or encouragement to take safety compliance more seriously but the time lag between the event and the trial renders the idea of relevant remedial action impractical. A manslaughter trial would not in any case, be the most effective forum in which to decide on appropriate remedial action. The penalty for failing to comply with any

¹⁵⁶⁶ Ibid 689.

¹⁵⁶⁷ Ormerod & Taylor (note 1485) 605.

¹⁵⁶⁸ Ibid.

¹⁵⁶⁹ The CMCHA (note 36) section 1 (6).

¹⁵⁷⁰ Wells (note 92) 105.

remedial order, a fine, would again only be enforceable against the organization itself. The government has rejected the suggestion that company directors should be liable for taking specified steps”.¹⁵⁷¹

It is unfortunate that the legislator did not make improvements in this regard as there are other ways of punishing a corporation or organization other than imposing a fine. It is important for English law to recognize the fact that the fine is not the only possible sanction.¹⁵⁷² There are ways of punishing corporations other than directly through its finances. Wells refers to sanctions ranging from “incapacitation in the form of corporate dissolution, corporate ‘imprisonment’, through to probation, adverse publicity, community service, direct compensation orders, and punitive injunctions”.¹⁵⁷³ These need to be seriously considered.

(a) Decisions under the CMCHA

(i) *R v Cotswold Geotechnical (Holdings) Ltd*¹⁵⁷⁴

This is the first manslaughter case that has gone to trial since the inception of the CMCHA.¹⁵⁷⁵ A company was convicted of corporate manslaughter following the death of one of its employees. The employee’s work entailed entering into trial pits in order to investigate soil conditions. There had been times when employees entered pits as deep as 1.2 metres, which were not supported, but there was usually another colleague close by, who was

¹⁵⁷¹ Ibid 105 – 106.

¹⁵⁷² Wells mentions Canada's probation orders, the U.S.'s corporate imprisonment etc., Wells (note 15) 37.

¹⁵⁷³ Ibid.

¹⁵⁷⁴ *R v Cotswold Geotechnical Holdings Ltd* [2011] All ER (D) 100 (May).

¹⁵⁷⁵ K Napley & J Grimes ‘First corporate manslaughter trial under the new act gets underway: R-V- Cotswold Geotechnical (Holdings) Limited Lexology’ <http://www.lexology.com/library/detail.aspx?g=764a95c2-e9a4-408a-93dd-a6e7f2c42766> (accessed 13 March 2014).

not in the pit. On the day of the deceased's death, he entered a pit that was 3.5 metres deep with no colleague nearby. The pit collapsed on him causing his death. The company was found to have breached its duty as it was "plainly foreseeable that the way the company conducted operations could cause serious injury or death".¹⁵⁷⁶ The fine imposed on the company was £385,000 which was payable over a ten year period.¹⁵⁷⁷ An appeal was made against the excessive amount of the fine. It was contended that the fine was far beyond the means of the company and would in fact result in the liquidation of the company. The appeal was dismissed and the company was severely punished for having caused "death as a result of a gross breach of duty following a system of work that was unsafe with the potential for causing death".¹⁵⁷⁸

Unfortunately, the corporation that was responsible for the deceased's death is a small corporation, similar to those ones that were successfully prosecuted under the application of the identification doctrine. It, therefore, has not given the court much to do in terms of application and interpretation of the CMCHA. As Napley puts it, it does "not really test the ability of CMCHA to identify corporate responsibility for manslaughter even where a corresponding human defendant ("the controlling mind") cannot be identified".¹⁵⁷⁹

In this case the identification of a senior individual who was responsible for the death was not a relevant factor to be considered before the corporation could be held liable. The issue was whether the corporation had breached its duty and when it was found to have breached

¹⁵⁷⁶ *R v Cotswold Geotechnical (Holdings) Ltd* (note 1574) 100.

¹⁵⁷⁷ *Ibid.*

¹⁵⁷⁸ *Ibid.*

¹⁵⁷⁹ Napley and Grimes (note 1575).

its duty, the punishment imposed was severe. This is indeed a positive step towards ensuring that corporations are effectively held liable for deaths caused by their negligence. The harshness of the sanction imposed shows that the English courts take seriously the negligent causing of loss of life by corporations. Although the sanction is a fine, it is so high that it is equivalent to a death penalty for that particular corporation. The court's attitude towards corporations that negligently cause loss of life is commendable and it is hoped that a message will be sent¹⁵⁸⁰ to all corporations that they must exercise their duty of care towards people dealing with them.

(ii) *R v JMW Farms*¹⁵⁸¹

This was a 2012 North Ireland case in which a pig farm, JMW Farms was convicted under the CMCHA.¹⁵⁸² It was fined 187,500 pounds. The prosecution was for the death of its employee, Robert Wilson, who had been hit by a metal bin that had fallen off a forklift truck while it was reversing. At the time the deceased had been working on the farm at a meal fixing plant. Upon investigation it became clear that the metal bin that had fallen on the deceased had not been secured on to the forklift, which was in temporary use at that time as the truck that was normally used was undergoing service.¹⁵⁸³ The Belfast Telegraph recorded

¹⁵⁸⁰ “The effect of the new act and the decision in Cotswold Geotechnical (Holdings) Ltd means that companies will now need to be more realistic and transparent in their assessment procedures and more rigid with the implementation of their health and safety policies. The new Act is likely to have a significant impact on organisations where jobs are carried out that bear considerable risk. Whilst the Act does not create new duties, with the offences continuing to be based on the civil law of negligence, it now enables the Courts to collectively look at the actions of senior management as a whole rather than just focusing on the actions of one individual in particular. Arguably, this new offence now makes it easier to sanction those who have failed their employees”. (K Jones ‘Corporate Manslaughter – R v Cotswold Geotechnical (Holdings) Ltd’ (2011) September 14 *PR FIRE* <http://www.prfire.co.uk/solicitors/corporate-manslaughter-r-v-cotswold-geotechnical-holdings-ltd-2011-all-er-d-100-may-75863.html> (accessed 13 November 2013)).

¹⁵⁸¹ *R v JMW Farms* [2012] NICC 17.

¹⁵⁸² L McKeown “Huge Fine for First Northern Ireland Company guilty in Corporate Manslaughter Case” Belfast Telegraph 15 February 2013 www.belfasttelegraph.co.uk/news/local-national/northern-ireland/huge-fine-for-first-northern-ireland-company-guilty-in-corporate-manslaughter-cas-28746966.html (accessed 15 February 2014).

¹⁵⁸³ *Ibid.*

Judge Tom Burgess as having stated 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”.¹⁵⁸⁴ He was further recorded as having stated that he hoped that the imposing such a huge fine would “send a message” to other companies.¹⁵⁸⁵

(iii) *R v Lion Steel Equipment Limited*¹⁵⁸⁶

The Manchester Crown Court convicted Lion Steel Limited under the Corporate Manslaughter and Corporate Homicide Act 2007 following the death of Steven Berry who sustained fatal injuries after falling “through a fragile roof panel”,¹⁵⁸⁷ while investigating a leak on the roof of the factory.¹⁵⁸⁸ The corporation was charged along with its three directors but the directors were charged for breach of the HSWA, as it is not possible to hold directors liable for corporate manslaughter under the CMCHA.¹⁵⁸⁹ The company pleaded guilty and the fine imposed is 480 000 pounds.¹⁵⁹⁰ This is the highest amount that has been imposed on a corporation convicted of corporate manslaughter.¹⁵⁹¹ In passing the sentences the judge stated that “the fine had been reduced by 20% in recognition of factors such as the company’s guilty plea to corporate manslaughter and its financial position”.¹⁵⁹² The British Safety

¹⁵⁸⁴ Ibid.

¹⁵⁸⁵ Ibid.

¹⁵⁸⁶ *R v Lion Steel Equipment Ltd* (2012) Unreported, Manchester Crown Court, 20 July 2012.

¹⁵⁸⁷ S Piddington “Third company convicted of corporate manslaughter. Could you be next?” <http://www.sarahpiddington.com/third-company-convicted-corporate-manslaughter/> accessed 15 February 2014.

¹⁵⁸⁸ British safety Council “Lion Steel fined 480 000 pounds in third corporate manslaughter case” <https://www.britsafe.org/news/lion-steel-fined-%C2%A3480000-third-corporate-manslaughter-case> (accessed 15 February 2014).

¹⁵⁸⁹ “The case is particularly notorious for the fact that not only was the company charged with corporate manslaughter but all three of its executive directors found themselves in the dock facing charges of gross negligence manslaughter and breach of s. 37 HSWA 1974”. (S Antrobus ‘The Criminal Liability of Directors for Health and Safety Breaches and Manslaughter (2013) 4 *Criminal Law Review* 309, 309).

¹⁵⁹⁰ Ibid.

¹⁵⁹¹ Ibid.

¹⁵⁹² Ibid.

Council further mentions that “companies convicted of corporate manslaughter are liable to unlimited fines, and the Sentencing Guidelines Council has stated a fine should ‘seldom be less than 500,000 pounds and may be measured in millions’”.¹⁵⁹³

(b) Observations from convictions

One of the main complaints against corporate criminal liability prior to the coming into being of the Corporate Manslaughter and Corporate Homicide Act was the collapse of prosecutions, mainly due to the failure to pinpoint senior individuals who were blameworthy. Within a few years there are already three successful prosecutions. It may be said that the Act has brought an improvement in the way killings caused by corporations are dealt with.

It is noteworthy that in each of the three cases even though the CMCHA provides the courts with other forms of punishment, the courts persist on making use of the fine as punishment for guilty corporations.¹⁵⁹⁴ Moreover, the amount of the fine imposed is quite high in spite of the fact that it is only one person’s life that is involved.

Another, rather surprising, observation is that contrary to the fear and expectation that under the CMCHA prosecutors would focus on organisations to the exclusion of directors, it has been observed that “the current trend suggests otherwise as the numbers of prosecutions of directors appears to be increasing”.¹⁵⁹⁵ Although it is not possible to prosecute directors for corporate manslaughter this has not been problematic as there are other avenues that can be

¹⁵⁹³ Ibid.

¹⁵⁹⁴ This issue will be discussed further in this chapter at VI above.

¹⁵⁹⁵ Antrobus (note 1589) 309.

used for purposes of holding directors liable.¹⁵⁹⁶ Antrobus makes an observation that “the inability to charge individuals with liability as secondary parties to corporate killing under the CMCHA 2007 may have provoked a more aggressive approach amongst the police and CPS”.¹⁵⁹⁷ In practice the corporation is charged for corporate manslaughter alongside the directors who face common law gross negligences manslaughter. In this way, the directors still face prosecution. It is submitted that it is good that prosecutions against directors continue to take place in spite of the Act not allowing prosecutions of directors for corporate manslaughter.¹⁵⁹⁸ With regard to organizational fault Antrobus notes that “the Act’s reliance upon such fault being substantially attributable to “senior management” means there will always be anxiety on the part of those prosecuting that they need to join one or more of those senior managers to the indictment”.¹⁵⁹⁹ This was in fact the case in *Lion Steel*, discussed above.¹⁶⁰⁰

(c) Moving towards another basis of liability

According to Clarkson “the central debate still rages on: should companies be held criminally responsible and, if so, how”?¹⁶⁰¹ As stated at the beginning of this chapter in England the contentious issue is no longer whether corporate criminal liability should exist, so the first part of Clarkson’s question is answered in the affirmative. The second part of the question reflects what the contentious issue is, and that is what form corporate criminal liability should

¹⁵⁹⁶ “The Health and Safety (Offences) Act 2008 sought to address the former concern by providing the courts with the ability to impose custodial sentences of up to two years’ imprisonment for employees and directors who are convicted of safety offences under the Health and Safety at Work Act 1974 (HSWA 1974) and its subordinate legislation. This expression of Parliamentary intent has been combined with a far greater emphasis upon individual accountability in terms of corporate harm, both from the HSE, CPS and industry itself”. (Ibid 309 – 310).

¹⁵⁹⁷ Ibid 311.

¹⁵⁹⁸ “Logically the concept of organisational fault in the CMCHA 2007 avoids the need to search for a directing mind to put in the dock alongside the corporate entity”. (Ibid).

¹⁵⁹⁹ Ibid.

¹⁶⁰⁰ See discussion in this chapter at V (a) (iii) above.

¹⁶⁰¹ Clarkson (note 793) 562.

take. Having examined vicarious liability, the identification doctrine as well as the form of liability brought about by the new crime of corporate manslaughter, the focus is now on whether the time has not come for a better approach to criminal liability to be considered, particularly when it comes to the negligent deaths of people. These questions were already raised prior to the coming into being of the CMCHA and from case law it can be seen that the courts did not rigidly adhere to the strict identification doctrine. As Clarkson observes, “an alternative device courts have recently started employing to circumvent the rigours of the identification doctrine has been that of vicarious liability”.¹⁶⁰²

Vicarious liability and the theory of identification reflect two different approaches to corporate criminal liability. As stated above, when it comes to holding a corporation vicariously liable, the liability is of the corporation is vicarious. This means that the guilt of the officer of the corporation remains the guilt of the corporation. The corporation is merely held liable as a result of its relationship with the responsible officer. Wells refers to the criticisms levelled against vicarious liability.

This approach differs from the identification doctrine, which results in the personal liability of the corporation. The guilt of the senior officer of the corporation is imputed to the corporation so that the corporation is also personally guilty of the crime.

With regard to vicarious liability Clarkson refers to the two opposing situations where the doctrine was allowed to apply to strict liability offences and even beyond and to the second

¹⁶⁰² Ibid 563.

situation where the doctrine of vicarious liability was rejected by the House of Lords when it came to strict liability.¹⁶⁰³ He then concludes that “the position appears to be that whether the doctrine of vicarious liability applies or not is a matter of statutory interpretation, taking into account the language, content and policy of the law, and whether vicarious liability will assist enforcement”.¹⁶⁰⁴ It does appear as though the vicarious liability approach on the rise.

Parsons draws attention to the fact that “the legal barrier to corporate criminal liability resulting from the operation of the identification doctrine has led to the courts questioning whether the doctrine is the most suitable route to corporate liability in respect of statutory offences of strict liability and of *mens rea*”.¹⁶⁰⁵ As seen from the discussion above, the courts have been making use of both the identification doctrine to impute guilt on the corporation, as well as vicarious liability to hold corporations vicariously liable for the guilt of its officers.¹⁶⁰⁶ The vicarious liability for statutory crimes of *mens rea* is by means of what is referred to as the principle of delegation.¹⁶⁰⁷ Parsons indicates that

“courts have been concerned with the legal barrier to criminal liability resulting from the operation of the identification doctrine and have moved away from it in respect of crimes of strict liability and of *mens rea* by imposing either a direct liability not limited by the fiction of identification or vicarious liability”.¹⁶⁰⁸

¹⁶⁰³ “first, the doctrine of vicarious liability has now been applied beyond confines of strict liability offences to offences of negligence or hybrid offences (ie prima facie strict liability offences which provide due diligence or reasonable knowledge defences such as are common in consumer protection legislation...secondly, the House of Lords has recently rejected the notion that vicarious liability can necessarily be imposed in strict liability offences”. (Ibid 564).

¹⁶⁰⁴ Ibid 565.

¹⁶⁰⁵ Parsons (note 242) 71.

¹⁶⁰⁶ “The flaws in the identification doctrine have already been exposed. An alternative device courts have recently started employing to circumvent the rigours of the identification doctrine has been that of vicarious liability”. (Clarkson (note 793) 563).

¹⁶⁰⁷ Parsons (note 242) 72.

¹⁶⁰⁸ Parsons (note 242) 73 – 74.

Parsons further observes that the statutory offences of *mens rea* and of strict liability are usually regulatory and he argues that applying the identification doctrine to such cases “where liability stops with the controlling officers, would defeat the purpose of the legislation”.¹⁶⁰⁹ This then begs the question why the identification approach has persisted. It is submitted that the answer is to be found in Ashworth’s observation that, despite its weaknesses / limitations, the identification doctrine is responsible for the successful prosecution of certain small corporations.¹⁶¹⁰ In that sense the identification doctrine still plays a valuable role, however, as there are still challenges when it comes to the prosecution of larger and more sophisticated corporations,¹⁶¹¹ it is submitted that there is a need for reform.

Parsons refers to the possibility of “the retention of the identification doctrine but with gross negligence being found by means of aggregating the fault of more than one controlling officer”.¹⁶¹² Parsons is not in favour aggregation and further observes that

“the difficulty is that even if the faults of various controlling officers are added together the aggregation may not amount to gross negligence in a large corporation because the organizational reality is that none of the controlling officers has responsibility for human safety as that responsibility has been delegated to others within the corporation”.¹⁶¹³

¹⁶⁰⁹ Ibid 71.

¹⁶¹⁰ Ashworth (note 246) 118.

¹⁶¹¹ “However, there are major problems with this identification doctrine and over the past decade there has been a growing realisation that it simply does not reflect modern corporate practice, particularly in larger companies. The doctrine ignores the reality of modern corporate decision-making which is often the product of corporate policies and procedures rather than individual decisions”. (Clarkson (note 793) 561).

¹⁶¹² Parsons (242) 76.

¹⁶¹³ Ibid.

Clarkson also advocates the rejection of aggregation states that it does not reflect “corporate decision making and reality”.¹⁶¹⁴ He goes on to criticize aggregation in that “instead of trying to find one person with whom the company can be identified, one simply finds several such persons”.¹⁶¹⁵ It must be noted though that despite the rejection of the principle of aggregation As stated above, Gobert points out that the wording of the CMCHA is such that it gives recognition to the possibility of aggregation.¹⁶¹⁶

With the courts having attempted to find a way to avoid strictness of the identification theory by making use of vicarious liability,¹⁶¹⁷ the question that arises as to whether the answer lies in applying both approaches, even though they each reflect two different approaches to corporate criminal liability. It is submitted that Wells’ assertion that “on their own, neither of these models is a solution”, is correct.¹⁶¹⁸ She goes on to state that “they are better conceived as part of a broader organizational model that is responsive to different forms of criminal offenses”.¹⁶¹⁹

Clarkson suggests an approach in which the rules of attribution are done away with and corporations are held directly liable for their crimes.¹⁶²⁰ In the 1995 *Meridian Global Funds* case¹⁶²¹ Lord Hoffman brings forth a compromise approach which would have the effect of

¹⁶¹⁴ Clarkson (note 793) 561.

¹⁶¹⁵ Ibid 562.

¹⁶¹⁶ See discussion in this chapter at III (a) (i) above. “Nonetheless, one can discern a gloss on the identification doctrine in the reference to senior management defined in terms of persons (note the plural) who play significant roles in either making decisions about how the whole or a substantial part of the company’s activities are to be managed, or the actual managing of the whole or a substantial part of those activities. This formulation implicitly recognises the possibility of ‘aggregated’ fault as a basis of corporate liability, a position previously rejected by the courts”. (Gobert (note 1411) 318).

¹⁶¹⁷ Ibid 563.

¹⁶¹⁸ Wells (note 92) 110.

¹⁶¹⁹ Ibid.

¹⁶²⁰ “a better approach would be to effect a complete break from all attribution rules, and hold companies as such, directly criminally liable”. (Clarkson (note 793) 566).

¹⁶²¹ *Meridian Global Funds Management Asia Ltd v Securities Commission* (note 1292). See discussion of this case in this chapter at III (g) above.

broadening the identification doctrine. Parsons points out that Lord Hoffman “was not imposing vicarious liability but rather was stretching the identification doctrine to include wider personnel than controlling officers”.¹⁶²² This is echoed by Wells who states that “there was likely to be a broadening of identification liability itself... A decision of the Privy Council, *Meridian Global Funds Management Asia Ltd v Securities Commission* appeared to herald a more modern, organizational, concept of liability”.¹⁶²³ Clarkson hails the *Meridian Global Funds* decision as “a more promising approach” and states that in “rejecting the doctrine of vicarious liability, the Privy Council held that a person had to be found within the company whose acts and knowledge could be attributed to the company. Significantly, however, Lord Hoffman was not prepared to limit the attribution of knowledge on the basis of the test of ‘directing mind and will’”.¹⁶²⁴

Wells states that “dissatisfaction with both the vicarious and identification routes has led to an emerging principle based on company culture that exploits instead the dissimilarities between individual human beings and group entities”.¹⁶²⁵

VI THE PUNISHMENT OF CORPORATIONS

One of the main obstacles to the development of corporate criminal liability was the fact that corporations could only be held liable for offences which were punishable via a fine.¹⁶²⁶ It has been accepted that there are certain punishments which cannot be imposed on a corporation as

¹⁶²² Parsons (note 242) 76.

¹⁶²³ Wells (note 15) 103.

¹⁶²⁴ Clarkson (note 793) 565.

¹⁶²⁵ Wells (note 92) 109.

¹⁶²⁶ “...most felonies attracted punishments such as imprisonment or death that could have no application to an inert body”. (Wells (note 15) 90).

it lacks a physical existence. The fine has therefore, been regarded as the most suitable penalty for a corporation. In English law the fine has mainly been the sanction imposed on convicted corporations.¹⁶²⁷ It is submitted, however, that imposing a fine as a penalty following a corporation's conviction for negligent deaths of people trivializes the crime committed and even if the fine is of a substantial amount or an unlimited amount, it is not necessarily the corporation that suffers as a result of the fine. If the corporation does not suffer it will neither be deterred nor rehabilitated.

The fine has been a point of criticism for several reasons. It has been pointed out that fining a corporation amounts to punishing innocent shareholders,¹⁶²⁸ who in turn suffer as a result of the corporation's conviction. This is referred to as 'overspill' which means that "it is not the company which pays the fine but shareholders (whose dividends may be reduced), employers (whose wages or jobs may be affected) and consumers (prices for whom may be increased)".¹⁶²⁹

Another criticism leveled at the fine is that the company may not be affected by the fine at all¹⁶³⁰ as "a fine on the corporation alone can be absorbed merely as a cost of doing business".¹⁶³¹

¹⁶²⁷ Ormerod (note 96) 152.

¹⁶²⁸ "The fine imposed is ultimately borne by the shareholders, who, in most cases, are not responsible, in any sense, for the offence". (Ibid 153).

¹⁶²⁹ Jefferson (note 897) 238 – 239.

¹⁶³⁰ Ibid 241.

¹⁶³¹ Ibid 241 – 242.

Ashworth wonders if there is “much point in punishing corporations? A company can hardly be imprisoned, moderate fines can be swallowed up as business overheads, and swingeing fines might have such drastic side-effects on the employment and livelihoods of innocent employees as to render them inappropriate”.¹⁶³²

On the contrary, in view of the fact that imprisonment is impossible, the fine appears to be a penalty that courts prefer to make use of. One of the criticisms against the fine is that it may result in “overkill”, that is, that the fine may be so high that it would have the effect of putting the convicted corporation out of business.¹⁶³³ This would result in, *inter alia*, the dismissals and unemployment of those who were employed by the companies as well as the loss of future dividends for shareholders.¹⁶³⁴ Also of importance is the fact that “heavy fines which led to the enforced liquidation of the company would also not deal with the facts which led to the crime”.¹⁶³⁵

The other criticism against fines is that instead of serving as punishment fines can serve as “licences to kill”. Many corporations have more than sufficient funds and with the knowledge that punishment is in the form of a fine they may set aside part of the budget for paying off fines. This would in turn allow them to disregard their duty of care with the knowledge that in the case of casualties there is money set aside for the fine. As Jefferson observes “there still

¹⁶³² Ashworth (note 246) 121 - 122.

¹⁶³³ Jefferson (note 897) 242.

¹⁶³⁴ *Ibid.*

¹⁶³⁵ *Ibid.*

remains the perception that fines are not seen as punishment but as ‘buying’ the ‘right’ for example to kill. Paying the fine buys the right to kill”.¹⁶³⁶

In spite of the above criticisms against the fine, the fine appears to be a form of punishment that is working well in jurisdictions such as England. It is submitted that in addition to the fine the courts should also make use of the other available forms of punishment.

Prior to the coming into being of the CMCHA there were suggestions made regarding possible alternative ways of punishing corporations that cause death. The inclusion of remedial orders and publicity orders is an improvement on the common law crime of gross negligence manslaughter, however, this is far from adequate. These orders are not compulsory and may be made at the discretion of the sentencing judge. Compulsory publicity orders in addition to the fine may have the desired effect of deterring the corporation. There is in fact an argument that

“enforced poor publicity is the sanction which will do most to deter corporate wrongdoing. It may have more of a deterrent effect than a fine because of the stigma associated with it. It may also draw the attention of the regulatory bodies down on the company and it may lead to that holy grail of increased compliance with regulatory regimes”.¹⁶³⁷

It is submitted that Gobert’s suggestion that “the way forward may lie in introducing more creative sanctions”¹⁶³⁸ is indeed the way forward. There are a number of suggested sanctions that may be used in addition to or as alternatives to the fine. These are discussed in more detail in chapter 6 below.

¹⁶³⁶ Ibid 243.

¹⁶³⁷ Ibid 258.

¹⁶³⁸ Gobert (note 1411) 324.

VII CONCLUSION

Corporate criminal liability is a concept that was faced with challenges when it was first introduced to English Law. Although a corporation had legal personality, it took time before it was accepted that a corporation could commit crime and could face prosecution. The concept of corporate criminal liability has gradually evolved through the ages and in England there is now a statutory system whereby corporations are held directly liable for the deaths of people to whom they owe a duty of care. The CMCHA has introduced an offence called corporate manslaughter, which ensures that there are uniform rules dealing with deaths caused by both corporations as well as unincorporated entities.

Public outcry and the written works of academics such as Celia Wells and CMV Clarkson played an important role in ensuring the development of the concept of corporate criminal liability and specifically corporate manslaughter, in England. Moreover, before passing the Act, the government saw to it that all stakeholders had an opportunity to comment on the recommendation and the Bills. Government did take many of the recommendations into account and clearly made an attempt at addressing concerns raised.

The CMCHA does have its shortcoming, as discussed above, however, it marks an improvement to the way English law dealt with deaths caused by corporations. With regard to applicable sanctions, even though the fine as imposed in *R v Cotswold*¹⁶³⁹ is high, it is hoped that the courts will make use of the alternative sanctions which may be more effective in deterring corporations, especially where a loss of lives has occurred as a result of corporations'

¹⁶³⁹ *R v Cotswold* (note 1574).

failure to exercise the relevant duty of care.

CHAPTER 5 – CANADIAN LAW AND CORPORATE HOMICIDE

I INTRODUCTION

As many have noted, corporate actors who cause injury and death rarely receive sanctions equivalent to those meted out to traditional criminals. Workplace injury and deaths, environmental crimes and corporate fraud are rarely sanctioned or shamed. And when they are, punishments are much lighter than those received by the street offender who commits comparable acts of theft, fraud, assault and murder.¹⁶⁴⁰

This statement shows that Canada, like many other countries, has also, over the years, been facing challenges when it comes to corporate criminal liability and particularly corporate homicide. From the quotation it is clear that Canada has experienced the differential treatment, by the criminal justice system, between natural persons and juristic persons who have caused deaths negligently. Corporate criminal liability, as a way of dealing with corporations that cause harm to society, including those that cause negligent deaths “is an established doctrine in Canada”¹⁶⁴¹ and it has been recognized by Canadian law for many years.¹⁶⁴²

Apart from the fact that criminal liability in Canada for all entities, including corporations, is now codified in the Criminal Code,¹⁶⁴³ case law has played a very significant role in the development of both corporate criminal liability and corporate homicide in Canada.¹⁶⁴⁴

Although allowing the law to be developed by judges has been criticized,¹⁶⁴⁵ Ferguson points

¹⁶⁴⁰ S Bittle & L Snider ‘From Manslaughter to Preventable Accident: Shaping Corporate Criminal Liability’ (2006) 28 (4) *Law and Policy* 470, 481.

¹⁶⁴¹ Ferguson (note 165) 155.

¹⁶⁴² *R v Stephens* (1866) L.R. 1 Q.B. 702; *R v Holbrook* (1878) 578 4, Q.B.D. 42. Moreover, as early as 1909 the legislature included a provision in the Criminal Code “that when a corporation was found guilty, a fine could be substituted for a sentence of imprisonment”. (Stessens (note 52) 498).

¹⁶⁴³ The Criminal Code is a national statute that regulates / codifies criminal law. In addition to common law rules, it is the primary source of criminal law in Canada.

¹⁶⁴⁴ For instance “the basis for imposing criminal liability – originally arose and is still dependent today on common law principles developed by judges on a case by case basis”. (Ferguson (note 165) 156). Examples of cases that have played important roles in developing corporate criminal liability are *Union Colliery Co. v The Queen* (1900), 31 S.C.R. 81; *R v Great West Laundry Co.* (1900), 3 C.C.C. 514 (Man.Q.B.); *R v Fane Robinson Ltd* [1941] 3 D.L.R. 409 (D.A.C.S.Alta); *Canadian Dredge & Dock Co. v R*, (note 160) 251; *The Rhone v The Peter A.B. Widener* [1993] 1 S.C.R. 497.

¹⁶⁴⁵ Ferguson refers to Jeremy Bentham’s “scathing criticism...that uncodified criminal law is undemocratic since it is created and altered by unelected and unrepresentative judges; it is unfair because judges thereby engage in ex post facto or retrospective law making; it is also unfair and undemocratic because common law rules which are

out that an important advantage of the common law is that it “permits, with relative ease and flexibility, the creation of new and adjusted principles of law to meet changing social conditions”.¹⁶⁴⁶

In addition to that, Canada has recently adopted amendments to its Criminal Code which have resulted in significant improvements to corporate criminal liability and corporate homicide. Bill C-45¹⁶⁴⁷ which brought about these improvements has been hailed as constituting “a fundamental change, if not a revolution, in corporate criminal liability”.¹⁶⁴⁸ It has extended corporate criminal liability in such a way that certain entities that were originally excluded from liability, due to lack of incorporation, are now regarded as organizations and for that reason they are also subject to corporate criminal liability if they commit crimes.¹⁶⁴⁹ The extension of criminal liability in such a way that it provides a wider scope of application¹⁶⁵⁰ is a positive development as it makes it difficult for individuals who have committed crime under the auspices of an unincorporated entity to hide behind the lack of incorporation in order to escape liability.

Another significant change made by the recent amendments is the move away from complete reliance on the identification doctrine as a way of establishing corporate fault. There are new rules that have been formulated for attributing criminal liability to organizations, which apply,

buried in cases are not accessible, intelligible or easily ascertainable to ordinary citizens, and finally it is unsystematic in the sense that it is an unruly sea of single decisions rather than an organized, rational and comprehensive body of law built up from first principles”. (Ferguson (note 165) 156 – 157).

¹⁶⁴⁶ Ibid 157.

¹⁶⁴⁷ Bill C-45, An Act to amend the Criminal Code (criminal liability of organizations) 2d Sess., 37th Parl., 2003 (Royal Assent, 7 November 2003), S.C. 2003, c.21 [Bill C-45].

¹⁶⁴⁸ T Archibald, K Jull and K Roach ‘The Changed Face of Corporate Criminal Liability’ 48 *Criminal Law Quarterly* (2003 – 2004) 367, 368.

¹⁶⁴⁹ These amendments came into being as a result of Bill C-45 (Bill C-45 (note 1647) which will be fully discussed in this chapter at III below.

¹⁶⁵⁰ DL MacPherson ‘Extending Corporate Criminal Liability?: Some thoughts on Bill C-45’ (2004) 30 *Manitoba Law Journal* 253, 253.

in addition to the identification doctrine. It is submitted that the move away from strictly applying the identification doctrine only is a positive development as the identification doctrine, on its own, played a big role in hampering the prosecution of corporations, particularly the large corporations and in circumstances where there were fatalities caused by corporate activities.

In this chapter the recognition and development of the concept of corporate criminal liability and corporate homicide in Canada will be discussed. The discussion will include the basis for liability, the shortfalls of the identification doctrine, the calls for reform, the reform that subsequently followed in the form of amendments to the Criminal Code as a result of Bill C-45, an assessment of some of the case law subsequent to the reform, and the effectiveness of corporate homicide in Canada. In assessing the effectiveness of corporate homicide in Canada, the question whether the penalties that may be imposed on the corporations are adequate and effective will form part of the discussion.

II THE HISTORICAL DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY IN CANADA

(a) The recognition of corporations as legal persons in Canada

Prior to the formal discovery of Canada in 1534, there were already fishing and fur-trading expeditions in the area, dating as far back as 1506¹⁶⁵¹ and these took the form of “unincorporated associations of merchants formed to raise a common fund to finance each expedition and they divided their profits at the end of each voyage in the ration of their

¹⁶⁵¹ “It is known that European fishing and fur-trading ventures extended to the land and waters of Newfoundland as early as forty years before Cartier’s formal discovery of Canada in 1534”. (FE Labrie & E Palmer ‘The Pre-Confederation History of Corporations in Canada’ in JS Ziegel *Studies in Canadian Company Law* 1967, 33).

contributions”.¹⁶⁵² During this period the French operated under the French legal system while the Britons operated under the British legal system.¹⁶⁵³ Corporate activity during the period before the mid-eighteenth century had little, if any impact on the development of corporate law.¹⁶⁵⁴

After the discovery of Canada, laws regulating corporations in Canada were influenced by the French and English legal systems as well as developments in the United States.¹⁶⁵⁵ Prior to the nineteenth century Canadian law made provision for two forms of incorporation,¹⁶⁵⁶ namely, by means of exercising royal prerogative¹⁶⁵⁷ and by means of legislation.¹⁶⁵⁸ Corporations created by means of royal prerogative were a far cry from the modern corporations as, for instance, in spite of incorporation the obligations of the corporation were borne by the shareholders.¹⁶⁵⁹ Incorporation by means of legislation rarely occurred.¹⁶⁶⁰

Until the late nineteenth century, fur trade¹⁶⁶¹ was the dominating economic activity.¹⁶⁶² Fur was mainly traded by companies that were originated in Paris and London.¹⁶⁶³ The *Compagnie de la Nouvelle France*¹⁶⁶⁴ and the Hudson’s Bay Company were two of those companies and

¹⁶⁵² Ibid.

¹⁶⁵³ Hadden *et al.* (note 941) 18.

¹⁶⁵⁴ Labrie & Palmer (note 1651) 36.

¹⁶⁵⁵ Hadden *et al.* (note 941) 18.

¹⁶⁵⁶ JA Van Duzer *The Law of Partnerships and Corporations* (2009) 90.

¹⁶⁵⁷ “This was done by the Crown issuing letters patent sometimes referred to as a “Royal Charter”. Only a small number of royal charters were granted”. (Ibid 91).

¹⁶⁵⁸ Ibid 90 – 91.

¹⁶⁵⁹ Ibid 91.

¹⁶⁶⁰ Ibid.

¹⁶⁶¹ “Following Cartier’s discoveries of Canada, there arose a commercial interest in carrying on a fur trade and a desire by the Kings of France to establish colonies in order to reinforce French claims to the territory”. (Labrie & Palmer (note 1651) 33).

¹⁶⁶² Hadden *et al.* (note 941) 18.

¹⁶⁶³ Ibid 19.

¹⁶⁶⁴ Also known as the *Compagnie des Cent Associes* “it was formed in 1628 and given the exclusive right to trade, colonize, govern and promote religious teaching in all of New France, from Florida northwards, the King reserving only the allegiance of residents in the territory and the right to select the judicial officers from among the company’s nominees. The company was incorporated by letters patent and given the privilege of limited liability by express stipulation in its articles. The head office of the company was in Paris, from where it was governed, and in form, it was similar to existing European corporations”. (Labrie & Palmer (note 1651) 36).

they “were modeled on well-established European precedents for foreign trading companies”.¹⁶⁶⁵ These companies featured greatly in the economic activities of Canada in its early days, however, they did not have a great impact on future forms of corporations.¹⁶⁶⁶

Prior to the mid eighteenth century “little corporate activity occurred in Canada”.¹⁶⁶⁷ The coming into being of the Joint Stock Companies Act in England in 1844 brought with it a new method of incorporation, which simply allowed for incorporation once specified documents were registered.¹⁶⁶⁸ This approach of incorporation by means of registration was followed by Canada and as early as 1849 Upper and Lower Canada passed statutes that allowed for the incorporation¹⁶⁶⁹ of certain companies.¹⁶⁷⁰ These companies are still not comparable to modern companies as “they were organizations set up for a limited purpose, and did not provide shareholders with limited liability”.¹⁶⁷¹

1850 is hailed as the year in which the “first truly private commercial companies in Canada”¹⁶⁷² came into being. This was as a result of the promulgation of the first Canadian Companies Act: An Act to Provide for the Formation of Incorporated Joint Stock Companies, for

¹⁶⁶⁵ Ibid.

¹⁶⁶⁶ “Though the fur trade and the companies which ran it played a dominant role in the early history of Canada, their operations were based on seventeenth and eighteenth century conceptions of business organization and cannot be said to have had much lasting impact on subsequent forms of corporate organization”. (Hadden *et al.* (note 941) 19).

¹⁶⁶⁷ Labrie & Palmer (note 1651) 36. Three reasons have been advanced for this state of affairs: “first in Great Britain the Bubble act was passed in 1720 which discouraged the creation of new companies; second, France wanted to use New France merely as a supplier of furs and a market for manufactured goods; and, third, in both British and French jurisdictions the companies then in existence had monopoly rights with regard to the fur trade and hence actively opposed the creation of any new companies”. (Labrie & Palmer (note 1651) 36 – 37).

¹⁶⁶⁸ Van Duzer (note 1656) 91.

¹⁶⁶⁹ “Incorporation did not require the exercise of the royal prerogative but was obtained by the registration of prescribed documents in the country in which the work was to be done”. Ibid.

¹⁶⁷⁰ These included: “An Act to Authorize the Formation of Joint Stock Companies for the Construction of Roads and Other Works in Upper Canada, S.C. 1849, c.84; An Act to Authorize the Formation of Joint Stock Companies in Lower Canada for the Construction of Macadamized Roads, and of Bridges and Other Works of Like Nature, S.C. 1849, c 56”. (Ibid).

¹⁶⁷¹ Ibid.

¹⁶⁷² Hadden *et al.* (note 941) 21.

Manufacturing, Mining, Mechanical or Chemical Purposes.¹⁶⁷³ The Act was promulgated in 1850 and it was a “more generally applicable statute for incorporation”.¹⁶⁷⁴ Incorporation under this Act was similar to the 1849 approach in that the mere registration of certain documents led to incorporation.¹⁶⁷⁵ The 1850 Act provided for a simple process of incorporation that would bring into being a corporation with its own rights and responsibilities, having the capacity to sue and to be sued in its own name; to enter into contracts of sale and to have succession.¹⁶⁷⁶ Incorporation under the 1850 Act, therefore “had two of the defining characteristics we associate with the modern corporation: separate legal personality and limited liability”.¹⁶⁷⁷ However, unlike modern companies, companies incorporated under the 1850 Act had a lifespan of only fifty years.¹⁶⁷⁸

With regard to the Canadian Companies Act 1850, it has been stated that

the basic features of modern Canadian company law are to be found here: readily available incorporation, central management which was to be accountable electorally to shareholders, shareholders with a ‘limited commitment’ and a measure of protection of the capital of the corporate vehicle, which had no parallel in general partnership law.¹⁶⁷⁹

The fur trade was replaced as the most dominant trade during the nineteenth and early twentieth century.¹⁶⁸⁰ Timber was one of the trades that replaced fur and the timber trade in Ontario and

¹⁶⁷³ An Act to provide for the formation of Joint Stock Companies for Manufacturing, Mining, Mechanical or Chemical Purposes 13 & 14 Vict., c 28 (Can 1850). (Labrie & Palmer (note 1651) 56). See also Van Duzer (note 1656) 91 and Hadden *et al.* (note 941) 25.

¹⁶⁷⁴ Van Duzer (note 1656) 91.

¹⁶⁷⁵ *Ibid* 92.

¹⁶⁷⁶ The Act made it clear that ‘the result of the process of incorporation was ‘a body politic and corporate’ which should ‘have succession’, and be capable of suing being sued and buying and selling real or personal property for the purposes of its operations...’. (Hadden *et al.* (note 941) 26).

¹⁶⁷⁷ Van Duzer (note 1656) 92.

¹⁶⁷⁸ *Ibid*.

¹⁶⁷⁹ Hadden *et al.* (note 941) 27.

¹⁶⁸⁰ *Ibid* 19.

Quebec had a greater impact on the future of corporations as it was more sophisticated and was under state control.¹⁶⁸¹ Capital for felling trees and transporting them was generally “provided by British timber traders who established branches or factors in Canada”.¹⁶⁸² In 1853 there was provision made for companies to be incorporated “for the improvement of river transportation facilities”.¹⁶⁸³ It is not clear how many took advantage of this opportunity, as the “larger timber houses...appear to have operated as unincorporated partnerships, at least until late in the nineteenth century”.¹⁶⁸⁴

Welling observes that “corporate development during the first half of the nineteenth century shows that, while a separate corporate legal personality had not yet fully evolved, statutory rules were leading in that direction”.¹⁶⁸⁵ This can be seen in that the Acts that provided for the incorporation of the Joint Stock Companies for Manufacturing Mining, Mechanical or Chemical Purposes and of the banking industry were the first Acts¹⁶⁸⁶ to enshrine limited liability for companies.¹⁶⁸⁷ This has led to the observation that the development of banking appear to have paved the way to the development of “the first truly private commercial companies in Canada”.¹⁶⁸⁸

The 1850 Act was followed by the Joint Stock Companies Judicial Incorporation Act of 1860¹⁶⁸⁹ and the 1864 Act to authorize the granting of charters on Incorporation to

¹⁶⁸¹ “All uncultivated land was in the hands of the Crown, and licences to fell timber were sold in individual lots by the state authorities. The authorities were also directly involved in the construction and operation of timber slides on the larger rivers, from which a substantial toll revenue was collected”. (Ibid 19 – 20).

¹⁶⁸² Ibid 20.

¹⁶⁸³ This was specifically “for the improvement of river transportation”. (Ibid).

¹⁶⁸⁴ Ibid.

¹⁶⁸⁵ Welling *et al.* (note 971) 92 – 93.

¹⁶⁸⁶ An Act to establish freedom of banking in this Province and for other purposes relative to Banks and Banking 13 & 14 Vict., c 21 (Can 1850) and An Act to provide for the formation of Joint Stock Companies for Manufacturing, Mining, Mechanical or Chemical Purposes 13 & 14 Vict., c 28 (Can 1850). (Ibid 91).

¹⁶⁸⁷ Ibid 85.

¹⁶⁸⁸ Hadden *et al.* (note 941) 21.

¹⁶⁸⁹ Joint Stock Companies Judicial Incorporation Act, 23 Vict., c. 31 (Can).

Manufacturing, Mining and other Companies.¹⁶⁹⁰ These were both passed by the United Province and focused mainly on tightening the procedure of incorporation.¹⁶⁹¹ In the 1864 Act the United Province made use of the approach based on royal prerogative whereby letters patent had to be issued by the governor in Council for the corporation to be incorporated.¹⁶⁹²

The confederation of Canada in 1867 brought with it significant developments in company law which resulted in the possibility of incorporation via federal authority and via the provincial legislature.¹⁶⁹³ The 1869 the Canadian Joint Stock Companies Letters Patent, a “federal incorporation statute” followed the letters patent approach.¹⁶⁹⁴ The same approach was followed in the provinces of Manitoba, New Brunswick, Ontario, Prince Edward Island, Quebec and Ontario.¹⁶⁹⁵ It has been stated that “throughout most of the twentieth century, Canadian registration and letters patent statutes changed very little”.¹⁶⁹⁶ On the other hand Alberta, British Columbia, Newfoundland, Nova Scotia and Saskatchewan followed the English approach of registration after filing a memorandum of association and articles of association.¹⁶⁹⁷ The vital difference between these two approaches is that “a letters patent corporation is deemed to have the rights and powers of a natural person, whereas a corporation under the English registration system...has only the powers provided for expressly or by implication in its articles”.¹⁶⁹⁸ The Ontario legislature deserted the letters patent system in 1967 in the new Ontario Act, which allowed for incorporation simply upon the registration of the

¹⁶⁹⁰ Act to authorize the granting of Charters on Incorporation to Manufacturing, Mining and other Companies.

¹⁶⁹¹ Hadden *et al.* (note 941) 28.

¹⁶⁹² “For some reason the United Province of Canada reverted to a model based on the exercise of royal prerogative... While permitting incorporation for any commercial purpose, under this Act, incorporation occurred only upon the issue of letters patent by the Governor in Council. Issuing letters patent was a discretionary act of an official of the state”. (Van Duzer (note 1656) 92).

¹⁶⁹³ “Federal competence lay in the residual power to pass laws ‘for the Peace, Order and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects’”. (Hadden *et al.* (note 941) 29).

¹⁶⁹⁴ Van Duzer (note 1656) 92.

¹⁶⁹⁵ *Ibid.*

¹⁶⁹⁶ *Ibid* 94.

¹⁶⁹⁷ *Ibid* 92.

¹⁶⁹⁸ *Ibid.*

“articles of association”. This was influenced by developments in the United States of America.¹⁶⁹⁹ In 1975 the Canada Business Corporations Act, a federal corporate law statute came into being, which followed the same approach of registering the articles of association for incorporation.¹⁷⁰⁰

Although there have been further developments in Canadian law, what remains vital is that as with both England and South Africa, Canada also relies on the principle of legal personality as stated in *Salomon v Salomon*.¹⁷⁰¹ A Canadian textbook cited this case as “having laid down the cornerstone of modern corporate law”.¹⁷⁰² The current position is that Canadian law recognizes corporations as full¹⁷⁰³ legal persons with rights and responsibilities and whose existence is separate from their shareholders.¹⁷⁰⁴

(b) The history of corporate criminal liability in Canada

“Corporations make decisions, hold property, and complete legal transactions. So do individuals. Some physical acts and transactional details that we think we see performed by individuals can be legally attributed to a corporation”.¹⁷⁰⁵

¹⁶⁹⁹ “Incorporation was effected by filing only a very simple document called “articles of incorporation”. This approach followed the Model Business corporations Act drafted by the Committee on Corporate Laws of the American Bar Association”. (Ibid 94).

¹⁷⁰⁰ Ibid.

¹⁷⁰¹ *Salomon v Salomon* (note 960).

¹⁷⁰² Welling *et al.* (note 971) 126.

¹⁷⁰³ Own emphasis.

¹⁷⁰⁴ “A corporation’s legal identity is separate from that of its shareholders, directors and officers. A corporation can hold property, enter contracts and can sue and be sued. Owners and shareholders enjoy the benefit of limited liability; they are not personally liable for the debts or obligations of the corporation. And a corporation is perpetual in the sense that its existence is not altered by the addition of new members or the retirement or death of existing members”. (G Ferguson ‘Corruption and Corporate Criminal Liability’ Paper presented at seminar on New Global and Canadian Standards on Corruption and bribery <http://www.icclr.law.ubc.ca/Publications/Reports/FergusonG.PDF> Also: *International Centre for Criminal Law Reform and Criminal Justice Policy*, [http://www.icclr.law.ubc.ca/Site% 20Map/Publications% 20Page/Gerry_Ferguson. htm](http://www.icclr.law.ubc.ca/Site%20Map/Publications%20Page/Gerry_Ferguson.htm) (1998) 1,2. (accessed 4 October 2013)).

¹⁷⁰⁵ Welling *et al.* (note 971) 132.

As corporations in Canada became legal entities with rights and responsibilities, they were also bound to have an impact on peoples' lives. It was therefore inevitable for the concept of corporate criminal liability to develop and to be recognized by Canadian law. The development of Canadian criminal law is therefore important.

The occupation of Canada took place in various stages¹⁷⁰⁶ and each territory, including Newfoundland,¹⁷⁰⁷ “possessed a criminal law – that is, the criminal law (both common law and applicable statute law) of England as of the date of their settlement. Each would, however, also have some form of legislature with power, to some degree, to change that law”.¹⁷⁰⁸ A process of consolidating the criminal law of the various territories into a single uniform system took place gradually and in 1892 the first Criminal Code of Canada came into being.¹⁷⁰⁹ Canadian criminal law has since been mainly¹⁷¹⁰ regulated by the Federal government¹⁷¹¹ by means of the Criminal Code.¹⁷¹²

At first it was thought that a corporation could not be subject to prosecution as it did not have a physical body.¹⁷¹³ This was subsequently overcome and Canadian law has accepted that

¹⁷⁰⁶ “The dates are fixed at September 17, 1792 for Ontario, October 1763 for Quebec, November 19, 1858 for British Columbia, July 15, 1870 for Manitoba, July 15, 1870 for Alberta, Saskatchewan, Northwest Territories and the Yukon, and 1758 for Nova Scotia, New Brunswick and Prince Edward Island”. (AW Mewett and M Manning *Mewett and Manning on Criminal Law* 3rd ed (1994) 4).

¹⁷⁰⁷ The criminal law of Newfoundland was declared to be the criminal law of England to a limited extent. (Ibid).

¹⁷⁰⁸ Ibid 3-4.

¹⁷⁰⁹ Ibid 4.

¹⁷¹⁰ “The position after 1892 was therefore that the criminal law consisted primarily of the Criminal Code of Canada, together with all those pieces of prior federal legislation preserved in the Schedule, plus as much of the common law preserved in each province as of the relevant date but excluding imperial criminal statutes, save where it had been altered or removed by federal legislation. While prosecutions for common law offences were not common, they did exist and there are several instances of successful prosecutions for offences that did not appear in any statute”. (Ibid).

¹⁷¹¹ DL MacPherson ‘Reforming the doctrine of attribution: a Canadian solution to British concerns’ in S Tully *Research Handbook of Legal Responsibility* (2005) 194, 200.

¹⁷¹² The Criminal Code (note 1643) section 2.

¹⁷¹³ “At one time, because of the ‘intangible’ nature of the corporate person, it was felt that corporations were not amenable to all types of criminal proceedings”. (DH Bonham and DA Soberman “The Nature of Corporate Personality” (1967) in JS Ziegel *Studies in Canadian Company Law* 3, 29).

corporations are capable of committing crimes and they may be prosecuted.¹⁷¹⁴ The Criminal Code has been instrumental in making it possible to prosecute corporations¹⁷¹⁵ and it has been credited with having ‘swept away’ “all difficulties as to procedure and punishment of corporations”.¹⁷¹⁶ Criminal liability has been extended to corporations by section 2 of the Criminal Code which, until recently, defined the terms ‘every one’ and ‘person’ in such a way that they encompass “public bodies, corporate bodies, societies and municipalities in relation to the acts and things that they are capable of doing”.¹⁷¹⁷ Although it is mainly corporations that have been prosecuted for crimes they have committed,¹⁷¹⁸ the law allows for the prosecution of corporations,¹⁷¹⁹ municipalities, societies, trade unions, incorporated associations and non-profit corporations such as religious corporations.¹⁷²⁰ An example of the recognition of corporate criminal liability with regard to entities that are not strictly speaking corporations can be seen in Cory J’s statement in *United Nurses of Alberta v Alberta*,¹⁷²¹ where in answering the question whether unions can be subject to criminal contempt he reasons that:

“There can be no doubt that unions have the legal status to sue and be sued in civil matters. They can and do present and defend cases before the courts. They make full use of the courts and the remedies they provide. If unions avail themselves of court facilities, they must be subject to the court’s rules and restraints placed on the conduct of all litigants. It follows that they are subject to prosecution for the common law offence of criminal contempt. There can

¹⁷¹⁴ Ibid.

¹⁷¹⁵ “Now the difficulties of summoning a corporation before the court and of prosecuting it have been eliminated by the Criminal Code. Also, the code contains provision for imposing fines as punishment on corporations in lieu of imprisonment. As a result, from a procedural point of view, there is no reason why a corporation should not be prosecuted criminally”. (Ibid).

¹⁷¹⁶ *R v Fane Robinson* (note 1644).

¹⁷¹⁷ Ferguson (note 165) 153.

¹⁷¹⁸ Ferguson (note 1704) 2.

¹⁷¹⁹ “Although legal writers differ as to why it may be desirable to hold corporations criminally responsible at all, it seems clear that Canadian law contemplates that corporations will be subject to the criminal law. Indeed it has been said that corporations and natural persons really ‘stand on an equal footing at the bar of criminal justice’”. (Bonham & Soberman (note 1713) 29).

¹⁷²⁰ Ferguson (note 165) 154. *Canadian Dredge & Dock Co. v R* (note 216) – corporation; *R v Sault Ste. Marie (City)* (1978), 40 C.C.C. (2d) 353 - municipality; *United Nurses of Alberta v Alberta* (Attorney General) [1992] 1 S.C.R. 901; [1992 S.C.J. No. 37. – societies and trade unions; *R v Church of Scientology* (1997), 33 O.R. (3d) 65 (Ont. C.A.) – religious corporation.

¹⁷²¹ *United Nurses of Alberta v Alberta* (Attorney General) (note 1720)

be no question that unions fall within the scope of the term ‘societies’ in the Criminal Code’s definition of person and they must be equally liable for prosecution for a common law crime”.¹⁷²²

Furthermore, in 1909 the Criminal Code was amended in such a way that it “introduced notions of corporate criminal liability” by providing for the substitution of a fine for a sentence of imprisonment, when a corporation was found to be guilty of a crime.¹⁷²³ In the 1941 case of *R v Fane Robinson* the idea that a corporation is capable of committing a crime was totally accepted.¹⁷²⁴

In *R v Fane Robinson* an appeal was heard against the dismissal of charges against a corporation for conspiracy to defraud and for obtaining money through false pretences.¹⁷²⁵ Both charges required *mens rea* to be proven. The court a quo had dismissed the charges on the ground that it was not possible for a corporation to be guilty of *mens rea*.¹⁷²⁶ With reference to the two directors that had committed the offences Ford JA stated that

“In my opinion George Robinson and Emile Fielhaber were the acting and directing will of Fane Robinson Ltd. Generally and in particular in respect of the subject-matter of the offences with which it is charged, that their culpable intention (*mens rea*) and their illegal act (*actus reus*) were the intention and the act of the company and that conspiracy to defraud and obtaining money by false pretences are offences which a corporation is capable of committing”.¹⁷²⁷

¹⁷²² Ibid par 3.

¹⁷²³ Stessens (note 52) 498.

¹⁷²⁴ *R v Fane Robinson* (note 1644). See also Stessens (note 52) 498.

¹⁷²⁵ *R v Fane Robinson* (note 1644) 410.

¹⁷²⁶ Ibid 409.

¹⁷²⁷ Ibid 410.

R v Fane Robinson is regarded as the leading Canadian case for having set the precedent for finding corporations guilty of crimes having *mens rea* as an essential element.¹⁷²⁸

(c) The development of corporate criminal liability in Canada

Corporations have mainly been held criminally liable for regulatory offences¹⁷²⁹ as Canadian law has, in the past, dealt with corporate criminal liability and corporate homicide mainly by means of enacting regulatory offences.¹⁷³⁰ These are offences that are found in statutory regulations. They emanate from the federal government as well as provincial and municipal governments.¹⁷³¹ With regard to employees, traditionally there was protection for employees in the form of factory inspectors and in the event of injuries and deaths at work, employers were held responsible and provision was made for employees to receive compensation for injuries sustained by them.¹⁷³²

It must be noted that regulatory offences in Canada have not been regarded as ‘true’ crimes.¹⁷³³ The main reason is that *mens rea* is not a requirement for liability for such offences. There is absolute liability, as long as the prohibited act has occurred.¹⁷³⁴ The prosecution is not required to prove fault on the part of the corporation, as long as it is clear that there has been a contravention. Holding corporations liable for the contravention of statutory regulations has therefore been normal practice. The kind of liability that corporations are subject to when it

¹⁷²⁸ P. Dusome “Criminal Liability under Bill C-45: Paradigms, Prosecutors, Predicaments” (2007 - 2008) 53 *Criminal Law Quarterly* 98, 142.

¹⁷²⁹ Ferguson (note 165)159. “Many regulatory offences deal with various forms of pollution and violations of health and safety standards in the work place and in the production and sale of goods and services. Penalties normally involve fines and the possibility (but infrequent use) of imprisonment, which might range from a few days up to two years”. (Ibid 159 – 160).

¹⁷³⁰ “Regulatory or public welfare offences emphasize the protection of the public from the risk of harm and the regulatory interests of the modern state, as opposed to the punishment of inherently wrongful and harmful conduct”. (Roach (note 310) 164.

¹⁷³¹ Ibid 164.

¹⁷³² Bittle & Snider (note 1640) 472.

¹⁷³³ Macpherson (note 1711) 198; Ferguson (note 165) 159.

¹⁷³⁴ Macpherson (note 1711) 198.

comes to regulatory offences is vicarious criminal liability.¹⁷³⁵ Vicarious liability or *respondent superior*¹⁷³⁶ made it possible for a corporation to be held liable for offences committed by its employee.¹⁷³⁷ The corporation as employer could be held liable simply because of its relationship with the employee responsible for committing the crime.¹⁷³⁸

Under the common law corporations could therefore be held criminally liable for crimes committed under their auspices provided that these were regulatory offences, as, Canadian courts were, at first, reluctant to hold corporations criminally liable for ‘true crimes’.¹⁷³⁹ The common law was opposed to the application of vicarious liability to criminal law due to the fact that *mens rea* / fault is an element of a crime¹⁷⁴⁰ and a corporation was regarded as being incapable of having *mens rea* as the corporation is an incorporeal being without a brain. This reasoning had the effect that courts were reluctant to hold corporations criminally liable for *mens rea* offences.¹⁷⁴¹

There were, however, exceptional instances where common law allowed for corporations to be held liable for ‘true crimes’ and the basis for liability in such cases was vicarious liability.¹⁷⁴²

¹⁷³⁵ D Goetz BillC-45 An Act to amend the criminal code (criminal liability of organizations) 2003 Law and Government Division http://www.parl.gc.ca/About/Parliament/?legislativeSummaries?bills_Is.asp?Is=c457P1 (Accessed 18 November 2013).

¹⁷³⁶ Ferguson (note 1704) 4.

¹⁷³⁷ Ferguson (note 165) 161.

¹⁷³⁸ “This doctrine was created in the law of tort in the seventeenth century in order to provide compensation to third parties who were injured by a master’s servant while the servant was carrying out the master’s business. This doctrine was justified on the ground that since the master acquired the benefits of the servant’s work, he should also carry the burdens. And as a practical matter, servants were impecunious and therefore if compensation was to be forthcoming it would have to be obtained from the master”. (Ferguson (note 1704) 4).

¹⁷³⁹ Ferguson (note 165) 161. “If an offence is considered a ‘true crime’, courts will presume Parliament intended the offence to require subjective *mens rea* (i.e. intent, knowledge, recklessness or willful blindness measured subjectively, but not negligence) unless the words of the statute suggest otherwise”. (Ibid 159).

¹⁷⁴⁰ Ibid 162.

¹⁷⁴¹ Ferguson (note 1704) 4.

¹⁷⁴² Ferguson (note 165) 161.

These were public nuisance,¹⁷⁴³ contempt of court¹⁷⁴⁴ as well as criminal libel,¹⁷⁴⁵ all of which, despite being regarded as true crimes, did not have *mens rea* as an element.¹⁷⁴⁶ These three categories of crimes together with regulatory offences, for which corporations were being held vicariously liable, were the only instances in which corporations were being held criminally liable for crimes.¹⁷⁴⁷

In addition to the courts' reluctance to hold corporations liable for true crimes, there was also the argument that when a crime has been committed, the corporation has acted *ultra vires* because the employee has acted beyond the scope of his or her employment, for that reason the corporation ought not be held criminally liable.¹⁷⁴⁸ The courts refused to accept this line of reasoning,¹⁷⁴⁹ but continued with the reluctance to hold corporations liable for crimes requiring *mens rea*.

The courts' reluctance begins to disappear during the early days of the 20th century. In *Union Colliery Co. v The Queen*¹⁷⁵⁰ the Supreme Court of Canada, faced with the question whether it is possible to indict a corporation for a crime, confirmed that in terms of sec. 213 of the Criminal Code it is possible for a corporation to be 'indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control'.¹⁷⁵¹ The Supreme Court of British Columbia had convicted a corporation

¹⁷⁴³ Ferguson (note 1704) 4. See also *R v Stephens* (note 1642).

¹⁷⁴⁴ Ferguson (note 1704) 4. See also *R v Evening Standard Co Ltd* [1954] 1 Q.B. 578.

¹⁷⁴⁵ Ferguson (note 1704) 4. See also *R v Holbrook* (note 1642).

¹⁷⁴⁶ Ferguson (note 165) 162.

¹⁷⁴⁷ Ferguson (note 1704) 4.

¹⁷⁴⁸ "corporate criminal immunity stemmed from the abhorrence of the common law for vicarious liability in criminal law, and from the doctrine of *ultra vires*, which regarded criminal activities by corporate agents as beyond their authority and beyond corporate capacity". (*Canadian Dredge & Dock Co. v R* (note 216) 674 - 675).

¹⁷⁴⁹ Ferguson (note 165) 162.

¹⁷⁵⁰ *Union Colliery Co. v The Queen* (note 1644) 81.

¹⁷⁵¹ *Ibid.*

following an indictment for the unlawful killing of people¹⁷⁵² caused by the corporation's failure to properly maintain a bridge used by certain trains.¹⁷⁵³ A train which had gone through this poorly maintained bridge had an accident while doing so, in which several lives were lost.¹⁷⁵⁴ The question "whether or not the indictment would lie against a corporation"¹⁷⁵⁵ was reserved for the opinion of the Court of Appeals, the Supreme Court of Canada. The Supreme Court of Canada held that in terms of the Criminal Code¹⁷⁵⁶ it was possible to indict a corporation for failure¹⁷⁵⁷ to perform the duty of avoiding danger to human life from anything under the control of the corporation. Furthermore, in deciding whether an indictment lies against a corporation, the Supreme Court confirmed that the term 'everyone' as found in the Criminal Code refers to all persons, including corporations.¹⁷⁵⁸ Sedgewick J stated that: "‘Everyone’ is an expression of the same kind as ‘person’, and therefore includes bodies corporate unless the context requires otherwise".¹⁷⁵⁹

It is interesting to note that the indictment in the Supreme Court of British Columbia was not specifically for manslaughter, but rather for the negligence of the corporation in the discharge of its duty. This is noted by the Court of Appeals and it is stated that

It is possible that the facts alleged in the indictment would be sufficient to sustain an indictment for manslaughter against an individual, but the offence alleged in the indictment here is not the manslaughter; it is criminal negligence in the discharge of duty. The killing is

¹⁷⁵² Ibid.

¹⁷⁵³ Union Colliery had been convicted for failure to exercise its duty to maintain a particular bridge. Due to its failure to do so there were fatalities. Union Colliery was alleged to have "unlawfully neglected, without lawful excuse, to take reasonable precautions and to use reasonable care in maintaining" the bridge. (Ibid 83).

¹⁷⁵⁴ Ibid 81.

¹⁷⁵⁵ Ibid.

¹⁷⁵⁶ The Criminal Code (note 1643) section 213.

¹⁷⁵⁷ Without lawful cause.

¹⁷⁵⁸ *Union Colliery Co. v. H.M. The Queen* (note 1644) 88.

¹⁷⁵⁹ Ibid.

not alleged as the offence, but merely the consequence of the offence. In an indictment for manslaughter it is at least necessary to charge manslaughter as the crime—to allege that the defendants "unlawfully did kill and slay, &c." or "did commit manslaughter," allegations wholly absent in the present case. It is not, therefore, necessary here to express any opinion as to whether or not under the present state of the law and its constantly broadening and widening jurisprudence on the subject of the civil and criminal liability of bodies corporate, they are capable of committing the offence.¹⁷⁶⁰

This observation by Sedgewick J is important. Although the notion of charging the corporation with the consequences of its action, rather than the actual killing of the deceased, appears to be strange and somewhat absurd, it must be understood that at that particular time it was not possible to hold a corporation liable for manslaughter. The main hindrance to such a charge is the fact that manslaughter requires *mens rea*, and at that time a corporation was regarded as an entity that could not possibly *possess mens rea*.

The Canadian legal system is, however, to be commended for taking seriously the consequences of the actions of corporations and for ensuring that the corporation are held criminally liable where they have discharged their duties in a negligent manner.

The indictment in this particular case was worded in such a way that the Court of Appeals found it unnecessary for it to comment on the fact that a corporation was regarded as an entity that could not possibly commit manslaughter. It is submitted that this could have been an opportunity to develop the concept of corporate homicide and, had that opportunity been used, the concept of corporate homicide would have likely developed during the early days of the recognition of corporate criminal liability.

¹⁷⁶⁰ Ibid 90.

It must be noted that in spite of the provisions in the Criminal Code, the Canadian courts' full acknowledgement of corporate criminal liability only occurred in 1941 in *R v Fane Robinson*¹⁷⁶¹ in which Ford JA stated that

After reading and considering, with many others, the cases cited on the argument I have, not without considerable hesitation, formed the opinion that the gradual process of placing those artificial entities known as corporations in the same position as a natural person as regards amenability to the criminal law has, by reason of the provisions of the *Criminal Code*, R.S.C., 1927, ch. 36, reached that stage where it can be said that, if the act complained of can be treated as that of the company, the corporation is criminally responsible for all such acts as it is capable of committing and for which the prescribed punishment is one which it can be made to endure.¹⁷⁶²

The current Criminal Code includes corporations under the term organization. The definition of organisation is rather wide as it refers to entities that have legal personality as well as those that do not have legal personality. The specific mention of the different entities is commendable as it provides certainty regarding which entities fall under the ambit of the Criminal Code. In addition to the specific mentioning of partnerships, societies and trade unions, the Legislature has gone a step further, by adding the phrase 'an association of persons'. By adding such a phrase, the Legislature has ensured that in the event of doubt regarding whether a particular entity is included or excluded in the Criminal Code, such entity will be regarded as an association of persons.

Developments to the Criminal Code have reached a point where the criminal code has a section dedicated solely to the criminal liability of organisations. This will be fully discussed below.

¹⁷⁶¹ *R v Fane Robinson Ltd* (note 1644).

¹⁷⁶² *Ibid* 4.

III MENS REA AND THE BASIS FOR LIABILITY

The Criminal Code does not provide the basis for the criminal liability of corporations. As a result it has been left to the common law and courts to develop the basis for liability.¹⁷⁶³ Canada has been holding corporations criminally liable on the following bases: vicarious liability and primary liability.¹⁷⁶⁴ Primary liability is in the form of absolute liability,¹⁷⁶⁵ strict liability and “real” criminal liability for *mens rea* offences.¹⁷⁶⁶ With regard to primary liability, it is important to note that the basis for liability is closely linked with the type of offence that the corporation has committed.¹⁷⁶⁷ The categories of offences that a corporation may be held liable for were made clear in *R v City of Sault Ste. Marie*¹⁷⁶⁸ where the court provided absolute liability offences, strict liability offences and offences requiring *mens rea* as the three classes of offences that a corporation could be held liable for.¹⁷⁶⁹

A corporation will face absolute liability where an absolute liability offence has been committed. This occurs where a statute clearly states that proof of the commission of the prohibited act will result in guilt.¹⁷⁷⁰ In this case the accused is held criminally liable without *mens rea* being proven and there is no possibility for the accused to “exculpate himself by showing that he was free of fault”.¹⁷⁷¹ Where a strict liability offence has been committed, the basis for liability will be strict liability. Public welfare offences fall under this category.¹⁷⁷²

¹⁷⁶³ Ferguson (note 165) 156.

¹⁷⁶⁴ Hanna (note 201) 453.

¹⁷⁶⁵ “...‘absolute liability’ entails conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offence. There is no relevant mental element”. (per Dickson J in *R v Sault ste. Marie* (note 1720) 362.

¹⁷⁶⁶ Hanna (note 201) 453.

¹⁷⁶⁷ Ferguson (note 165) 157.

¹⁷⁶⁸ *R v Sault Ste Marie* (note 1720) 373 – 374.

¹⁷⁶⁹ *Ibid.*

¹⁷⁷⁰ *Ibid* 374.

¹⁷⁷¹ *Ibid* 374. See also Stessens (note 52) 497.

¹⁷⁷² *R v Sault Ste Marie* (note 1720) 374.

Here the accused is also held criminally liable without *mens rea* being proven, however, the accused has the opportunity to vindicate himself / herself by proving due diligence.¹⁷⁷³ Where offences requiring *mens rea* have been committed ‘real’¹⁷⁷⁴ criminal liability for *mens rea* offences will take place.

(a) Vicarious liability

Vicarious liability entails holding a person criminally liable for the unlawful actions and fault of another person.¹⁷⁷⁵ This is a tort law doctrine and in Canada holding a person vicariously liable for crime is a notion that was not well received.¹⁷⁷⁶ The courts’ argument against this has been that “criminal law regards a person as responsible for his own crimes only”.¹⁷⁷⁷ In essence vicarious liability was regarded as not being suitable for crimes as one of the elements for a crime is that there must be *mens rea* or personal fault on the part of the accused.¹⁷⁷⁸ The fact that there is an employer – employee relationship does not justify the attribution of blame to the employer for crimes committed by the employee.¹⁷⁷⁹ In fact the conviction of one person for the crime that has been committed by another without taking into consideration the fault of the person being accused, has been referred to as being unjust.¹⁷⁸⁰

In the English case of *R v Huggins*¹⁷⁸¹ a prison warden and his servant were indicted for the murder of a prisoner who had been killed by the servant. The prisoner had been put by the

¹⁷⁷³ Stessens (note 52) 497.

¹⁷⁷⁴ Own emphasis.

¹⁷⁷⁵ “Vicarious liability occurs when the acts and fault of another person are attributed to the accused for the purpose of determining liability”. (Roach (note 310) 176).

¹⁷⁷⁶ “This doctrine was created in the law of tort in the 17th century in order to provide compensation to third parties who were injured by a master’s servant while the servant was carrying out the master’s business”. (Ferguson (note 165) 162).

¹⁷⁷⁷ *R. v. Stevanovich* (1983), 7 C.C.C. (3d) 307 (Ont. C.A.), 311; Roach (note 310) 176.

¹⁷⁷⁸ Ferguson (note 165) 162.

¹⁷⁷⁹ *Ibid.*

¹⁷⁸⁰ Colvin (note 60) 6.

¹⁷⁸¹ *R v Huggins* (1730), 92 E.R. 518.

servant in a room¹⁷⁸² which was not suitable for human habitation for a period of six weeks.¹⁷⁸³

The court had to decide whether the prison warden could be found guilty of the same offence, murder, as his servant.¹⁷⁸⁴ The court found that the prison warden could not be held liable for murder, as

‘He only is criminally punishable, who immediately does the act, or permits it to be done... So that if an act be done by an under-officer, unless it is done by the command or direction, or with the consent of the principal, the principal is not criminally punishable for it’.¹⁷⁸⁵

The decision in *R v Huggins* was thus based on the lack of fault on the part of the prison warden for a crime that required fault on the part of the accused. *R v Huggins* is an English case, and since Canadian law was greatly influenced by English law, this decision was later followed in Canada.¹⁷⁸⁶ In spite of the fact that *R v Huggins* dealt with the possibility of an individual being vicariously liable for the crime of another, it is relevant to corporate criminal liability and corporate homicide as it laid the foundation for the courts’ refusal to accept the principle of vicarious liability where crimes are concerned. This principle is followed in *Canadian Dredge and Dock Co v The Queen*¹⁷⁸⁷ where Estey J makes it clear that vicarious liability has no place in criminal law with regard to natural persons.

¹⁷⁸² “the walls of the aforesaid room made of bricks and mortar at the aforesaid time of imprisonment...in the same being very moist), and the room aforesaid being situated over the common sewer of the said prison... the room aforesaid was very unwholesome and greatly dangerous to the life of any person detained in the same”. (Ibid 519).

¹⁷⁸³ “Barnes assaulted, and carried by force the said Arne into the room, and kept him there against his consent”. (Ibid).

¹⁷⁸⁴ Ibid 521.

¹⁷⁸⁵ Ibid 522 -523.

¹⁷⁸⁶ “The British became the dominant force in Canada, so it is as much historical accident as intellectual narrowness that led us to develop our legal institutions, corporate and otherwise, around English models”

(Welling (note 971) 85.

¹⁷⁸⁷ *Canadian Dredge & Dock Co. v. The Queen* (note 216) 662.

In *R v Burt*¹⁷⁸⁸ the Saskatchewan Court of Appeals was faced with the question whether the owner of a motor vehicle could be held vicariously liable for offences committed by the driver of the vehicle. In question was section 253 of the Vehicle Act for the Province of Saskatchewan which states

The owner of a motor vehicle, tractor or trailer, other than a public service vehicle, is liable for violation of any provision of this Act in connection with the operation of the motor vehicle, tractor or trailer, unless he proves to the satisfaction of the provincial magistrate or justice of the peace trying the case that at the time of the offence the vehicle, tractor or trailer was not being operated by him, nor by any other person with his consent, express or implied.¹⁷⁸⁹

In giving judgment Bayda J identifies the doctrine in section 253 as vicarious liability.¹⁷⁹⁰ Bayda J goes on to trace the origin of the doctrine and explains that it is a law of tort doctrine which “virtually does not exist outside that sphere”.¹⁷⁹¹ He further points out that the distinguishing factor of vicarious liability is that a person is held vicariously liable without any investigation being made regarding that person’s fault in the matter.¹⁷⁹² Bayda J comes to the conclusion that vicarious liability is justifiable in tort law situations as it is compensatory in nature and is directed at the person who stands to benefit economically as a result of that person’s relationship with the wrongdoer.¹⁷⁹³ He then states that vicarious liability as imposed by section 253 is not justifiable as it is not compensatory in nature, but rather ‘regulatory and punitive’.¹⁷⁹⁴ Bayda J concludes that section 253 offends the principles of fundamental

¹⁷⁸⁸ *R v Burt* (1987), 38 C.C.C. (3d) 299 Sask. C.A.

¹⁷⁸⁹ *Ibid* 301.

¹⁷⁹⁰ “Section 253 makes the owner of the automobile automatically (with one exception) responsible for the wrongdoing of the driver solely on the basis of the owner-driver relationship. It is a case of pure vicarious liability”. (*Ibid* 305).

¹⁷⁹¹ *Ibid*.

¹⁷⁹² *Ibid* 306.

¹⁷⁹³ *Ibid* 309.

¹⁷⁹⁴ *Ibid* 309.

justice¹⁷⁹⁵ and is in contravention of section 7 of the Charter,¹⁷⁹⁶ however, he emphasizes the fact that his conclusion is only with regard to natural persons, thus leaving the question whether the same applies to corporations unanswered.

Bayda J points out that

In a Charter context, this statement of the law means that in the case of offences requiring *mens rea* the doctrine of vicarious liability has no place whatever amongst the principles of fundamental justice. That is so regardless of the penalty which a conviction for the offence may attract. The principles of fundamental justice simply do not recognize the ascribing to one person of another's state of mind. Accordingly, where a statute purports to make one person vicariously liable for another's *mens rea* offence the statute may be said to offend, ipso facto, the principles of fundamental justice.¹⁷⁹⁷

Bayda J provides a thorough discussion of vicarious liability which is clear and convincing and in his judgment he looks at works of Prof Atiyah as well as case law which dealt with vicarious liability previously.¹⁷⁹⁸ Roach criticizes vicarious liability by pointing out that ‘an offence that bases the accused’s liability on the acts and faults of another may be found to be an absolute liability offence that punishes the accused without fault’.¹⁷⁹⁹ He goes further to state that the person being held vicariously liable for the offence should not be sentenced to imprisonment.¹⁸⁰⁰

¹⁷⁹⁵ Ibid 311.

¹⁷⁹⁶ Ibid 313. This refers to the Canadian Charter of Rights and Freedoms. Section 1 of the Charter states that “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Section 7 of the Charter states that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. (Canadian Charter of Rights and Freedoms).

¹⁷⁹⁷ *R v Burt* (note 1788) 310 – 311.

¹⁷⁹⁸ Ibid 308 - 311.

¹⁷⁹⁹ Roach (note 310) 177.

¹⁸⁰⁰ Ibid.

Another criticism against vicarious liability is that where a crime has been committed, but fault is not attributed to a particular individual within the corporation, the corporation may end up not being held liable at all, despite the existence of corporate fault.¹⁸⁰¹

In spite of all the criticism leveled against the application of vicarious liability to criminal acts, vicarious liability is part of the history of corporate criminal liability and it has played an important role in the recognition and development of corporate criminal liability.

In applying vicarious liability to hold corporations liable for crimes committed by their employees it is important to ensure that the individual concerned must have acted within his or her scope of employment.¹⁸⁰² Acting within the scope of employment does not, however, mean that there must be instructions or even authorization to commit a particular act.¹⁸⁰³ Colvin states that “it is sufficient if the conduct falls within the area of operations that has been assigned and also perhaps has or is intended to have some benefit for the corporation”.¹⁸⁰⁴ In fact a corporation may still be held vicariously liable even in circumstances where it is clear that the employee in committing the offence had acted against clear instructions from the corporation.¹⁸⁰⁵ It must be noted though that “because vicarious liability does not require proof of personal fault on the part of the part of the master, it is only used in exceptional circumstances in Canadian penal law”.¹⁸⁰⁶

¹⁸⁰¹ Vicarious liability “is underinclusive because it is activated only through the criminal liability of some individual. Where offences require some form of fault, that fault must be present at the individual level. If it is not present at this level, there is no corporate liability regardless of the measure of corporate fault”. (Colvin (note 60) 8).

¹⁸⁰² Ibid 7.

¹⁸⁰³ Ibid.

¹⁸⁰⁴ Ibid.

¹⁸⁰⁵ Ibid 7 - 8.

¹⁸⁰⁶ Ferguson (note 165) 164.

(b) Primary Liability

As stated above, primary liability is in the form of absolute liability, strict liability and liability for *mens rea* offences.

(aa) Absolute Liability

Absolute liability occurs when a corporation is held liable for an offence simply due to the fact that the prohibited act has occurred.¹⁸⁰⁷ Absolute liability offences are also known as ‘no fault offences’.¹⁸⁰⁸ Absolute liability is found in regulatory offences.¹⁸⁰⁹ Absolute liability has been classified in *Canadian Dredge* as primary liability, where Estey J explains it in the following manner:

Where the legislature by the clearest intendment establishes an offence where liability arises instantly upon the breach of the statutory prohibition, no particular state of mind is a prerequisite to guilt. Corporations and individual persons stand on the same footing in the face of such a statutory offence. It is a case of automatic primary responsibility. Accordingly, there is no need to establish a rule for corporate liability nor a *rationale* therefor. The corporation is treated as a natural person.¹⁸¹⁰

A statute will simply state that the commission of a particular act consists in the commission of an act. Once that act is committed, the corporation will be held liable, without it being given the opportunity to defend itself by stating that the individual who committed the offence had no intention to do so, or by providing evidence that the corporation had taken reasonable steps

¹⁸⁰⁷ “As there is no defence of due diligence nor a requirement of *mens rea*, liability merely follows from the commission of the *actus reus* of the offence such that a corporation is liable for the acts of any employee who is acting on the corporation’s behalf”. (Hanna (note 201) 460).

¹⁸⁰⁸ *Ibid.*

¹⁸⁰⁹ “Regulatory offences frequently apply to corporations that have engaged in harmful conduct such as pollution, misleading advertising, or violations of health, safety or licensing requirements”. (Roach (note 310) 165).

¹⁸¹⁰ *Canadian Dredge & Dock Co. v R.*, (note 216) 251.

to avoid the commission of the offence.¹⁸¹¹ In *R v Sault Ste. Dickson J* makes it clear that with absolute liability offences it is not possible for the accused to escape liability by providing evidence that he or she was not at fault.¹⁸¹² Clearly the question of *mens rea* does not feature at all when it comes to absolute liability.¹⁸¹³

Since a corporation is guilty once it has been proven that there was an *actus reus*, the question arises as to how the *actus reus* of a corporation is established. Where an employee or an agent of the corporation has committed the *actus reus*, the corporation becomes liable. It is submitted that this creates a blur between vicarious liability and absolute liability, as the corporation is held liable without any fault on its part because a prohibited act has been committed by its employee or agent. This concern is echoed by Ferguson's conclusion that "notwithstanding the Supreme Court's claim that the corporation's liability is primary, it seems in fact to be more like vicarious liability".¹⁸¹⁴

Roach's criticism of absolute liability offences includes the fact that such offences are open to attack for being in contravention with section 7 of the Charter,¹⁸¹⁵ particularly where the penalty is imprisonment. Furthermore one of the criticisms against absolute liability that was referred to in *Sault Ste. Marie* is that absolute liability

¹⁸¹¹ "Absolute liability offences are sometimes referred to as 'no fault' offences. Once the Crown proves the *actus reus*, the accused will be found guilty even if the accused shows that he or she is free of any fault. The fact that the accused did not intend the harm and took all reasonable steps to avoid the harm is no defence". (Ferguson (note 165) 158).

¹⁸¹² *R v Sault Ste. Marie (City)* (note 1720) 374.

¹⁸¹³ "Under an appropriate statute (assuming it passes constitutional muster) one can be vicariously liable for the acts and the state of mind of another, whereas absolute liability excludes, by definition, state of mind as a consideration". (Hanna (note 201) 460).

¹⁸¹⁴ Ferguson (note 165) 165.

¹⁸¹⁵ Roach (note 310) 170.

“violates fundamental principles of penal liability. It also rests upon assumptions which have not been and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability”.¹⁸¹⁶

Ferguson points out that in practice, absolute liability offences are “few in number; they are only appropriate where the penalty is relatively trivial, where there is no real stigma attached to a conviction, and where requiring proof of fault would seriously impair enforcement procedures”.¹⁸¹⁷

(bb) Strict Liability

In *R v Sault Ste. Marie (City)*¹⁸¹⁸ strict liability offences are defined as

“Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused believed in the mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability”.¹⁸¹⁹

For a strict liability offence the prosecution will therefore succeed as long as it is able to prove the *actus reus* beyond reasonable doubt.¹⁸²⁰ The accused will, however, escape liability if he/she is able to prove due diligence or absence of negligence on a balance of probabilities.¹⁸²¹

Dickson J in *R v Sault Ste. Marie (City)* explains that the due diligence that is referred to when

¹⁸¹⁶ *R v Sault Ste. Marie (City)* (note 1720) 363.

¹⁸¹⁷ Ferguson (note 165) 165.

¹⁸¹⁸ *R v Sault Ste. Marie (City)* (note 1720).

¹⁸¹⁹ *Ibid* 374.

¹⁸²⁰ Roach (note 310) 172.

¹⁸²¹ Ferguson (note 165) 166.

discussing strict liability offences is the due diligence of the corporation itself,¹⁸²² ie that of the persons regarded as the directing mind of the corporation. He states that

‘the availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself’.¹⁸²³

In this way, the court also makes it clear that the corporation will be regarded as being at fault, not as a result of the application of vicarious liability, but rather based on the identification doctrine.¹⁸²⁴

It must be noted that the majority of statutory regulations are strict liability offences.¹⁸²⁵ Strict liability offences have played a role in the development of corporate criminal liability as they are concerned with both individual activities as well as business activities.¹⁸²⁶

In *Canadian Dredge & Dock Co. v R* it was made clear that one is found guilty of a strict liability offence once it is established that there was an *actus reus* and a defence of due diligence is not raised.¹⁸²⁷

¹⁸²² “Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused’s direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent the commission of the offence and by taking reasonable steps to ensure the effective operation of the system”. (*R v Sault Ste. Marie (City)* (note 1720) 377).

¹⁸²³ Ibid 377 – 378.

¹⁸²⁴ Ibid. In this regard Ferguson states that “the inquiry into whether the directing minds of the corporation have exercised due diligence is focused on whether the corporation ‘has established a proper system to prevent commission of the offence’ and has taken ‘reasonable steps to ensure the effective operation of the system’. This emphasis on systems and procedures is consistent with the idea that corporate fault can be found in a corporation’s organizational structure, culture and ethos”. (Ferguson (note 165) 168).

¹⁸²⁵ Ferguson (note 165) 166. “In 1978 the Supreme Court indicated that all regulatory offences would be presumed to be strict liability offences, unless there was a clear indication from the legislature that either absolute liability or subjective *mens rea* was intended”. (Roach (note 310) 172).

¹⁸²⁶ Ferguson (note 165) 166.

¹⁸²⁷ “Where the terminology employed by the legislature is such as to reveal an intent that guilt shall not be predicated upon the automatic breach of the statute but rather upon the establishment of the *actus reus*, subject to

(cc) ‘Real’ criminal liability for *mens rea* offences

Usually offences of *mens rea* are those that have “intention, knowledge or wilful recklessness” as an essential element.¹⁸²⁸ As mentioned above, Canadian courts at first rejected the idea of holding corporations vicariously liable for *mens rea* offences.¹⁸²⁹ A gradual acceptance of the fact that corporations are capable of being criminally liable for *mens rea* offences is seen in cases such as *R v Simington*¹⁸³⁰ and *R v Solloway*.¹⁸³¹ In both cases the judges assumed that corporations could be convicted for conspiracy to defraud, a crime having *mens rea* as an element.

*R v Fane Robinson Ltd*¹⁸³² was, however, the case that made a pronouncement that a corporation is capable of committing *mens rea* offences.¹⁸³³ The doctrine applied in *R v Fane Robinson* is a doctrine which identifies individuals holding senior positions in the corporation and regards their acts and faults as the acts and faults of the company.¹⁸³⁴ This doctrine is known as the identification doctrine or the *alter ego* doctrine. With regard to *mens rea* offences, ie where the element of fault has to be proven, the identification doctrine is the basis for liability.¹⁸³⁵

the defence of due diligence, an offence of strict liability arises”. (*Canadian Dredge & Dock Co. v R.* (note 216) 674).

¹⁸²⁸ Ferguson (note 165) 168.

¹⁸²⁹ “At common law a corporate entity could not generally be convicted of a criminal offence”. (*Canadian Dredge & Dock Co. v R.*, (note 216) 674).

¹⁸³⁰ *R v Simington* (1926) 45 C.C.C. 249.

¹⁸³¹ *R v Solloway* [1930] 2 W.W.R. 516, 54 C.C.C. 129.

¹⁸³² *R v Fane Robinson Ltd* (note 1644).

¹⁸³³ Ford JA states that “I find it difficult to see why a corporation which can enter into binding agreements with individuals and other corporations cannot be said to entertain *mens rea* when it enters into an agreement which is the gist of conspiracy, and if by its corporate act it can make a false pretence involving it in liability to pay damages for deceit why it cannot be said to have the capacity to make a representation involving criminal responsibility”. (Ibid para 20).

¹⁸³⁴ Roach (note 310) 178.

¹⁸³⁵ Macpherson (note 1650) 254.

The identification doctrine basically refers to the holding of a corporation criminally liable if, the person responsible for the criminal conduct is one who is regarded as the directing mind of the corporation.¹⁸³⁶ To be regarded as a directing mind of a corporation, one had to be a senior employee thereof.¹⁸³⁷ The identification doctrine is a doctrine derived from English law, which, as mentioned above, has greatly influenced Canadian law.¹⁸³⁸

In English law the common law application of the identification doctrine emanated from the English case of *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*¹⁸³⁹ Later on, the identification doctrine was explained by Lord Reid in *Tesco Supermarkets Ltd v Natrass*,¹⁸⁴⁰ and it basically states that a corporation ought to be held criminally liable for acts that were committed by the directing mind of the company. Lord Reid described the directing mind as follows:

“Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their function of management giving to their delegate full discretion to act independently of instructions from them”.¹⁸⁴¹

The essence of the identification doctrine is that a corporation will be held criminally liable only if the crime has been committed by senior personnel, who are regarded as people who

¹⁸³⁶ Bittle and Snider (note 1640) 475.

¹⁸³⁷ Ibid.

¹⁸³⁸ This can be seen in the constant citation of English cases by Canadian judges. For instance in *Union Colliery Co. v The Queen* (note 1644) 84 the judge not only cites, but bases his decision on Lord Denman C.J.'s pronouncements in the 1846 English case of *Regina v. The Great North of England Railway Co.* (note 164).

¹⁸³⁹ *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*, (note 234).

¹⁸⁴⁰ *Tesco Supermarkets Ltd v Natrass* (note 249).

¹⁸⁴¹ Ibid 171.

represent the will of the corporation.¹⁸⁴² The identification doctrine entails identifying such directing minds and in cases where they could not be identified, corporations could escape liability. The identification doctrine came into being as a result of the fact that there was a need for corporations to be held liable for *mens rea* offences.¹⁸⁴³ Roach makes it clear that when basing liability on the identification doctrine ‘the wrongful action of the directing mind is attributed to the corporation so that the corporation has primary, not vicarious liability for the acts and mind of an official who is the directing mind of the corporation’.¹⁸⁴⁴

The application of the identification doctrine in Canadian corporate criminal liability was, at first similar to that of the English law.¹⁸⁴⁵ In *R v St. Lawrence Corp Ltd*¹⁸⁴⁶ the identification doctrine was applied successfully and an agent who played such an important role in the corporation and whose portfolio put him in a position where he was literally the directing mind of the corporation, the conduct and intent of such a person are indeed the conduct and intent of the corporation itself.¹⁸⁴⁷ This is the case if such a person’s conduct falls within the scope of his / her express or implied authority.¹⁸⁴⁸

¹⁸⁴² Ramraj points out that the “corporation cannot act but through natural persons; it is their desires, intentions and purpose that are deemed to be those of the corporation”. (V Ramraj ‘Disentangling Corporate Criminal Liability and Individual Rights’ (2001 - 2002) 45 *Criminal Law Quarterly* 29, 47).

¹⁸⁴³ “There is said to be on this theory no responsibility through vicarious liability or any other form of agency, but rather a liability arising in criminal law by reason of the single identity wherein is combined the legal entity and the natural person; in short, a primary liability. This rule stands in the middle of the range or spectrum. It is but a legal fiction invented for pragmatic reasons”. (*Canadian Dredge & Dock Co. v R.* (note 216) 675). See also Ferguson (note 165) 168.

¹⁸⁴⁴ Roach (note 310) 178.

¹⁸⁴⁵ Some examples of application of identification doctrine in Canada are *R v Fane Robinson* (note 1644) *R v St. Lawrence Corp Ltd* [1969] 3 C.C.C. 263, 281, 7 C.R.N.S. 265, 272 – 273; *R v Waterloo Mercury Sales Ltd* (1974), 18 C.C.C. (2d) 248, 27 C.R.N.S. 55, [1974] 4 W.W.R. 516 (Alta. Dist. Ct.); *R v Syncrude Canada Ltd* [1984] 1 W.W.R. 355, 48 A.R. 368, 28 Alta.L.R. [2d] 233[Q.B.].

¹⁸⁴⁶ *R v St. Lawrence Corp Ltd* (note 1845).

¹⁸⁴⁷ *Ibid* 272 - 273.

¹⁸⁴⁸ *Ibid*.

In the case of *R v Waterloo Mercury Sales Ltd*¹⁸⁴⁹ a corporation was faced with fraud charges arising from the fact that its car sales manager who had odometers tampered with on used cars before selling them.¹⁸⁵⁰ The court had to answer the question whether the corporation could be held criminally responsible for crimes committed by its used car sales manager, provided that he was acting within the scope of his employment.¹⁸⁵¹ The court in finding the corporation liable for the crimes committed by the corporation's used car salesman stated that '...it was the policy of the accused corporation to delegate to him 'the sole active and directing will' of the corporation in all matters relating to the used car operation of the company, and as such he was the its directing mind and will. His actions and intent were those of the accused itself and his conduct renders the company criminally liable.'¹⁸⁵²

The Ontario Supreme Court in *R v Amway Corp* was faced with the prosecution of two related corporate defendants, whose chairman of Board of Directors and President, held the same positions in both corporations.¹⁸⁵³ The corporations were found guilty of having defrauded the Canadian government by means of false presentations and submissions of false invoices and price lists to the Department of National Revenue.¹⁸⁵⁴ Evans C.J.O. referred to the two individuals in the following manner: 'They were either directly or indirectly one might call joint owners of the two corporations and they were certainly the directing mind and policy-makers and exercised control over these companies'.¹⁸⁵⁵

¹⁸⁴⁹ *R v Waterloo Mercury Sales Ltd* (note 1845) 248.

¹⁸⁵⁰ *Ibid.*

¹⁸⁵¹ *Ibid* 250.

¹⁸⁵² *Ibid* 254.

¹⁸⁵³ *R v Amway Corp* [1982] O.J. No. 3129, par 3.

¹⁸⁵⁴ *Ibid* Par 4.

¹⁸⁵⁵ *Ibid* Par 3.

In *R v Syncrude*¹⁸⁵⁶ a corporation was charged with criminal negligence causing death. This was as a result of the deaths of two workers employed by an independent contractor who had been killed by nitrogen gas when they entered a reactor vessel at the corporation's plant where they were carrying out repairs. The identification doctrine was applied, but not successfully as the court acquitted the corporation. *In casu* the people responsible for issuing safe working permits were alleged to be the directing mind and will of the corporation. Agrios J questioned whether those individuals played such an important role in the corporation that they could be considered as its directing mind and will, in such a way that their conduct and intentions ought to be regarded as the conduct and intentions of the corporation.¹⁸⁵⁷ He then came to the conclusion that he could not "find that in a company with 4000 employees, permit issuers, albeit they have the authority to implement safety procedures, can be considered the directing mind and will of the corporation, the *alter ego* of the corporation".¹⁸⁵⁸

(c) *Canadian Dredge & Dock Co. v R*

In the leading case on the identification doctrine in Canada Estey in *Canadian Dredge & Dock Co. v R* refers to the identification doctrine as a

median rule whereby the criminal conduct, including the state of mind, of employees and agents of the corporation is attributed to the corporation so as to render the corporation criminally liable so long as the employee or agent in question is of such a position in the organization and activity of the corporation that he or she represents its *de facto* directing mind, will, centre, brain area or ego so that the corporation is identified with the act of that individual.¹⁸⁵⁹

¹⁸⁵⁶ *R v Syncrude Canada Ltd.* (note 1845).

¹⁸⁵⁷ *Ibid* 250.

¹⁸⁵⁸ *Ibid.*

¹⁸⁵⁹ *Canadian Dredge & Dock Co. v R.* (note 216) 675.

In this case, Estey J provided an explanation of the identification doctrine. This explanation extended the notion of the directing mind beyond the board of company directors. In *Canadian Dredge & Dock Co. v R* Estey J's interpretation of the identification doctrine is not the same as that found in English law. *Canadian Dredge & Dock Co. v R* is a case that brought changes to the identification doctrine as the basis of liability for corporate criminal liability in Canada.¹⁸⁶⁰ Basically Estey J endorsed the idea of a directing mind, as expressed in *Tesco Supermarket*, however he disagreed with idea of having a single directing mind.¹⁸⁶¹ Instead of the single directing mind Estey developed the identification doctrine so that it allows for "multiple directing minds".¹⁸⁶²

In Canada the application of the identification doctrine entails the holding of a corporation 'liable only for the acts and omissions of such persons who by reason of their relevant position or authority in the corporation may be said to constitute a 'directing mind' of the corporation, including all those to whom 'governing executive authority' has been delegated'.¹⁸⁶³

Below is a discussion of some of the significant points raised by the Supreme Court in this leading case on the identification doctrine in Canadian law:

The case dealt with an appeal by four appellants,¹⁸⁶⁴ all of whom were companies that had been convicted in terms of sections 338(1) and 423(1)(d) of the *Criminal Code*. The identification doctrine was a central issue in this case, particularly the question whether a corporation could

¹⁸⁶⁰ *Ibid.*

¹⁸⁶¹ Colvin (note 60) 10.

¹⁸⁶² Archibald *et al.* (note 1648) 371.

¹⁸⁶³ Goetz (note 1737) 2.

¹⁸⁶⁴ The appellants were Canadian Dredge & Dock Company; Marine Industries Limited; the J.P. Porter Company Limited and the Richelieu Dredging Corporation Inc.

face criminal liability for a *mens rea* offence on the basis of the identification theory.¹⁸⁶⁵ The appellants claimed that the corporations could not be held liable as the people whose action the corporations were held liable for ‘(1) were acting in fraud of the appellant-employers, (2) were acting throughout for their own benefit, or (3) were acting contrary to instructions and hence outside of the scope of their employment with the appellants’.¹⁸⁶⁶

Estey J refers to several English law cases in which the identification doctrine was applied or endorsed. He states that ‘the identification theory was inspired in the common law in order to find some pragmatic, acceptable middle ground which would see a corporation under the umbrella of the criminal law of the community but which would not saddle the corporation with the criminal wrongs of all its employees and agents’.¹⁸⁶⁷

In dismissing the appeals, Estey J made observations and remarks that changed the face of corporate criminal liability in Canadian law. Apart from providing a classification of the offences as recognized by Canadian law (absolute liability offences, offences of strict liability and offences requiring *mens rea*) the court accepted the identification doctrine as

...a court-adopted principle put in place for the purpose of including the corporation in the pattern of criminal law in a rational relationship to that of the natural person. The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation.¹⁸⁶⁸

¹⁸⁶⁵ *Canadian Dredge & Dock Co. v R.* (note 216) 670.

¹⁸⁶⁶ *Ibid* 662.

¹⁸⁶⁷ *Ibid* 701.

¹⁸⁶⁸ *Ibid* 693.

In *Canadian Dredge & Dock Co. v R.*,¹⁸⁶⁹ the Supreme Court therefore embraced the identification doctrine. The identification doctrine as adopted in Canada basically meant that a person's guilt would be imputed to the corporation only if that person is the directing mind of the corporation.¹⁸⁷⁰ One was regarded as a directing mind only if a specific department or unit was the responsibility of that particular person and if the corporation benefitted from the crime.¹⁸⁷¹

The court, however, did not interpret the identification doctrine in the same way as the English Court in *Tesco Supermarkets*.¹⁸⁷² Estey provided an interpretation of the identification doctrine that was peculiar to Canada¹⁸⁷³ - an interpretation that did not accept the idea that 'a corporation necessarily has a single directing mind, wielding centralized authority'.¹⁸⁷⁴ According to Justice Estey

"A corporation may... have more than one directing mind. This must be particularly so in a country such as Canada where corporate operations are frequently geographically widespread. The transportation companies, for example, must of necessity operate by the delegation and sub-delegation of authority from the corporate centre; by the division and subdivision of the corporate brain; and by decentralizing by delegation the guiding forces in the corporate undertaking. The application of the identification rule in *Tesco*... may not accord with the realities of life in our country, however appropriate we may find to be the enunciation of the abstract principles of law there made".¹⁸⁷⁵

¹⁸⁶⁹ Ibid

¹⁸⁷⁰ Ramraj (note 1842) 47, who further states that "the corporation cannot act but through natural persons; it is their desires, intentions and purposes that are deemed to be those of the corporation".

¹⁸⁷¹ Bittle & Snider (note 1642) 475.

¹⁸⁷² *Tesco Supermarkets, Ltd v Natrass* (note 249).

¹⁸⁷³ *Canadian Dredge & Dock Co.* (note 216).

¹⁸⁷⁴ Colvin (note 60) 10.

¹⁸⁷⁵ *Canadian Dredge & Dock Co. v R* (note 216) 693; Colvin (note 60) 11;

In contrast with the English identification doctrine, the interpretation of the doctrine in Canadian *Dredge* takes away the obstacle of identifying a particular individual as the directing mind of the corporation. It allows more than one person to be regarded as the directing mind of the corporation. The broader interpretation of the identification doctrine also meant that in Canada even though the directing mind still has to be a senior person, the directing mind did not necessarily have to be in top management.¹⁸⁷⁶ Even the actions or omissions of people in lower management positions could be regarded as acts or omissions of the corporation.¹⁸⁷⁷ This is a marked difference from the identification theory in English law, which requires that the directing mind be located at the senior management level.¹⁸⁷⁸

Another major difference between the application of the identification doctrine in English law and in Canadian law is the fact that under Canadian law where the ‘directing mind’ of the corporation acted with the aim of defrauding the corporation, the corporation escaped liability.

“Where the directing mind conceives and designs a plan and then executes it whereby the corporation is intentionally defrauded, and when this is the substantial part of the regular activities of the directing mind in his office, then it is unrealistic in the extreme to consider that the manager is the directing mind of the corporation. His entire energies are, in such a case, directed to the destruction of the undertaking of the corporation. When he crosses that line he ceases to be the directing mind and the doctrine of identification ceases to operate”.¹⁸⁷⁹

¹⁸⁷⁶ “The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation”. (*Canadian Dredge & Dock Co. v R.*, (note 216) 693).

¹⁸⁷⁷ “The directing mind does not have to be the corporate president, but it does have to be a manager with responsibility for the corporate activities that result in the crime”. Roach (note 310) 15.

¹⁸⁷⁸ “The difference between the Canadian and English identification theory is that Canadian courts are apparently prepared to locate the directing mind at a lower level in the corporation than are the English courts”. (Ferguson (note 165) 164).

¹⁸⁷⁹ *Canadian Dredge & Dock Co. v R.* (note 216) 713.

It is submitted that the reasoning of the judge is correct as it would be unjust to hold the corporation liable in a situation where it has been defrauded. In line with Roach's view, in such a case the corporation itself "would be the victim of the crime"¹⁸⁸⁰ indeed.

The court also stated that the corporation will only be held liable for the actions or omissions of a person regarded as the 'directing mind', if such action / omission occurred with the intention to benefit the corporation.¹⁸⁸¹ It is also commendable to provide clarity regarding this, as it would not be in line with the concept of corporate criminal liability to hold a corporation criminally liable when it was clearly not the intended beneficiary of the crime. Where the actions of the directing mind are for his own exclusive benefit, the identification doctrine is not applicable.¹⁸⁸² As Colvin states "the Supreme Court of Canada took the view that the identification doctrine made no sense without some link either by design or by result with a benefit for the corporation".¹⁸⁸³

In conclusion Estey J stated that in his opinion

'the identification doctrine only operates where the crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company'.¹⁸⁸⁴

¹⁸⁸⁰ Roach (note 310) 178.

¹⁸⁸¹ "Where the criminal act is ... intended to and does result in benefit exclusively to the employee-manager, the employee directing mind, from the outset of the design and execution of the criminal plan, ceases to be a directing mind of the corporation and consequently his acts could not be attributed to the corporation under the identification doctrine". (*Canadian Dredge & Dock Co. v R.* (note 216) 713).

¹⁸⁸² Stessens (note 52) 515

¹⁸⁸³ Colvin (note 60) 27 - 28;

¹⁸⁸⁴ *Canadian Dredge & Dock v R.*, (note 216) 713 - 714.

Canadian Dredge & Dock Co. v R played an important role in the development of corporate criminal liability in Canada. Apart from providing clarity regarding primary and vicarious liability, it provides a wider interpretation of the identification doctrine. In this interpretation we see the net of individuals who are regarded as directing minds being cast further than it had been previously. It is made clear that a corporation does not necessarily have only one directing mind, there may be more. In this regard, it has been stated that ‘Estey J contemplated the Canadian reality that a company might have multiple directing minds’.¹⁸⁸⁵ This extension provided the possibility of making it easier to prosecute and convict large corporations whose structures are more complicated or sophisticated. Clarity regarding situations where the corporation is defrauded by its directing mind and where the benefit of the crime is derived solely by that individual, is also a welcomed development, as it would eliminate the absurdity of having corporations who are victims of crimes being held liable for those particular crimes.

(d) Difficulties posed by the identification principle and the road towards reform

As a result of the decision in *Canadian Dredge and Dock* the identification doctrine in Canada was made broader¹⁸⁸⁶ in that it allowed for more than one individual to be regarded as the directing mind of the corporation. Moreover, the directing mind of the corporation did not necessarily have to belong to top management in the corporation. In cases that followed *Canadian Dredge and Dock*, however, this broad interpretation was not always applied. Instead the broader interpretation that came from *Canadian Dredge and Dock* was limited by the courts. For instance in *The Rhone v The Peter A.B. Widener*,¹⁸⁸⁷ a case dealing with the collision

¹⁸⁸⁵ Archibald *et al.* (note 1648) 371 who further state that “the modern and frequently multinational corporation has indeed evolved beyond geographic multiple minds to add a series of decision making layers”.

¹⁸⁸⁶ “Canadian courts have tended to define the directing mind of the corporation more broadly than English courts, in part because of the decentralized nature of much corporate activity in Canada”. (Roach (note 310) 179).

¹⁸⁸⁷ *The Rhone v The Peter A.B. Widener* (note 1644) 497.

of a tug boat and a ship, Iacobucci J refers to what Estey said in *Canadian Dredge and Dock*¹⁸⁸⁸ with regard to the fact that in applying the identification doctrine it must be determined whether the person being regarded as the directing mind of the corporation has, through the scope and authority of his/her work been given ‘governing executive authority’ of the corporation and provides an explanation of the term ‘governing executive authority’ by stating:

“That one must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity”.¹⁸⁸⁹

Accordingly, a person who plays an active role in formulating company policies has “governing executive authority” and is regarded as the mind and will of the corporation.¹⁸⁹⁰ This is in contrast to a person who, after policies have been made, is in charge of the implementation thereof.¹⁸⁹¹ Such a person does not have “governing executive authority” and can therefore not be regarded as the directing mind / will of the corporation.¹⁸⁹²

Another important aspect of Iacobucci J’s explanation of “governing executive authority” is the fact that he does not refer to the general exercising of such authority. He speaks of the “decision-making power **in a relevant sphere** of corporate activity”.¹⁸⁹³ A person may

¹⁸⁸⁸ “As Estey J.’s reasons demonstrate, the focus of inquiry must be whether the impugned individual has been delegated the ‘governing executive authority’ of the company within the scope of his or her authority”. (Ibid 520 – 521).

¹⁸⁸⁹ Ibid 521.

¹⁸⁹⁰ As Iacobucci puts it:

“The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis”. Ibid 526.

¹⁸⁹¹ Ibid.

¹⁸⁹² MacPherson (note 1650) 255.

¹⁸⁹³ *The Rhone v The Peter A.B. Widener* (note 1644) 521.

therefore have such authority when it comes to certain activities and not have it when it comes to others.¹⁸⁹⁴ Where the person had governing executive authority, the corporation will be held liable. Where the person did not have ‘governing executive authority’ the company would not be held liable, however, such individual would face prosecution.¹⁸⁹⁵ MacPherson provides an interesting example in which he explains this.¹⁸⁹⁶

In *R v Safety-Kleen Canada Inc*¹⁸⁹⁷ the Ontario Court of Appeal applied *The Rhone*, however, in *R v Church of Scientology*¹⁸⁹⁸ the decision in *The Rhone* was not applied by another panel of the Ontario Court of Appeal. In *R v Safety-Kleen Canada Inc* an appeal was heard against a conviction of a corporation on two counts: non-compliance with regulations and the falsification of documents and the latter was a *mens rea* offence. Both the corporation had been charged together with the employee who had committed the offence, Paul Howard.¹⁸⁹⁹ The corporation operated waste oil collection trucks as well as transfer stations. The charges emanated from an event where Mr Howard transferred waste from a broken-down truck owned by a third party to the corporation’s truck.¹⁹⁰⁰ Regulations in this industry must be strictly adhered to and both Mr Howard and the driver of the other truck had full knowledge of that,

¹⁸⁹⁴ MacPherson (note 1652) 255.

¹⁸⁹⁵ *Ibid.*

¹⁸⁹⁶ Macpherson states:

“For example, assume that a fraud is perpetrated against a third party by the vice-president of marketing, using the corporation’s advertising department to line both the company coffers and his own pockets. The corporation will be liable, provided the vice-president for marketing sets policies for the advertising department (which he / she presumably would). The company would be criminally liable in addition to the human perpetrators of the fraud. If, however, the vice-president of research and development perpetrated the same fraud using the advertising department, it is unlikely that the corporation would be liable. The vice-president of research and development generally does not set corporate policy with respect to advertising. Since the vice-president of research and development is only a directing mind for the areas where he or she has the discretion to set policy, and the fraud related to the advertising department, the corporation would not be liable for the actions of the vice-president research and development. However this does not prevent the individuals responsible for carrying out the fraud from potentially being convicted”. (MacPherson (note 1650) 255).

¹⁸⁹⁷ *R v Safety-Kleen Canada Inc* (1997), 114 C.C.C. (3d) 214 (Ont.C.A.).

¹⁸⁹⁸ *R v Church of Scientology* (note 1720).

¹⁸⁹⁹ *R v Safety-Kleen Canada Inc* (note 1897) par 1.

¹⁹⁰⁰ *Ibid.*

however they chose not to.¹⁹⁰¹ Apart from not complying with the regulations, Mr Howard falsified information on the official document concerning the transfer.¹⁹⁰² In applying the decision in *The Rhone*, Doherty JA stated that:

“I find no evidence, however, that he had authority to devise or develop corporate policy or make corporate decisions which went beyond those arising out of the transfer and transportation of waste. In my opinion, Mr. Howard's position is much like that of the tugboat captain in *The Rhône, supra*. Both had extensive responsibilities and discretion, but neither had the power to design and supervise the implementation of corporate policy. The majority of the Supreme Court of Canada concluded that the captain was not a directing mind of his corporate employer. I reach the same conclusion with respect to Mr. Howard”.¹⁹⁰³

In *R v Church of Scientology* the Guardian’s Office of the church had planted some of the members of the church as employees in government agencies that had been identified by the church as “enemies of the church”, so that they could steal documents, thus breaching “their oath of office”.¹⁹⁰⁴ The church was prosecuted and convicted in the court *a quo*. The appeal was dismissed in the appeal court, which applied the identification doctrine. On appeal it was argued that the applicable law was the one stated in *The Rhone*.¹⁹⁰⁵ The court did not accept

¹⁹⁰¹ “Both men knew that they needed verbal authorization from the Ministry of the Environment to do so. They also knew that the transfer required a new manifest complete with a new generator number. After one attempt to contact the Ministry proved unsuccessful, Mr Corcoran and Mr Howard went ahead without authorization and transferred the waste water into Mr Howard's truck”. (Ibid para 6).

¹⁹⁰² “Mr Howard immediately completed Part C of the original manifest showing that the waste water had been received at the appellant's transfer site in Trenton at 2:30 p.m. This was patently false. In fact the waste water was transferred at Mr Corcoran's garage at about 9:30 a.m.”. (Ibid par 6).

¹⁹⁰³ Ibid par 14.

¹⁹⁰⁴ *R v Church of Scientology* (note 1720).

¹⁹⁰⁵ *The Rhone v The Peter A.B. Widener* (note 1644). “The corporate appellant argues that even if the identification doctrine applies to it, the trial judge failed to direct the jury properly on the doctrine as it is now understood in light of the Supreme Court's decision, after the trial in this case, in “*Rhone*” (*The*) v. “*Peter A.B. Widener*” (*The*). In fact, the appellant submits that based on the law as enunciated by Iacobucci J. in “*Rhone*” (*The*), there was no evidence upon which the appellant could be convicted”. (*R v Church of Scientology* (note 1720) par 225).

this argument and decided that the decision in *The Rhone* was not applicable *in casu*, mainly because the structure of the church differs from that which was referred to in *The Rhone*, where there is a board of directors which holds the “ultimate executive authority”.¹⁹⁰⁶

Despite the changes brought about by *Canadian Dredge* to the identification principle in Canada, it became increasingly clear that the identification doctrine was not the most ideal basis of liability, due to its failure to “reflect the reality of the internal dynamics of corporations, particularly in the case of larger corporations”.¹⁹⁰⁷ Moreover the identification doctrine as a basis for liability proved to be dissatisfactory in that

“It is only the misconduct of those who are relatively high up in the corporate structure that can cause the corporation to be criminally liable, because generally only executives have the discretion to set corporate policy. Middle managers do not usually set policy; rather, they are the instrument to implement the policy set by others. This means that at common law the corporation is generally immune from criminal sanction for the actions of mid- to low-level managers and other employees”.¹⁹⁰⁸

In this regard, Bittle and Snider point out that the identification doctrine is specifically aimed at people in senior positions in the corporations.¹⁹⁰⁹ This posed a challenge when it came to prosecutions as even though the senior people make policy decisions in doing so they may

¹⁹⁰⁶ “In my view, the decision of the Supreme Court of Canada in *“Rhone” (The)* did not apply to this case, and the trial judge properly directed the jury with respect to corporate criminal liability. The discussions by Iacobucci J. in *“Rhone” (The)* and Estey J. in *R.* are premised on a corporate structure in which ultimate executive authority lies with the board of directors. The identification doctrine renders the corporation liable as a result of the acts, in addition to those of the board of directors, of those persons to whom the board has expressly or impliedly delegated executive authority. That, however, was not this case. The Church operated in the context of a rigid command structure in which the board of directors was irrelevant. The board of directors did not appoint, much less delegate to, the senior officials of the Church. In fact, the members of the board were themselves required to sign undated letters of resignation. The evidence is clear that the appellant's board of directors had no executive authority. Thus, it is beside the point to attempt to apply principles relating to the degree of delegation of that authority”. (Ibid par 227).

¹⁹⁰⁷ Goetz (note 1735) 2.

¹⁹⁰⁸ Macpherson (note 1650) 255.

¹⁹⁰⁹ Bittle & Snider (note 1640) 475.

“create or contribute to a corporate environment where subordinate managers, supervisors and employees feel encouraged or even compelled to cut corners on health and safety matters, even in the face of legal prohibitions or official corporate policy”.¹⁹¹⁰ After all, it is normally corporate officers in lower management levels who are faced with the actual task of “interpreting company policies”.¹⁹¹¹ Roach warns that following the interpretation that only actions of senior persons will lead to the criminal liability of a company, may result in it being virtually impossible to hold corporations responsible for crimes committed by them.¹⁹¹² In practice, these senior people are usually far removed from actual day to day operations of the company and play no role in the actual implementation or failure to implement company policy and in making decisions that may result in death or injury or other violations of occupational health and safety rules.¹⁹¹³

Bittle & Snider further state that at times it was extremely difficult to identify the senior employees responsible for crimes committed.¹⁹¹⁴ Moreover, Colvin points out further criticism of the doctrine of identification by stating that ‘it distorts the allocation of liability as between large and small corporations’ in that there are many decisions that are made at levels other than the high level of management and applying the identification doctrine restrictively results in corporations escaping liability.¹⁹¹⁵ The identification doctrine thus found itself being criticized

¹⁹¹⁰ Goetz (note 1735) 2.

¹⁹¹¹ Bittle & Snider (note 1640) 475.

¹⁹¹² “This trend may make it difficult to hold corporations criminally accountable for crimes committed in Canada. The designers and even the supervisors of corporate policies in a large and economically dependent country such as Canada may often be so far away from the criminal acts that take place under the corporate aegis that they may not have the *mens rea* required for the particular crime. Those closer to the ground who would have the required fault, may not be classified as directing minds because they do not design or supervise the implementation of corporate policy”. Roach (note 310) 170.

¹⁹¹³ Goetz (note 1735) 2.

¹⁹¹⁴ Bittle & Snider (note 1640) 475.

¹⁹¹⁵ “Many important decisions in large corporations are taken at the level of branches or units”. (Colvin (note 60) 15.

for hampering prosecutions against large corporations¹⁹¹⁶ and as a result of this and the other criticisms mentioned above, calls were made for the identification doctrine to be replaced by a more flexible approach.¹⁹¹⁷

In view of the criticism against the strict application of the identification doctrine as well as the failure of prosecutions against some of the corporations that had committed crimes, it became clear that change was inevitable. The Law Commission made proposals in 1987 for an identification doctrine that would be of broader application.

(e) The 1987 proposals / recommendations of the Law Reform Commission of Canada

In 1987 the Law Reform Commission made recommendations for broadening the application of the identification doctrine. These recommendations are contained in the Law Reform Commission of Canada, *Recodifying Criminal law*, Report No. 31.¹⁹¹⁸ The Commission made two recommendations for the improvement of corporate criminal liability in Canada. The first recommendation entailed continuing with the application of the identification doctrine, but making it broader. This recommendation, if effected, would result in the broadening of corporate criminal liability in such a way that the liability of the corporation could be triggered by ‘directors, officers or employees acting within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy’.¹⁹¹⁹ This would expand the group of people whose unlawful acts could lead to the corporation being held criminally liable.

¹⁹¹⁶ “Increasingly vocal critics argued that this legislation obviously failed to ‘reflect the reality or complexity of corporate decision-making in large, modern companies’”. (Bittle & Snider (note 1640) 475. Ferguson states that “the organizational and command structure and complexity of corporations is so varied between small corporations and multinational corporations that a certain degree of flexibility is essential in both the wording and the application of the identification theory”. (Ferguson (note 165) 177).

¹⁹¹⁷ Roach (note 300) 180. “Given the internal behavioural dynamics of corporations, it is argued that the criminal law must look beyond the discrete, wrongful conduct of individuals”. (Goetz (note 1735) 2).

¹⁹¹⁸ Law Reform Commission of Canada, *Recodifying Criminal law*, Report No. 31, (rev. & enl. Ed 1987).

¹⁹¹⁹ Bittle and Snider (note 1640) 475; Goetz (note 1735) 2.

The second recommendation was an alternative approach to corporate criminal liability. Where the offence was one of negligence, it was proposed that even where the individual who acted negligently is not held liable, the corporation should still be held liable for that negligent act of that individual.¹⁹²⁰ It was a proposal to move ‘away from the identification doctrine toward a finding of corporate fault in its own right’.¹⁹²¹ The Commission was in fact proposing the application of the doctrine of aggregation when it comes to the attribution of corporate criminal liability, and this was intended for all crimes.¹⁹²²

The Law Reform Commission of Canada also made a recommendation that corporate criminal liability in Canada should be made a strict liability offence.¹⁹²³ These recommendations were not, however, carried forth as “political will was lacking”.¹⁹²⁴

(f) 1993 Government White Paper by the Minister of Justice

The 1993 Government White Paper by the Minister of Justice¹⁹²⁵ was a federal government proposal for recodifying criminal law.¹⁹²⁶ It included a proposal “to codify a definition of corporate criminal liability”.¹⁹²⁷ This proposal is in section 22 of the White Paper which states:

A corporation commits a *mens rea* offence if

- (a) One or more of its representatives, acting under its express, implied or apparent authority, do or make, individually or collectively, the act or omission specified in the

¹⁹²⁰ Colvin (note 60) 13; Where negligence is an element of the crime, “the relevant actions and states of mind of all such employees with the requisite authority could be aggregated for the purposes of fixing liability on the corporation. In other words, it would not be necessary for any individual to have committed the offence for the corporation to be guilty”. (Goetz (note 1735) 2 – 3).

¹⁹²¹ Colvin (note 60) 13.

¹⁹²² Goetz (note 1735) 3.

¹⁹²³ Bittle & Snider (note 1640) 475.

¹⁹²⁴ Ibid.

¹⁹²⁵ 1993 Government White Paper by the Minister of Justice.

¹⁹²⁶ Ferguson (note 165) 179.

¹⁹²⁷ Ibid.

description of the offence, and

(b) One or more of its representatives

- (i) knows that the occurrence described in paragraph (a) is taking place, has taken place, might take place or will take place;
- (ii) has its express or implied authority to direct, manage or control its activities in the area concerned; and
- (iii) has, while executing that authority, the state of mind required for the commission of the offence,

Whether **or** not the representatives referred to in paragraph (a) and those referred to in paragraph (b) are the same person or persons, whether or not any of them is identified, and whether or not any of them has been prosecuted for or convicted of that offence.¹⁹²⁸

In essence in the White Paper the Minister of Justice made a recommendation to Parliament that criminal liability should be attributed to corporations for ‘the acts and omissions of any of its **‘representatives’** while acting under the corporation’s express, implied or apparent authority’.¹⁹²⁹ The term ‘representative’ is defined as “including a director, officer, employee, member or agent”.¹⁹³⁰ The term ‘corporation’ is defined as including “a public body, body corporate, society, company, partnership and trade union”.¹⁹³¹

Proposals contained in the White Paper advance a basis for liability which is broader than vicarious liability and which is also not limited in its application, as the identification doctrine is.¹⁹³² The proposal provides for the liability of the corporation even in situations where traditionally, the corporation would not be held liable. There is a recognition that the

¹⁹²⁸ Government White Paper (note 1925) section 22 of the White Paper; Ferguson (note 165) 179.

¹⁹²⁹ Goetz (note 1735) 3.

¹⁹³⁰ Ferguson (note 165) 179.

¹⁹³¹ *Ibid.*

¹⁹³² *Ibid.*

corporation should be held criminally liable even where the crime committed has been committed by individuals other than those high up in the corporation.¹⁹³³ From the proposal, it is clear that there is a recognition that “the directing mind who has the *mens rea* for an offence does not have to be the person who physically committed the offence”.¹⁹³⁴

Similar to the 1987 Law Commission Recommendation, the White Paper contained proposals for the further development of corporate criminal liability in a way that would make it possible to cast the net wider as restrictions imposed by vicarious liability and by the identification doctrine would be reduced or removed. In both cases there was a move away from the ‘directing mind’ of the corporation. Moreover, like the 1987 Law Commission Recommendation, the White Paper made a clear distinction between crimes of negligence and those of intent / recklessness. For negligence they both suggested the aggregation theory. With regard to crimes of intent or recklessness the proposal in the White Paper was ‘the aggregation of representatives’ conduct only with respect to the attribution of the *actus reus*, or the guilty physical act or omission forming the basis of the offence. The requisite intent would actually have to be formed by one or more corporate representatives acting within their area of corporate authority’.¹⁹³⁵

In addition to that, it was proposed that corporate criminal liability be broadened in such a way that it includes entities, other than corporations, e.g. partnerships, limited partnerships and trade unions.¹⁹³⁶

¹⁹³³ “Corporate criminal liability can be imposed provided the *actus reus* and *mens rea* are proven, even if the Crown cannot establish which specific employees or agents in the corporation committed the *actus reus* and *mens rea*”. (Ibid).

¹⁹³⁴ Ibid.

¹⁹³⁵ Goetz (note 1735) 3.

¹⁹³⁶ Ibid.

Proposals in the White Paper drew criticism from the corporate sector, particularly for “allowing corporate criminal liability without actual corporate knowledge and through the artificial aggregation of the acts and knowledge of various individuals”.¹⁹³⁷ Unfortunately, similar to the 1987 Law Commission Recommendation the proposals contained in the White Paper did not result in any action on the part of the government.¹⁹³⁸ The proposals in the White Paper came ten years before the amendment of the Criminal Code and even though they were ignored, they paved the way for reform.

(g) The Westray Disaster and the Parliamentary Sub-committee of the Standing Committee on Justice and Human Rights, 1994

Unfortunately, as was the case in England, it took a disaster for the Canadian government to realize that there was a need for the reform of corporate criminal liability in Canada.¹⁹³⁹ This disaster was the 9 May 1992 deaths of 26 miners in Westray. The mine, which belonged to a mining company called Curragh Resources, had been opened eight months prior to the disaster, and at the time of its official opening it had been seen as a ray of hope in terms of addressing the high levels of unemployment that were being experienced at the time in that area.¹⁹⁴⁰

The disaster occurred when an explosion during the early hours of the morning claimed the lives of 26 miners who had been on night duty.¹⁹⁴¹ Although at first it was not clear what had

¹⁹³⁷ Ibid.

¹⁹³⁸ “The White Paper proposals have to date been ignored by Parliament”. (Ferguson (note 165) 179).

¹⁹³⁹ Bittle and Snider (note 1642) 474 where it is noted that “as is often the case, the latest government initiative to get tough on corporate crime followed a much-publicized disaster”.

¹⁹⁴⁰ “Traditionally, unemployment in the area was high (over 25 percent), and many of the younger people had to leave to other parts of Canada to find employment. Westray promised to turn things around in a significant way: fifteen to twenty years of employment at good wages were guaranteed for 200 local residents and, of course, spinoff benefits for the local economy”. (C Goff ‘The Westray Mine Disaster: Media Coverage of a Corporate Crime in Canada’ in HN Pontell and D Shichor *Contemporary Issues in Crime and Criminal Justice – Essays in Honour of Gilbert Geis* [2000] 195, 197).

¹⁹⁴¹ Ibid.

caused the explosion,¹⁹⁴² it later transpired that there was an underground methane gas explosion.¹⁹⁴³ The strength of the explosion was such that “the blast, apparently caused when sparks from a mining machine ignited methane gas, was so intense that ‘it blew the top off the mine entrance, more than a mile above the blast centre’”.¹⁹⁴⁴ It is therefore not surprising that it was not possible to recover all the victims’ bodies.¹⁹⁴⁵

After the disaster, the question of safety standards at Westray was raised. Apparently, the area where the mine was located was known for having high levels of methane gas, which prior to the Westray disaster, had claimed 290 miners’ lives over a period of time.¹⁹⁴⁶

It has been stated that the Westray disaster “might have been prevented by corporate compliance with health and safety”.¹⁹⁴⁷ The subsequent prosecution of the company and its three directors failed mainly due to the fact that “it was deemed too difficult to determine legal responsibility”¹⁹⁴⁸ and this was subsequently followed by a public inquiry which subsequently led to the law to being reformed.¹⁹⁴⁹

In 1994 recommendations based on the 1987 Law Reform Commission Proposals were made by a Parliamentary Sub-committee of the Standing Committee on Justice and Human Rights.

¹⁹⁴² Ibid.

¹⁹⁴³ Bittle & Snider (note 1640) 474.

¹⁹⁴⁴ Ibid.

¹⁹⁴⁵ “Fifteen of the victim’s bodies were recovered; rescuers were unable to reach the remaining eleven victims, whose bodies remain trapped in the mine to this day”. (Ibid).

¹⁹⁴⁶ Goff (note 1940) 197.

¹⁹⁴⁷ Archibald *et al.* (note 1648) 367.

¹⁹⁴⁸ Bittle & Snider (note 1640) 474.

¹⁹⁴⁹ “In 1997, the Nova Scotia public inquiry into the Westray Mine disaster recommended that the federal government study the issue of the accountability of corporate executives and directors for corporate wrongdoing, particularly in relation to workplace safety, and introduce any necessary legislation”. (Goetz (note 1735) 3).

It was recommended that “corporations be made liable for any ‘collective failure’ to exercise reasonable care by any or all corporate ‘representatives’”.¹⁹⁵⁰

(h) The Recommendations made in the Report of the Westray Inquiry, 1997

Following the failure of the prosecution for the Westray Disaster, the Royal Commission of Inquiry was established with a view to investigating the Westray disaster. The Royal Commission’s findings were reported in *The Westray Story: a Predictable Path to Disaster* (Report of the Westray Inquiry 1997).¹⁹⁵¹ Among the recommendations made by the Royal Commission of Inquiry, was a call for a change in the Criminal Code of Canada in such a way that corporate officials would be held ‘properly accountable for workplace safety’.¹⁹⁵²

As part of responding to the recommendations made in the Report of the Westray Inquiry there was an introduction in the House of Commons of private members’ bills ‘providing for enhanced criminal accountability of corporations and senior corporate officials for corporate wrongdoing’.¹⁹⁵³ Although these Bills contained important proposals,¹⁹⁵⁴ none of them reached a point where they were adopted as law.

(i) Bill C-468, 1999

¹⁹⁵⁰ Bittle & Snider (note 1640) 476.

¹⁹⁵¹ Ibid 474.

¹⁹⁵² Ibid.

¹⁹⁵³ Goetz (note 1735) 3.

¹⁹⁵⁴ “These bills would have extended the basis of attributing criminal liability to corporations by: 1) expanding the category of individuals whose acts or omissions could supply the physical element of an offence (the actus reus); and 2) permitting the mental element of the offence (mens rea) to be attributed to the corporation through various scenarios of management participation or collective management negligence. The bills also would have shifted the onus to the corporation to disprove the various scenarios for attributing fault to the corporation once the physical element of the offence had been established. The bills also sought to facilitate the personal criminal liability of corporate directors and officers in respect of crimes attributable to the corporation either where these officials were aware of such wrongdoing, or where it was deemed that they should have been aware of it. Finally, the bills proposed the creation of a new Criminal Code offence of failing to provide a safe working place, aimed at corporations and their directors and officers”. (Ibid 3).

Bill C-468 – ‘An act to amend the Criminal Code to make corporations and directors of corporations liable when they knowingly permit unsafe working conditions’, was introduced by New Democratic Party leader Ms Alexa McDonough at the 36th Parliament in 1999.¹⁹⁵⁵ According to McDonough Bill C-468 would give MPs “the chance to stand up to those who wilfully risk the safety of their employees”.¹⁹⁵⁶ Bill C-468 did not proceed any further, after the 1st session of the 36th Parliament ended.¹⁹⁵⁷

(j) Bill C-259, 1999

Bill C- 259 An Act to amend the Criminal Code (criminal liability of corporations, directors and officers) was introduced by Ms Desjarlais in the House of Commons, also in the 36th Parliament in 1999.¹⁹⁵⁸ The Bill proposed the amendment of the Criminal Code by adding section 467.3; 467.4; 467.5; and 467.6 to the Criminal Code which would deal with offences by corporations, directors and officers.¹⁹⁵⁹ The phrase ‘management of a corporation’ is explained in wide terms and includes directors, officers and even individuals to whom day to day duties have been delegated,¹⁹⁶⁰ and it included situations where there was failure to prevent the crime.¹⁹⁶¹

The proposal made in Bill C- 259 would widen the scope of corporate criminal liability as ‘a corporation to be guilty of an offence under subsection (2), it is not necessary to show that the person who committed or ordered the act or omission was or was a part of the management of

¹⁹⁵⁵ Bill C-468 (Historical) An Act to amend the Criminal Code (criminal liability of directors and officers) <http://openparliament.ca/bills/36-1/ C-648> (25 November 2013).

¹⁹⁵⁶ Ibid.

¹⁹⁵⁷ Bittle & Snider (note 1640) 476; Goetz (note 1735) 3.

¹⁹⁵⁸ Goetz (note 1735) 3.

¹⁹⁵⁹ Bill C-259 An Act to amend the Criminal Code (criminal liability of corporations, directors and officers) R.S., c. C-46.

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2330610&Language=E&Mode=1&File=16> (25 November 2013).

¹⁹⁶⁰ Proposed section 467.3.

¹⁹⁶¹ Proposed section 467.3.

the corporation'.¹⁹⁶² The proposal also included the possibility of the personal criminal liability of directors or officers of a convicted corporation, even in the event where the director or officer did not know that the said crime was being committed but should have known that a crime was being committed or was likely to be committed.¹⁹⁶³

It was further proposed that corporations that fail to take reasonable measures to ensure safe working conditions be convicted and fined.¹⁹⁶⁴ Where such convictions take place, the directors and officers, who ought to have known that the working conditions are not safe would also face personal criminal liability.¹⁹⁶⁵ Bill C-259 also did not make headway as it ceased when the 36th Parliament was dissolved.¹⁹⁶⁶

(k) Bill C-284, 2001

Out of frustration from the Liberal government's failure to reform the laws regulating corporate criminal liability, Bill C-284 was tabled by the New Democratic Party.¹⁹⁶⁷ Bill C-284 was characterised by its emphasis on "corporate culture".¹⁹⁶⁸ Bittle and Snider explain that corporate culture is a concept that was developed by the Australian government in 1995.¹⁹⁶⁹ They go on to define corporate culture as meaning that "senior management could be held criminally liable if a corporate culture – defined as an 'attitude, policy, rule course of conduct or practice existing within the corporate body generally or in the part of the body corporate in which the relevant activities take place' – allowed or encouraged violation or facilitated law avoidance".¹⁹⁷⁰ It is further stated that corporate culture 'signifies official recognition that in

¹⁹⁶² Proposed section 467.4.

¹⁹⁶³ Proposed section 467.4.

¹⁹⁶⁴ Proposed section 467.5.

¹⁹⁶⁵ Proposed section 467.5.

¹⁹⁶⁶ Goetz (note 1737) 3.

¹⁹⁶⁷ Bittle & Snider (note 1640) 476.

¹⁹⁶⁸ Ibid 477.

¹⁹⁶⁹ Ibid.

¹⁹⁷⁰ Ibid.

any profit-making business there is always ample motivation to justify or ignore unsafe working conditions'.¹⁹⁷¹ Bill C-284 was 'withdrawn at second reading stage'.¹⁹⁷² It was then passed on to the House of Commons Standing Committee on Justice and Human Rights for study.¹⁹⁷³

This was followed by hearings, during which more than 30 witnesses provided evidence to the Justice Committee. The Committee then issued a recommendation in 2002 that "the Government table in the House legislation to deal with the criminal liability of corporations, directors and officers".¹⁹⁷⁴

IV THE CURRENT REGULATION OF CORPORATE HOMICIDE IN CANADA

(a) Bill C-45

Bill C-45, An Act to Amend the Criminal Code (criminal liability of organizations) was given Royal Assent on 7 November 2003¹⁹⁷⁵ and became law on March 31 2004.¹⁹⁷⁶ The legislation, also known as the Westray Bill,¹⁹⁷⁷ was a direct response to the Justice Committee's recommendation¹⁹⁷⁸ and its aim was to remove the obstacles to prosecuting larger corporations.¹⁹⁷⁹ Through the Bill, the Canadian government has, for the first time, made statutory provisions that deal specifically with the criminal liability of corporations.¹⁹⁸⁰ The

¹⁹⁷¹ Ibid.

¹⁹⁷² Ibid.

¹⁹⁷³ Goetz (note 1735) 3.

¹⁹⁷⁴ Ibid.

¹⁹⁷⁵ Macpherson (note 1650) 253.

¹⁹⁷⁶ "The Criminal Code was amended effective 31 March 2004 to alter the rules used to determine when a corporation is criminally responsible, expanding significantly the categories of persons whose actions can trigger corporate criminal liability. These changes have been described as a 'revolution' in the criminal liability of corporations". (Van Duzer (note 1656) 200).

¹⁹⁷⁷ The Westray disaster led to public outcries that the corporation and its directors should not escape criminal liability, which led to Bill C-45. (Dusome (1728) 121).

¹⁹⁷⁸ Goetz (note 1735) 3.

¹⁹⁷⁹ Welling *et al.* (note 971) 236.

¹⁹⁸⁰ Bittle & Snider (note 1640) 471.

Bill has codified corporate criminal liability and it has also brought about significant changes to corporate criminal liability in Canada.¹⁹⁸¹ The main features of the Bill are extension of criminal liability to entities other than corporations; the expansion of the basis for corporate criminal liability; effecting changes to rules of attribution for fault-based crimes; effecting changes to potential defences; increasing fines and including sentencing guidelines.

(i) Extension of criminal liability to entities other than corporations

Whereas under the common law corporate criminal liability was directed at business corporations, Bill C-45 moves from the common law corporate criminal liability, to the criminal liability of organizations.¹⁹⁸² In terms of the amendments brought into being by Bill C-45 the net of corporate criminal liability is now cast so widely that those entities that were previously not held criminally liable are now subject to corporate criminal liability.

Prior to the amendment the meaning in section 2 of the Criminal Code of ‘everyone’, ‘person’ and ‘owner’ included ‘various public bodies and private entities with the legal capacity to engage in the relevant conduct’.¹⁹⁸³ Bill C-45 changes the definition that appears in section 2 of the Criminal Code of the terms ‘everyone’, ‘person’ and ‘owner’ as well as similar expressions. These terms now include Her Majesty and also an organization.¹⁹⁸⁴ The word “organizations” is now used and it is defined as a

“public body, body corporate, society, company, firm, partnership, trade union or municipality or an association of persons that

¹⁹⁸¹ “Recent amendments to the Criminal Code have redefined the circumstances in which corporations may be held criminally responsible by creating a more robust and specific set of rules that expand the scope for corporate criminal liability substantially”. (Welling *et al.* (note 971) 203).

¹⁹⁸² “It creates a new regime of criminal liability that applies not only to corporations, but unions, municipalities, partnerships and other associations of persons”. (Archibald *et al.* (note 1648) 368).

¹⁹⁸³ Goetz (note 1735) 3.

¹⁹⁸⁴ Bill C-45 (note 1647) clause 1(1).

- (i) is created for a common purpose,
- (ii) has an operational structure, and
- (iii) holds itself out to the public as an association of persons”.¹⁹⁸⁵

The changed definition makes it possible to hold entities such as trade unions and associations lacking legal personality criminally responsible for the crimes committed in the interest of the entity. Macpherson observes that by extending liability to organisations “the government has decided that, regardless of the form chosen to undertake illegal activity...prosecution of the organization should be allowed”.¹⁹⁸⁶ The new definition is a firm acknowledgement and acceptance that criminal activities may be performed by the different types of entities that exist, regardless of whether they have legal capacity or not and holding organizations criminally liable is commendable. Goetz states that it ‘expands the reach of criminal liability to a wide range of entities that structure and embody the collective activities and interests of associated individuals’.¹⁹⁸⁷ It is submitted that the following observation by Archibald, Juls and Roach clearly sums up the effect of the new definition.

“While previously it may have been possible under the common law to charge such organizations, the explicit reference to them in this legislation sends a green light to policing bodies and private complainants that they now become potential targets”.¹⁹⁸⁸

It has been observed that the new definition will have a greater impact on those entities which did not fall under the ambit of corporate criminal liability, prior to its codification.¹⁹⁸⁹ This is

¹⁹⁸⁵ Ibid clause 2.

¹⁹⁸⁶ Macpherson (note 1650) 256.

¹⁹⁸⁷ Goetz (note 1735) 4.

¹⁹⁸⁸ Archibald *et al.* (note 1648) 375.

¹⁹⁸⁹ “The real effect of these changes, if implemented, will be felt in circles outside of the corporation (which was already subject to criminal law of *Canadian Dredge*)”. (Ibid 375 - 376).

likely due to the fact that the corporation is already familiar with the fact that it will be subject to corporate criminal liability if it commits a crime.

The question that arises is on what grounds should organizations be put on the same footing as corporations. One of the main reasons for holding corporations criminally liable is the corporation's separate existence and the acceptance that the 'separate entity' is capable of committing crimes.¹⁹⁹⁰ Macpherson questions that Bill C-45 "offers no insight into why the other 'organizations' should be treated similarly to corporations".¹⁹⁹¹

(ii) The expansion of the basis for corporate criminal liability

One of the main changes brought about by the Bill is the move from the identification doctrine as the basis of liability to a form of corporate criminal liability that is not limited by relying on the existence of the culpability of someone in a senior position who is regarded as the directing mind / will of the corporation to establish corporate fault.¹⁹⁹² The identification doctrine that had been developed¹⁹⁹³ and even been modified¹⁹⁹⁴ by courts is a rule of attribution which had become problematic as it was making it possible for corporations to escape liability. There were two main grievances that stemmed from the application of the doctrine of identification. Firstly, as establishing corporate fault was not possible without the identification of a blameworthy senior official, when such identification was not possible that would mean the corporation escaped liability. Secondly, the application of the identification doctrine proved to be problematic as it had the effect of making it easier to prosecute small corporations while, on

¹⁹⁹⁰ "In other words the corporation is a reality that permeates modern commerce and modern life in general. Therefore, the courts have been unwilling to place corporations outside the reach of criminal law. This is a pragmatic rationale for corporate criminal liability. So much occurs in the corporate form that society cannot allow this activity (some of it criminal) to remain untouchable by the criminal law". (Macpherson (note 1650) 257.

¹⁹⁹¹ Ibid 258.

¹⁹⁹² "It is no longer necessary for the criminal act to be committed by a person who is a directing mind of the corporation". (Van Duzer (note 1656) 203).

¹⁹⁹³ *Lennards Carrying* (note 234).

¹⁹⁹⁴ *Canadian Dredge* (note 216).

the converse, it was making it virtually impossible to prosecute large corporations. It has been said that the changes made by Bill C-45 “altered the treatment of the criminal mind”.¹⁹⁹⁵

Under Bill C-45 there is more than one manner in which organisations are held criminally liable.¹⁹⁹⁶

“For offences based on negligence, an organization can be found guilty if the Crown can prove that ‘employees of the organization committed the act and that a senior officer should have taken reasonable steps to prevent them from doing so’¹⁹⁹⁷....For subjective intent offences – offence requiring intent, knowledge, or proof of fault – there must be evidence that harmful actions of senior officers somehow benefitted the organization”.¹⁹⁹⁸

It puts blameworthiness for corporate crime on the ‘representatives’ of organizations or on the ‘senior officers’ of organizations.¹⁹⁹⁹ An organization is now regarded as a party to the offence where one of its senior officers, with the intention of benefitting the organization takes part in the offence in the scope of duty; or where the senior officer directs the work of other representatives within the organization in such a way that they commit the offence; or where the senior officer whilst being aware of the fact that a crime is or is about to be committed, by one of the organisation’s representatives, fails to take reasonable steps to prevent that representative from taking part in the offence.²⁰⁰⁰

¹⁹⁹⁵ Welling *et al.* (note 971) 236.

¹⁹⁹⁶ Bittle & Snider (note 1640) 477.

¹⁹⁹⁷ *Ibid.* See section 22.1.

¹⁹⁹⁸ Bittle & Snider (note 1640) 477. These will be dealt with in the discussion that follows at (iii) below.

¹⁹⁹⁹ *Ibid.*

²⁰⁰⁰ See section 22.1.

With regard to the latter, Goetz points out that it deviates from the previous position in that criminal liability may be borne by the corporation or organization even where there is no senior person involved in the commission of the offence.²⁰⁰¹

In essence, what this means is that when determining the offence it is the conduct of representatives of companies that is taken into account,²⁰⁰² alternatively, that of senior officers.²⁰⁰³ For an organization to be prosecuted successfully the Crown must have provided proof that representatives of the corporation / organization “committed the act and that a senior officer should have taken reasonable steps to prevent them from doing so”.²⁰⁰⁴ The term representative refers to people within the organization, including employees, agents and even contractors.²⁰⁰⁵

Senior officers are defined as those members of the organization who have a vital role when it comes to establishing the policies of the organization or managing an important aspect of the activities of the organization.²⁰⁰⁶ Macpherson sees this part of the definition of ‘senior officer’ simply as the codification of the common law.²⁰⁰⁷ The Bill further specifies that where the organization is a body corporate, the term senior officers encompasses its director, chief executive officer and chief financial officer,²⁰⁰⁸ which means that “anyone who ‘is responsible for managing an important aspect of the organisations’ activities’ can render the corporation

²⁰⁰¹ Goetz (note 1735) 4. “It is no longer necessary for the criminal act to be committed by a person who is a directing mind of the corporation”. (Van Duzer (note 1656) 203.

²⁰⁰² Whyte (note 35) 5.

²⁰⁰³ “Under the new rules of organisational liability...liability for a crime will be attributed to an organisation, either on the basis that one or more ‘senior officers’ actually participated in the offence, or on the basis of a combination of the actions of one or more ‘representatives’ and the intent or negligence of one or more ‘senior officers’”. (Goetz (note 1735) 4).

²⁰⁰⁴ Bittle & Snider (note 1640) 477.

²⁰⁰⁵ Whyte (note 35) 5.

²⁰⁰⁶ Bill C-45 (note 1647) clause 2.

²⁰⁰⁷ MacPherson (note 1650) 259.

²⁰⁰⁸ Bill C-45 (note 1647) clause 2.

liable”.²⁰⁰⁹ MacPherson is of the view that this is an extension of the attribution of corporate criminal liability to include even the conduct of individuals who are at the lower echelons of the corporate ladder i.e. ‘mid-level managers’.²⁰¹⁰ He argues that “‘senior officers’ would include those managers who implement and operationalize corporate policies set by executives and/or directors and points out that “this is a much lower standard than under the common law”.²⁰¹¹ Bittle and Snider also note this extension of the attribution of corporate criminal liability to persons who need not be the directing mind/will of the corporation.²⁰¹² Bittle and Snider agree with Archibald, Jull and Roach’s observation that “while this is not pure vicarious liability (as it only applies to senior officers) it borders on that principle”.²⁰¹³ It has been stated that the term ‘senior officer’ represents a classic Canadian compromise – broader than the ‘directing mind’ but narrower than vicarious liability.²⁰¹⁴ Where senior officers have not acted with due diligence, the corporation may be held liable for the crime committed.

The effect of this is that, the Criminal Code makes it clear that even where the offence in question has been committed by an employee at a low level of the corporate ladder, the organization may still face corporate criminal liability.²⁰¹⁵ It is pointed out though that “for all crimes, whether they require negligence or intention, the actus reus element can be satisfied by any individual involved in the corporation committing the act. However, the mens rea element must be satisfied by a senior officer”. In essence in terms of Bill C-45 ‘the criminal liability of corporations and other organisations will no longer depend on a senior member of the organization with policy-making authority [i.e. a directing mind’ of the organization] having

²⁰⁰⁹ MacPherson (note 1650) 259.

²⁰¹⁰ Ibid.

²⁰¹¹ Ibid.

²⁰¹² Bittle & Snider (note 1640) 477.

²⁰¹³ Archibald *et al.* (note 1648) 381. Also quoted in Bittle & Snider (note 1640) 477.

²⁰¹⁴ Bittle & Snider (note 1640) 478.

²⁰¹⁵ “Canadian law therefore makes it more explicit that corporate liability can be triggered by the conduct of relatively junior employees”. (Whyte (note 35) 5).

committed the offence'.²⁰¹⁶ In this regard Macpherson avers that corporate criminal liability is extended by Bill C-45 in that “it essentially eradicates the distinction between those who create or set corporate policy and those charged with managing its implementation”.²⁰¹⁷

(iii) Effecting changes to rules of attribution for fault-based crimes

Section 22.2 deals with corporate criminal liability for crimes that require fault in a form other than negligence. These are regarded as subjective intent offences and such offences require “intent, knowledge or proof of fault”.²⁰¹⁸ Where subjective intent offences have been committed, it is required that evidence / proof be provided, showing that the organization did, indeed, benefit from the criminal act.²⁰¹⁹

Paragraph 22.2 states that

22.2 In respect of an offence that requires the prosecution to prove fault - other than negligence - an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

(a) acting within the scope of their authority, is a party to the offence;

(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

²⁰¹⁶ Goetz (note 1735) 3.

²⁰¹⁷ MacPherson (note 1650) 259.

²⁰¹⁸ Bittle & Snider (note 1640) 477.

²⁰¹⁹ Ibid.

Section 22.2 (a) refers to the traditional position²⁰²⁰ of having corporate criminal liability for *mens rea* offences arising if the crime in question was committed “by a person who has the requisite guilty mind”.²⁰²¹ Although it differs from the traditional position in that that person need not be a person who is senior to the extent that he has an influence on corporate policy, Macpherson points out that “this paragraph does not expand corporate criminal liability”.²⁰²²

According to this subsection 22.2(b) “corporate liability can now arise where the actions constituting the crime were innocently committed by employees or other lower level representatives of the corporation, so long as a senior officer had the required guilty mind”.²⁰²³ In other words, under Canadian law “a corporate executive or board member can also be liable under the Criminal Code for aiding or abetting an offence, for counseling a person to be a party to an offence or being an accessory after the fact to an offence”.²⁰²⁴ The Criminal Code in section 21.1 explains who parties to an offence are. It states as follows:

- 21. (1) Every one is a party to an offence who
 - (a) actually commits it
 - (b) does or omits to do anything for the purpose of aiding any person to commit it ; or
 - (c) abets any person in committing it.

Macpherson avers that “the statute unites the *actus reus* (of the other representative) with the fault element (of the senior officer) to hold the corporation liable”.²⁰²⁵ He then points out that

²⁰²⁰ It has been observed that this paragraph “seems to replicate the common law, in that if a person in a position of authority is a party to the offence, and is acting within the scope of his or her authority, the corporation may be held liable”. (MacPherson (note 1650) 259 – 260).

²⁰²¹ Van Duzer (note 1656) 204.

²⁰²² MacPherson (note 1650) 260.

²⁰²³ Van Duzer (note 1656) 204. “If a senior officer directed employees to deal in stolen goods, for example, the corporation would be liable, even though the employees had no knowledge that the goods were stolen”. (Van Duzer (note 1656) 204).

²⁰²⁴ Whyte (note 35) 5.

²⁰²⁵ MacPherson (note 1650) 261.

Paragraph 22.2(b) is a not new form of attributing liability as it already exists under the common law.²⁰²⁶ Macpherson finds paragraph 22.2(b) to be “redundant”²⁰²⁷ and states that “it does not expand the conditions for corporate criminal liability”,²⁰²⁸ in that

[i]f the senior officer directs another representative to commit the *actus reus*, and the other representative does so with the requisite fault element, then the other representative commits the offence and the senior officer abets the other representative. Both are parties to the offence and are thus liable. As long as the senior officer acts within the scope of his or her authority, paragraph 22.2(a) is satisfied and there is no need to resort to paragraph 22.2(b).²⁰²⁹

Paragraph 22.2(c) makes it possible for a corporation to be prosecuted where a senior officer, who is aware of the fact that an offence is about to be committed by representatives of the organization does nothing to prevent them from taking part in that. It has been observed that paragraph 22.2(c) changes the law substantially²⁰³⁰ as it provides that “if any senior officer becomes aware that any representative is or is about to be a party to an offence, then the corporation would be criminally liable, subject to a due diligence defence”.²⁰³¹

With regard to corporate criminal liability for crimes requiring *mens rea* / negligence as an element, the organization is held liable if its representative, within the scope of his or her duties takes part in the offence or where it is more than one representative, the conduct must be such, that if it had only been one representative responsible, such representative would have been party to the offence. Secondly, where a senior officer or senior officers responsible for the

²⁰²⁶ “At first blush, this might appear to be a change; however, the common law has already covered this. It has established that if one person (the senior officer) gets a second person (the other representative) to commit the *actus reus* of an offence without the knowledge of that other person, that other person is known as ‘the innocent agent’ of the person with the guilty mind. The person with the guilty mind is then considered to be the person who ‘commits the offence’”. (Ibid 261).

²⁰²⁷ Ibid.

²⁰²⁸ Ibid 262.

²⁰²⁹ Ibid 261 – 262.

²⁰³⁰ Ibid 262.

²⁰³¹ Ibid.

‘aspect of the organisation’s activities that is relevant to the offence’ deviate from the reasonably expected standard of care that could have prevented the representative from taking part in the crime, the organization will be regarded as a party to the offence. It must be noted here that “what is key is that the senior officer must have ‘departed markedly’ from standards that could be reasonably expected to be followed to prevent the employee from committing the offence”.²⁰³²

The basis for liability is that the criminal conduct must be attributable to the organisation’s representative or senior officer. In fact, as Goetz points out, this section makes it possible for a corporation / organization to be held criminally liable even when no specific individual within the corporation / organization, has committed the crime.²⁰³³ It allows ‘the aggregation of the acts and omissions and the state of mind of the organization’s representatives and senior officers in fixing organizational liability’.²⁰³⁴ This overcomes the difficulty posed by the identification principle of identifying senior employees who had ‘governing executive authority’, which in many cases led to the failure of the prosecution of some companies for crimes committed. It is submitted that this indeed is a positive development, which is likely to go a long way in ensuring that corporations are held criminally liable for their crimes.

In all three circumstances the corporation will only be held liable if the offence was committed with the aim of benefitting the corporation.²⁰³⁵

²⁰³² Bittle & Snider (note 1640) 477.

²⁰³³ Goetz (note 1735) 4.

²⁰³⁴ Ibid.

²⁰³⁵ Bill C-45 (note 1647) section 22.2.

The traditional demarcation between true crimes and regulatory offences fades away and we see the corporation's liability for both, being primarily based on the fault of the individuals within the corporation. This is also noted by Archibald, Jull and Roach who state that

“The new law blurs the traditional and important distinction between regulatory and criminal liability. A corporation can now be found guilty of a subjective intent offence because its senior officers (including some managers) knew that a representative of a corporation was or was about to become a party to the offence, but did not take all reasonable measures to stop that representative – an employee agent or contractor – from being a party to the offence”.²⁰³⁶

(iv) Safety in the workplace

Another important aspect of Bill C-45 is that it specifically places a legal duty on people whose responsibility is to direct the work of others, to see to it that such people are conducting their work under safe working conditions. The Bill adds section 217 to the Criminal Code, which states that:

“Every one who undertakes, or has the authority to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task”.²⁰³⁷

Goetz points out that section 217 does not create a new concept in Canadian law, ‘however, by clarifying the existence of such a legal duty, the provision facilitates the application of the offence of criminal negligence, which is predicated, in part, on the existence of a legal duty.’²⁰³⁸

In addition to section 217, section 219 of the Criminal Code is also important when it comes to the criminal liability of corporations / organizations. In terms of section 219:

²⁰³⁶ Archibald *et al.* (note 1648) 368-369.

²⁰³⁷ The Criminal Code (note 1643) section 217.

²⁰³⁸ Goetz (note 1735) 4.

“Every one is criminally negligent who:

a. In doing anything; or

b. In omitting to do anything that is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons”.

This provision will be discussed in more detail below, under the discussion of the future of corporate homicide.

(v) Sentencing of organizations that have been convicted

Bill C-45 increases the amount of the fine that may be imposed on a corporation / organization²⁰³⁹ and in addition to that the 2004 federal budget plan effected further changes by disallowing the deduction of fines and other legally imposed penalties.²⁰⁴⁰ This move is commended by MacPherson.²⁰⁴¹ The new section 718.21 of the Criminal Code as inserted by Bill C-45 introduces a new way of sentencing organizations. It lists factors which the sentencing court must take into consideration when it comes to sentencing a convicted organisation. These include whether the organization benefitted from the offence; the extent of planning the offence and how complex the offence is; if the organization tried to hide its assets with a view to avoid paying a fine or restitution; previous convictions of the prosecution.

²⁰³⁹ In this regard Bill C-45 makes changes to section 735(1) of the Criminal Code.

²⁰⁴⁰ Budget Plan, Annex 9 “Fines and Penalties” [Budget Plan] (Budget 2004) (<http://www.fin.gc.ca/budget04/bp/bpa9ae.htm> (accessed 20 November 2013)).

²⁰⁴¹ “Previously, under the common law, fines were deductible unless they were either specifically disallowed by legislation or so egrerious that their deductibility would offend public policy. The federal government provides reasons based in tax law and policy for this change. In my views, there is another reason why the deductibility of criminal fines is problematic. This argument is based, not in tax law and policy, but rather in the criminal law. The Code clearly sets out the purposes of sentencing: a sentence is meant, among other things, “to denounce unlawful conduct”, “to deter the offender and other persons from committing offences”, “to provide reparations from harm to victims or to the community” and “to promote a sense of responsibility in offenders, and acknowledgement of harm done to victims and to the community”. Since these are some of the purposes of sentencing, the deductibility of fines (the predominant way that we punish corporate criminal wrongdoers) does not further any of these avowed statutory ends”. (MacPherson (note 1650) 275).

Furthermore, it introduces hefty fines for summary offences.²⁰⁴² The Criminal Code is further amended by Bill C-45 so that it adds optional probation conditions for organisations.²⁰⁴³ These include making restitution, “establishing policies standards and procedures to reduce the likelihood of subsequent offences,”²⁰⁴⁴ seeing to it that those policies, standards and procedures are communicated to its representative; reporting on the implementation of those policies, standards and procedures to the court; making public, in accordance with the specifications made by the court, the offence that the organization was convicted of, the sentence that the court imposed and measures that the organization has put in place to avoid that happening again.²⁰⁴⁵

Goetz points out that these probation conditions are made available for courts to impose them, in addition to the fine. He further explains that though the Criminal Code already contains probation orders the reason these ones should be added is that the existing ones were such that they were more geared towards natural persons and not suitable for corporations.²⁰⁴⁶

V CRITICISMS / SHORTFALLS OF THE AMENDMENTS BROUGHT ABOUT BY BILL C-45

The Westray disaster and the failure to convict the corporation for that disaster made it clear that the identification doctrine was not working as a basis for liability and that there was a need for improvement in the field of corporate criminal liability in such a way that when it is clear that the activities of the corporation were the cause of deaths the likelihood of prosecution and

²⁰⁴² Bittle & Snider (note 1640) 478.

²⁰⁴³ The Criminal Code (note 1643) section 732(1).

²⁰⁴⁴ Ibid section 732(1)(b).

²⁰⁴⁵ Ibid section 732(1 (c), (d) and (f).

²⁰⁴⁶ Goetz (note 1735) 5.

conviction should really be there. Bill C-45 came into being with the aim of improving the situation and its main aim was to ensure that corporate criminals were prosecuted and convicted. Although Bill C-45 has been hailed as constituting “a fundamental change, if not a revolution in corporate criminal liability”²⁰⁴⁷ it has also been subjected to criticism.

The changes brought about by Bill C-45 have been blamed for blurring “the traditional and important distinction between regulatory and criminal liability”²⁰⁴⁸ in that it is now possible to hold a corporation criminally liable for an offence that requires subjective intent.²⁰⁴⁹

One of the changes brought about by Bill C-45 is the move from holding only individuals and corporations criminally liable to including “every one”. The term “every one” makes it possible for organisations to be held criminally liable. These include partnerships, municipalities, trade unions, as well as “other associations of persons”.²⁰⁵⁰ It is commendable that liability has been expanded in such a way that individuals will not be able to hide behind the veil of an organisation in order to escape criminal liability. What is of concern is that the list of people or groups that may be regarded as “every one” has not been made to be exhaustive²⁰⁵¹ and as a result just about any association of persons may find itself being subject to criminal liability.

Dusome observes that this means that

“any group that organizes a public meeting, with tasks assigned to members of the group, could be an ‘association of persons’ and be subject to possible prosecution. Even the nuclear family could conceivably be an association of persons under the definition in the Code”.²⁰⁵²

²⁰⁴⁷ Archibald *et al.* (note 1648) 368.

²⁰⁴⁸ *Ibid.*

²⁰⁴⁹ *Ibid.*

²⁰⁵⁰ *Ibid* 368.

²⁰⁵¹ Dusome (1728) 120.

²⁰⁵² *Ibid* 121.

It is submitted that not making the list exhaustive results in corporate criminal liability being expanded in such a way that it could have a far-reaching effect. In addition to that, Dusome raises the important question of “how the act and mental state of such a group are to be established”. Dusome concludes that in this regard the change made is to broaden the scope of groups that may be held criminally liable, however the application of the identification doctrine remains unchanged:

“we remain firmly in the identification theory, in which the act and mental state of individual human beings are attributed to the group for the purpose of establishing criminal liability. Rather than change the paradigm of the individual's act and mental state being the basis of criminal liability, we have just extended the basis for corporate criminal liability to the other groups that can now be held criminally responsible”.

It is submitted that this is a point of concern and a legitimate criticism of the changes brought about by Bill C-45 as the idea was to overcome the weaknesses of the identification doctrine.²⁰⁵³

A further shortcoming of the changes brought about by Bill C-45 is that the requirement that the offence in question should have been to the benefit of the corporation is no longer there. As Dusome points out under the current position “the test of intent to benefit, or resulting benefit to, the corporation is absent”.²⁰⁵⁴

²⁰⁵³ Dusome does, however also note the improvements brought about by the Bill C-45 changes:

“Bill C-45 does represent an improvement in theory over the pre-existing situation in two respects. First, in expanding the test for liability beyond the directing minds of the common law, the bill partially addresses the inadequacies of the identification theory, so that fewer large groups will escape liability. Secondly, there is now a continuum of liability, from individuals to large organizations, so that fewer groups escape potential liability. If the group is unorganized, it will be small, and the individuals can be charged. If a criminal group does not hold itself out to the public as an association of persons, its members may be caught by the criminal organization provisions and the members charged”. (Dusome (note 1728) 122.

²⁰⁵⁴ Ibid.

Since aggregation is included in the basis for liability, where there is more than one single individual who is responsible for the cause of death the prosecution's task of proving the elements becomes more arduous than it was prior to the changes.²⁰⁵⁵ It is hoped that this will not impede prosecutions as it has been observed that

“the number of elements to be proven, in comparison to prosecution of an individual, is significantly increased, requiring increased resources to pursue, increased risk of failure of the case, all of which can provide an incentive to seek a less costly route”.²⁰⁵⁶

Moreover, the changes brought about by Bill C-45 have been criticised for putting the blame for corporate crime on employees instead of taking into account the fact that decisions regarding safety in the workplace are usually taken at a higher level.²⁰⁵⁷ Bittle and Snider state that

“All of these changes imply that corporate crime is a result of defective low-level employees – not of bad corporate management, malign corporate culture, or profit-maximising strategies. They ignore the broader context within which decisions about workplace safety are made”.²⁰⁵⁸

(a) A discussion of some of the decisions made after the amendments brought about by Bill C-45

²⁰⁵⁵ “But now the prosecution also has to prove the existence of elements 7 and 9 to 14 inclusive, in order to obtain a conviction of the corporation. The prosecution has to prove two *mens reae*: the wanton or reckless disregard of criminal negligence on the part of the representative, and the marked departure on the part of the senior officer(s)”. (Ibid 133).

²⁰⁵⁶ Ibid 137.

²⁰⁵⁷ Bittle and Snider (note 1640) 485.

²⁰⁵⁸ Ibid.

“Unfortunately, since 2004, Bill C-45 charges have been laid in only six cases – we need to “work closely with local law enforcement to ensure they are aware of the law so that employers can be criminally charged after serious workplace accidents”.²⁰⁵⁹

This is according to the Canadian Labour Congress in February 2013, almost a decade after Bill C-45 effected changes to the law on corporate criminal liability in the Criminal Code. This is in spite of the fact that the amendments brought about by Bill C-45 are progressive and should result in organisations being more cautious about avoiding deaths of people. It is unfortunate that it has been further observed by the Canadian Labour Congress that “police are often not enforcing the corporate criminal negligence laws introduced into the Criminal Code in 2004 through Bill C-45”.²⁰⁶⁰

Two post 2004 decisions in which the court was faced with the prosecution of organisations that were allegedly responsible for the deaths of others will be discussed below. These are *R v Ontario Power Generation*²⁰⁶¹ and *R v Metron Construction Corporation*.²⁰⁶²

(i) *R v Ontario Power Generation*

In *R v Ontario Power Generation* a corporation, a generating station, was being held liable for having allowed a huge amount of water to be released in an area which the public made use of for recreation purposes and this led to two lives being lost. The case was heard in the latter part of 2006 and it was noted that the changes brought about by Bill C-45 were not yet effective when the offence occurred²⁰⁶³ and it could not have been the legislature’s intention that they

²⁰⁵⁹ Canadian labour congress ‘Death and injury at Work, Prosecutions’ 21 February 2013 <http://www.canadianlabour.ca/news-room/publications/death-and-injury-work-prosecutions> (accessed 20 March 2014).

²⁰⁶⁰ Ibid.

²⁰⁶¹ *R v Ontario Power Generation* [2006] O.J. No. 4659.

²⁰⁶² *R v Metron Construction Corporation* [2013] O.J. No. 3909.

²⁰⁶³ *R v Ontario Power Generation* (note 2061) para 3.

apply retrospectively.²⁰⁶⁴ The court was therefore bound to “apply the law as it existed on June 23 2002”.²⁰⁶⁵

The issue of the directing mind was therefore examined in accordance with relevant case law and the judge specifically referred to *Canadian Dredge*,²⁰⁶⁶ *The Rhone*²⁰⁶⁷ and *R v Safety Kleen*.²⁰⁶⁸ It was found that the corporation could not be held liable as the individual concerned was not found to be a directing mind of the corporation.²⁰⁶⁹

Although the case was not decided based on the changes brought about by Bill C-45 the relevance of this case lies in the fact that with regard to the changes brought about by Bill C-45 through section 22.1 read together with section 2 of the Criminal Code it was stated that “the combined effect of these changes is that the corporation is now linked to the aggregated results of the actions of its key officials and their delegates”.²⁰⁷⁰ It is submitted that the changes brought about by Bill C-45 are significant and commendable and had this unfortunate event occurred after those changes had become operational the outcome of the case would have been different.

(ii) *R v Metron Construction Corporation*

In *R v Metron Construction Corporation*, the company was held liable for criminal negligence causing the deaths of three employees and a supervisor as a result of the collapse of a swing stage as it was descending from the fourteenth floor.²⁰⁷¹ The swing stage, which is supposed to

²⁰⁶⁴ Ibid para 7.

²⁰⁶⁵ Ibid para 36.

²⁰⁶⁶ *Canadian Dredge & Dock Co. v R* (note 216).

²⁰⁶⁷ *The Rhone v The Peter A.B. Widener* (note 1644).

²⁰⁶⁸ *R v Safety-Kleen Canada Inc* (note 1897).

²⁰⁶⁹ *R v Ontario Power Generation* (note 2061) para 20.

²⁰⁷⁰ Ibid para 6.

²⁰⁷¹ *R v Metron Construction Corporation* (note 2062) para 1.

be boarded by two people had six people on board and only two lifelines available. The swing stage was not able to withstand the combined weight of the six men as well as their equipment and it collapsed.²⁰⁷² The four people without the lifelines perished. The company pleaded guilty as a result of the deceased supervisor's negligence in that he allowed six people to work on the swing stage which was only meant for two people; and had allowed them to board the swing stage while being aware of the fact that it only two lifelines and also that he allowed individuals who were under the influence of drugs to take part in the work that was being done.²⁰⁷³ The supervisor was regarded as a 'senior officer', hence the decision by the company to plead guilty. At issue were the aggravating and mitigating factors

(iii) *R v Scrocca*²⁰⁷⁴

In this case an employer in Quebec, Pasquale Scrocca, who was a landscape contractor, was found guilty by the court of criminal negligence causing death as a result of the death of an employee, Mr Aniello Boccanfuso. According to the facts of the case Boccanfuso had been driving a vehicle, a backhoe, which had "major mechanical defects". While operating the vehicle, Boccanfuso was fatally injured as its brakes failed and the front left side of the backhoe's shovel hit him. The employer was then charged with criminal negligence causing death and was subsequently convicted. It was established that the backhoe had been purchased in 1976 and

"The uncontradicted facts establish serious and major mechanical defects including brake system and, after all, a vehicle whose major components are in a poor condition".²⁰⁷⁵

²⁰⁷² Ibid para 11.

²⁰⁷³ Ibid para 15.

²⁰⁷⁴ *R. v. Scrocca* 2010] J-Q NO 9605.

²⁰⁷⁵ Ibid.

The court analysed article 219 of the Criminal Code and came to the conclusion that “the mechanical defects result from a failure to provide proper maintenance”.²⁰⁷⁶ For that reason section 219(1)(b) was found to be applicable and the employer was convicted.

Laverne CJG stated that

“It is not conceivable that a prudent person uses a heavy vehicle for many years without at least annually to monitor the status of its capital for its proper functioning components. There in the defendant's conduct a blatant lack of care equivalent to a marked and important given his use of the backhoe as well as the associated risks, among others, a defective braking system”.²⁰⁷⁷

The court further considered section 217 of the Criminal Code and clarified the point that

“Section 217.1 does not create offense, but confirms the obligation imposed on anyone who is responsible for any work to take measures necessary to ensure the safety of others. It facilitates the proof of the offenses of criminal negligence brought against corporations or organizations that the meaning of "person" extends the scope of the provision to any person”.²⁰⁷⁸

(b) Observations from convictions

The Metron case serves as an indication that the mere fact that one is a senior officer makes it possible for that person to bind the organisation through his or her actions or lack thereof. Furthermore the Metron case makes it clear that Canadian law has been brought to a point where “it is no longer necessary for prosecutors to prove fault in the boardrooms or at the highest levels of corporation: the fault of even middle managers may suffice”.²⁰⁷⁹ Corporations and other organizations need to be aware of the fact that actions of middle managers will also lead to the corporation or organisation being held criminally liable. Archibald, Jull and Roach regard

²⁰⁷⁶ Ibid para 81.

²⁰⁷⁷ Ibid para 99.

²⁰⁷⁸ Ibid para 107.

²⁰⁷⁹ T Archibald, K Jull and K Roach “Critical Developments in Corporate Criminal Liability: Senior Officers, Wilful Blindness, and Agents in Foreign Jurisdictions” 2013 (60) *Criminal Law Quarterly* 92, 92.

“the Canadian model is one that ought to be studied by other jurisdictions as an efficient model that avoids the difficulty of proving fault at the level of the board of directors or directing mind but also is a fair model that avoids holding the corporation vicariously responsible for the wrongs of every employee or contractor”.²⁰⁸⁰

They further commend the judge in the Metron case for having recognised that the fault of the senior manager should not be separated from the fault of the corporation or organisation.²⁰⁸¹

The *Scrocca* case has been hailed as being “noteworthy since it is the first trial decision under Bill C-45 and serves to remind employers, supervisors, officers and directors that the OHS criminal negligence provisions carry a real risk of accountability”.²⁰⁸²

From the cases discussed above it is clear that the holding of corporations and organisations for criminal negligence causing death that has been brought about by Bill C-45 is a crime that is taken seriously by the courts and corporations, organizations and employer may find it difficult to avoid convictions. It is therefore crucial for all corporations, organisations and employers to be fully aware of the changes brought about by Bill C-45 especially since the sentences that may be imposed may possibly cripple them.

²⁰⁸⁰ T Archibald, K Jull and K Roach “Corporate Criminal Liability: Myriad complexity in the scope of senior officer” 2013 50(3) *Criminal Law Quarterly* <http://ssrn.com/abstract=2354562> 1, 2 (accessed 20 March 2014).

²⁰⁸¹ “A corporation should not be permitted to distance itself from culpability due to the corporate individual's rank on the corporate ladder or level of management responsibility: this reflects the fact that senior officers at both policy and operational levels are merged. It would be inconsistent if a corporation were to be held liable for the actions of a middle level manager and then be excused on sentencing because the manager was lower on the corporate ladder than senior policy makers. Such a result would be contrary to the intention of Bill C-45. By rejecting the American concept of vicarious liability, Bill C-45 makes it possible to identify all senior officers with the corporation. It does not require sentencing judges to mitigate an overbroad liability rule (ie vicarious liability) at sentencing. We applaud Justice Pepall's judgment which closes off this potential loophole on sentencing and recognizes that the fault of all senior officers should be identified with that of the corporation”. (Ibid 14).

²⁰⁸² N Keith “Bill C-45 sees second conviction in Canada” 26 May 2011 *Canadian Occupational Safety* <http://www.cos-mag.com/legal/legal-columns/bill-c-45-sees-second-conviction-in-canada.html> (accessed 12 March 2014).

(c) The future of corporate homicide in Canada

Corporate homicide in Canada is a clear and well-established phenomenon. Even prior to the full codification of corporate criminal liability in the form of Bill C-45, there are several court cases in which corporations were charged with offences relating to causing people's deaths. Even though prosecutions did not necessarily result in convictions, it is nevertheless important that there is an acceptance of the notion of prosecuting a corporate entity for deaths caused by its negligence.

In *R v Syncrude Canada Ltd*²⁰⁸³ a corporation was charged with 'criminal negligence causing death, following the asphyxiation of two of its employees by nitrogen gas. The deceased were two employees of Western Stress Relieving Servicing Inc, an independent contractor, hired to do repairs at a plant belonging to Syncrude Canada Ltd. At the time of their deaths they had been doing repairs at the Syncrude Canada Ltd plant. The first deceased had dropped a tool in a reactor and upon entering the reactor with the aim of retrieving it he was asphyxiated by nitrogen fumes. His colleague also entered the reactor with the aim of assisting the deceased, and was similarly asphyxiated. According to medical evidence the nitrogen gas had led to the two employees falling unconscious and they both died a few moments thereafter.'²⁰⁸⁴

Evidence presented by Syncrude Canada Ltd showed that safety measures were in place, even though there was room for improvement. Among its safety measures was a well-known inhouse rule that vessels were not to be entered into without proper authorisation.²⁰⁸⁵ This was supplemented by requirements that

- A safe entry tag needs to be on a vessel prior to the vessel being entered into and such tag needs

²⁰⁸³ *R v Syncrude* (note 1845) 233.

²⁰⁸⁴ *Ibid* 236.

²⁰⁸⁵ *Ibid* 242.

to be read and understood.

- A safe work permit which had to have a specific vessel entry endorsed on it was a requirement.
- There had to be a stand-by person outside the vessel, who had to be ready to render assistance to the person inside the vessel. The stand-by person was required to remain there until the other person is out of the vessel. He was further required to have a Scott Air Pac with him.²⁰⁸⁶

The prosecution's argument was that Syncrude negligently caused the deceased's deaths by letting them work in an unsafe working area where there was a reactor filled with nitrogen. The deceased had no oxygen masks and there was no signage warning them that there was a lack of oxygen inside the reactor and this gave the deceased a 'sense of false security'.²⁰⁸⁷

In making a finding, the court relied on *R v Int. Paper Co. of Can.*²⁰⁸⁸ in which a corporation was acquitted on a charge of criminal negligence. The court in *R v Syncrude* stated that 'For there to be criminal negligence, there must be added to civil negligence the factor of criminality. The act or omission for which the accused is blamed must indicate a reckless carelessness with respect to the safety of others'.²⁰⁸⁹ It was also stated that the deceased had not been required to enter the vessel and they were so experienced that they should have known that the vessel should not have been entered into.²⁰⁹⁰ The accused corporation was acquitted of criminal negligence.

There are other instances where Canadian corporations have caused human rights abuses outside Canada and this has been taken very seriously in Canada. Barrick Gold, which is a Canadian mining company was dealing with the deaths of several people who had been shot

²⁰⁸⁶ Ibid 243.

²⁰⁸⁷ Ibid 251.

²⁰⁸⁸ *R v Int. Paper Co. of Can.*, [1979] C.A. 411, 50 C.C.C. (2d) 231.

²⁰⁸⁹ *R v Syncrude* (note 1845) 256.

²⁰⁹⁰ Ibid 257.

by police at one of its mines on May 16 2011,²⁰⁹¹ when it was exposed for sexual attacks of fourteen women in Mara, Tanzania.²⁰⁹² This was followed by intensive investigations which led to a decision that African Barrick Gold, a subsidiary of the Barrick Gold should award compensation to the victims of the sexual attacks.²⁰⁹³ There is still uncertainty regarding whether criminal charges will be laid though.²⁰⁹⁴

Another company, HudBay Minerals Inc which is based in Toronto, along with two of its subsidiaries faces criminal charges for human rights abuses including the violent death of a community leader in Guatemala (Choc action).²⁰⁹⁵ An order was sought for a motion to strike the actions against the three companies (Hudbay, HMI and CGN, which was the only one not connected to Canada).²⁰⁹⁶ In the event of that being successful, CGN sought the permanent stay of the Choc action based on the fact that the Canadian court has no jurisdiction over CGN.²⁰⁹⁷ Brown J in the Superior Court of Ontario dismissed the motion to strike the three actions as well as CGN's jurisdiction motion and ruled that HudBay Minerals Inc could be held criminally liable in Canada for those crimes.²⁰⁹⁸ It has been stated that

²⁰⁹¹ G York "In an African mine the lust for gold sparks a deadly clash" 7 June 2011 *The Globe and Mail* <http://www.theglobeandmail.com/news/world/in-an-african-mine-the-lust-for-gold-sparks-a-deadly-clash/article598554/> (accessed 20 May 2014).

²⁰⁹² G York "Claims of sexual abuses in Tanzania blow to Barrick Gold" 30 May 2011 *The Globe and Mail* <http://www.theglobeandmail.com/news/world/claims-of-sexual-abuses-in-tanzania-blow-to-barrick-gold/article598557/> (accessed 20 May 2014).

²⁰⁹³ G York "African Barrick to compensate assault victims" 19 December 2013 *The Globe and Mail* <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/african-barrick-to-compensate-assault-victims/article16063262/> (accessed 20 May 2014).

²⁰⁹⁴ "The company said it found the complaints "credible" and "highly disturbing." It launched its own investigation by a team of experienced experts, and it turned over its findings to the Tanzanian police, although on Thursday it was unable to say whether the police will lay criminal charges against the perpetrators". Ibid.

²⁰⁹⁵ R Hart (contact person) "Award winning mining company being sued for violent death of community leader: Industry out of step with Canadian values and expectations" 2 December 2010 *Mining Watch Canada* <http://www.miningwatch.ca/news/award-winning-mining-company-being-sued-violent-death-community-leader-industry-out-step-canadi> accessed 22 May 2014.

²⁰⁹⁶ *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414 para 1.

²⁰⁹⁷ Ibid.

²⁰⁹⁸ Ibid para 87.

“as a result of this ruling, Canadian mining corporations can no longer hide behind their legal corporate structure to abdicate responsibility for human rights abuses that take place at foreign mines under their control at various locations throughout the world”.²⁰⁹⁹

It is submitted that the ruling is commendable and is in line with Bill C-45 in that it makes it possible for corporations to be held criminally accountable for crimes they have committed, regardless where in the world the crimes have been committed. It is likely that Hudbay and other companies who commit atrocities abroad will be prosecuted in accordance with the changes brought about by Bill C-45.

The changes effected by Bill C-45 to the concept of corporate criminal liability in Canada have a direct effect on the concept of corporate homicide. The legislature has defined and extended the concept of corporate criminal liability to such an extent that corporate homicide is fully accommodated. Where a corporation / organization has negligently caused the death of a person, such corporation / organization will be prosecuted. The Canadian law is to be commended in that in its regulation of corporate criminal liability it specifically includes the issues of failure to provide safe working conditions. Moreover in terms of the Criminal Code, section 219, every one who endangers the lives of others by showing disregard for the lives and safety of others is criminally negligent and may be prosecuted for criminal negligence. As stated above, every one includes organizations, which in turn includes corporations.

The current Canadian model has been hailed as being “a fair model that avoids holding the corporation vicariously responsible for the wrongs of every employee or contractor”.²¹⁰⁰

²⁰⁹⁹ *Choc v. HudBay Minerals Inc. & Caal v. HudBay Minerals Inc.* Lawsuits against Canadian company HudBay Minerals Inc. over human rights abuse in Guatemala <http://www.chocversushudbay.com/> (accessed 20 May 2014).

²¹⁰⁰ Archibald *et al.* (note 2080) 2.

Archibald, Jull and Roach look at the definition of senior officers and point out the advantages of having moved from the strict identification doctrine to a position where it is easier to convict corporations. They state that the definition of ‘senior officer’ makes it easier because, whereas in the past one had to look for a senior individual, currently this term includes even “a director, its chief executive officer and its chief financial officer”.²¹⁰¹ In this way the limitation as to which parties’ actions may lead to the corporation being held liable is broadened, and in this way, the chances of a corporation being found liable are higher.²¹⁰²

VI THE PUNISHMENT OF CORPORATIONS

As with South Africa and England, Canada also makes use of the fine as the main way in which it punishes corporations that have been convicted for having caused death by negligence. Again, as in England, there are alternative sanctions that are made available to the courts, however, the dominant form of punishment for corporations that have caused deaths still remains the fine. It appears that the fine in both Canada and in England, works well and is an effective form of punishment for corporations that have caused death. In both jurisdictions the reform to the law of corporate criminal liability also brought with it additional ways in which corporations may be sentenced.

An innovation to corporate criminal liability in Canada that was brought about by Bill C-45 is the possibility of sentencing a corporation by means of probation. In this way the court is able to compel the corporation “to take steps to repair harms that it has caused and to prevent similar harms in the future”.²¹⁰³ It is submitted that the manner in which corporations together with

²¹⁰¹ Ibid 3.

²¹⁰² “The scope of what constitutes a “senior officer” has been significantly broadened. The potential criminal liability of corporations has been dramatically increased”. (Ibid 1).

²¹⁰³ Archibald *et al.* (note 1648) 368.

other organisations are punished may make them avoid being found guilty of causing death through criminal negligence.

(a) Sentencing Guidelines

Since 31 March 2004 the Criminal Code requires a court which is sentencing an organization, including corporations, to take certain aggravating and mitigating factors into account. These are found in section 718.21 of the Criminal Code. The wording of the section is mandatory²¹⁰⁴ therefore the sentencing courts are obliged to take the listed factors into account.

(i) Any advantage realized by the organization as a result of the offence;²¹⁰⁵

The court has to take into account whatever benefits the organisation or corporation has derived from the offence. It is submitted that this is an important factor to consider when deciding on the sentence to impose. The more the corporation or organisation has benefitted the harsher the punishment should be. This would serve as an aggravating factor, whereas if the corporation or organisation did not derive any benefit or derived very little benefit that would serve as a mitigating factor.

(ii) The degree of planning involved in carrying out the offence and the duration and complexity of the offence;²¹⁰⁶

The court is further obliged to take into account the amount of planning that was involved as well as the period of time over which the offence took place and how complex the offence was.

²¹⁰⁴ According to the Criminal code “A court that imposes a sentence on an organization shall also take into consideration the following factors...” (own emphasis). The Criminal Code (note 1643) section 718.21.

²¹⁰⁵ Ibid section 718.21(a).

²¹⁰⁶ Ibid section 718.21(b).

(iii) Whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;²¹⁰⁷

When faced with a prosecution, some organisations may be tempted to create the impression that they are not in a position to pay the fine or to make restitution due to financial restraints. If an organisation falsely creates such an impression by concealing or converting its assets, the court will take this into account when deciding on the sentence to impose on the organisation. This will serve as an aggravating factor.

(iv) The impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;²¹⁰⁸

In deciding which sentence to impose the court has to look at the position of the corporation or organisation and how it will be affected by the sentence. This makes it possible to impose a sentence that is suitable for the particular corporation or organisation that is being sentenced. It is commendable that each time the court sentences a convicted organisation or corporation it must look at its particular circumstances.

(v) The cost to public authorities of the investigation and prosecution of the offence;²¹⁰⁹

The court is also required to take into account the amount spent on investigating and prosecuting the corporation for the offence which the corporation has been convicted of. It is submitted that taking such into account for purposes of aggravating the sentence is

²¹⁰⁷ Ibid section 718.21(c).

²¹⁰⁸ Ibid section 718.21(d).

²¹⁰⁹ Ibid section 718.21(e).

commendable as it may have a deterrent effect. In future that same corporation or organisation may plead guilty and save costs when it has acted unlawfully.

(vi) Any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;²¹¹⁰

If in addition to being convicted, the corporation or organisation also has a penalty imposed on it stemming from a regulatory authority, the sentencing court must take that into account. It is submitted that this is a good practice as additional punishment for the same offence is considered when deciding on the sentence to be imposed.

(vii) Whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;²¹¹¹

When sentencing the organisation, an enquiry as to whether the organisation or its representatives have on a previous occasion been convicted of the same or similar offence is taken into account. This is an important factor, as it serves as an indication as to whether the organisation or its representatives are repeat offenders. If they have previously been convicted of the same offence this would serve as an aggravating factor, whereas, if the organisation and its representatives are first time offenders that may be used as a mitigating factor.

(viii) Any penalty imposed by the organization on a representative for their role in the commission of the offence;²¹¹²

²¹¹⁰ Ibid section 718.21(f).

²¹¹¹ Ibid section 718.21(g).

²¹¹² Ibid section 718.21(h).

The court takes other penalties that have been imposed on the corporation or on its representative for the offence.

(ix) Any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence;²¹¹³

In the event that the organisation has been ordered to make any restitution or to make any payment to the victim for that offence, the court takes that into account when sentencing the organisation for the same offence that gave rise to the restitution or payment.

(x) Any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.²¹¹⁴

If it is clear that the organization has taken measures to try to ensure that the organization does not subsequently commit an offence this will be viewed favourably.

VII CONCLUSION

Canadian law has gradually evolved from not accepting that a corporation could be held criminally liable for *mens rea* offences, to a point where it provides a wide scope for holding corporations and other organisations criminally liable for their crimes. The concept of corporate criminal liability for *mens rea* offences evolved from the narrow application of the identification to the wider application brought into being by Estey J in *Canadian Dredge* to a point where the identification no longer features in corporate criminal liability. Corporate liability is therefore no longer dependent on the fault of an individual who is regarded as directing mind of the corporation as the aggregation of the acts of more than one individual

²¹¹³ Ibid section 718.21(i).

²¹¹⁴ Ibid section 718.21(j).

may be sufficient to bring about the liability of a corporation for an offence. Moreover, partnerships and other organizations may now be held criminally liable in the same way as corporations.

These recent changes to the Criminal Code that have been brought into being via Bill C-45 have resulted in a system that facilitates the holding of corporations that injure and kill, criminally liable.

From the above discussion it is also clear that sentencing an organization or a corporation is not an exercise that is taken lightly. It involves investigations and the attaining of accurate information from the corporation or organization. For the court to be furnished with correct information, apart from information received from investigators, corporations and organizations that have been convicted have to be co-operative and supply the required information. It is submitted that having clear instructions to follow when deciding on the sentence to impose is a helpful tool that has the effect of enabling appropriate sentences to be imposed on corporate criminals. It is further submitted that since the guidelines enable the sentencing courts to take into account uniform factors in making a decision, this makes the sentencing process to be fair and similar.

Although the Canadian system also provides for fines, there are also alternative sentences may also be meted out to corporate criminals. The Canadian system seems to be effective, as may be seen from recent cases and it is submitted that South Africa ought to draw from it. It is unfortunate that, as in England, it was only after there was public outcry that reform was made in this field of law.

PART THREE – CONCLUSION

CHAPTER SIX – A NEW LEGAL FRAMEWORK FOR CORPORATE HOMICIDE IN SOUTH AFRICA

I INTRODUCTION

In part one of this thesis, corporate criminal liability was introduced as a relevant concept in today's society, which is characterised by many corporate activities.²¹¹⁵ It was pointed out that corporations and corporate activities have become part of life and corporations have made it possible for society to advance.²¹¹⁶ It was further pointed out that unfortunately, such advancement has come at a high price,²¹¹⁷ i.e. the negative impact on society in the form of

²¹¹⁵ See discussion in Chapter Two III above.

²¹¹⁶ See discussion in Chapter Two III (a) above.

²¹¹⁷ "In recent decades, these costs, in the form of deleterious effects on the public health, safety, and welfare, have become increasingly apparent". (WA Spurgeon & TP Fagan 'Criminal Liability for Life-endangering Corporate Conduct' (1981) 72 (2) *The Journal of Criminal Law* 400, 401 – 402).

corporate criminality.²¹¹⁸ This negative impact on society necessitates invoking criminal law, hence the prosecution of corporations for corporate crimes.

Furthermore, as a way of showing that corporate criminality is a universal problem and that the consequences of corporate activities can sometimes be extremely severe, the Bhopal disaster was discussed in part one.²¹¹⁹ The Bhopal disaster does not only show that corporate activities can sometimes impact very negatively on society by causing illnesses, disabilities, serious injuries and deaths. It also shows that despite imposing civil liability on corporations and individual criminal liability on the directors thereof, for justice to prevail it is imperative for the actual corporations that are involved in corporate criminality to be held criminally accountable for their unlawful actions or omissions.

South Africa's section 332 of the CPA has made it possible to hold corporations criminally accountable for corporate crimes, as illustrated by cases discussed in part two, chapter three above. The mere existence of section 332 of the CPA serves as an indication that South Africa takes corporate crime seriously and endeavours to ensure that corporations that are involved in corporate criminality are subjected to criminal law. It is submitted that corporate criminal liability is indeed a crucial concept in this day and age in which some corporate activities result in harm to members of society.²¹²⁰ The reason is that corporate criminal liability not only makes it possible to ensure that there is justice for the victims or for the families of victims of corporate crimes, but through corporate criminal liability it is also ensured that offending corporations

²¹¹⁸ From the case law that was discussed in each of the jurisdictions in part two of the thesis, the corporations' negative impact on society was illustrated.

²¹¹⁹ See the discussion in Chapter One I above.

²¹²⁰ Spurgeon & Fagan (note 2117) 401. Bucy (note 105) 1437.

are subjected to prosecution and to punishment, in the same way as all other offenders. It is further submitted that corporate criminal liability is the most appropriate way to deal with corporations that commit crimes, as opposed to individual criminal liability²¹²¹ or to subjecting corporations to civil liability²¹²² only. However, for corporate criminal liability to be effective, adequate and just corporations need to be punished in such a way that the purposes and theories of punishment as outlined in part one, chapter two²¹²³ are fulfilled.

It has been shown that section 332 of the CPA is a provision that contains flaws that render it ineffective, inadequate and unjust.²¹²⁴ The provision has been criticised for its many weaknesses which, among others, impede the prosecution of corporate criminals.²¹²⁵ Nevertheless, corporate criminal liability, as discussed above, is an essential part of South-African law.²¹²⁶ It is submitted that it ought to be retained, however, it is essential to embark on a process of reforming this area of the law as it has been indicated that it is in desperate need of reform.²¹²⁷

In this final part of this thesis although the focus will be on corporate homicide, the chapter will begin by mapping a way forward with regard to the manner in which reform to corporate criminal liability and corporate homicide should take place. A new framework of corporate criminal liability in South Africa will then be recommended. This will be followed by a discussion of the key areas of concern with regard to corporate homicide that arise from the

²¹²¹ (Isaacs (note 120) 252). Also see Chapter Two III (c) above.

²¹²² See Chapter Two III (b) above and the suggestion that corporations should be exposed to both criminal liability and civil liability.

²¹²³ See Chapter Two VI above.

²¹²⁴ See Chapter Three V above.

²¹²⁵ See Chapter Three V above.

²¹²⁶ Snyman (note 22) 253.

²¹²⁷ See Chapter Three V and VI above.

comparative study as well as justification for a separate legal framework for corporate homicide. The thesis will then conclude with the proposed legal framework for corporate homicide for South Africa and an explanation thereof.

II MAPPING A WAY FORWARD FOR REFORM OF BOTH CORPORATE CRIMINAL LIABILITY AND CORPORATE HOMICIDE

The reform of corporate criminal liability may take place in several ways. One of the ways is by means of remedying section 332 of the CPA through the making of amendments where necessary. As it has already been shown that section 332 has many weaknesses,²¹²⁸ making use of this method may mean overhauling the entire provision through amendments. It is submitted that an overhaul of an entire provision by making use of amendments is not an ideal solution.

Another way in which reform may occur is through making use of a proposal that was made in *S v Coetzee* of remedying a provision by means of severance²¹²⁹ of the parts of the provision that render it ineffective, inadequate and unjust. Making use of this particular method may resolve the problematic parts of section 332 of the CPA, however, should this method be followed it is imperative to ensure that after severance “what remains gives effect to the purpose of the legislative scheme”.²¹³⁰ This may be an arduous task and for the reform undertaken to succeed it is doubtful that the simple severance of undesirable parts of section 332 of the CPA will remedy the provision. Another possibility is to reform corporate criminal

²¹²⁸ See Chapter Three V above.

²¹²⁹ Kentridge J and O’Regan J in *S v Coetzee* (note 56) para 108 and para 202 respectively.

²¹³⁰ *S v Coetzee* (note 56) para 205.

liability by formulating a new legal framework for corporate criminal liability that will be free of the weaknesses that characterise section 332 of the CPA.

It is submitted that corporate criminal liability in South Africa is so defective, inadequate and so unjust that neither amendments to section 332 of the CPA nor severance of parts of the provision will lead to corporations being held criminally liable in an effective, adequate and just manner. Amendment or severance will not cater for all the aspects that need to be addressed in the process of reform. It is submitted that the problems raised by section 332 of the CPA may be resolved through the formulation of a new legal framework for corporate criminal liability in South Africa.

It should, however, be noted that although formulating a new legal framework for corporate criminal liability will lead to reform, such reform may not adequately address the crisis of the unlawful causing of deaths by corporations. It is submitted that reform is also urgently needed urgently in this area of South African law.²¹³¹ As discussed above, many deaths have been caused through corporate activities, however, the prosecution of corporations for deaths is generally not satisfactory in South Africa²¹³² and this gives the incorrect impression that deaths caused by corporations are acceptable.²¹³³ This perception is reinforced by the manner in which

²¹³¹ Rycroft states that “a more vigorous intervention by criminal law agencies is needed to bring about corporate resolve to avoid workplace deaths”. (Rycroft (note 365) 157). See also Burchell (note 49) 565.

²¹³² There is a lack of available statistics, however, during the period between June 2012 and June 2014 there are no prosecutions for deaths allegedly caused by corporations or corporate activities that were reported in the South African Criminal Law Reports. It must be noted though that these are reports of the High Courts, the Constitutional Court and the Supreme Court of Appeal. They do not include decisions made by the Magistrates courts.

²¹³³ “The acceptance of workplace deaths tends to confirm that contrary to what many would claim, society does not value human life above all: it is willing to accept a degree of hazard as the price of pursuing other goods. And yet it has been observed that the treatment of corporate killing by the legal system is particularly problematic in that there is a general recognition that the law fails to satisfy public opinion when it seeks to deal with death which is brought about by gross negligence in the exercise of a lawful pursuit such as commerce and industry”. (Rycroft (note 365) 142).

deaths caused by corporations are treated differently²¹³⁴ from deaths caused by individuals, to such an extent that it has been averred that “South African law treats corporate homicide in a different manner to other forms of culpable homicide”.²¹³⁵

Despite the lack of available statistics on the prosecution of corporations for deaths in South Africa, it is clear that there is a serious problem when it comes to prosecutions as media reports and civil claims for compensation continue to provide evidence that such deaths take place regularly. On the other hand, England has, after the coming into being of the CMCHA, experienced a 40% increase in the number of corporate manslaughter prosecutions.²¹³⁶ The English law statistics show that since the changes were made to its laws there has been an increase in the number of corporations that are prosecuted. This is an indication that the new law is making a difference, albeit slowly, as the number of successful prosecutions is still very low. It must be noted, however, that these are simply prosecutions, not convictions. In Canada the number of prosecutions since the inception of Bill C-45 has not really increased and it has been averred that the problem is that the new law is not being properly enforced²¹³⁷

²¹³⁴ “Enforcement processes are influenced and partly determined by stereotypes of crime and criminals; corporations are not stereotypical deviant offenders. Whichever comes first, the chicken or the egg, is not a question which we are likely to be able to answer, but the deployment of words such as ‘accident’ rather than ‘violence’ to describe the outcome of corporate risk-taking will undoubtedly influence the construction which is placed upon it. For these reasons, it is proposed to use the term ‘violence’ as one way of describing negligently caused corporate deaths and physical injuries”. Wells (note 15) 12. “The very use of the word ‘accident’ in the context of workplace and transport deaths, itself functions as a block to the perception of these deaths as criminally caused”. (A McColgan “The Law Commission Consultation Document on Involuntary Manslaughter – Heralding Corporate Liability” (1994) *Criminal Law Review* 547).

²¹³⁵ Rycroft (note 365) 157.

²¹³⁶ “Despite only three convictions since 2008 there has been a large rise in the number of corporate manslaughter cases opening”. ‘Corporate Manslaughter Cases Up By 40% In A Year’ *Sky News* 22 July 2014 <http://news.sky.com/story/1042970/corporate-manslaughter-cases-up-by-40-percent-in-a-year> (accessed 22 May 2014). “The number of corporate manslaughter cases opened by the Crown Prosecution Service jumped by 40pc last year as prosecutors stepped up their use of recent legislation that has produced just three convictions to date”. E Gosden “Corporate Manslaughter Cases Rise” *The Telegraph* 28 Jan 2013 <http://www.telegraph.co.uk/finance/financial-crime/9830480/Corporate-manslaughter-cases-rise.html>. (accessed 22 May 2014).

²¹³⁷ “in the 10 years since Bill C-45 passed into law, there have only been 10 prosecutions. This is particularly concerning because the number of fatalities has not changed over that decade — the average number of fatalities has remained constant at about 990 every year for the last 10 years, according to the Association of Workers’ Compensation Boards of Canada”. (N Keith “After 10 years Bill C-45 yields few prosecutions” <http://www.cos->

It is submitted that reform of corporate criminal liability which includes a specific focus on deaths caused by corporations in South Africa, is likely to bring about an increase in the number of prosecutions, as has been the case with England. There must, however, be the political will to ensure that the new law is enforced. Failure to do that will result in the number of prosecutions not increasing, while the number of deaths caused by corporations and through corporate activities continue to occur, as is the case in Canada.

Moreover, for South Africa to be able to effectively protect the right to life in the context of corporate criminal liability it is proposed that reform with regard to deaths caused by corporations or through corporate activities should be made in such a way that there is a specific offence of corporate homicide that is regulated by means of a separate legal framework. This submission is based on the premise that death is the most serious harm against a person²¹³⁸ and it should be given special attention through being treated separately.

It is envisaged that having a separate legal framework dedicated solely to unlawful deaths caused by corporations²¹³⁹ will lead to corporate criminal liability becoming more effective, more adequate and just, particularly with regard to ensuring that corporations face criminal prosecutions for causing loss of life. Moreover, the existence of such a separate legal framework may serve as a deterrent, thus increasing chances of combatting deaths caused by corporations or through corporate activities.

mag.com/legal/legal-columns/3900-after-10-years-bill-c-45-yields-few-prosecutions.html?print=1&tmpl=component (accessed 22 May 2014).

²¹³⁸ See discussion in Chapter One III above.

²¹³⁹ “It is because safety should be rated highly in assessing the seriousness of crimes, that an appropriate system of criminal justice should be devised which reflects its importance both symbolically and instrumentally”. (Wells (note 15) 17). Also see discussion in Chapter One III which shows that when it comes to the protection of life there are more jurisdictions which are moving towards a separate offence of corporate homicide.

With both England and Canada having recently reformed their laws in a manner “aimed at making it easier to prosecute corporations for homicide and for workplace injuries”²¹⁴⁰ South Africa should, in forming a separate legal framework for corporate homicide, draw from lessons learnt through the comparative study from the reform in both countries.

III RECOMMENDATIONS FOR A FUTURE SOUTH AFRICAN CORPORATE CRIMINAL LIABILITY FRAMEWORK

The comparative study that has been made above clearly shows that South Africa is lagging far behind Canada and England when it comes to development in the area of corporate criminal liability.²¹⁴¹ As stated above, Burchell is of the view that there is a dire need for reform of corporate criminal liability in South Africa.²¹⁴² The view that there is a need for reform has also been expressed by various commentators on corporate criminal liability in South Africa, including Rycroft, Jordaan, Van der Linde and Borg-Jorgensen. Based on what these commentators have said, together with the criticisms made against section 332 of the CPA above²¹⁴³ it is submitted that the time has indeed come for South Africa to see to it that reform in this area of the law takes place.

Recommendations for a future corporate criminal liability framework for South Africa are made below. In the process of making the recommendations suggestions will be made that will result in some parts of section 332 that are not problematic being retained, however, for the

²¹⁴⁰ Beale (note 113) 1482.

²¹⁴¹ This is seen from case law in England and Canada as well as England’s CMCHA and Canada’s Bill C-45 which have resulted in drastic changes in corporate criminal liability in both jurisdictions.

²¹⁴² See discussion in Chapter Three III (a) (ii) above. See also Burchell (note 195) 60.

²¹⁴³ See discussion above in Chapter Three V above.

most part the future legal framework of corporate criminal liability for South Africa will, as suggested above, be drawn from lessons learnt from both the Canadian and the English corporate criminal liability models.

(a) Entities that should be subjected to corporate criminal liability

Currently corporate criminal liability in South Africa applies to corporations. Section 332(1) specifically refers to the imposition of criminal liability “upon a corporate body”.²¹⁴⁴ The phrase “corporate body” limits application to commercial entities that have legal personality. The meaning is, however, broad enough to include local governing bodies, universities and other specially constituted corporations.²¹⁴⁵ In addition to that section 332(7) makes it possible for corporate criminal liability to apply where an entity lacks legal personality, but in this case it is the members of that association of persons who face personal criminal liability.²¹⁴⁶ The partnership itself is excluded from criminal liability.

Apart from excluding partnerships, the current South African law on corporate criminal liability does not specifically apply to other associations of persons such as clubs, trade unions, employers’ organisations, societies, a trust created by notarial deed²¹⁴⁷ etc. It is also mainly directed towards entities that are involved in commercial activities. There is, however, no reason why other entities are excluded from corporate criminal liability. Pieth and Ivory show that there are many other entities that play a role in today’s economy and that they are just as

²¹⁴⁴ See discussion in Chapter Three IV (a) (i) above.

²¹⁴⁵ Delpont *et al.* (note 87) Appx 7.

²¹⁴⁶ See discussion in Chapter Three IV (a) (vii) above.

²¹⁴⁷ *S v Peer* (note 883).

capable of causing harm to members of society as corporations.²¹⁴⁸ For that reason they ought to also be the object of corporate criminal liability.

It is therefore submitted that corporate criminal liability should not be restricted to corporate bodies. It ought to be extended in such a way that it also applies to entities that are not corporate bodies. The main consideration should be the fact that all these entities interact with society and, in the same way as corporate bodies, they are capable of causing harm to those with whom they interact.

Extending corporate criminal liability in such a way that it includes entities other than corporate bodies will be a development that is in line with developments in the compared jurisdictions. In English law the CMCHA has expanded corporate homicide to include all sorts of entities. It is therefore possible for *inter alia*, partnerships, the police force, government departments, trade unions and employers' associations that are employers to be held criminally liable for corporate homicide.²¹⁴⁹ The CMCHA further extends liability to include entities that are listed in schedule 1.²¹⁵⁰ Corporate homicide is therefore not only limited to corporations. Canada has similarly expanded corporate criminal liability in such a way that it is now possible for organisations, other than corporations to be held criminally liable for corporate crimes.²¹⁵¹ It

²¹⁴⁸ “In industrialised economies, companies are only one vehicle for investment. National private laws recognize other structure (trusts, partnerships, *Anstalten*, *Einzelunternehmer*, etc.) some of which have legal personality under national law and others which are legally identified with their owners. Further, individuals and groups of citizens are not the only participants in the economy: many government and government agencies are also engaged in commercial activities, including in industries or sectors with higher levels of “compliance risk”. Finally, neither companies nor governments are the only large, complex institutions whose stakeholders have the opportunity to harm others through their collective operations. Non-government, non-profit entities operating in the “public” sector may provide important social services and otherwise exercise considerable influence over human health and well-being”. (Pieth & Ivory (note 24) 5).

²¹⁴⁹ Matthew (note 1403) 14.

²¹⁵⁰ See discussion in Chapter Four IV (a) (v) above.

²¹⁵¹ See Chapter Five III (a) (i) above.

is submitted that moving away from strictly holding only corporations criminally liable to holding other entities criminally liable eliminates the possibility of entities escaping prosecution due to the fact that they are not entities that are legally recognised as corporate bodies.

In Canada, through Bill C-45 the Criminal Code has also extended corporate criminal liability to those entities that are not corporate bodies.²¹⁵² As with the Canadian approach the extension of liability in South Africa to other entities should be “to widen criminal liability beyond formal corporations to include various types of collective organizations”.²¹⁵³ The inclusion of entities other than corporate bodies to the application of corporate criminal liability will also be of value as “the stigma and sanctions of the criminal law promise greater deterrence from corporate misconduct and more opportunities for asset recovery, compensation and mandatory corporate reform”.²¹⁵⁴

In the CMCHA these entities or organisations have been listed.²¹⁵⁵ In contrast with the CMCHA, the Canadian model does not provide a list of those entities. It merely expands the definition of “association of persons” to include organisations. The term organisation is therefore wide enough to include “organised criminal gangs”.²¹⁵⁶

²¹⁵² See discussion in Chapter Five IV (a) (i) above.

²¹⁵³ Archibald *et al.* (note 1648) 374.

²¹⁵⁴ Pieth and Ivory (note 24) 5.

²¹⁵⁵ Apart from the list in Schedule 1 in terms of section 1(2) “a department or other body listed in schedule 1”; a police force; a partnership, or a trade union or employers’ association, that is an employer” is also subjected to the Act. See discussion in Chapter Four IV (a) (v) above.

²¹⁵⁶ Archibald *et al.* (note 1648) 374.

Not providing a list has been criticised for expanding criminal liability too wide to such an extent that

“any group that organises a public meeting with tasks assigned to members of the group, could be an ‘association of persons’ and be subject to prosecution. Even the nuclear family could conceivably be an association of persons under the definition of the Code”.²¹⁵⁷

As a way of ensuring that the term organisation in the legal framework for corporate criminal liability in South Africa is not too wide, it is recommended that South Africa should follow the English law model by providing a list of entities that may be subjected to corporate criminal liability, and this list should include “organised criminal gangs”. The legal framework must be in such a way that it makes provision for the future expansion of that list. With regard to the CMCHA “the list of organisations to which the offence applies can be further extended by secondary legislation, for example to further the types of unincorporated association, subject to the affirmative resolution procedure (s.21)”.²¹⁵⁸ Provisions similar to section 21 and section 22 of the CMCHA may be therefore be included in the new legal framework for corporate criminal liability in South Africa so as to ensure that the list does not remain static.

(b) The basis for liability

As explained in chapter three, South Africa relies on the derivative approach as a basis for the liability of corporations.²¹⁵⁹ Burchell refers to this as an “antiquated” approach.²¹⁶⁰ This approach, as discussed in chapter three above²¹⁶¹ entails reliance on the identification of or the pointing out of an individual within the corporation with guilt, so that that guilt can be imputed

²¹⁵⁷ Dusome (note 1728) 121.

²¹⁵⁸ Ormerod and Taylor (note 1485) 597. See also section 22 of the CMCHA.

²¹⁵⁹ See Chapter Three III (b) (ii) above.

²¹⁶⁰ Burchell (note 195) 472

²¹⁶¹ Chapter Three III (b) (ii) above.

to the corporation. It is submitted that this hinders the effectiveness of corporate criminal liability, as the failure to identify such an individual leads directly to the inability to prosecute.²¹⁶² It is recommended that another basis for liability which will be more effective should replace the derivative approach.

The identification doctrine²¹⁶³ could be an option, however, it does not differ from the derivative approach as it also relies on the identification of a particular individual, albeit a senior one, within the company who is guilty of the offence. Gobert states that

“In effect, the identification test imposes derivative liability on the company; the company’s liability derives from that of a person who is identified with the company and who commits a criminal offence”.²¹⁶⁴

From Gobert’s statement it is clear that the similarities between the current South African position and the identification doctrine are such that they are likely to present with the same challenges. As seen from discussions above in both England and Canada the identification doctrine was problematic²¹⁶⁵ and as a way of overcoming its problems changes were made in both jurisdictions. It is submitted that for South Africa the solution should be found in making a move towards

²¹⁶² See discussion in Chapter III (b) above.

²¹⁶³ See discussion in Chapter Four III (a) (iii) above.

²¹⁶⁴ Gobert (note 1411) 316. Moreover, “With regard to the identification model, it is important to note that it encourages senior management or the board of directors to delegate the management of criminogenic activities to middle or junior level managers in order to escape liability”. (Nana (note 488) 100).

²¹⁶⁵ “It has been widely recognised that groups can divide responsibility within the organization so that no one individual is responsible for an action, or no individuals can be identified as having been responsible, thus shielding individuals from liability, so that without group liability independent of individuals, no one is responsible or punished. Such diffusion presents a serious problem for any model that requires the identification of a specific individual possessing a specific fault in order to attribute fault to the group”. (Dusome (note 1728) 109).

“a more realistic concept of corporate liability and a more sophisticated acknowledgement that corporations can be criminally responsible, whether collectively or individually, not just through the conduct of their ‘controlling minds’, but through their management, other personnel, and even their policies. The corporation as such can be at fault”.²¹⁶⁶

The English CMCHA imposes a duty on the corporation and then holds the corporation liable directly or personally for breach of that duty if senior management failure has played a substantial role in the breach of that duty.²¹⁶⁷ The ‘senior management failure approach’ has been dubbed the “most controversial provision in the Act”²¹⁶⁸ and the issue of requiring proof of failure by senior management has drawn criticism.²¹⁶⁹ Pinto and Evans pose the following question

“Does the need to prove that “senior management failure” was a “substantial element in the breach” reproduce the same old problems by focusing on individuals at particular levels as opposed to systemic fault?”²¹⁷⁰

On the other hand, with regard to Canada changes brought about by Bill C-45 to the Canadian Criminal Code,²¹⁷¹ require that where the prosecution has to prove negligence the senior

²¹⁶⁶ Burchell (note 195) 471 – 472.

²¹⁶⁷ Section 1(3) of the CMCHA states that “an organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1)”.

²¹⁶⁸ Matthews (note 1403) 110. It has also been criticised for among others the fact that “it would introduce additional legal argument about who is and who is not a ‘senior manager’ and “that by aiming at senior management to catch larger organizations, it actually focuses on smaller organisations”. (Matthews (note 1403) 111).

²¹⁶⁹ Matthews points out the concerns raised by the Joint Committees regarding the ‘senior management requirement’ including that

“- it would introduce additional legal argument about who is and who is not a ‘senior’ manager’
- that by aiming at senior management to catch larger organizations, it actually focuses on smaller organizations”. (Ibid)

²¹⁷⁰ Pinto & Evans (note 94) 251.

²¹⁷¹ See section 22.1(b) of the Canadian Criminal Code.

officers' marked departure from the standard of care collectively leads to the corporation or organization being held criminally liable.²¹⁷²

It is submitted that questions raised about and criticisms made against the senior management failure approach and against the issue of "senior officers"²¹⁷³ are valid as they seem to retain the weakness of the identification doctrine that both England and Canada intended to move away from. These two approaches, are however, as seen from the discussions above an improvement in that they do make a move away from the strict nominalist approach.²¹⁷⁴

The South African system may still benefit from making use of either of these two approaches. It is submitted that for corporate criminal liability the senior management failure approach would eliminate some of the problems posed by the derivative approach. The shortfalls of this approach may be remedied by following the suggestion made by Nana that this approach may be followed with improvements being made to it.²¹⁷⁵ Nana suggests "clearly stipulating which officers and employees qualify as the senior management of the company for purposes of a particular offence and when their acts would be attributed to the company".²¹⁷⁶

The legal framework of corporate criminal liability would therefore

- Impose a duty of care on corporations and other organisations. Although this will be a duty based on the common law duty of care, it is important for the duty of care to be clearly defined and explained in such a way that the corporations / organisations are

²¹⁷² See discussion on the Canadian approach in Chapter Five IV (a) above.

²¹⁷³ See criticisms of the Canadian approach in Chapter Five IV (a) above.

²¹⁷⁴ "The old limitations of the identification doctrine are gone and this aspect of the definition is linked to a particular level of management but considers how an activity was managed within the organisation as a whole. It will now be possible to examine the shortcomings of a wide variety of individuals within the organisation to prove a failure of management by the organisation..." (Ormerod & Taylor (note 1485) 602).

²¹⁷⁵ Nana (note 488) 104.

²¹⁷⁶ Ibid.

fully aware of the duty imposed on them. As with the CMCHA the question whether the duty existed should be a question of law that is determined by the criminal court.²¹⁷⁷

- Where the duty has been breached, before the corporation or organization is held criminally liable, it must be shown that the breach was as a result of senior management failure. The onus will be on the prosecution to prove this.

(c) The citation in summons

Section 332 does not allow for the corporate body to be summonsed in its own name.²¹⁷⁸ There is no reason that has been provided for disallowing the summoning of the corporate body in its own name. The representative of the corporation who will plead on behalf of the corporation and who will be tried in the place of the corporation is the one whose name is cited in the summons. The unfortunate result of using the name of the representative is that the case ends up appearing as though it is a prosecution against that natural person who is tried in his representative capacity on behalf of the corporation and not a prosecution against a corporation.

As observed above, this has the untenable result of concealing the fact that a particular company is being or has been prosecuted. If the case is not publicised those who deal with the corporation are effectively deprived of information regarding the alleged crimes committed by that corporation. The stigma, which serves to make corporate criminal liability more effective is therefore not present. The corporation continues with business as usual and unless those who deal with the corporations may not be aware of the allegations against that corporation unless,

²¹⁷⁷ “Given the potential breadth of the categories of duty and examination of the common law necessary to determine whether a duty does exist, it is reassuring to see that the question whether a duty of care is owed is a question of law. It is for the trial judge to decide: s.2(5). Moreover, ‘the judge must make any findings of fact necessary to decide that question’”. (Ormerod & Taylor (note 1485) 599 – 600).

²¹⁷⁸ *R v Hammersma and Another* (note 602) 39. See discussion in Chapter Three IV (a) (ii) above.

perhaps with the help of the media the prosecution is made public. Members of society who deal with corporations and other organisations should not have to rely on the media or chance to be made aware of criminal court proceedings against the corporations or organisations they deal with.

It is submitted that the new legal framework for corporate criminal liability must ensure that unlike the current provision the corporate body or the organisation is cited in its own name in the summons. In this way it becomes clear that it is the corporate body or the organisation that is being subjected to prosecution. As with corporate criminal liability in England when proceedings are against a corporate defendant, the corporate defendant must be cited in the summons. Pinto and Evans point out that

“...summoning the wrong defendant may be fatal to the proceedings. This is particularly so if the defendant is a corporation, since amending the summons to change the name may be a substitution of the accused, not just an insignificant or merely technical modification”.²¹⁷⁹

It is submitted that making changes to the issuing of summons in such a way that the corporation is cited as a defendant will also put South Africa in line with other jurisdictions.

(d) The inclusion of a defence

One of the Constitutional weaknesses of section 332 of the CPA, which also makes it to be unjust, is that corporations do not have a defence against corporate criminal liability. Borg-

²¹⁷⁹ Pinto & Evans (note 94) 105.

Jorgensen and van der Linde observe that as a result of not having a defence the current provision “as it stands might not be susceptible to justification in terms of the limitation clause and might therefore be inconsistent with the constitution”.²¹⁸⁰ It is proposed that for corporate criminal liability to be just and to be in line with the Constitution it should be possible for the corporation to have a defence. The framework for the future corporate criminality ought to include possible defences for a corporation against corporate criminal liability.

It is submitted that due diligence should be a defence. If it can be shown that the corporation took steps to prevent the crime from taking place the corporation should be able to escape liability on the basis of due diligence. The new legal framework for corporate criminal liability in South Africa should, however, be worded in such a way that the duty of care that is imposed on the corporation or organisation is not undermined by the defence. Where it can be shown that the corporation has a valid defence, the individual within the corporation who actually committed the crime should be held criminally liable.

(e) A legal framework that results in corporate criminal liability that is free of provisions that infringe upon the presumption of innocence

In Chapter three it has been shown that the criminal courts and the Constitutional Court are loathe to accept provisions that undermine the Constitution by infringing upon the presumption of innocence. Various court cases have been discussed that show that such provisions cannot pass the constitutional test,²¹⁸¹ including *S v Coetzee*²¹⁸² which dealt directly with the

²¹⁸⁰ Borg-Jorgensen & Van der Linde (note 53) 459.

²¹⁸¹ See discussion in Chapter Three IV (a) (v) (bb) above.

²¹⁸² *S v Coetzee* (note 56).

infringement of the presumption of innocence in section 332 of the CPA.²¹⁸³ Moreover in the discussion of criticisms or shortfalls of section 332 of the CPA the fact that section 332(1), 332(4) and 332(7) of the CPA contain infringements of the presumption of innocence have been raised.

It is submitted that the wording of the new legal framework for corporate criminal liability should be in such a way that there is absolutely no part of the provision that will infringe upon the presumption of innocence, as such infringement results in the provision being unjust.

(f) Punishment and sentencing

As already noted one of the challenges posed by section 332 of the CPA is that it allows for the fine as the only form of punishment that may be imposed on a corporation. This makes corporate criminal liability ineffective in certain cases, especially where a minimal fine is imposed on a corporate criminal whose net worth exceeds that of an average corporation. That corporation is therefore not punished by the sentence and there is a possibility that since it faced no consequences, the corporation may repeat the offence at a later stage. It is recommended that the fine be retained but when deciding on the amount of the fine, the court must take into consideration factors such as how serious the offence committed is and what the corporation's financial status is. In this way the fine that is imposed may lead to corporate criminal liability being effective. This is an important aspect that is drawn from English law.²¹⁸⁴ Moreover, the court should be able to impose any amount that it deems fit for the offence committed and the

²¹⁸³ The case dealt with section 332(5) of the CPA and found that its infringement of the presumption of innocence was not justifiable. See discussion in Chapter Three IV (a) (v) (aa) above

²¹⁸⁴ "See discussion in Chapter Four VI above.

offender concerned. In England in terms of the CMCHA there is no limit as to the amount that may be imposed as a fine.

It is recommended that whilst retaining the fine, there should be other forms of punishment that may be imposed on a corporation.²¹⁸⁵ It is submitted that having other forms of punishment in addition to or as alternatives to the fine plays a role in making corporate criminal liability or corporate homicide more effective. Although both England and Canada both rely heavily on the fine, they have both developed to a point where there are additional sentences that may be imposed on a corporation. South Africa should, in addition to the fine, impose sentences such as remedial orders, publicity orders, as well as court orders that restrict the operation of the corporation. It is submitted that since these additional sentences have the direct effect of tarnishing the image of the corporation this effectively punishes the corporation. It is submitted that having the additional sanctions at the court's disposal will lead to a situation where

“even the individualistic, rehabilitative aim of punishment could be seen as providing an incentive to the organisation to change its behaviour or policies, rather than just imposing a retributive penalty on a corporation for committing a wrong”.²¹⁸⁶

In this way the theories of punishment as discussed in part one of the thesis will be put into effective application in the new corporate criminal liability provision for South Africa.

The theories of punishment as discussed in Chapter Two VI above are all important. It is submitted that the importance of the theories of punishment should be reflected in the sentencing regime of corporate criminal liability. Currently the fine may fulfil the retributive, deterrent and preventive theories, however the courts' lack of forms of punishment at their

²¹⁸⁵ See Rycroft (note 365).

²¹⁸⁶ Burchell (note 195) 472.

disposal that will ensure that theories such as restorative justice are also fulfilled means that the other theories of punishment are completely left out when it comes to the punishment of corporations. Where the nature of the corporation makes it impossible for that theory to be fulfilled this is not a problem, however, where it is possible for the theory to be fulfilled it is submitted that this it is not satisfactory to continue not to have forms of punishment that may be relevant.

We have moved from the time when punishment was intended for the natural person who has been convicted of an offence, to a time when it is possible to convict corporations for offences. Where it is possible to fulfil the other theories of punishment through other forms of punishment, this should be the case. Corporations play an important role in society and like other offenders it should be possible to punish them in such a way that it is possible for instance, for restorative justice to take place through the punishment that is imposed on the corporation.

It is submitted that making use of the above suggestions when formulating a new corporate criminal liability regime for South Africa will lead to corporate criminal liability being effective, adequate and just.

IV CORPORATE HOMICIDE – KEY AREAS OF CONCERN ARISING FROM THE COMPARATIVE STUDY

It is submitted that the reform of corporate criminal liability in South Africa should include a specific focus on the loss of life caused by corporations and corporate activities. As indicated in part one of this thesis, the South African Constitution respects human life²¹⁸⁷ and provides protection thereof in the form of the right to life.²¹⁸⁸ The right of life is in turn regarded as the most fundamental human right²¹⁸⁹ as well as the basis for all other rights.²¹⁹⁰ For that reason apart from the general reform of corporate criminal liability in South Africa, corporate homicide is a concept that needs to be formally established and formally recognised in South African law as a specific and separate offence that entities such as corporations as well as individuals may be prosecuted for. In this part of this thesis key areas of concern regarding corporate homicide that arise from the comparative study will be pointed out, with a view to making proposing a legal framework for a separate offence of corporate homicide in South Africa.

(a) Acceptance of the concept of corporate homicide

In South African law corporate homicide is not a specific crime that is recognised on its own, having its own peculiar elements that need to be proven for liability to arise. Corporate homicide is regulated by section 332 of the CPA in the same way as other corporate crimes. Consequently corporations that cause deaths are held criminally liable in the same manner as those corporations which have allegedly committed any other form of crime. On the contrary, English law makes provision for a specific and separate crime of corporate manslaughter.²¹⁹¹ This is done through the CMCHA which puts mechanisms in place to deal specifically with

²¹⁸⁷ See Chapter one III above.

²¹⁸⁸ Section 11 of the Constitution.

²¹⁸⁹ *S v Makwanyane* (note 29) para 217.

²¹⁹⁰ Chapter One III above.

²¹⁹¹ CMCHA (note 36).

corporations that cause deaths. The CMCHA makes the circumstances that may lead to criminal liability clear. Similarly, Canadian law through its amended Criminal Code²¹⁹² also makes specific provision for the criminal liability of corporations that cause deaths, however these are not contained in separate legislation dealing specifically with corporations that cause deaths.

It is submitted that both the English and the Canadian systems provide more effective systems which make it more possible and conducive for corporations to be prosecuted for deaths. The existence of separate legislation or of a provision that deals directly with loss of life caused by corporations or through corporate activities results in legal certainty and in the clear protection of the right to life. Moreover as it makes it possible for corporations to have at their disposal knowledge of actions or omissions that may lead to corporations being held criminally liable for loss of life, this may possibly deter corporations from causing deaths.

(b) The basis for liability

The application of section 332 of the CPA to corporate crimes generally, means that the basis for liability even in the case of deaths caused by corporations is derivative liability. There is therefore a reliance on the identification of a particular individual who is at fault so that that fault can be imputed to the corporation for the corporation's criminal liability to arise.²¹⁹³ As already mentioned in discussion above,²¹⁹⁴ the failure to identify such a person translates into the inability to impute fault on the corporation which in turn leads to the inability to prosecute

²¹⁹² With changes that were brought about by Bill C-45.

²¹⁹³ See Chapter Three III (b) (ii) above.

²¹⁹⁴ See discussion in Chapter Four III (d) above.

the corporation. This is problematic and unsatisfactory as it hinders the effectiveness of section 332 of the CPA by disallowing a prosecution even in circumstances where it is clear that the fault originated from somewhere within the corporation, simply because the specific individual who is personally responsible cannot be identified.

Under the CMCHA there is a need to prove gross breach by senior management.²¹⁹⁵ It must therefore be established that management failure was at a senior level. This differs from the previous position under the identification doctrine where a corporation's liability relied on the identification of a specific senior individual. It has been observed that in effect the CMCHA has moved from the identification doctrine to a point where it allows for the aggregation of the fault of several individuals within the corporation.²¹⁹⁶ The current position in Canada depends on whether the offence requires the prosecution to prove negligence²¹⁹⁷ or whether it is required to prove fault other than negligence.²¹⁹⁸ With regard to proof of negligence there must be a senior officer or senior officers collectively who have departed from the expected standard of care.²¹⁹⁹ Although still referring to seniority of the position it is submitted that this is clearly a move from the focus on the identification of a single individual to allowing for collective action to lead to the criminal liability of the corporation. Goetz further points out that in this way a corporation or organization may be held criminally liable even when there is no identification of a specific individual within the corporation or organization who has committed the crime.²²⁰⁰ The current position is that where the prosecution is required to prove negligence aggregation

²¹⁹⁵ The CMCHA (note 36) section 1(3).

²¹⁹⁶ Pinto & Evans (note 94) 251. See also Gobert (note 1411) 318 – 319.

²¹⁹⁷ The Criminal Code (note 1643) Section 22.1.

²¹⁹⁸ Ibid Section 22.2.

²¹⁹⁹ Ibid Section 22.1(b).

²²⁰⁰ Goetz (note 1735) 4.

is possible and the corporation or organization's liability may be based on the aggregation of the fault of several representatives or senior individuals.²²⁰¹

In both England and Canada there is clearly a move from the strict application of the identification doctrine to the aggregation of fault. Prior to the coming into being of the CMCHA the application of the identification doctrine was blamed for the failure of the prosecution of some companies that were clearly responsible for having caused the loss of life.²²⁰² The acceptance of aggregation by both England and Canada is something that South Africa ought to consider when trying to find a solution to the basis of liability that relies on the identification of a particular individual who is responsible for the loss of life.

(c) Entities that may be held criminally liable for corporate homicide

As discussed above in the proposed legal framework for corporate criminal liability the inclusion of organisations other than corporate bodies casts the net as wide as is seen in both the English and the Canadian law and that is commendable. It is submitted that the separate provision for corporate homicide should also include organisations other than corporate bodies. Such an inclusion shows that there is an acceptance of the fact that an entity that is not a corporation is capable of committing corporate homicide or corporate manslaughter. By including entities that are not corporations the English and Canadian law provide systems that are more likely to be effective and adequate in the context of corporate homicide as criminal liability is not restricted to corporations. It is submitted that South Africa should follow suit.

²²⁰¹ Ibid.

²²⁰² Clarkson (note 90) 145. Parsons (note 242) 71. See also Chapter Four II (f) above.

(d) The possibility of individual liability for corporate homicide in addition to the criminal liability of the corporation for the same death(s).

In South African law the criminal prosecution of the corporation for having caused deaths does not exclude the possibility of individual liability.²²⁰³ The individual within the corporation who is personally responsible for having caused the deaths may be prosecuted together with the corporation or this may be done through a separate trial.²²⁰⁴ In English law, however, the CMCHA prohibits individual liability for corporate manslaughter.²²⁰⁵ The crime may only be committed by corporations or organisations.²²⁰⁶ Although the CMCHA does not allow for individual liability, it must be noted that “such persons will continue to be subject to the common law offence of individual gross negligence manslaughter”.²²⁰⁷ In Canadian law apart from holding organisations criminally liable the responsible individual may also be held criminally liable for criminal negligence causing death.

It is submitted that the South African and the Canadian approach, of ensuring that in addition to the prosecution of the corporation the individuals who are personally responsible for having caused death takes place are subject to the same offence, is a positive approach. It is further submitted that South Africa should maintain the possibility of individual liability when reforming its laws. Ensuring that individual liability is not excluded from corporate homicide

²²⁰³ In terms of section 332(2)(d) “the citation of a director or servant of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, shall not exempt that director or servant from prosecution for that offence...”

²²⁰⁴ Du Toit in his commentary on section 332(2) observes that “Very often the person who is charged in a representative capacity is also charged in his personal capacity”. (Du Toit (note 514) 33-6).

²²⁰⁵ CMCHA (note 36) Section 20.

²²⁰⁶ “Therefore there can be no secondary liability for directors, managers or officers of an organization for the offence of corporate manslaughter”. (Matthews (note 1403) 17).

²²⁰⁷ Ibid 17.

will make it difficult for individuals, whose negligence has led to the corporation being held criminally liable, to hide behind the corporation and escape liability for their own unlawful actions.

(e) Applicable punishment

In South African law the fine is the only punishment that may be imposed on corporations that are convicted of crime.²²⁰⁸ A successful prosecution for corporate homicide leads to a corporation being sentenced to a fine. In England the fine is the main way in which corporations or organisations are punished for corporate manslaughter. Under the CMCHA there are, however, additional punishments that the court may possibly impose. Canadian law also relies on the fine as its main form of punishment, but has additional forms of punishment.

Both England and Canada have effective systems of corporate homicide and have not shown that having the fine as the main form of punishment is problematic. They, however, have the added advantage of having other forms of punishment at their disposal. It is submitted that for corporate homicide to be more effective in South Africa it is therefore important for South Africa, when reforming its laws, to move away from having the fine as the sole punishment to a point where there are alternative or additional forms of punishment, which may lead to the other purposes of punishment being fulfilled.

²²⁰⁸ "...if the said person, as representing the corporate body, is convicted, the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as an alternative, other than a fine in respect of the offence in question, and such fine shall be payable by the corporate body..." (CPA note 16) Section 332 (2) (c).

VI JUSTIFICATION FOR PROPOSING A SEPARATE LEGAL FRAMEWORK FOR CORPORATE HOMICIDE

In the discussion that follows justification for having a separate legal framework for corporate homicide is provided.

- (a) A separate offence of corporate homicide is necessary because an offence as serious as the unlawful causing of the death of other persons cannot adequately be regulated by means of a provision that treats all forms of corporate crimes generally.**

Deaths caused by corporations have a significant impact on society.²²⁰⁹ Apart from the fact that a single incidence may result in the number of actual deaths caused by a corporation being high,²²¹⁰ there is also the need to prevent future similar occurrences. It is submitted that when it comes to the loss of life, it is crucial that the weaknesses brought about by section 332 of the CPA are eliminated completely so that corporations can be held properly liable. It is further submitted that the criminal liability of corporations for unlawful killings requires special attention when it comes to reforming corporate criminal liability in South Africa, hence the proposal that reform should be in the form of a new and separate legal framework for corporate homicide.

Apart from the fact that death is a serious offence, it will be seen from the proposed offence below that the offence of corporate homicide contains several elements that cannot be properly accommodated in a general provision. In addition to that, when sentencing a corporation that

²²⁰⁹ “There is an emerging consensus among corporate criminologists, which is that corporate crime and violence inflicts (sic) far more damage on society than all street crime combined”. (Singh (note 23)).

²²¹⁰ Bucy (note 105) 1437.

has been convicted for corporate homicide there are certain factors that the court must take into consideration, which may not necessarily be appropriate or applicable to other forms of corporate crimes.

(b) Given the seriousness of unlawful deaths caused by corporations, a separate legal framework requires the direct liability of a corporation as opposed to sole reliance on a basis of liability that depends on individual fault.

The application of section 332 results in derivative liability whereby the guilt of the individual is imputed to the corporation. Although it has been stated that the imputation of the acts and *mens rea* of these individuals to corporations serves the purpose of removing “the obstacle to imposing liability upon an artificial person that could not be found guilty of a crime requiring fault since it has no mind”,²²¹¹ it is submitted that the derivative liability that is found in section 332 hampers prosecutions and is not always suitable for a crime as serious as corporate homicide. The reason is that as with the identification doctrine, derivative liability makes it easy to prosecute small corporations successfully, while it enables larger and more complex corporations to escape liability.²²¹² This is due to the fact that in smaller corporations it is easier to pinpoint an individual who is at fault, while in larger and more complex corporations it is sometimes not possible to identify a specific individual whose guilt may be imputed to the corporation, even if circumstances point to the guilt of the corporation.

It is submitted that section 332’s reliance on derivative liability leads to injustice as it enables corporations to escape liability even in circumstances where it is clear that death would not have occurred had it not been for the activities of the corporation. This is a clear indication that

²²¹¹ Burchell (note 49) 565.

²²¹² See discussion in Chapter Four III (d) above.

the basis of corporate criminal liability in South Africa needs to be revisited with a view to shifting from the derivative approach or to making it possible to have direct or personal liability of corporations, in addition to the derivative approach if the corporation is alleged to have killed. The solution to these problems could be addressed by applying the principle of aggregation,²²¹³ however it is not clear if in its current form section 332 has any room for liability to be based on the aggregation of the fault of various individuals.²²¹⁴

Moreover, unfortunately, section 332 does not leave room for the corporation to be held directly or personally liable for its crimes and as it is, under the derivative approach the number of prosecutions or convictions of corporations, particularly for corporate homicide is very low. Since derivative liability mainly results in the non-prosecution or non-conviction of corporate criminals, the possibility of the corporation escaping liability is higher. It is submitted that with regard to corporate homicide this serious shortfall of the derivative approach will be rectified through the separate legal framework for corporate homicide.

It is submitted that in addition to allowing for the guilt of individuals to be imputed to the corporation, there is a need for a separate legal framework that will, in addition to derivative liability, make it possible for corporations that kill to be held directly liable without reliance on the individual liability of specific individuals. Where it is clear that the corporation is liable for the deaths, the basis of liability should not be a hindrance to prosecution.

²²¹³ “The principle of aggregation solves this problem by allowing the conduct and fault of more than one individual within a corporation to be combined to establish the elements of a crime and to satisfy the standards required for criminal liability”. (Borg-Jorgensen & Van der Linde (note 53) 462).

²²¹⁴ “The current position relating to the application of aggregation to section 332(1) is uncertain. It has been argued that corporate liability cannot be established where fault resides in a different individual from the one who performed the unlawful act, but there are different opinions in this regard. It is uncertain whether the mindsets of different individuals may be combined when negligence or a particular form of intent is required. It is also uncertain whether the conduct of various different individuals may be combined”. (Ibid 462 – 463).

It is submitted that having a legal framework that imposes a duty on a corporation with regard to deaths caused may provide a solution to this particular challenge. In that case the corporation itself would be held directly liable for its failure to comply with the duty imposed on it. This would result in a shift of the determining factor from being whether there is an individual whose fault can be imputed to the corporation to whether the corporation complied with the legal duty that was imposed on it. It is submitted that in this way the prosecution of corporations will not be hindered as direct liability entails that the offence can only be committed by the party upon whom a duty has been imposed, in this case, the corporation.

(c) A separate legal framework of corporate homicide that will allow for a defence and thus eliminate the possibility of a conviction even in the absence of fault on the part of the corporation is necessary.

Even where due diligence has been exercised in order to avoid the commission of the crime, section 332 allows for the corporation to be held criminally liable.²²¹⁵ As Jordaan notes under section 332(1):

“individual liability establishes corporate liability even if all reasonable precautions have been taken to prevent a crime from occurring. In other words, a corporate body may be stigmatized by a criminal conviction and punished in the absence of fault”.²²¹⁶

It is submitted that section 332’s failure to allow the corporation to present its defence is a defect that makes it possible to convict even when measures have been taken by the corporation to prevent harm. It is a flaw which needs to be rectified in the South African context, especially when the corporation is being prosecuted for causing the death of others. It is inconceivable that for a crime as serious as causing the death of another the accused would be deprived of an

²²¹⁵ *S v Suid Afrikaanse Uitsaaikorporasie* (note 549); Borg- Jorgensen & Van der Linde (53) 458.

²²¹⁶ Jordaan (note 42) 67.

opportunity to provide a defence. It is submitted that through a legal framework that gives the corporation the opportunity to present its defence, the process of prosecution for unlawful deaths caused by corporations will be fair and just.

(d) A separate legal framework of corporate homicide will lead to justice as it will not allow for the fault of the employee to be imputed to the corporation in spite of the fact that the employee or director has acted beyond his or her powers.

Section 332 allows for the corporation to be held liable even where the director or employee has exceeded his powers or his scope of employment, as long as he committed the offence in the process of furthering the interests of the corporation. Because of this the corporation suffers heavily. Firstly, the corporation suffers in that it is wronged by an employee or director who exceeds his scope of employment or powers. Secondly, the corporation is subjected to criminal liability for that offence that the employee or director committed in spite of the fact that he acted beyond the scope of employment or powers.

It is submitted that where the servants or directors have acted beyond the scope of their employment or authority, the corporation should not be held criminally liable, especially when it comes to the serious offence of corporate homicide. This is in line with Barlow's submission that "The real question is whether the company is liable for a criminal act committed when a director or servant is engaged in an ultra vires act. It is submitted that it is not so liable".²²¹⁷

Barlow reasons that:

"As far as acts committed by a director in the exercise of his powers or by a servant in the performance of his duties are concerned, it is clear that these powers and duties are, by the

²²¹⁷ Barlow (note 149) 506.

essential principles of company law, confined to the acts within the powers conferred on the company. The same reasoning, it is submitted, applies to acts done “in furthering or endeavouring to further the interests of the company” because, according to the same principles, the interests of a company can only be furthered along the lines indicated by the memorandum”.²²¹⁸

It is submitted that Barlow’s reasoning is clear and logical and indeed for the reason provided, the corporation should only be held criminally liable in circumstances where the director or servant has acted within his or her scope of duties or authority. Moreover, Matzukis points out that

“There are good reasons for the civil-law rule that an employer is liable for the delicts of its employees only if they acted within the scope of their employment (and not simply, where unauthorized, to the intended advantage of the employer). In the criminal law, where punishments can be so much more severe than the compensation awarded in the civil law, there is an even greater need for the imposition of these limits to liability”.²²¹⁹

Under the proposed legal framework of corporate homicide where the employee or director acted outside the scope of employment or beyond powers, the corporation will not be criminally liable, however, that particular employee or director will be held criminally liable personally. In this way when it comes to corporate homicide, corporations will avoid undue criminal liability as they would have made the scope of employment and the powers of directors clear from the outset.

²²¹⁸ Ibid 507.

²²¹⁹ Matzukis (note 592) 216.

- (e) Under a separate legal framework of corporate homicide corporate criminal liability should not be possible in circumstances where there can be no civil liability against the corporation.**

Under normal circumstances the same set of facts gives rise to both criminal liability and civil liability. In this way the victim or the aggrieved party has the opportunity to claim compensation in addition to the perpetrator being prosecuted. Unfortunately, this is not always the case under section 332 of the CPA as it allows for criminal liability in circumstances where there can be no civil liability.²²²⁰ It is submitted that this is an anomaly. Matzukis explains that this anomaly occurs when a corporation is held liable in circumstances where the servant has acted beyond the scope of employment, something that will not occur under civil law.²²²¹

Matzukis avers that

“Section 332(1) is clearly a very far-reaching provision...This is so because, while an employer is civilly liable for his employee’s misdeeds only where the employee acted within the scope of his employment, a corporate employer may incur criminal responsibility for its employee’s acts as long as the employee was endeavouring to further the interests of the company when he acted”.²²²²

The proposed offence is needed to remedy this anomaly by allowing for a corporation to be held directly liable for its offences. In this way, the same set of facts will allow for the prosecution of the corporation as well as the opportunity for the aggrieved party to claim compensation. This is crucial when it comes to harm as serious as death.

²²²⁰ Kahn emphasizes the observation made by Murray J in *R v Bennett* that “a company could be criminally liable even when it would not be civilly liable for injuries suffered by a complainant”. (Kahn (note 493) 175).

²²²¹ Matzukis (note 592) 215 – 216.

²²²² Ibid 215.

- (f) A separate legal framework will ensure that knowledge by the corporation of the offence is a factor that is considered when determining whether the corporation should be held criminally liable or not;**

One of the criticisms of section 332 of the CPA is its failure to take into account the fact whether the corporation was aware of the offence or not. Jordaan observes that “whether the corporation or its members had knowledge of the exact criminal acts or omissions, is also not a relevant consideration in determining criminal liability”.²²²³ It is submitted that it is not sound law to prosecute and even convict where it is clear that the corporation was oblivious of the offence.

It is submitted that where the corporation was unaware of the offence and the prosecution is unable to prove beyond reasonable doubt that the corporation was aware, the corporation should not be convicted. The individuals within the corporation who committed the offence should, however, be prosecuted. In the proposed offence knowledge of the offence is a factor that will be taken into account as it would be unjust not to take such an important factor into account when prosecuting for an offence as serious as corporate homicide.

- (g) A separate offence of corporate homicide that will allow for alternative sanctions is necessary.**

With section 332 only allowing for a fine as punishment, corporations that cause deaths are not receiving adequate and effective punishment. This is particularly the case with recidivists. In South Africa where the fine is the only available sanction, the likelihood is that in many cases other parties also bear the brunt of the punishment.²²²⁴ Although those are unintended

²²²³ Jordaan (note 42) 51.

²²²⁴ In addition to the parties mentioned above, Jefferson points out that there may be additional parties who suffer as a result of the fine: “Suppliers may have to reduce costs to the defendant company; freelance workers may have their salaries cut or their engagements ended; distributors may be obliged to reduce profit margins. The

consequences of the fine, it is submitted that this is not a sufficient reason to abandon the fine completely as it still punishes the corporation. Arguments in favour of the fine include the fact that it is a sanction that is not problematic in terms of collection and that “they can oblige a company ‘to pull up its corporate socks’”.²²²⁵ It is submitted that the fine is an acceptable and effective form of punishment. The compared jurisdictions serve as testimony that the fine is a sentence that is working²²²⁶ and there is no need to eradicate it, however, it is submitted that even though the fine does punish corporations it is still lacking in terms of deterrence and rehabilitation.

It has been submitted above that when it comes to punishment it is best to take all theories into account so that in the end the sentence that is imposed is retributive, preventive, deterrent and also reformative. To achieve this there is a need to impose various sentences. It is therefore submitted that in addition to imposing the fine the court should be allowed to impose additional suitable sentences. In this way corporations will be adequately and effectively punished for corporate homicide.

Under the separate legal framework of corporate homicide the problem of a fine being the only possible punishment will no longer exist as in addition to the fine there will be other other sanctions that a corporation may be subject to. These will include adverse publicity orders, corporate probation, remedial orders, community service and the corporate death penalty or dissolution, which should be reserved for instances where the corporation has become a habitual offender and it is clear that the corporation is failing to be rehabilitated.

government may lose tax revenues and may have to provide benefits for those dismissed as a result of the company’s efforts to spread the fine”. (Jefferson (note 897) 243).

²²²⁵ Ibid 238.

²²²⁶ As was seen in Chapters Four and Five above England and Canada used to impose the fine prior to changes being made to their laws and continue to impose the fine successfully under the current laws.

(h) A new separate legal framework for corporate homicide will ensure that corporations do not bear criminal liability for acts of complete outsiders.

In its current form section 332 makes it possible for a corporation to be held criminally liable even in circumstances where the responsible individual is a total outsider who has not been mandated by the corporation to perform an act or an omission. This occurs, for instance, where an employee, who drives vehicles on behalf of the corporation allows a third party to drive for him and that party causes a collision.

The third party is not acting within his scope of employment as he is not employed by the corporation. He is a complete outsider and when he agrees to assist the employee of the organisation, he should be doing so at the risk of being personally criminally liable for any deaths that may occur as a result of his actions. The employee may also be held liable for having given the third party the mandate to act on his behalf. The corporation can should only be held liable for actions or omissions of those who have been given the mandate to act on behalf of the corporation.

(i) The reverse onus that is found in section 332(1), section 332(4) and section 332(7) would be eliminated in the new legal framework for corporate homicide in line with the Constitutional Court's decisions on reverse onus provisions.

In *S v Coetzee*²²²⁷ the reverse onus provision was rejected by the majority and declared unconstitutional. As explained above, the Coetzee decisions is in line with the Constitution as

²²²⁷ *S v Coetzee* (note 56).

well as with the Constitutional Court's decisions which have shown that the Constitutional Court is loathe to allow reverse onus provisions to continue.²²²⁸

The proposed legal framework of corporate homicide is framed in such a way that it does not contain any reverse onus provisions.

VII THE WORDING OF THE PROPOSED OFFENCE

The prosecution of corporations, organisations, directors of corporations and of managers of organisations for corporate homicide and corporate murder

(a) Definitions:

- **“adverse publicity order”** refers to an order made by the sentencing court which compels the convicted corporation or organisation to publish details concerning the conviction against the convicted corporation or organisation. These details are i) the name of the corporation or organisation; ii) the fact that the corporation or organisation has been convicted of corporate homicide or corporate murder; iii) a brief description of the event causing deaths and the number of the deceased; iv) the fact that the corporation or organisation was found guilty and the details of the convicting court; v) the sentence that the court imposed on the corporation or organisation.

The publication must be made in a local and in a national newspaper that is determined by the court and this must be done within a period of three months of the sentence having been imposed. The court may also order that the information

²²²⁸ See discussion in Chapter Three IV (v) (bb) above.

should appear in the website of the corporation or organisation for a specified period of time.

- **“community service”** refers to an order of court which compels the convicted corporation or organization to give back to the community where the harm was done. The court uses its discretion when it decides what community service should entail for each convicted corporation organisation. It must take into account all surrounding circumstances.
- **“corporate inquiry report”** refers to a report compiled by an independent investigator who has been appointed by the court to compile information pertaining to the corporation or organization that will shed light on the value of the corporation or organization, its history with regard to deaths, as well as measures that the corporation or organization had in place, at the time of the death(s), to prevent unlawful deaths. The court is obliged to look at this report when determining a suitable sentence to impose on a convicted corporation or organisation.
- **“Corporate probation”** refers to a sentence that may be imposed by a court on a corporation or organization. It entails various limitations that are placed by the court on the corporation or organization. The court may decide on these limitations once it has taken into account the corporate inquiry report as well as all aggravating and mitigating factors. These factors may include any of the following or any combination of the following: the inability to operate outside South Africa for a specified period of time; in the event of failure by the convicted corporation or organization to comply with any of the terms of the corporate probation, within the

period of corporate probation, the convicted corporation or organization shall be compelled to re-appear for further sentencing.

- **“Corporate death penalty”** refers to an order made by the court for the dissolution of the convicted corporation or organization. The court may only make such an order if the convicted corporation or organization is a recidivist and the court is convinced that the corporation or organization is not deterred / dissuaded and there are no chances of rehabilitating it. In making such an order the number of lives that have been lost each time the corporation or organization has been convicted as well as the frequency of the convictions must be taken into account together with all other factors.
- **“Corporations”** refers to corporate bodies vested with legal personality that are recognised under South African law, regardless of whether they are profit or non-profit companies, as well as close corporations. These include public companies, state-owned enterprises, personal liability companies as well as private companies.
- **“Duty of care”** refers to the civil-law duty of care. A corporation or organization has a duty of care which can be carried out by means of providing safe working conditions; to ensure that all who deal with it are safe from any harm that may possibly be caused by corporate activity and vehicles and machinery belonging to the corporation or organization are operated in a safe manner.
- **“Intention”** refers to intention in the form of *dolus eventualis* and is only applicable to a charge of corporate murder.

- **“Managers of an organization”** shall include all people in higher management of the organization as well as people in middle management. It also includes anyone within an organization who holds a senior position.
- **“Organizations”** refers to all legally-constituted entities as well as associations of persons. These include partnerships, firms, societies, trade unions, public bodies, and any other associations of persons which have been formed for a common purpose. Where the organization is not vested with legal personality those individuals who were responsible for the management of the organization at the time of the commission of the corporate homicide or corporate murder shall be prosecuted individually or collectively for the corporate homicide or corporate murder
- **“Remedial orders”** refers to an order of court which provides instructions to the convicted corporation or organization to provide redress for the harm caused by the corporation.
- **“Victims”** refers to any person who has lost his or her life as a result of the activities of the company or organization. This includes, but is not limited to, employees, people who are being provided with services by the corporation or organization, any other person whose death has been caused by the activities of the company or organization, even if the company or organization did not have any business with that person.

(b) The wording of the offence

(1) A corporation or an organization shall be held liable for the offence of corporate homicide or corporate murder if any director of a corporation or manager of an organization or any employee or any agent of the corporation or organization has omitted to act or has performed an act negligently or intentionally that results in the death of persons in circumstances where the corporation or organization has not complied with the duty of care to ensure the safety of the victims;

- a) The corporation or organization shall be charged with the offence of corporate homicide if the death was caused negligently and unlawfully
 - (i) as a result of the unlawful act or omission of the director of a corporation or manager of an organization or employee or agent of the corporation whilst acting within his powers or within his scope of employment and in the interest of the corporation or organization; or
 - (ii) as a result of an aggregate on the unlawful acts or omissions of two or more directors of managers or employees or agents of the corporation or organization, whilst acting within their powers or within their scope of employment and in the interest of the corporation or organization.

- b) The corporation or organization shall be charged with the offence of corporate murder if the death was caused intentionally and unlawfully as a result of the act or omission of the director of a corporation or manager of an organization or employee or agent of the corporation or organization in circumstances where the corporation or organization or the director of a corporation or manager of

an organization, the employee or the agent, was individually or collectively, conscious of the substantial possibility of death, but proceeded with the risky activity in spite of being conscious of the substantial possibility of death;

unless sufficient proof that all reasonable steps were taken to prevent the unlawful act or omission that has resulted in death is provided;

The corporation shall be held liable for corporate homicide or corporate murder if it can be shown that the offence was committed while the individuals within the corporation or organisation were acting in the interest of the corporation and that the corporation or organization benefitted or stood to benefit as a result of the offence.

(2) Any director of a corporation or manager of an organisation, any employee or any agent of a corporation or organisation who was personally responsible for the intentional or negligent and unlawful act or omission that resulted in death will also be held liable for the offence of corporate homicide or the offence of corporate murder if

(i) The omission or act was within that director's, manager's, employee's, or agent's authority or scope of employment and

(ii) The intentional or negligent and unlawful act or omission that results in death occurred in the process of furthering the interests of the corporation.

(3) The corporation, organisation, director of a corporation, manager of an organisation, employee or agent against whom allegations of corporate homicide or corporate murder have been made may be charged and prosecuted jointly or separately for the same offence. If the

corporation, or organisation, director of a corporation, manager of an organisation, employee of the organisation or agent are charged and prosecuted separately, the verdict in one trial will not have an effect on the outcome of the other trial.

(4) The corporation or organisation, director of a corporation, management of organisation, employee or agent will be allowed to rely on defences including the defence that

(a) there was no knowledge that the act or omission that caused the death unlawfully was about to be committed; or

(b) the directors of a corporation, managers of an organisation, employees or agents were specifically prohibited from committing the act or the omission that caused the unlawful death;

(5) In any prosecution against the corporation or organisation the corporation or organisation itself must be cited as the offender and a representative of the corporation or organisation shall stand trial in his representative capacity, on behalf of the corporation or organisation and shall make a plea as authorized by the corporation or organisation.

(6) If the corporation or organisation is convicted, upon conviction the court must make an order that a corporate enquiry report should be prepared for the court and should be made available within a specified period to the court.

(a) The specified period may not exceed eight weeks.

(b) The content of the report must include details pertaining to the activities of the corporation or organisation, including previous convictions against the corporation or organisation.

(c) The details contained in the corporate enquiry report must include details pertaining to the activities of the corporation within the five years prior to the conviction of the corporation or organisation for corporate homicide or corporate murder.

(d) The court shall not allow sentencing to take place unless the court has taken into account the corporate enquiry report.

(e) During the sentencing stage counsel for the corporation or organisation shall be allowed to provide evidence in mitigation of the sentence and counsel for the State shall be allowed to provide evidence in aggravation of sentence.

(f) In addition to evidence provided by counsel in mitigation and in aggravation of sentence the sentencing court shall be obliged to take cognizance of all mitigating and aggravating factors that may appear in the corporate enquiry report.

(7) Sentencing guidelines for corporate homicide and corporate murder

In addition to the corporate inquiry report and evidence adduced in mitigation and in aggravation of sentence the sentencing court is obliged to take into account the following factors:

- The extent of the harm caused. This includes, but is not limited to the number of the deceased; the number of people who were seriously injured; damage to property not

belonging to the corporation or organisation; illnesses that have arisen and that may in future arise as a direct result of the corporate activity that has led to deaths.

- Measures taken by the corporation to prevent the harm prior to its occurrence.
- Measures taken by the corporation to limit the extent of harm.
- Previous convictions for unlawful deaths.
- Any benefits gained by the corporation or organization as a result of the crime.
- Safety measures that the corporation or organisation have in place.
- The amount of money that the State has spent on the case e.g. amount spent on investigators.
- Measures put into place by the corporation or organization to prevent causing similar harm in the future.

(8) The sentence that is to be imposed on a convicted corporation or organisation is a fine.

The amount of the fine is unlimited and may be determined by the court having taken into account the corporate inquiry report.

In addition to the fine the court may include any of the following sanctions or a combination of the following, as determined by the court:

- (a) Adverse publicity orders;

- (b) corporate probation;
- (c) corporate death penalty;
- (d) remedial orders;
- (e) community service

(9) In the case of individual liability, the convicted individual may be subjected to imprisonment as determined by the court, in accordance with established rules concerning sentencing for culpable homicide and murder.

(10) Circumstances when an organisation or corporation will be regarded as having a duty of care:

- organisations or corporations that are employers have a duty of care towards their employees to provide safe working conditions.
- organisations or corporations that provide services have a duty of care towards their clients to ensure that they are not harmed.
- organisations or corporations that provide transport have a duty of care towards those who make use of their transport services. This entails making sure that the vehicles are serviced regularly and are in good working condition.
- organisations or corporations that make use of machinery have a duty of care to ensure that the machinery is in a safe working condition.

VI EXPLANATION / JUSTIFICATION OF THE PROPOSED OFFENCE OF CORPORATE HOMICIDE

(a) The elements of the proposed offence

The crux of the offence is that it should entail

- *the unlawful and*
- *negligent (in the event of corporate homicide) or intentional (in the form of dolus eventualis or dolus directus in the event of corporate murder).*
- *causing of the death of another*
- *by a corporation or organization*
- *as a result of the act or omission of a director or employee or agent of the corporation acting within the scope of employment or within his powers or*
- *as a result of the aggregate acts or omissions of two or more directors, managers, employees or agents of the corporation or organisation whilst acting within their scope of employment or within their powers.*
- *The act or omission should have been performed in the interest of the corporation or organization.*
- *The corporation or organization must have benefitted or must stand to benefit as a result of the act or omission.*
- *Failure by the corporation to comply with the duty of care.*

The elements of the crime are therefore (i) unlawfulness (ii) negligence or intention (iii) causing the death of a human being (iv) by a corporation through the act or omissions of an individual or through the aggregated acts or omissions of two or more individuals within the corporations (v) in the exercise of their powers or within the scope of their employment (vi) failure to comply with a duty of care.

(b) A discussion of the proposed offence

(i) Corporate homicide

A corporation or organization will commit the offence of corporate homicide if the acts or omissions of an individual within the corporation or the aggregate acts or omissions of two or more individuals within the corporation or organization result in the negligent and unlawful death of a person and if the corporation or organization has failed to comply with its duty to ensure the safety of the deceased person. This resembles the changes brought about by Bill C-45 to the Canadian Criminal Code.²²²⁹

Under the proposed offence where a corporation or organization allegedly committed corporate homicide, the corporation or organization shall be held criminally liable due to the collective unlawful and negligent acts or omissions of people in management positions. This will be the case, provided that they were acting within their scope of employment or within their powers and in the interest of the corporation or organization.

In this way the inability to identify a single individual, who is responsible for the unlawful and negligent act or omission that has resulted in death, will not lead to the corporation or organization escaping liability in circumstances where it is clear that the fault emanates from within the corporation or organization.

²²²⁹ See section 22.1(b) of the Canadian Criminal Code.

(ii) Corporate murder

A corporation or organisation will commit the offence of corporate murder if the acts or omissions of an individual within the corporation or the aggregate acts or omissions of two or more individuals within the corporation or organisation result in the intentional and unlawful death of a person and if the corporation or organisation has failed to comply with its duty to ensure the safety of the deceased person.

(iii) Acting within scope of employment or within powers

Under the proposed offence the corporation or organization will only be held liable if the perpetrator acted within his scope of employment or within his powers. This is important because the liability of the corporation or organization ought to be linked with the authority given to the person within the organisation who is responsible for the commission of the offence. Where the person has acted *ultra vires* the corporation or organization should not be held criminally liable.

By ensuring that the corporation or organization is only held liable in circumstances where one has acted within his scope of employment or powers, the proposed offence will be addressing the shortfall of section 332 that it is such a broad provision that it even allows for the corporation to be held criminally liable even in situations where the responsible individual within the organisation has acted outside the scope of employment or beyond his powers.

(iv) Acting in the interest of the corporation or organization and the corporation or organization benefiting or standing to benefit

Section 332 of the CPA makes the corporation liable in circumstances where the person whose fault is imputed to the corporation was furthering or endeavouring to further the interests of the corporation. It is submitted that this part of section 332 is relevant, hence its inclusion in the proposed offence. Where the responsible individual acts in furthering his own interests the corporation should not be held criminally liable.

Acting in the interest of the corporation implies that the corporation benefits or stands to benefit from that. Where the unlawful act does not benefit or stand to benefit the corporation or the organization, the corporation or organization should not be held liable for the resulting offence. It should be the individual concerned who should be held liable.

(v) The duty of care

The requirement that there must have been a duty of care on the corporation or organisation has been drawn from both the English Corporate Manslaughter and Corporate Homicide Act and the Canadian Bill C-45. Establishing whether there is an existence of the duty of care towards the deceased should not be problematic as a list of circumstances when a corporation will be regarded as having a duty of care is listed in the provision.

With regard to the duty of care, a corporation will commit the offence of corporate homicide if its corporate activities result in death in circumstances where it can be shown that the corporation or organisation failed to comply with the duty of care that is expected of corporations and organisations and failed to prevent deaths from occurring. Where death is a result of the corporation's failure to avoid a risk when there was a substantial possibility that the risk would result in death, the corporation will not have complied with its duty of care and commits corporate murder.

(vi) The inclusion of organisations

In South Africa corporate criminal liability has not been confined to corporations only as section 332 includes the criminal liability of members of entities that are not incorporated. South Africa has many forms of entities including government-owned entities. Such entities are capable of acts and omissions that may result in the unlawful deaths of people. The reason is that when it comes to the commission of crime there is a possibility of using an entity's legal personality to divert attention from the actual perpetrators to the legal entity.

Moreover, both the Corporate Manslaughter and Corporate Homicide Act and the Canadian Bill C-45 amendments resulted in criminal liability being expanded to include all sorts of associations and organisations. It is submitted that this is a progressive move and that South Africa should also adopt the expansion of liability in such a way that all entities, organisations and associations fall under the ambit of the proposed legal framework for corporate homicide.

In this way all entities and associations of persons that are involved in corporate criminality, particularly corporate homicide and corporate murder should be held criminally liable.²²³⁰

In both England and Canada the new legislation has expanded liability to include ‘organisations’. This is to be commended as it is a fact that unlawful deaths are also caused by entities other than organisations. These may occur, *inter alia*, in the context of workplace deaths, non-compliance with safety standards or in the context of the kind of services they render. Excluding such entities from the ambit of the proposed framework would mean that when they cause deaths they may possibly not be subject to the same treatment as corporations in the same positions. It is submitted that by including organisations in the proposed legal framework when deaths have been caused by unincorporated entities and government-owned entities or government departments, they will be subjected to the proposed homicide framework in the same way as corporations would be.

(vii) Liability can be established without reliance on individual liability

One of the main weaknesses of South Africa’s section 332 of the CPA is that it hinders prosecutions by enabling a corporation to escape liability where it is not possible to establish individual fault which can be imputed to the corporation. In the proposed legal framework this is addressed in two ways:

(1) The proposed offence allows for the aggregate conduct of two or more individuals to establish corporate liability; This eliminates the difficulty of prosecuting corporations in circumstances where it is the conduct of various individuals within the corporation that results

²²³⁰ Such liability need not exclude the criminal liability of the individuals responsible for the offence that the corporation is held liable for.

in death. The conduct is considered collectively and is able to give rise to the liability of the corporation for that conduct.

(1) The proposed offence takes into account whether the corporation has complied with its duty of care that it owes to people. Failure to comply with the duty of care is a fault borne by the corporation. Liability therefore arises if it is proven that the corporation failed to comply with its duty of care. This is personal or direct liability which does not require the fault of any other party to be established.

(viii) The inclusion of murder

Although it has been argued with regard to English law that a corporation could, apparently, not commit murder “because the only lawful sentence, life imprisonment, can only be inflicted upon an individual in his personal capacity”²²³¹ it is submitted that excluding murder, particularly in circumstances where facts show clearly that the corporation was fully aware of the fact that its conduct would result in a loss of life but still proceeded, is not satisfactory. It has been shown that corporations are capable of taking risky decisions which result in loss of life and it has to be clear that such conduct will not be tolerated. For that reason, with regard to deaths caused through corporate activities it is submitted that it is important to include murder in the proposed framework and prescribe a punishment that is suitable for corporations.

²²³¹ Pinto & Evans (note 94) 5.

In South Africa all crimes have fault as an element that has to be proven²²³² and this fault may either be intention,²²³³ also known as *dolus*, or negligence,²²³⁴ also known as *culpa*.²²³⁵ Culpable homicide is one of the exceptions to the rule that all common-law crimes must have fault in the form of intention.²²³⁶ Burchell points out that “the law of homicide has provided the focal point for debate on the meaning of fault, in particular the nature of the fault in the form of intention required for a murder conviction”.²²³⁷ The fact that corporations have a tendency of conscious risk-taking is something that needs to be seriously considered. Where it can be proved that there was intention in the form of *dolus eventualis*,²²³⁸ the corporation should face the more serious crime of corporate murder.²²³⁹

With regard to corporations it is submitted that this may be applicable for instance where a fire breaks out and causes the death of employees who were working on the premises and upon investigation it is discovered that it is company policy for management to lock up the premises and leave with the keys while workers are inside working at night. When one leaves the premises with the keys knowing that there are employees locked up inside who have no way

²²³² Burchell (note 195) 353.

²²³³ “Intention involves a purposefully chosen course of action, knowing that it was unlawful. The test of intention is simply what the accused knew or foresaw. It is an enquiry into the actual state of mind of the actor. The test is ‘subjective’”. Burchell (note 49) 523.

²²³⁴ “The test of negligence is not necessarily what the actor thought or foresaw but rather what a reasonable person would have foreseen and done in the circumstances. The enquiry is thus not as to the actual state of the actor’s mind but rather as to whether his or her conduct measured up to that of the reasonable person. The test is ‘objective’”. (Ibid).

²²³⁵ Ibid.

²²³⁶ Ibid.

²²³⁷ Ibid.

²²³⁸ “No distinction is in principle drawn between first and second degree murder in South Africa and *dolus eventualis* is, in fact, sufficient intention for a conviction of any crime based on intention in South Africa”. Burchell (note 195) 354. “The nature of this form of intention is illustrated by examples: If X sets fire to a building, foreseeing the possibility that someone might be in the building, and someone is burned to death, X can be said to have intended the death of that person. Similarly, if X means to kill Z, but the bullet misses and kills Y, although X does not mean to kill Y, he or she nevertheless in law intends Y’s death if X foresees it as a possible result of shooting at Z.” Burchell (note 195) 364.

²²³⁹ Whiting (note 770) 446. See discussion in Chapter Three IV (b) above.

of leaving the premises without the keys, the possibility of the employees perishing in the event of a fire breaking out is foreseen.

Whiting proposes a manner in which *dolus eventualis* can be founded for liability for murder and it is submitted that these may be made applicable to corporations:

“(1) A person will have *dolus eventualis* in relation to a result if he intentionally commits an act, foreseeing that it may cause that result. (2) The degree of likelihood with which the happening of the result must be foreseen will not be the same in all situations. (3) In the great majority of cases, the happening of the result will have to be foreseen as a substantial possibility (4) In cases where one or more factors militating against a finding of *dolus eventualis* are present, the happening of the result will have to be foreseen as something more than a substantial possibility, unless there are countervailing considerations neutralising the effect of such factors. (5) In a case where it is the purpose of the person concerned to create the risk, it will be sufficient if he foresees the happening of the result only as a remote possibility”.²²⁴⁰

In making a proposal of a new statutory framework for corporate homicide, it is submitted that the inclusion of murder in the form of *dolus eventualis* will make corporate criminal liability an effective tool in dealing with corporations that cause harm to society. Murder is a more serious offence and the sentence that will have to be imposed on a convicted corporation is more likely to result in prevention, deterrence, retribution as well as rehabilitation. In this way,

²²⁴⁰ Whiting (note 770) 446.

it is envisaged that there may be a decline in the number of deaths caused by corporations in circumstances where intention in the form of *dolus eventualis* is present.

(ix) Corporate sentencing

The fine as a form of punishment for corporate criminals has proved to be a sanction that works well for both England and Canada. In both jurisdictions it was used prior to the changes made to the laws and after the laws were reformed it was retained. The problem with the fine in South Africa is that section 332 of the CPA does not provide for any additional or alternative sentence. This limitation makes the fine to be unsuitable as it does not carry with it the stigma that is desired for the sentence to have the deterrent effect on the convicted corporation as well as on other corporations that may be contemplating corporate homicide. The fine also does not have the rehabilitative effect and it is necessary to look at all purposes of punishment when deciding on the sentence to be imposed.

Furthermore for companies that are prone to keeping budgets for corporate crime, having additional and more stigmatic sentences at the court's disposal, will lead them to avoid committing corporate crime as opposed to budgeting for it. For those that continue to budget for it, there is now the added threat of additional and more stigmatic sentences that may even lead to the demise of the corporation. It is envisaged that the problems associated with the fine being the only form of punishment will be eliminated by the additional forms of punishment that have been proposed.

Both England and Canada under their new corporate homicide and corporate criminal liability regimes impose very, very high fines that have the capacity to literally cripple the convicted corporation. It is submitted that as suggested in England's Consultation Paper on Sentencing for Corporate Manslaughter, the fine should be imposed in order to show that loss of life is a very serious concern; to see to it that corporations comply with safety standards that have been set; and to ensure that the corporations do not gain financially from offences committed by them.²²⁴¹ Where there are aggravating factors the amount of the fine should reflect this.

Letting courts have access to information about the corporation prior to sentencing is intended to put the courts in a better position to enable them to impose more suitable sentences on in particular convicted corporations. The corporation is thus punished in accordance with the information about it that is at the court's disposal. It is submitted that with the knowledge of the circumstances and history of the corporation, the courts are more likely to impose sentences that will take into account more than one of the theories of punishment (deterrence, reformation, rehabilitation, retribution).

Ensuring that in sentencing courts also take into account mitigating and aggravating factors will result²²⁴² in corporate sentences that are 'tailor made' for the particular convicted corporation. For instance, a corporation which is a habitual offender will receive a harsher sentence than a corporation which is a first-time offender, even if their offences are the same. In this way a message is sent out that corporate crime, particularly corporate homicide is viewed

²²⁴¹ Sentencing Advisory Panel, Consultation Paper on Sentencing for Corporate Manslaughter (November 2007) para 29.

²²⁴² FL Rush "Corporate probation: Invasive techniques for restructuring institutional behaviour" 1987 *Suffolk University Law Review* 33, 40.

in a very serious light and the repetition of such by the same companies will inevitably lead to severe punishment.

It is submitted that the fine should not be imposed on its own. In addition to the fine, the court should have at its disposal additional sentences such as adverse publicity orders; corporate probation; corporate death penalty; remedial orders; community service etc. Wells states that such possible additional sentences

“Are promising because they increase the variety of deterrent, retributive, and rehabilitative measures available against corporations and in so doing circumvent some of the major limitations of monetary sanctions”.²²⁴³

(aa) Corporate probation

This is basically the imprisonment of a corporation as it amounts to “restraining the corporation from acting in specified ways”.²²⁴⁴ This may include limiting the corporation’s area of operation to South Africa only. Through corporate probation the corporation or organization will be regulated and in this way the potential of further corporate homicides being committed by the same corporation or organization is limited. Wells states that to corporate probation orders

“are ‘potentially powerful instruments’ which can include punitive as well as rehabilitative elements. The costs of probation can be charged to the company and at the same time the probation conditions can require corporate decision-making to be restructured”.²²⁴⁵

(bb) Adverse publicity orders

²²⁴³ Wells (note 15) 37.

²²⁴⁴ Ibid.

²²⁴⁵ Wells (note 15) 37.

An adverse publicity order is a sentence that will likely deter future corporate homicide through stigmatisation.²²⁴⁶ According to Wells “adverse publicity could also be used as part of the strategy to combat corporate disregard of criminal law and as a backup to probation”.²²⁴⁷

(cc) Community service

With regard to community service it must be noted that Rush observes that “A pervasive sentiment exists that corporations “get off easy” when sentenced to community service”.²²⁴⁸ Rush further points out that in order “to counteract these perceptions, community service must be keyed to societal harm”.²²⁴⁹

Moreover when imposing community service the sentencing court must do it in such a way that through community service reparation is effected and that it is the corporation itself that does the community service. For instance, “if a corporation pollutes a river, affecting numerous businesses and individuals beyond those who are direct victims, it is much more appropriate to direct the corporation to detoxify streams than to order corporate employees to work at drug halfway houses”.²²⁵⁰

(dd) Corporate death penalty or compulsory dissolution of the company

The corporate death penalty or the compulsory dissolution of the company is the ultimate sentence that can be imposed on a corporation. As Wells correctly states, such “incapacitation through compulsory winding up or closures is the most drastic penalty available and is used in some jurisdictions against corporations formed for an illegal purpose”.²²⁵¹ With regard to

²²⁴⁶ Wells observes that “the importance of prestige and status to many corporations is evidenced both by their extensive use of brand-image in advertising and by their efforts to regain a ‘clean’ image after a major disaster is associated with their name”. (Wells (note 15) 38.

²²⁴⁷ Ibid.

²²⁴⁸ Rush (note 2242) 61

²²⁴⁹ Ibid.

²²⁵⁰ Ibid 63.

²²⁵¹ Wells (note 15) 37.

corporate homicide, where a corporation has repeatedly caused deaths²²⁵² and has failed to be deterred by previous sentences the sentencing court may impose the corporate death penalty or the compulsory dissolution of the company.

(x) The inclusion of individual criminal liability in the proposed legal framework

Section 332(5) of the Criminal Procedure Act made provision for the individual liability of directors and servants; however, the provision contained fatal flaws that led to it being constitutionally challenged successfully.²²⁵³ Since then these individuals are held liable under common law. It is submitted that for the specific proposed offence, it is crucial to make it possible for individuals within the corporation to face liability for the same statutory offence that the corporation is charged with. The proposed offence must therefore be inclusive of individuals within the corporations so that they may also be subject to prosecution together with the corporation as “it is increasingly argued that general deterrence as well as retributive arguments demand the prosecution of directors and managers as well as of the corporation itself”.²²⁵⁴ Including individual criminal liability makes it clear from the outset to individuals within the corporations that they will be subject to personal criminal liability if their acts or omissions lead to the deaths of people. It is submitted that the possibility of imprisonment for convicted individuals will make the individuals within corporations more cautious when it comes to decision-making, even where there is a remote possibility of death. This personal threat may lead to the reduction of risky decision-making that may possibly result in deaths.

²²⁵² “Greed is at the heart of some of the world's worst tragedies. Corporations are being used as instrumentalities for great and unimaginable suffering”. (DM Aman “Capital punishment: corporate criminal liability for gross violations of human rights” *Hastings International Law Review* (2001) 327, 336).

²²⁵³ See discussion in chapter two.

²²⁵⁴ Wells (note 15) 161.

The period of imprisonment will be affected by whether the individual has been convicted of corporate homicide or corporate murder.

One of the criticisms levelled against the English CMCHA is that individuals may not be charged with the offence of corporate manslaughter.²²⁵⁵ Although there is the exclusion of individuals from the ambit of the Corporate Manslaughter and Corporate Homicide Act, the directors may still be held liable in terms of the Health and Safety at Work Act. It is submitted that in drawing from the law in the compared jurisdictions, where criticisms have been made, South Africa can learn from those criticisms and avoid exposing the proposed framework to the same criticisms. It is submitted that for purposes of the proposed offence excluding these people from liability would lead to the untenable situation whereby individuals who are directly responsible for deaths and serious injury are not prosecuted.

VII CONCLUSION

After examining corporate criminal liability in South Africa, England and Canada this thesis concludes with a recommended legal framework for future corporate criminal liability in South Africa. In making the recommendations those parts of the current South African provision that contribute to making the provision ineffective, inadequate and unjust are removed, while relevant strengths of the provision are included in the recommended legal framework for future

²²⁵⁵ “Controversially, the Act also provides that individuals cannot be liable as a secondary party to an offence of corporate manslaughter (s. 18 (1))”. (Ormerod & Taylor (note 1485) 594).

corporate criminal liability. Most importantly for recommendations for the legal framework for corporate criminal liability in South Africa to be made, valuable lessons have been drawn from both the English and the Canadian system. It is envisaged that when reform is eventually made to corporate criminal liability in South Africa these recommendations will be of assistance or guidance.

Apart from the recommendation of the legal framework for corporate criminal liability in South Africa, this thesis concludes with a comprehensive proposal for a separate offence of corporate homicide. Under the proposed offence the focus is on corporate activities and the results thereof. This is a move away from section 332 which focuses on the guilt of the individual for the liability of the corporation. Here the corporation will be held directly liable based on (a) the resulting serious injury or death (b) the conduct of an individual or the aggregated conduct of two or more individuals (c) non-compliance with a duty to ensure the safety of those who deal with the corporation.

It is submitted that the proposed offence is an improvement on the current position as it makes it possible for the corporation to be held criminally liable even in the absence of an individual whose fault can be imputed to the corporation. This promotes the criminal liability of corporations for corporate killings as it holds the corporation liable independently or personally for its crimes.

Since this makes it possible for the corporation to be held liable even in circumstances where there is no identifiable single individual who was personally liable for death, the proposed

offence eliminates quite a number of weaknesses that make section 332 an ineffective, inadequate and unjust provision. These include the failure to hold corporations liable for its crimes, independent of individual fault and the possibility of a prosecution even in circumstances where the corporation could not be held civilly liable.

Regarding the corporation as a corporate actor and holding it liable independently for its offences provides a much better state of affairs as compared to derivative liability. Moreover, the proposed provision provides a better approach to the criminal liability for corporate killings as it takes into account the knowledge by the corporation of the offence when determining liability. This is a crucial factor to be considered if prosecutions for corporate killings are to be fair and just.

It is envisaged that the placing of a duty on the corporation for ensuring the safety of people will not only make it difficult for the corporation to escape liability, but that it will also make corporations or organisations become more vigilant when it comes to making sure that there are safety measures in place to ensure the safety of all who deal with the corporation or organisation.

By engaging in an assessment of the English law and the Canadian law insight has been provided into the way corporate criminal liability and particularly corporate homicide has been approached by the two jurisdictions. It has assisted in identifying the weaknesses of the identification doctrine, which could have been an alternative to the derivative approach. It has also highlighted that South Africa really needs to develop further in terms of the manner in

which it holds corporations criminally liable for corporate crimes, particularly corporate killings. In drafting the proposed offence the weaknesses that have already been identified in the Corporate Manslaughter and Corporate Homicide Act and Bill C-45 have been avoided and in this manner South Africa benefits from the analysis of corporate criminal liability in those jurisdictions. The analysis has also brought to light strengths of the corporate criminal liability statutes in both jurisdictions which have resulted in concepts such as ‘organisations’ and the placing of a duty of care on the corporation being adopted in the proposed offence. The analysis further highlighted the availability of sanctions other than the fine that may be meted out to corporations that cause harm to society and has also provided examples of sentencing guidelines to be followed when sentencing a corporate offender.

It is submitted that the adoption of a separate legal framework for corporate killings in the proposed offence together with the adoption of the aggregate doctrine from Canada’s Bill C-45, where negligence has to be proved, will result in the criminal liability of corporations and organisations for corporate killings being more effective and adequate.

The examination of the English and the Canadian positions has been a positive exercise and for the most part the proposed offence is influenced by developments in England and Canada. It is hoped that the proposed offence will assist in reforming the criminal liability of corporations and other organisations for deaths and that South Africa will not wait for public outcry to compel it to make reforms to this area of the law.

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